CRIMINAL LAW — FEDERAL SENTENCING — FIRST CIRCUIT HOLDS THAT REHABILITATION CANNOT JUSTIFY POST-REVOCATION IMPRISONMENT. — *United States v. Molignaro*, 649 F.3d 1 (1st Cir. 2011).

Federal sentencing law states that "imprisonment is not an appropriate means of promoting correction and rehabilitation."[1] Although this admonition clearly applies to initial sentencing, until last year, every court of appeals to address the issue had agreed that the statute did not apply to resentencing upon revocation of a defendant's supervised release.[2] Recently, however, in *United States v. Molignaro*,[3] the First Circuit held that even upon revocation of supervised release, courts may not impose imprisonment with the aim of facilitating rehabilitation.[4] The court acknowledged that the other circuits' interpretation of the supervised release statute was plausible, but it chose to move beyond those circuits' relatively narrow analyses to consider the larger statutory framework. Because the other circuits' interpretation appeared to clash with that larger framework, the First Circuit sensibly rejected the accepted interpretation and instead left Congress the option of modifying the statutory scheme.

Two sections of title 18 of the U.S. Code are implicated when a court revokes a defendant's supervised release and sentences him to additional imprisonment: § 3582 ("Imposition of a sentence of imprisonment") and § 3583 ("Inclusion of a term of supervised release after imprisonment"). Section 3582(a) instructs courts to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation."[5] On its face, the statute makes no distinction between initial and post-revocation sentencing: it simply addresses itself to any court "determining whether to impose a term of imprisonment."[6] Section 3583(e) authorizes courts to terminate, extend, modify, or revoke an offender's term of supervised release.[7] Critically, the introductory clause preceding these options says that courts may undertake these actions only after considering a variety of factors, including rehabilitation.[8]

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[1] 18 U.S.C. § 3582(a) (2006).

[2] *See* United States v. Breland, 647 F.3d 284, 289 (5th Cir. 2011) ("[A]ll of our sister circuits that have addressed this issue have uniformly held that § 3582(a)'s limitation does not apply to post-revocation sentencings . . . .").

[3] 649 F.3d 1 (1st Cir. 2011).

[4] *See id.* at 5.

[5] 18 U.S.C. § 3582(a).

[6] *Id.*

[7] *Id.* § 3583(e).

[8] *Id.* (cross-referencing, inter alia, *id.* § 3553(a)(2)(D), which requires courts to consider the need "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner").

After pleading guilty to possession of child pornography in 2005, Eric Molignaro was sentenced to twenty-four months in prison, followed by thirty-six months of supervised release.[9] In 2010, the U.S. District Court for the District of Massachusetts found that Molignaro had violated the terms of his supervised release by lying to his probation officer and by failing to complete a sex offender treatment program.[10] Pursuant to 18 U.S.C. § 3583(e), the district court revoked Molignaro's supervised release and resentenced him to twenty-two additional months of imprisonment, far above the three to nine months recommended by the Federal Sentencing Guidelines.[11] The court explained that the longer sentence was intended to allow the defendant sufficient time to participate in a sex offender treatment program at the federal prison in Devens, Massachusetts.[12] Molignaro objected that imposing a prison term for the purpose of facilitating his participation in the program constituted reversible error.[13]

The First Circuit vacated the sentence and remanded for resentencing.[14] Writing for the panel, Justice Souter[15] began by noting that although Congress had made "the provision of 'needed . . . medical care, or other correctional treatment in the most effective manner'"[16] an objective of criminal sentencing, Congress had also indicated that imprisonment — as opposed to probation or supervised release — is not an appropriate means of achieving such rehabilitative ends.[17] This prohibition on premising imprisonment on rehabilitation clearly applies to "the paradigm circumstance of the initial sentencing after a conviction,"[18] Justice Souter explained, but its applicability to resentencing following revocation of supervised release is not so certain.[19]

Justice Souter next reviewed the textual arguments that had led other courts to permit consideration of rehabilitation in post-revocation resentencing, rejecting two as unpersuasive and a third as cogent but preempted by Supreme Court precedent. First, some courts had

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[9] *Molignaro*, 649 F.3d at 1.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 2. Molignaro also argued that twenty-two months was an unreasonably long sentence, but because the First Circuit held that it was legal error to consider rehabilitation, it never reached the question of unreasonability. *See id.*

[14] *Id.*

[15] Justice Souter, sitting by designation, was joined by Judges Lipez and Howard.

[16] *Molignaro*, 649 F.3d at 2 (alteration in original) (quoting 18 U.S.C. § 3553(a)(2)(D) (2006)).

[17] *Id.* (quoting 18 U.S.C. § 3582(a)). The court also noted that the Federal Sentencing Commission is statutorily required to create guidelines that "reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant." *Id.* (quoting 28 U.S.C. § 994(k) (2006)).

[18] *Id.*

[19] *See id.*

pointed out that while § 3582(a)'s prohibition on rehabilitative imprisonment speaks of "imposing a term of imprisonment,"[20] § 3583(e)'s authorization of revocation speaks instead of "requir[ing] the defendant to serve in prison all or part of the term of supervised release."[21] Justice Souter found this semantic distinction unconvincing in light of the fact that another subsection of § 3583 "refers to ordering imprisonment on post-revocation resentencing as 'impos[ing]' imprisonment."[22] Second, some courts had relied on the fact that § 3583(e) instructs courts to consider rehabilitation before terminating, extending, modifying, or revoking supervised release.[23] Justice Souter reasoned that because a post-revocation sentence may include a second period of supervised release (to be served after reimprisonment),[24] § 3583(e) may simply be instructing judges to consider rehabilitation when imposing this additional period of supervised release rather than when imposing reimprisonment.[25]

Justice Souter did, however, find compelling a third argument for distinguishing between initial and post-revocation sentencing. The argument hinged on a critical "textual contrast"[26]:

> When § 3582(a) tells a court to sentence in order to realize the objectives of § 3553(a), (which include rehabilitation), it instructs that imprisonment is not the proper setting to realize a treatment objective. But when § 3583(e) tells a court that it may revoke an earlier release order and sentence again, including imposing imprisonment, the limitation is absent.[27]

Justice Souter proposed two reasons to believe that this distinction indicates congressional intent to treat initial and post-revocation sentencing differently. First, over the course of seventeen years of litigation, every circuit to address the issue had upheld the distinction.[28] Congress's failure to amend § 3583(e) in that period suggests congressional agreement with the judicial consensus.[29] Second, although prison is not the best environment for treatment, revocation occurs when treatment in the more promising context of release has already failed. Why would Congress wish to forbid courts from making a final attempt at treatment, even if it must occur in prison?[30]

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[20] *Id.* (quoting 18 U.S.C. § 3582(a)) (internal quotation mark omitted).

[21] *Id.* (quoting 18 U.S.C. § 3583(e)) (internal quotation mark omitted).

[22] *Id.* (alteration in original) (quoting 18 U.S.C. § 3583(h)).

[23] *See id.* at 2–3.

[24] *See* 18 U.S.C. § 3583(h) ("When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment.").

[25] *Molignaro*, 649 F.3d at 2–3.

[26] *Id.* at 3.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 3–4.

Justice Souter admitted that, but for the Supreme Court's recent decision in *Tapia v. United States*,[31] this third argument would have convinced the First Circuit to join the consensus among its sister circuits.[32] *Tapia* concerned initial sentencing and addressed whether rehabilitation could justify extending the length of a prison term once the initial decision to imprison had been justified on other grounds.[33] The Court held that rehabilitation could not be used to justify either imposition or extension of initial imprisonment.[34] The Court justified its holding in part by explaining that federal judges do not actually have the authority to ensure that prisoners are placed in particular facilities or participate in particular treatment programs.[35] In contrast, judges do have the authority to require participation in rehabilitative programs as part of supervised release.[36] The Court reasoned that Congress intended courts to consider rehabilitation in fashioning sentences only insofar as those courts had the authority to ensure participation in treatment programs.[37]

Justice Souter found no "hint in the [*Tapia*] Court's exposition that this understanding of congressional intent would not extend to provisions authorizing resentencing after violation of release conditions."[38] Indeed, Molignaro's specific circumstances illustrated why the Supreme Court's logic remains relevant in the post-revocation context: despite the district judge's recommendation to the Bureau of Prisons, Molignaro was in fact placed in a correctional facility that did not offer a sex offender treatment program.[39] Given this lack of judicial authority and what it indicated about congressional intent, Justice Souter "fe[lt] bound to conclude that rehabilitation concerns must be treated as out of place at a resentencing to prison, just as [when] ordering commitment initially."[40]

As Justice Souter acknowledged, in deciding that rehabilitation could not be used to justify post-revocation reimprisonment, the First Circuit cut against a widespread and long-standing interpretive grain. Justice Souter cited nine decisions from nine courts of appeals that had

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[31] 131 S. Ct. 2382 (2011).

[32] *Molignaro*, 649 F.3d at 4.

[33] *See Tapia*, 131 S. Ct. at 2385–86. The Sixth, Eighth, and Ninth Circuits had previously held that "§ 3582(a) allows a court to lengthen, although not to impose, a prison term based on the need for rehabilitation." *Id.* at 2386 n.1.

[34] *Id.* at 2385.

[35] *Id.* at 2390. The Bureau of Prisons has "plenary control" over where a prisoner is incarcerated and in which treatment programs he participates. *Id.*

[36] *See id.*

[37] *See id.*

[38] *Molignaro*, 649 F.3d at 5.

[39] *See id.* at 4.

[40] *Id.* at 5.

all reached the opposite holding.[41] Had the court affirmed Molignaro's sentence, no eyebrows would have been raised. The court thus deserves praise for reassessing the relevant problem of statutory interpretation and for moving beyond the narrow analyses of the other circuits. It properly recognized the troubling implications of the prevailing interpretation in light of the statutory limits on judicial authority, and its decision, by highlighting the issue, will hopefully encourage Congress to amend the statutory framework such that it is both clear and just.

Uncertainty about the interaction of § 3582(a)'s prohibition and § 3583(e)'s authorization is rooted in legislative history. Both sections were part of the Sentencing Reform Act of 1984,[42] which fundamentally reshaped federal criminal sentencing.[43] As originally passed, § 3583(e) did not provide for revocation and reimprisonment when defendants violated conditions of supervised release; instead, it provided that violations would merely subject defendants to contempt proceedings.[44] Originally, therefore, the subsection's reference to rehabilitation could have applied only to early termination, extension, or modification of supervised release. Additionally, because initial sentencing was the only kind of sentencing that existed, it was not necessary to define the reach of § 3582(a)'s prohibition. However, in 1986, before the new sentencing system had taken effect, Congress amended § 3583(e) to provide for revocation and reimprisonment,[45] but it did not amend § 3582(a). Congress thereby created two critical ambiguities: (1) Did § 3583(e)'s reference to rehabilitation apply to the newly created process of revocation and reimprisonment? And (2) did § 3582(a)'s prohibition remain applicable only to initial sentencing?

None of the pre-*Molignaro* decisions investigated this legislative history or considered how it might bear on the interpretive question. Indeed, the decisions' analyses were decidedly abstract: they relied almost entirely on the text and structure of the two sections and did not consider any outside factors that might guide interpretation, even those factors that might support the courts' conclusions that the two types of

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[41] *Id.* at 3 n.2 (collecting cases).

[42] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified in scattered sections of 18 and 28 U.S.C.).

[43] *See generally* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 1–77 (1998).

[44] Sentencing Reform Act of 1984 § 3583(e), 98 Stat. at 2000. The Senate Report accompanying the Act explained: "The Committee [on the Judiciary] did not provide for revocation proceedings for violation of a condition of supervised release because it does not believe that a minor violation of a condition of supervised release should result in resentencing of the defendant and because it believes that a more serious violation should be dealt with as a new offense." S. REP. NO. 98-225, at 125 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3308.

[45] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006(a)(3), 100 Stat. 3207, 3207-6 to -7 (codified as amended in scattered sections of 18, 21, and 28 U.S.C.).

sentencing are distinguishable.[46] Consideration of such outside factors would be unnecessary if the statutory language were perfectly clear, but even those pre-*Molignaro* decisions that claimed the issue is resolved by the "plain language"[47] engaged in lengthy analyses to justify their holdings. In light of the statutory tension, a wider-ranging inquiry is warranted.[48]

In addition to the legislative history, which explains but may not resolve the ambiguity, pre-*Molignaro* decisions also ignored the undoubtedly significant practical consequences of each of the two possible interpretations. The *Molignaro* court's concern for such real-world consequences is the great strength of its decision. While the court gave significant consideration to the textual arguments that dominated the earlier decisions, it was ultimately swayed by a concern about the practical implications of limited judicial authority. Whereas federal judges have authority to ensure defendants' participation in treatment programs as part of supervised release, they can only *recommend* a defendant's placement in a particular prison or prison-based treatment program; the decision ultimately rests with the Bureau of Prisons.[49] Given this bifurcated authority, the worrisome implication of allowing rehabilitation to justify post-revocation reimprisonment is that — as Molignaro's experience attests — defendants can and sometimes do serve lengthened prison terms without actually receiving the treatment that justified their extended incarceration. As Justice Souter observed, in such a case, "[t]he prisoner is left with the time to serve but no therapy even if he would be willing to accept it."[50]

This concern for the actual fates of prisoners places *Molignaro* in stark contrast with some cases that have simply relied on textual arguments about what the language of the supervised release statute conceivably authorizes. For instance, the defendant in *United States*

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[46] For example, even before *United States v. Booker*, 543 U.S. 220 (2005), when the Federal Sentencing Guidelines were mandatory, the Guidelines' post-revocation sentences were merely advisory. *See, e.g.*, United States v. Mathena, 23 F.3d 87, 92 (5th Cir. 1994). Judges thus generally had greater discretion in the context of post-revocation sentencing, a fact that could be used to support the conclusion that Congress intended to allow judges to consider rehabilitation as justification for post-revocation reimprisonment.

[47] *See, e.g.*, United States v. Doe, 617 F.3d 766, 770 (3d Cir. 2010) (relying on the "plain language and operation" of § 3583(e)); United States v. Anderson, 15 F.3d 278, 283 (2d Cir. 1994) (relying on the "plain language of 18 U.S.C. § 3583(e)").

[48] A strict textualist would perhaps argue that such an inquiry is never warranted, but the debate surrounding the proper role of nontextual material in statutory interpretation is beyond the scope of this comment.

[49] Tapia v. United States, 131 S. Ct. 2382, 2390–91 (2011); *see also* 18 U.S.C. § 3621 (2006).

[50] *Molignaro*, 649 F.3d at 4. Similarly, the defendant in *Tapia* did not in fact participate in the prison-based drug treatment program the judge had invoked to justify the length of her reimprisonment, though she appears to have chosen not to participate. *Tapia*, 131 S. Ct. at 2391.

v. Bidon[51] was sentenced to eighteen months in prison upon revocation of the supervised release that followed her drug conviction.[52] The court based the sentence length on its desire for the defendant to participate in the Bureau of Prison's 500-hour drug treatment program,[53] but the prison in which she was placed did not offer the program.[54] The Eighth Circuit dismissed the notion that this fact might make the sentence unreasonable:

> [I]t is possible Bidon may be transferred to a facility that does offer the program, and, regardless, we do not think the district court abused its discretion in imposing a sentence for this purpose even if she ultimately is unable to participate in the program because of factors outside the court's control.[55]

This statement embodies a troubling judicial approach to sentencing. The implications of prisoner placement should weigh more heavily in the judgment of a court *because* placement is outside the court's control. In the interests of justice, courts should fashion sentences that will serve permissible goals regardless of whether the Bureau of Prisons heeds their recommendations.

It is worth noting, however, that the injustice of leaving prisoners "with the time to serve but no therapy"[56] functioned only as an indirect justification for the First Circuit's holding in *Molignaro*. The court did not say that the possibility of such a result, in itself, proved the invalidity of the prevailing interpretation; it said that the possibility of such a result was simply strong evidence that Congress *did not intend* the prevailing interpretation.[57] The court was able to link its equitable concern to congressional intent because the operation of the statute is ambiguous enough to merit an inquiry into that intent. Of course, nothing would prevent Congress from amending § 3583(e) to expressly allow or forbid consideration of rehabilitation during post-revocation sentencing, and spurring Congress to clarify the statute may indeed have been one of the court's goals. Yet while it seems clear (and appropriate) that the *Molignaro* court would be troubled by legislative ratification of the other circuits' prevailing interpretation — and one hopes *Molignaro* dissuades legislators from this unpalatable option — the court's decision does not claim that prohibiting consideration of rehabilitation is necessarily the best choice as a matter of poli-

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[51] 310 F. App'x 937 (8th Cir. 2009).

[52] *Id.* at 939.

[53] *Id.*

[54] *Id.* at 940.

[55] *Id.*

[56] *Molignaro*, 649 F.3d at 4.

[57] *See id.* at 4–5 ("[I]f Congress wanted judges to consider rehabilitation, it gave judicial authority to control. If no authority was given, Congress did not want rehabilitation to be considered." *Id.* at 5.).

cy.[58] But to make a system entailing such consideration just — so that lengthened incarceration is not justified by treatment that may never occur — would require an expansion of judicial authority that the First Circuit had no power to effect. The court's decision to forbid consideration of rehabilitation was thus the best remedy available, and it leaves Congress the option of moving in the other direction if it so chooses.

Whether Congress amends § 3583(e) may depend on whether *Molignaro* remains an outlier or sparks a debate vigorous enough to attract lawmakers' attention. The Fifth Circuit was unaware of the First Circuit's decision in *Molignaro* when, just two weeks later, it reaffirmed its own holding that rehabilitation could justify imprisonment in post-revocation sentencing.[59] More recently, though, the U.S. Attorney's Office for the Eastern District of North Carolina embraced the logic of *Molignaro* and reversed its position on the permissibility of considering rehabilitation in revocation sentencing.[60] Now that there is no longer a "unanimous judicial [and prosecutorial] conclusion" about the law, will Congress break its "lengthy silence"?[61] One hopes it will, either to affirm *Molignaro*'s conclusion that rehabilitation may not justify reimprisonment or to provide judges with the power to ensure that prisoners receive the treatment that justifies their reincarceration.

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[58] In fact, in discussing the support for the "textual contrast" argument, Justice Souter made a compelling argument for allowing consideration of rehabilitation at the post-revocation stage: "Would it not be sensible to permit a final try at treatment even if prison's circumstances are comparatively unpromising, once a defendant has shown that attempting to treat outside will not work?" *Id.* at 4.

[59] *See* United States v. Breland, 647 F.3d 284, 285, 289 (5th Cir. 2011). Although the Fifth Circuit was unaware of *Molignaro*, it specifically referred to *Tapia*. The court acknowledged *Tapia*'s insight that judges lack the authority to ensure participation in prison-based rehabilitation, but unlike the First Circuit, it did not think that this fact undermined the case for considering rehabilitation at post-revocation sentencing. *See id.* at 290. In fact, the Fifth Circuit argued that *Tapia* supported its holding because the Supreme Court "specifically pointed to § 3583(c) as one such provision where Congress clearly 'wanted sentencing courts to take account of rehabilitative needs.'" *Id.* (quoting Tapia v. United States, 131 S. Ct. 2382, 2390 (2011)). But § 3583(c) says nothing about revocation; it simply tells courts what factors to consider in deciding whether to include a term of supervised release and in determining the term's length and conditions. That rehabilitation may be properly considered in that context sheds no light on whether it should be allowed to justify post-revocation reimprisonment.

[60] *Compare* Corrected Brief for the United States at 15–19, United States v. Novak, No. 11-4358 (4th Cir. Sept. 27, 2011), 2011 WL 4460618, at *15–19 (arguing that § 3582(a) applies to post-revocation sentencing), *with* Brief for the United States at 17–24, United States v. Novak, No. 11-4358 (4th Cir. Sept. 8, 2011), 2011 WL 3958530, at *17–24 (arguing that § 3582(a) does not apply to post-revocation sentencing).

[61] *Molignaro*, 649 F.3d at 3.