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## The Costs of Abusing Probationary Sentences: Overincarceration and the Erosion of Due Process

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# The Costs of Abusing Probationary Sentences

## OVERINCARCERATION AND THE EROSION OF DUE PROCESS

*Andrew Horwitz*<sup>†</sup>

### I. INTRODUCTION

The American criminal justice system has an apparent addiction to the use of probation as a means for adjudicating vast numbers of cases, particularly misdemeanors. With little discussion of or agreement about the appropriateness or efficacy of this sentencing practice, probation has become by far the most common form of criminal sentencing. While the primary justification given for such heavy reliance on probation is that we simply do not have the resources to incarcerate these offenders, that justification cannot survive serious scrutiny. In the first instance, it relies on the premise that we would, if we could, incarcerate huge numbers of low-level offenders, a proposition that is highly unrealistic. Additionally, however, because probation violators constitute the fastest growing component of an exploding prison population, it may well be that our reliance on probation as a default sentence is not really reducing our incarceration ranks, but simply reorganizing them to incarcerate different offenders.<sup>1</sup> So if the

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<sup>1</sup> There are tremendous but largely unexplored public policy ramifications when decisions about whom to incarcerate are made in such a backward and unintentional fashion. For instance, if any interaction with the criminal justice system can easily escalate to incarceration, the system will disproportionately incarcerate those who are most likely to have that interaction, most notably the urban poor and people of color. See, e.g., Jerome Miller, *Do We Really Need More Prisons?*, N.J. RECORD, May 14, 1989, at O1 (noting that in certain parts of the country, seven out of ten young black men can expect to be arrested at least once).

use of probation as a default sentence for those we do not incarcerate cannot be justified on those grounds, why have we continued down this path? And at what cost?

There are two clear and direct consequences of the overuse and abuse of probation as a criminal disposition. The first is that we are losing a tremendous opportunity to use probation for its historically intended purpose: rehabilitation. When the numbers of probationers becomes so large that supervision and the provision of services and support becomes impossible, the reformatory potential of probation is completely lost. The second and more disturbing consequence is the creation of a shadow criminal justice system in which an extraordinary percentage of criminal charges is resolved not through our normal adjudicative process, but rather through a probation violation process that runs roughshod over the constitutional rights of the accused. When a probationer is charged with a new criminal offense, that new offense typically generates a corresponding allegation that the probationer violated the terms of his or her probation. When the new charge is processed as an alleged probation violation, the probationer is entitled only to a limited hearing at which the rules of evidence are relaxed, the right to confrontation is limited, the burden of proof is far lower than the usual beyond a reasonable doubt standard, and the right to a trial by jury is non-existent. The outcome of this violation hearing will often obviate the relevance of any trial on the new charge. A probationer facing such a violation hearing, with its quite limited prospect for a successful outcome, will most often simply admit to the new charge, whether innocent or not.

This Article will explore each of these consequences in depth and provide some ideas for constructive ways to avoid them. In Part II, the Article will describe the evolution of probation from its roots as a condition imposed upon a select population of criminal defendants who seemed likely to benefit from assistance, support, and supervision, to the default sentence imposed upon a majority of defendants with little to no regard for whether probation makes sense for that defendant. As our prison population grows larger and larger, a relatively small amount of our corrections budget is designated for probation departments, resulting in minimal or, in many cases, no supervision or provision of services to an exploding probation population. We have overwhelmed probation departments so that they cannot possibly perform the function that we hope they might. Recognizing this, we have abandoned

any prospect that probation might assist a defendant's rehabilitation and now use it simply as a noose around an offender's neck, waiting for the inevitable violation. Not surprisingly, recidivism and failure to adhere to the technical requirements of probation have created a burgeoning prison population. Having placed an offender on probation, a court often feels compelled to respond to a violation with incarceration in order to maintain credibility. And, in that fashion, probation imposed upon a defendant who never needed programmatic support and supervision, or who needed it but never got it, turns a case that never merited incarceration into an incarceration case. In the process, we have created a cycle out of which many defendants never emerge, preventing them from obtaining jobs and decent housing.

Part III of this Article will detail the probation violation process, explaining how the process has largely taken over the criminal justice system, eradicating some of the constitutional rights and protections that we hold most dear. We have created a second class of citizens—those on probation—for whom the Constitution no longer applies in any meaningful way. The rights and protections inherent in our legal system, developed and refined over the past two centuries, are relegated to the caboose of a train driven by the probation violation process. The end result is often that any interaction whatsoever with the criminal justice system can escalate into incarceration, which means that those most likely to have low-level interactions with the criminal justice system—the urban poor and people of color—will suffer disproportionately.

Part IV will suggest a return to an earlier time when probation was used with a specific purpose in mind, reserved for those defendants who can truly benefit from support and supervision. In order to allow probation to engage in meaningful support and supervision, the number of probationers each probation officer is expected to supervise must be drastically reduced. One means of accomplishing this, of course, would be a significant expansion in funding allowing for the hiring of many more probation officers. In today's economic and political climate, however, the likelihood of greater funding for probation on the scale that would be required is simply unrealistic. Although these concepts are not mutually exclusive, a more feasible and realistic approach would entail a significant reduction in the number of probationers. This reduction can be accomplished by ending the concept of unsupervised probation and by significantly

expanding the use of other alternative sentencing options. If we move beyond the "probation-as-default" approach of the last few decades and return to using probation only when actual support and supervision are merited, we can accomplish several crime control objectives and avoid unnecessary fiscal and human costs.

Finally, Part V of this Article will propose changes to the probation violation process to enhance the fairness and reliability of the criminal justice system. To maintain the integrity of the criminal justice system, we must stop using probation as a means of engaging in an end-run around the system's mechanisms for protecting the rights of defendants. Except under extraordinary circumstances, the hearing concerning an alleged probation violation predicated on a new criminal charge should not be held before the resolution of the new charge. If the probationer is acquitted of the new charge or the new charge is dismissed, the violation allegation should likewise be dismissed. If the probationer is convicted of or admits to a new charge, he or she can be sentenced on the probation violation accordingly. By sequencing the events in this fashion, we can avoid the use of the probation violation hearing as a substitute for a trial. In so doing, we can restore some of the public's eroded faith in the fairness and integrity of the system.

## II. FROM POSITIVE REHABILITATIVE TOOL TO LOST OPPORTUNITY

### A. *The Origins of Probation*

The origins of probation in the United States can be traced to a Boston cobbler named John Augustus, referred to as the "father of probation." In the 1840s, Augustus intervened in the Massachusetts court system on behalf of thousands of "common drunkards" and "petty criminals."<sup>2</sup> The prevailing penal philosophy of the eighteenth century was quite severe, suggesting that the only response to criminal behavior was harsh corporal punishment.<sup>3</sup> Reforms during the early

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<sup>2</sup> See 1 NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 1:3 (2d ed. 1999); PAUL F. CROMWELL, JR. ET AL., *PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM* 10 (2d ed. 1985); Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 174-75 (2003).

<sup>3</sup> COHEN, *supra* note 2, § 1:2; CROMWELL, *supra* note 2, at 5.

nineteenth century focused on the replacement of corporal punishment with incarceration.<sup>4</sup> Augustus's intervention was part of a larger reform movement that questioned the retributive orientation of the criminal justice system and sought a greater focus on the rehabilitation of the offender. Augustus's view was that the purpose of the criminal law should be "to reform criminals and to prevent crime, and not to punish maliciously or from a spirit of revenge."<sup>5</sup>

Early on, Augustus's efforts were roundly criticized as being soft on crime and encouraging criminal behavior.<sup>6</sup> But due in part to the widespread recognition that prisons were not serving any rehabilitative purpose and in part to Augustus's early successes, the concept of probation became more popular and more widely accepted. In 1878, Massachusetts passed the first probation statute, followed quickly by a number of other states.<sup>7</sup> By 1925, all forty-eight states and the federal government formally adopted probation by statute.<sup>8</sup>

Although Augustus supervised over two thousand probationers in his eighteen years in the field,<sup>9</sup> he chose them carefully, recognizing that probation would not be an appropriate disposition for every offender. As he described the process, "Great care was observed, of course, to ascertain whether the prisoners were promising subjects for probation, and to this end it was necessary to take into consideration the previous character of the person, his age, and the influences by which he would in future be likely to be surrounded."<sup>10</sup> In the early part of the twentieth century, the prevailing notions of probation incorporated this selective ideal. A summary of the professional literature in 1960 described probation as "the application of modern, scientific case work to specially selected offenders who are placed by the court under the personal supervision of a probation officer . . . and given treatment

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<sup>4</sup> COHEN, *supra* note 2, § 1:2; CROMWELL, *supra* note 2, at 5.

<sup>5</sup> CROMWELL, *supra* note 2, at 11 (quoting JOHN AUGUSTUS, A REPORT OF THE LABORS OF JOHN AUGUSTUS 23 (1852)).

<sup>6</sup> *Id.*; Logan, *supra* note 2, at 176; Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 155-56 (1997) [hereinafter Petersilia, *Probation*].

<sup>7</sup> Logan, *supra* note 2, at 175.

<sup>8</sup> CROMWELL, *supra* note 2, at 12.

<sup>9</sup> Logan, *supra* note 2, at 175.

<sup>10</sup> CROMWELL, *supra* note 2, at 10 (quoting JOHN AUGUSTUS, A REPORT OF THE LABORS OF JOHN AUGUSTUS 34 (1852)).

aimed at their complete and permanent social rehabilitation.”<sup>11</sup> The expansion of probation coincided with a significant shift in the prevailing philosophy of the criminal justice system away from retribution and in the direction of reform and rehabilitation. In 1949, the United States Supreme Court recognized the magnitude of the attitudinal shift: “Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”<sup>12</sup>

The second half of the twentieth century brought with it a number of developments. Perhaps the most notable was the abandonment of the notion that probation was a disposition that should be reserved for specially selected offenders. The newly minted Model Penal Code suggested a “probation-as-default” approach to criminal sentencing, suggesting that all cases should be resolved with probation unless incarceration was absolutely necessary for public protection.<sup>13</sup> Similarly, the American Bar Association’s Standards for Criminal Justice suggested that “the automatic response in a sentencing situation ought to be probation, unless particular aggravating factors emerge in the case at hand.”<sup>14</sup> What followed was a substantial expansion of the probation population<sup>15</sup> as probation quickly became “the most common form of criminal sentencing in the United States.”<sup>16</sup> Between the 1950s and the 1970s, probation “evolved in relative obscurity” until published reports in the 1970s exposed the massive underfunding of probation departments and criticized the utility of probation as a criminal disposition.<sup>17</sup>

### B. *Probation in the Modern Era*

In what many view as a watershed event, sociologist Robert Martinson in 1974 published a meta-analysis of over two hundred evaluations of rehabilitative programs, famously

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<sup>11</sup> Logan, *supra* note 2, at 180 n.42 (alteration in original) (quoting Lewis Diana, *What is Probation?*, 51 J. CRIM. L., CRIMINOLOGY & POL. SCI. 189, 197 (1960)).

<sup>12</sup> Williams v. New York, 337 U.S. 241, 248 (1949).

<sup>13</sup> See Logan, *supra* note 2, at 181-87 (detailing the creation of the Model Penal Code provisions relating to probation).

<sup>14</sup> AMERICAN BAR ASS’N, A.B.A. STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION, Introduction (1970).

<sup>15</sup> Logan, *supra* note 2, at 187.

<sup>16</sup> Petersilia, *Probation*, *supra* note 6, at 149.

<sup>17</sup> *Id.* at 157.



concluding that “nothing works.”<sup>18</sup> While the scholarly community expressed serious concerns about the methodology employed<sup>19</sup> and even Martinson himself tried later to qualify his conclusions,<sup>20</sup> Martinson’s “nothing works” conclusion “quickly caught on with the public and politicians”<sup>21</sup> and became “the rallying cry of a new generation of criminologists.”<sup>22</sup> By the end of the 1980s, the abandonment of the rehabilitative ideal in favor of a retributive model of criminal justice was all but complete.<sup>23</sup>

With the end of the rehabilitative ideal came an extraordinary and unprecedented movement toward incarceration. Criminologist Michael Tonry describes in stark terms “the modern American preoccupation with absolute severity of punishment and the related widespread view that only imprisonment counts.”<sup>24</sup> As a consequence, the United States incarcerates a higher percentage of its citizens for a greater average duration than any other western nation.<sup>25</sup> The prison and jail population in the United States increased nearly seven-fold from 1970 to the early twenty-first century,<sup>26</sup> with much of that growth coming in the 1990s and beyond. As of 2008, over 2.2 million Americans, one in every 131 people, were incarcerated.<sup>27</sup> More than one in ten black males aged 25-29 was in prison or jail.<sup>28</sup>

One might think that the abandonment of the rehabilitative ideal and the increased reliance on incarceration would have foreshadowed the end of probation as a primary sentencing mode, but such was not to be the case. As the incarceration rates have grown, so too have the rates of defendants being placed on probation. The probation

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<sup>18</sup> Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INT. 22, 48-49 (1974).

<sup>19</sup> See Robert A. Shearer & Patricia Ann King, *Multicultural Competencies in Probation—Issues and Challenges*, FED. PROBATION, June 2004, at 3.

<sup>20</sup> See Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 244 (1979).

<sup>21</sup> Logan, *supra* note 2, at 190.

<sup>22</sup> Shearer & King, *supra* note 19, at 3.

<sup>23</sup> See William D. Burrell, *Trends in Probation and Parole in the States*, in COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 2005 595, 597 (2005).

<sup>24</sup> MICHAEL TONRY, SENTENCING MATTERS 128 (1996).

<sup>25</sup> *Id.*; THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (2009), available at [http://www.sentencingproject.org/doc/publications/publications/inc\\_factsaboutprisons\\_Dec2009.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_factsaboutprisons_Dec2009.pdf).

<sup>26</sup> Logan, *supra* note 2, at 190; THE SENTENCING PROJECT, *supra* note 25.

<sup>27</sup> THE SENTENCING PROJECT, *supra* note 25.

<sup>28</sup> *Id.*

population in the United States almost tripled between 1980 and 1997, from just over one million to more than three million,<sup>29</sup> and that growth has continued unabated. By 2002, the number had climbed to over four million, a 30% increase between 1995 and 2002, and has since continued upward, reaching nearly 4.3 million in 2007.<sup>30</sup> Probation cases accounted for over half of the growth in the entire correctional population between 1995 and 2006,<sup>31</sup> and made up three quarters of the growth in the number of offenders under community supervision in 2007.<sup>32</sup> Projections predict continued growth.<sup>33</sup> Within the adult population in the United States, 1.78% are presently on probation.<sup>34</sup> The massive expansion of probation appears to be explained in many jurisdictions largely by prison overcrowding and insufficient funds to support further incarceration.<sup>35</sup>

This extraordinary expansion of the probation system has not been accompanied by any correlating expansion in funding. As the number of probationers continues to rise in staggering proportions, spending on probation has been “stagnant or decreasing.”<sup>36</sup> From 1977 to 1990 the number of probationers essentially tripled in size but spending as a percentage of governmental budgets did not change.<sup>37</sup> During the same period, spending for prisons and jails doubled.<sup>38</sup> “Despite the fact that they handle the vast majority of the offender population, probation and parole receive less than ten

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<sup>29</sup> COHEN, *supra* note 2, § 1:1 n.2.

<sup>30</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 228230, PROBATION AND PAROLE IN THE UNITED STATES, 2008, at 1 (2009) [hereinafter ANNUAL PROBATION SURVEY, 2008], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus08.pdf>.

<sup>31</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 220218, PROBATION AND PAROLE IN THE UNITED STATES, 2006, at 1-2 (2007).

<sup>32</sup> ANNUAL PROBATION SURVEY, 2008, *supra* note 30, at 3 tbl.1.

<sup>33</sup> Burrell, *supra* note 23, at 595.

<sup>34</sup> ANNUAL PROBATION SURVEY, 2008, *supra* note 30, at 1. It is interesting to note for sake of comparison that while 1.78% of the nation's adult population is on probation today, in 1980 only 1.12% of that same population was under any correctional supervision, including jail, prison, probation and parole. *Id.*

<sup>35</sup> See COHEN, *supra* note 2, § 1:25.

<sup>36</sup> Joan Petersilia, A *Crime Control Rationale for Reinvesting in Community Corrections*, 75 PRISON J. 479, 484 (1995) [hereinafter Petersilia, *Crime Control*].

<sup>37</sup> *Id.* at 483-84.

<sup>38</sup> *Id.* at 483.

percent of the correctional funding from state and local governments.”<sup>39</sup>

Not surprisingly, then, two things have happened over the past few decades: caseloads for probation officers have grown exponentially, and the level of actual support and supervision has declined nearly to the point of non-existence. In the era when probation was viewed as a legitimate rehabilitative enterprise, recommendations for probation officer adult caseloads ranged from the 1967 President’s Crime Commission recommendation of thirty probationers<sup>40</sup> to what the American Bar Association in 1970 called the “widely recognized standard” of fifty probationers.<sup>41</sup> More recent reports estimate national caseloads averaging as high as 250 probationers per officer.<sup>42</sup> In data published in 1999, Rhode Island had the highest reported average of any state in the country with an average of over 350 probationers per supervising probation officer.<sup>43</sup>

As caseloads have skyrocketed, supervision has precipitously declined. For significant numbers of probationers, probation means complete freedom from supervision. On the national level, the percentage of probationers who are even required to report to a probation officer declined from 79% in 1995 to 70% in 2005.<sup>44</sup> Locally, things appear to be much worse in the urban areas where most offenders live. A 1995 study of the probation system in Los Angeles, reporting caseloads in the hundreds, concluded that at least 60% of all probationers received no services or supervision of any kind.<sup>45</sup> A similar study in Texas revealed that 95% of the 400,000 adults on probation were required to report only once every three months.<sup>46</sup> A probation officer testifying in California in 1993, acknowledging that more than half of the probationers on his

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<sup>39</sup> Burrell, *supra* note 23, at 596; see also Petersilia, *Crime Control*, *supra* note 36, at 484.

<sup>40</sup> See Petersilia, *Crime Control*, *supra* note 36, at 484.

<sup>41</sup> AMERICAN BAR ASS’N, *supra* note 14, at Standard 6.1 cmt.

<sup>42</sup> Petersilia, *Probation*, *supra* note 6, at 167.

<sup>43</sup> AM. PROB. & PAROLE ASS’N, app. 1 tbl.11 (on file with author) (citing C.G. CAMP & G.M. CAMP, *THE CORRECTIONS YEARBOOK 1999: ADULT CORRECTIONS* (1999)).

<sup>44</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 215091, PROBATION AND PAROLE IN THE UNITED STATES, 2005, at 6 tbl.3 (2006) [hereinafter ANNUAL PROBATION SURVEY, 2005], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus05.pdf>.

<sup>45</sup> Petersilia, *Crime Control*, *supra* note 36, at 484; Petersilia, *Probation*, *supra* note 6, at 169.

<sup>46</sup> Petersilia, *Crime Control*, *supra* note 36, at 484.

caseload were completely unsupervised, summarized the situation quite starkly:

On each judicial day hundreds of California judges sentence thousands of offenders to probation, sternly enumerating the many conditions of probation that are enforced by the probation officer. Unfortunately, virtually all of these offenders will never see a probation officer and there will be absolutely no enforcement of the court ordered conditions. Equally unfortunate is that all of the players in this drama—especially the offender—understand that the offenders will go unsupervised.<sup>47</sup>

As a consequence of underfunding and growing caseloads, “probation supervision in many large jurisdictions amounts to simply monitoring for rearrest.”<sup>48</sup>

### C. *A Shift in the Underlying Philosophy of Probation*

These trends in probation—exploding caseloads, little to no supervision—have been accompanied by a corresponding change in the prevailing philosophy undergirding and governing probation supervision. Because the history of probation is firmly rooted in the rehabilitative ideal, abandoning that ideal while at the same time increasing reliance on the use of probation required an adjustment in thinking. A “Justice Model” of probation, in which the primary focus of probation is retribution, emerged in the 1980s and remains dominant to this day.<sup>49</sup> The decision to place an offender on probation has become much more likely to be motivated by a desire to exact retribution for criminal conduct while, at the same time, avoiding the state expense of incarceration.<sup>50</sup> With the widespread adoption of the “nothing works” mantra, there is no real expectation of rehabilitation. Probation has shifted from being viewed as an alternative to punishment, supplemented with services and support, to being considered a punishment in and of itself, supplemented with obligations and restrictions on freedom.<sup>51</sup> Even the American

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<sup>47</sup> *Id.* at 486 (quoting testimony of Robert Kelgord before the Commission on the Future of the California Courts, 1993).

<sup>48</sup> *Id.*; see also Robin Campbell & Robert V. Wolf, *Problem-Solving Probation: An Overview of Four Community Based Experiments*, TEX. J. CORRECTIONS, Aug. 2001, at 8, 9 (noting that “at best, a handful of probationers may get the necessary referrals and support to guide them on a path of reform while the vast majority live in the community with virtually no supervision”).

<sup>49</sup> COHEN, *supra* note 2, § 1:5; CROMWELL, *supra* note 2, at 111.

<sup>50</sup> COHEN, *supra* note 2, §§ 1:9, 1:25.

<sup>51</sup> *Id.* at § 1:6; Logan, *supra* note 2, at 196.

Bar Association in its 1994 Standards for Criminal Justice abandoned the term "probation" in favor of the term "compliance programs."<sup>52</sup> The justice model "repudiates the notion that probation is a sanction designed to rehabilitate offenders in the community, and presents the concept that a sentence of probation represents a proportionate punishment lawfully administered for certain prescribed crimes."<sup>53</sup> Along those lines, the justice model "holds that current practices of counseling, surveillance, and reporting accomplish very little and have minimal impact on recidivism. On the other hand, probation that consists of monitoring court orders for victim restitution or community service and ensures that the imposed deprivation of liberty is carried out, represents a clear and achievable task."<sup>54</sup>

The adoption of the justice model brought with it a major change in both the staffing and the philosophy of probation departments. Traditionally, probation officers most commonly came from social work backgrounds.<sup>55</sup> They often referred to themselves as "probation counselors" and to the probationers as "clients." Under the justice model, the probation officer is much more likely to come from a law enforcement background, to call himself or herself a "probation officer," and to refer to probationers as "offenders."<sup>56</sup> These changes in staffing and in language are reflective of the move away from the rehabilitative model and firmly in the direction of a retributive model.

Viewing probation through a law enforcement perspective rather than a social work perspective has consequences, of course. If probation is about complying with conditions as a form of punishment, then noncompliance must be penalized if the system is to maintain any credibility.<sup>57</sup> And that penalty is frequently incarceration.<sup>58</sup> Two broad categories of offenders now flood the prison system: probationers who have failed to comply with some condition of probation—called "technical violators"—and probationers who have been

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<sup>52</sup> AMERICAN BAR ASS'N, A.B.A. STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING § 18-3.13 cmt. (3d ed. 1994).

<sup>53</sup> CROMWELL, *supra* note 2, at 111.

<sup>54</sup> *Id.* at 111-12.

<sup>55</sup> *Id.* at 105-07.

<sup>56</sup> *See id.* at 105-12.

<sup>57</sup> *See* TONRY, *supra* note 24, at 101-02.

<sup>58</sup> *See* Petersilia, *Probation*, *supra* note 6, at 193.

rearrested on a new criminal allegation.<sup>59</sup> With an almost complete absence of programmatic support or supervision, the fact that each of these categories is substantial ought not be terribly surprising. "Stated simply, offenders who fail while under community supervision constitute the fastest growing component of the prison and jail populations in this country."<sup>60</sup> One study reports that probation violators represented 17% of prison admissions nationally in 1980 but by 1999 had doubled to 35%.<sup>61</sup> Another study placed the figure at between 30% and 50% of new admissions.<sup>62</sup> Some state figures are substantially greater, reaching as high as 80% of new admissions.<sup>63</sup> Because of the intractable nature of many of the causes of violations, "these revocation processes result in 'churning,' in which individuals repeatedly circulate in and out of custody . . . . It has become increasingly clear to correctional administrators and policymakers alike that this is a costly and counterproductive approach."<sup>64</sup> It has become equally clear that the "high failure rates of probationers and parolees . . . contribute significantly to prison crowding."<sup>65</sup> Something clearly must be done to reverse this path.

### III. THE PERVERSION OF THE CRIMINAL JUSTICE PROCESS

#### A. *The Probation Violation Cycle*

The fact that our prisons are being flooded with probation violators begs the question of how all of those probation violators were sentenced to jail time. The reality is that we have designed a shadow criminal justice system in which probationers can be sent to prison on little evidence and with little procedural protection. Record numbers of offenders are placed on probation each and every year, with probation

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<sup>59</sup> See *id.* at 166; Petersilia, *Crime Control*, *supra* note 36, at 488.

<sup>60</sup> Faye S. Taxman & James M. Byrne, *Locating Absconders: Results from a Randomized Field Experiment*, FED. PROBATION, Mar. 1994, at 13, 13, see also Petersilia, *Crime Control*, *supra* note 36, at 488.

<sup>61</sup> RYAN S. KING, CHANGING DIRECTION?: STATE SENTENCING REFORMS 2004-2006, at 11 (The Sentencing Project 2007), available at <http://www.sentencingproject.org/doc/publications/sentencingreformforweb.pdf>.

<sup>62</sup> Petersilia, *Crime Control*, *supra* note 36, at 488.

<sup>63</sup> See Petersilia, *Probation*, *supra* note 6, at 166 (noting that Texas reported that 66% of all prison admissions in 1993 were probation or parole violators, while California reported a rate of over 60% and Oregon a rate of over 80%).

<sup>64</sup> KING, *supra* note 61, at 11.

<sup>65</sup> Petersilia, *Crime Control*, *supra* note 36, at 488.

serving as the default sentence for any offender who cannot or will not be incarcerated as an immediate consequence of the court's adjudication of the case. In some jurisdictions, almost every misdemeanor is resolved by placing the offender on probation. If the offender sees a probation officer at all—and very many will not—the visit alone will be an end, not a means, of establishing compliance with the terms of probation. Failing to keep that appointment will result in the filing of a technical violation of probation. If there are special conditions attached to the term of probation, the offender will generally be expected to provide some evidence of compliance with those conditions. Because the probation officer has an unmanageable number of probationers to supervise, it is unlikely that any support services beyond referrals to underfunded or unavailable service providers will be offered or received. In the absence of available services, evidence of some effort to obtain services, even if wholly unsuccessful, will often be deemed as compliance. Absent an arrest on a new charge, the probationer will be deemed to have successfully completed the probationary term if he or she can comply with these minimal obligations.

What of the probationer who cannot or does not comply with these obligations? The technical violator—the probationer who fails to appear for a scheduled appointment, fails a drug test, or fails to fulfill a special condition—will in all likelihood be brought before the sentencing court as a probation violator. Although the original criminal charge did not merit a jail sentence and the probationer has not been charged with engaging in new criminal activity, it is more likely than not that the probationer will now be incarcerated, at great expense to the government, and often for an extraordinarily long period of time.<sup>66</sup> If the goal of the probationary sentence was to deter future criminal behavior, it is hard to justify incarceration in the absence of criminal behavior. The consequence of a probationer's failure to meet what are often unrealistic expectations can frequently be a prison sentence far in excess of what anyone would ever have thought justified by the original criminal charge.<sup>67</sup> In what might be viewed as a classic

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<sup>66</sup> See TONRY, *supra* note 24, at 105.

<sup>67</sup> Criminologist Michael Tonry, in his book entitled *Sentencing Matters*, explores the argument that the high rates of technical violations of probation simply “expose the unreality and injustice of conditions—like prohibitions of drinking or expectations that offenders will conform to middle-class behavioral standards they have never observed before—that many offenders will foreseeably breach and that do not involve criminality. Many offenders have difficulty in achieving conventional, law-

example of this scenario, a defendant in Arkansas who had been convicted of theft was eventually sentenced to five years in prison solely for failing to report to his probation officer as required.<sup>68</sup> The defendant, who had been given permission to leave the state to look for work, explained that he had "moved a lot . . . looking for work, and that he could not always get the report, a stamp, and an envelope together."<sup>69</sup> The Court of Appeals of Arkansas upheld the five year sentence.<sup>70</sup> In just this fashion, we often dedicate scarce prison resources to a failed probationer who committed a minor or non-violent crime rather than to an offender who committed a far more serious offense.

But even more disturbing is the treatment of the probationer who is charged with a new crime. In many jurisdictions this probationer will be incarcerated as a matter of practice or as a matter of law while he or she awaits a probation violation hearing, whether or not the new charge merits incarceration.<sup>71</sup> In all likelihood this probationer will end up incarcerated as a probation violator as a result of the new criminal allegation, and this remains the case even if the new charge is ultimately dismissed or, worse, even if he or she is ultimately acquitted on that charge after a trial.<sup>72</sup> Most frequently the probation violation allegation will be used as a vehicle to force a resolution of the new criminal charge, leaving that charge completely untested by the normal adjudicative process.

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abiding patterns of living and many stumble along the way." *Id.* He points out that a "traditional social work approach to community corrections would expect and accept the stumbles (so long as they do not involve significant new crimes) and hope that through them, with help, the offender will learn to be law-abiding." *Id.*

<sup>68</sup> *Luyet v. State*, CA CR 81-69, 1981 WL 930, at \*1 (Ark. Ct. App. Nov. 12, 1981).

<sup>69</sup> *Id.* at \*1.

<sup>70</sup> *Id.* at \*2. Similarly, in *Morgan v. State*, 588 S.W.2d 431 (Ark. 1979), the court upheld a three year prison sentence for a defendant who had pled guilty to forgery and who, while on probation, moved out of state without permission to obtain employment.

<sup>71</sup> Most efforts by probationers to be released while they await a hearing are unsuccessful. Because there is no constitutional presumption of innocence at a probation revocation proceeding, absent a statute allowing judges the discretion to grant bail, probationers will generally be held until their revocation hearing. COHEN, *supra* note 2, §§ 18:5-18:7.

<sup>72</sup> Most jurisdictions justify this outcome by noting that the standard of proof during a probation violation is by a preponderance of the evidence, whereas during a criminal trial, the standard is beyond a reasonable doubt. The significant gap between these two standards of proof creates a very high likelihood that a probationer will be found guilty during a violation hearing even if they are acquitted during criminal proceedings. *Id.* § 22:15.



### B. *An End-Run Around the Constitution*

The honest truth is that the probation violation mechanism has in many cases completely taken over the mechanical functioning of criminal justice system. With unprecedented numbers of offenders on probation at any time, the likelihood that a defendant charged with a crime is presently on probation is high.<sup>73</sup> In that scenario, the system lends itself to an end-run around all of the procedural protections in place to protect the innocent, and the simple exercise of constitutional rights is punished. The primary impact of probation on the criminal justice system is the generation of a shadow criminal justice system in which procedural protections such as the presumption of innocence and the right to a jury trial are disregarded and decisions about incarceration are made essentially by default.

When a probationer is arrested on a new criminal charge, that person is brought before the court to be arraigned on the new charge. It is generally at that very same arraignment that the probationer is generally presented with the allegation that he or she, by committing the new crime, has violated his or her probationary terms. Often, there is a heavy presumption or even a requirement that the probationer will be incarcerated until the probation violation allegation is adjudicated.<sup>74</sup> In the misdemeanor context, this presumption can frequently have the effect of coercing an immediate resolution of both the alleged probation violation and the new criminal charge.<sup>75</sup> If a defendant can avoid further detention and obtain release from custody only by admitting a violation and pleading guilty to a new criminal charge, he or she will almost invariably exercise that option regardless of guilt or innocence.<sup>76</sup>

A recent story in the *Providence Journal* chronicled the ugly path that the system can follow when a defendant is placed on probation. A woman engaged in a bitter divorce was repeatedly arrested and charged with misdemeanor offenses

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<sup>73</sup> In 2007, one in every forty-five adults in the United States was supervised in the community and over 80% of those being supervised were on probation. ANNUAL PROBATION SURVEY, 2008, *supra* note 30, at 1.

<sup>74</sup> See COHEN, *supra* note 2, §§ 18:5-18:7; ANDREW R. KLEIN, ALTERNATIVE SENTENCING, INTERMEDIATE SANCTIONS AND PROBATION 319 (2d ed. 1997).

<sup>75</sup> See KLEIN, *supra* note 74, at 329.

<sup>76</sup> See *id.*

based on allegations made by family members.<sup>77</sup> On nine separate occasions she was held without bail as an alleged probation violator based on those allegations alone, sometimes for more than a month, until she was ultimately acquitted or the charge was dismissed.<sup>78</sup> It is unclear whether she was ever offered the opportunity to enter an admission to any of those charges in order to avoid incarceration; if she had been offered that chance, she almost certainly would have taken it. It is the rare defendant indeed who will stay in custody in order to contest a charge when he or she can be released upon an admission of guilt.<sup>79</sup>

With the looming threat of incarceration, the defendant's status as a probationer acts as an almost complete barrier to challenging the veracity of the new criminal allegation or exercising any of the connected constitutional rights because the cost of doing so is more than most defendants can or will bear. While expedient, this process actually serves no constituency very well. Because the veracity and accuracy of the charges is unsubstantiated, the innocent can and do get swept up with the guilty. Because the validity of arrests and charges goes untested, sloppy or unlawful police and prosecutorial work gets rewarded. The defendant, unable to challenge even unjust or untrue charges, accumulates a criminal history from which he or she is unlikely to recover. And because what follows from the new charge is almost invariably yet another term of probation, the defendant walks closer and closer to that line of incarceration. Eventually, and often sooner rather than later, a defendant who has never received any support or social services and whose problems remain untreated winds up incarcerated on charges that nobody truly believes merit incarceration. And the injustice of

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<sup>77</sup> John Hill, *Override Urged in Probation-Violation Veto*, PROVIDENCE J., Dec. 17, 2009, at A13.

<sup>78</sup> *Id.*

<sup>79</sup> Another Rhode Island story makes this point in a rather stark fashion, albeit in the context of an alleged bail violation. Accused by an ex-boyfriend of violating a restraining order, a special needs teacher in her fifties was released on bail. Bob Kerr, *She Paid When the Law Came Apart*, PROVIDENCE J., Oct. 12, 2008, at B1. When the ex-boyfriend made another unsupported allegation, she faced the choice of admitting guilt to obtain her release or asserting her innocence enduring two weeks of incarceration to contest the charge. *Id.* On the day of her arraignment she initially asserted her innocence, but then changed her plea to avoid incarceration. *Id.* Unable to live with her false admission, she moved to vacate her plea and, when that motion was granted, she was jailed for two weeks. *Id.* Ultimately, all of the charges against her were dismissed. *Id.*

this system falls disproportionately upon those for whom contact with the criminal justice system is most likely as a matter of sheer probability: the urban poor and people of color.<sup>80</sup>

Contrast that same scenario with a defendant arrested on a new misdemeanor charge committed one day after his or her probation has expired. Because the probationary period has expired, he or she cannot be presented to the court as a probation violator and the defendant is likely to be free to exercise the rights related to challenging the charge without threat of immediate incarceration. And this is most often true even if the alleged crime took place while the person was still on probation.<sup>81</sup> So a defendant arrested and brought to court on a new misdemeanor charge on the last day of his probation can and most often will be incarcerated without bail unless he admits to the new criminal charge, while that same defendant arrested on the same offense but two days later maintains all

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<sup>80</sup> It is a well documented reality that people of color are more likely to be stopped by the police and that their encounters with the police are more likely to result in arrests. Examples abound. The New York City Police Department reported stopping and searching over 500,000 people in 2007; 86% of those stopped and searched were black or Latino. Steven Zeidman, *Time to End Violation Pleas*, N.Y. L.J., Apr. 1, 2008, at 2. In that same year, the Los Angeles Police Department reported that 34.4% of the motor vehicle drivers that it stopped were white, while 18.7% were black, and 37.4% were Hispanic. See Noah Kupferberg, *Transparency: A New Role for Police Consent Decrees*, 42 COLUM. J.L. & SOC. PROBS. 129, 164 app. A (2008). While the numbers of people pulled over appear to have been roughly in proportion to the percentages of each race stopped, a marked difference existed in the number of motorists asked to exit their vehicles and subjected to a search. While just 17.0% of the motorists asked to exit were white, 25.0% were black and 53.2% were Hispanic. *Id.* at 165 app. A. Similarly, of the motorists who were searched once outside of their vehicles, only 11.6% were white, while 31.0% were black and 54.6% were Hispanic. *Id.* Obviously, more stops and more searches will result in more arrests. While any encounter between a police officer and a citizen can escalate into an arrest, people of color are statistically much more likely to be arrested in that kind of encounter. A recent report in Seattle revealed that African-Americans were eight times more likely than whites to be arrested and charged solely with the crime of obstruction, known by local law enforcement officers as “contempt of cop.” Eric Nalder, Lewis Kamb & Daniel Lathrop, *‘Obstructing’ Justice: Blacks Are Arrested on ‘Contempt of Cop’ Charge at Higher Rate*, SEATTLE POST-INTELLIGENCER, Feb. 28, 2008, at A1. In New York City, 87% of the 40,300 people arrested for the lowest-level misdemeanor marijuana possession in 2008 were black or Latino even though research suggests that whites are the heaviest users. Jim Dwyer, *Whites Smoke Pot, But Blacks Are Arrested*, N.Y. TIMES, Dec. 23, 2009, at A24.

<sup>81</sup> Some jurisdictions have enacted statutes that allow them to retain jurisdiction for a “reasonable” period of time following the expiration of the probation period within which hearings can be conducted for violations that occurred while the defendant was on probation. COHEN, *supra* note 2, § 18:19. Even in these jurisdictions, the probation violation hearing is generally avoided if formal revocation proceedings have not commenced prior to the expiration of the probation period. See *United States v. Barton*, 26 F.3d 490, 492 (4th Cir. 1994). In the federal system, for example, unless a warrant or summons has been issued prior to the expiration of probation, the court may not revoke a sentence for probation. 18 U.S.C. § 3565(c) (2006).

of his constitutional rights, including the presumption of innocence and the right to reasonable bail that will generally mean his release from custody. Is the enormous distinction in the treatment of these two defendants justified by any rational public policy? Is it fair? Does it lead to justice?

If the alleged probation violator has the wherewithal and the fortitude to seek a probation violation hearing, that hearing will be one in which virtually all procedural protections for the accused have been removed.<sup>82</sup> The accused enjoys no right to a trial by jury.<sup>83</sup> The rules of evidence are relaxed such that hearsay may be introduced<sup>84</sup> and illegally obtained evidence may be used.<sup>85</sup> The right to confront and cross-examine one's accusers is a "conditional right" that a judge can take away.<sup>86</sup> The burden of proof upon the prosecution, even if the allegation is that the probationer committed a new crime, is significantly reduced.<sup>87</sup> In some jurisdictions, for example, the government must simply offer evidence such that a judge is "reasonably satisfied" that the probationer has violated a term or condition of probation.<sup>88</sup> A probationer's ability to obtain discovery in advance of the probation violation hearing is limited,<sup>89</sup> and because the hearing often takes place before a trial of the new criminal charge is scheduled, probation violation hearings "are frequently held without the benefit of preparation that precedes a criminal trial."<sup>90</sup>

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<sup>82</sup> See, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778, 787-90 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 483-89 (1972); see also *State v. Gautier*, 871 A.2d 347, 359 (R.I. 2005) (noting that probation violation defendants "are afforded considerably less due process protection than that to which they are constitutionally entitled in a full-blown criminal trial").

<sup>83</sup> COHEN, *supra* note 2, § 21:49. In fact, revocation hearings may even be presided over by an "independent officer," who is often a probation officer not directly involved in the case. *Morrissey*, 408 U.S. at 486; see also *Gagnon*, 411 U.S. at 781, 786.

<sup>84</sup> COHEN, *supra* note 2, § 20:11.

<sup>85</sup> Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 369 (1998).

<sup>86</sup> See *Gautier*, 871 A.2d at 359; *Commonwealth v. Durling*, 551 N.E.2d 1193, 1199 (Mass. 1990); see also *United States v. Waters*, 1998 FED App. 0299P (6th Cir.).

<sup>87</sup> KLEIN, *supra* note 74, at 260-61.

<sup>88</sup> *Id.* at 260 (internal quotation marks omitted).

<sup>89</sup> COHEN, *supra* note 2, §§ 21:29-30. Courts have held that, unlike in a criminal proceeding where a defendant is entitled to disclosure of evidence if it is material to his or her case, in a probation violation hearing due process may not be denied if the government fails to disclose evidence, even potentially exculpatory evidence, so long as the government does not plan to use that evidence during a violation proceeding. See *United States v. Neal*, 512 F.3d 427, 436 (7th Cir. 2008); *United States v. Derewal*, 66 F.3d 52, 55 (3d Cir. 1995).

<sup>90</sup> *Commonwealth v. Cosgrove*, 629 A.2d 1007, 1011 (Pa. Super. Ct. 1993).

In practice, unless the prosecution fails to present any evidence at all, the outcome of a probation violation hearing is often all but a foregone conclusion. When a probationer is found after a hearing to have violated the terms of his or her probation by committing a new crime, that probationer is often sentenced in a fashion that, in reality, is intended to punish the probationer for having committed the new crime. While the sentence is legally justified not as a sentence for the new offense, but rather as a sentence for violating the terms of probation,<sup>91</sup> any honest assessment of the situation acknowledges the truth as perceived by all of the relevant players: the sentence is punishment for the new offense. Often the severity of the probation violation sentence is sufficient to allow the government either to offer a disposition on the new charge with a sentence that functionally merges with the probation violation sentence, or to forgo the prosecution of the new charge altogether. The outcome is that the prosecution gets the sentence it was seeking on the new charge without the burden of ever having to prove it. There is no need, under this system, to have a criminal trial, and our entire system of procedural protections for the accused is left on the sidelines. Something must be done to correct this abuse and restore the legitimacy of our criminal justice system.

#### IV. ALTERNATIVES TO USING PROBATION AS A DEFAULT SENTENCE

National reports indicate that as many as 80% of adult misdemeanor convictions result in sentences of probation.<sup>92</sup> The sheer volume of misdemeanor probationers completely overwhelms the system, preventing probation from achieving any measure of effectiveness. It does not have to be this way. Virtually all jurisdictions employ alternative sentencing mechanisms besides probation to resolve criminal cases. If

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<sup>91</sup> See *Lucido v. Superior Court*, 795 P.2d 1223, 1230 (Cal. 1990) ("The fundamental role and responsibility of the hearing judge in a revocation proceeding is not to determine whether the probationer is guilty or innocent of a crime, but whether a violation of the terms of probation has occurred . . ."); *Gautier*, 871 A.2d at 361 ("[A] probation-revocation hearing is considered a continuation of the original prosecution for which probation was imposed—in which the sole purpose is to determine whether a criminal defendant has breached a condition of his existing probation, not to convict that individual of a new criminal offense."); *Cosgrove*, 629 A.2d at 1011 ("It is neither [a probation hearing's] purpose nor function to serve as a final arbiter of an individual's guilt or innocence of criminal charges.").

<sup>92</sup> Petersilia, *Probation*, *supra* note 6, at 173.

probation is no longer viewed as serving a rehabilitative function, then presumably probation is being used for its retributive or deterrent value. Non-probationary sentences, such as the imposition of time served, of a fine, of community service, or even of a finding of guilt without further punishment, can certainly carry as much retributive value as a probationary period that involves little supervision or, more commonly, no supervision at all. If the retributive value comes from conditions that might be attached to probation, those conditions can be enforced without reliance on probation. Similarly, the deterrent value of a probationary sentence, if there is any in fact, can frequently be equaled by the imposition of a non-probationary sentence.

A. *Debunking the Current Rationales for Probation*

As the system presently exists, the stated rationales supporting the extensive reliance on probation as a sentencing mechanism do not withstand scrutiny. The primary rationale—that probation is cheaper than incarceration and that we simply do not have room in our jails and prisons for all of these defendants—relies on the premise that most or all of those who are placed on probation should be incarcerated. When as many as 80% of all misdemeanor convictions result in a period of probation, it is clear that these defendants are not being placed on probation as an alternative to incarceration.<sup>93</sup> What the casual use of probation actually accomplishes for these defendants is the prospect of incarceration for a probation violation that would not otherwise exist if the person had not been placed on probation in the first place. This use of probation does not drive incarceration costs down, but rather quite the opposite.

Another rationale for the reliance on probation as a sentencing mechanism is that probation is a form of retributive sentence. This might make sense in a context in which compliance with probation was onerous. If the vast majority of probationers report rarely or never, and if the level of supervision is diluted to the point of virtual non-existence, it is very hard to comprehend how probation exacts a form of retribution. The honest reality is that for most probationers, probation serves as little more than a noose around their neck,

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<sup>93</sup> *Id.*

waiting to be tightened when or if they have an encounter with the law. Any system that relies on a future encounter with the law as a triggering mechanism will have a grossly disproportionate impact on the urban poor and people of color.<sup>94</sup> As noted above, the retributive value of any conditions that might be attached to probation can be achieved by imposing those same conditions without imposing probation.<sup>95</sup>

Yet another rationale for the reliance on probation as a sentencing mechanism is the notion that the mere fact that the offender is on probation will serve as a deterrent to future criminal conduct. But there are several flaws with this reasoning. There is very little empirical data supporting the general notion of deterrence theory with respect to probation.<sup>96</sup> Experts agree that a low probability threat of a severe sanction is not effective.<sup>97</sup> For the vast majority of probationers who are obtaining little to no supervision, a violation of probation will occur only if there is an arrest for a new offense. Apprehension for criminal behavior is often a relatively low probability event.<sup>98</sup> To the extent that a crime involves any premeditation rather than a response to impulse, the offender's estimation of the probability of apprehension will certainly be low in an offender's mind. Presumably the potential sentence for that new crime already serves as a deterrent, so the relevant deterrent value is the differential in deterrence that can be derived solely from one's status as a probationer. With a complete absence of data on this question, it seems relatively

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<sup>94</sup> See *supra* note 80.

<sup>95</sup> See *supra* Part IV.

<sup>96</sup> See Petersilia, *Probation*, *supra* note 6, at 154-55; Faye S. Taxman, *Supervision—Exploring the Dimensions of Effectiveness*, FED. PROBATION, Sept. 2002, at 14.

<sup>97</sup> See COHEN, *supra* note 2, § 1:7 (citing research suggesting that “certainty of punishment is a greater deterrent than severity of punishment”); Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 52 (2005) (“Current knowledge concerning deterrence is little different than eighteenth-century theorists supposed it to be: certainty and promptness of punishment are much more powerful deterrents than severity.”); Angela Hawken & Mark Kleiman, *H.O.P.E. for Reform: What a Novel Probation Program in Hawaii Might Teach Other States*, AM. PROSPECT, Apr. 10, 2007, [http://www.prospect.org/cs/articles?article=hope\\_for\\_reform](http://www.prospect.org/cs/articles?article=hope_for_reform) (noting that crime “attracts reckless and impulsive people, for whom deferred and low-probability threats of severe punishment are less effective than immediate and high-probability threats of mild punishment”).

<sup>98</sup> See Tonry, *supra* note 97, at 53; see also Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 79 (2005) (“[T]he detection rates for most crimes are very low, and the probability of an offender receiving a custody sentence is often less than one out of every one hundred crimes committed.”).

safe to assume that this differential is minimal if not non-existent.

The remaining rationale for the heavy reliance on probation as a sentencing mechanism, if one is honest about how it works, is that it makes the processing of a future criminal charge faster and easier for the prosecution. But this rationale, despite its efficiency, is the one that is so deeply troubling. It makes for very poor public policy choices in a variety of ways—not just who we incarcerate and for how long, but also how quickly we allow offenders to accumulate criminal records that render them unemployable and ineligible for most rental housing. And this process serves to seriously undermine the public perception of the fairness of the system.<sup>99</sup>

If the legitimate justifications for such extraordinarily heavy reliance on probation do not hold up, the obvious solution is to stop using probation as the default non-jail sentence and start relying more heavily on other non-jail dispositions, particularly for misdemeanor offenses. This simple step can help restore the viability and credibility of the probationary sanction by precipitously reducing caseloads. With smaller caseloads, real support and supervision is an attainable goal and there is substantial research suggesting that it can make a real difference.<sup>100</sup> Probation should be imposed sparingly and deliberately in the way in which it was historically intended: as a means of providing support and supervision to those select offenders for whom such support and supervision seems likely to make a difference. There is little value in using probation as a means of monitoring an offender's performance of an identifiable condition of probation; that function can be served either directly by the court or by referral to an outside agency.<sup>101</sup> Those offenders who are placed

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<sup>99</sup> A prime example of the public perception of the probation violation system can be found in an article published in the *Providence Phoenix* in 1997, the title of which tells the reader all he or she needs to know. Jody Ericson, *Take a Ride on Rhode Island's Revocation Railroad: Make One False Move While on Probation and Go Directly to Jail*, PROVIDENCE PHOENIX, Oct. 3, 1997, at 9. A similar message can be found a decade later in the magazine *Rhode Island Monthly*. *Guilty, Even While Innocent*, R.I. MONTHLY, Dec. 2008.

<sup>100</sup> See *infra* notes 138-144 and accompanying text.

<sup>101</sup> In Rhode Island, a private not-for-profit entity called Justice Assistance has a contract with the courts to monitor compliance with conditions such as community service, domestic violence counseling, substance abuse counseling, mental health counseling, and restitution in cases in which probation is not ordered. See Justice Assistance, [www.justiceassistance.org](http://www.justiceassistance.org) (last visited March 6, 2010). The agency reports back to the court to indicate compliance or non-compliance. *Id.*



on probation must receive much more than just monitoring, but also intervention, support, and supervision.

### *B. Alternatives to Probation*

A wide variety of non-probationary sentences is available. One common non-probationary sentence is the “unconditional discharge” found in many state statutes. In New York, for example, a court may impose a sentence of unconditional discharge “if the court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant’s release.”<sup>102</sup> The statutory provision governing an unconditional discharge in Connecticut uses precisely the same language.<sup>103</sup> In New Hampshire, an unconditional discharge may be imposed if the court is of the opinion that neither supervision nor any other condition would serve a proper purpose.<sup>104</sup> The statutes in each of these states provide that a sentence of unconditional discharge “is for all purposes a final judgment of conviction.”<sup>105</sup>

Pennsylvania uses different language to accomplish essentially the same function, explicitly allowing a court to impose a sentence of “guilt without further penalty.”<sup>106</sup> In other jurisdictions, a plea of guilty followed by a sentence of “time served” has the same effect, creating a criminal conviction and discharging the offender with no further obligations to the court.<sup>107</sup>

The statutory sentencing schemes in some states seem designed to discourage or prevent the overuse of probation by statute. In New Hampshire, for example, probation is not a permissible sentence for a Class B misdemeanor and may be imposed only if the offense is a felony or a Class A misdemeanor.<sup>108</sup> Pennsylvania’s Sentencing Guidelines suggest

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<sup>102</sup> N.Y. PENAL LAW § 65.20 (McKinney 2009).

<sup>103</sup> See CONN. GEN. STAT. §53a-34 (2007).

<sup>104</sup> See N.H. REV. STAT. ANN. § 651:2 (VIII) (2007).

<sup>105</sup> CONN. GEN. STAT. §53a-34 (b); N.H. REV. STAT. ANN. § 651:2 (VIII); N.Y. PENAL LAW § 65.20.

<sup>106</sup> PA. CONS. STAT. § 9753 (2007).

<sup>107</sup> See, e.g., COLO. REV. STAT. § 16-7-206 (2009) (providing that the court’s acceptance of a guilty plea “acts as a conviction for the offense); MINN. STAT. § 609.02, subd. 5 (2007) (defining a “conviction” as a plea of guilty or a verdict of guilty that is “accepted and recorded by the court”); N.Y. CRIM. PROC. § 1.20(13) (McKinney 2009) (defining a “conviction” as “the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument”).

<sup>108</sup> N.H. REV. STAT. ANN. § 651:2 (I), (III).

“the use of the least restrictive, non-confinement sentencing alternatives” appropriate to the case, including the “determination of guilt without further penalty.”<sup>109</sup> Maine has gone much further, prohibiting the use of probation as a sentence in the majority of misdemeanor cases and making a sentence of unconditional discharge the default sentence even in those situations where probation is permissible.<sup>110</sup> The Maine statute provides that a court may impose probation as a sentence only if it affirmatively finds that “the person is in need of the supervision, guidance, assistance or direction that probation can provide.”<sup>111</sup> In the alternative, an offender “for whom the court determines that no other authorized sentencing alternative is appropriate punishment *must* be sentenced by the court to an unconditional discharge.”<sup>112</sup> The adoption of these sentencing policies in Maine made an enormous difference in a very short period of time, with the number of probationers under supervision declining by over one-third between 2004 and 2007.<sup>113</sup> During the same time frame the percentage of prison inmates incarcerated in Maine on a probation violation declined from 30% of the prison population to 25%.<sup>114</sup> By 2005, Maine was among the top ten states in the country with the smallest percentage of its adult population under probation supervision.<sup>115</sup> In New York, substantial use of the sentence of “time served” has helped keep probation numbers quite low.<sup>116</sup> Statewide in 2007, more than 12% of misdemeanor convictions in New York were

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<sup>109</sup> 10A PA. PRACTICE SERIES § 27:14, *Driving Under the Influence* (2009).

<sup>110</sup> See ME. REV. STAT. ANN. tit. 17-A, § 1201 (2009).

<sup>111</sup> *Id.* § 1201(2).

<sup>112</sup> *Id.* § 1346 (emphasis added). The commentary to § 1201 notes that “probation should be used if it appears that the convicted person would be helped thereby” but that, “[a]bsent such a need, an unconditional discharge is warranted.” *Id.* § 1201 cmt.

<sup>113</sup> MARK RUBIN, TARGETED INTERVENTIONS COULD EASE MAINE’S PRISON AND JAIL POPULATIONS (2008), available at [http://muskie.usm.maine.edu/justiceresearch/Publications/Adult/Targeted\\_Interventions\\_Could\\_Ease\\_ME\\_Prison\\_Jail\\_Population.pdf](http://muskie.usm.maine.edu/justiceresearch/Publications/Adult/Targeted_Interventions_Could_Ease_ME_Prison_Jail_Population.pdf).

<sup>114</sup> *Id.*

<sup>115</sup> ANNUAL PROBATION SURVEY, 2005, *supra* note 44, at 3 tbl.1.

<sup>116</sup> Like Maine, in 2005 New York was among the top ten states in the country with the smallest percentage of its adult population under probation supervision. *Id.* As will be developed elsewhere, this status can also be attributed to the widespread use of conditional discharge sentences and the imposition of fines. See *infra* notes 123-128 and accompanying text.

resolved with a sentence of time served,<sup>117</sup> while in New York City the percentage exceeded 17%.<sup>118</sup>

The retributive and deterrent value of an unconditional discharge, a sentence of guilt without further penalty, or a sentence of time served is clear. In all of the statutory schemes cited above, the imposition of a sentence creates a criminal conviction. The mere fact of the criminal conviction carries all of the same retributive characteristics of a period of probation that entails no supervision. The criminal conviction is a matter of public record and available for all of the world to see. The stigma connected with being a convicted criminal is equally poignant without the accompanying period of probation, as are the adverse consequences for future employment and housing. And the fact of the conviction remains accessible and available for use against the defendant in any future court proceeding or sentence. The Supreme Court of Pennsylvania acknowledged this general logic some time ago:

In some instances, the court may decide that the needs of justice are fulfilled by a determination of guilt alone, without necessity for further penalty. The shame and trauma of public conviction may be punishment enough and there may be no need of any plan for 'reformation' or control. In such cases, the courts should be free to make such a judgment without requiring useless probation.<sup>119</sup>

Whatever deterrent value may be served by an offender's awareness that the commission and detection of a new crime while on probation may carry an enhanced penalty—and there is no available evidence to suggest that such deterrent value even exists—can be replicated by a more intelligent graduated sentencing scheme for repeat offenders.

The unconditional discharge is, of course, far from the only way to achieve the desired result of reducing excess reliance on probation while at the same time imposing a sentence that has retributive and deterrent value. Most states list a variety of alternative non-jail sentences in their array of sentencing possibilities, including community service, restitution, various counseling or educational regimens, and

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<sup>117</sup> N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVICES, DISPOSITION OF ADULT ARRESTS, NEW YORK STATE 5 (2009), available at <http://www.criminaljustice.state.ny.us/crimnet/ojsa/dispos/nys.pdf> [hereinafter DISPOSITION OF ADULT ARRESTS, NEW YORK STATE].

<sup>118</sup> *Id.*

<sup>119</sup> *Commonwealth v. Rubright*, 414 A.2d 106, 109 (Pa. 1980) (quoting S. TOLL, PENNSYLVANIA CRIMES CODE ANNOTATED § 1323 (Supp. 1978)).

finer. These conditions can and do have retributive value. Indeed, for many offenders a community service obligation is much more onerous than a period of probation, particularly if that probation is essentially unsupervised.<sup>120</sup> Research studies have concluded that, as measured by recidivism rates, a community service sentence has no less deterrent value than a sentence of probation.<sup>121</sup> Each of these sorts of conditions can be monitored either directly by the court through a future court appearance or through some outside agency without any need for probationary supervision. Indeed, the use of a probationary sentence to accomplish nothing more than monitoring of compliance with a specific condition is one of the primary reasons that probation has been so grossly overused.

The easiest mechanism for overseeing the imposition of a specific alternative sanction is the use of the "conditional discharge." In New York, for example,

[A] court may impose a sentence of conditional discharge for an offense if the court, having regard to the nature and circumstances of the offense and to the history, character and condition of the defendant, is of the opinion that neither the public interest nor the ends of justice would be served by a sentence of imprisonment and that probation supervision is not appropriate.<sup>122</sup>

Other states have quite similar provisions. In New Hampshire, for example, a defendant "may be sentenced to a period of conditional discharge if such person is not imprisoned and the court is of the opinion that probationary supervision is unnecessary, but that the defendant's conduct should be according to conditions determined by the court."<sup>123</sup>

Reliance on non-probationary alternative sentences has allowed some jurisdictions to keep their probation rates relatively under control. In 2007, almost one-third of all misdemeanor convictions in the state of New York resulted in a sentence of conditional discharge.<sup>124</sup> When added to the misdemeanor cases resolved by sentences of time served and those resolved with the imposition of a fine, the total percentage of misdemeanor convictions resolved without resort

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<sup>120</sup> Michael Tonry, describing alternative sentencing in Europe, reports that "In law and in practice, CSOs (community service orders) are regarded in England as more intrusive and punitive than probation." TONRY, *supra* note 24, at 122.

<sup>121</sup> *Id.* at 122-23.

<sup>122</sup> N.Y. PENAL LAW § 65.05 (1)(a) (2009).

<sup>123</sup> N.H. REV. STAT. ANN. § 651:2 (VI)(a) (2007).

<sup>124</sup> See DISPOSITION OF ADULT ARRESTS, NEW YORK STATE, *supra* note 117, at 5.

to probation or incarceration was just under 75%.<sup>125</sup> Fewer than 5% of misdemeanor convictions resulted in probationary sentences.<sup>126</sup> In New York City the numbers were even more pronounced, with over 40% of misdemeanor convictions being resolved with a conditional discharge and not even 1% sentenced to probation.<sup>127</sup> Not surprisingly, then, in 2005 New York was listed among the top ten states in the country with the lowest percentage of its adult population under probationary supervision.<sup>128</sup> And the vast majority of those adults on probation appear to be on probation for felony offenses, presumably a much wiser use of the limited supervisory resources available to the probation department. Similarly, as noted earlier, Maine has achieved substantial reductions in number of probationers by prohibiting the use of probation as a misdemeanor sentence except on a select category of misdemeanors.<sup>129</sup>

Data in North Carolina indicate that of all cases resolved with a sentence defined as “community punishment” only one-third were sentenced to a period of supervised probation.<sup>130</sup> Despite that fact, North Carolina’s percentage of adults on probation is nearly as high as the national average.<sup>131</sup> This anomalous result may be explained by what appears to be a quite unfortunate and ill-advised reliance on unsupervised probation, which is imposed in 44% of community punishment cases.<sup>132</sup> That undue reliance may in turn be explained by the Criminal Code Commission’s rejection of a recommendation to include unconditional discharge as a sentencing option.<sup>133</sup> If the high volume of unsupervised probation cases were excluded, the percentage of adults being supervised by probation officers would presumably be significantly reduced.

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See DISPOSITION OF ADULT ARRESTS, NEW YORK CITY, *supra* note 118, at 5.

<sup>128</sup> ANNUAL PROBATION SURVEY, 2005, *supra* note 44, at 3 tbl.1.

<sup>129</sup> See *supra* notes 110-115 and accompanying text.

<sup>130</sup> N.C. SENTENCING AND POLICY ADVISORY COMM’N, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS 50-51 (Feb. 2008), available at <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/06-07statisticalreport.pdf>.

<sup>131</sup> ANNUAL PROBATION SURVEY, 2005, *supra* note 44, at 3 tbl.1.

<sup>132</sup> N.C. SENTENCING AND POLICY ADVISORY COMM’N, *supra* note 130, at 50-51.

<sup>133</sup> See N.C. GEN. STAT. § 15A-1301 cmt. (2009).

### C. *The Potential Benefits of Reform*

A substantial reduction in probation caseloads, particularly on the misdemeanor level, can have significant crime control ramifications with what would seem to be very little to no risk of adverse consequences. National statistics reveal that 75% of misdemeanor probationers complete their period of probation without violation.<sup>134</sup> Since the majority of these probationers receive little to no support or supervision, one logical conclusion is that these offenders were not in need of any supervision.<sup>135</sup> If that is the case, any potential benefits of the probationary sentence would seem to be far outstripped by the costs.<sup>136</sup> The costs of placing enormous numbers of misdemeanor defendants on probation are very real. There are administrative and transactional costs connected to each probationer, even if he or she is totally unsupervised.<sup>137</sup> For those probationers who do not succeed, there are costs connected to the entire violation process as well as to the potential escalation of a non-jail case into incarceration. With each failure the reputation of probation as a potentially effective crime control mechanism suffers. But perhaps most importantly, the opportunity cost—in both human and financial terms—connected with failing to provide actual support and supervision in a fashion that has some possibility of efficacy is immeasurable.

Despite the popularity of the “nothing works” philosophy that first took hold in the 1970s, in fact there is a great deal of evidence that the provision of support services and supervision can work quite well in reducing recidivism and helping to control crime. The study that created the “nothing works” furor came under persistent and compelling attack from the moment of its publication. As a National Academy of Sciences Panel concluded in reevaluating the original “nothing works” study just three years after its publication, “when it is

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<sup>134</sup> See COHEN, *supra* note 2, § 1:23 n.3; Petersilia, *Probation*, *supra* note 6, at 180-81.

<sup>135</sup> Another logical conclusion may be that some of these probationers violated their probation but the violations went undetected. The higher the number of probationers in this category, the less value probation would seem to have as any sort of deterrent to future criminality.

<sup>136</sup> See Petersilia, *Probation*, *supra* note 6, at 181 (questioning “the wisdom of placing such low-risk persons on probation in the first place” because the costs appear to outstrip the benefits).

<sup>137</sup> *Id.*

asserted that 'nothing works,' the panel is uncertain as to just what has even been given a fair trial."<sup>138</sup> The programs that made up the basis of the "nothing works" study were "often not only underfunded and understaffed, but typically staffed by poorly trained and often unmotivated people."<sup>139</sup>

More recent research strongly supports the proposition that support services and supervision can have a meaningful impact on recidivism. In a leading study published in 1987, Professors Paul Gendreau and Robert Ross surveyed over 200 studies on rehabilitative programs, concluding that "successful rehabilitation of offenders had been accomplished, and continued to be accomplished quite well."<sup>140</sup> They found that "reductions in recidivism, sometimes as substantial as 80 percent, had been achieved in a considerable number of well-controlled studies."<sup>141</sup> Research continuing on through the 1990s, now known as the "what works" literature, consistently found similar results.<sup>142</sup> In the case of drug addicted offenders, there is "rather solid empirical evidence that ordering offenders into treatment, and getting them to participate, reduces recidivism."<sup>143</sup> But these reductions in recidivism were seen only in "programs in which offenders both received surveillance (e.g., drug tests) and participated in relevant treatment."<sup>144</sup>

The plain reality is that probation can have a rehabilitative impact only if we return to the rational and judicious use of probation as a criminal sanction, allowing probation officers to engage constructively with probationers. That requires a manageable case load that can involve actual interaction and supervision, complete with referrals to viable treatment programs and adequate follow up to assure compliance. The lost opportunity to have a meaningful impact on an offender's prospects for rehabilitation cannot be justified.

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<sup>138</sup> See Miller, *supra* note 1.

<sup>139</sup> *Id.* (quoting criminologist Elliott Currie).

<sup>140</sup> Paul Gendreau & Robert R. Ross, *Revivification of Rehabilitation: Evidence from the 1980s*, 4 JUST. Q. 349, 350-51 (1987).

<sup>141</sup> *Id.*

<sup>142</sup> See generally WHAT WORKS?: REDUCING REOFFENDING (James McGuire ed., 1995).

<sup>143</sup> Petersilia, *Crime Control*, *supra* note 36, at 489.

<sup>144</sup> *Id.*

## V. THE RETURN TO A SYSTEM THAT APPROXIMATES JUSTICE

If the American criminal justice system is to be true to its name and its purported mission, it must stop using the probation violation system as an end-run around due process to resolve new charges for those who are charged with committing a new offense while on probation. New criminal allegations should be prosecuted using the procedural mechanisms that have been developed throughout our history for the prosecution of criminal charges, whether or not the accused happens to be on probation at the time of the alleged offense or prosecution. While it may be appropriate to hold a probationer to a higher standard of behavior, it is not appropriate to let a probationer be prosecuted for a new criminal offense under a process that has been stripped of virtually all of its procedural protections. Creating protections against this sort of abuse of the probation violation system will reduce the temptation on the part of some sentencing judges to use probation as nothing more than a noose around an offender's neck. Correcting this misguided use of probation will create both the appearance and, more importantly, the reality of observing constitutional principles and assuring fundamental fairness in this very broken part of the criminal justice system.

It is plain to any observer, despite judicial protestations to the contrary, that judges frequently impose probation violation sentences based upon a new criminal allegation in a fashion that is designed to punish the probationer for the new criminal allegation. The consequences in terms of fairness, both in actuality and in the public perception, are devastating. In Rhode Island, media coverage of the issue has generated headlines including "Found Innocent, But Still Jailed,"<sup>145</sup> "Guilty, Even While Innocent,"<sup>146</sup> and "Take a Ride on Rhode Island's Revocation Railroad."<sup>147</sup> Each of these articles lays out in compelling terms multiple scenarios in which probation violation hearings were held in advance of, and used as substitutes for, criminal trials based upon new criminal allegations. Even when a probationer has been acquitted after a trial of the new criminal charge, a lengthy sentence based upon that same conduct continues unabated. Often, the

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<sup>145</sup> John Hill, *Found Innocent, But Still Jailed*, PROVIDENCE J., Aug. 9, 2009, at A1.

<sup>146</sup> *Guilty, Even While Innocent*, *supra* note 99.

<sup>147</sup> Ericson, *supra* note 99.



prosecution of a new criminal charge is abandoned or short-circuited after a violation hearing because the probationer has already received the desired sentence on the probation violation and the adversarial testing of the new criminal allegation never takes place.

Tellingly, there is but one context in which the courts have routinely recognized the inadequacy of using the probation violation hearing as a substitute for a criminal trial: when the accused wins. The courts seem to have little trouble upholding lengthy sentences following from probation violation hearings conducted with minimal procedural protections for the innocent. But when a hearing court has found that the government's evidence is insufficient to meet even the reduced burden of proof used at a violation hearing, the majority of jurisdictions have rejected the application of collateral estoppel to prevent the government from nonetheless proceeding with a trial based on the same allegations.<sup>148</sup> When faced with a not guilty finding at a violation hearing, those courts have maintained that the criminal trial process is "the intended forum for ultimate determinations as to guilt or innocence of newly alleged crimes"<sup>149</sup> and that applying collateral estoppel to prevent the criminal prosecution of the new charge "would undesirably alter the criminal trial process by permitting informal revocation determinations to displace the intended factfinding function of the trial."<sup>150</sup> The Superior Court of Pennsylvania, in rejecting the application of collateral estoppel to a not guilty finding at a probation violation hearing, explained that:

It is neither the[] purpose nor function [of a violation hearing] to serve as a final arbiter of an individual's guilt or innocence of criminal charges. It is only through a criminal trial at which the defendant is presumed innocent and the [government] bears the burden of proof of guilt beyond a reasonable doubt that contested

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<sup>148</sup> See, e.g., *Lucido v. Superior Court*, 795 P.2d 1223, 1232-33 (Cal. 1990); *State v. McDowell*, 699 A.2d 987, 990 (Conn. 1997); *Commonwealth v. Cosgrove*, 629 A.2d 1007, 1011 (Pa. Super. Ct. 1993); *State v. Gautier*, 871 A.2d 347, 360-61 (R.I. 2005); *State v. Brunet*, 806 A.2d 1007, 1008 (Vt. 2002). See generally George L. Blum, Annotation, *Determination that State Failed to Prove Charges Relied Upon for Revocation of Probation as Barring Subsequent Criminal Action Based on Same Underlying Charges*, 2 A.L.R. 5th 262 (1992 & Supp.) (collecting and discussing cases deciding whether the government's failure to prove a probation violation at a revocation hearing precludes a subsequent criminal prosecution based upon the same underlying conduct).

<sup>149</sup> *Lucido*, 795 P.2d at 1230-31.

<sup>150</sup> *Id.* at 1229.

issues of criminal culpability are determined with finality. To cede this responsibility to a setting that does not adhere to the procedural safeguards necessary for a fair adjudication of guilt, such as a probation revocation hearing, would result in a perversion of the criminal justice system.<sup>151</sup>

More than one judge has described this process as a "Heads I win, tails I flip again" proposition,<sup>152</sup> allowing the government to present minimal evidence at a violation hearing with an option to try again at a trial if unsuccessful. The accused, on the other hand, must litigate fully at the probation violation hearing because he or she faces dire consequences if found to be a violator.

This scenario can easily be avoided by sequencing the events differently. If a new criminal charge is adjudicated in advance of the probation violation hearing, the substitution of the violation hearing for the trial will never take place. If the probationer admits to or is convicted of the new offense, the probation violation has been established without sacrificing the procedural screening mechanisms upon which we rely. And if the probationer is acquitted at a trial or the charge is dismissed, under present law the prosecution can generally still proceed with a probation violation allegation.<sup>153</sup> The fact that prosecutors in so many jurisdictions resist all attempts to sequence events in this fashion, despite pleas from the American Bar Association<sup>154</sup> and sometimes from their own courts<sup>155</sup> to do so, reveals a great deal about the motivations

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<sup>151</sup> *Cosgrove*, 629 A.2d at 1011.

<sup>152</sup> *Lucido*, 795 P.2d at 1243 (Broussard, J., dissenting) (internal quotation marks omitted); *McDowell*, 699 A.2d at 992 (Berdon, J., dissenting) (internal quotation marks omitted) (quoting *Lucido*, 795 P.2d at 1243 (Broussard, J., dissenting)); *Brunet*, 806 A.2d at 1017 (Johnson, J., dissenting) (internal quotation marks omitted) (quoting *Lucido*, 795 P.2d at 1243 (Broussard, J., dissenting)).

<sup>153</sup> See COHEN, *supra* note 2, § 22:15. Simple fairness, in addition to respect for the values underlying the criminal justice system, would suggest that this practice be abandoned.

<sup>154</sup> AMERICAN BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING § 18-7.4 (h) (3d ed. 1994) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING] ("When an alleged violation is based solely on the alleged commission of another offense, the rules should provide that the final hearing on the alleged violation ordinarily should be held after disposition of the new criminal charge."); see also AMERICAN BAR ASSOC., STANDARDS RELATING TO PROBATION § 5.3 (1970) [hereinafter ABA STANDARDS RELATING TO PROBATION] ("A revocation proceeding based solely upon commission of another crime ordinarily should not be initiated prior to the disposition of that charge.").

<sup>155</sup> See, e.g., *People v. Coleman*, 533 P.2d 1024, 1046 (Cal. 1975) ("[W]e wish to note that the most desirable method of handling the problems of concurrent criminal and probation revocation proceedings may well be for revocation proceedings not even to be initiated until after disposition of the related criminal proceedings."); *State v.*

behind their use of probation and the probation violation system.

Several procedural requirements could be implemented that would make the probation violation process much fairer. Sequencing events so that a trial on a new criminal allegation precedes a probation violation hearing based upon that same conduct, the most obvious of these reforms, has been promoted by the American Bar Association for decades. Section 18-7.4 (h) of the American Bar Association Standards for Criminal Justice provides that "[w]hen an alleged violation is based solely on the alleged commission of another offense, the rules should provide that the final hearing on the alleged violation ordinarily should be held after disposition of the new criminal charge."<sup>156</sup> Commentary to an earlier version of the standards, explaining this sequencing recommendation, explicitly recognized the danger at issue, noting that the relaxation of the rules of evidence, the absence of a jury, and the lowering of the burden of proof "can lead to an abuse of the proceeding by basing revocation upon a new criminal offense when the offense could not be proved in an ordinary criminal trial."<sup>157</sup> The commentary further noted that "it would be unseemly for the probation court to conclude, counter to the result of a criminal trial, that an offense has occurred and that it could provide a basis for a revocation."<sup>158</sup>

The First Circuit has likewise acknowledged the serious potential for abuse in holding a violation hearing based upon a new criminal allegation before the disposition or trial of the new charge. In *Flint v. Mullen*,<sup>159</sup> a case in which a probationer was sentenced to twelve years on a violation based solely on a criminal charge upon which he was ultimately acquitted, the court indicated its view that "it would be preferable for the state to have held the violation hearing after the . . . trial,"<sup>160</sup>

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Chase, 588 A.2d 120, 123 (R.I. 1991) ("The disposition of the instant case should encourage the state to initiate future probation-revocation proceedings with more concern for judicial economy."); *State v. Begins*, 514 A.2d 719, 723 (Vt. 1986) ("We caution against a policy of scheduling probation revocation hearings prior to trial, without exercising discretion in each case. . . . [T]he better method of dealing with problems of concurrent criminal and probation revocation jurisdiction is to postpone the probation proceedings until after disposition of related criminal proceedings . . .").

<sup>156</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING, *supra* note 154, § 18-7.4 (h).

<sup>157</sup> ABA STANDARDS RELATING TO PROBATION, *supra* note 154, § 5.3 cmt.

<sup>158</sup> *Id.*

<sup>159</sup> 499 F.2d 100 (1st Cir. 1974).

<sup>160</sup> *Id.* at 105.

adding that it could "see little public interest served by this kind of timing."<sup>161</sup> As the court explained:

Were the order reversed, the alleged violator could be held on high bail or without bail if he were a poor bail risk. If there were a criminal conviction, the subsequent violation decision would be simple; if there were an acquittal, the court conducting the violation hearing could proceed with full knowledge of that result, remaining free to weigh evidence by a lower standard, but having in mind the acquittal. The result is apt to be, if not also appear, more just.<sup>162</sup>

The Supreme Courts of Vermont and California have both opined that the "better" or "most desirable" method of handling concurrent criminal and probation violation proceedings is for the trial to proceed first.<sup>163</sup>

One is hard pressed to find legitimate justifications for holding a violation hearing based upon a new criminal allegation in advance of a criminal trial. The only justification that appears in any of the case law concerns the issue of detention in advance of the hearing, particularly in light of the constitutional requirement that a violation hearing take place "within a reasonable time after the [probationer] is taken into custody."<sup>164</sup> Several responses to this potential objection make its resolution rather easy. In many settings, the primary justification for detention lies not in the person's status as a probationer, but rather in his or her status as a person with a criminal history accused of a new crime. That detention can be accomplished by the setting of appropriate bail (or holding the accused without bail when permitted) on the new criminal offense. In such a scenario, there would be no need for the prosecution to file the probation violation allegation until after the new criminal charge is resolved. Another response could be to detain the probationer on the alleged violation and put the decision about sequencing in the hands of the probationer, allowing the probationer to waive the right to a prompt violation hearing in order to delay it until after the resolution of the new criminal charge.

When one pushes past objections about detention while awaiting a violation hearing, it becomes apparent that a primary reason for sequencing the events as many states do is

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *State v. Begins*, 514 A.2d 719, 723 (Vt. 1986); *People v. Coleman*, 533 P.2d 1024, 1046 (Cal. 1975).

<sup>164</sup> *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972).

to accomplish just what must be prohibited: the creation of a system in which the right to a trial by jury, the right to fully confront witnesses, and the right to put the government to its burden of proof beyond a reasonable doubt recede into the background and prosecution by violation hearing becomes the norm. Perhaps the most obvious and extreme abuses come in the cases that buck the trend of this shadow system, those in which the probationer prevails at the probation violation hearing and is nonetheless prosecuted for the underlying new crime, and those in which the probationer, having been found in violation and sentenced severely, prevails at the criminal trial. In either scenario, the perception, if not the reality, is that an end-run has been made around the Constitution. Even if one were to tolerate a system in which a probation violation hearing comes first, these particular abuses could be stopped.

If the government chooses to present a probationer as a violator and move forward with a violation hearing, it does not seem unreasonable to force the government to live with the consequences of its decision. If the government, even with the benefit of relaxed rules of evidence, cannot meet a reduced burden of proof at a violation hearing, it is unclear why the government should then be allowed another chance to try to prove the same allegations. But in the majority of jurisdictions in this country, the government enjoys just that privilege. Ironically, as noted earlier, courts ruling in this fashion have generally relied on the argument that the procedures employed at a violation hearing are insufficiently reliable to justify using them to resolve a criminal charge. These courts seem not to recognize the irony that this is precisely how probation violation hearings are used on a daily basis in thousands of cases. Common principles of collateral estoppel should be employed, as they are in some jurisdictions,<sup>165</sup> to prevent the government from relitigating an issue that it lost.

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<sup>165</sup> See *People v. Bone*, 412 N.E.2d 444, 447 (Ill. 1980) (noting that collateral estoppel will apply when “an issue of ultimate fact was decided in the prior revocation proceeding which was determinative of the issues in the criminal prosecution for the offenses”); *People v. Anzures*, 670 P.2d 1258, 1260 (Colo. Ct. App. 1983) (noting that collateral estoppel will apply although the revocation hearing and criminal charge are “technically based on the commission of wholly separate offenses, but where the same facts are determinative of guilt for each”); *State v. Bradley*, 626 P.2d 403, 406 (Or. Ct. App. 1988) (noting that an “express finding on a matter of fact material to a probation revocation proceeding will collaterally estop the state from” relitigating the same issue where the issue was “fully litigated at the probation revocation proceeding” (emphasis omitted)).

When a probationer is found to have been in violation of probation based upon a new criminal charge and is ultimately acquitted of that new charge, again the probationer seems to be a victim of a gaming of the system. This scenario would be avoided by sequencing the events properly, but if the hearing must proceed first, it does not seem unreasonable to let the issue be revisited in the light of an acquittal after a full trial replete with constitutional protections. Another way of reducing the likelihood of this scenario, and of enhancing the reliability and fairness of a probation violation hearing, would be to elevate the government's burden of proof at a probation violation hearing. The greater the disparity between the government's burden at a violation hearing and the government's burden at a trial, the greater the likelihood of unjust or disparate outcomes. When the government's burden at a violation hearing is as low as the "reasonable satisfaction" of the judge, it is far from surprising when a charge that cannot be proved beyond a reasonable doubt results in a finding of violation. Do we really intend to have a system in which probationers can be convicted of new crimes based on a lesser standard of proof achieved through the introduction of evidence that would normally be inadmissible? The distance between the language found in court decisions explaining the purported purpose of probation violation hearings and the reality as experienced by participants in the criminal justice system is staggering.

## VI. CONCLUSION

Something has gone terribly wrong in the American criminal justice system. In the process of moving from a system focused on the rehabilitative potential of the defendant to a system myopically focused on retribution, we have trampled not only upon the tool with the greatest rehabilitative potential, but also upon the due process protections that we supposedly hold most dear. By using probation as a default sentence for all of those whom we choose not to incarcerate, we have created burgeoning caseloads that prevent probation from serving any useful rehabilitative function. Many probationers go without any supervision whatsoever, and those who are in need of social services and support rarely get it. Not surprisingly, then, high percentages of probationers do not succeed on probation. Many of those wind up incarcerated, even though the system's conclusion was that the underlying

crime did not justify incarceration. The “crime” that we punish with incarceration is the inability to live up to the terms and conditions of probation, even if it was entirely unrealistic to expect the probationer to live up to those terms and conditions and entirely predictable that the probationer would fail. This is a peculiar way indeed to make determinations about whom to incarcerate. A far more logical system would use probation only when it can serve a real function. In that fashion, probation officers could actually do their jobs, future criminality could be dealt with on its own terms, and a simple failure to abide by imposed norms of behavior and conformity would not become a cause for incarceration.

One reason it may be hard to convince some constituencies to abandon the abuse of probation is that they are wedded to what follows from that abuse: a shadow criminal justice system in which huge numbers of cases are processed not through the due process protections that come with the prosecution of a criminal charge, but through a violation hearing process that is devoid of virtually all of these protections. This process is certainly efficient, but does not reflect the values of justice that our system is supposed to represent. It is simply inappropriate to hold a violation hearing at which a criminal charge is adjudicated not through a criminal trial replete with protections for the innocent, but rather through a truncated procedure designed for a very different purpose.

If we persist in proceeding with a probation violation hearing in advance of a criminal trial on a new charge, we can at least aspire to level the playing field just a little bit. Those jurisdictions with very low burdens of proof can require at least proof by a fair preponderance of the evidence. And if the accused manages to prevail at a probation violation hearing based solely on a new criminal charge, traditional principles of collateral estoppel should prevent the government from trying a second time to prosecute the accused for the same behavior.

We are all losers when we engage in a process for which the thinly veiled legal justification is readily transparent to all as a fraud. All criminal charges should be adjudicated on the merits. When a probation violation is predicated on a new criminal charge, the adjudication of that new charge should normally resolve the issue of whether or not the terms and conditions of probation have been violated. If the criminal charge cannot be successfully prosecuted, it should follow that the probation violation should be dismissed. And if we insist on

a process that adjudicates the probation violation first, we can at least abide by procedural rules that more closely approximate fairness. We owe it to ourselves to restore the public's faith in the integrity of the prosecutorial function and to put the concept of justice back into the criminal justice system.