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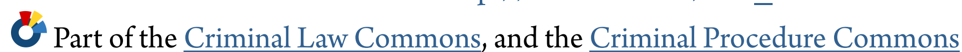
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# No Exit, No End: Probation in Rhode Island

**Lara Montecalvo, Kara Maguire, and Angela Yingling**[*][†]

*Imagine you are a criminal defense lawyer practicing in Rhode Island. One day you receive a call from a frantic*

[*] Attorneys in the Appellate Division of the Rhode Island Public Defender. We are extremely grateful to Olin Thompson, Timothy Baldwin, and our colleagues at the Rhode Island Public Defender's Office for their invaluable comments and suggestions on earlier drafts of this Article. We are also indebted to the staff at the Roger Williams University Law Review for their editorial assistance.

[†] Inspired by the March 2015 Symposium *Sounding the Alarm on Mass Incarceration: Moving Beyond the Problem and Toward Solutions* ("Symposium") at Roger Williams University School of Law, this Article was drafted in August and early September of 2015. At the same time, Governor Gina Raimondo's Justice Reinvestment Working Group was beginning to work on several proposals to alter the state of probation and incarceration in Rhode Island. *See* Press Release, R.I. Office of the Governor, Raimondo Launches Working Group to Improve Criminal Justice System, Reduce Costs (July 7, 2015), *available at* http://www.ri.gov/press/view/25229. Recently, we have begun to see the results of the group's efforts: The same week this Article was submitted for publication, a majority of justices on the Rhode Island Superior Court proposed a series of amendments to the rules that address some of the concerns discussed herein. *See* Order Soliciting Comments on Proposed Amendments to the Rhode Island Superior Court Rules of Criminal Procedure and Superior Court Sentencing Benchmarks (Mar. 16, 2016), https://www.courts.ri.gov/Courts/SupremeCourt/SupremeMiscOrders/Order-ProposedAmendmentsSuperiorCourtRulesofCriminalProcedure-SentencingBenchmarks3-16-16.pdf. We are hopeful that the efforts of the working group, the courts, and others will continue to improve the criminal justice landscape in Rhode Island and render obsolete some of the observations made in this Article. The same may be true of our references to other states' practices because this area of law is rapidly evolving as the states explore ways to encourage rehabilitation while limiting the cost of corrections.

> *woman, "Ana." She is eight months pregnant and her twenty-five-year-old husband, "Dennis," has been arrested on a misdemeanor charge of simple assault after an incident at a local bar. Ana tells you that Dennis is currently being held without bail at the state's jail facility, and that his next court date is not for two weeks. He has a decent job at a local carpet installation company, she explains, but he is in danger of losing it if he misses too many days of work.*[1]

At first, this scenario might seem to be implausible; after all, the Rhode Island State Constitution *requires* that every person arrested on a misdemeanor charge be afforded reasonable bail.[2] However, in her distress, Ana forgot to mention one important fact: At the time Dennis was arrested, he was also serving a one-year probationary sentence for a previous charge.[3] As a result, when Dennis was brought to court the day after the bar fight, he was not only arraigned on the simple assault charge, but he was also presented with a notice of the state's intention to revoke his probation based on the new allegations.[4]

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1. "Dennis's" case is modeled on the real-world experiences of criminal defense practitioners in Rhode Island. While this example is based on actual cases, the names and details have been altered for the purposes of this Article.

2. *See* R.I. CONST. art. I, § 9.

3. Ten months earlier, after a friend's house party had grown a little too out-of-control, Dennis had unwisely confronted one of the officers summoned to break up the revelry; minutes later, he found himself charged with resisting arrest and disorderly conduct. After spending the night at the local police station, Dennis appeared in the District Court the following morning for arraignment on his misdemeanor charges. Knowing that he had been a little intoxicated the previous night, and that the complaining witness was a police officer, Dennis had accepted the judge's offer to plead nolo contendere to the resisting arrest charge in exchange for a one-year probationary sentence and the dismissal of the disorderly conduct charge. It had seemed like a good deal at the time, so Dennis decided to resolve his case on the spot, without consulting an attorney. Dennis's entire exchange with the judge took less than ten minutes.

4. Pursuant to Rule 32(f) of the Rhode Island District Court Rules of Criminal Procedure, the state must provide the probationer with notice of its intention to seek the revocation of their probation. R.I. DIST. CT. R. CRIM. P. 32(f). This document, informally referred to as a "32(f) petition," is often presented to the defendant on the same day they are arraigned on a new criminal charge.

## INTRODUCTION

No defense attorney will deny that probation is a valuable part of the criminal justice system. When used appropriately, it provides a cost-effective alternative to incarceration and permits lower-risk individuals to remain in the community under certain stated conditions. However, in Rhode Island, where defendants are often placed on disproportionately long terms of supervision, the probationary system has ballooned into a resource-draining behemoth.[5] Unfortunately, the system's growth in size has not been matched by an increase in efficacy; too often, the inequitable structure of the probation revocation process results in the over-incarceration of probationers, frequently for minor transgressions or even specious allegations.[6]

This Article begins in Part I with an overview of Rhode Island's probation violation system viewed through the lens of a criminal defense attorney advising a specific client, "Dennis," and highlights many of the problems associated with the state's probation violation paradigm. In Part II, the focus moves from the practitioner to the law governing probation violations in Rhode Island and elsewhere. In Section II.A, the extremely low standards of legal and factual proof employed in probation violation hearings in Rhode Island are dissected and the potential for modifying those standards is discussed. Section II.B contains suggestions for reforms of probation violation law, including modifying the legal and factual standards of proof. In Section II.C, two rule-based changes that might efficiently reduce the number of unnecessarily lengthy probationary sentences in this state are examined.

## I. YOUR CLIENT ON PROBATION

To those unfamiliar with the criminal justice system, the idea of accepting a prison sentence based on false or unsupported allegations is simply unthinkable; after all, why would anyone

5. *See* John Hill, *Expert: Rhode Island's Outdated Probation System Needs Overhaul,* PROVIDENCE J. (Oct. 27, 2015, 11:15 PM), http://www.providencejournal.com/article/20151027/NEWS/151029335.

6. *See* CAITLIN O'CONNOR & DANIELLE BARRON, R.I. DEP'T OF CORR., RIDOC HISTORICAL OVERVIEW 19 (2015) [hereinafter RIDOC HISTORICAL OVERVIEW], http://www.doc.ri.gov/docs/RIDOC%20Historical%20Overview.pdf.

*ever* plead guilty to a crime they did not commit? However, any seasoned defense attorney practicing in Rhode Island—having asked numerous clients about their prior records—has had this conversation before:

> *"So you have two prior convictions for breaking and entering?"*
>
> *"Yes, well, I was guilty the first time. The second one, I didn't do."*
>
> *"Well, it says right here that you admitted to the second as well. Why?"*
>
> *"I had to; I was on probation."*

Although succinct, this answer is deceivingly complicated. Indeed, to fully understand how probation—a supposed alternative to incarceration—can ultimately lead to unjust imprisonment, one must start at the very beginning of the typical revocation process: the arrest and presentment of the violation notice.

### A. *Go Directly to Jail; Do Not Pass Go*

Let's return to Dennis. As Ana told you, he was held without bail at his presentment—i.e., the first day he appeared in court.

At Dennis's presentment hearing—a proceeding akin in both length and depth to an arraignment on a criminal charge—the court had the choice to release him on his own recognizance, set surety bail, or hold him without bail.[7] In practice, the decision to grant or withhold bail in these cases is often made on the basis of cursory and one-sided evidence.[8] This initial proceeding, in our experience, typically involves little more than a mere recitation of the allegations by the prosecuting officer. In most of these cases, the accused has not yet consulted with an attorney or, if they have done so, it had only been for a few brief moments.

7. *See* R.I. GEN. LAWS § 12-19-14 (2006) ("The court . . . pending receipt of [the probationary authority's written report on defendant's conduct], *may* order the defendant held without bail . . . ." (emphasis added)); R.I. SUPER. CT. R. CRIM. P. 32(f) ("The defendant may be admitted to bail pending [a probation revocation] hearing.").

8. *Cf.* R.I. GEN. LAWS § 12-19-9; State v. Vashey, 823 A.2d 1151, 1155 (R.I. 2003) (defendants facing probation violation allegation have no right to preliminary hearing to determine probable cause).

Despite the fact that both the Rhode Island General Laws and the District and Superior Court Rules of Criminal Procedure establish a presumption of bail in violation proceedings,[9] in our experience, only a small number of alleged violators are released pending a hearing. Rather, most defendants, like Dennis, are denied bail throughout the duration of their case on the basis of a five-minute court appearance.[10] While the presentment is not intended to be a full hearing, the severity of the consequences—near-certain detention for a minimum of two weeks—is vastly disproportional to the amount of scrutiny that the allegations are given at this proceeding.

Recent statistics reveal that the average pretrial/prehearing detention in Rhode Island is twenty-three days in length, with fifteen percent of alleged offenders remaining on pretrial status after thirty days.[11] This presents a significant problem for these probationers: How many people can just—without notice—walk away from their life for twenty-three days without suffering major consequences to their jobs, housing situations, and families? Too often, as the probationer sits in jail, his or her life on the outside begins to crumble. Criminal defense attorneys witness this phenomenon all of the time, and can offer little comfort to their incarcerated clients or their families. After all, most employers are understandably not sympathetic about an unplanned weeks-long absence from work, causing many probationers to lose jobs that were difficult to obtain in the first place. Similarly, many probationers and their families lose their housing as a result of this detention[12] because it is difficult, if not impossible, to pay

9. R.I. GEN. LAWS §§ 12-19-9, -14; R.I. SUPER. CT. R. CRIM. P. 32(f); R.I. DIST. CT. R. CRIM. P. 32(f); *see also* R.I. DIST. CT. R. CRIM. P. 46(i); R.I. SUPER. CT. R. CRIM. P. 46(i).

10. Recently, spurred on in part by the Symposium, some public defenders in Rhode Island have begun to advocate more vociferously for bail to be set in certain probation violation cases. As of the drafting of this Article in September of 2015, the authors can report anecdotally that a few Superior Court justices have been responsive, releasing more alleged violators on bail in appropriate circumstances. However, the vast majority of alleged violators are still held without bail pending a hearing.

11. R.I. DEP'T OF CORR., FISCAL YEAR 2014 ANNUAL POPULATION REPORT 13 (2014), http://www.doc.ri.gov/docs/FY14%20Annual%20Report%2010-9.pdf.

12. In our practice representing defendants in both District and Superior Courts, we have observed our clients lose their housing as a result of

rent and bills from behind bars. Additionally, alleged violators must scramble for emergency care for children, elderly family members, and even pets. In many cases, the alleged violation is trivial—a misdemeanor, perhaps, or a minor drug charge, or even just a "technical violation," i.e., no new charge at all—and these collateral consequences can cause the probationer to suffer disproportionally to the nature of the allegation.[13]

The immediate, nearly ubiquitous detention of alleged violators puts probationers in a precarious position. As each day passes, the consequences of continued incarceration grow more severe for the accused and their families: bills accrue, jobs are lost, emergency childcare providers grow weary. The state's leverage over the defendant increases, incentivizing the defendant to enter into a plea deal—on the violation as well as the underlying charge—regardless of the weaknesses of the allegations. This widespread detention of alleged violators becomes even more problematic when it is combined with the diminished level of due process guarantees afforded to individuals at the actual violation hearing.

### B. *The Violation Hearing: The Presumption of Guilt*

> *At the next court date, you meet with Dennis in one of the tiny, cinderblock attorney rooms in the courthouse cellblock. It is two weeks later, the day of the hearing, and it has been three days since your last visit with Dennis at the prison. A thick pane of glass muffles your conversation, so you lean down to speak through the small screen located at the bottom of the window. First, you*

relatively short periods of detention. This phenomenon has been documented in the mainstream press; a recent article about the bail system in New York City found that "[d]isappearing into the machinery of the justice system [by failing to make bail] separates family members, interrupts work and jeopardizes housing." Nick Pinto, *The Bail Trap*, N.Y. TIMES: MAG. (Aug. 13, 2015), http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html.

13. Remember, too, that these detainees are only *accused* violators; the immediate detention upends the lives of the innocent as well as the guilty. In some cases, violation reports are withdrawn as the evidence wilts under later scrutiny or upon further investigation. However, due to the mass prehearing detention of accused violators, any such vindication often comes at a steep price: The probationer may walk out of jail, but they might do so as homeless, jobless, or both.

*update Dennis with the good news: You have been able to track down one of the other patrons at the bar on the night of his arrest. This woman, "Sara," is willing to testify that the complaining witness, "John," had assaulted Dennis over a spilled drink and some angry words, and that Dennis's participation in the fight had only been in self-defense. Dennis breaks into an excited smile at your words, but it quickly fades from his face as you continue, reminding him of the bad news: Like all accused violators, his fate will be determined by a judge via a probation violation hearing—a David-versus-Goliath-style proceeding where the state's standard of proof is frighteningly low, the rules of evidence are loosely applied, and the defendant's confrontational rights are severely constrained.*

Even though an individual's freedom—his or her most fundamental liberty interest—is at stake at a probation violation hearing, the alleged violator is afforded a mere sliver of the due process rights that form the bedrock of our criminal justice system. While it has been long recognized that a probation revocation hearing is civil in nature, and thus not subject to the stricter rules enforced in a criminal trial,[14] the overly-relaxed burden of proof and diminished evidentiary standards have all but transformed the violation hearing process into a mere formality. Many alleged violators put it another way: *As soon as they put the handcuffs on me, I knew it was over.*

This oft-repeated refrain, familiar to the ears of any experienced criminal defense attorney, is technically incorrect—only a judge or magistrate, after either a hearing or an admission, can adjudicate a person a probation violator and impose a sentence of imprisonment.[15] But, to the man or woman sitting in

14. The Rhode Island Supreme Court has stated that a probation-violation hearing "is not part of a criminal prosecution, and, thus, does not call for the full panoply of rights due a defendant in such a criminal proceeding." State v. Bourdeau, 448 A.2d 1247, 1248 (R.I. 1982).

15. Pursuant to both statute and court rule, probationers are entitled to an evidentiary hearing to determine whether they have violated the conditions of their probation. R.I. GEN. LAWS § 12-19-9 (2006); R.I. SUPER. CT. R. CRIM. P. 32(f). If the court, after such a hearing, determines that a violation has occurred, it may either continue the probationary term or sentence the probationer to a period of imprisonment. R.I. GEN. LAWS § 12-

one of the cramped cells of Rhode Island's Adult Correctional Institutions, this distinction is a matter of mere semantics. As both defense attorneys and probationers know far too well, an incarceration sentence often becomes a *fait accompli* upon a probationer's arrest. This is due in large part to three factors: (1) the relaxed application of the rules of evidence and constitutional principles in violation hearings; (2) the exceedingly low and vague standard of proof employed in these hearings; and (3) the near absolute sentencing discretion granted to the hearing justice.[16] Combined, these factors result in very few defendants willing to take the risk and fight for their freedom at a hearing.

While a criminal trial functions as the ultimate crucible, where evidence is both scrutinized under a set of strict rules and forced to endure the fiery test of cross-examination, the violation hearing, in contrast, is a much less exacting process. Hearsay

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19-9. In cases where the defendant is serving a "straight" probationary sentence—one without a concomitant suspended sentence—the court may currently impose a prison sentence of *any* length after a violation hearing, provided that the sentence does not exceed the maximum statutory penalty for the original charge. *Id.* In cases where the violator's probation is accompanied by a suspended sentence, the court can either: (1) impose the entire suspended sentence, (2) impose a portion of the suspended sentence, or (3) continue the suspension of the entire sentence. *Id.*

16. The state is also permitted to use illegally obtained evidence to prove a violation, except where police actions are intended to harass, or where such actions "shock the conscience" of the court—circumstances which, to the authors' knowledge, have never been found in Rhode Island. *See* State v. Spratt, 386 A.2d 1094, 1095 n.2 (R.I. 1978). The rationale for not applying the exclusionary rule to constitutional violations was that "it would be unrealistic to believe that a police officer will be further deterred from engaging in an unlawful search by the knowledge that his conduct will render the illegally obtained evidence inadmissible not only at a criminal trial but also at a revocation hearing." *Id.* at 1095. Given the current legal landscape in Rhode Island, where the threat of revocation often accompanies—and sometimes supplants—criminal prosecution, there is good reason to question whether the lack of the exclusionary rule in violation hearings is, in fact, serving as an incentive for police to ignore the Fourth Amendment of the Constitution, especially when dealing with young, black residents in high-crime neighborhoods. *See* RIDOC HISTORICAL OVERVIEW, *supra* note 6, at 29 (noting that one in six black male Rhode Islanders over the age of eighteen are under community corrections supervision); R.I. DEP'T OF CORR., ADULT PROB. & PAROLE, RI PROBATION AND PAROLE OFFENDERS LIVING IN RI COMMUNITIES AS OF 12-31-14, at 6 (2015), http://www.doc.ri.gov/docs/PP%20city-gender%20data%2012-31-14-expanded%20age%202.pdf (noting that one in ten men between the ages of twenty-five and twenty-nine that live in the 02909 ZIP code are on probation or parole).

evidence is admissible upon a showing of "good cause," even when it implicates a defendant's constitutional right to confrontation.[17] Thus, a defendant does not always have the opportunity to have his or her accuser testify to the allegations in person, under oath, and in a courtroom; in many cases, a responding police officer can recite the complaining witness's claims, often based on the officer's memory or a brief report.[18] The analysis employed in *Crawford v. Washington*, which strictly limits the admissibility of "testimonial" statements without the unavailability of the witness and a prior opportunity for cross-examination,[19] has been held to be inapplicable to probation violation proceedings.[20] In practice, this curtailment of the confrontation right presents the state with an incentive to introduce its evidence through the sanitized testimony of these professional witnesses instead of the less predictable, but first-hand, accounts of civilian eyewitnesses or complainants.

These relaxed rules of evidence become even more troubling when combined with Rhode Island's shockingly low standard of proof at a probation violation hearing. Rhode Island is one of the few states that allows the hearing justice to find against a probationer as long as the evidence "reasonably satisfies" her that a violation has occurred.[21] This standard raises an important question—what *does* it take to "reasonably satisfy" the court? Furthermore, the judge does not need to find that the probationer actually committed a crime or broke a specific condition of probation in order to impose a prison sentence; she must merely

17. State v. Bernard, 925 A.2d 936, 939 (R.I. 2007) (citing State v. DeRoche, 389 A.2d 1229, 1234 (R.I. 1978)).

18. *See, e.g.*, State v. Pompey, 934 A.2d 210, 213 (R.I. 2007).

19. 541 U.S. 36, 68 (2004).

20. *Pompey*, 934 A.2d at 214.

21. *See* State v. Gibson, 126 A.3d 427, 431 (R.I. 2015) (quoting State v. Hazard, 68 A.3d 479, 499 (R.I. 2013)). Recently, however, a majority of justices of the Rhode Island Superior Court have proposed raising the legal standard of proof at a violation hearing, which would require the state to prove an alleged violation by a "fair preponderance of the evidence." *See* Order Soliciting Comments on Proposed Amendments to the Rhode Island Superior Court Rules of Criminal Procedure and Superior Court Sentencing Benchmarks (Mar. 16, 2016) [hereinafter Order Soliciting Comments on Proposed Amendments], https://www.courts.ri.gov/Courts/SupremeCourt/SupremeMiscOrders/Order-ProposedAmendmentsSuperiorCourtRulesofCriminalProcedureSentencingBenchmarks3-16-16.pdf.

be satisfied that the defendant "failed to keep the peace and to remain on good behavior" on the day in question.[22] The reality is that this standard is as low as it is vague, leaving attorneys and defendants uncertain of both the type and quantum of proof necessary to sustain a finding of violation.

Given this probation violation landscape, prevailing at a violation hearing is a Herculean task, even for the innocent. As a result, a defendant facing flimsy or questionable allegations is often left to one of two unfortunate fates. First, if she elects to go to a hearing, she has a good chance of losing on extremely weak, unreliable, or even unsupported evidence, and facing years—if not decades—of imprisonment as a result, even if the criminal charges are later dismissed or amended.[23] This phenomenon—often referred to as the "proxy trial" problem—allows the state to "supplant[] the use of the more rigorous trial proceeding, and in effect create[] a criminal conviction where one might not otherwise be available."[24] This is especially true in Rhode Island, where a hearing justice may consider the "totality of the circumstances" when determining what sentence to impose after a violation hearing,[25] and has wide discretion in fashioning the imprisonment sentence.[26] Thus, a hearing justice can take the new allegations into consideration when shaping a violation sentence, even if liability for that conduct has not been established through the

22. State v. Gautier, 774 A.2d 882, 887 (R.I. 2001) (quoting State v. Znosko, 755 A.2d 832, 835 (R.I. 2000)) (internal quotation marks omitted).

23. *See* Andrew Horwitz, *The Costs of Abusing Probationary Sentences: Overincarceration and the Erosion of Due Process*, 75 BROOK. L. REV. 753, 766, 771 (2010).

24. Daniel F. Piar, *A Uniform Code of Procedure for Revoking Probation*, 31 AM. J. CRIM. L. 117, 119–20 (2003); *see also* AM. BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 5.3 cmt., at 63 (1970); Horwitz, *supra* note 23, at 785.

25. State v. Wisehart, 569 A.2d 434, 437 (R.I. 1990).

26. *See* R.I. GEN. LAWS § 12-19-9 (2006). It is important to note, however, that a majority of the Rhode Island Superior Court justices have recently attempted to create more uniformity in violation sentences via a proposed amendment to the Superior Court Sentencing Benchmarks. *See* Order Soliciting Comments on Proposed Amendments, *supra* note 21, at 4. The proposed change would require a Superior Court justice to consider the sentencing benchmark ranges for the original offense when imposing a violation sentence, and would allow departure from the benchmarks only "when substantial and compelling circumstances exist." *Id.* at 3–4.

rigorous criminal prosecution process.[27]

In the second group of cases, alleged violators, knowing they are facing near-impossible odds at a hearing, decide to admit to the false or unsubstantiated allegations in exchange for a shorter sentence. As criminal defense attorneys practicing in Rhode Island can confirm, a probationer charged with a new criminal offense is often offered a sentencing incentive to resolve both the new charge and the violation at the same time.[28] Usually, this deal includes a defined violation sentence (lower than the maximum term the defendant could face after a violation hearing), conditioned on a nolo contendere plea to the related misdemeanor or felony charge.[29] In District Court, where the violation hearing and criminal trial are usually scheduled for the same day, the probationer often is given a choice of either resolving both cases with an admission of guilt, or proceeding to both a bench trial and the violation hearing that very day.[30] In Superior Court, where the violation hearing is usually scheduled long before the criminal charge is reached for trial, the defendant must often choose either an immediate violation hearing or an accelerated, combined plea disposition on both the violation and criminal charge(s).[31] If used

27. This was not always the case: in *State v. Wisehart*, the Rhode Island Supreme Court substantially limited prior caselaw that prevented the hearing justice from considering the new allegations when determining an appropriate violation sentence. *See* 569 A.2d at 436–37 (finding that evidence of criminal conduct or bad behavior adduced at a hearing can be taken into account at sentencing because it gives the sentencing justice insight into the probationer's "amenability to rehabilitation").

28. *See* COUNCIL ST. GOV'TS: JUST. CTR., RHODE ISLAND JUSTICE REINVESTMENT WORKING GROUP: THIRD MEETING 14, 21 (Oct. 27, 2015) [hereinafter THIRD MEETING], https://csgjusticecenter.org/wp-content/uploads/2015/11/RhodeIslandWorkingGroup3.pdf.

29. *See* R.I. GEN. LAWS §§ 12-19-8, -9, -19.

30. In all misdemeanor cases, Rhode Island criminal defendants have a right to a jury trial in the first instance. State v. Holliday, 280 A.2d 333, 338 (R.I. 1971); R.I. DIST. CT. R. CRIM. P. 23. However, a criminal defendant may also elect to have the case first heard in the District Court, and, if he is aggrieved by the judge's decision in a criminal case, he is then entitled to a de novo jury trial in the Superior Court on the misdemeanor charge itself (but not the adjudication of violation). R.I. GEN. LAWS § 12-22-1; R.I. DIST. CT. R. CRIM. P. 23; State v. Avila, 415 A.2d 180, 182 (R.I. 1980) (citing State v. Gill, 342 A.2d 256, 257 (R.I. 1975)).

31. If the defendant expresses a reluctance to resolve the new case at the time of their violation hearing in Superior Court, the court will often offer a third choice, the so-called "violation-only offer." This allows the defendant to

correctly, this practice—commonly referred to as "wrapping" the new charge in with the violation allegation[32]—provides both the state and the defendant with the ability to efficiently resolve several matters on mutually acceptable terms. Wrapping the cases is especially useful when the new charge is based on substantial evidence that would likely allow the state to secure a guilty verdict after trial. However, because the violation offer is often conditioned on the defendant's admission to the criminal offense, this process also permits the state to secure a conviction in cases where the evidence is weak or unsupported.[33]

> *Back in the courthouse cellblock on the day of the probation-violation hearing, two weeks after Dennis was initially held, you explain to him that, at a trial, he would be allowed to present an absolute defense to the charge of simple assault, based on his claim of self-defense. The evidence against him, the complainant John's testimony, can be contradicted by Sara's testimony. The state's other civilian witness, John's friend "Nick," who was with him at the bar that night, has moved to California and will not return to testify in the case. Thus, Nick's damaging statement to the police cannot come into evidence at a trial, as it is hearsay and its admission would violate the confrontation principles outlined in Crawford.*[34] *You explain to Dennis that, even if he loses his first trial before the District Court judge, he has a right to appeal the case to the Superior Court for a full jury trial where he can present his case to a jury of his peers.*[35] *At the jury trial,*

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admit violation and receive an agreed-upon term of imprisonment on the probation case alone. In a situation like this, the new charge would proceed independently of the violation. This practice is rarely used in the District Court. In the Superior Court, sometimes—although not always—the term of imprisonment included in the "violation-only offer" is either equal to or *greater than* the one included with the wrap offer. This leverage technique is not universally employed, but it is all-too-frequently witnessed by the criminal practitioners who handle violation cases with regularity. *See* Horwitz, *supra* note 23, at 766.

32. *See, e.g.*, THIRD MEETING, *supra* note 28, at 21 ("Half of those on probation are reconvicted/wrapped within three years.").

33. *See* Horwitz, *supra* note 23, at 766.

34. *See generally* Crawford v. Washington, 541 U.S. 36 (2004).

35. R.I. GEN. LAWS § 12-22-1.

*you tell him, each and every one of the jurors would have to be convinced beyond a reasonable doubt that he assaulted John first, and not in self-defense, in order to find him guilty of misdemeanor assault.*

*But, you warn, the violation hearing is a different matter. There is no appeal to a jury; there is only the judge. You explain that the police officer, a trained and confident witness, will be allowed to testify to Nick's inculpatory statement if the court finds there is "good cause" to admit this hearsay evidence.*[36] *Even if Sara's testimony gives the judge some doubt about the validity of John's claim, the judge can still find Dennis to be a violator if she is reasonably satisfied that he was not of good behavior that night.*[37] *After all, you remind Dennis, the judge does not have to find that he committed the assault in order to keep him in prison.*[38] *While there is no evidence that Dennis was severely intoxicated that evening, you remind him that he had admitted to the responding officer that he "might have had one too many" in the bar. Could this be considered bad behavior? You cannot say for sure. You also remind him that Sara will testify, and Dennis does not deny, that he and John were involved in a heated verbal argument before John threw the first punch. Is this verbal sparring a failure to keep the peace and be of good behavior? Dennis looks to you for answers, but you can only remind him that if he loses, then the judge can sentence him to up to one year of prison, the maximum sentence allowed on the original resisting arrest charge.*[39]

*You then present him with the state's offer: If Dennis*

36. State v. Bernard, 925 A.2d 936, 939 (R.I. 2007) (citing State v. DeRoche, 389 A.2d 1229, 1234 (1978)).

37. *See* State v. Sylvia, 871 A.2d 954, 957 (R.I. 2005) (citing State v. Anderson, 705 A.2d 996, 997 (R.I. 1997)).

38. *See* State v. Gautier, 774 A.2d 882, 887 (R.I. 2001) ("It is not the role of the hearing justice to determine the validity of the specific charge that formed the basis of the violation.").

39. *See* R.I. GEN. LAWS § 12-7-10(b) (allowing imprisonment for up to one year following a conviction for resisting arrest); R.I. GEN. LAWS § 12-19-9 ("Upon a determination that the defendant has violated the terms and conditions of his or her probation the court . . . may . . . impose a sentence if one has not been previously imposed . . .").

*enters a plea of nolo contendere to the charge of simple assault, he will be placed on probation for an additional year, with the special condition that he enter counseling for alcohol treatment. If he accepts that offer, the judge has agreed to sentence him to time served on the violation and release him from prison that day. You warn him that if he takes this deal, however, he will not only face additional probation and required treatment, but he also will have two misdemeanor convictions on his record, making his criminal record now inexpungable under Rhode Island law.*[40] *That means, you tell him, that no matter how many positive things he accomplishes in the future, these convictions will haunt him for the rest of his life.*

*At first he protests—he did not assault anyone, he was just defending himself! He does not want to plead guilty to the charge. But then he closes his eyes and his shoulders sag. He tells you that he might be able to get his job back if he is released today; Ana has spoken to his boss, who has not replaced him yet but cannot wait much longer. Ana is due to give birth in a few weeks; he knows he needs to be out to help her, and he does not want to miss the birth of his baby. "What would you do?" he asks as he sighs and opens his eyes and tells you to prepare the paperwork.*

## II. RHODE ISLAND'S UNREASONABLY LOW PROBATION VIOLATION STANDARDS

Most criminal defense attorneys have had clients like Dennis, maybe dozens or even hundreds of them. As both lawyers and defendants are aware, the consequences of a probation revocation can be just as serious as another criminal conviction, with judges often doling out lengthy prison sentences after hearings.[41] Therefore, the extremely low standard of proof employed at these

40. *See* R.I. GEN. LAWS § 12-1.3-2 (allowing only first offenders to file a motion for expungement).

41. *See*, *e.g.*, State v. Raso, 80 A.3d 33, 41 (R.I. 2013) (reviewing an adjudication in which a judge found the defendant to be a violator and sentenced him to serve twenty-five years of previously imposed suspended sentences).

hearings is a key component of Rhode Island's imbalanced probation system, and as such, a natural starting point for reform.

As discussed, a hearing judge is not tasked with finding, to a degree of reasonable satisfaction, whether the defendant committed the crime alleged, an undertaking that would require the finding of specific elements. The question, rather, is whether the defendant "fail[ed] to keep the peace and remain on good behavior"[42]—an indefinite touchstone that leaves a probationer vulnerable to violation based on a wide variety of undefined non-criminal behavior.[43] In other words, a lack of evidence as to whether a probationer committed a specific crime may be compensated by evidence that he or she engaged in tangential, non-criminal—arguably "bad"—behavior.[44] Thus, revocation turns on a question with not one, but two pliant variables, referred to in this Article as the "legal" burden of proof and the "factual" burden of proof, respectively: Is the hearing judge (1) *reasonably satisfied* (2) that the probationer failed to *keep the*

42. State v. McCarthy, 945 A.2d 318, 326 (R.I. 2008) (citing State v. Forbes, 925 A.2d 929, 934 (R.I. 2007)).

43. *See, e.g.*, State v. Pitts, 960 A.2d 240, 242, 246 (R.I. 2008) ("Irrespective of whether [the defendant] could be found guilty of disorderly conduct, there was sufficient evidence for the hearing justice to conclude that he had violated his probation by failing to keep the peace and remain on good behavior . . . [by] engag[ing] in a sexual act in a vehicle on a public highway, at a time when he was on probation for prior sex offenses."). Indeed, the Rhode Island Supreme Court has provided little in the way of guidance on what non-criminal behavior would *not* amount to a failure to keep the peace and be of good behavior. *See, e.g.*, *McCarthy*, 945 A.2d at 328 (avoiding issue of whether non-criminal possession of women's underwear in coat liner or driving by the home of sex offender counselor amounted to a failure to keep the peace and be of good behavior). *But see id.* at 329 n.9 (Flaherty, J., dissenting) (noting that although defendant's possession of female undergarments as a twice-convicted sex offender was "downright disturbing," it was "neither a violation of the law nor a breach of a condition of probation").

44. *See, e.g.*, State v. Lamoureux, 58 A.3d 189, 193–94 (R.I. 2013) (affirming finding of violation based on evidence that defendant had placed "himself into unseemly and probably criminal activities within [twenty-four] hours of each other"; hearing justice did not have to determine whether defendant actually assaulted anyone (alteration in original)); State v. Gautier, 774 A.2d 882, 887 (R.I. 2001) (reversing a finding of no violation where there was evidence that defendant was present at the scene of the murder, failed to report the murder, and fled from a police officer; hearing justice was not required to find that defendant was guilty of murder).

*peace and be of good behavior*?[45] When mapped against the national landscape, Rhode Island's exceptionally discretionary standard is an outlier.

In an effort to find guidance from other states, Section II.A provides a brief overview of the burdens of proof used at probation revocation hearings in other jurisdictions. Section II.B examines potential avenues of reform to Rhode Island's revocation standards, including a recently proposed amendment to Rule 32(f) of the Rhode Island Superior Court Rules of Criminal Procedure that would increase the legal burden of proof to "fair preponderance of the evidence."[46] Section II.B also recommends replacing the current factual burden of proof, "keeping the peace and being of good behavior," with a framework that allows for revocation only when a probationer commits a new crime or violates a specific condition of probation. Section II.C discusses two pragmatic sentencing reforms that target Rhode Island's disproportionately long probationary sentences: (1) a system of earned compliance credits for probationary periods (also referred to as good time credits), and (2) probationary sentence limits for certain categories of crimes, a measure that has recently been proposed by a majority of current Rhode Island Superior Court Justices.[47]

### A. *Legal Burdens of Proof Across the Country*

Notably, there is no constitutionally mandated burden of proof at a probation violation hearing. While the United States Supreme Court has laid out minimum due process requirements for parole revocation hearings and probation revocation hearings in *Morrissey v. Brewer* and *Gagnon v. Scarpelli*, respectively, it has not mandated any standard of proof for such hearings.[48]

45. *See* State v. Ditren, 126 A.3d 414, 418 (R.I. 2015) (citing State v. Delarosa, 39 A.3d 1043, 1049 (R.I. 2012)).

46. *See* Order Soliciting Comments on Proposed Amendments, *supra* note 21, at 1.

47. *Id.* at 4.

48. 411 U.S. 778, 781–82, 786 (1973) (probation revocation proceedings); 408 U.S. 471, 482–89 (1972) (parole revocation proceedings). Minimum due process requirements include:

> "(a) written notice of the claimed violations of [probation or] parole;
> (b) disclosure to the [probationer or] parolee of evidence against him;
> (c) opportunity to be heard in person and to present witnesses and

However, its refusal to require the "full panoply of rights"[49] afforded to defendants in criminal proceedings implies that violations need not be proven beyond a reasonable doubt.[50] In the absence of a clear constitutional direction, the states have formed a rough bell curve, with the majority of states using the middling "preponderance of the evidence" burden of proof employed in most civil cases, and the others adopting higher or lower standards.[51] These standards of proof, ordered from the lowest to highest burden, include Rhode Island's "reasonable satisfaction"[52] standard on the extreme low end, followed by "preponderance of the evidence,"[53] "clear and convincing evidence,"[54] and, finally, the "beyond a reasonable doubt" standard[55] topping the high end of the spectrum.[56]

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> documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole."

*Gagnon*, 411 U.S. at 786 (alterations in original) (quoting *Morrissey*, 408 U.S. at 489).

49. *Morrissey*, 408 U.S. at 480.

50. *See* Piar, *supra* note 24, at 127 ("In neither *Morrissey* nor *Gagnon* . . . did the Court address what standard of proof should apply in this less-than-criminal proceeding, thus leaving the matter to the states and their individual codes of procedure.").

51. Thirty-six states and the District of Columbia employ what amounts to a preponderance of the evidence standard for probation revocation hearings. *See infra* text accompanying notes 65–66.

52. *See, e.g.*, State v. Ditren, 126 A.3d 414, 418 (R.I. 2015) ("[T]he state need only show that 'reasonably satisfactory' evidence supports a finding that the defendant has violated his or her probation." (quoting State v. Delarosa, 39 A.3d 1043, 1049 (R.I. 2012))).

53. *See, e.g.*, CONN. GEN. STAT. § 53a-32(d) (West 2012 & Supp. 2015) ("No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by the introduction of reliable and probative evidence and by a preponderance of the evidence.").

54. *See, e.g.*, MINN. R. CRIM. P. § 27.04 (allowing probationers a right to "a revocation hearing to determine whether clear and convincing evidence of a probation violation exists and whether probation should be revoked").

55. *See, e.g.*, COLO. REV. STAT. § 16-11-206 (2013) (requiring proof beyond a reasonable doubt where the violation is a new criminal offense).

56. South Carolina and Virginia do not have explicitly-stated burdens that easily fall into such categories. In South Carolina, although there must be "sufficient evidence" establishing that the defendant violated probation, the courts have not made clear what quantum of evidence is "sufficient." *See*

While there is no case law defining exactly what "reasonable satisfaction" requires in Rhode Island, it is clear that it is not only less exacting than the beyond a reasonable doubt standard used in criminal prosecutions, but also lower than the preponderance of evidence standard employed in civil actions.[57] Indeed, the burden is perhaps most akin to the burden of production of a defendant seeking an affirmative defense: namely, the burden to point to *some* evidence.[58]

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State v. Allen, 634 S.E.2d 653, 655 (S.C. 2006). Similarly, in Virginia, "the court may revoke the suspension of sentence for any cause the court deems sufficient," an evidentiary determination firmly within the discretion of the court. VA. CODE ANN. § 19.2-306(A) (2008); Marshall v. Commonwealth, 116 S.E.2d 270, 273 (Va. 1960).

57. Although a hearing judge must weigh evidence and assess credibility, "[t]he burden of proof in a probation-revocation hearing . . . is *considerably lower* than in a criminal case; the state is required to show only that defendant is a violator by reasonably satisfactory evidence." State v. Forbes, 925 A.2d 929, 934 (R.I. 2007) (emphasis added); *see also* State v. Sparks, 667 A.2d 1250, 1252 (R.I. 1995) (rejecting argument that a prior inconsistent statement was insufficient to support a finding of violation, and citing state's argument that the "'reasonably satisfied' standard of a probation-revocation hearing allows an even more relaxed burden of proof than the preponderance-of-the-evidence standard required in a civil case"). One Superior Court justice has even suggested that "reasonable satisfaction" requires less proof than probable cause. State v. Reis, No. P2-03-2726A, 2012 WL 3638892, at *14 (R.I. Super. Ct. Aug. 20, 2012) ("The same way the State does not need to prove a violation beyond a reasonable doubt, the State need not prove that there exists probable cause to determine a finding of violation.").

58. *Compare* State v. Bouffard, 945 A.2d 305, 310 (R.I. 2008) ("The burden of proof on the state at a probation violation hearing is much lower than that which exists in a criminal trial—the state need only show that 'reasonably satisfactory' evidence supports a finding that the defendant violated his or her probation."), *with* State v. Verrecchia, 766 A.2d 377, 387–88 (R.I. 2001) ("A court assessing the sufficiency of the defendant's presentation on this score (that is, whether 'some evidence' has been adduced) must be able to find more than a scintilla of support to justify such an instruction."). The standard is arguably so low that it only requires the state to produce evidence of violation, not to persuade the trier of fact. As the Court of Appeals of Maryland put it: "We have great difficulty in conceptualizing how a reasonable satisfaction standard can meaningfully operate below the level of a preponderance of the evidence while the State would still bear the burden to produce evidence *and the burden of persuasion*." Wink v. State, 563 A.2d 414, 419 (Md. 1989) (emphasis added). Given the extremely deferential standard of review on appeal, it is difficult to determine whether, in practice, there is any amount of evidence that would be insufficient to support a finding. *See* State v. English, 21 A.3d 403, 407 (R.I. 2011) (stating that appellate review "is limited to considering whether

Only five other states utilize a burden of proof similar to Rhode Island's: Alabama,[59] Nevada,[60] North Carolina,[61] South Dakota,[62] and Washington.[63] Of course, none of these jurisdictions has revocation landscapes identical to that of Rhode Island, and other principles, not applicable in Rhode Island, help mitigate the effects of the low standard in other states.[64]

Three other states—Delaware, Idaho, and Maryland—use a

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the hearing justice acted arbitrarily or capriciously in finding a violation" (quoting State v. Sylvia, 871 A.2d 954, 957 (R.I. 2005))).

59. Sams v. State, 48 So. 3d 665, 669 (Ala. 2010) ("[T]he trial court need 'only be reasonably satisfied from the evidence that the probationer has violated the conditions of his probation.'" (quoting *Ex parte* J.J.D., 778 So. 2d 240, 242 (Ala. 2000))).

60. In *Lewis v. State*, the Supreme Court of Nevada affirmed reasonable satisfaction as the appropriate standard of proof for a violation hearing. 529 P.2d 796, 797 (Nev. 1974). In *Dail v. State*, the petitioner asked, to no avail, that the court reject this standard in favor of adopting a preponderance of the evidence standard. 610 P.2d 1193, 1196 (Nev. 1980).

61. State v. Hewett, 154 S.E.2d 476, 480 (N.C. 1967) (stating that the evidence must "be such as to reasonably satisfy the judge . . . that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended"); *see also* State v. Harris, 646 S.E.2d 526, 529 (N.C. 2007).

62. State v. Beck, 619 N.W.2d 247, 249 (S.D. 2000) ("All that is required is the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.").

63. City of Aberdeen v. Regan, 239 P.3d 1102, 1104 (Wash. 2010) ("In order to revoke probation, '[a]ll that is required is that the evidence and facts be such as to reasonably satisfy the court that the probationer has breached a condition under which he was granted probation.'" (quoting Standlee v. Smith, 518 P.2d 721, 723 (Wash. 1974))).

64. For example, in Alabama, "[i]t is well settled that hearsay evidence may not form the sole basis for revoking an individual's probation." Goodgain v. State, 755 So. 2d 591, 592 (Ala. Crim. App. 1999); *see also* Clayton v. State, 669 So. 2d 220, 222 (Ala. Crim. App. 1995) ("The use of hearsay as the sole means of proving a violation of a condition of probation denies a probationer the right to confront and to cross-examine the persons originating information that forms the basis of the revocation."). Additionally, in North Carolina, probation can be revoked only where the probationer (1) commits a new crime; (2) absconds supervision; or (3) violates a specific condition of probation after serving two periods of "confinement in response to violation" for committing technical violations. N.C. GEN. STAT. § 15A-1344(a) (2013); State v. Nolen, 743 S.E.2d 729, 730 & n.1 (N.C. Ct. App. 2013). Unlike Rhode Island, probation in North Carolina cannot be revoked for something as vague as "fail[ing] to keep the peace and to remain on good behavior." State v. Gautier, 774 A.2d 882, 887 (R.I. 2001).

reasonable satisfaction standard, but apply it as preponderance of the evidence.[65] Indeed, the preponderance of the evidence standard is far and away the most prevalent burden of proof, with thirty-three other states and the District of Columbia requiring it at revocation hearings—by statute, court procedural or evidentiary rule, or court decision.[66] Two states, Minnesota and

65. A leading case in Delaware, cited in most violation decisions in that state, echoed the Fifth Circuit in stating:

> A judge in [a probation revocation] proceeding need not have evidence that would establish beyond a reasonable doubt guilt of criminal offenses. All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.

Brown v. State, 249 A.2d 269, 272 (Del. 1968) (quoting Manning v. United States, 161 F.2d 827, 829 (5th Cir. 1947)). In more recent decisions, however, the reasonable satisfaction standard has been applied as a preponderance standard. For example, in *Weaver v. State*, the court stated that "the trial court has broad authority to find a probation violation applying a preponderance of the evidence standard, in contrast to the standard of proof beyond a reasonable doubt required for the initial conviction." 779 A.2d 254, 259 (Del. 2001). In Idaho, although the state must provide "satisfactory proof" of a violation, the standard requires that the prosecution present "substantial evidence" of the violation, which suggests that a preponderance standard is actually required. State v. Rose, 171 P.3d 253, 256 (Idaho 2007). Additionally, in Maryland, if the court is "reasonably satisfied by a preponderance of the evidence that a violation has occurred," then the standard of proof has been met and probation may be revoked. Gibson v. State, 616 A.2d 877, 879 (Md. 1992); *accord* Hammonds v. State, 80 A.3d 698, 703–04 (Md. 2013); Baynard v. State, 569 A.2d 652, 655 (Md. 1990); Wink v. State, 563 A.2d 414, 415 (Md. 1989). In other words, as applied in Maryland, the reasonable satisfaction standard is equivalent to the preponderance of the evidence standard. *Wink*, 563 A.2d at 415; Robert B. v. State, 998 A.2d 909, 919 (Md. Ct. Spec. App. 2010).

66. *See* ARIZ. R. CRIM. P. 27.8(b)(3); ARK. CODE ANN. § 16-93-308(d) (2014); CONN. GEN. STAT. § 53a-32(d) (West 2012 & Supp. 2015); GA. CODE ANN. § 42-8-34.1(b) (2014); 730 ILL. COMP. STAT. 5/5-6-4(c) (2014); IND. CODE § 35-38-2-3(f) (2012); ME. STAT. tit. 17-A, § 1206 (2006 & Supp. 2015); MICH. CT. R. 6.445(E)(1); MONT. CODE ANN. § 46-18-203(6)(a) (2014); N.Y. CRIM. PROC. LAW § 410.70(3) (McKinney 2005 & Supp. 2016); TENN. CODE ANN. § 40-35-311(e)(1) (2015); VT. STAT. ANN. tit. 28, § 302(a)(4) (2008 & Supp. 2015); WYO. R. CRIM. P. 39(a)(5); N.D. R. CRIM. P. 32(f)(3)(B); Holton v. State, 602 P.2d 1228, 1238 (Alaska 1979); People v. Rodriguez, 795 P.2d 783, 785 (Cal. 1990); Harris v. United States, 612 A.2d 198, 203 (D.C. 1992); Russell v. State, 982 So. 2d 642, 646 (Fla. 2008); Calvert v. State, 310 N.W.2d 185, 187 (Iowa 1981); State v. Gumfory, 135 P.3d 1191, 1193 (Kan. 2006); Barker v. Commonwealth, 379 S.W.3d 116, 123 (Ky. 2012); Commonwealth v. Wilcox, 841 N.E.2d 1240, 1246 (Mass. 2006); State v. Oliver, 856 So. 2d 328, 332

Nebraska, have split the difference between preponderance of the evidence and beyond a reasonable doubt, adopting clear and convincing evidence as the burden of proof at revocation hearings.[67] New Mexico also falls somewhere between preponderance of the evidence and beyond a reasonable doubt, requiring a violation of probation to be proven with "reasonable certainty."[68]

Three states—Colorado, Hawaii, and Louisiana—go above what is constitutionally necessary, using a reasonable doubt standard, at least when the revocation is based on the alleged commission of a crime.[69] For example, in Hawaii, legislation requires that probation "shall" be revoked upon conviction of a felony, and "may" be revoked upon conviction of a crime other than a felony.[70] This scheme requires prosecutors to proceed on the underlying charge first, negating any "proxy trial" problem posed by revocation proceedings when the basis of the revocation is a new criminal charge.[71] Similarly, in Louisiana, probation may be revoked upon a misdemeanor or felony conviction.[72] Lastly, Colorado has an explicit two-tier system. When the violation alleged is a criminal act, the prosecution has the burden of establishing the violation beyond a reasonable doubt unless the

(Miss. 2003); Turner v. State, 784 S.W.2d 342, 344 (Mo. Ct. App. 1990); State v. Carlson, 767 A.2d 421, 426 (N.H. 2001); State v. Lavoy, 614 A.2d 1077, 1080 (N.J. Super. Ct. App. Div. 1992); State v. Garner, 5th Dist. Tuscarawas No. 15-AP-06-003, 2016-Ohio-461, ¶ 3; Tilden v. State, 306 P.3d 554, 556 (Okla. Crim. App. 2013); State v. Donovan, 751 P.2d 1109, 1110 (Or. 1988); Commonwealth v. Brown, 469 A.2d 1371, 1373 n.2 (Pa. 1983); Hacker v. State, 389 S.W.3d 860, 864–65 (Tex. Crim. App. 2013); Layton City v. Stevenson, 337 P.3d 242, 244 (Utah 2014); State v. Brown, 600 S.E.2d 561, 564 (W. Va. 2004); State *ex rel.* Thompson v. Riveland, 326 N.W.2d 768, 771 (Wis. 1982).

67. MINN. R. CRIM. P. 27.04; NEB. REV. STAT. § 29-2267 (Reissue 2008).

68. *See, e.g.*, State v. Guthrie, 257 P.3d 904, 909 (N.M. 2011); State v. Brusenhan, 438 P.2d 174, 176 (N.M. Ct. App. 1968).

69. *See* COLO. REV. STAT. § 16-11-206(3) (2013); HAW. REV. STAT. § 706-625(3) (2014) (requiring conviction if a new crime is the basis of a probation violation); LA. CODE CRIM. PROC. ANN. art. 901 (2005 & Supp. 2013) (same).

70. HAW. REV. STAT. § 706-625(3) ("The court shall revoke probation if the defendant . . . has been convicted of a felony. The court may revoke the suspension of sentence or probation if the defendant has been convicted of another crime other a felony.").

71. *See* Horwitz, *supra* note 23, at 784–88.

72. LA. CODE CRIM. PROC. ANN. art. 901.

defendant has already been convicted of the offense.[73] When the violation alleged is a technical violation of a condition of probation rather than a criminal offense, the prosecution has the burden of establishing the violation by a preponderance of the evidence.[74]

## B. *Modifying Rhode Island's Legal and Factual Burden of Proof*

### *1. Legal Burden of Proof*

The proposed amendment to Rule 32(f) of the Superior Court Rules of Criminal Procedure, still pending at the time of this Article's publication, provides that "[n]o revocation shall occur unless the State establishes by a fair preponderance of the evidence that the defendant breached a condition of his/her probation or deferred sentence or failed to keep the peace and or remain on good behavior."[75] If the Rhode Island Supreme Court approves this proposal, Rhode Island will join the majority of states that require a hearing court to find a violation by the preponderance of the evidence before revoking probation.

A higher legal burden of proof, especially as it applies to violations based on new crimes, lessens the state's ability to use revocation hearings or the threat of revocations as relatively quick and easy mechanisms to imprison a person under circumstances where it would be difficult or impossible to obtain a conviction. The beyond a reasonable doubt standard, though currently used by only a few states in revocation hearings, would best safeguard against the "proxy trial" problem.[76] The adoption of a beyond a reasonable doubt standard as to probation violations based on new crimes also would alleviate the innocence concerns that Rhode

73. COLO. REV. STAT. § 16-11-206(3) ("[T]he commission of a criminal offense must be established beyond a reasonable doubt unless the probationer has been convicted thereof in a criminal proceeding.").

74. *Id.* (stating that, except for criminal offenses, "the prosecution has the burden of establishing by a preponderance of the evidence the violation of a condition of probation").

75. Order Soliciting Comments on Proposed Amendments, *supra* note 21, at 1.

76. *See supra* notes 23–27 and accompanying text. Of course, imposition of a high burden of proof could not altogether eliminate the proxy trial problem. As long as revocation hearings continue to be subject to a relaxed version of the rules of evidence and allow the admission of illegally obtained evidence, it will remain easier to prosecute via Rule 32(f) than by criminal charge. *See* Horwitz, *supra* note 23, at 785.

Island General Laws section 12-19-18(b) intended to address.[77] Finally, the beyond a reasonable doubt standard would be easily workable, given the judges' familiarity with applying the standard in criminal bench trials.

On the other hand, some have expressed concern that judges would be less willing to offer the benefit of probation at the time of the initial sentencing if probation were too difficult to revoke.[78] Furthermore, if probation violations were more difficult to prove, prosecutors might also be reluctant to offer a probationary sentence as a part of a plea deal. Of course, defendants' incentives should also be examined when considering the optimal burden of proof at violation hearings. Many defendants may be better served by taking a short period of incarceration over a longer period of probation and suspended time, because when a defendant is on probation, any and every allegation of wrong-doing—no matter how minor or specious—could expose the defendant to the entirety of the longer suspended sentence.[79] Assuming probation is an effective rehabilitation tool,[80] an

77. *See* Ellen Liberman, *Guilty, Even While Innocent*, R.I. MONTHLY 31, 31–35 (Dec. 2008), *available at* http://www.rimonthly.com/Rhode-Island-Monthly/December-2008/Guilty-Even-While-Innocent/. Section 12-19-18(b) of the Rhode Island General Laws, enacted by the General Assembly in 2010, provides for an end to imprisonment when a person previously violated on probation is not ultimately convicted of the criminal offense that formed the basis for the violation. *See* John Hill, *R.I. Modifies Law on Probationers After Four-Year Campaign*, PROVIDENCE J., Jun. 20, 2010, at A1. In 2012, Rhode Island Superior Court Justice William E. Carnes held that the statute was unconstitutional. State v. Reis, No. P2-03-2726A, 2012 WL 3638892, at *18 (R.I. Super. Ct. Aug. 20, 2012). Although that particular case has since become moot, the Rhode Island Public Defender's Office appealed that ruling in connection with another case that is now pending in the Rhode Island Supreme Court.

78. *See, e.g.*, Campbell v. Aderhold, 36 F.2d 366, 367 (N.D. Ga. 1929) ("Unless the broad discretion to revoke be fully recognized, much greater caution will have to be exercised in extending this grace originally, and the benefits of the act will become greatly restricted."); Piar, *supra* note 24, at 128–29 (citing People v. Rodriguez, 795 P.2d 783, 788–89 (Cal. 1990)).

79. *See* R.I. GEN. LAWS § 12-19-9.

80. While courts often view probationary sentences as a means to ensure that a defendant receives needed counseling or treatment in the community, it is not the only vehicle by which this goal can be accomplished. This Article omits extensive reference to several alternative sentencing programs existing in Rhode Island. The largest of those programs, the Rhode Island Adult Drug Court, has reported a high degree of success in lowering recidivism rates among recent offenders; however, given acceptance parameters which limit

optimum burden of proof would balance both the state's interest in keeping the community safe and the offender's interest in his or her continued liberty.[81]

Most states have concluded that the preponderance of the evidence burden provides this happy medium.[82] Similar to the

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entry to those without drug distribution and other charges, it accepts only a fraction of those who could be served by such a program. NATHANIEL LEPP ET AL., COUNCIL ON CRIME PREVENTION, REPORT ON ADULT DRUG COURT: ELIGIBILITY, PROCEDURE, AND FUNDING 3, 6–7 (2007), http://www.opendoorsri.org/sites/default/files/ccpdrugcourt.pdf. Programs like the Adult Drug Court, which directly minister to illicit drug users accused of crimes, are sorely needed: Rhode Island ranks as one of the states with the greatest number of individuals needing but not receiving treatment for illicit drug use, the second highest percentage of illicit drug abusers in the country, and the highest incidence of illicit drug abuse among those who are 18–25 years old. *Id.* at 2–3.

81. The judicial system is not perfect. In all types of cases, regardless of the burden of proof, there will be some decisions or verdicts that reflect the factual truth, and there will also be some false positives or false negatives. *See* Henry L. Chambers, Jr., *Getting it Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 6–7 (1996); *see also* Addington v. Texas, 441 U.S. 418, 423 (1979). The particular burden of proof employed will determine whether the errors will skew towards false negative (here, a finding of no violation when one actually occurred) or false positive (a finding of violation when the defendant was innocent). On the one hand, because the "beyond a reasonable doubt" standard is difficult to meet, convictions should, in theory, skew towards false negatives. The high standard thus prioritizes the interest of the defendant over the community. By employing this standard in criminal cases, we have decided that, as a society, it is more important that a guilty person go free than an innocent person be punished. On the other hand, in a civil trial where monetary awards rather than personal liberties are at stake, a plaintiff is only required to prove his or her case by a "preponderance of the evidence." *E.g.*, *Addington*, 441 U.S. at 423. In civil cases, "[t]he risk of error is divided equally between plaintiff and defendant because the risk of a false positive is equal to that of a false negative." Chambers, *supra*, at 6. In other words, as a society, we have determined that the harm of a truly at-fault plaintiff escaping civil liability is nearly equal to the harm of a plaintiff being wrongly held financially accountable. The current burden of proof at a revocation hearing, skewed in favor of the state, ensures that false positives will prevail. Theoretically speaking, the current standard actually allows more innocent probationers to be imprisoned than guilty ones to go free.

82. *See* sources cited *supra* note 66. Preponderance of the evidence was also the uniform standard proposed by the American Bar Association in 1970. *See* AM. BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 24, § 5.4(a), at 67 ("[T]he government should have the burden of establishing the occurrence of the violation by a preponderance of the evidence in those cases where the facts are contested.").

beyond a reasonable doubt standard, it is a workable burden, familiar to judges from civil litigation.[83] Additionally, unlike the burden of reasonable satisfaction in use at the time of this writing, preponderance of the evidence is specific, requiring a certain quantum of proof: "[P]roof which leads the [factfinder] to find that the existence of the contested fact is more probable than its nonexistence."[84] Conversely, it appears that even hearing justices ascribe different definitions to the term "reasonable satisfaction," leaving the probationer—and his lawyer—with little understanding of the quantum of evidence that will satisfy the state's burden at a violation hearing.[85] The Superior Court's proposed modification to the legal burden of proof, if adopted, would be a welcome recalibration of our probationary system, better balancing the public's safety interest with the probationers' liberty interest. While it is likely that the state will still meet its burden in the majority of cases, more probationers may prevail in very weak cases.[86] This effect will trickle down to bail decisions

83. Some states have concluded that the preponderance of the evidence standard should apply precisely because a violation hearing is civil in nature. *See*, *e.g.*, Jackson v. State, 420 N.E.2d 1239, 1241 (Ind. Ct. App. 1981). Although the Rhode Island Supreme Court has often recited that the hearing is a civil proceeding, it has not applied the same rationale to the burden of proof. *See, e.g.*, State v. Gautier, 950 A.2d 400, 408 (R.I. 2008) ("A probation-violation hearing is a civil proceeding to determine whether a probationer has kept the peace and been of good behavior . . . .").

84. CHARLES T. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 339(a), at 794 (Edward W. Cleary ed., 2d ed. 1972).

85. The "reasonable satisfaction" burden was described by one hearing justice as an "extremely low standard that does not take much to satisfy." State v. Rioux, 708 A.2d 895, 898 (R.I. 1998). In *Rioux*, the hearing justice revealed just how indefinable the standard really is, quipping that he could be "reasonably satisfied by a hot dog on occasion." *Id.* We recognize that other Rhode Island trial justices, troubled by the idea of depriving an individual of their liberty on an "extremely low" standard of proof, have interpreted the "reasonable satisfaction" burden somewhat more rigorously. The difference in interpretation alone demonstrates the malleable and amorphous nature of the current standard. *Cf.* State v. Hodges, 798 P.2d 270, 278 (Utah Ct. App. 1990) (applying preponderance of the evidence standard and finding that a "'some competent evidence standard' is too nebulous to apply to probation revocation").

86. Georgia provides an example of a state where an increase in the burden of proof at violation hearings resulted in an actual change in practice. There, the state legislature codified the burden of proof at a violation hearing, increasing it from "slight evidence" to a preponderance of the evidence in 1988. 1988 Ga. Laws 1911–12, § 1 (codified at GA. CODE ANN. §

and negotiated admissions, providing defendants newfound leverage in cases with limited or problematic evidence.

*2. Factual Burden of Proof*

Realistically, however, any increase in the burden of proof in Rhode Island would be undermined by the revocation hearing's focus on whether the probationer failed to keep the peace and be of good behavior.[87] In other words, as the legal burden ratchets up, violations can nonetheless be found on factual grounds more and more distant than those articulated in the criminal complaint attached to the Rule 32(f) petition. Taking Dennis's case as an example, there might not be proof to support, by a preponderance of the evidence, that Dennis threw the first punch in the bar fight. However, the judge may have nonetheless found by a preponderance of evidence that he had committed the non-criminal, but arguably "bad," behavior of consuming too much alcohol that evening or engaging in a heated barroom argument, and declare a violation on one of those grounds alone, resulting in the imposition of all or part of Dennis's suspended sentence.[88]

42-8-34.1(b) (2014)). Several years later, the Georgia Court of Appeals reversed the decision of a trial court that revoked a defendant's probation when there was only "slight evidence" to suggest that the defendant had violated probation by being in a home in the presence of narcotics, even though this would have been sufficient under Georgia's previous standard. Anderson v. State, 442 S.E.2d 268, 268 (Ga. Ct. App. 1994).

87. The Committee Notes for the proposed amendment to Superior Court Rule 32(f) explicitly reaffirms the good behavior requirement:

> In addition, the amendment reflects and recites the Rhode Island Supreme Court's settled rule that revocation should not be determined by whether the defendant violated any offense which may form the basis of the violation allegation; rather, the "'sole purpose of a probation violation hearing is for the trial justice to determine whether the conditions of probation'—'keeping the peace and remaining on good behavior'—have been violated.'"

Order Soliciting Comments on Proposed Amendments, *supra* note 21, at 1 (quoting State v. Hazard, 68 A.3d 479, 499 (R.I. 2013)).

88. For example, in *State v. Lamoureux*, the hearing justice declined to find whether the probationer had slapped, grabbed, pushed or otherwise accosted the complaining witness, or stabbed her brother, and instead based his finding of violation on the probationer acting in an "untoward manner towards [the complainant] on at least two occasions" and "put[ting] himself into unseemly and probably criminal activities within [twenty-four] hours of each other," including participating in a backyard "melee." Transcript of Bench Decision at 66–67, State v. Lamoureux, No. P1/93-2785A (R.I. Super.

As any criminal defense attorney can attest, a major deficiency of the "keep the peace and be of good behavior" standard is that it fails to provide notice of what, in particular, violates this requirement. Is it associating with other people on probation, whether or not you know they are on probation? Is it being in the vicinity of drugs, guns, or stolen property, even if you are not aware of your proximity to such items? Is it being at a party where a fight happens to break out? Is it running from the police? Is it raising your voice in an argument with your spouse? Is it using drugs or alcohol? Indeed, an Assistant Public Defender recalled one occasion where the state sought to revoke an intellectually disabled client's probation for using his allowance money from his mother for something other than the promised purpose.

In the absence of legislative or judicial reform, the good behavior standard is ripe for constitutional attack.[89] As the United States Supreme Court has made clear, a law is void for vagueness if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."[90] Such is the

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Ct. Dec. 7, 2011), *aff'd*, 58 A.3d 189, 193–94 (R.I. 2013). Moreover, in Rhode Island, the state may rely on *any* allegation of arguably "bad behavior" contained within the 32(f) petition when seeking a revocation of probation. State v. Znosko, 755 A.2d 832, 835 (R.I. 2000). This allows the state to rest a revocation argument on minute examples of imperfect behavior, further discouraging defendants from challenging violation allegations even when the majority—or the entirety—of the accompanying criminal claims are false or unsupported by the evidence.

89. *See*, *e.g.*, Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 303, 305 (2016) (describing the lack of constitutional challenges to "be good" conditions as "surprisingly rare . . . despite the strong basis for objection," perhaps because these "conditions become embedded in the routine landscape of the law").

90. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); State v. Authelet, 385 A.2d 642, 643–44 (R.I. 1978) (stating the due process prohibition against vagueness is animated by fairness concerns); *see also* United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002) ("A probationer . . . has a separate due process right to conditions of supervised release that are sufficiently clear to inform him of what conduct will result in his being returned to prison."); United States v. Schave, 186 F.3d 839, 843 (7th Cir. 1999) ("A condition of supervised release is unconstitutionally vague if it would not afford a person of reasonable intelligence with sufficient notice as to the conduct prohibited."); Birzon v. King, 469 F.2d 1241, 1243 (2d Cir. 1972); Hunter v. State, 883 N.E.2d 1161, 1163 (Ind. 2008) ("Like statutes defining penal offenses, the language [of a condition of probation] must be such that it describes with clarity and particularity the misconduct that will

case with Rhode Island's factual burden of proof, which, like other "good behavior" standards, is "so broad" as to "defy basic due process requirements."[91] Nothing in Rhode Island caselaw has limited or defined this all-encompassing language, leaving probationers and attorneys alike in the dark about the precise conduct prohibited.[92]

This amorphous standard poses at least two serious risks to the fair administration of our probationary system: (1) that "the innocent may be trapped by inadequate warning of what the state forbids," and (2) that those who administer the law may arbitrarily or discriminatorily enforce the law, perhaps even unintentionally.[93] Other states avoid these constitutional vagueness problems by specifically providing, whether through judicial common law or legislation, that probation can only be revoked when a probationer violates an explicit condition of probation or commits a new crime. In Indiana, for example, "good behavior" has been judicially defined as "*lawful* conduct."[94] And, in North Carolina, recent legislation explicitly limits the grounds of revocation to circumstances where the probationer: (1) commits a new crime; (2) absconds supervision; or (3) violates a specific condition of probation after serving two brief periods of "confinement in response to violation" for committing technical violations.[95] Both frameworks successfully maneuver around the

result in penal consequences.").

91. Doherty, *supra* note 89, at 304–05. Several courts have found similar conditions of probation to be unconstitutional. *See*, *e.g.*, Dulin v. State, 346 N.E.2d 746, 753 (Ind. Ct. App. 1976) (finding that a condition requiring probationer to be of good behavior was "so vague as to be unreasonable"); Glenn v. State, 327 S.W. 2d 763, 764 (Tex. Crim. App. 1959) (concluding that a condition requiring a probationer to "conduct himself as to warrant the confidence and esteem of all law-abiding citizens of this state" was "neither definite nor certain as to the conduct required"). Even narrower conditions have been found to be unconstitutionally vague. *See, e.g.*, United States v. Kappes, 782 F.3d 828, 848–49 (7th Cir. 2015) (condition forbidding probationer from associating with any persons engaged in criminal activity or convicted of a felony was unconstitutionally vague); *In re* Sheena K., 153 P.3d 282, 294 (Cal. 2007) (condition forbidding association with anyone "disapproved of by probation" was vague and overbroad).

92. *See supra* notes 42–44 and accompanying text.

93. Authelet, 385 A.2d at 643–44.

94. Hoffa v. State, 368 N.E.2d 250, 252 (Ind. 1977) (emphasis added); Gee v. State, 454 N.E.2d 1265, 1266 n.4 (Ind. Ct. App. 1983).

95. N.C. GEN. STAT. § 15A-1344(a) (2011); State v. Nolen, 743 S.E.2d 729,

constitutional minefields planted by a revocation system based on non-criminal "bad" behavior.

Moreover, the requirement that a probationer must keep the peace and be of good behavior may not be desirable as a matter of public policy. Presumably, the primary goal of probation is to promote public safety, not to create perfect citizens. Yet, some justices appear to equate "good behavior" with "perfect behavior"—an impossible burden for anyone to meet. For example, in one case, a Superior Court judge declared that the probationer's behavior "must be not only lawful, it must be impeccable."[96] In another, a judge remarked that a probationer's behavior should be "above reproach."[97] Revoking probation for imperfect behavior only increases corrections costs without an appreciable improvement to public safety. The governing factual standard in Rhode Island, in other words, is not tailored to the overriding goal of probation.

Finally, requiring perfection sets the probationer up for failure, for even the most careful and lawful individual is still only human. As defense attorneys, we recognize this, and are often at a loss when advising our clients, telling them to just do their best to stay out of trouble, whatever that may be.

### C. *Pragmatic Solutions: Changing the Sentencing Paradigm*

The Superior Court's recommended amendment to its court rules provides the justices with the ability to terminate a probationary sentence once an individual has successfully completed three years of probation and met certain other conditions.[98] The Superior Court also proposed a new benchmark sentence—"Probation Benchmark 37"—that would limit probationary terms to three years for non-violent crimes unless "substantial and compelling circumstances exist."[99] These recommendations target two intertwined problems that have bedeviled Rhode Island's probationary system in recent years: the

730 n.1 (N.C. Ct. App. 2013).

96. State v. Wiggs, 635 A.2d 272, 274 (R.I. 1993).

97. Transcript of Bench Decision at 66, State v. Lamoureux, No. P1/93-2785A (R.I. Super. Ct. Dec. 7, 2011), *aff'd*, 58 A.3d 189, 193–94 (R.I. 2013).

98. Order Soliciting Comments on Proposed Amendments, *supra* note 21, at 1–2.

99. *Id.* at 4.

lack of uniformity in probationary sentencing, and probationary periods that far exceed the national average in length.

Currently, it is customary for the prison sentence, usually suspended in whole or in part, to equal the length of probation in Rhode Island.[100] Unlike most other states and the federal system,[101] Rhode Island does not cap its probationary terms; rather, the length of a probationary sentence is only limited by the maximum penalty for the crime charged.[102] Most felonies in Rhode Island are punishable by up to five years, ten years, twenty years, or life in prison.[103] For this reason, it is quite common to see long probationary sentences tacked on to relatively short prison sentences.

This practice, however, is misguided, for it fails to address the separate and distinct purposes of a suspended sentence and probation. The sentence that is handed down after a conviction—whether suspended or imposed—should represent the appropriate punishment for the relevant crime, taking into account the severity of the crime, mitigating circumstances, and all other factors contained within the sentencing benchmarks.[104] When a

100. THIRD MEETING, *supra* note 28, at 49.

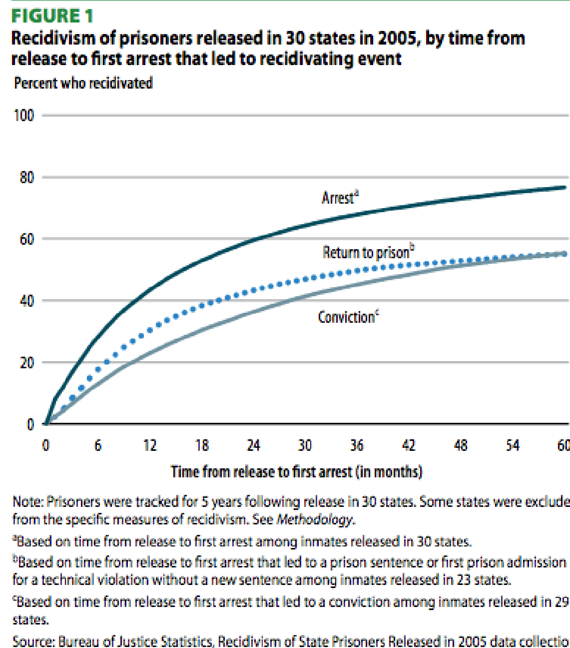
101. *See* ALISON LAWRENCE, NAT'L CONFERENCE OF STATE LEGISLATURES, MAKING SENSE OF SENTENCING: STATE SYSTEMS AND POLICIES 7 (2015), http://www.ncsl.org/documents/cj/sentencing.pdf.

102. R.I. GEN. LAWS § 12-19-8(b) (2014).

103. *See, e.g.*, R.I. GEN. LAWS §§ 11-5-8, -10, 11-42-4, 31-9-1 (2014) (assault of a correctional officer, assault on a person over sixty years of age, threats to public officials, driving a vehicle without the consent of the owner are all punishable by five years in prison); §§ 11-8-2, 11-41-1, 11-41-2, 11-41-5, 11-47-8 (breaking and entering into a dwelling house, larceny over $1500, receiving stolen goods over $1500, obtaining money under false pretenses over $1500, possession of a firearm without a license are all punishable by ten years in prison); §§ 11-5-2, 11-4-3, 11-5-1 (felony assault, assault with a dangerous weapon, second degree arson, assault with the intent to commit a specified felony are all punishable by twenty years in prison); §§ 11-23-2, 11-37-2, 11-37-8.2, 11-39-1, 11-4-2, 11-8-1 (first-degree murder, second-degree murder, first-degree sexual assault, first-degree child molestation, first-degree robbery, first-degree arson, and burglary are all punishable by life in prison). Some felony sentences fall between these parameters. For instance, a first conviction for drug possession of a drug other than marijuana carries a three-year penalty, a second conviction for possession of drugs carries a six-year penalty, and a third conviction for possession carries a nine-year penalty and manslaughter carries a thirty-year sentence. R.I. GEN. LAWS §§ 11-23-3, 21-2-8-4.01.

104. *Using The Benchmarks*, *in* R.I. R. SUPER. CT. SENTENCING

sentencing court, in an act of grace, suspends part, or all, of that sentence, it allows the defendant the chance to demonstrate that he or she can live safely in the community under prescribed conditions. The amount of time that the probationer should live under this supervision should be related to its efficacy. In other words, probationers should be monitored only during the period of time when they are likely to reoffend. In either of the two major studies analyzing the data related to rates of recidivism in America, a bell curve results: Within the first twelve months, recidivism occurs at a high rate for prisoners following their release from prison.[105] The graph below illustrates that the rate of arrests for new crimes or violations of probation decreases after a prisoner has been out of prison for twelve months or more—the curve of the bell flattens starkly between months twelve and thirty-six:[106]




BENCHMARKS.

105. MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, NCJ 244205, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 to 2010, at 1 & fig.1 (2014) [hereinafter RECIDIVISM OF PRISONERS], http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf.

106. *Id.*

These statistics suggest that once a probationer has completed three years of successful probation, it is very unlikely that he or she will reoffend, rendering further monitoring unnecessary. Many states recognize this, as twenty-seven other states impose a maximum probationary cap of five years or fewer in nearly every case[107]—a far cry from the five, ten, or even twenty-year probationary sentences regularly imposed in this state as a result of our instinctive bundling of the probationary and suspended terms. However, if the Supreme Court approves the rule changes recently recommended by the Superior Court, the sentencing landscape in Rhode Island may soon be altered for the better. In particular, by establishing a probation benchmark of three years for most felonies[108] and permitting the Court to terminate probation when certain conditions are met,[109] the proposals seek to challenge Rhode Island's reliance on disproportionately long probation sentences and provide some relief to qualifying individuals.

In addition to its lengthy probationary sentences, Rhode Island also places people on probation at an alarmingly high rate—the third-highest in the nation.[110] As a result, the pervasive problems with the probationary system likely affect over twenty-three thousand individuals in this state—one in every forty-four Rhode Islanders[111]—as well as their families. In the capital city, the rate is doubled: One in twenty-one Providence residents are currently under probation supervision.[112]

Even more troubling is the data showing that the probationary system has a disproportionate effect on the minority population. Currently, one in every six black adult males is under

107. LAWRENCE, *supra* note 101, at 7.

108. Order Soliciting Comments on Proposed Amendments, *supra* note 21, at 4.

109. *Id.* at 1–2.

110. ERINN J. HERBERMAN & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, NCJ 248029, Probation and Parole in the United States, 2013, at 16 app. tbl.2 (rev. Jan. 21, 2015), http://www.bjs.gov/content/pub/pdf/ppus13.pdf.

111. *Id.*; *see also* RI PROBATION AND PAROLE OFFENDERS LIVING IN RI COMMUNITIES AS OF 12-31-14, *supra* note 16, at 1, 6.

112. RI PROBATION AND PAROLE OFFENDERS LIVING IN RI COMMUNITIES, *supra* note 16, at 1, 6.

community corrections supervision in Rhode Island.[113] *One in six.* The Hispanic community fares only slightly better, with one in every fourteen adult males on probation.[114] Although comparatively lower, the percentage of adult, white males on probation—one in every thirty-four —is still unacceptably high.[115]

*1. Earned Compliance Credit Legislation*

As one of the central problems Rhode Island probationers face is the sheer length in years of probation,[116] other states and the federal system may serve as models for a more restrained probationary sentencing rubric, one that is better tailored to the efficient and effective monitoring of probationers. Several states have experimented with legislation designed to allow probationers to earn a reduction in the term (or sometimes the type) of community supervision attached to a sentence.[117] The logic behind such legislation is clear: It offers an incentive to probationers to refrain from further criminal activity and comply with the rules of community supervision.[118] Earned good time credit legislation has the added benefit of reducing the cost of corrections and lowering the caseload of overburdened probation officers.[119] The exact calculation of earned compliance credit, or earned good time credit, varies by state. Some states, like Missouri, allow for probationers to be fully discharged from their

113. RIDOC HISTORICAL OVERVIEW, *supra* note 6, at 1, 29.

114. *Id.*

115. *Id.*

116. Comparing Bureau of Justice Statistics regarding probationary sentences throughout the United States, with data from Rhode Island's Probation Department, the Council of State Governments found that Rhode Island felony probation terms were 53% longer than in other states. COUNCIL OF ST. GOV'TS: JUST. CTR., JUSTICE REINVESTMENT WORKING GROUP: FIRST MEETING 1, 16 (July 7, 2015), https://csgjusticecenter.org/wpcontent/uploads/ 2015/07/ RIWG1handout.pdf.

117. *See, e.g.*, MD. CODE ANN. CORR. SERVS. § 6-117 (West 2015) (reduces or ends active supervision of an individual placed on probation, parole, or mandatory release supervision; does not terminate, or end, the legal expiration of probation); MO. REV. STAT. § 217.703 (2014) ("[R]educ[ing] the term of probation, parole, or conditional release by thirty days for each full calendar month of compliance with the terms of supervision.").

118. *See, e.g.*, Alison Lawrence, *Justice Reinvestment in Missouri*, NAT'L CONF. ST. LEGISLATURES (Dec. 15, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/justice-reinvestment-in-missouri.aspx.

119. *Id.*

sentence due to earned compliance credit.[120] Other states, like Maryland, allow for reduced supervision rather than the full termination of the probationary sentence.[121]

Missouri's legislation, "reduce[s] the term of probation, parole, or conditional release by thirty days for each full calendar month of compliance with the terms of supervision."[122] Under the Missouri law, probationers are informed biannually of the time remaining on their probationary sentence after their earned compliance credit is calculated.[123] Probationers may be ordered discharged from their sentences as long as they have completed at least two years of supervision.[124] Certain types of defendants—those sentenced for violent crimes—are ineligible for earned compliance credits.[125] Other defendants—sentenced for involuntary manslaughter, second degree assaults, and some types of sex offenses—are eligible for good time credit but can be found ineligible to earn compliance credits upon motion of the sentencing court or prosecuting officer.[126] There are, of course, provisions for those who do not comply with probation rules, as well as those who reoffend or violate probation.[127]

Rhode Island would benefit by either enacting an earned

120. MO. REV. STAT. § 217.703.

121. MD. CODE ANN. CORR. SERVS. § 6-117. It is worth noting that legislative changes to the length of probationary sentences would likely need to take into consideration a recent ruling by the Rhode Island Supreme Court in *Rose v. State*, which determined that the original probationary sentence handed down by the sentencing judge was inviolable even by Department of Corrections good time sentencing regulations pertaining to good time credits awarded for prison time. *See* 92 A.3d 903, 911–912 (R.I. 2014). Sentencing in Rhode Island and elsewhere is a highly choreographed dance between branches, with the General Assembly defining the permissible range of sentences, the court proclaiming the sentence, and the executive implementing the sentence. *See* Mistretta v. United States, 488 U.S. 361, 364 (1989) (noting that "[h]istorically, federal sentencing—the function of determining the scope and extent of punishment—never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of three branches of Government."). It is no wonder, with those competing interests, that disputes between the branches about the exact parameters of sentencing power arise on occasion.

122. MO. REV. STAT. § 217.703.3.

123. *Id.* § 217.703.9.

124. *Id.* § 217.703.7.

125. *Id.* § 217.703.1(2).

126. *Id.* § 217.703.2.

127. *See id.* § 559.036(2)–(3) (Supp. 2014).

compliance credit scheme similar to Missouri's or adopting the Superior Court's proposed amendment to Rule 35 of its Rules of Criminal Procedure. As discussed above, a person should only be supervised on probation long enough to demonstrate that he or she is able to remain in the community safely. States that terminate probation early or impose a probationary cap—discussed more fully in the pages that follow—recognize this distinction, but Rhode Island courts continue to place men and women on probationary periods for long periods of time. These individuals are then subjected to the heightened behavior requirements and exposed to the broken revocation process for years longer than is necessary to protect public safety. The over-prescription of probation comes with a real cost to the tens of thousands of men and women who live within the system. Probation is not only expensive—an actively monitored probationer is subject to an "offender supervision" fee of twenty dollars a month[128]—but it also can require regularly scheduled, mandatory appointments with a probation officer.[129] For a low-income probationer with an inflexible employment schedule and/or no vehicle, these conditions are particularly burdensome.[130]

128. R.I. DEP'T OF CORR., ADULT PROB. & PAROLE, NOTICE: PROBATION AND PAROLE OFFENDER FEES (Mar. 17, 2008), http://sos.ri.gov/documents/archives/regdocs/released/pdf/DOC/5452.pdf.

129. *See*, *e.g.*, State v. Jones, 942 A.2d 982, 983 (R.I. 2008) (involving a defendant faced with a violation hearing "for failure to report to probation and to notify his probation officer of a change in address").

130. While special conditions of probation—such as substance abuse counseling, mental health treatment, domestic violence classes, and restitution payments—are often well-intentioned, these liberally-prescribed requirements often place an unrealistic strain on the budgets of low-income probationers. Failure to comply with these conditions of probation can result in serious consequences, evidenced by the fact that over one-third of all incarcerated violators have been sentenced on a technical petition, meaning that he or she has not complied with one of the general rules of probation, such as failing to report to the probation officer, leaving the state without permission, or failing to complete a special condition. *See* RIDOC HISTORICAL OVERVIEW, *supra* note 6, at 19. As discussed in Part I, even a short sentence on a technical violation can result in the loss of employment or housing, which leaves the probationer in far worse financial straits once released from prison, therefore making it increasingly difficult to comply with probation's requirements. Many probationers end up trapped in this vicious cycle as short sentences accumulate into years of incarceration, all based on a probationer's inability—for reasons financial or otherwise—to comply with the technical demands of probation.

### *2. Placing Limits on Probationary Sentences*

Unlike Rhode Island, most states have placed relatively short statutory maximums on the length of probation periods, limiting felony supervision (with the exception of sex crimes) to between three and ten years.[131] According to the National Council of State Legislatures, at least eighteen states have limited probation to five years in length, and nine states have limits that vary based on the offense or the class of offense.[132]

Like the twenty-seven other states that cap probationary terms, the federal system also employs a relatively restrained community supervision sentencing regime where all supervision—aside from certain sex, drug trafficking, and terrorism cases—is capped at five years.[133] The federal model offers one example of a sentencing system that curtails the length of probationary supervision while still respecting public safety concerns and data about when probationers tend to reoffend. Rhode Island imposes probationary terms in almost all sentences handed down by the District and Superior Courts.[134] Like Rhode Island, supervision is also imposed in most federal cases but the federal system uses two separate terms to describe the supervision: supervised release and probation. Supervised release refers to supervision imposed upon defendants after they serve a prison sentence.[135] Probation, in the federal scheme, constitutes supervision imposed when no prison sentence is handed down.[136] In both situations, the length

131. LAWRENCE, *supra* note 101, at 7. Some states require that probationary sentences be imposed rather than incarceration for certain types of crimes. For instance, mandatory probationary sentences are required in Kansas and Minnesota for some offenders. *Id.* In other states, probation is mandated as a sentence for certain crimes, with a narrow exception when the defendant is considered unsafe to supervise in the community. *Id.*

132. *Id.*

133. 18 U.S.C. §§ 3561(c), 3583(b) (2012).

134. Probation is included in sentences of straight probation, probationary sentences running with suspended prison time, and probationary sentences running at the same time, and after, prison terms are imposed. *See*, *e.g.*, State v. Dantzler, 690 A.2d 338, 339 (R.I. 1997). As noted above, Rhode Island has the third highest rate of people on probation, per 100,000 residents, in the United States. *See* HERBERMAN & BONCZAR, *supra* note 110, at 16 app. tbl.2.

135. *See* 18 U.S.C. § 3583(a).

136. *See id.* § 3561.

of supervision a sentencing judge may impose is governed by sentencing guidelines and federal law.[137] No supervised release sentence or sentence of probation exceeds five years, except for certain sex offenses, drug trafficking, and terrorism offenses.[138] For instance, for class C and class D felonies—which carry statutory maximum penalties up to twelve years and up to six years, respectively—the term of supervised release imposed must be three years or less.[139] For class A and B felonies—those which carry statutory maximum penalties of life in prison and twenty-five years, respectively—the supervised release term must be five years or less (except for certain types of sex offenses, drug trafficking, and terrorism offenses).[140]

These limited probationary regimes throughout the fifty states and the federal government stand in stark contrast to Rhode Island's lengthy terms of probation. Practitioners from different parts of the state's criminal justice system have pointed out that criminal defendants in Rhode Island often trade shorter prison sentences for longer probationary terms, leading to a cultural acceptance of long probationary sentences.[141] However, making changes to the probationary scheme in Rhode Island (such as capping the length of probation for certain categories of crimes, as recently proposed by the Superior Court) could refocus the entire criminal justice community on the true purposes of probation. Judges and attorneys—both prosecution and defense—might no longer view the imposition of lengthy probationary sentences as part of the status quo of the Rhode Island sentence

137. *See, e.g.*, *id.* §§ 3561, 3583.

138. *See, e.g.*, *id.* § 3583(k) (certain offenses involving minors); 21 U.S.C. § 841(b)(1)(A)–(C) (describing mandatory minimum supervised release sentences for drug trafficking offenses); U.S. SENTENCING GUIDELINES MANUAL § 5D1.2(b) (U.S. SENTENCING COMM'N 2014) (allowing up to lifetime supervised release for certain terrorism crimes or any sex offense).

139. 18 U.S.C. § 3583(b)(2).

140. *Id.* § 3583(b)(1).

141. Rhode Island has a relatively low incarceration rate compared to other states. The Bureau of Justice Statistics ranks Rhode Island's incarceration rate in the middle thirty-nine of states in terms of sentenced prisoners per 100,000 of population. *See* E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, NCJ 247282, 7 tbl.6 (rev. Sept. 30, 2014), http://www.bjs.gov/content/pub/pdf/p13.pdf. This means Rhode Island is neither among the five lowest states in incarceration rate, nor among the five highest states in incarceration rate. *See id.*

bargaining system; instead, we all might see that our unnecessarily long probationary terms are an anomaly in the American criminal justice system signifying a deviation from fair and efficient sentencing practices.

In the same vein, the Superior Court's recent recommendation to set a probation benchmark sentence of three years for non-violent felony offenses[142] is a major step forward. Adopting this proposal would lead to increased consistency in probationary sentencing, while taking into account public safety and law enforcement concerns. As nearly all re-offenses occur within the first three years of a probationary period,[143] a probationary sentence of ten, fifteen, or even twenty-five years is needlessly excessive, punitive, and inefficient. A three-year cap, on the other hand, would conserve resources and allow probation officers more time to focus on their higher-risk clients.[144] Indeed, imposing probationary term limits could be a practical fix to the problem of ineffectively long probationary sentences—and one that may be fairly simple to accomplish in Rhode Island.[145]

142. Order Soliciting Comments on Proposed Amendments, *supra* note 21, at 4.

143. *See* RECIDIVISM OF PRISONERS, *supra* note 105, at 1 & fig.1.

144. The effect of the Superior Court's Benchmark 37 will be directly proportional to how many people fall within its ambit. One potential weakness of the proposed benchmark is that many felony offenses are disqualified from consideration. For example, the Benchmark 37 does not apply to cases where no-contact orders or restitution are imposed, thereby excluding most domestic-related offenses, most financial crimes, and many theft offenses from the three-year probation cap. *See* Order Soliciting Comments on Proposed Amendments, *supra* note 21, at 4. Rather than excluding these types of cases entirely, it might be more efficacious to allow the imposition of a no-contact order or a restitution order to be a factor to consider when making a departure from the three-year benchmark. Similarly, more narrowly defining those offenses excluded from the benchmark because they meet the definition of a "crime of violence" would broaden the reach of the benchmark and extend its applicability to, for instance, some types of felony assaults and breaking and entering offenses which are barred in the current proposal.

145. Separation of powers arguments have been implicated in recent legislation regarding sentencing. If the probationary benchmark sentences were created by court committee, the benchmarks would necessarily be discretionary guidelines rather than mandatory sentencing rules and, as such, would not interfere with the General Assembly's constitutional prerogative to define criminal offenses and their punishments and to regulate the imposition and execution of sentences, including the parameters for the suspension and execution of sentences of imprisonment. State v. Monteiro,

## CONCLUSION

At its best, probation provides certain offenders the opportunity to accept responsibility for past wrongdoings in a rehabilitative environment, where they can be monitored and counseled as they seek employment, support their families, and attempt to distance themselves from their criminal past. However, as discussed in this Article, Rhode Island's probationary system has failed to function as intended, resulting in the costly incarceration of too many of its residents. Too often, otherwise productive citizens collapse under inordinately long sentences that are imposed in a one-sided violation scheme, while others, like Dennis, end up with life-long criminal records due to minor mistakes. Like the eponymous sailor in Samuel Taylor Coleridge's *The Rime of the Ancient Mariner*, these probationers are unable to free themselves from the weight of their past transgressions until long after they have suffered unnecessarily.

Unlike the doomed mariner, however, there is hope for the probationers of Rhode Island. We are encouraged by the interest in reform that has been expressed in the wake of the Mass Incarceration Symposium, and as public defenders, we look forward to collaborating with the various stakeholders working to create a fair and efficient offender rehabilitation system, which would benefit all Rhode Islanders.

924 A.2d 784, 793 (R.I. 2007); State v. Tucker, 747 A.2d 451, 454–55 (R.I. 2000).