

2015

# The Burdens of Leniency: The Changing Face of Probation

Ronald P. Corbett Jr.

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Corbett, Ronald P. Jr., "The Burdens of Leniency: The Changing Face of Probation" (2015). *Minnesota Law Review*. 267.  
<https://scholarship.law.umn.edu/mlr/267>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## Article

# The Burdens of Leniency: The Changing Face of Probation

Ronald P. Corbett, Jr.<sup>†</sup>

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.<sup>1</sup>

## I. PROLOGUE: CASES IN POINT

### A. THE WOMAN WHO LOVED PLANES

On August 13, 2014, Marilyn Jane Hartman, age sixty-two, a probationer in Los Angeles, was sentenced to 177 days in jail for violating her probation terms.<sup>2</sup> Her violation was wandering around the Los Angeles Airport.<sup>3</sup> She had been placed on probation for previously sneaking onto a Southwest Airlines flight without a ticket.<sup>4</sup> She had made a number of previous attempts

---

<sup>†</sup> Ronald P. Corbett, Jr., Ed.D., is Director of the Probation Revocation Project, Robina Institute, University of Minnesota Law School and a Lecturer at the School of Criminology and Justice Studies, University of Massachusetts Lowell. The ideas contained in this Article are a product of nearly daily conversations with wonderful colleagues at the Robina Institute and UMass/Lowell, whose scholarly fellowship never fails to stimulate and clarify my thinking. I thank them all. Copyright © 2015 by Ronald P. Corbett, Jr.

1. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

2. Matt Hamilton, *Plane Stowaway Gets Jail for Probation Violation*, ASSOCIATED PRESS (Aug. 13, 2014), [http://www.apnewsarchive.com/2014/Plane\\_stowaway\\_gets\\_jail\\_for\\_probation\\_violation/id-f56fcab299124b2382f2720e9a6cb89e](http://www.apnewsarchive.com/2014/Plane_stowaway_gets_jail_for_probation_violation/id-f56fcab299124b2382f2720e9a6cb89e).

3. *Id.*

4. *Id.*

to sneak onto airplanes.<sup>5</sup> There was no indication that she had any intent other than a joyride in the sky.<sup>6</sup>

#### B. BUT WHAT IF I'M OUT OF BLOOD?

Augusta, Georgia, 2014—Tom Barrett is a former pharmacist who developed a severe alcohol and drug problem.<sup>7</sup> Down and out, he shoplifted a \$2 can of beer.<sup>8</sup> For this offense, he was placed on probation with an order for electronic monitoring, at a cost of \$12 per day, plus the cost of installation of a dedicated telephone line in his home.<sup>9</sup>

Barrett's only income included food stamps and selling his own blood, so he fell behind in his payments.<sup>10</sup> His probation officer said that each time his money owed reached \$500, he would be sent to jail.<sup>11</sup> Without the money to pay more than \$400 monthly, he was incarcerated on three occasions for a total of over sixty days.<sup>12</sup>

A 1983 Supreme Court decision, *Bearden v. Georgia*, ruled that people on probation cannot be jailed if they cannot afford to pay financial sanctions.<sup>13</sup> Evidently, the Georgia court system didn't get the memo.

#### C. ANYBODY KNOW WHAT TIME IT IS?

In 2014, Kelli Martin of Tarrant County, Texas, supervisor of the Research Unit of Tarrant County Community Supervision and Corrections, explained to the *Star-Telegram* newspaper that a new program developed for problem offenders included a rule that any probationer who is one minute late for a court-ordered activity is brought immediately before a judge and sentenced to two days in jail.<sup>14</sup> A second-time offense re-

---

5. *Id.*; see also Henry K. Lee, *SFO Habitue Marilyn Hartman Arrested Yet Again*, SFGATE (Apr. 9, 2014), <http://blog.sfgate.com/crime/2014/04/09/sfo-stowaway-marilyn-hartman-arrested-for-6th-time>.

6. See Hamilton, *supra* note 2.

7. Joseph Shapiro, *Measures Aimed at Keeping People Out of Jail Punish the Poor*, NPR (May 24, 2014), <http://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor>.

8. *Religion and Ethics Newsweekly: Probation for Profit* (PBS television broadcast Aug. 29, 2014), available at <http://video.pbs.org/video/2365315028>.

9. *Id.*; Shapiro, *supra* note 7.

10. *Religion and Ethics Newsweekly: Probation for Profit*, *supra* note 8; Shapiro, *supra* note 7.

11. *Religion and Ethics Newsweekly: Probation for Profit*, *supra* note 8.

12. *Id.*; Shapiro, *supra* note 7.

13. *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983).

14. Mitch Mitchell, *In Tarrant County, It's Probation with Some Pop*, STAR-TELEGRAM (Aug. 6, 2014, 10:02 PM), <http://www.star-telegram.com/>

sults in a sentence of four days in jail.<sup>15</sup>

#### D. OVERVIEW OF ARTICLE

It wasn't always this way. In the balance of this Article I will examine the role and impact probation has in the criminal justice system, along with trends over time in the philosophy and practice of probation. Special attention will be given to the social and economic disparities that exist between the agents of the state and the subjects of their control, a social distance that compromises the ability to fashion sentences that are at once proportional to the offense and feasible to comply with. In the latter section of the Article, the current climate which has created new openings for reform will be discussed, along with some new ideas for creating a more just and effective system.

## II. WHY PROBATION MATTERS

### A. SHEER NUMBERS, COSTS, OPPORTUNITIES, AND POTENTIAL RISK

The American correctional system is divided into two main branches. The institutional branch is comprised of prisons and jails, and the community side includes probation (supervision as an alternative to incarceration) and parole (supervision following incarceration). By far, the domain responsible for the greatest number of offenders under correctional control is probation.

At the end of 2013, the total number of offenders under any form of correctional control was 6.9 million.<sup>16</sup> Of that number, nearly 4.8 million offenders were under supervision in the community, and, of those, just under 4 million were on probation.<sup>17</sup> Of the entire correctional population, 57% were the responsibility of probation departments throughout the country.<sup>18</sup>

The growth in prison populations has been much commented on and has been the focus of many criminologists.<sup>19</sup> So-

---

news/local/crime/article3868349.html.

15. *Id.*

16. LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 248479, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013, at 1 (2014), available at <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>.

17. *Id.* at 2 (likening this number to about eight in ten offenders under community supervision).

18. *Id.*

19. See, e.g., Matthew DeMichele, *Studying the Community Corrections Field: Applying Neo-Institutional Theories to a Hidden Element of Mass Social*

cial science research rarely attracts much notice beyond the scholarly community, but the dimensions of the problem as covered in Michelle Alexander's book titled *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*<sup>20</sup> were widely reviewed and discussed in the popular press.<sup>21</sup>

The facts are daunting. In 2008, the Pew Center on the States reported that for the first time more than one in one-hundred Americans were incarcerated.<sup>22</sup> The dramatic announcement, in its fearful symmetry, seemed to open up entirely new and urgent discussions about the role prisons were playing in American life. In the quarter century leading up to 2009, the number of Americans incarcerated grew by 274%, which translated into 2.3 million behind bars.<sup>23</sup> In 1982, those who were incarcerated represented 28% of the overall correctional population. By 2007, that proportion had increased to 31%.<sup>24</sup>

What was lost or ignored in the coverage of the state crises with prisons was an even larger growth in absolute numbers in the community corrections sector of the correctional system—probation and parole. As an aside, it seems that public familiarity with these components declines as the number of offenders involved increases—a paradoxical effect. Little is known by the general public about probation—how it is run, whom it supervises and with what kind of restrictions, or what level of success it achieves.<sup>25</sup> By comparison, the subject of prison is a strong presence in popular culture, being the central subject matter of many movies (*Each Dawn I Die*, *Escape from Alcatraz*, *Cool Hand Luke*, and *The Shawshank Redemption* are just

---

*Control*, 18 THEORETICAL CRIMINOLOGY 546 (2014); John E. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547 (2008).

20. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

21. See, e.g., Jennifer Schuessler, *Drug Policy As Race Policy: Best Seller Galvanizes the Debate*, N.Y. TIMES (Mar. 6, 2012), <http://www.nytimes.com/2012/03/07/books/michelle-alexanders-new-jim-crow-raises-drug-law-debates.html>; Bill Frezza, *Is Drug War Driven Mass Incarceration the New Jim Crow?*, FORBES (Feb. 28, 2012, 1:17 PM), <http://www.forbes.com/sites/billfrezza/2012/02/28/is-drug-war-driven-mass-incarceration-the-new-jim-crow>.

22. THE PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 4 (2009), available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2009/PSPP1in31reportFINALWEB32609pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2009/PSPP1in31reportFINALWEB32609pdf.pdf).

23. *Id.*

24. *Id.*

25. Shadd Maruna & Anna King, *Public Opinion and Community Penalties*, in ALTERNATIVES TO PRISON: OPTIONS FOR AN INSECURE SOCIETY 83, 83–112 (Anthony Bottoms et al. eds., 2004).

a few examples),<sup>26</sup> television shows (*Lockup*, *Oz*),<sup>27</sup> and popular songs (“Folsom Prison Blues,” “Midnight Special,” “Wings of an Angel”).<sup>28</sup> Almost nothing of the kind exists with regard to community supervision. This is surprising because the daily practice of probation presents a dramatic tableau with all of the variety and narrative potential as a police procedural. This long-standing inattention has led many experienced probation officers to refer to probation as “the real Secret Service.”<sup>29</sup>

Despite its lack of notoriety, the increase in the number of Americans under supervision in the community was equally impressive, breaking the five-million-and-counting barrier by 2006, at which time one in every fifty-three Americans was on probation.<sup>30</sup> (In the last several years, the numbers on probation have declined.)<sup>31</sup> Despite probation leading the pack in terms of an increase in absolute numbers, and a steady growth in expenditures, in a sample of states the increase in new appropriations for prisons dwarfed the growth in new spending for probation and parole—by a factor of seven.<sup>32</sup>

But probation’s importance goes beyond its sheer size—its significance is amplified by the fact that each of its charges, on any given night in America, is at home and in the community with at least some degree of freedom of movement (depending on the restrictions imposed) and is a potential threat to the peace and safety of neighborhoods. Unlike those who are locked up, and despite their being under government control, the pos-

---

26. COOL HAND LUKE (Jalem Productions 1967); EACH DAWN I DIE (Warner Bros. 1939); ESCAPE FROM ALCATRAZ (Paramount Pictures & The Malpasco Company 1979); THE SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994). Descriptions of these movies may be found at <http://www.imdb.com>.

27. *Lockup* (MSNBC television broadcast); *Oz* (HBO television broadcast). Descriptions of these TV shows may be found at <http://www.imdb.com>.

28. JOHNNY CASH, *Folsom Prison Blues*, on JOHNNY CASH WITH HIS HOT AND BLUE GUITAR (Sun Records 1957); LEAD BELLY, *Midnight Special*, on SHOUT ON: LEAD BELLY LEGACY VOL. 3 (Smithsonian Folkways Recordings 1998); MIKE BLOOMFIELD, *Wings of an Angel*, on PRESCRIPTION FOR THE BLUES (Fabulous 2005). Recordings of these songs may be found at <http://www.youtube.com>.

29. See, e.g., Bethany Bruner, *Sitting at Desks Just Part of Probation Officer’s Job*, NEWARK ADVOC. (Nov. 8, 2014, 7:55 PM), <http://www.newarkadvocate.com/story/news/local/2014/11/08/sitting-desks-just-part-probation-officers-job/18734135>.

30. ERINN J. HERBERMAN & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 248029, PROBATION AND PAROLE IN THE UNITED STATES, 2013, at 3 (2014), available at <http://www.bjs.gov/content/pub/pdf/ppus13.pdf>.

31. *Id.*

32. THE PEW CTR. ON THE STATES, *supra* note 22, at 11.

sibility that these five million offenders on conditional release might commit new crimes is real and must be reckoned with. Not so for those behind bars. As the late Ben Wattenberg, conservative commentator and writer, offered in defense of prison: A felon behind bars “can’t mug your sister.”<sup>33</sup>

No such guarantee can be made for probationers. In a 2000 study of 1700 probationers in Michigan, during a follow-up period 13% of all probationers were reported as having committed a new crime.<sup>34</sup> When isolating to crimes committed by felons on probation, studies report a significantly higher re-arrest rate.<sup>35</sup> In studies done in Kentucky and Missouri, rates of re-arrest for felons were found in the 22–23% range over a forty month follow-up period.<sup>36</sup> If non-compliance with standard requirements of probation are included (commonly referred to as “technical” violations), unsuccessful outcomes loom larger, reaching up to 50%.<sup>37</sup> These failure rates take on greater significance for communities when they are reckoned against the large number of probationers—as was mentioned above, nearly four million across the United States.<sup>38</sup>

On the positive side, the majority of probationers (a large group) navigate their way through this period of supervision without significant difficulty. Because the option of probation exists, millions of offenders can avail themselves, if they choose to, of all the positive forces that can mitigate future offending—family ties, continuing education, employment, and substance abuse and mental health treatment, along with an additional array of benefits (e.g., social and civic enhancement) that do not accrue in anywhere near the same degree to inmates.<sup>39</sup> From the perspective of the probationer, it is an opportunity to continue to access the benefits of a free, beneficial society, provided

---

33. Paul Starr, *Restoration Fever*, AM. PROSPECT, Mar.–Apr. 1996, at 10, available at <http://prospect.org/article/restoration-fever> (internal quotation mark omitted).

34. EDWARD J. LATESSA & PAULA SMITH, CORRECTIONS IN THE COMMUNITY 36 (2011).

35. *Id.* (reviewing research showing 67% re-arrest and 51% new conviction rates for felons on probation in California).

36. *Id.* at 36–37.

37. *Id.* at 27–28.

38. *See supra* note 17 and accompanying text.

39. *See, e.g.*, Stephen M. Gavazzi et al., *Global Risk Factors and the Prediction of Recidivism Rates in a Sample of First-Time Misdemeanant Offenders*, 52 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 330, 340–43 (2008); Eva Mulder et al., *Risk Factors for Overall Recidivism and Severity of Recidivism in Serious Juvenile Offenders*, 55 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 118, 129–30 (2011).

there is a willingness to be accountable in the ways that a term of probation requires.

Every sentence of probation, therefore, is an opportunity and a gamble, with the stakes being individual rehabilitation against public safety. Are the odds of reoffending low enough that the benefits that accrue through community supervision are sufficient to outweigh the risk? I will return to this topic in a later section.<sup>40</sup>

#### B. COST TO THE TAXPAYER

Probation is truly the low-cost option in corrections—or so it would appear at first glance. While estimates vary from state to state, the Pew Center on the States reports that, on average, the daily cost of supervising a probationer is \$3.42, against the daily cost of \$78.95 for incarcerating a prisoner.<sup>41</sup> Looked at from a purely fiscal point of view, this startling discrepancy is, in some respects, fortunate. Given probation's overwhelming dominance in its population served, states already struggling to meet the costs of running prisons would (without incurring great opportunity costs related to underfunding a variety of other state services) be thrown into complete fiscal chaos without this low-cost option for so many offenders. In the year 2008, spending on corrections increased by a greater annual percentage than spending in any other major sector of government.<sup>42</sup> In the two decades prior to 2009, it was second only to Medicaid in terms of growth over time in expenditures.<sup>43</sup>

The costs of building and maintaining bricks-and-mortar facilities, feeding, clothing, providing health services, and administering round-the-clock surveillance and control make prisons extraordinarily expensive enterprises. Consequently, about 90% of public monies are devoted to running institutions, while the community branch of corrections—responsible for 60% of the correctional population—receives just 10% of the funding.<sup>44</sup> One has to wonder about this allocation from a cost/benefit perspective. If the best chance of diverting an offender from a life of crime presents itself early in a criminal career, wouldn't a more prudent investment strategy reallocate

---

40. See *infra* Part III.D.

41. THE PEW CTR. ON THE STATES, *supra* note 22, at 13.

42. *Id.* at 11.

43. *Id.*

44. See *id.*; Solomon Moore, *Prison Spending Outpaces All But Medicaid*, N.Y. TIMES (Mar. 2, 2009), <http://www.nytimes.com/2009/03/03/us/03prison.html>.

funds to beef up the front end of the correctional pipeline, thereby increasing the chances that the cost to society in continued victimization and subsequent incarceration would be averted? One obvious response to this question might be that we can't underfund institutions because they are needed to contain the worst among the offender population—those who commit predatory violent crimes and chronic property crimes—but this is a hard argument to sustain if upwards of 50% of prison inmates are drug offenders.<sup>45</sup>

In this financial context, probation matters because if the job is not done well, in addition to reoffending and all the personal, social, and governmental costs that ensue from that, more offenders will face the high-cost alternative—prison. In fact, the numbers of probationers who have their community sentences revoked have increased dramatically in recent years.<sup>46</sup> This increase has contributed to rising costs and swelling prison populations.<sup>47</sup> The reasons behind this increase will be explored later in the paper.<sup>48</sup>

### III. THE ARC OF PROBATION: 1841–2015

How can people be so heartless?

How can people be so cruel?

Easy to be hard,

Easy to be cold

—From the musical *Hair*<sup>49</sup>

On Court Street in Boston, a plaque is affixed to a school department building, commemorating the work done on that spot (the location in the mid-1800s of the Boston Police Court) by John Augustus,<sup>50</sup> widely acknowledged to be the “Father of Probation.”<sup>51</sup> It reads as follows:

---

45. See, e.g., *Offenses*, FED. BUREAU PRISONS, [http://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) (last updated Feb. 21, 2015) (showing that 48.7% of federal offenders currently incarcerated were imprisoned for drug offenses).

46. THE PEW CTR. ON THE STATES, WHEN OFFENDERS BREAK THE RULES: SMART RESPONSES TO PAROLE AND PROBATION VIOLATIONS 3 (2007), available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2007/when20offenders20break20the20rulespdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2007/when20offenders20break20the20rulespdf.pdf).

47. See *supra* notes 22–24, 41–43 and accompanying text.

48. See *infra* Part III.D.

49. LYNN KELLOGG, *Easy To Be Hard, on HAIR* (THE ORIGINAL BROADWAY CAST RECORDING) (BMG Music 1988).

50. See Barbara F. Berenson, *Ghosts of the Civil War*, BOS. GLOBE (Nov. 27, 2011), <http://www.bostonglobe.com/opinion/2011/11/27/ghosts-civil-war/esHd3MEiDMa4jXhDPL2HQK/story.html>.

51. *History of Probation*, NYC DEP'T PROBATION, <http://www.nyc.gov/>

John Augustus—Moved by the plight of the unfortunate in the jails and prisons of his day, a humble Boston shoemaker began a great movement in the reformation of offenders, when in 1841 he took from the court for a period of probation one who, under his care and with his friendship, became a man again . . . .<sup>52</sup>

Thus probation began. This plaque, affixed in 1941, on the centenary of Augustus's work,<sup>53</sup> is transparent in terms of the underlying philosophy of Augustus's approach, still celebrated in Boston one hundred years later. A simple content analysis provides insight into the founder's intent and philosophy: "plight," "unfortunate," "reformation," "care," "friendship," and "became a man." These simple terms confirm that Augustus was an unreconstructed correctional liberal in his approach to offenders, and this philosophy predominated the field into the 1970s.

Augustus's philosophy fits nicely with the orientation of the Progressives, who put a more social scientific gloss on probation, introducing a "medical model" approach more in tune with the growing disciplines of psychology and psychiatry.<sup>54</sup> But the use of new terminology, with probationers seen as "clients," needing assessment and treatment plans, was a difference in discourse more than a change of philosophy.<sup>55</sup> Probationers need help and assistance, in the Progressive view, to be provided by a corps of university-trained social workers.<sup>56</sup>

As sociologists became more interested in penology in the 1960s, the perspective again shifted in terms of nomenclature and emphasis (now more on the social structures and conditions that produced disadvantage and promoted offending).<sup>57</sup> Still, offenders were the focus of attention and concern, particularly those kept in institutions which were then seen as wholly annihilative of the prospect of rehabilitation. This continued in-

---

[html/prob/html/about/history.shtml](http://prob/html/about/history.shtml) (last visited Apr. 3, 2015).

52. A photograph of the plaque may be found at *File: Boston Public Schools HQ John Augustus Plaque.JPG*, WIKIMEDIA COMMONS, [http://commons.wikimedia.org/wiki/File:Boston\\_Public\\_Schools\\_HQ\\_John\\_Augustus\\_plaque.JPG](http://commons.wikimedia.org/wiki/File:Boston_Public_Schools_HQ_John_Augustus_plaque.JPG) (last visited Apr. 3, 2015).

53. *See id.*

54. *See* EDWARD W. SIEH, COMMUNITY CORRECTIONS AND HUMAN DIGNITY 59 (2006).

55. *See id.*; Doris Layton MacKenzie, *Probation and Parole: History, Goals, and Decision-Making*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1210, 1212 (Joshua Dressler ed., 2002), available at <http://www.encyclopedia.com/doc/1G2-3403000205.html>.

56. *See* MacKenzie, *supra* note 55, at 1210, 1212.

57. *See* TODD R. CLEAR & NATASHA A. FROST, THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA 15, 54–60 (2014).

to the 1970s.<sup>58</sup> Jonathan Simon mentions the example of California, which he claims was the most forward-thinking state in the nation with respect to correctional philosophy.<sup>59</sup> “Rehabilitation” was king, and all the resources of the institutions were directed toward reclaiming the offender for a satisfying and purposeful life.<sup>60</sup>

And then things changed. In a matter of just a few years, rehabilitation was replaced by punishment, deterrence, and public safety as the new priorities of the correctional system.<sup>61</sup> Given the varieties of factors at play in determining social policy at any one time in history, it is impossible to point with certainty to one or two factors that caused this turnaround in thinking. Among the nominees as leading causal factors are the rise in violent crime in the '70s and beyond, and the effects of highly publicized prison riots in two high-profile states (New York at Attica and California at San Quentin) which brought the issue of the state of prisons and the behavior of prisoners to the attention of the public and its elected officials, with the latter group quickly realizing that a “tough on crime and criminals” stance would resonate with voters.<sup>62</sup>

This trend was certainly strengthened by an apparent turnaround in the findings of social science. Robert Martinson, a researcher for the State of New York, published a large study of the effectiveness of rehabilitative programs entitled *What Works?—Questions and Answers About Prison Reform*.<sup>63</sup> The answer Martinson reached to the question raised in the title was widely (and somewhat inaccurately) read as “Nothing Works.”<sup>64</sup> Thereafter, social science—despite its long history of supporting treatment models for offenders—was used as evidence of a mistaken investment in rehabilitation.<sup>65</sup> The claim was credible because it came from an unlikely source: a social scientist. Martinson didn't hedge: he referred in a 1976 article to probation as “a kind of standing joke” and quickly became the darling of those who were ready for a crack-down.<sup>66</sup>

---

58. *Id.*

59. JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 18 (2014).

60. *See id.* at 25.

61. *See, e.g., id.* at 18.

62. *See* CLEAR & FROST, *supra* note 57, at 57–62.

63. Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974).

64. *See id.* at 48–50.

65. CLEAR & FROST, *supra* note 57, at 56, 63–64.

66. *Id.* at 91.

And the crack-down came. Todd Clear and Natasha Frost, in their 2014 treatment of recent correctional policy and practices, point to a number of specific changes in criminal justice practice which added width and depth to this new conservatism.<sup>67</sup> Examples include the war on drugs, a shift away from indeterminate to determinate sentencing, and increases in both the number of offenders imprisoned and the length of those terms.<sup>68</sup> These last two factors implicate the “Iron Law of Prison Populations,” which envisions the size of the prison population as a function of the increase in those incarcerated and the lengthening of prison terms.<sup>69</sup> It was this dynamic that powered the prison overcrowding crises and the related charges of “mass incarceration.”<sup>70</sup>

#### A. AND AUGUSTUS WEPT

How was the new punitiveness reflected in probation practice? As a government organization, depending upon the support of legislators for adequate appropriations for responsible operations, no probation administrator could afford to ignore the shifting political winds. Accordingly, probation departments around the country raced to take on the look and feel and accoutrements of a “get tough” agency.<sup>71</sup> This transformation was reflected in three major areas—supervision, philosophy, and practice generally; increased requirements on probationers; and greater rates of revocation (the ending of probation and the incarceration of the probationer for violating the terms of supervision).<sup>72</sup>

#### B. CHANGE IN THEORY-OF-PRACTICE

Perhaps the earliest and most widely hailed change appeared in the form of Intensive Supervision Programs (ISPs) for high-risk offenders.<sup>73</sup> Although originally designed (by Stanford’s Joan Petersilia and others) as a balanced approach, with an equal emphasis on surveillance and treatment, in practice it was the surveillance and accountability piece that was emphasized.<sup>74</sup> Probation officers, whose previous mediums were coun-

---

67. *See id.* at 71–112.

68. *Id.*

69. *Id.* at 160.

70. *Id.* at 17.

71. *See id.* at 62, 157.

72. *Id.* at 91, 155–57.

73. *See id.* at 91–93.

74. *See id.*

seling meetings and treatment referrals, now took to the streets in an effort to watch their charges more closely so as to discover infractions more readily.<sup>75</sup> As Yogi Berra, former New York Yankee and noted sage, suggested, “[Y]ou can observe a lot just by watching,”<sup>76</sup> and probation officers did, very predictably uncovering more violations by increasing their periods of “watching.”<sup>77</sup>

### C. INCREASED REQUIREMENTS PLACED ON PROBATIONERS

Dan Beto is a retired former Probation Director, having headed two different county departments in Texas.<sup>78</sup> Following his time as a practitioner, he ran the Correctional Management Institute of Texas, dedicated to training corrections officials for leadership and housed at Sam Houston State University.<sup>79</sup> He is widely published on all matters probation and is a Past-President of the National Association of Probation Executives.<sup>80</sup> In a recent interview, Beto offered the following comments on changes in the imposition and enforcement of probation conditions:

When I became a probation officer in 1968, offenders placed on probation typically had to adhere to relatively few standard conditions of probation. Over the years we have witnessed the growth in the number of special conditions of probation, and now it is not uncommon for offenders to be saddled with up to a couple of dozen. And many of these conditions now have a financial obligation attached to them. . . .

It is also my sense that the imposition and enforcement of probation conditions has become more punitive in nature, and I think much of that may be attributed to the type of persons we are attracting to the probation profession. And, to a degree, to those occupying the bench. I’m afraid that many judges impose conditions of probation because of personal biases and because they want to be in vogue, and not because they are necessary or relate to offender risk factors or needs.<sup>81</sup>

A number of researchers support Beto’s perspective. Dale Parent believes that offenders are being subjected to a greater number of release conditions than in the past as way to promote probation’s credibility as comporting with the new

---

75. *Id.* at 92.

76. ALLEN BARRA, YOGI BERRA: ETERNAL YANKEE, at xxxv (2009).

77. CLEAR & FROST, *supra* note 57, at 92.

78. *Governing Board*, TRCPI, <http://www.cjcenter.org/trcpi/cops3.htm> (last visited Apr. 3, 2015).

79. *Id.*

80. *See id.*

81. E-mail from Dan Beto, Chair, Int’l Comm. of the Nat’l Ass’n of Probation Execs., to author (Sept. 13, 2014, 18:39) (on file with author).

punitiveness.<sup>82</sup> Todd Clear and Natasha Frost point to the increased imposition of special conditions in recent times, also attributing them to the public's expectation for a greater emphasis on punishment.<sup>83</sup> Cecelia Klingele, in her 2013 article *Rethinking the Use of Community Supervision*, offers the following observation: "While often reasonable when considered individually, in the aggregate, the sheer number of requirements imposes a nearly impossible burden on many offenders."<sup>84</sup>

What are these requirements that typically are imposed? Conditions imposed on probationers fall into two categories: general or standard conditions, which lay out basic obligations imposed on all probationers (e.g., refrain from breaking the law, report to your probation officer as requested, do not leave the state without permission)<sup>85</sup> and special conditions, tailored to the circumstances of each case (e.g., drug testing and treatment, curfews, restraining orders).<sup>86</sup> In a sample of state probation contracts obtained for this Article,<sup>87</sup> the number of standard conditions ran from a low of seven to a high of twenty-four. The average was in the mid-teens. Standards conditions included such matters as reporting, when required, to a probation officer, not violating any laws, notifying the officer of any change of residence, supplying a DNA sample, allowing the probation officer to visit at home with or without notice, avoid-

---

82. See DALE G. PARENT ET AL., OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, RESPONDING TO PROBATION AND PAROLE VIOLATIONS 25 (1994), available at <https://www.ncjrs.gov/pdffiles1/Digitization/149473NCJRS.pdf> ("[A]bsconders . . . threatened the credibility of community supervision.").

83. CLEAR & FROST, *supra* note 57, at 1–3, 91–99.

84. Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1035 (2013).

85. THE PEW CTR. ON THE STATES, *supra* note 46, at 4; see PEGGY B. BURKE, POLICY-DRIVEN RESPONSES TO PROBATION AND PAROLE VIOLATIONS 14–15, 44 (1997).

86. THE PEW CTR. ON THE STATES, *supra* note 46, at 4; see BURKE, *supra* note 85, at 14–15.

87. To obtain the probation contract data discussed here, I had the Secretariat of the National Association of Probation Executives (NAPE) send an email to all NAPE members, asking them to forward to me information on the probation contract in use in their jurisdiction. In particular, the email asked the NAPE members for information on (1) the number and types of standard conditions imposed, (2) the average number and types of special conditions imposed, and (3) the average length of the probation order imposed. For the standard conditions, I stated that a copy of the probation order or contract would be sufficient, and I generally asked for data from a modest sample of cases, unless the wider data was readily available. E-mail from Christie Davidson, Exec. Dir., Nat'l Assoc. of Probation Execs., [icc\\_cxh@shsu.edu](mailto:icc_cxh@shsu.edu), to [nape\\_members@lists.shsu.edu](mailto:nape_members@lists.shsu.edu) (Sept. 3, 2014, 16:38 CDT) (on file with author).

ing the use of alcohol, avoiding the company of convicted offenders unless specifically excused by the probation officer, obtaining full-time employment, not leaving the state without permission, and paying a supervision fee and any other financial sanctions.<sup>88</sup>

Special conditions typically numbered in the range of three to five. Typical special conditions included drug testing, drug treatment participation, curfews, and “stay away” (from a person or a place, as in domestic violence cases) orders.<sup>89</sup>

Thus, the combination of standard and special conditions on offenders might typically mean that the offender is obliged to conform to eighteen to twenty requirements in order to stay in good standing with the probation department.

#### D. INCREASE IN PROBATION REVOCATIONS

There has been a dramatic growth in the number of times probationers are returned to court, are charged with a probation violation, have their probation revoked, and have a term of incarceration imposed. This is a logical consequence of the trend toward closer enforcement and increased responsibilities. In the fourteen years between 1990 and 2004, the number of probationers revoked for non-compliance grew by 50%, increasing from 220,000 to 330,000.<sup>90</sup>

A 2007 report by the Pew Center on the States noted that “[h]alf the U.S. jail population is the consequence of failure under community supervision” (combining probation and parole) and referred to revocation as “one of the chief reasons for the rapid growth of prison and jail populations.”<sup>91</sup> A report published by the state of California in 2009 reported that 40% of new prison admissions were attributable to probation revocations.<sup>92</sup>

Since avoiding a new crime is perhaps the preeminent re-

---

88. This list of standard conditions was compiled from the probation contract information sent by the NAPE members. *See also* U.S. SENTENCING GUIDELINES MANUAL § 5B1.3(a) (2014); BURKE, *supra* note 85, at 14–15; THE PEW CTR. ON THE STATES, *supra* note 46, at 4.

89. This list of special conditions was also compiled from the probation contract information sent by the NAPE members. *See also* U.S. SENTENCING GUIDELINES MANUAL § 5B1.3(e); BURKE, *supra* note 85, at 14–15; THE PEW CTR. ON THE STATES, *supra* note 46, at 4.

90. THE PEW CTR. ON THE STATES, *supra* note 46, at 3.

91. *Id.* at 1.

92. MAC TAYLOR, LEGISLATIVE ANALYST’S OFFICE, ACHIEVING BETTER OUTCOMES FOR ADULT PROBATION 20 (2009), available at [http://www.lao.ca.gov/2009/crim/Probation/probation\\_052909.pdf](http://www.lao.ca.gov/2009/crim/Probation/probation_052909.pdf).

quirement of probationers, it could be said that public safety requires that those who are given the “second chance” of probation and then flout it should be imprisoned. What do we know, then, about the nature of this growing number of revocations? A study in Michigan in 1996 found that revocations based on new criminal offenses accounted for a mere 10% of all revocations.<sup>93</sup> Thus, 90% of those returned to prison were sent there for so-called “technical” violations—failed drug tests, failure to report, failure to meet financial obligations, etc.<sup>94</sup> The Pew Center on the States reported that, in some states, technical violations account for more than half of those revoked from community supervision.<sup>95</sup>

As the burdens of probation, a sentence conventionally conceived of as a grant of leniency, increase along with the probability of not being able to avoid violation, researchers as well as defense attorneys have found, unexpectedly, an ironic but fully logical development in the attitudes of offenders—a preference for a short period of incarceration over probation. What would have been unthinkable in the Progressive era is now a reality: probation is not viewed as an act of grace or a second chance at law-abiding living but rather a staging area for eventual imprisonment. As an example, Ben Crouch reports that 66%, 49%, and 32% of Texas offenders would prefer one year in prison to ten, five, and three years on probation, respectively.<sup>96</sup> This author has heard this sentiment expressed repeatedly by probationers in focus groups, reasoning that the stiff enforcement of an impossibly demanding set of requirements will ultimately lead to incarceration. So, they ask, why postpone the inevitable and subject themselves to the steady drip-drip-drip of close monitoring of everyday behavior?

#### E. SOAKING THE POOR: THE HIGH COST OF PROBATION (FOR PROBATIONERS)

For unto every one that hath shall be given, and he shall have abundance: but from him that hath not shall be taken away even that which he hath.

—*Matthew 25:29*<sup>97</sup> (referred to as “the Matthew effect” in sociology)<sup>98</sup>

---

93. Eric J. Wodahl et al., *Revocation Trends: A Threat to the Legitimacy of Community-Based Corrections*, 91 PRISON J. 207, 212–13 (2011).

94. *See id.* at 212.

95. THE PEW CTR. ON THE STATES, *supra* note 46, at 3.

96. Ben M. Crouch, *Is Incarceration Really Worse? An Analysis of Offenders Preferences for Prison Over Probation*, 10 JUST. Q. 67, 79 (1993).

97. *Matthew 25:29* (King James).

98. *See, e.g.*, DANIEL RIGNEY, THE MATTHEW EFFECT: HOW ADVANTAGE

As Dan Beto again offered in a recent interview:

In most jurisdictions, in addition to restitution in appropriate instances, probationers are now required to pay probation supervision fees, court costs, urinalysis fees, electronic monitoring fees, DWI/DUI education class fees, anger management class fees, counseling fees, and fines. For persons marginally employed or unemployed who are barely [eking] out an existence, all these financial obligations can seem quite onerous and create a sense of hopelessness. And with [the] introduction of these financial conditions of probation, the role of the probation officer changed; no longer are they agents of change, but rather they have assumed the job of collection agent.

I am aware of some probation departments where more emphasis is placed on probation officer collection rates than probation success rates. In fact, in some probation departments a monthly report was posted ranking probation officers by the amount of their collections. . . . [W]hen I was asked to take over [such] a troubled probation department in 1991[,] that practice was discontinued my first day on the job, and agency morale improved, as did the focus of the department.<sup>99</sup>

A detailed study of the imposition of financial sanctions on offenders conducted by National Public Radio (NPR) in 2013 found that since the 2008 recession, forty-eight states have increased the fees to offenders in criminal court.<sup>100</sup> In other instances, new fees have been created.<sup>101</sup> Some states have done both.<sup>102</sup>

As the financial penalties incurred by probationers grow, one wonders what those who impose them imagine the financial standing of probationers to be. If it were the case that the average probationer could afford to pay all the costs, fines, and fees that are imposed, there would not have been a crime in the first place, quite possibly.<sup>103</sup> Of course, there are exceptions to

---

BEGETS FURTHER ADVANTAGE 1–24 (2010).

99. E-mail from Dan Beto to author, *supra* note 81.

100. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

101. *Id.*

102. *Id.*

103. This isn't just a problem for probationers. Most of the people in local or county jails are there for minor violations (like shoplifting or driving with a suspended license) and are jailed for longer periods of time, and have been for the last thirty years, because they are too poor to pay the court-imposed costs. Timothy Williams, *Jails Have Become Warehouses for the Poor, Ill and Addicted, a Report Says*, N.Y. TIMES (Feb. 11, 2015), <http://www.nytimes.com/2015/02/11/us/jails-have-become-warehouses-for-the-poor-ill-and-addicted-a-report-says.html>; see also Campbell Robertson et al., *Ferguson Became Symbol, but Bias Knows No Border*, N.Y. TIMES (Mar. 7, 2015), <http://www.nytimes.com/2015/03/08/us/ferguson-became-symbol-but-bias-knows-no-border.html> ("Across the country, a mounting number of investigations and lawsuits have focused attention on the justice system's heavy burdens on the

this. Bernie Madoff didn't need the money, as one example, and a number of drunk drivers are financially comfortable. However, in most cases, if you're on probation in the large urban areas, where most probationers reside, you're often flat broke.

For the study, NPR conducted over 150 interviews with lawyers, judges, offenders, government officials, advocates, and others.<sup>104</sup> The principal finding of the study was that in a significant number of cases, offenders are incarcerated for failure to pay fines and fees.<sup>105</sup> In addition to traditional fines and court costs, offenders are charged for the cost of being supervised.<sup>106</sup> So when you can't pay for the opportunity to be surveilled and monitored, you may go to jail.

The costs of the criminal justice system, as we have seen, have ballooned in the last few decades under the weight of the "new penology"—emphasizing punishment and control.<sup>107</sup> One of the devices created to mitigate costs was a notion new to the practice of corrections up to that point—that is, obtaining money from offenders to pay the bills.<sup>108</sup> In the absence of a steady stream of collections from offenders—under a system often referred to as "retained revenue"—the system would not meet its expenses, and cutbacks would have to be made.<sup>109</sup> Consequent-

---

poor.”).

104. Shapiro, *supra* note 100.

105. *Id.* In Ferguson, Missouri, the practice of jailing the poor for non-payment of fines such as traffic tickets has become so problematic that civil rights lawyers have filed a lawsuit against the city, likening the city's jails to "debtors' prisons." See Joseph Shapiro, *Civil Rights Attorneys Sue Ferguson over "Debtors Prisons,"* MPRNEWS (Feb. 8, 2015), <http://www.mprnews.org/story/2015/02/09/npr-ferguson-lawsuit>. Moreover, though Ferguson has been the subject of a recent Justice Department report, the unfairness of its court system as highlighted by the report is not limited to Ferguson. Many cities in St. Louis County face the same problems as, or even worse problems than, Ferguson. See Robertson et al., *supra* note 103.

106. Shapiro, *supra* note 100.

107. See PARENT ET AL., *supra* note 82, at 1–3; see also *supra* notes 41–43, 71–72 and accompanying text.

108. See, e.g., M. Scott Carter, *Revenue Dilemma at the Heart of Rising Offender Fees,* OKLA. WATCH (Feb. 8, 2015), <http://oklahomawatch.org/2015/02/08/revenue-dilemma-at-heart-of-rising-offender-fees>; see also PARENT ET AL., *supra* note 82, at 5; Shapiro, *supra* note 100.

109. See, e.g., JOINT COMM. ON WAYS & MEANS, JUSTICE IN THE BALANCE: BUDGET OVERVIEW OF THE MASSACHUSETTS JUDICIARY FOR THE LEGISLATURE 10 (2012), available at <http://www.massbar.org/media/1205698/justice%20in%20the%20balance.pdf> (projecting that the Massachusetts trial courts would fail to collect the maximum of \$53 million in retained revenue, which would reduce their operational funding by \$7 million); Robertson et al., *supra* note 103 (stating that court fines and fees comprised forty percent of the general operating revenue for Calverton Park, Missouri in 2014); Shapiro, *supra* note 105 (discussing how the city of Ferguson, Missouri collected \$2.6 million in court

ly, there is a real but rarely spoken pressure on judges to impose financial sanctions and on probation officers to collect them.<sup>110</sup> The trouble is they're fishing in an empty hole much of the time.<sup>111</sup>

Included among the services that were once provided for free and are now charged for are supervision costs, drug test costs, and treatment costs.<sup>112</sup> Offenders at least in some jurisdictions pay for their own arrest warrants, DNA samples, and GPS monitoring costs.<sup>113</sup>

According to research by Alexes Harris, most people coming before criminal courts are poor. In Harris's words, "[T]hese are already very poor and marginalized people in our society"—high school dropouts, the mentally ill, the addicted.<sup>114</sup> NPR found that courts do waive fees, but the more frequent solution, in the case of a poor defendant, is the creation of a payment plan.<sup>115</sup> But this is often unrealistic. In one state studied, the average financial burden for a felony case was \$2500.<sup>116</sup> A typical amount requested of the poor is \$10 per month, which means the pay-off dates will be reached in twenty years.<sup>117</sup>

---

finances and fees in 2013, which made up about twenty-one percent of the city's budget).

110. See Shapiro, *supra* note 100 ("[F]ees are more common than ever, as states are under increased pressure to find funding.").

111. See Carter, *supra* note 108 ("[L]awmakers are moving the cost of the correction system onto the backs of people who can't pay for it."); Shapiro, *supra* note 100. An extreme case of extorting the poor through the criminal justice system is revealed by a complaint the Southern Poverty Law Center recently filed against the city of Clanton, Alabama. See Andrew Cohen, *The State of Alabama*, BRENNAN CTR. FOR JUST. (Mar. 16, 2015), <https://www.brennancenter.org/analysis/state-alabama>. According to the complaint, Clanton's municipal judge routinely failed to disclose to poor defendants that they had a right not to be jailed if they could not afford to pay court fines. *Id.* These defendants were then sent to a private company whose employees called themselves "probation officers," even though they had no legal right to do so and did not perform many of the functions associated with probation officers. *Id.* In exchange for not charging Clanton for "probation services," the city allowed the company to collect the fines and fees imposed on these defendants. See *id.* The company "wielded enormous power over citizens, not just in determining how much defendants were supposed to pay each month but also in determining which ones might be sent to jail for failing to pay these often exorbitant amounts." *Id.* Fittingly, the complaint includes charges of a racketeering conspiracy. *Id.*

112. See Shapiro, *supra* note 100.

113. *Id.*

114. *Id.*

115. *Id.*; see also Shapiro, *supra* note 105.

116. Shapiro, *supra* note 100.

117. *Id.*; see also Mike Carter, *Poor Offenders Must Be Asked If They Can Afford To Pay Fines, State Supreme Court Says*, SEATTLE TIMES (Mar. 12,

NPR also found that non-payment can lead to non-jail punishments, such as loss of a driver's license and food stamps.<sup>118</sup> It boggles the mind to imagine how that strategy could be thought to improve the likelihood of payment. Those who lose their license but continue to drive, so that they can continue to work to pay their fines and other expenses, if caught, are often sent to jail.<sup>119</sup>

NPR's report echoes findings in Alice Goffman's recently published and celebrated urban ethnography *On the Run*.<sup>120</sup> In both studies, it was found that the strategy employed by the offenders caught in this bind is to go underground, with these offenders severing themselves from the very services and opportunities that might improve their status.<sup>121</sup> This appears to be a system designed to perpetuate failure and reoffending.

One example of the hundreds of Americans discovered by NPR to be incarcerated for failure to pay court debts: in Westminster, Colorado, Jared Thornburg received a ticket for making an illegal left turn. The court imposed \$165 of fees and fines.<sup>122</sup> At that time, Jared was homeless and unemployed. He had lost a job at an oil refinery due to a workplace injury.<sup>123</sup> He obtained a job at Taco Bell, but the day before his start date at the job, he was arrested for non-payment of the fines, which had increased to \$306 as a result of interest and late penalties.<sup>124</sup> The judge sentenced him to ten days in jail, thereby putting his new job in jeopardy—the job he needed to meet his obligations.<sup>125</sup> Another completely irrational, self-defeating decision.

In one county studied by NPR, twenty-five percent of the

---

2015), <http://www.seattletimes.com/seattle-news/crime/state-supreme-court-says-judge-must-ask-if-defendant-can-afford-fine> (“Even offenders who attempt to pay minimal amounts find themselves saddled with mounting debt because interest can reach 12 percent. The court noted that, on average, a person who can pay just \$25 a month toward his or her fines will owe more 10 years after conviction than he or she did when the fines were imposed.”).

118. Shapiro, *supra* note 100.

119. *Id.*; see also Shapiro, *supra* note 105 (discussing the case of one man who was arrested and lost his license, and thus his means of transportation, for unpaid traffic tickets and who can now no longer work at his job painting houses).

120. ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014).

121. *Id.* at 8; Shapiro, *supra* note 100.

122. Shapiro, *supra* note 100.

123. *Id.*

124. *Id.*

125. *Id.*

inmates in the local jail were there for non-payment of court fines and fees.<sup>126</sup> When it comes to the management of financial sanctions, in too many places the American justice system has lost its mind.

One last, terrifying example from Benton County, Washington: an unidentified defendant is brought in from the county jail where he has been staying since being arrested for non-payment of \$1200 in fines.<sup>127</sup> In court, the defendant reports to the judge that he was homeless at the time of his arrest, but he nonetheless offers to come up with \$50.<sup>128</sup> The judge imposes seventy-five days in jail, with an option to get out if he pays \$500.<sup>129</sup> The defendant addresses the judge: “What am I supposed to do? Pray to God that it falls out of the sky in my hands, ma’am?”<sup>130</sup>

A final reminder: *Bearden v. Georgia* prohibits sending offenders to jail for being too poor to pay fines and fees.<sup>131</sup> With this in mind, who is the more serious law-breaker in these vignettes?

#### IV. “YOU DON’T UNDERSTAND”—THE PROBLEM WITH “BLIND JUSTICE”

Well, I am no thief, but a man can go wrong when he’s busted  
The food that we canned last summer is gone, and I’m busted  
—Ray Charles<sup>132</sup>

Bernie Mac, a multi-talented African American comedian who gained prominence through stand-up comedy, movies, and his own television show based loosely on his own domestic

126. *As Court Fees Rise, the Poor Are Paying the Price* (NPR radio broadcast May 23, 2014), available at <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* For a humorous, but informative, overview of the various issues discussed in this Section, see *Last Week Tonight with John Oliver* (HBO television broadcast Mar. 22, 2015), available at <https://www.youtube.com/watch?v=0UjpmT5noto>. In the long segment of this episode, John Oliver discusses and heavily criticizes the ways cities earn revenue by compounding court fines and fees against poor defendants, often in an inescapable spiral, for minor municipal violations. *See id.*

131. *Bearden v. Georgia*, 461 U.S. 660, 668–69 (1983) (“[I]f the probationer has made all reasonable efforts to pay the fine . . . and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically . . .”).

132. RAY CHARLES, *Busted*, on *GENIUS: THE ULTIMATE COLLECTION* (Concord 2009).

life,<sup>133</sup> had a tag line in his stand-up appearances that came to sum up his relationship with the audience: “You don’t understand.”<sup>134</sup> The central argument of this Article is that justice for probationers and others will never be fully served as long as judges and probation officers fail to understand the world that so many probationers come from and have to navigate through daily—that world described by Michael Harrington as the “other America.”<sup>135</sup>

The notion of justice has traditionally been embodied in the iconic figure of Lady Justice, wearing a blindfold and holding the scales of justice in her hands. The notion is that justice will be meted out without regard to the personal identity or standing of the accused. This is, in my view, a deeply flawed metaphor for the administration of justice.

At this task they must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.

—Anatole France, *The Red Lily*<sup>136</sup>

France makes my point for me. Lady Justice cannot take into account the particular circumstances under which a crime such as trespassing or loitering, to take the begging example, occurs and therefore proudly treats the rich man and the poor man similarly, blind to the compulsion and necessity under which the poor man labors. Charles Dickens makes a similar observation:

133. Bernie Mac played a fictional version of himself in *The Bernie Mac Show*, which depicted Mac’s travails in raising his sister’s three young children after his sister had become addicted to drugs and custody had been given to Mac. See *The Bernie Mac Show*, IMDB, <http://www.imdb.com/title/tt0285341> (last visited Apr. 3, 2015). Although fictional, *The Bernie Mac Show* was based on Mac’s own experience in taking in his teenaged niece and her baby and on the experiences of a friend who had actually taken care of her drug-addicted sister’s children. See LaToya Ferguson, *10 Episodes of The Bernie Mac Show That Capture the Struggle of Building Anything from the Ground up*, A.V. CLUB (Jan. 19, 2015, 12:00 AM), <http://www.avclub.com/article/10-episodes-bernie-mac-show-capture-struggle-build-213757>. Along the theme of this Section, one can imagine that such experiences as these, which are relatively common among the poor and underprivileged, would be foreign to the judges and probation officers that interact with them.

134. See *Stand-Up Comedy: Why Is It Funny When Bernie Mac Repeatedly Says “You Don’t Understand. I Ain’t Scared of You Motherf\*\*\*\*\*?”*, QUORA, <http://www.quora.com/Stand-Up-Comedy-1/Why-is-it-funny-when-Bernie-Mac-repeatedly-says-You-dont-understand-I-aint-scared-of-you-motherfuckers> (last visited Apr. 3, 2015).

135. See MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* 1–18 (1962).

136. ANATOLE FRANCE, *THE RED LILY* 91 (Winifred Stephens trans., Dodd, Mead & Co. 1925) (1894).

There are many pleasant fictions of the law in constant operation, but there is not one so pleasant or practically humorous as that which supposes every man to be of equal value in its impartial eye, and the benefits of all laws to be equally attainable by all men, without the smallest reference to the furniture of their pockets.<sup>137</sup>

At least in the case of Lady Justice, it is an intentional blindness. In the case of many judges and probation officers, the blindness to the world of the poor is largely unconscious and therefore all the more pernicious. This is not at all to say that no judges and probation officers grew up in difficult economic circumstances—clearly some did. But the educated guess here, after working for thirty-nine years in a state justice system, is that most have not experienced poverty or real disadvantage in the way that most probationers have and do. And this “blind spot” fatally compromises their ability to fashion appropriate probationary sentences, the restrictions of which should match the circumstances of the offender and should be in line with what is actually feasible for probationers, given their strained life circumstances.

There is evidence from the social sciences that suggests authority figures who have little experience with the underclass are poorly positioned to empathize with the realities of underclass life. Nicholas Kristof, in his series of *New York Times* articles entitled *When Whites Just Don't Get It*, argues that the social distance between judges (mainly middle class or higher) and those who come before them (mostly poor or low income) makes it difficult for judges to relate in any insightful way.<sup>138</sup> Kristof reports on research with judges that showed that they are more sympathetic with women's rights when they have a daughter.<sup>139</sup> He argues that the severe racial segregation in America makes it unlikely that many judges would be exposed to the life of the poor black youth.<sup>140</sup> He cites a study from the Public Religion Research Institute which found that for those whites with a network of one hundred friends, on average one

---

137. CHARLES DICKENS, *NICHOLAS NICKLEBY* 700 (Tom Doherty Assoc., Inc. 1998) (1839).

138. See Nicholas Kristof, *When Whites Just Don't Get It, Part 3*, N.Y. TIMES (Oct. 12, 2014), <http://www.nytimes.com/2014/10/12/opinion/sunday/nicholas-kristof-when-whites-just-dont-get-it-part-3.html> [hereinafter Kristof, *Part 3*] (discussing how the justice system is “skewed against the poor”).

139. Nicholas Kristof, *When Whites Just Don't Get It*, N.Y. TIMES (Aug. 30, 2014), <http://www.nytimes.com/2014/08/31/opinion/sunday/nicholas-kristof-after-ferguson-race-deserves-more-attention-not-less.html> [hereinafter Kristof, *Part 1*].

140. See Kristof, *Part 3*, *supra* note 138; cf. Kristof, *Part 1*, *supra* note 139 (“[W]hites are unlikely to have many black friends.”).

friend is black.<sup>141</sup>

In an article also appearing in the *Times* entitled *Powerful and Coldhearted*, two university-based professors of psychology conducted experiments that raised the question of whether individuals in high positions of power (judges would seem to qualify) could easily empathize with those at lower levels of society.<sup>142</sup> The professors believe that their and other research suggests the answer is negative: “Studies have repeatedly shown that participants who are in high positions of power . . . are less able to adopt the visual, cognitive or emotional perspective of other people . . . .”<sup>143</sup> Judicial officials live in radically different worlds from those they sentence and thus interact in the dark.

What are the circumstances of too many probationers? Decades after the war on poverty, it might be natural to assume that we have continued to minimize the degree of financial distress in the United States, among the wealthiest of all countries. Not true. For *The American Way of Poverty*, Sasha Abramsky traveled across the United States in recent years to study the current state of poor Americans.<sup>144</sup> She found that the lives of poor Americans are “increasingly desperate”; that there are now more people on the bottom rung of the economy than there were in the early 1960s; and that, of developed countries, the United States rates second in child poverty.<sup>145</sup> Citing Peter Edelman’s work, she also found that poverty increased fifty-three percent in the years 2000–2010, adding fifteen million people over the ten years.<sup>146</sup> During that time, the value of welfare benefits also declined.<sup>147</sup> In a way that brings her findings home, Abramsky reports discovering an eighteen-year-old hungry, sometimes crying, and with nothing to eat.<sup>148</sup> She reports on the increasing number of poor living on the edge of a perpetual housing crisis and the growing number living under those bridges that France referred to.<sup>149</sup> It is tragic to have to

---

141. Kristof, *Part 1*, *supra* note 139.

142. Michael Inzlicht & Sukhvinder Obhi, *Powerful and Coldhearted*, N.Y. TIMES (July 25, 2014), <http://www.nytimes.com/2014/07/27/opinion/sunday/powerful-and-coldhearted.html>.

143. *Id.*

144. SASHA ABRAMSKY, *THE AMERICAN WAY OF POVERTY: HOW THE OTHER HALF STILL LIVES* 4 (2013).

145. *Id.* at 4–6, 10.

146. *Id.* at 9.

147. *Id.* at 105–10.

148. *See id.* at 22.

149. *Id.* at 163–74; *see supra* note 136 and accompanying text.

observe that Abramsky's findings are reminiscent of those made by Katherine Boo in her study of slum life in Mumbai, India, in *Behind the Beautiful Forevers*.<sup>150</sup>

For this Article, a state in the Northeast was asked to provide data on the financial conditions of defendants in criminal court.<sup>151</sup> The data revealed that, at the time of arraignment across three of the busier jurisdictions, 63% of the defendants had been determined to be indigent.<sup>152</sup> In terms of employment across the state as a whole, of those placed under active supervision, 48% were unemployed at the time of arrest and 55% reported that they were currently experiencing financial problems.<sup>153</sup>

How might we learn about the new "other America" and how its invisibility to the authorities leads to decisions that reinforce the already difficult plight of offenders? In addition to Abramsky's work, new ethnographies—first-hand, "you are there" studies of specific subcultures—bring to light both the living conditions and attitudes of the underclass.

In the previously mentioned *On the Run*, Alice Goffman reports on her seven years "embedded" in a poor, overwhelmingly black Philadelphia neighborhood, living and interacting daily with a number of youths with criminal records.<sup>154</sup> She catalogues the many aspects of the lives of those who came to be her friends. Too many were homeless and sleeping in cars, looking fruitlessly for low-paying jobs denied to them because they had criminal records.<sup>155</sup> Some young men had turned to drug dealing to feed their younger siblings in the absence of respon-

---

150. KATHERINE BOO, *BEHIND THE BEAUTIFUL FOREVERS: LIFE, DEATH AND HOPE IN A MUMBAI UNDERCITY* (2012).

151. To obtain this information, I contacted the Office of the Commissioner of Probation located in Boston, Massachusetts.

152. E-mail from Laura Lempicki, Dir. of Research, Office of the Comm'r of Prob., to author (Jan. 16, 2015, 10:13 CST) (on file with author). These data are for three urban, district courts in Massachusetts over the months of September through November in 2014. *Id.*

153. E-mail from Laura Lempicki, Dir. of Research, Office of the Comm'r of Prob., to author (Dec. 27, 2014, 09:43 EST) (on file with author). These data are for active Ohio Risk Assessment System/Community Supervision Tool (ORAS/CST) cases across the state of Massachusetts as of December 2014. *Id.* The ORAS is an assessment system used to "classify the risk level of offenders in the system while also identifying criminogenic needs and barriers to [rehabilitative] programming," with CST being the instrument used for offenders under community supervision. EDWARD LATESSA ET AL., *CREATION AND VALIDATION OF THE OHIO RISK ASSESSMENT SYSTEM FINAL REPORT 6-10* (2009).

154. GOFFMAN, *supra* note 120, at xii–xiv.

155. *See id.* at 3–8, 195–96; *see, e.g., id.* at 14–16; *id.* at 97–98.

sible parents.<sup>156</sup> Other young men were incarcerated after failed urine tests or lost jobs after being locked up for not paying substantial fines.<sup>157</sup> Goffman reports a case where an acquaintance received two years in jail for breaking a curfew,<sup>158</sup> on the overall weight of multiple conditions on probationers when they know full compliance is hopeless, and on appointments with probation officers that were scheduled with such irregularity that it was impossible to stay in good standing with school or jobs.<sup>159</sup>

Victor Rios, for his book *Punished*, mentored, observed and interviewed Black and Latino boys between the ages of fourteen and seventeen, during the years 2002–2005 in Oakland, California.<sup>160</sup> Thirty of the boys he interacted with had criminal convictions.<sup>161</sup> Of those who had experienced both prison and probation, the consensus was that probation was worse due to the unpredictable, seemingly capricious enforcement of a laundry list of rules.<sup>162</sup> Prison, by comparison, was seen as having clearly established and predictably enforced rules.<sup>163</sup> The young men felt so negatively treated by the system that the rules of probation (a common example would be imposed curfews) were deliberately broken as a way of establishing some dignity in the face of a system that was seen as putting them down.<sup>164</sup> Here again, the ethnographer finds a general feeling that there is no way to succeed with the load of probation conditions placed on the young men. Probation was seen as a form of punitive social control, a destroyer of self-esteem, with no evidence of efforts by the officers to express acceptance or the offering of an affirmative statement if a job was obtained by a probationer.<sup>165</sup>

Let us now examine the voices of poor, young men and women as expressed in yet another recent urban ethnography, *Arresting Citizenship*<sup>166</sup>:

**Xavier:** “I haven’t got any name, nobody. Nobody is trying

---

156. See, e.g., *id.* at 178.

157. See *id.* at 5–8.

158. *Id.* at 58–59.

159. See *id.* at 123–24, 142–43, 197.

160. VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* 8 (2011).

161. *Id.*

162. See *id.* at 84–91.

163. *Id.* at 64.

164. *Id.* at 108.

165. *Id.* at 84–91.

166. AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* 3–5 (2014).

to hear me.”<sup>167</sup>

**Marcus:** “[I]f you don’t follow their rules . . . or the way that the rules are written, they figure that you’re going against them, so they’re going to make things harder.”<sup>168</sup>

**Trina,** addressing whether the criminal justice system understands what it’s like to be poor: “No. Absolutely not. They don’t suffer. They don’t know. They haven’t been there. . . . Come on. They don’t care. . . . They couldn’t handle being poor.”<sup>169</sup>

**Sarah:** “They really don’t get the grip of what really goes on in places like this . . . . [Y]ou can hear about things . . . , but until you put yourself in that situation, and actually go through it, then you wouldn’t understand.”<sup>170</sup>

**Melvin:** “I don’t think they actually been there, to the bottom, to where they actually have to wear the same clothes every day. Have to beg and borrow and wonder how we gonna pay it back or how’s my next day gonna be, how am I gonna eat . . . . I don’t think they actually been through that.”<sup>171</sup>

**Andre:** “But if you can just take him [a politician] for a week, just take all his valuable belongings away from him for a week and put him in our shoes, how would he feel? Could he survive? Could he last just seven days of living like this—eating what we eat? Listening to somebody say, “[Y]ou ain’t never [going to] amount to nothing, you’ll never be nothing, you ain’t about nothing.”<sup>172</sup>

#### A. NEW FINDINGS ON THE INTERACTION OF POVERTY AND PROBATION

“I’m so poor I can’t even pay attention.”

—An old Vaudeville joke

It’s not just being broke that makes it hard to comply with court orders stressing financial obligations: the offender, faced with compound directives, loses the ability to move on in school or employment. The condition of scarcity, as investigated by two behavioral economists (those who bring the discipline of psychology into the economic study of choices and behavior) in their recent book entitled *Scarcity*, causes those on the edge to be afflicted with a kind of “tunnel vision” that leaves the multi-

---

167. *Id.* at 135.

168. *Id.* at 142 (internal quotation marks omitted).

169. *Id.* at 144.

170. *Id.* at 145.

171. *Id.*

172. *Id.* at 146.

ple demands of authority figures outside of their scope of attention.<sup>173</sup>

Sendhil Mullainathan and Eldar Shafir define “scarcity” as having less than you need for daily living.<sup>174</sup> The condition of scarcity, they find, concentrates the mind in a potentially hazardous way, as the preoccupation with finding ways to just get through the day leaves no room for attention to other obligations.<sup>175</sup> Employing the metaphor of bandwidth, the authors find that being poor reduces “cognitive” capacity, or bandwidth, in a way that exceeds the effects of going without sleep. Preoccupation with financial concerns is more mentally disabling than sleep deprivation.<sup>176</sup> Reduced cognitive bandwidth leaves space for addressing immediate, pressing needs but causes the subject to “neglect other concerns, and . . . become less effective in the rest of life.”<sup>177</sup>

Adequate bandwidth—the condition characteristic of those with enough to get by—on the other hand, increases the ability to pay attention (e.g., in school) and, most significantly for offenders, stick with plans, resist temptations, and make good decisions.<sup>178</sup> Deficient bandwidth leads to impulsivity and to carelessness.<sup>179</sup> (Missing meetings is the example they use here, resonating with the point that keeping meetings is imperative for all probationers).<sup>180</sup> The authors are quick to stress that this diminished cognitive capacity is not inherent in the individual but is a condition created by poverty.<sup>181</sup> One of their final notes refers to the anger created in those who are held accountable for responsibilities outside their attention span,<sup>182</sup> leading them, I would imagine, to want to say in their frustration to those expecting more from them than they can reasonably accomplish, “You don’t understand.”<sup>183</sup>

Charles Blow, columnist for the *N.Y. Times*, will have the last word in this section:

Poverty is a demanding, stressful, depressive and often violent state.

---

173. SENDHIL MULLAINATHAN & ELДАР SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 29 (2013).

174. *Id.* at 4.

175. *Id.* at 13.

176. *Id.*

177. *Id.* at 15.

178. *Id.* at 41–42.

179. *Id.* at 65.

180. *Id.*

181. *Id.* at 13.

182. *See id.* at 156.

183. *See supra* notes 133–34 and accompanying text.

No one seeks it; they are born or thrust into it. In poverty, the whole of your life becomes an exercise in coping and correcting, searching for a way up and out, while focusing today on filling the pots and plates, maintaining a roof and some warmth, and dreading the new challenge tomorrow may bring.<sup>184</sup>

## V. THE ONCE AND FUTURE PROBATION

Rethinking probation now, its purpose and practices, particularly with respect to condition-setting and revocation (where the first act creates the second result), comes at a propitious time. For someone like this author who started working in criminal justice when the goal of rehabilitation was ascendant and lived through decades of massive retrenchment, there are encouraging signs at this moment. The notion of “justice reinvestment” seems to be at the core of a changing climate in America towards prisons and sentencing. The “justice reinvestment initiative” (JRI) is a process that states are engaging in with the help of the Pew Center on the States, in which a close look is taken at the way correctional dollars are spent (traditionally, with nine out of every ten dollars going to prisons)<sup>185</sup> and practical questions are asked about return on investment.<sup>186</sup> All this is aimed at reducing reoffending while also restraining the run-away growth of correctional costs, which are the twin goals of criminal justice in the modern era.<sup>187</sup> To date, nearly half the states have undertaken the JRI process.<sup>188</sup>

Has there really been some change in the climate regarding criminal justice? Two leading thinkers in the area of sentencing and community corrections seem to think so. Todd Clear of Rutgers University, an author of one of the most recent and compelling critiques of the trends in criminal justice over the last decades, identifies a “new consensus” for progressive change in this country, driven by extreme costs and a record of failure by a number of prominent strategies, the war on drugs

---

184. Charles Blow, *Poverty Is Not a State of Mind*, N.Y. TIMES (May 18, 2014), <http://www.nytimes.com/2014/05/19/opinion/blow-poverty-is-not-a-state-of-mind.html>.

185. See *supra* note 32 and accompanying text (discussing the amount of spending on prisons).

186. NANCY LAVIGNE ET AL., URBAN INST. & BUREAU OF JUSTICE ASSISTANCE, JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT 1–4, 13–17 (2014), available at <http://www.urban.org/UploadedPDF/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.pdf>.

187. See *id.*; see also *supra* Part II.B; *supra* notes 50–60 and accompanying text.

188. See LAVIGNE ET AL., *supra* note 186, at 1.

being perhaps the most infamous.<sup>189</sup> This new paradigm is given breathing room by the declining rates in serious crime since the mid-90s, which has taken fear of crime off the nation's political agenda and away from the bully pulpit.<sup>190</sup> What Clear refers to as "increasing energy for change" is manifested in the following development: prisons have been closed in eleven states with Michigan leading the pack at twenty-two prisons closed.<sup>191</sup> Clear points out that two of the most surprising aspects of this emerging change are its bi-partisan nature and the fact that many of the so-called "red states" have been the most involved.<sup>192</sup>

One vivid case of a change in heart on criminal justice from a leader in the conservative wing in Congress is Congressman Paul Ryan's recent proposals for reform, which include the following provisions:

Once people have paid their debt to society, they should be able to move on. In that spirit, this proposal suggests three possible reforms:

- Grant judges more flexibility within mandatory-minimum guidelines when sentencing non-violent drug offenders.
- Implement a risk- and needs-assessment system in federal prisons while expanding enrollment in rehabilitative programming to reduce recidivism. Allow non-violent and low-risk inmates to use enrollment to earn time off their prison stay towards prerelease custody.
- Partner with reforms at the state and local level.<sup>193</sup>

Cecelia Klingele of the University of Wisconsin Law School also identifies a reforming trend from the last ten years where the strange bedfellows of evidence-based scholars and fiscally conservative politicians have created a "synergistic dynamic" to promote the passing of new laws that accomplish structured, research-based decision-making with respect to the intensity of supervision and the need for revocation.<sup>194</sup> Klingele cites the example of North Carolina which passed its own Justice Reinvestment Act in 2011, thereby placing restraints on the circumstances under which officers can seek revocation, limiting them largely to absconders and those that have committed new crimes.<sup>195</sup> She goes on to mention that, in 2010, Alabama also

---

189. CLEAR & FROST, *supra* note 57, at 6.

190. *Id.* at 3–5.

191. *See id.* at 7.

192. *Id.*

193. PAUL RYAN, EXPANDING OPPORTUNITY IN AMERICA: A DISCUSSION DRAFT FROM THE HOUSE BUDGET COMMITTEE 55 (2014), available at [http://budget.house.gov/uploadedfiles/expanding\\_opportunity\\_in\\_america.pdf](http://budget.house.gov/uploadedfiles/expanding_opportunity_in_america.pdf).

194. Klingele, *supra* note 84, at 1047.

195. *Id.* at 1047–48.

moved legislatively to restrict probation revocations, originally providing that full revocation was only applicable to those who committed new crimes.<sup>196</sup> Klingele reports that other states such as Louisiana, Oregon, and Washington have moved legislatively in a similar direction.<sup>197</sup> Regarding evidence of impact of these novel efforts, Klingele reports that California's new laws have resulted in a twenty-three percent reduction in revocations.<sup>198</sup> A similar decline has been achieved in Kansas.<sup>199</sup>

In a publication dated July 2014 from the esteemed Vera Institute of Justice, a "turning tide" is reported in crime control policy.<sup>200</sup> Vera reports that between 2006–2012, nineteen states reduced their prison populations, including six states that experienced double-digit drops in prison censuses.<sup>201</sup> Vera suggests that these declines may well be due to specific policy changes but acknowledges that "cause and effect" is difficult to determine.<sup>202</sup> Nonetheless, Vera believes that there are clear new trends: "[M]any states are continuing to reexamine the ways in which they respond to offenders at every stage of the criminal justice process, from arrest and punishment to reentry and rehabilitation."<sup>203</sup> Focusing on 2013, Vera indicates that the following goals were embodied in legislation passed by many states: reducing prison populations and costs; expanding and strengthening community corrections; implementing risk/need instruments (designed to provide more accurate estimates of risk to recidivates and better identification of criminogenic needs); supporting reentry of offenders into the community; and making better informed criminal justice policy (through the use of such measures as fiscal and social impact statements).<sup>204</sup>

#### A. THE ROAD FROM HERE

Clearly, there are encouraging signs: new openness for the discussion of shifts in correctional policy and many experiments

---

196. *Id.* at 1048. Alabama later revised the law to allow revocations for firearm violations, "stay away" order violations, and violations that endanger other people. *Id.*

197. *Id.* at 1048–49.

198. *Id.* at 1052.

199. *Id.*

200. VERA INST. OF JUSTICE, RECALIBRATING JUSTICE: A REVIEW OF 2013 STATE SENTENCING AND CORRECTION TRENDS 4 (2014).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 5–7.

underway to build a stable of proven and cost-effective programs and strategies. What would be the main features of a thoughtful reform platform—the chief concern addressed in this Article—on the overly punitive probation practice, which focuses on oppressive condition-setting and an over-reliance on revocation?

Klingeles has made a major start in designating a variety of steps that might be considered (in addition to the ones she mentions already being experimented with)<sup>205</sup> in *Rethinking the Use of Community Supervision*, where she offers three major, different approaches that are compelling and warrant serious consideration.<sup>206</sup>

### 1. Limiting the Sanction

Klingeles first imagines dispositions for minor offenders which would not involve a term of community supervision and with no possibility of revocation—they would constitute “unconditional discharge.”<sup>207</sup> Arguing that the process is often the punishment, and that convictions carry with them a variety of “collateral consequences” (e.g., loss of welfare benefits, ineligibility for a variety of jobs, etc.) which are reported to run into the hundreds, all serving as impediments to moving on in life, Klingeles reasons that discharge may be enough and the court need go no further in sanctioning.<sup>208</sup> Probation would be reserved for those who have committed serious offenses and who exhibit the need for assistance and supervision.<sup>209</sup>

### 2. Limiting Release Conditions

In line with the analysis above, Klingeles argues against imposing on offenders a host of boilerplate conditions, many of which serve no useful or relevant purpose.<sup>210</sup> Legislatures should revise their promulgated list of mandatory probation conditions and exercise parsimony in their choice of requirements so that offenders are not exposed to the enforcement of a multitude of conditions that serve no compelling correctional goals.<sup>211</sup>

---

205. See *supra* notes 194–99 and accompanying text.

206. Klingeles, *supra* note 84, at 1054–64.

207. *Id.* at 1055–60.

208. *Id.*

209. *Id.* at 1060.

210. *Id.* at 1060–61.

211. *Id.*

### 3. Limiting Lengths of Probation

Noting the trend, over the last decades, of expansionism in the length of terms of supervision, Klingele argues that this trend towards longer terms ignores the research indicating that the risk of re-offense is greatest in the first few years and consequently exposes the offender in the out years, after a long span of law-abiding life, nonetheless to the potential for revocation for a technical violation.<sup>212</sup> A companion recommendation offered by Klingele (and a number of other scholars) is to institute early termination opportunities for fully compliant probationers, which would have the added advantage of creating an incentive to comply.<sup>213</sup>

## VI. NOW IT'S MY TURN

I would like to propose the following elements for a reengineered probation, one that takes account of the emerging research findings and the rethinking that is actively underway across the country. The aim is to devise at once a more just, effective, and affordable correctional system. In some instances, I owe a debt to fellow scholars who have opened up new territories for thought, theorizing, and action.

### A. IMPLEMENT ZERO-BASED CONDITION SETTING<sup>214</sup>

At the moment an offender is placed on probation, the judge and the probation officer, working collaboratively to set appropriate conditions, would start with a blank sheet. Or almost blank—every probationer should be required to obey the law. Beyond that, any additional conditions would have to be determined, in the instant case, to be necessary in the service of appropriate sanctioning and treatment. Most importantly, the conditions would need to be determined to be reasonable for the offender. Standard conditions (save the one) would be eliminated, and conditions would optimally be few in number so that probationers (who are often broke and thoroughly preoccupied with survival, as discussed above)<sup>215</sup> would have a decent chance to succeed. Setting conditions, the obtainment of which

---

212. *Id.* at 1062.

213. *Id.* at 1063–64.

214. This proposition is made with acknowledgement to the National Institute of Corrections and its idea of “dosage probation.” *See generally* MADELINE M. CARTER & RICHARD J. SANKOVITZ, CTR. FOR EFFECTIVE PUB. POLICY, *DOSAGE PROBATION: RETHINKING THE STRUCTURE OF PROBATION SENTENCES* 16–18 (2014) (describing the dosage probation model of supervision).

215. *See supra* Part IV.A.

would be within the reach of the offender, would create opportunities for an experience so seldom available to probationers—a sense of accomplishment for those offenders in dire need of that experience, which would earn them the commendation of the authorities and the pleasure of early termination as a reward for full compliance.

#### B. FOCUS ON ADMINISTRATIVE SANCTIONS FOR MOST VIOLATIONS

Probation officers would be allowed, with supervisory review, to handle most technical violations with an administrative sanction, such as “grounding” through a time-limited curfew, the addition of ten to twenty hours of community service, or more frequent attendance at Alcoholics Anonymous, provided these sanctions are determined to be within the capacity for the offender to deal with and would not disrupt a job or schooling. The right of appeal of the imposition of any such sanctions to a judge would be provided.

#### C. REVOKE REVOCATION

The possibility for revocation to prison would be eliminated for all probationers. Probationers who are non-compliant with technical conditions, would, at the most, be detained for a night or two in the local jail but would never be revoked to state prison for technical violations. Probationers who commit new crimes would have those charges processed in the normal way, i.e., a trial with the full panoply of rights. Currently, probation departments can prosecute probationers in revocation hearings for the commission of new crimes, relying on diminished standards of proof and relaxed evidentiary rules.<sup>216</sup> This sort of bargain basement justice ought to be avoided as it teaches a bad lesson to the offender—that the system will take advantage of due process shortcuts where available. Such practices violate fundamental principles of procedural fairness, which a body of work by Tom Tyler has established is key to forming a positive alliance between offenders and the system.<sup>217</sup>

---

216. See PARENT ET AL., *supra* note 82, at 10.

217. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 6–7, 115–24 (2006).

#### D. GRANT CERTIFICATES OF GOOD CONDUCT TO SUCCESSFUL PROBATIONERS

The stigma of a conviction can be a block to a variety of opportunities, most significantly employment.<sup>218</sup> Wherever the probationer's behavior warrants what the military calls an "honorable discharge" the probationer would receive a certificate of impressive design that could be shared with a potential employer, indicating how responsible and mature the offender acted during the probationary period. This could open some doors currently closed in the faces of offenders.

#### E. OFFER VOUCHERS

In order to make positive moves—particularly with respect to jobs and housing—many probationers may need to buy appropriate clothes for job interviews or obtain funds sufficient for down payments on apartments. This would be possible through vouchers offered to probationers by the corrections system. These vouchers would be repayable by the end of probation, provided the ability to pay is established. It would act as "seed" money to give disadvantaged offenders some lift in the early days of their probation.

#### F. VISIT THE OTHER AMERICA

All new judges and probation officers would be required to stay with a family in a local housing project for a week, to familiarize themselves with the world of the truly disadvantaged. Similarly, judges and officers would be required to spend an overnight or two in the local jail or state prison. It is unconscionable to relegate an offender to an institution with which those who are making the recommending and cutting the orders have no familiarity. This again is "blind justice."<sup>219</sup>

In addition, as suggested by both Rios in *Punished*<sup>220</sup> and Bill Jordan and Martyn Jones in *Poverty, the Underclass and Probation Practice*,<sup>221</sup> judges and probation officers would meet with a small group of ex-probationers, to listen to each other, understand each other's worlds, close the social distance between the two groups, and bring divergent worlds together.

As Jordan and Jones point out:

---

218. See, e.g., *supra* note 155 and accompanying text.

219. See *supra* notes 136–41 and accompanying text.

220. RIOS, *supra* note 160, at 161–63.

221. Bill Jordan & Martyn Jones, *Poverty, the Underclass, and Probation Practice*, 35 PROBATION J. 123, 127 (1988).

Our [the authorities'] ways of interpreting events, whether conservative or critical have been acquired within a majority culture. At the very least, we are obliged to attempt to create the conditions whereby an active conversation is possible between ourselves and our clients through which we can understand what our practice represents to them.<sup>222</sup>

#### G. USE OF POSITIVE INCENTIVES

Recent work on the key principles of offender change has emphasized the value of creating incentives for positive behavior and compliance with conditions of community supervision.<sup>223</sup> To date, despite the call for introducing contingency management that would employ both “carrots and sticks,” it seems surprisingly few “carrots” are offered.

As one example of the principle, experimenting with the use of “probation good time” (for example, a twenty-five percent reduction in time served on probation in return for full compliance and no reoffending) would seem to have more than enough theoretical and empirical support, at least for a trial period.

#### CONCLUSION

What are the prospects for these ideas and for those of Klingele and other like-minded reformers? Nobody has lost much money betting against radical change in social policy. Yet Americans are widely misunderstood with regard to their views on sentencing policy and are more moderate and open to rehabilitation than is generally assumed. In a recent poll in Massachusetts (admittedly, the bluest of blue states) MassInc, a bipartisan think tank, found that 64% of residents want the criminal justice system to focus on prevention and rehabilitation, “two areas where the current system is not seen as effective.”<sup>224</sup> Whereas 1997 polling in Massachusetts found strong support for the building of a new \$100 million prison, in 2014, 67% of residents supported reforming the system so that fewer people go to prison, versus 26% who wanted more prisons built.<sup>225</sup>

The final word goes to Judge Learned Hand, an unregenerate optimist on the question of legal and social reform:

---

222. *Id.*

223. Amy L. Solomon et al., *The Urban Inst., Putting Public Safety First: 13 Parole Supervision Strategies to Enhance Reentry Outcomes* 31–32 (2008).

224. THE MASS. INST. FOR A NEW COMMONWEALTH, *READY FOR REFORM?: PUBLIC OPINION ON CRIMINAL JUSTICE IN MASSACHUSETTS* 5–6, 26 (2014) (internal quotation marks omitted).

225. *Id.*

Beware then of the heathen gods; have no confidence in principles that come to us in the trappings of the eternal. Meet them with gentle irony, friendly skepticism and an open soul. . . . Nor be cast down, . . . for it is always dawn. Day breaks forever, and above the eastern horizon the sun is now about to peep. Full light of day? No, perhaps not ever. . . . [but] if one watches sharply enough the paths that were so blind will become hourly plainer. . . . [W]e shall learn to walk straighter. Yes, it is always dawn.<sup>226</sup>

---

226. CONSTANCE JORDAN, REASON AND IMAGINATION: THE SELECTED CORRESPONDENCE OF LEARNED HAND: 1897–1961, at xxiv (2013).