



REFORMING PROBATION AND PAROLE SUPERVISION



Josh Withrow

Reforming Probation and Parole Supervision

By Josh Withrow

While much attention has been drawn to the staggering number of Americans who are incarcerated in prisons and jails across the United States — over 2 million people — it is perhaps less widely known that more than double that number are entangled in court-ordered government supervision, on probation or parole. A December 2018 Prison Policy Initiative estimate places the number of Americans under judicial supervision at a staggering 4.5 million in total (nearly 1.4 percent of the entire U.S. population), with roughly 3.6 million on probation and 870,000 on parole.¹

With many states actively trying to deemphasize long terms of incarceration for lower-level crimes, especially non-violent crimes, this has increased pressure on probation or parole systems already overwhelmed by enormous caseloads. In addition, for many offenders, the terms and conditions of supervision can be their own sort of prison, and even those who are making the best effort to get back on track can find it hard not to keep getting entangled with the justice system, even without committing any new crimes.

If structured poorly, probation and parole systems can be a major contributor to the cycle of re-incarceration that plagues our justice system. However, if employed in a more targeted manner that aligns the system's incentives with those of maximizing the successful reentry of ex-offenders as rehabilitated members of society, judicial supervision can be a key part of effective and smart-on-crime criminal justice reform.

History, and the Explosion of Supervision Populations

Probation and parole are both agreements made between the courts and a person convicted of a crime, to allow that person to avoid incarceration or further incarceration and, instead, be placed under a government official's supervision for a defined period of time, as long as certain requirements are met. Probation can be given in lieu of or in addition to a term of incarceration in jail or prison, whereas parole is an agreement to release a prisoner, under supervision, before his or her term has formally ended. In both cases, violations of the supervision agreements subject the offender to sanctions up to entirely voiding the agreement and being remanded to prison, a process known as revocation.

The modern conception of probation and parole as ways to rehabilitate offenders

¹ Alexi Jones, "Correctional Control 2018: Incarceration and Supervision by State," Prison Policy Initiative, Dec., 2018. <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html>

rather than imprison them dates back to the mid-19th century, though the basic idea goes back much farther. A Boston shoemaker named John Augustus generally gets credited with the first informal probation system in the United States, starting in 1841. Augustus personally paid the bail for selected inmates who couldn't afford it, helped them get back on their feet with a job and education, and had the judge suspend their sentence if they succeeded (which most did).²

The idea of prisoners earning time towards early supervised release, or parole, dates back to experiments in the British penal system around that same time period. In the United States, formal parole and probation laws started to become commonplace at the state level around the turn of the twentieth century, and by mid-century every state had established a system for both forms of judicial supervision.³ Notably, the federal judicial system has the ability to offer probation sentences, but no option for parole once incarcerated.⁴

Just as the tough-on-crime response to rising crime rates in the 1970s and 1980s, and the escalation of the “War on Drugs,” saw massive increases in U.S. incarceration rates, so too the supervision population exploded. Unfortunately, during this time period, attitudes towards the criminal justice system as a whole took a sharp turn away from the ideal of helping offenders rehabilitate and reintegrate, and towards a model much more strictly built on social control. This change in attitudes changed probation and parole enforcement and “led to probation officers emphasizing the law enforcement aspects of their job, with a particular emphasis on strictly enforcing the conditions of probation.”⁵

This emphasis on supervision as an enforcement tool naturally served to bolster the dramatic incarceration rates that were beginning to overload state corrections budgets by the late 1990s and early 2000s. By the mid 2000s, even a number of the more conservative states with a harder, “lock-’em-up” approach to law enforcement began to realize that mass incarceration was fiscally unsustainable.⁶

This urgent need to cut corrections budgets made the use of probation sentences for minor offenders seem increasingly attractive. For example, a Pew study estimated that “on average, the daily cost of supervising a probationer in fiscal 2008 was \$3.42; the average daily cost of a prison inmate, \$78.95.”⁷ Thus, while

2 Ryan M. Labrecque, “Probation in the United States: A Historical and Modern Perspective,” in *Handbook of Corrections in the United States*, O.H. Griffin, III and V.H. Woodward, eds., 2017. https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1029&context=ccj_fac

3 “Probation and Parole: History, Goals, and Decision-making,” Law Library: American Law and Legal Information, 2020. <https://law.jrank.org/pages/1817/Probation-Parole-History-Goals-Decision-Making-Origins-probation-parole.html>

4 Recent reforms such as the First Step Act (P.L. 115-391) allow earned time credits towards shorter sentences, but in most circumstances prisoners must receive a pardon or commutation to get out of federal prison before their sentence is up.

5 Labrecque, “Probation in the United States,” pg. 8.

6 For more on the wave of conservative states that have quickly turned back towards a more rehabilitative model of criminal justice, see: Josh Withrow, “Red State Redemption: Ten Conservative States that Have Led the Way on Justice Reform,” FreedomWorks.org, Jan. 16, 2020. <https://www.freedomworks.org/content/red-state-redemption-ten-conservative-states-have-led-way-justice-reform>

7 “One in 31: The Long Reach of American Corrections,” Pew Center on the States, Mar., 2019. https://www.pewtrusts.org/-/media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf

states have eagerly downsized their overcrowded prisons' populations, supervision populations spiked to a high of over 5.1 million people in 2007. The most recent official total of 4.5 million just gets us back down to 2000 levels (although, adjusting for population, the per capita supervision rate had fallen to 1993 levels).⁸

The downside of this emphasis on reducing corrections populations and budgets quickly is that many states have failed to take a holistic approach to the interaction between incarceration, rehabilitation, re-entry, and supervision. All of these components have to work together so that they are encouraging, not discouraging, those offenders who are sincerely trying to put their past mistakes behind them.

Probation as a Pipeline Back to Prison - Revocations

Probation and parole agreements, after all, are merely substitute punishments offered in lieu of a term of imprisonment - the Sword of Damocles hanging over every person under judicial supervision is the threat of having that agreement revoked and having to serve some or all of their remaining time behind bars. More so than even the tremendous raw number of people currently under judicial supervision, the revocation rate for offenders in many states highlights a system that is not working. A recent study by the Council of State Governments revealed that in 2017, 45 percent of all state prison admissions were via probation and parole violations, well over half of which were “technical” violations, most often meaning that no new crime was committed. That same study notes, “In 13 states, more than 1 in 3 people in prison on any given day are there for a supervision violation.”⁹

Of course, there will always be some individuals who will not be reformed and who will re-offend; however, to be clear, revocations do not necessarily indicate recidivism. The data is somewhat difficult to parse with total accuracy because states all have their own definition of what constitutes a technical supervision violation, but in general “technical” means that the violation would not constitute a criminal offense by itself, were the person involved not already under a term probation or parole.

To put a finer point on it, according to research by Professor Michelle S. Phelps, “Among inmates in the mid-2000s who were on probation at the time of their arrest, 75 percent of jail inmates and 30 percent of prison inmates had not been convicted of a new crime.”¹⁰ Functionally, many civil offenses that might result in merely a fine for ordinary citizens can land a probationer or parolee in, or back in, jail. In some

8 Danielle Kaeble and Mary Cowhig, “Correctional Populations in the United States, 2016,” Bureau of Justice Statistics, April 2018. <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>

9 “Confined and Costly: How Supervision Violations are Filling Prisons and Burdening Budgets,” Council of State Governments Justice Center, June, 2019. <https://csgjusticecenter.org/wp-content/uploads/2020/01/confined-and-costly.pdf>

10 Michelle S. Phelps, “Ending Mass Probation: Sentencing, Supervision, and Revocation,” *Reducing Justice System Inequality*, 28:1, Spring 2018, pp. 125-146 <https://futureofchildren.princeton.edu/sites/futureofchildren/files/media/vol28issue1.pdf>

jurisdictions, even a traffic ticket can count as a technical violation that can be punished as such.¹¹

These alarming numbers highlight the tension inherent in probation and parole programs — guidelines and punishments need to exist to force offenders to take the programs seriously, but to make them too onerous or arbitrary is to risk a system where even well-intentioned participants are set up to fail. Excessively long terms of supervision, combined with dozens of ways to have them extended or revoked while subjecting offenders to a far higher degree of scrutiny than an ordinary citizen, can be a recipe for keeping people ensnared in the judicial system indefinitely.

Probation Is More Than Just a Slap on the Wrist - The Burdens of Supervision

Since many probation and parole agreements are managed at the county or municipal level, there are about as many different supervision conditions in existence across America as one could imagine. That said, certain types of requirements are common enough to talk about generally. Checking in at regular intervals with a probation officer, seeking and maintaining employment, avoiding alcohol and drug use, and paying fines and fees are all fairly ubiquitous terms nationwide.

While, on the surface, it is easy to regard compliance with these agreements as a relative slap on the wrist compared to incarceration, they can stack up to become both a compliance nightmare for offenders and a paperwork nightmare for their supervising departments. In some cases, studies found that offenders may even find serving a jail sentence to be less of a burden than serving a comparable length of time under probation.¹²

IN-PERSON REPORTING AND TESTING

A standard requirement of nearly every supervision term is that the offender periodically check in with their supervising officer. Very often this means coming in person to the local probation or parole office, although check-ins via phone or online are thankfully becoming much more common. Officers sometimes also conduct in-home visits, which they are often not required to announce in advance, and in some cases officers will even check in on an offender's employer. Offenders who miss a check-in are said to have "absconded," an offense that can lead to a warrant being placed for their arrest.

Obviously, checking in on offenders under supervision is part of the whole point of these programs, to ensure that they are not relapsing into criminal behavior and

11 Fiona Doherty, "Obey All Laws and Be Good: Probation and the Meaning of Recidivism," *Georgetown Law Journal*, Vol. 104, No. 2, 2016. pp. 302-3. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726740

12 Joan Petersilia, "When Probation Becomes More Dreaded Than Prison," *Federal Probation*, 54:1, Mar., 1990. Accessed via the National Criminal Justice Reference Service, <https://www.ncjrs.gov/pdffiles1/Digitization/123146NCJRS.pdf>

endangering public safety. If made too frequent, however, check-ins can pile onto the heap of other time-consuming requirements put upon the offender, such as employment, rehabilitation programs, community service, and drug testing.

Drug testing is used more often in more intensive supervision contexts such as drug courts, where it makes sense because individuals in these programs are being helped to kick an addiction. However, it is not altogether uncommon under ordinary supervision agreements in some jurisdictions. Drug testing is a time- and cost-intensive practice that studies suggest can be counterproductive if used in a purely punitive fashion, as opposed to being combined with sanctions that may help an offender get needed treatment.¹³

LOCATION/CURFEW RESTRICTIONS

Restriction of movement, including a curfew, is another common supervisory condition, sometimes to the point of fitting the individual with an ankle bracelet or other GPS tracker. Usually, moving around outside of a specific geographic area and/or time window is allowed only under the express permission of the individual's probation supervisor. Gaining such permission assumes the supervisor can be reached, which is unfortunately not always the case.

Restrictions on movement that make sense include prohibiting offenders from deliberately contacting or getting too near a victim of one of their crimes - violating a term like this ought to be regarded as an extremely serious offense. However, movement and curfew restrictions, if made too onerous, can greatly interfere with an offender's ability to be independent, to find and hold a job, and to access support networks that can help keep them out of trouble.

A subset of mobility restrictions is the suspension of an offender's driver's license. While this may make sense for certain vehicular offenses, such as repeated intoxicated driving offenses, many states will suspend drivers' licenses for a multitude of other reasons, including inability to pay court fees or probation costs. Offenders with their license suspended, but who still need transportation to a job and for any of the other activities mandated by their supervision agreements, may be faced with the tough decision of whether to risk driving without a license, an offense which itself could lead to new criminal charges.

OFFENDER MUST OBTAIN/MAINTAIN EMPLOYMENT

The requirement that offenders must find and keep a job certainly makes sense in terms of establishing that they are going to be able to succeed in re-entering society. Unfortunately, many of the aforementioned terms of supervision can make

¹³ Jessica Reichert, "Drug Testing in Community Corrections: A Review of the Literature," Illinois Criminal Justice Information Authority, Jan 23, 2020. <https://icjia.illinois.gov/researchhub/articles/drug-testing-in-community-corrections-a-review-of-the-literature#fn40>

holding down a job incredibly difficult. This is on top of the existing difficulty in finding a job for individuals with a criminal - and especially a felony - record.¹⁴ Short-term revocations as a part of a response to supervision violations can particularly complicate employment, which is another argument for limiting what probation violations rise to the level of reincarceration.

NO INTOXICATING SUBSTANCES

This requirement is no surprise, and makes sense given the large percentage of offenders whose crimes are related to drug or alcohol use. The devil, as ever, is in the details. In many states, absolute abstinence from both legal (alcohol, marijuana in some states) and illegal intoxicants is a base requirement of probation and/or parole, often regardless of whether substance abuse was related to the crime. There are some jurisdictions that go so far as to prohibit the offender from setting foot in places that serve alcohol, or even from being in a residence where alcohol or other substances are present.¹⁵

Revocation for violating these provisions when no other criminal behavior is involved risks causing greater damage to the offender and to public safety, depending on their circumstance. Fortunately, more states are moving towards trying to help offenders address any substance abuse issues they have, instead of counterproductively punishing at every turn.

FINES, FEES, AND DEBTOR'S PRISONS

Being convicted of a crime — even the most minor — is expensive. After paying legal fees (even the use of a public defender incurs a charge in many states), offenders are faced with court costs, fines, and sometimes victim restitution payments. Probation and parole agreements usually charge an additional regular fee, and failing to make any of these legally mandated payments is often considered a technical violation that in some jurisdictions can lead to revocation.¹⁶ If rehabilitation programming is mandated as part of the supervision agreement, that often carries a cost as well. Finally, if the offender has any child support or alimony payments, paying those is often a condition of their agreement too.

Given that a large proportion of convicted offenders are from low-income backgrounds, the burden of these payments can quickly not only obstruct getting back on their feet, in many states they can trap people in what effectively amounts to debtor's prisons. This is compounded with the aforementioned difficulty in finding jobs for ex-offenders, who are often only able to find low-wage work. A criminal

14 An extensive amount of research has been done on the difficulties in finding employment faced by individuals with a criminal record. See, for example, Scott Decker, Cassia Spohn, and Natalie Ortiz, "Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment," Final report to the National Institute for Justice, Jan. 2014. https://thecrimereport.s3.amazonaws.com/2/fb/e/2362/criminal_stigma_race_crime_and_unemployment.pdf

15 Doherty, pg. 316.

16 Doherty found these fee payment requirements to be present in very nearly every jurisdiction.

record can preclude access to many welfare programs as well, such as housing and nutritional assistance. Small wonder, then, that many of these payments never get collected. Just at the federal level, outstanding criminal justice debts exceeded \$124 billion in FY 2017.¹⁷

Due Process and the Supervisors

One condition of judicial supervision that is common to most states and jurisdictions is a dramatic lowering of due process rights. In 1987, the U.S. Supreme Court in *Griffin v. Wisconsin* held that “Supervision of probationers is a ‘special need’ of the State that may justify departures from the usual warrant and probable cause requirements,” as long as the probation officer has “reasonable grounds” for suspicion of illegal activity or possession.¹⁸

In 2001, the Supreme Court slightly upped this standard to “reasonable suspicion,” but left open that “although the Fourth Amendment ordinarily requires probable cause, a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable.”¹⁹

In addition, defendants have far fewer due process protections in revocation hearings than they would in a regular criminal proceeding. Offenders in a revocation proceeding do not enjoy any presumption of innocence, and their guilt with respect to the violations they are being accused of does not have to be established beyond a reasonable doubt. A “preponderance of the evidence” standard is instead the most common threshold of proof that law enforcement has to meet in order for an offender to have their supervision agreement revoked.²⁰

Effectively, judicial supervision is considered a voluntary arrangement and a privilege under which the person to be supervised waives their normal rights in exchange for not being incarcerated. In many jurisdictions, this leaves probation officers with extraordinary power over the individuals on their docket. Yale Law Professor Fiona Doherty notes that this was a deliberate result of the early days of the probation system, fueled by progressives who touted what she labels the “benevolent supervisor theory” of offender management.²¹ There are several practical problems with this theory, leaving aside the question of what happens when the supervisor isn’t benevolent.

The first is the size of the average supervision official’s caseload. Though this obviously varies widely, in states with higher supervision populations it is not

17 Patrick Liu, Ryan Nunn, and Jay Shambaugh, “Nine Facts About Monetary Sanctions in the Justice System,” Brookings Institute, Mar. 15, 2019. <https://www.brookings.edu/research/nine-facts-about-monetary-sanctions-in-the-criminal-justice-system/>

18 *Griffin v. Wisconsin*, 483 U.S. 868 (1987)

19 *United States v. Knights*, 534 U.S. 112 (2001)

20 Doherty, pp. 321-323.

21 *Ibid*, pp. 328-330

uncommon to find parole or probation officers overseeing several hundred individuals at once. In Pennsylvania, for example, the average probation officer's caseload in 2018 was 143 offenders, with 105 of those being active cases, while some counties saw caseloads as high as 299 per officer.²² Some states and jurisdictions are better than others about apportioning cases so that officers focusing on higher-risk offenders (such as violent felons) have smaller caseloads, but this can also lead to officers supervising lower-risk offenders holding absurd caseloads, as is the case in Georgia.²³

Secondly, if the point of these incredibly intrusive powers to randomly show up, check in, and potentially search offenders is for the officer to establish a real human connection with the people under their supervision, the ability to make that connection is lessened the larger the officer's caseload. Overburdened supervision officials are far more likely to resort to automatically use the harsher tools provided to them, such as threatening revocation, if that is the only time-efficient tool available to them.

A certain amount of temporarily heightened scrutiny of released offenders may be necessary depending on the nature of the offense. Yet, when imposing any given probation requirement, the violation of which may mean a renewed loss of freedom, it is worth asking how many ordinary citizens might find it difficult to comply if under the same level of observation. As a probation officer interviewed by the Robina Institute scoffed, "you get clients in the system, and then you get 16 different conditions. If I was on probation, I would violate every other month."²⁴

Reducing the arbitrariness of the criminal justice system is difficult when its aim reaches beyond merely ensuring public safety and keeping the peace to enforcing virtue instead.

Violations that Aren't Even Crimes - The Arbitrary

In addition, judges are often given wide latitude to tailor supervision conditions to the particular characteristics of the individual. This can be positive, and is certainly more sensible than forcing every single prisoner through an overly rigorous program that caters to the worst common denominator among them. However, some of the requirements contemplated in many state and local guidelines allow for supervision requirements that are indefinite, arbitrary, and reach beyond merely ensuring that an offender doesn't pose a danger to public safety.

22 Pennsylvania Department of Corrections, "County Adult Probation and Parole Annual Statistical Report," 2018. <https://www.cor.pa.gov/About%20Us/Statistics/Documents/Reports/2018%20CAPP%20Annual%20Statistical%20Report.pdf>

23 In Fulton County (which contains downtown Atlanta), for example, an investigation found a ratio of one probation officer for every 587 low-risk probationers. Erica Byfield and Terah Boyd, "Caseloads High for Ga. Probation Officers," *Atlanta Journal-Constitution*, Apr. 30, 2016. <https://www.ajc.com/news/crime--law/caseloads-high-for-probation-officers/A2nA8TZCAIRHJcRVSPVxFN/>

24 Ebony Ruhland, "What Purpose Should Probation Serve? Looking to Other Alternatives," *Robina Institute of Criminal Law and Criminal Justice Blog*, Jan. 31, 2018. <https://robina.institute.umn.edu/news-views/what-purpose-should-probation-serve-looking-other-alternatives>

The condition of only associating with “good” people, sometimes specifically codified as avoiding association with anyone with a criminal record, is both particularly egregious and unfortunately found in many jurisdictions.²⁵ While the intent is presumably to discourage an offender from falling back in with a gang or other criminal band who might lead them back to crime, one can easily see how such a broad requirement could be used to discriminate on the basis of race or socioeconomic status.²⁶

In many cases this might even make associating with close friends and family a violation, precisely when an offender most needs a social network to help them. Similarly, individuals with criminal records who have successfully returned to society and navigated many of the same hurdles either on probation, parole, or otherwise could be the very people who are most helpful to enabling those newly on probation or parole to succeed.

Another common virtue requirement is to “avoid injurious or vicious habits,” variations of which can be found in many states. This sort of clause springs from the same mindset as forcing prisoners to avoid even the presence of alcohol, even if they have no recorded history of substance abuse. Similarly, vague “obey all laws” clauses often do not differentiate between civil and criminal infractions, which is how violations that would land a normal citizen a mere fine can be grounds for a probationer to end up back in jail.²⁷

Policy Solutions:

EVIDENCE-BASED RISK ASSESSMENT

When it comes to the key combination of simultaneously improving outcomes (i.e. higher supervision completion rates, lower crime rates) and reducing the number of people involved with the justice system, a core function that needs to be done well is risk assessment. In other words, determining who actually needs a higher level of supervision involvement in order to maximize public safety, and who is likely going to do well as long as they have some basic resources to help them along.

Risk assessment by various methods has been used by many states for decades; however, as a Council of State Governments study notes, “purposeful or not, correctional personnel and institutions tend to perpetuate an ineffective one-size-fits-all approach to offender management and rehabilitation.”²⁸ Indeed a number of

25 Doherty, pg. 302

26 For example, an estimated 1 in 3 African-American males now have a felony conviction, and that percentage is doubtless much higher within certain inner-city communities. See Shannon, S.K.S., Uggen, C., Schnittker, J. et al. “The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010,” *Demography*, Vol. 54, Pp. 1795–1818 (2017). <https://doi.org/10.1007/s13524-017-0611-1>

27 Doherty, pg. 302-303

28 Sarah L. Desmarais and Jay P. Singh, “Risk Assessment Instruments Validated and Implemented in Correctional Settings In the United States: An Empirical Guide,” Council of State Governments Justice Center, 2013. <https://csgjusticecenter.org/wp-content/uploads/2020/02/Risk-Instruments-Guide.pdf>

studies have even suggested that subjecting lower-risk offenders to overly intensive supervision and rehabilitation programs can actually lead to worse outcomes.²⁹

While risk assessments are always going to be subjective, given that every person who becomes ensnared in the justice system is different, an increasing body of research is showing that there are a number of common metrics that can guide probation and parole departments in most cases. A Pew Research publication analyzed the main risk indicators for persistent criminal activity, and unsurprisingly found that available support networks after release, education, and attitude (whether the offender expresses remorse or recognizance) have the most bearing on the risk of recidivism.³⁰

CREATE INCENTIVES FOR SUCCESSFUL REENTRY

Once states establish a decent risk assessment tool, the next most important step is understanding that incentives matter, for offenders and supervisors both, and creating policies that acknowledge this reality. This means making sure that the supervision programs present clear and present options for offenders to advance in ways that could expedite their freedom. Just as prisoners increasingly have options to earn credits towards their early release, probationers and parolees who demonstrate success in their re-entry to society should be able to earn a shortening of their supervision. A number of states have proven this approach can be successful.

Missouri, which implemented good behavior credits for both probationers and parolees in 2012, has been an excellent example of this type of reform done well. By 2016, a Pew study found that “more than 36,000 probationers and parolees reduced their supervision terms by an average of 14 months” and that the state’s supervision population fell by 18 percent in just those few years.³¹ Several of the states with the largest supervision populations, including Georgia and Pennsylvania, have implemented some form of incentives to either shorten supervision sentences or at least move offenders to low-supervision probation or parole in response to good behavior.³²

SPEND LESS TIME SUPERVISING LOW-RISK OFFENDERS

Since a large majority of criminals who are going to re-offend do so within the first year after their conviction (or, in the case of parolees, their release), it makes

29 See: Christopher T. Lowenkamp and Edward J. Latessa, “Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders,” Topics in Community Corrections, 2004. <https://www.correctiveservices.justice.nsw.gov.au/Documents/Risk-principal--accessible-442577.pdf>

30 “Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders,” Pew Center the States Public Safety Performance Project Issue Brief, Sept., 2011. https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2011/pewriskassessmentbriefpdf.pdf

31 Pew Charitable Trusts, “Missouri Policy Shortens Probation and Parole Terms, Protects Public Safety,” Aug. 8, 2016. <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/missouri-policy-shortens-probation-and-parole-terms-protects-public-safety>

32 See “Red State Redemption,” for more examples of successful reforms in ten conservative states.

sense that the intensity of scrutiny of low-risk offenders ought to diminish as time passes. In fact, some states have shown success with dispensing with active supervision altogether after a period of time, usually a few months, and a few allow for a supervision term to be terminated altogether after a given period with no violations.³³ This opens up supervision officers' caseloads to focus on the few dozen people in each of their portfolios who are either just struggling with reentry or who are demonstrating a troubling need for closer scrutiny. Public safety is quite obviously better served by focusing our criminal justice resources on offenders who are a higher risk to pose a threat to others.

CHANGE THE GOVERNMENT'S FINANCIAL INCENTIVES TOO

The incentives have to change for probation and parole offices as well. As Greg Glod formerly of the Texas Public Policy Foundation notes,

"The majority of state funds distributed to probation departments are based upon the number of individuals the department has under direct supervision. This means that there is a substantial disincentive to terminate probation sentences for individuals who have followed all requirements of their probation, timely paid their restitution, and no longer need to be supervised."³⁴

It is also important that states realign financial incentives for supervision programs to align with the goal of helping offenders successfully rehabilitate and leave the justice system entirely. Several states have made moves in this direction, including Arizona and California, both of which have seen declines in revocation since tying probation funding to increasing the successful completion of their supervision terms.³⁵

In addition, it is important to allow some latitude for those offenders who upon release find themselves truly without the resources to pay the many fines, fees, and obligations required of them. Many states provide for suspending or even waiving some of these costs, which again discourages states and local justice programs from relying upon excessive fees as a means of funding.

REDUCE REVOCATIONS FOR TECHNICAL VIOLATIONS AND MAKE CONSEQUENCES EASIER TO UNDERSTAND

Put simply, many states and localities need to reevaluate what offenses are actually worthy of sending a probationer or parolee to jail or prison, and for how

33 Alexis Lee Watts, "Probation In-Depth: The Length of Probation Sentences," Robina Institute of Criminal Law and Criminal Justice, 2016. https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/probation-in-depth_final.pdf

34 Greg Glod, "Incentivizing Results: Lessons From Other States' Probation Funding Formula Reforms and Recommendations to Texas Lawmakers," Texas Public Policy Foundation, Jan., 2017. <https://files.texaspolicy.com/uploads/2018/08/16103231/2016-11-PP27-IncentivizingResults-CEJ-GregGlod.pdf>

35 Ibid

long. The metric needs to be what is necessary to help ensure that an offender doesn't commit more crimes that endanger other people, and that's it. Supervision requirements that effectively criminalize activities or behavior that wouldn't land an ordinary person in jail shouldn't be used to incarcerate offenders under supervision either. Incentivizing virtue is a nice ideal that shouldn't be enforced by law enforcement.

A potentially helpful reform that has been adopted by a number of states is making short-term revocations for certain violations "swift and certain," allowing probation and parole officers to establish up front that certain violations can result in a quick, automatic, short-term jail stay (usually just a handful of days). Several states which have adopted versions of this approach, including North and South Carolina, appear to have seen increases in successful completion of supervision programs.³⁶

The downside of swift-and-certain policies is that they can also provide an incentive for supervision officers to use quick trips to jail as a punishment much more liberally, as it may be a far easier alternative to taking the time to evaluate and work with the offender. Even short bursts of jail time (3-5 days) could prove disastrous to an offender's prospects of holding onto a job, for example, so overuse of this tactic could easily prove counterproductive. This just highlights the importance of implementing many of these policies in tandem, to reduce supervision caseloads and allow for a more individualized approach to each offender's case.

Another approach outlined by Right on Crime's Mark Levin is that defined, graduated sanctions may serve as a better enforcement mechanism than the immediate threat of revocation.³⁷ In other words, offenders may be more likely to cooperate in good faith if they are assured that they have chances to recover if they slip up, just as a "B" student still gets to pass the class. If they believe that one missed check-in, one failed drug test, will result in full revocation, offenders may be more likely to try to abscond rather than own up to their problems.

No matter the exact approach, research has shown that programs that are focused on working with offenders towards compliance lead to better outcomes than a purely punitive enforcement approach.³⁸ In addition, technical violations haven't been shown to correlate strongly with risk of recidivism, so it doesn't make sense to treat every violation like a crime.³⁹

36 Michael Haugen, "Getting Technical: Preventing and Responding to Technical Supervision Violations and Misdemeanors," Texas Public Policy Foundation Policy Perspective, December 2019. <http://files.texaspolicy.com/uploads/2019/12/18133429/Haugen-Technical-Supervision-Violations.pdf>

37 Marc Levin, "Ten Tips for Policymakers for Improving Probation," Right on Crime Policy Perspective, May 2019. <https://files.texaspolicy.com/uploads/2019/05/17151137/Levin-Improving-Probation.pdf>

38 Christopher T. Lowenkamp, Anthony W. Flores, et al., "Intensive supervision programs: Does program philosophy and the principles of effective intervention matter?" *Journal of Criminal Justice*, 38:4, July-August 2010, pp. 368-375. <https://www.sciencedirect.com/science/article/pii/S0047235210000590?via%3Dihub>

39 Christopher M. Campbell, "It's Not Technically a Crime: Investigating the Relationship Between Technical Violations and New Crime," *Criminal Justice Policy Review*, 27:7, Nov., 2016, pp. 643-667. <https://journals.sagepub.com/doi/10.1177/0887403414553098>.

INCREASE DIVERSIONARY PROGRAMS, INCLUDING PRE-TRIAL

Finally, various diversionary programs can work to actually address underlying causes of criminal behavior. These include mental health, substance abuse, and anger management programs, which all address issues that strongly correspond to repeat offenses if left untreated. Increasingly, many states have also recognized veterans as a class of offender with particular mental health needs, and have established specific diversionary programs for them.

Especially for minor and first-time offenders, diverting them into these programs pre-trial can help them make changes that may be far more beneficial to both them and the safety of their communities than simply processing them through the criminal justice system, with all the burdens that entails. Similarly, for those already under supervision, these programs may provide a more effective option, both in terms of efficacy and cost, than sending them back to jail for technical violations. For higher-risk offenders whose offenses are related to substance abuse, diversion to more intensive drug courts has shown a good deal of success in decreasing the recidivism rates of participants.⁴⁰

Another type of diversionary program that has been piloted in a number of localities is restorative justice, which works to allow a more direct process of restitution and healing for both the offender and victim. Implemented only in situations where both the offender and victim choose to participate, a group consisting of law enforcement, counselors, and the victim and accused design a set of conditions to fulfil that in some way requires the offender to repay the victim through their actions, and if successfully completed the offender can avoid the criminal justice system entirely.⁴¹

Conclusion

It is encouraging to see that an increasing number of states are realizing that probation and parole systems that just serve as a pipeline to incarceration foster neither justice nor public safety. States and localities need to think about their criminal justice systems holistically, and evaluate whether the incentives created by their supervision programs align with their stated goals — which ought to be to help offenders who can be rehabilitated get back to normal life as productive members of society.

40 Jake Horowitz, "Policy Reforms Can Strengthen Community Supervision: A Framework to Improve Probation and Parole," Pew Charitable Trusts, Apr. 23, 2020. <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/04/policy-reforms-can-strengthen-community-supervision>

41 Rebecca Beitsch, "States Consider Restorative Justice as an Alternative to Mass Incarceration," PBS News Hour, Jul 20, 2016. <https://www.pbs.org/newshour/nation/states-consider-restorative-justice-alternative-mass-incarceration>

