PROBATION DETAINERS IN PHILADELPHIA: A DUE PROCESS DUD?

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ABSTRACT

Cash bail has drawn significant popular attention as a target for criminal justice reformers, and for good reason: studies continue to demonstrate that negative outcomes are considerably more likely for people who are detained pre-trial. Despite possessing the presumption of innocence—at least theoretically—individuals who can't afford bail and are detained pre-trial often lose jobs, housing, or even custody of children while awaiting adjudication. Many who are detained pre-trial will plead guilty—even if they are factually innocent, especially to low-level charges—in order to avoid spending months or longer in jail waiting for a trial.

This focus on cash bail reform is undoubtedly a worthy cause. In Philadelphia, as across the rest of the country, an important portion of the people filling the local jails are those accused of crimes who can't afford bail. But there is also another population of people, facing similar detention and attendant consequences, whose situation has not received quite the same level of attention. The largest portion of Philadelphia's jail population, by far, is made up of people who are held on a probation detainer. Probation detainers are a legal order that can be imposed when someone violates the terms of their probation; once lodged, an individual is jailed without the possibility of bail and held until their detainer is lifted. While these detainers are supposed to be within the sole purview of judges, in Philadelphia the reality on the ground is that individual probation officers, acting on their own, can

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have a probationer taken into custody and cause a detainer to be lodged against them.

This Note examines the world of due process issues surrounding Philadelphia's use of probation detainers. To that end, this Note will review the history and rise of probation in the United States and the Commonwealth of Pennsylvania, examine contemporary probation law, and analyze the problem of detainers being used in a way that erodes the due process rights of people on probation.

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INTRODUCTION

Giovanni Guzman-Vegas was detained without bail for months based on an arrest: he had gotten into a fight with a man who had groped his seven-months-pregnant girlfriend.[1] Guzman-Vegas was on probation at the time of his arrest.[2] When an individual on probation in Philadelphia commits a violation—even a technical violation like failing a drug test or

1. Maura Ewing, *How Minor Probation Violations Can Lead to Major Jail Time*, ATLANTIC (June 9, 2017), www.theatlantic.com/politics/archive/2017/06/philadelphia-detainer-holds/529758/.

2. *Id.*

missing a curfew—a probation detainer can be lodged against them.[3] A probation detainer is a legal order that causes a person to be held in custody, without the possibility of securing release by posting bail.[4] Once lodged, a probation detainer can only be lifted by a judge or trial commissioner, a process that nearly always results in the probationer spending a few weeks in jail at a minimum.[5] Even worse, if the probationer has open charges the detainer can be in effect for months until the underlying case is resolved.[6] In his case, without the possibility of posting bail, Guzman-Vegas faced a common choice for people in his position: plead guilty to this new charge and be immediately released but with additional probation, or wait an undetermined amount of time for his case to grind through the criminal court dockets so he could have the chance to defend himself.[7] Guzman-Vegas, with a pregnant girlfriend and a job at his family's bar at home to tend to, chose to plead guilty to obtain release.[8]

José Ribot, who has never been convicted of a violent crime, spent a year and a half in Philadelphia jails because of a probation detainer.[9] His first arrest for a low-level drug offense led to a plea deal after he was unable to make bail.[10] This first arrest rendered him unemployed, and Ribot's second low-level drug arrest triggered a probation detainer that led to an

3. *Id.*

4. Samantha Melamed, *Philly Courts to Stop Withholding Controversial Bail Fee*, PHILA. INQUIRER (Oct. 10, 2018, 4:14 PM), https://www.inquirer.com/philly/news/philly-money-bail-community-bail-fund-probation-detainers-20181010.html [hereinafter Melamed, *Philly Courts*]; *see also* Ewing, *supra* note 1.

5. Samantha Melamed, *Philly Public Defender Suit Seeks to Blow Up 'Unlawful' Probation Detainers*, PHILA. INQUIRER (July 11, 2019, 5:00 AM), https://www.inquirer.com/news/philadelphia-probation-detainers-keir-bradford-gray-20190711.html [hereinafter Melamed, *Philly Public Defender*].

6. *Id.*

7. Ewing, *supra* note 1.

8. *Id.*

9. Ryan Briggs, *Escaping the Detention Trap*, CITY & ST. PA. (June 27, 2016, 3:07 PM), https://www.cityandstatepa.com/content/escaping-detention-trap.

10. *Id.*

eighteen-month period of incarceration.[11] This is a familiar story, as individuals struggling with drug addiction—especially those living in poverty—are at frequent risk of arrest for drug possession.[12] For those on probation, with arrests come detainers, with detainers come plea deals to obtain release, and with plea deals come more probation or sometimes even incarceration.[13] The combination of probation detainers and addiction can become like quicksand.

Annie Jackson, a fifty-six-year-old Philadelphian, was just thirty days away from completing her probation sentence for a retail theft when she was arrested again, this time for a crime she had not committed.[14] After lending her car to a neighbor, Jackson went to retrieve the car and found the neighbor's boyfriend using it.[15] Police got involved in the situation and arrested Jackson based on a backpack full of drugs and guns that the neighbor's boyfriend had left in the car's back seat.[16] Jackson would eventually be acquitted of all charges in connection with the incident, but her arrest led to a probation detainer that foreclosed the possibility of bail.[17] She spent nearly a year in jail waiting for her chance to prove her innocence.[18] In the end, Jackson would lose both her car and home during the ordeal, and she continued to struggle with obtaining secure housing five months after her eventual release.[19]

These results are not atypical. When faced with extended pretrial detention, people accused of a crime who cannot afford bail often plead guilty to charges, regardless of the underlying

11. *Id.*

12. *See, e.g.*, Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31, 71 (2011).

13. Briggs, *supra* note 9.

14. Samantha Melamed, *The Philly Rule that Jails People Indefinitely on Detainers Could Get Way Worse*, PHILLY.COM (Oct. 18, 2018, 4:24 PM), http://www2.philly.com/philly/news/the-philly-rule-that-jails-people-indefinitely-without-trial-could-get-way-worse-20181018.html [hereinafter Melamed, *Philly Rule*].

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

facts or circumstances, simply to achieve release.[20] Those who refuse to plead guilty and choose to exercise their constitutional rights by demanding a trial—and consequently deferring their release—often find themselves in situations like that of Annie Jackson: risking the loss of crucial foundations of life like jobs, housing, or even custody of children in the process.[21]

As of September 2018, roughly 19% of the people incarcerated in Philadelphia city jails were pretrial defendants who could not afford bail; however, a far greater proportion—just over 56%—were incarcerated because of a probation detainer.[22] An informal 2017 survey by *The Atlantic*, documenting the probation detention rates in the ten largest jurisdictions in the United States, suggested that Philadelphia stands out in this regard.[23] Of the jurisdictions to respond, all trailed Philadelphia in their detention rates for probation: Bexar County, TX (San Antonio) reported 32%, New York City reported 21%, Harris County, TX (Houston) reported 5%, and Los Angeles County reported 4%.[24]

One force likely driving such results is the fact that Pennsylvania has one of the highest rates of individuals under

20. *See, e.g.*, Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713–14 (2017) ("Available evidence suggests that the large majority of pretrial detainees are detained because they cannot afford their bail, which is often a few thousand dollars or less. This expansive system of pretrial detention has profound consequences both within and beyond the criminal justice system. A person detained for even a few days may lose her job, housing, or custody of her children. There is also substantial reason to believe that detention affects case outcomes. A detained defendant 'is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.' . . . More directly, a detained person may plead guilty—even if innocent—simply to get out of jail."); *see also, e.g.*, ADAM BENFORADO, UNFAIR: THE NEW SCIENCE OF CRIMINAL INJUSTICE 39–40 (2015) (discussing other incentives that can coerce plea deals); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U.L. REV. 1399, 1406–07, 1419 (2017) (finding that pre-trial detention generates large social cost).

21. *See* Heaton et al., *supra* note 20, at 713; *see also* Melamed, *Philly Rule*, *supra* note 14 (describing the collateral effects of probation detention on Annie Jackson's life).

22. *See* DEP'T OF RESEARCH & DEV., FIRST JUDICIAL DIST. OF PA., PHILADELPHIA'S JAIL POPULATION 6 (2018), https://www.phila.gov/media/20181017134516/September-2018-Jail-Population-Report.pdf.

23. Ewing, *supra* note 1.

24. *Id.*

supervision by the courts in the United States.[25] As a raw number, the total comes to 296,000 people across the Commonwealth between probation and parole; on a given day there are roughly 44,000 Philadelphians—around 3% of the city's population—on probation.[26] José Ribot described his view of the paradigm as a trap:

> When you get your first [drug] case, the thing they offer you is called a 'six-five split.' It's six months jail, five years probation. But you're young, what's the possibility of you spending five years on probation and getting in no trouble whatsoever? It doesn't have to be a major violation. You did a traffic violation? You get a detainer. Bus is running late when you have to come in? You get more probation. So you could be on probation 10 years later for something that happened when you were 21.[27]

For these individuals the risk of a detainer is never far away, as illustrated by the real-world examples: Guzman-Vegas for getting into a fight protecting his pregnant girlfriend; Ribot for drug addiction related issues; Annie Jackson for an arrest that eventually ended in an acquittal.[28] In fact, as previously referenced, people on probation do not even need to commit a "direct" violation (i.e., get arrested) for a detainer to be lodged against them.[29] Probation officers in Philadelphia have wide discretion to detain those under their supervision, and people are frequently taken into custody and have detainers lodged

25. *See* DANIELLE KAEBLE ET AL., U.S. DEPARTMENT OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, at 17–21 (Lynn McConnell & Jill Thomas eds., 2015), http://www.pacenterofexcellence.pitt.edu/documents/Correctional%20Population%20in%20the%20US_2014.pdf.

26. Samantha Melamed, *Analysis: Pa.'s Rate for Probation or Parole Supervision 3rd Highest in U.S.*, PITTSBURGH POST-GAZETTE (Apr. 29, 2018 7:54 PM), http://www.post-gazette.com/news/state/2018/04/29/Pennsylvania-probation-parole-supervision-prison-jail-Columbia-University-analysis/stories/201804290159 [hereinafter Melamed, *Pa.'s Rate*].

27. Briggs, *supra* note 9.

28. *See* Ewing, *supra* note 1; Briggs, *supra* note 9; Melamed, *Philly Rule*, *supra* note 14.

29. *See, e.g.*, Ewing, *supra* note 1; Briggs, *supra* note 9.

against them, based on technical violations alone, at the direction of their individual probation officer.[30]

In response to public criticism and pressure regarding the use of detainers,[31] the First Judicial District of Pennsylvania indicated that it would rescind the policy entirely, but guidance regarding what the policy's replacement would look like did not immediately follow.[32] When a draft of a new rule surfaced after being sent to the Pennsylvania Supreme Court for review, critics alleged that it was a step backward, not forward: the old rule, though frequently not followed, was supposed to require hearings within seventy-two hours for all technical violations; the new rule did not specify any time period.[33] Where the old rule—again, though frequently not followed—was supposed to limit automatic detainers to crimes of violence, the new rule appeared to subject to a detainer anyone on probation arrested for anything.[34] Rather than fixing or improving the situation, critics responded, the new rule simply provided authorization to maintain the status quo that was the original source of the criticism.[35]

This Note will analyze the due process implications of probation detainers in detail and lay out a vision for how courts across the Commonwealth can improve the system in a way that better serves the needs of Pennsylvanians by bringing the associated processes in line with more traditional aspects of criminal procedure. Part I provides background information regarding probation, its history, and what contemporary

30. *See, e.g.*, Bobby Allyn, *Top Public Defender Says 'Automatic Detainers' Are Illegal, Swelling Philly Jail Population*, WHYY (Mar. 27, 2018), https://whyy.org/segments/top-public-defender-says-automatic-detainers-are-illegal-swelling-philly-jail-population/; Joe Trinacria, *Philly's Chief Public Defender Challenges Handling of Probation Violations*, PHILA. MAG. (Mar. 28, 2018, 9:13 AM), https://www.phillymag.com/news/2018/03/28/philly-public-defenders-challenge-automatic-detainers/.

31. *See, e.g.*, Allyn, *supra* note 30; Trinacria, *supra* note 30.

32. Melamed, *Philly Courts*, *supra* note 4.

33. Melamed, *Philly Rule*, *supra* note 14.

34. *Id.*

35. *Id.* (quoting Nyssa Taylor of the Pennsylvania ACLU as stating "[t]here's a lack of due process and there's a lack of timeline. It appears to codify what's currently happening and make that acceptable, when we know it's not.").

probation looks like in Pennsylvania. Part II lays out modern law and procedure, both federal and state, regarding probation revocation and detention. Part III analyzes the gap between the law and the conditions on the ground in Philadelphia through the lens of due process and suggests that the correct solution is to bring probation detainers more in line with traditional criminal procedure. This Note concludes with a proposal to curb the probation department's wide discretion by requiring all detainers to be judicially authorized *prior* to a person being jailed, similar to the way that an arrest warrant operates, to maintain the guarantees of due process.

I. PROBATION BACKGROUND

Probation occupies an odd place in the law. Generally speaking, it is supposed to be difficult for the government to imprison individuals, based on the very high burden of proof in a criminal case, the accused's right to an attorney, and the collection of constitutional rights and procedural protections the defendant possesses.[36] As we know, however, a significant portion of the criminal justice system in the United States operates in spaces where these protections either do not exist or apply to a much lesser extent.[37] Probation fits within this context, and it has been criticized on the grounds that "the procedures associated with this shadow system [of probation] are very different than those associated with criminal trials."[38]

Probation orders generally take the form of an injunction, and the probation revocation hearings that operate to enforce the

36. Nirej S. Sekhon, *Punitive Injunctions,* 17 U. PA. J.L. & SOC. CHANGE 175, 176 (2014).

37. *See id.* ("In theory, a host of procedural protections, including a heightened burden of proof and right to appointed counsel, make it difficult for the State to incarcerate individuals. In practice, however, courts routinely incarcerate individuals for violating injunctions to which the reasonable doubt standard and other protections . . . do not apply."); *see also* BENFORADO, *supra* note 20 (noting the prevalence of plea agreements and the way in which they undermine the procedural protections of the trial process); Daniel F. Piar, *A Uniform Code of Procedure for Revoking Probation*, 31 AM. J. CRIM. L. 117, 118–19 (2003) (describing the probation system as a "shadow criminal justice system" because of the numbers of people involved and the relative lack of procedural protections despite the substantial impact on liberty).

38. Piar, *supra* note 37, at 118.

injunctions "inhabit a legal nether region," because they do not "fit[] comfortably into the axiomatic criminal-civil binary that defines the American legal tradition."[39] Despite the strange place that punitive injunctions occupy within the law, they are far from rare.[40] Instead, punitive injunctions—of which probation orders are among the most common forms[41]—are a "pervasive and defining mechanism within mass justice courts. Millions are subject to such injunctions. And hundreds of thousands are held in custody for having violated them."[42] This pervasive use of punitive injunctions alongside unclear or unestablished procedures ensures that probation and subsequent revocation can look very different across the different states in the union. After giving a brief history of probation more generally, the following sections explore the development of probation in Pennsylvania and describe what contemporary probation and revocation looks like in the Commonwealth.

A. *The History of Probation*

It might come as a surprise to most Americans that "[p]robation is the most common form of criminal sentencing in the United States."[43] Indeed, it has previously been described as "a 'distinctively American' form of rehabilitation."[44] As of the end of 2016, the most recent year for which data is available, the Bureau of Justice Statistics estimated that there were 3,673,100 American adults on probation.[45] Probation in the United States

39. Sekhon, *supra* note 36, at 180.

40. *Id.* at 191.

41. *Id.* at 197.

42. *Id.* at 191.

43. Roni A. Elias, *Fourth Amendment Limits on Warrantless Searches of Probationers' Homes*, 25 WIDENER L.J. 13, 13 (2016).

44. Andrew M. Hladio & Robert J. Taylor, *Parole, Probation and Due Process*, 70 PA. BAR ASS'N. Q. 168, 170 (1999).

45. DANIELLE KAEBLE, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2016, at 1 (Caitlin Scoville & Jill Thomas eds., 2018), https://www.bjs.gov/content/pub/pdf/ppus16.pdf.

is not a new concept or development, however. Historians generally trace the roots of probation to a man named John Augustus—a Boston religious reformer who attempted to create a rehabilitation program that would serve as a substitute for imprisonment for criminal offenders.[46] In 1841, Augustus, who had previous experience in the temperance movement, posted bail for a man who had been criminally charged as a public drunk.[47] At the man's sentencing, Augustus essentially created the basic concept of probation out of thin air when he "asked the judge to defer sentencing for three weeks and release the man into Augustus's custody. At the end of this brief probationary period, the offender convinced the judge of his reform," and therefore only received a nominal fine as additional punishment.[48]

Augustus's ideas represented a new approach to penal philosophy. In the eighteenth century, the prevailing penal philosophy in the United States was "quite severe," with harsh corporal punishment generally accepted as the only proper response to crime.[49] The early nineteenth century brought a wave of reforms, but these changes largely focused on merely replacing corporal punishment with incarceration.[50] Augustus, however, was "part of a larger reform movement that questioned the retributive orientation of the criminal justice system and sought a greater focus on the rehabilitation of the offender."[51]

Over the course of his life, Augustus provided such bail and rehabilitative services to nearly 2,000 select offenders, services that included helping the men obtain employment, education, and housing.[52] Legal scholars have previously said that

46. Elias, *supra* note 43, at 17.

47. Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 155 (1997).

48. Elias, *supra* note 43, at 17.

49. Andrew Horwitz, *The Costs of Abusing Probationary Sentences: Overincarceration and the Erosion of Due Process*, 75 BROOK. L. REV. 753, 756 (2010).

50. *Id.* at 756–57.

51. *Id.* at 757.

52. Elias, *supra* note 43, at 17; *see also* Hladio & Taylor, *supra* note 44.

"[v]irtually every basic practice of probation was conceived by" Augustus, including the use of the term "probation" (from the Latin *probatio*, a "period of proving or trial").[53] Augustus is credited with creating the concepts of presentence investigation, supervision conditions, social casework, and the provision of reports back to the court, as well as probation revocation.[54] Although Augustus provided his bail and rehabilitative services to a relatively large number of offenders, the individuals that he chose were carefully selected; many people were excluded from Augustus's new probation model based on character, age, or their personal associations.[55]

During the nineteenth century, the use of Augustus's probation model was largely confined to his state of Massachusetts, and even then its use was significantly limited and frequently informal.[56] Massachusetts began formally experimenting with probation for juveniles in 1869, but it wasn't until 1901 that New York became the first state to enact a statute permitting courts to sentence adult offenders to formal probation.[57] Pennsylvania first authorized probation in 1909.[58] By 1925, every state (forty-eight at the time) and the federal government had enacted formal probation laws.[59] While probation was expanding to new jurisdictions, however, the prevailing wisdom at the time remained that the availability of probation should and must be limited to a carefully selected population of offenders.[60]

As the twentieth century progressed, there was a dramatic expansion in the use of probation, "coincid[ing] with a significant shift in the prevailing philosophy of the criminal justice system away from retribution and in the direction of

53. Petersilia, *supra* note 47, at 156.
54. *Id.*
55. Horwitz, *supra* note 49, at 757.
56. Elias, *supra* note 43, at 17.
57. *Id.* at 18.
58. Hladio & Taylor, *supra* note 44.
59. Horwitz, *supra* note 49.
60. *Id.*

reform and rehabilitation."[61] In addition, the American justice system had also begun moving away from the notion that probation should be reserved for a small population of select criminal offenders.[62] The Model Penal Code, first published in 1962, suggested that probation replace incarceration as the presumptive resolution to criminal cases, with incarceration only utilized when required to ensure public safety.[63] Along the same lines, the 1970 American Bar Association standards for criminal justice suggested that "the automatic response in a sentencing situation ought to be probation, unless particular aggravating factors emerge in the case at hand."[64]

In the 1970s, attitudes regarding probation began to shift, with various parties criticizing probation as either inadequate or ineffective.[65] For example, a 1974 report by sociologist Robert Martinson, titled *What Works? Questions and Answers about Prison Reform*, concluded that when it came to post-conviction rehabilitation programs: "nothing works."[66] Despite the fact that the "scholarly community expressed serious concerns about the methodology employed,"[67] the conclusion of Martinson's report "quickly caught on with the public and politicians,"[68] and "became the rallying cry of a new generation of criminologists."[69] As the era of mass incarceration began to take root, it seemed as if the new nineteenth century ideal of

61. *Id.* at 758; *see also* Williams v. New York, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.").

62. Horwitz, *supra* note 49, at 758.

63. Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 181–87 (2003).

64. ADVISORY COMM. ON SENTENCING & REVIEW, AM. BAR ASS'N, STANDARDS RELATING TO PROBATION, TENTATIVE DRAFT 2 (1970).

65. Petersilia, *supra* note 47, at 157 (referencing the 1973 National Advisory Commission on Criminal Justice Standards and Goals, a 1974 report by sociologist Robert Martinson, and a 1976 U.S. Comptroller General's Office report).

66. Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 48–49 (1974).

67. Horwitz, *supra* note 49.

68. Logan, *supra* note 63, at 190.

69. Robert A. Shearer & Patricia Ann King, *Multicultural Competencies in Probation—Issues and Challenges*, FED. PROB., June 2004, at 3, 3.

rehabilitation had already been abandoned in favor of a return to retributive ideals of criminal justice.[70]

But despite shifting attitudes regarding the efficacy of probation, its use did not decline. Instead, the rate of defendants being placed on probation has grown hand-in-hand with the rise in incarceration rates since the 1970s.[71] The number of individuals on probation nearly tripled between 1980 and 1997, from roughly one million to three million;[72] five years later in 2002 the number had surpassed four million.[73] Between 1995 and 2006, probation cases accounted for nearly 60% of the growth in the correctional population.[74] Unlike certain other areas of the criminal justice system, however, the "extraordinary expansion of the probation system has not been accompanied by any correlating expansion in funding."[75] Instead, as the probation population exploded in size, government spending on probation as a percentage of budgets did not change; at the same time, government spending on prisons and jails doubled.[76] By way of example, in 1989 Philadelphia had 400 people in its probation department to supervise 30,000 people on probation; as of 2016, Philadelphia had 386 people in its probation department to supervise almost 46,000 individuals.[77]

B. *Probation in Pennsylvania*

Much like the country at large, the scale and reach of probation in Pennsylvania also began to resemble the current

70. *See* Horwitz, *supra* note 49, at 759.

71. *Id.*

72. *Id.* at 759–60.

73. LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2008, at 1 (Georgette Walsh & Jill Duncan eds., 2009), https://bjs.gov/content/pub/pdf/ppus08.pdf.

74. LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2006, at 2 (Tina Dorsey & Doris J. James eds., 2008), https://www.bjs.gov/content/pub/pdf/ppus06.pdf.

75. Horwitz, *supra* note 49, at 760.

76. *Id.*

77. Briggs, *supra* note 9.

reality starting in the 1970s, after the Pennsylvania Commonwealth Court was created.[78] "[T]he law of probation and parole in Pennsylvania was nearly nonexistent" prior to the setup of the Commonwealth Court in 1970, with "very few appellate court decisions [relating] to the field of probation and parole prior to that time frame."[79] Created by the Pennsylvania Constitution of 1968, the Commonwealth Court is the newest of Pennsylvania's appellate courts, with the Superior Court of Pennsylvania dating to 1895 and the Supreme Court of Pennsylvania dating to 1722.[80] Two main factors drive the importance of the Commonwealth Court in the context of probation: First, the Commonwealth Court has exclusive jurisdiction over appeals from the final orders of the Pennsylvania Board of Probation and Parole.[81] Second, following the Pennsylvania Supreme Court's decision in *Bronson v. Board of Probation & Parole*, state parolees have a constitutional right of appeal from any such Parole Board decisions.[82]

Both probation and the criminal courts have vastly expanded in Pennsylvania, right along with the rest of the country. To give a sense of the scale of this growth in the Commonwealth specifically, in 1965 Philadelphia processed over 8,000 criminal cases involving adults;[83] in 2017, Philadelphia processed over 12,000 cases in the Criminal Trial Division of the Court of Common Pleas alone, to say nothing of the nearly 40,000 annual adjudications in the Criminal Division of the Philadelphia

78. Timothy P. Wile, *Contributions of the Commonwealth Court to the Field of Probation and Parole*, 21 WIDENER L.J. 77, 77 (2011).

79. *Id.*

80. PA. DEP'T. OF GEN. SERVS., THE PENNSYLVANIA MANUAL § 5-3 (Sharon Bogden ed., 2013), https://www.dgs.pa.gov/Documents/Vol%20121%20-%20Entire%20Manual.pdf.

81. *See* 42 PA. CONS. STAT. § 763(a)(1) (2018); Wile, *supra* note 78.

82. Bronson v. Board of Probation & Parole, 421 A.2d 1021, 1025 (Pa. 1980); *see also* Wile, *supra* note 78, at 79.

83. Comment, *Probation in Philadelphia: Judicial Decision and Constitutional Norms*, 117 U. PA. L. REV. 323, 325 (1968).

Municipal Court.[84] In 1965, 2,100 adults were placed on probation or received suspended sentences in Philadelphia.[85] In 2016, over 21,200 adults were added to the rolls of Philadelphia's probation and parole department.[86] This drastic expansion of Philadelphia's criminal justice system since the 1960s is especially stark when considering the fact that the city's population plummeted from 2,002,512 residents to an estimated 1,576,390 residents between 1960 and 2016.[87]

Currently, the probation and parole population in Pennsylvania is generally divided into two groups. A small minority of individuals—around 15%, mostly people convicted of a felony—are supervised directly by the Commonwealth's Board of Probation and Parole, [88] which was established by the Parole Act of 1941.[89] The remaining majority of individuals in Pennsylvania's probation and parole population are supervised at the county level.[90] Pennsylvania is one of only five states that utilize county management for probation, along with

84. FIRST JUDICIAL DIST. OF PA., 2017 ANNUAL REPORT: THE PHILADELPHIA COURTS 41, 130 (2017) https://www.courts.phila.gov/pdf/report/2017-First-Judicial-District-Annual-Report.pdf.

85. Comment, *supra* note 83.

86. FIRST JUDICIAL DIST. OF PA., 2016 ANNUAL REPORT: THE PHILADELPHIA COURTS 40 (2016), https://www.courts.phila.gov/pdf/report/2016-First-Judicial-District-Annual-Report.pdf.

87. *See* U.S. DEP'T OF COMMERCE, U.S. CENSUSES OF POPULATION AND HOUSING: 1960 CENSUS TRACTS FINAL REPORT PHC(1)-116 21 (1962), https://www2.census.gov/library/publications/decennial/1960/population-and-housing-phc-1/41953654v8ch06.pdf; *Resident Population in Philadelphia County/City, PA*, FED. RES. BANK ST. LOUIS, https://fred.stlouisfed.org/series/PAPHIL5POP (last updated Sept. 6, 2019).

88. Mark Dent, *The Problem with Probation in Philadelphia: 'This Thing is Bigger than Meek Mill,'* BILLYPENN (Nov. 17, 2017, 9:00 AM), https://billypenn.com/2017/11/17/the-problem-with-probation-in-philadelphia-this-thing-is-bigger-than-meek-mill/.

89. *About the Board*, PA. BOARD PROB. & PAROLE, https://www.pbpp.pa.gov/About%20PBPP/Pages/default.aspx (last visited Dec. 18, 2019). It should be noted that a 1965 amendment to the Parole Act "significantly broadened the board's powers and duties to include . . . the establishment of Statewide probation and parole personnel and program standards, the provision of training for county adult probation and parole personnel, and the collection, compilation, and publication of county probation and parole statistical information." *County Probation and Parole*, PA. BOARD PROB. & PAROLE, https://www.pbpp.pa.gov/County-Map/Pages/default.aspx (last visited Dec. 18, 2019). As a result, the Board has significant influence beyond the 15% of probationers that it directly supervises.

90. Dent, *supra* note 88.

California, Georgia, New York, and Texas.[91] This county-level management of probation can create problematic incentive structures: While an individual is released on probation, the costs of his supervision and case management are borne by the *county*. But if the probationer violates his probation in a way that triggers incarceration, he will be sent to *state* prison—substantially shifting the costs from the county to the state for the duration of the incarceration period.[92] In this way, counties have a perverse financial incentive to unburden themselves of the cost of supervision by first finding that probationers have violated their terms of supervision and then sentencing them to extended incarceration in the state system.

Although probation revocation is not currently considered a phase of a criminal trial in Pennsylvania, individuals on probation must be afforded a level of due process before their probation can be revoked and they are re-incarcerated.[93] This guaranteed process takes the shape of notice and hearings, specifically both a preliminary hearing and a final hearing, and within these hearings additional due process staples like notice, confrontation of witnesses, and statements of evidence relied upon are supposed to be provided to the individual on probation prior to revocation and sentencing.[94] Once an individual has been sentenced to probation, the offender is said to obtain a "vested liberty interest in the limited freedom

91. *Id.* It is worth noting that these states have some of the largest probation populations in the country. As of January 1, 2016, Georgia had the largest probation population with 410,964 individuals, Texas had the second largest with 378,514 individuals, California had the third with 238,911 individuals, Pennsylvania had the sixth largest with 183,868 individuals, and New York had the eleventh largest with 101,789 individuals. *See* KAEBLE, *supra* note 45, at 13–14.

92. *See* JASON HORWITZ & ALEX ROSAEN, INCENTIVES IN STATE PROBATION SYSTEMS: RELATION TO STRUCTURE AND PRACTICES 11–12 (Oct. 23, 2013), https://www.prisonfellowship.org/site/wp-content/uploads/2015/12/Incentives-in-State-Probation_AEG_March-2014.pdf; Dent, *supra* note 88.

93. *See* Commonwealth v. Harrison, 398 A.2d 1057, 1059 (Pa. Super. Ct. 1979); Commonwealth v. Holmes, 375 A.2d 379, 380 (Pa. Super. Ct. 1977); Commonwealth v. Ball, 363 A.2d 1322, 1323 (Pa. Super. Ct. 1976); Commonwealth v. Brown, 361 A.2d 846, 849 (Pa. Super. Ct. 1976).

94. *See Harrison*, 398 A.2d at 1059; Commonwealth v. Davis, 336 A.2d 616, 620–21 (Pa. Super. Ct. 1975).

offered by probation or parole," which the Commonwealth can only take away from the individual after providing them with due process.[95]

C. *The Situation Now*

All told, when including both probation and parole, Pennsylvania currently has 296,000 individuals under some level of court supervision, a number that is comparable to the entire population of Pittsburgh.[96] Almost one-third of Pennsylvania's total prison population is comprised of individuals who are incarcerated not because of underlying crimes, but because of subsequent probation or parole violations.[97] This problem appears especially stark given the fact that, while populations under court supervision have been decreasing nationwide, Pennsylvania's court-supervised population continues to grow.[98] Across the country, the number of people subject to some type of court supervision *decreased* by 1.5% in 2015, while at the same time Pennsylvania experienced a 5.3% *growth*.[99] All told, Pennsylvania has the "highest incarceration rate in the Northeast, coupled with the third highest percentage of its citizens on probation and parole in the country."[100] In Philadelphia, one in every twenty-two adults is under court supervision, which is more than double the rate of the country overall.[101]

95. Hladio & Taylor, *supra* note 44, at 171; *see also* Gagnon v. Scarpelli, 411 U.S. 778, 781–82 (1973); Morrissey v. Brewer, 408 U.S. 471, 485 (1972); Franklin v. Pa. Bd. of Prob. and Parole, 476 A.2d 1026, 1027 (Pa. Commw. Ct. 1984); *infra* Part II.

96. Ryan Briggs, *Meek Mill Released, but Study Shows PA Parole Rate Highest in US*, CITY & ST. PA. (Apr. 25, 2018, 12:05 AM), https://www.cityandstatepa.com/content/meek-mill-released-study-shows-pa-parole-rate-highest-us; KAEBLE, *supra* note 45, at 12.

97. Briggs, *supra* note 96.

98. VINCENT SCHIRALDI, COLUM. U. JUST. LAB, THE PENNSYLVANIA COMMUNITY CORRECTIONS STORY 2 (2018) https://justicelab.columbia.edu/sites/default/files/content/PACommunityCorrections4.19.18finalv3.pdf.

99. *Id.*

100. *Id.* at 1.

101. *Id.* at 2.

Probation detainers in Philadelphia fit within this dynamic. Although the number of people held in Philadelphia jails has decreased in recent years, the number of people held on a probation detainer has actually increased.[102] As of July 2015, there were more than eight thousand people in Philadelphia's jails.[103] In 2016, the city of Philadelphia received a $3.5 million grant from the MacArthur Foundation, with a goal of reducing the city's jail population by 34% in three years.[104] When the city hit the target and reduced its population by 36% in just two years, it received an additional $4 million MacArthur Foundation grant with the goal of pushing for a 50% reduction by 2020.[105] In spite of this laudable progress toward reducing incarcerated populations in the city, probation detainers have remained a stubborn road block: while the raw numbers decreased, the proportion of the city's jail population that was held based on a probation detainer actually increased during this period, from 46% in 2015 to 56% in 2018.[106]

Another factor likely driving the persistent probation problems in the Commonwealth is Pennsylvania sentencing law.[107] In the Commonwealth, individuals can be sentenced to a probation term that is equivalent to the statutory maximum sentence of the underlying crime.[108] A 2014 study conducted by the University of Minnesota analyzing sentencing laws in twenty-one states found that Pennsylvania was one of only four states that allowed felony probation terms equivalent to the maximum sentence, and it was the only state where that

102. *Id.*; DEP'T OF RESEARCH & DEV., *supra* note 22.

103. Tom Jackman, *Justice Reforms Take Hold, the Inmate Population Plummets, and Philadelphia Closes a Notorious Jail,* WASH. POST (Apr. 23, 2018, 5:55 AM), https://www.washingtonpost.com/news/true-crime/wp/2018/04/23/justice-reforms-take-hold-the-inmate-population-plummets-and-philadelphia-closes-a-notorious-jail/?noredirect=on&utm_term=.dd4c282c1ff6.

104. Jarrett Lyons, *Philly Gets Second MacArthur Grant to Cut Prison Population in Half*, WHYY (Oct. 24, 2018), https://whyy.org/articles/philly-gets-second-macarthur-grant-to-cut-prison-population-in-half/.

105. *Id.*

106. DEP'T OF RESEARCH & DEV., *supra* note 22.

107. SCHIRALDI, *supra* note 98.

108. *See* 42 PA. CONS. STAT. § 9754(a) (2019); *see also* SCHIRALDI, *supra* note 98.

concept applied to misdemeanors.[109] A subsequent 2016 study found that thirty-three states prohibited imposing a probation sentence longer than five years.[110] Further, while probation term sentencing is limited to the statutory maximum for the underlying crime in Pennsylvania, subsequent violations enable the extension of probation—and all of its corresponding consequences—effectively indefinitely.[111] By way of illustration, if an individual is convicted of a crime for which the maximum sentence is ten years' imprisonment, they can theoretically be sentenced to a maximum ten years of probation. However, if the person is found to have violated the terms of their probation during this time period, the sentencing judge can then extend the person's probation sentence at their discretion.

The abnormal nature of Pennsylvania's seemingly never-ending probation is perhaps best-known to the general public through the lens of thirty-two-year-old Philadelphian Robert Williams—better known by his professional name, Meek Mill. A prominent rapper and social activist, Williams was arrested on gun charges when he was a teenager and subsequently served several months in prison, yet continued to experience probation-related consequences—including further incarceration—stemming from that incident over a decade later.[112] In July 2019, the Superior Court of Pennsylvania vacated Williams' 2008 conviction and ordered that he receive a new trial; as a result, Williams' became probation-free for the first

109. ALEXIS LEE WATTS, ROBINA INST. OF CRIM. LAW & CRIM. JUST., PROBATION IN-DEPTH: THE LENGTH OF PROBATION SENTENCES (2016), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/probation-in-depth_final.pdf.

110. CARL REYNOLDS ET AL., COUNCIL OF STATE GOV'T, JUSTICE REINVESTMENT IN PENNSYLVANIA 33 (2016), https://csgjusticecenter.org/wp-content/uploads/2016/05/PA-Second-Presentation.pdf.

111. *See* Katie Meyer, *Calling Pa Laws "Antiquated," Bipartisan Group Pushes Parole Reform,* WHYY (Jan. 29, 2019, 9:29 PM), https://whyy.org/articles/calling-pa-laws-antiquated-bipartisan-group-pushes-parole-reform/.

112. Joseph A. Slobodzian, *Meek Mill Sentenced to 2 to 4 Years in State Prison*, PHILA. INQUIRER (Nov. 6, 2017, 5:49 PM), http://www2.philly.com/philly/news/crime/meek-mill-sentenced-state-prison-probation-violation-20171106.html; Meek Mill (@MeekMill), TWITTER (Jan. 29, 2019, 11:19 PM), https://twitter.com/MeekMill/status/1090464378309279746 ("I've been on probation 11 years and sent to prison 3 times without committing [a] crime [due to technical violations].").

time since he was twenty-one years old.[113] The progression of Williams' situation drew national attention as critics pointed out that a wealthy artist with excellent legal representation and powerful connections struggling to manage the requirements of probation did not bode well for the idea that people of average means could successfully navigate Pennsylvania's system, especially over long periods of time.[114] Partially in response, bipartisan legislation has recently been introduced that would cap Pennsylvania's probation sentences at three years for misdemeanors and five years for felonies.[115] Placing such a cap on probation sentences would go a long way toward ending the cycle that people like Giovanni Guzman-Vegas, José Ribot, Annie Jackson, and even Meek Mill have found themselves in, but the never-ending sentences are only one component of the trap.

II. CONTEMPORARY PROBATION LAW

The foundation of modern law regarding violations of post-conviction supervision (i.e., parole and probation) in the United States rests on two landmark Supreme Court cases: *Morrissey v. Brewer*[116] and *Gagnon v. Scarpelli*.[117] *Morrissey* established that, under the Due Process Clause of the Fourteenth Amendment, individuals on parole are entitled to two hearings prior to having their parole revoked: a preliminary hearing and a final

113. John Duchneskie & Oona Goodin-Smith, *Meek Mill's Decade of Legal Woes: Prison, Probation, and a Clash with a Judge*, PHILA. INQUIRER (July 24, 2019, 6:07 PM), https://www.inquirer.com/news/meek-mill-probation-jail-case-new-trial-history-20190724.html.

114. *See* Althea Legaspi, *Meek Mill's Reform Alliance Proposes Pennsylvania Probation and Parole Reform Bill*, ROLLING STONE (Apr. 2, 2019, 9:18 PM), https://www.rollingstone.com/music/music-news/meek-mill-reform-alliance-pennsylvania-probation-parole-reform-bill-817034/.

115. S.B. 14, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019), https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=S&billTyp=B&billNbr=0014&pn=0059. Senate Bill 14 was referred to the Judiciary Committee on January 24, 2019, where it remains as of publication. *Id.*; *Session of 2019 Documents Ever in the Senate Committee on Judiciary*, Pa. Gen. Assembly, https://www.legis.state.pa.us/cfdocs/legis/BC/bc_action.cfm?sessId=20190&Committees=S|39&inOut=A (last visited Dec. 18, 2019).

116. Morrissey v. Brewer, 408 U.S. 471, 472 (1972).

117. Gagnon v. Scarpelli, 411 U.S. 778, 779 (1973).

determination.[118] According to the Court, while proceedings regarding revocation of post-conviction supervision are not a stage of criminal prosecution, there is clearly a liberty interest at stake.[119] Decided less than a year after *Morrissey*, the Court in *Gagnon* extended the application of this ruling to the context of probation.[120]

A. Morrissey v. Brewer

The *Morrissey* case involved two petitioners, Morrissey and Booher, who had pled guilty to crimes: Morrissey for "false drawing or uttering of checks" in 1967, and Booher for forgery in 1966.[121] In both cases, less than a year after they were paroled, the individuals were arrested at the direction of their respective parole officers for alleged violations of their parole conditions.[122] After the two individuals were arrested, their respective parole officers submitted reports to the Iowa Board of Parole recommending that parole be revoked for both men.[123] The reports claimed that Morrissey had violated his parole by committing a series of infractions related to operating an automobile on parole; Booher was alleged to have violated his parole through a similar series of automobile-related infractions and failing to maintain gainful employment.[124] Both Morrissey and Booher had their paroles revoked on the basis of these reports and were reincarcerated without any type of hearing.[125]

In response to this treatment, Morrissey and Booher both filed petitions for a writ of habeas corpus in federal court, arguing that their constitutional due process rights had been violated

118. *See Morrissey*, 408 U.S. at 490; *see also* Cody Warner, *The Waiting Game: How States Deny Probationers Their Constitutional Right to a Preliminary Hearing*, CRIM. L. BRIEF, Spring 2013, at 13, 13.

119. *See Morrissey*, 408 U.S. at 482.

120. *Gagnon*, 411 U.S. at 782.

121. *Morrissey*, 408 U.S. at 472–73; *see also* Warner, *supra* note 118, at 14.

122. *Morrissey*, 408 U.S. at 472–73.

123. *Id.* at 472–74.

124. *See id.*

125. *Id.* at 473–74; *see also* Piar, *supra* note 37, at 124.

because they were not given a hearing.[126] The District Court disagreed.[127] On appeal, the cases of Morrissey and Booher were consolidated, and the Eighth Circuit Court of Appeals affirmed, after which the Supreme Court granted certiorari.[128] Before deciding the question of whether constitutional due process applies to the parole system, the Supreme Court began its opinion in *Morrissey* by describing the role of parole within the correctional system.[129] Even as early as 1972, the Court recognized the expanded, formal role that post-conviction supervision was beginning to play in the justice system:

> Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison.[130]

The Court in *Morrissey* also seemed to identify some of the potential incentives being created by this new growth and prominence of the parole system, noting that "[s]ometimes revocation occurs when the parolee is accused of another crime; it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State."[131] Taken together, the Court recognized that while "the State properly subjects [the parolee] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a

126. *Morrissey*, 408 U.S. at 474; *see also* Warner, *supra* note 118, at 14.

127. *Morrissey*, 408 U.S. at 474.

128. Warner, *supra* note 118, at 14.

129. *Morrissey*, 408 U.S. at 477–78.

130. *Id.* at 477.

131. *Id.* at 479.

prison."[132] As a result, the Court held that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others."[133]

The Court was quick to note, however, that "[t]he parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law."[134] The Court found that this societal stake in the conditioned liberty of the parolee has two further implications: Firstly, if society has an interest in rehabilitating parolees, then society also has an interest in ensuring that individuals do not have their parole revoked on the basis of either erroneous information or erroneous evaluation of parole conditions.[135] Secondly, and in the same vein, society has an interest in promoting fair treatment of parolees, because "fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness."[136]

After finding that individuals on parole maintain at least some level of liberty interest—and therefore fall within the protection of the Due Process Clause of the Fourteenth Amendment—the Court considered the question of what process is due to parolees to satisfy the Fourteenth Amendment's commands.[137] Faced with this issue, the Court identified two stages of the parole revocation process where "the interest of both State and parolee will be furthered by an effective but informal hearing," to satisfy due process.[138]

The first stage of the parole revocation process requiring a hearing is when the parolee is taken into custody and

132. *Id.* at 482.
133. *Id.*
134. *Id.* at 484.
135. *Id.*
136. *Id.*
137. *See id.* at 482–83; *see also* Piar, *supra* note 37, at 124.
138. *Morrissey*, 408 U.S. at 484–85.

detained.[139] Because there may be significant lags in time between an individual's arrest and their parole revocation, and because parolees may be arrested far from the state prison to which they will potentially be returned, the Court reasoned that "due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available."[140] The Court compared such a hearing to a preliminary hearing in the traditional criminal context: an inquiry to determine whether probable cause exists to believe that an individual has violated his conditions of parole.[141]

In addition to mandating that parolees receive a sort of modified preliminary hearing for allegations that they have violated their parole, the Court also reasoned that "due process requires that after the arrest, the determination that reasonable ground exists for parole revocation should be made by someone not directly involved in the case."[142] While requiring that parolees be granted this sort of preliminary hearing in front of an independent officer, the Court stopped short of mandating that the independent officer be a member of the judiciary.[143] Instead, the Court held that the hearing would be sufficient as long as it was presided over by "someone such as a parole officer other than the one who has made the report of parole violations or has recommended revocation."[144] Further, the Court also explained that said independent hearing officer must create a summary of the hearing, including the responses of the parolee, the substance of documents and evidence introduced, and the reasons for the presiding officer's determination.[145] It is also important to note that the Court in *Morrissey* "used

139. *Id.* at 485.
140. *Id.*
141. *See id.*
142. *Id.*
143. *Id.* at 486.
144. *Id.*
145. *Id.* at 487.

command words, such as 'should' and 'requires,' in listing proper features of the preliminary hearing. In doing so, the Court indicated that the Due Process Clause in fact mandates these features."[146]

The second stage of the parole revocation process requiring a hearing is when there is a final decision on revocation by the relevant parole authority.[147] The Court explained its vision for undertaking this step of the process: the final hearing must go beyond the mere probable cause determination of the "preliminary" hearing, and must include an "evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation."[148] Further, the parolee must be given an opportunity to contest the allegation that he violated his parole conditions, and if he did violate those conditions, the parolee must be given an opportunity to show mitigating factors that suggest his violation does not warrant revocation of his parole.[149] Finally, the parolee must be given this hearing within "a reasonable time after the parolee is taken into custody."[150] Although the Court did not define an unreasonable length of time, it did say "[a] lapse of two months, as respondents suggest occurs in some cases, would not appear to be unreasonable."[151]

Despite laying out its vision for what is required for parole revocation hearings to comply with the Fourteenth Amendment, the Court was quick to note, "[w]e cannot write a code of procedure; that is the responsibility of each State."[152] While stopping short of attempting to write such a code of procedure, the Court was quite clear about what its ruling in *Morrissey* would require for states to bring their parole revocation processes in line with the commands of the due

146. Warner, *supra* note 118, at 14.

147. *See Morrissey*, 408 U.S. at 487–88.

148. *Id.* at 488.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

process clause of the Fourteenth Amendment.[153] To satisfy the requirements of the due process clause, states must provide written notice of violations, disclosure of evidence against the defendant, an opportunity for the defendant to present his own witnesses and evidence, the right to confront and cross-examine witnesses, a neutral forum, and a written statement of the relied-upon evidence and the reasons for revocation.[154]

B. Gagnon v. Scarpelli

Just one year after its decision in *Morrissey*, the Supreme Court extended the minimum procedural due process protections created in that case to similarly situated individuals facing like consequences in the context of probation.[155] In *Gagnon*, respondent Gerald Scarpelli received a suspended sentence of fifteen years for armed robbery and was placed on probation for seven years in Wisconsin.[156] Scarpelli was permitted by the state of Wisconsin to sign an agreement that allowed him to reside in Illinois under a multi-state supervision agreement, and on August 6, 1965, Scarpelli and an accomplice were apprehended by police on allegations of an attempted home burglary.[157] On September 1, 1965, the state of Wisconsin revoked his probation—without a hearing—on the grounds that he had associated with known criminals in violation of his probation, and for his role in the burglary.[158] On September 4, 1965, Scarpelli was taken into custody to begin serving the fifteen-year sentence that he had originally been given by the trial judge.[159] At no point during this month-long period between alleged violation and incarceration was Scarpelli afforded a hearing.[160]

153. *Id.* at 488–89.
154. *Id.*
155. Warner, *supra* note 118, at 14.
156. Gagnon v. Scarpelli, 411 U.S. 778, 779 (1973).
157. *Id.* at 780.
158. *Id.*
159. *Id.*
160. *Id.*

Three years into this period of incarceration—still with no hearing on his original probation violation—Scarpelli filed a petition for a writ of habeas corpus.[161] The District Court held that the State violated Scarpelli's due process rights by revoking his probation without granting him a hearing and providing him with counsel,[162] and the Court of Appeals affirmed.[163]

The Supreme Court immediately recognized the parallels between *Morrissey* and *Gagnon*: recapping its holding in *Morrissey*, the Court found no relevant distinction between parole and probation that would affect the way the protections of due process apply.[164] While probation revocation is "not a part of a criminal prosecution," it still results in a deprivation of liberty serious enough to require the provision of due process guarantees.[165] As a result—just like with parole in *Morrissey*[166]—the Court in *Gagnon* held that probationers are entitled to two hearings with respect to revocation: a preliminary hearing to determine whether there is probable cause to believe that a probation violation has been committed, and a more comprehensive second hearing where a final revocation decision is made.[167] The Court again made specific reference to *Morrissey*: "[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. Accordingly, we hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer*."[168] The Court also found that the six due process requirements detailed in

161. *Id.*
162. Scarpelli v. Gagnon, 317 F. Supp. 72, 78–79 (E.D. Wisc. 1970).
163. Gunsolus v. Gagnon, 454 F.2d 416, 423 (7th Cir. 1971).
164. Warner, *supra* note 118, at 14.
165. *Gagnon*, 411 U.S. at 781.
166. *See supra* notes 138–39, 147 and accompanying text.
167. *Gagnon*, 411 U.S. at 781–82.
168. *Id.* at 782 (footnotes omitted) (citation omitted).

Morrissey for parole revocations would also apply to probation revocations.[169]

However the *Gagnon* Court left a number of key decisions regarding the substance of these hearings to the States.[170] For example, the Court was silent on what standard of proof should be utilized in probation revocation, whether the rules of evidence apply, whether there is a right to discovery or confrontation, and whether the exclusionary rule applies.[171] The *Gagnon* case is illustrative of the way that probation proceedings are "neither exclusively criminal nor civil law,"[172] but rather "inhabit a legal nether region."[173]

C. *Pennsylvania*

So, what is the state of probation revocation law today, post-*Gagnon*, as it applies to the over one hundred thousand Pennsylvanians who find themselves navigating the requirements of probation on a daily basis? The Commonwealth can revoke probation and impose prison sentences on probationers even without findings of subsequent criminal acts; such consequences can be imposed for far less serious offenses when an individual is already on probation.[174]

169. *Id.* at 786 ("The final hearing is a less summary one . . . but the 'minimum requirements of due process' include very similar elements: '(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole." (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (alterations in original)); *see also* Piar, *supra* note 37, at 125.

170. Piar, *supra* note 37, at 127.

171. *Id.*

172. Hladio & Taylor, *supra* note 44, at 174.

173. Sekhon, *supra* note 36, at 180.

174. *See* Commonwealth v. Brown, 469 A.2d 1371, 1375–76 (Pa. 1983) ("In this jurisdiction it is well settled that a probation violation hearing may be conducted prior to a trial for the criminal charges based on the same activities. Nor is the revocation of probation and the imposition of a prison sentence restricted to a finding that a subsequent criminal act has been committed by the probationer during the term of the probation." (citations omitted)).

However, probation may not be completely revoked on the basis of an arrest (or other allegation) alone.[175] People on probation must be afforded a level of due process before their probation can be revoked.[176] This safeguard is a result of the fact that when a person has been sentenced to probation they are said to obtain a "vested liberty interest in the limited freedom offered by probation or parole," which the Commonwealth can only take away from the individual after providing them with due process.[177]

As discussed, this process generally takes the shape of notice and hearings: specifically, both a preliminary hearing and a final hearing where additional due process staples like notice, confrontation of witnesses, and statements of evidence relied upon should be provided to the person on probation prior to revocation and sentencing.[178] Regardless of why the Commonwealth is trying to revoke probation, there must also be an official finding—after both hearings—that the arrest or

175. *See* Commonwealth v. Kates, 305 A.2d 701, 708 (Pa. 1973) ("The focus of a probation violation hearing, even though prompted by a subsequent arrest, is whether the conduct of the probationer indicates that the probation has proven to be an effective vehicle to accomplish rehabilitation and a sufficient deterrent against future antisocial conduct.").

176. *See* Commonwealth v. Harrison, 398 A.2d 1057, 1059 (Pa. Super. Ct. 1979) ("It is established law in this Commonwealth that before a defendant's probation may be revoked, he is entitled to certain due process safeguards."); Commonwealth v. Brown, 361 A.2d 846, 849 (Pa. Super. Ct. 1976) ("Recent court decisions have been unanimous, however, in holding that a parolee or probationer must be afforded due process."); Commonwealth v. Ball, 363 A.2d 1322, 1323 (Pa. Super. Ct. 1976) ("[D]ue process requirements, including the right to receive written notice of the alleged violations, were subsequently extended to probation revocation proceedings.").

177. Hladio & Taylor, *supra* note 44, at 170; *accord* Gagnon v. Scarpelli, 411 U.S. 778, 779 (1973); Morrissey v. Brewer, 408 U.S. 471, 472 (1972); Franklin v. Pa. Bd. of Prob. & Parole, 476 A.2d 1026, 1026 (Pa. Commw. Ct. 1984).

178. *See Harrison*, 398 A.2d at 1059 ("Through the vehicle of [preliminary and final] hearings, additional due process safeguards are provided the defendant including notice of the asserted violations, an opportunity to be heard and to confront witnesses, a neutral and detached hearing body, and a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." (citing Commonwealth v. Davis, 336 A.2d 616 (Pa. Super. Ct. 1975)); Commonwealth v. Holmes, 375 A.2d 379, 381 (Pa. Super. Ct. 1977) ("The requirement of a speedy hearing embodied in the Rule is nothing more than a restatement of the doctrine developed by our courts that a revocation hearing must be held with 'reasonable promptness' after probation officials know or reasonably should have known of the violation." (quoting Commonwealth v. Lipton, 352 A.2d 521, 526 (Pa. Super. Ct. 1975) (Hoffman, J., dissenting))).

other activity was a violation of probation terms.[179] Further, even when it has been established at a final hearing that a probationer committed a probation violation, it is important to note that the decision of whether to revoke probation—and what sentence to impose, if any—is solely a matter of judicial discretion rather than the discretion of any probation authorities or other officials.[180]

The two-step hearings that are now required in cases of parole and probation revocation are commonly referred to as "*Gagnon I*" and "*Gagnon II*" hearings.[181] When an individual on probation is accused of a violation and detained while he awaits a revocation hearing, *Gagnon I* hearings are held to determine whether there is probable cause that a probation violation occurred.[182] The purpose behind requiring *Gagnon I* hearings as stated by the courts, certainly relevant to the issue of detainers, is "to ensure against detention on allegations of violations that have no foundation of probable cause."[183] Pennsylvania courts have previously outlined what is required at *Gagnon I* hearings:

> "At the preliminary [*Gagnon I*] hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the

179. *See Davis*, 336 A.2d at 621.

180. *See* 42 PA. CONS. STAT. § 9754(b) (2019); PA. R. CRIM. P. 708; Commonwealth v. Vilsaint, 893 A.2d 753, 755–57 (Pa. Super. Ct. 2006) ("Thus, the legislature has specifically empowered the court, not the probation offices and not any individual probation officers, to impose the terms of probation."); Commonwealth v. MacGregor, 912 A.2d 315, 317 (Pa. Super. Ct. 2006) (quoting *id.*). *But see* Commonwealth v. Elliott, 50 A.3d 1284, 1291 (Pa. 2012) ("generally agree[ing]" with *MacGregor* but distinguishing between "conditions of probation" and "conditions of supervision," and holding "the [Probation] Board and its agents may impose conditions of supervision that are germane to, elaborate on, or interpret any conditions of probation that are imposed by the trial court").

181. Hladio & Taylor, *supra* note 44, at 174.

182. Commonwealth v. Sims, 770 A.2d 346, 349 (Pa. Super. Ct. 2001) (citing Commonwealth v. Ferguson, 761 A.2d 613, 617 (Pa. Super. Ct. 2000)).

183. Commonwealth v. Perry, 385 A.2d 518, 520 (Pa. Super. Ct. 1978).

> hearing." Thus, the *Gagnon I* hearing is similar to the preliminary hearing afforded all offenders before a Common Pleas Court trial . . . .[184]

Pennsylvania courts have also dealt with the issue of timing of *Gagnon I* hearings. The court in *Commonwealth v. Ferguson* held that a fifteen-day delay between detention and hearing was reasonable.[185] The court acknowledged that its "research reveal[ed] no statute, court rule, or case specifically outlining the timing requirements for *Gagnon I* revocation hearings where the court of common pleas has jurisdiction."[186] The court did, however, find guidance in Pennsylvania Rule of Criminal Procedure 1409, which addressed timing for purposes of *Gagnon II* hearings.[187]

The *Ferguson* court noted that the language of Rule 1409 requiring that *Gagnon II* hearings be held "as speedily as possible" had previously been interpreted as mandating that "a hearing be held within a reasonable time," to be determined through an evaluation of three factors: "the length of the delay; the reasons for the delay; and, the prejudice resulting to the defendant from the delay."[188] After establishing this interpretation of the rules language, the *Ferguson* court held that the "reasonable time" standard of Rule 1409 *Gagnon II* hearings also applied to *Gagnon I* hearings.[189] After *Ferguson*, Pennsylvania Rule 1409 was renumbered Rule 708 and amended, effective April 1, 2001.[190] The comment to the current Rule 708 indicates that "[t]his rule addresses *Gagnon II* revocation hearings only, and not the procedures for determining probable cause (*Gagnon I*)."[191] Pennsylvania courts

184. *Davis*, 336 A.2d at 621 (citation omitted) (quoting Gagnon v. Scarpelli, 411 U.S. 778, 779 (1973)).

185. *Ferguson*, 761 A.2d at 619.

186. *Id.* at 618.

187. *Id.*

188. *Id.* at 619 (citing Commonwealth v. Saunders, 575 A.2d 936, 938 (Pa. Super. Ct. 1990)).

189. *Id.*

190. PA. R. CRIM. P. 708 comment (2019).

191. *Id.*

have not yet considered the application of this comment since the rule was renumbered and amended. However, the Western District of Pennsylvania, considering a *Gagnon I* issue, had occasion to comment on the nature of the rule change:

> The Court cannot agree with Plaintiffs' counsel that Pennsylvania law does not require a timely *Gagnon I* hearing. In Commonwealth v. Ferguson, the court held that although "no statute, court rule, or case specifically outlin[ed] the timing requirements for *Gagnon I* revocation hearings where the court of common pleas has jurisdiction," the predecessor to Criminal Rule 708, Rule 1409, "appl[ied] to the *Gagnon I* hearing" and required that "a hearing [be] held as speedily as possible." Although Plaintiffs' counsel highlights that the Rule now in effect, Rule 708, states in its comment section that it "addresses *Gagnon II* revocation hearings only," the same comment appeared in the final version of its predecessor, Rule 1409. The comment notwithstanding, the *Ferguson* Court held that "the 'reasonable time' standard applicable to a . . . *Gagnon II* hearing . . . likewise applies to the *Gagnon I* hearing."[192]

It is important to note, however, that in Pennsylvania *Gagnon I* hearings can also be waived in certain cases. For example, if a probationer is arrested on new criminal charges, his preliminary hearing on the new charges can act as a substitute for his *Gagnon I* hearing with respect to his probation revocation.[193] This is because "inasmuch as [the individual] had notice of the alleged violations by virtue of his arrest and preliminary proceedings on the underlying criminal charges,

192. Menifee v. McVey, No. 09-104, 2009 WL 413773, at *2 n.3 (W.D. Pa. Feb. 17, 2009) (citations omitted).

193. Commonwealth v. Jordan, 634 A.2d 637, 639 (Pa. Super. Ct. 1993).

the purpose of the *Gagnon I* hearing was clearly served."[194] If an individual decides to waive their *Gagnon I* hearing, this is considered a concession that there is probable cause to believe that a probation violation occurred.[195] But, such a waiver of a *Gagnon I* hearing "does not amount to an admission at the *Gagnon II* hearing that the Commonwealth established by a preponderance of the evidence that appellant committed a violation of his probation."[196]

The *Gagnon II* hearing, while not providing the probationer with due process safeguards equivalent to that of a criminal trial, nonetheless provides "additional due process safeguards" to those present in *Gagnon I* hearings.[197] The due process requirements of *Gagnon II* hearings include written notice of the alleged probation violation, disclosure of evidence against the accused, the opportunity to be heard and present evidence, the conditional right to confront witnesses,[198] a neutral hearing adjudicator, and a written statement of evidence relied upon with reasons provided for the probation revocation.[199]

Gagnon II hearings ask the court to make two separate decisions: First, did the individual on probation factually violate their probation terms?[200] Second, what should happen to the individual as a result of their violation, weighing concerns of both public safety and potential rehabilitation?[201] With respect to the first determination, to establish factually that an individual has violated their probation, the Commonwealth

194. *Id.*; *see also* Commonwealth v. Del Conte, 419 A.2d 780, 781 n.2 (Pa. Super. Ct. 1980); Commonwealth v. Davis, 336 A.2d 616, 622–23 (Pa. Super. Ct. 1975).

195. Commonwealth v. Sims, 770 A.2d 346, 350 (Pa. Super. Ct. 2001).

196. *Id.*

197. Commonwealth v. Allshouse, 969 A.2d 1236, 1240 (Pa. Super. Ct. 2009) (quoting *Sims*, 770 A.2d at 349–50).

198. Commonwealth v. Kavanaugh, 482 A.2d 1128, 1130 (Pa. Super. Ct. 1984) ("[T]he hearing officer is required to make a finding that there is good cause for not allowing confrontation before hearsay evidence may be admitted.").

199. *Sims*, 770 A.2d at 349–50 (citing Commonwealth v. Ferguson, 761 A.2d 613, 617–18 (Pa. Super. Ct. 2000)).

200. *Id.* at 349.

201. *Id.*

must show that "the conduct of the probationer indicates the probation has proven to have been an ineffective vehicle to accomplish rehabilitation and not sufficient to deter against future antisocial conduct."[202] An arrest while on probation alongside "evidence of some facts in addition" can be sufficient to effectuate revocation.[203] As indicated previously, the Commonwealth must prove such violations not beyond a reasonable doubt, but by a preponderance of the evidence.[204] Once the Commonwealth has proven both that the individual committed a violation and that probation is insufficient to accomplish rehabilitation, sentencing is conducted in accordance with judicial discretion.[205]

III. WHEN LAW MEETS REALITY: THE STATUS QUO AND A NEW APPROACH

A. *Philadelphia's Use of Detainers*

Prior to October 9, 2018, probation violation cases falling under the jurisdiction of the Philadelphia courts also needed to comply with Local Rule 910, *Probation Detainer and Violation Procedure*.[206] Local Rule 910 governed both probation violations resulting from a subsequent arrest and technical violations.[207] The way that rule was supposed to work was that when an individual on probation was arrested, notification would be provided to the original sentencing judge.[208] For certain serious crimes, if the charges from the new arrest were held for court at the preliminary hearing, a detainer would be lodged

202. Commonwealth v. Brown, 469 A.2d 1371, 1376 (Pa. 1983).

203. *Sims*, 770 A.2d at 350 (quoting Commonwealth v. Davis, 336 A.2d 616, 620 (Pa. Super. Ct. 1975)).

204. Commonwealth v. Ahmad, 961 A.2d 884, 888 (Pa. Super. Ct. 2008); *see also* Commonwealth v. Ortega, 995 A.2d 879, 886 (Pa. Super. Ct. 2010).

205. *See* PA. R. CRIM. P. 708.

206. PHILA.CRIM.R. 910, (rescinded Oct. 9, 2018); 48 Pa. Bull. 6788 (Oct. 27, 2018), https://www.pabulletin.com/secure/data/vol48/48-43/1661.html.

207. PHILA.CRIM.R. 910 (rescinded Oct. 9, 2018).

208. *Id.*

automatically; otherwise, the decision whether to lodge a detainer would remain squarely within the discretion of the probation judge.[209] In the case of a technical violation, Rule 910 mandated that the probation department notify the probation judge regarding any violations, and that judge could then decide whether the defendant should be scheduled for a violation hearing, brought into custody, or both.[210] Responding to public criticism, the First Judicial District of Pennsylvania rescinded Rule 910 entirely in October 2018, leaving the status quo in place.[211]

In its place, the Court of Common Pleas for Philadelphia County formally adopted Philadelphia Criminal Rule 708 on March 6, 2019.[212] Rather than solve the problems with the use of detainers or address the compliance issues with the old rule, the new rule effectively legitimizes the prior status quo. Leaving aside for a moment the prior issues with compliance, by the letter of the law the old Rule 910 required that automatic detainers only be lodged in situations where the defendant was charged with either murder, robbery, aggravated assault, rape, or involuntary deviate sexual intercourse; otherwise, the decision to lodge a detainer remained squarely in the purview of the judge.[213] The new Rule 708, however, empowers probation officers to take a more explicit role in both the decision whether to take a person on probation into custody and the decision whether a detainer should be lodged.[214] While Rule 708 notes in an explanatory comment that probation officers "must exercise discretion in determining when a

209. *Id.*

210. *Id.*

211. *See* Melamed, *Philly Courts*, *supra* note 4.

212. *See* 49 Pa. Bull. 1514 (Mar. 30, 2019), https://www.pabulletin.com/secure/data/vol49/49-13/449.html.

213. *See* PHILA.CRIM.R. 910 (rescinded Oct. 9, 2018).

214. *See* 49 Pa. Bull. 1514 (Mar. 30, 2019), https://www.pabulletin.com/secure/data/vol49/49-13/449.html ("A probation officer may arrest or cause to be arrested, with or without a warrant, any person ('Defendant') who has been placed on probation or parole for: failure to report as required by the terms of that person's probation or parole, or for any other violation of that person's probation or parole as provided by law").

detainer ought to be issued, and shall reference the rule(s) and condition(s) of probation or parole allegedly violated,"[215] this is little protection when the discretion of probation officers in this context is vast.[216]

Further, Rule 708 completely eliminates the requirement that individuals subject to non-automatic detainers receive a hearing within seventy-two hours. In its place, Rule 708 mentions in an explanatory comment that "[t]he Gagnon I hearing must be held within a reasonable period after the person is arrested and detained."[217] Apparently attempting to justify this change, the explanatory comment goes on to say that "[r]equiring that a Gagnon I hearing be held within a mandatory or inflexible number of days, without regards to the individualized factors present in each case, may result in delay in the scheduling and holding some or all Gagnon I hearings."[218] It is perhaps worth noting that the explanatory comment chooses not to address the fact that there are already a litany of court rules requiring just such "mandatory or inflexible" timelines.[219] How such a change addresses any of the underlying problems with the city's use of detainers is not apparent.

215. *Id.*

216. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 9913 (2019) (granting probation officers "authority throughout this Commonwealth to arrest, with or without warrant, writ, rule or process, any person on probation, intermediate punishment or parole under the supervision of the court for failing to report as required by the terms of that person's probation, intermediate punishment or parole or for any other violation of that person's probation, intermediate punishment or parole"); 42 PA. CONS. STAT. ANN. § 9754 (2019) (identifying permissible probation requirements, including, among a list of other mandates, that an individual "satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience").

217. 49 Pa. Bull. 1514 (Mar. 30, 2019), https://www.pabulletin.com/secure/data/vol49/49-13/449.html.

218. *Id.*

219. *See, e.g.*, PA. R. CRIM. P. 540 (providing for timeline requirements in the context of preliminary hearings); PA. R. CRIM. P. 600 (providing for timeline requirements in the context of trials); PA. R. CRIM. P. 704 (providing for timeline requirements in the context of sentencing); PA. R. CRIM. P. 720 (providing for timeline requirements in the context of deciding post-sentence motions).

This Note has already discussed briefly the realities of probation in Philadelphia. In 2016, the city had 386 people in its probation department to supervise almost 46,000 individuals.[220] By 2018, one out of every twenty-two adults in the city was under court supervision,[221] with more than half of the city's jail population in custody because of a probation detainer.[222] Given these facts, it is unclear how placing even more power and responsibility into the hands of individual probation officers is responsive to the critical description of the old system as "[f]ile a detainer and we'll work it out later."[223] Indeed, this new rule seems to explicitly endorse that paradigm: Probation officers may initiate the arrest of any person suspected of violating any term of their probation. After a probationer spends a few days (or more) in jail, the courts then figure out which of the new arrestees should be released pending an actual hearing to determine whether they violated their probation terms as alleged.[224] Anyone searching for examples of Philadelphians subject to a detainer at the discretion of their probation officer—whether before or after the formal enactment of this "new" rule—need only spend some time talking to the assembled visitors in the waiting rooms on State Road.[225]

The current situation is untenable. There are nearly fifty thousand Philadelphians on probation, and under current practice anyone who does not maintain a spotless probation record—including technical violations—is at risk of spending time in the custody of the city's jails based on a detainer.[226] At that point, even in the best-case scenario where the defendant

220. Briggs, *supra* note 9.

221. SCHIRALDI, *supra* note 98.

222. *See* DEP'T OF RESEARCH & DEV., *supra* note 22.

223. Briggs, *supra* note 9 (quoting civil rights attorney David Rudovsky).

224. 49 Pa. Bull. 1514 (Mar. 30, 2019), https://www.pabulletin.com/secure/data/vol49/49-13/449.html.

225. The Philadelphia Department of Prisons operates four prisons next to one another on State Road in the northeastern part of the city. *See Facilities*, PHILA. DEP'T. PRISONS, https://www.phila.gov/prisons/Facilities/Pages/default.aspx (last visited Dec. 18, 2019). This is why being incarcerated in the city is sometimes referred to as "going to State Road."

226. *See supra* notes 3, 83–87 and accompanying text.

has their detainer lifted at the *Gagnon-I* hearing, the individual will have spent around a week in jail. As this Note has shown, even such "short" periods of detention can lead to lost jobs or missed rent payments that can set people's lives back months. For the unlucky, a technical violation can spiral into weeks, months, even a year in custody based on a detainer. At such a point, the technical violation has become a crisis in the person's life, setting them back significantly.

It is past time to reclaim John Augustus's vision of probation as an alternative to incarceration, an alternative that eschews the retributive goals of incarceration in favor of an approach that is more focused on rehabilitation.[227] Rather than a rehabilitative alternative, modern probation has begun to look more like a trap or a ticking time bomb for those caught up in the system—one technical violation can be enough for additional consequences to come bearing down.[228] Bringing the ideas of John Augustus into the twenty-first century should also include reflecting on how those ideas can be moved forward. It is time to find a new approach to probation detainers in Philadelphia.

B. *The Way Forward*

Before sketching a vision for how the use of probation detainers can be reformed, it is useful to return to the Supreme Court's holdings in *Morrissey* and *Gagnon* to ensure that the new proposal is in tune with the spirit of due process expressed in those cases. The thrust of the Court's approach to due process in *Morrissey* and *Gagnon* is that, while not in possession of the "the absolute liberty to which every citizen is entitled,"[229] people under court supervision on probation or parole nonetheless possess a liberty interest that is "valuable and must

227. *See supra* notes 48–53 and accompanying text.

228. *See supra* notes 7–8, 10–11, 17–19 and accompanying text.

229. Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973) (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

be seen as within the protection of the Fourteenth Amendment."[230]

The Supreme Court recognized a very important trend that was already developing in the area of post-conviction supervision way back in *Morrissey*: "[s]ometimes revocation occurs when the parolee is accused of another crime; it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State."[231] This quote is instructive for understanding how probation has been warped from a rehabilitative alternative into a shadow system where individuals are subject to strict requirements while simultaneously being stripped of many of the crucial protections that are otherwise provided to people caught up in the criminal courts—even though the potential consequences are substantially the same.

Given this spirit, the first step to reforming probation detainers should be to introduce key protections akin to those available to people in criminal court. To start, detention decisions in the context of probation must remain squarely, and only, in the purview of judges. Neither the probation department, nor individual probation officers, should have discretion to unilaterally place probationers in custody and lodge a detainer against them. Instead, absent any critical exigencies, probation officers should be required to obtain a detention warrant signed by a judge any time that the officer wants a probationer arrested for an alleged violation.

Further, there are improvements to be made to the way *Gagnon* hearings have been conducted in the city. As discussed, Philadelphia courts provide two *Gagnon* hearings;[232] the *Gagnon I* hearing is held within 10 days, in front of a trial commissioner instead of the probation judge.[233] In these hearings, "no

230. *Morrissey*, 408 U.S. at 482.

231. *Id.* at 479.

232. *See supra* notes 179–80 and accompanying text.

233. *See* Melamed, *Philly Rule*, *supra* note 14. *But see* 49 Pa. Bull. 1514 (Mar. 30, 2019), https://www.pabulletin.com/secure/data/vol49/49-13/449.html (announcing the enactment of a new

testimony is taken, 'probable cause' for a violation is found in seemingly every case, and the vast majority of detainers remain in place" until further proceedings.[234] These further proceedings, the *Gagnon II* hearing among them, are then scheduled by the probation judge "within a reasonable period." Consolidating these two hearings into a single proceeding held in front of the probation judge within ten weekdays is more in line with the true spirit of *Gagnon I* and could improve process for probationers. Under Philadelphia's previous *Gagnon* processes, such a change on its own might be overwhelming from the perspective of probation judges. However, such a change should be considered in the context of the other proposals in this Note—for example, the intended effect of requiring that probation officers obtain a judicially-authorized warrant prior to taking a probationer into custody is to reduce the number of probationers taken into custody for insufficient or frivolous reasons. Such changes, made in tandem, could both reduce the overall number of hearings needed while also improving the quality of hearings with respect to the rights of the accused.

Another important step toward creating new processes surrounding probation violations is an honest evaluation of how risk is assessed when considering when to lodge a detainer. As discussed previously, while judges remain ultimately responsible for court supervision, Philadelphia's new Rule 708 empowers individual probation officers to take an even more direct role in the detention process. In the past, the Probation Department has utilized a "risk score" that is supposed to inform the decision of whether a detainer should be lodged.[235] However, the operation of this score—how it works, what inputs are considered, and how factors are

Gagnon I rule eliminating firm hearing-timeline requirements.) The actual effect of this rule on the ground remains to be seen due to the recency of the enactment.

234. Melamed, *Philly Public Defender*, *supra* note 5.

235. Briggs, *supra* note 9.

weighted—is currently an opaque process.[236] Given the increased discretion granted to probation officers under the new rules, transparency in probation officers' decision-making process is more important than ever. A supermajority—nearly 70%—of the people held on a detainer in Philadelphia were scored something other than "high-risk."[237] Clearly, a key goal for any proposed reforms in this area must be the introduction of additional transparency in the lodging of detainers to ensure that detention decisions are not being made arbitrarily.

CONCLUSION

For too long, the Philadelphia criminal justice system was out of compliance with its own local rules of procedure for probation detainers. In response to criticism over this noncompliance, rather than enforcing the local rule of procedure, the First Judicial District withdrew the rule entirely and eventually enacted a rule that codified and formalized the status quo. But the status quo is precisely the problem. The judiciary must be the sole institution with the requisite authority to cause an individual on probation to be taken into custody, absent extreme circumstances. A probation officer with a suspicion that someone under their supervision committed a probation violation should be a probation officer who is looking to get a warrant. True reform of the use of probation detainers in Philadelphia—and true reform of probation more broadly—requires a drastic reorientation of the system away from "procedural ease,"[238] and back toward the firmly rehabilitative ideals of John Augustus. Changing the way probation detainers are used would be a positive step in that direction.

236. Melamed, *Philly Public Defender*, *supra* note 5.

237. Briggs, *supra* note 9 ("Probation Department statistics from May [2016] show[ed] that just 31 percent of the city's current detainer population had, in fact, been deemed 'high-risk.' Fifty-seven percent were moderate-risk; the rest were low-risk.").

238. Morrissey v. Brewer, 408 U.S. 471, 479 (1972).