

Sentenced to Probation: The Compromised Rights of the Offender

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We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.

--Declaration of Independence

Offenders that are released on probation are granted a compromised freedom; though they escape the physical confinement of a prison, there are a number of distinct differences between the treatment of probationers and that of ordinary citizens. Both the standards of behavior to which they are held and the procedural rights to which they are entitled are transformed by their new status. This paper seeks to explore the changes that occur as a defendant moves through the criminal justice system and transitions to the role of probationer, as well as explain the reasoning behind the compromised rights of probationers.

Legal Standards of the Ordinary Citizen

Article IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

--Bill of Rights

The legal standards to which the general population is held are set through legislation and carried out by our judicial system. Such standards can ultimately be traced to the founding ideologies of our government; each citizen is guaranteed certain rights, to be regulated only to the extent that they are believed to infringe on the rights of others, or on society as a whole. Regulation is accomplished through the passage of laws.

For the population-at-large, it is the police that serve as gatekeepers for the criminal judicial system. As indicated by Cole, Gertz, and Bunker, “prosecutors and judges cannot bypass the police by making arrests on their own” (2002, p.7). Acting both

reactively and increasingly proactively (Greene, 2000), it is ultimately the police that are charged with detecting and responding to criminal behavior among the general population. Infractions must either be brought to the attention of law enforcement or detected in the course of their patrols, investigations, and community relations.

At its roots, law enforcement is based in a crime-control function.

Despite the authority given to the police force, due process concerns remain; there are a number of limitations on how laws may be enforced without jeopardizing the criminal prosecution or compromising the rights of the accused. These limitations are in place to protect the rights of citizens. For example, those placed under arrest must be read their Miranda rights; also, in order to conduct a search in an area that a person would have a “reasonable expectation of privacy,” police must meet probable cause and warrant requirements (Hemmens & Del Carmen, 1997).

Standards for Probationers

Offenders that have been granted probation experience what Morris and Tonry have described as a “withdrawal of autonomy varying with the terms of the probation order” (1990, p. 178). From the signing of an agreement to abide by the conditions of their probation, probationers must certainly be aware that the standards to which they will be held extend beyond the controls of the ordinary citizen. Conditional release is contingent upon more than the abstaining from future legal violations. In fact, a 1969 study by Landis, Merger, and Wolff indicated that “80% of probation failures were for violations of probation orders, whereas 20% were for convictions of new offenses” (Gray, Fields, & Maxwell, 2001, p.539). Such probation orders, or conditions of supervision, often include: fulfilling court obligations such as fines and court costs;

reporting to the assigned supervising agent and keeping that agent informed; and submitting to treatment as deemed appropriate by the court or the agent (Dressler, 1969). A number of other conditions tailored to the specific history of the probationer are also routinely implemented; for example, the offender may be instructed to abstain from the consumption of alcohol (Bondeson, 1994).

In examining these conditions, it is possible to see the extent to which probation extends beyond the boundaries of law enforcement. The consumption of alcohol, for instance, is not a legal violation for the general population of adults over the age of 21. Whereas the initial crime of the probationer may have been drunk driving, a legitimate offense of written law, their placement on probation is not likely to be a release contingent only upon abstaining from future drunk driving offenses, nor are restrictions bound to be limited to heavy or public intoxication. Rather, the conditions of the offender's probation can order that the probationer must abstain from any consumption of alcohol. Therefore, the probationer may face probation revocation, and thus a period of incarceration, based upon evidence of a violation such as consumption of an alcoholic beverage in the home—even where there has been no violation of written law.

Despite the mixed role of law enforcer and social worker that is often present in the work of probation agents, the crime control emphasis of probation is apparent in the scope of conditions imposed on probationers. No longer held to the written-law ideology of being accountable only to the extent that their behavior has infringed upon the rights of others or upon the whole of society, those placed on probation become accountable for behaviors that are believed to possibly have contributed to their offending. Such conditions clearly reflect Herbert Packer's 1968 description of the crime control position

that “the repression of criminal conduct is by far the most important function to be performed by the criminal process” (Cole, Gertz, & Bunger, 2002, p.13).

Further exemplifying the crime control emphasis of probation is the relaxed standard of offender rights applied to the enforcement of probation conditions. “Individuals convicted of a crime, whether on probation or parole, do not retain the privacy rights enjoyed by the average citizen” (Hemmens & Del Carmen, 1997, p.34). The Supreme Court has upheld searches of probationers and parolees that have not met the standards of probable cause and warrant requirements, with the reasoning that such requirements would interfere with the protection of the public in such cases (Hemmens & Del Carmen, 1997). In the 1987 case of *Griffin v. Wisconsin*, the Supreme Court ruled that, rather than probable cause, searches could be conducted on those under supervision based on the reduced standard of “reasonable cause” (Stevens, 1999). The probation and parole rules of the state of Wisconsin specifically outline that the offender is agreeing to make themselves “available for searches or tests ordered by [their] agent including but not limited to urinalysis, breathalyzer, DNA collection and blood samples or search of residence or any property under [their] control” (Wisconsin Department of Corrections, 2001, p.1) by signing the agreement, thereby absolving the supervising agent of any responsibility to establish probable cause, or even reasonable cause, prior to conducting a search.

Criminal Court

Article V: ...[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law...

--Bill of Rights

Though all aspects of the legal system are ultimately a combination of crime control and due process concerns, the significance of due process is perhaps best indicated by courtroom proceedings. Though criminal courts would not exist without placing priority in the control of crime, a number of due process protections are in place to safeguard the accused and maintain the integrity of the judicial process. Procedural regulations and individual protections govern such areas as the admissibility of evidence and the right to counsel.

The exclusionary rule holds that evidence obtained illegally is inadmissible in court; this rule was implemented to safeguard the rights of defendants as stated in the 4th Amendment by discouraging law enforcement from acting “in bad faith” by deliberately conducting unconstitutional searches to obtain evidence (Stevens, 1999). In the case of *Mapp v. Ohio*, 1961, the Supreme Court extended the application of the exclusionary rule to state proceedings as well as federal, with the reasoning that such protection falls under the rights of the accused to be subject to due process (Stevens, 1999).

As a further protection of the rights of the accused, criminal proceedings place the burden of proof on the state. This is an added security for the defendant, decreasing the likelihood that he will lose his liberty—or, in capital cases, his life—based on false accusations. Therefore, as opposed to the “preponderance of evidence” standard of civil cases, guilt in criminal proceedings must be proven “beyond a reasonable doubt.”

Probation Revocation Hearings

Probation revocation hearings carry with them the weight of the criminal trial; the probationer’s liberty is at stake. Most likely, a finding that the offender has violated the terms of probation will result in the imposition of a period of incarceration. Yet in the

examination of the revocation hearing, it can be seen that the probationer has much less protection available than is provided in criminal court. As the hearing is sometimes viewed as an administrative rather than judicial proceeding, in a number of ways it has not been subject to the same scrutiny in the protection of the rights of the accused.

The first area of discrepancy lies in the admissibility of evidence. The Supreme Court has recently ruled on the application of the exclusionary rule to revocation hearings; in *Pennsylvania Board of Probation and Parole v. Scott*, 1998, the Court decided that the exclusionary rule does not apply to revocation hearings (Stevens, 1999). Prior to that, a number of states and federal circuit courts had ruled the same way; again, the protection of society is placed ahead of the safeguards for the offender. In addition, there is a lower standard of admissibility in regard to the quality of information used in the proceedings. Whereas hearsay or unauthenticated documents are excluded as evidence in criminal court, the revocation hearings do allow the use of letters, affidavits, and other sources that may be questionable in reliability (Hemmens & Del Carmen, 1997).

Aside from admissibility standards, there is also a difference in the burden of proof for revocation hearings. No overarching standard is currently in place. The Wisconsin revocation process outlines only that the hearing will determine “whether sufficient evidence was provided by the Department of Corrections to establish that the offender did, in fact, violate the rules and conditions of his/her supervision, and, if so, that revocation of his/her probation or parole is appropriate” (The Revocation Process, 2001). Such vague guidelines provide for a large amount of subjectivity in determining the appropriate decision regarding revocation.

Despite the number of ways in which the probationers' rights are placed at risk, there have now been decisions by the Supreme Court that provide some empowerment for the offender in the process of revocation. The case of *Mempa v. Rhay* in 1967 resulted in the ruling that probationers are entitled to an attorney at revocation hearings (Abadinsky, 1982). In the 1973 case of *Gagnon v. Scarpelli*, the Court found that, because of the possibility of loss of liberty inherent in the revocation proceedings, probationers are entitled to due process in the course of revocation, entailing both a preliminary hearing and a final revocation hearing at which witnesses and evidence can be presented in defense (Abadinsky, 1982).

The Compromised Rights of Probationers: Where is it Rooted?

To even a greater extent than in the case of imprisonment, probation and parole practice is determined by an administrative discretion that is largely uncontrolled by legal standards, protections or remedies.

--American Correction Association's Manual of Correctional Standards
(cited in Killinger & Cromwell, 1978, p.335)

The factors that result in the compromised rights of offenders can primarily be traced to three sources: the theories behind probation; probation's crime-control orientation; and the ambiguity in the role definition of probation agents.

One theory surrounding the ability of the system to reduce the rights of those on probation is referred to as the "grace theory" (Abadinsky, 1982; Stevens, 1999). Since the offender hypothetically might have received a term of imprisonment for the same offense that resulted in a sentence of probation, courts feel that they have extended a privilege to the offender; therefore, there is found some justification for being able to set the terms of the offender's release. This justification does raise some questions regarding

the ethics of the reduced rights granted to probationers—it may be viewed as “attaching unconstitutional conditions to a grant of state privileges” (Stevens, 1999, p.1057).

The theory that most directly addresses the reduction of Constitutional protections granted to the offender is the “constructive custody theory” (Stevens, 1999) or “custody theory,” wherein “the probationer is in the legal custody of the court and is thus a quasi-prisoner with his/her constitutional rights being limited accordingly” (Abadinsky, 1982, p. 111). For example, if any particular offender had been sentenced to prison rather than probation, there would be no protection from warrantless searches or protection of a right to privacy; the probationer is subject to the same lack of protection while under supervision in the community.

The final theoretical justification for reducing the rights of the offender is the “contract theory” (Abadinsky, 1982), which most closely justifies the extending of substantive offenses for which the offender is subject to penalty beyond those present in written law. In this case, probation is seen as a contract; when the offender signs an agreement to the terms of probation, a breach of those terms can legitimately lead to the revocation of the privilege of probation.

In addition to these theories, one can look to the crime control model to better understand the system’s ability to justify a reduction in the rights of those on probation. With its emphasis on efficiency (Cole, et.al., 2002) and community protection, an actuarial model is developed that values the supervision of “high-risk” offenders above the protection of their rights to privacy. This is clearly seen in the common interpretation of *Griffin v. Wisconsin*, which ruled that only reasonable cause is needed to conduct searches on those under supervision, as meaning that the status of being a probationer,

independent of other factors, is sufficient “reasonable cause” to conduct searches (Stevens, 1999).

Additional understanding of the disparate protections granted to probationers compared to the citizenry at large can be found in the ambiguous role definition of their supervising agents. One of the ambiguities is found in the agent’s combined role of law enforcer and social worker. Agents take on elements of both roles, but in most states are primarily to aid in the offenders rehabilitation; in other states, though, the agents actually are considered law enforcement officers (Hemmens & Del Carmen, 1997). This ambiguity can lead to difficulties in determining how agents should be regulated. One example of this issue is found in the inapplicability of the exclusionary rule to revocation hearings. The exclusionary rule is meant to deter police officers from abusing their powers; this check is seen as necessary because of the adversarial relationship of law enforcement personnel and suspected offenders. As probation agents are seen in part as social workers, and therefore not adversaries to the probationers under their supervision, such a safeguard to the 4th amendment rights of the probationer has been seen by some courts as unnecessary (Hemmens & Del Carmen, 1997; Stevens, 1999). Nonetheless, it is the supervising agent that initiates revocation hearings, placing them in a distinctly adversarial role, and indicating that safeguards such as the exclusionary rule may indeed be appropriate.

The other primary ambiguity regarding the role of probation agents is their location within the framework of the criminal justice system. Probation agents fall under both the judicial and executive branches of government, varying state-by-state (Killinger & Cromwell, 1978). Though each arrangement has advantages or disadvantages, it

appears that this ambiguity also impacts how revocation hearings are viewed, potentially detracting from the protected rights of the offender. Revocation hearings are “generally considered extrajudicial proceedings” (Hemmens & Del Carmen, 1997, p.32), leaving them immune to a number of the safeguards that are in place in criminal proceedings. The number of rulings passed implementing court standards on the revocation hearings, though, such as the right of offenders to due process and to having counsel, point to the uncertainty regarding the appropriate realm for such proceedings.

Conclusion

It has been shown how people that are placed on probation are transported to a gray area that resides between the role of full citizen and that of prisoner. There is an equally vague placement of probation itself, with agencies oddly fluctuating between identification with the judicial and the executive branches of government. These factors have combined to create a state of differing standards and relaxed protections for those placed on probation. The appropriateness of such a status must be examined beyond the context of the current crime control movement toward increased emphases on surveillance and community protection; it must also be examined within larger ideals regarding the freedoms and protections of citizens.

References

- Abadinsky, H. (1982). Probation and parole: Theory and practice (2nd Ed.). New Jersey: Prentice Hall Inc.
- Bondeson, U. V. (1994). Alternatives to imprisonment: Intentions and reality. In J. Hagan (Series Ed.), Crime and society series. Boulder: Westview Press.
- Cole, G.F., Gertz, M.G. & Bunger, A. (2002). The criminal justice system: Politics and policies (8th Ed.). United States: Wadsworth Group.
- Dressler, D. (1969). Practice and theory of probation and parole (2nd Ed.). New York: Columbia University Press.
- Gray, M.K., Fields, M. & Maxwell, S.R. Examining probation violations: Who, what, and when. Crime and delinquency, 47 (4), 537-557.
- Greene, Jack R. (2000). Community policing in America: Changing the nature, structure, and function of the police. In J. Horney (Vol. Ed.), Criminal justice 2000: Vol. 3. Policies, processes, and decisions of the criminal justice system (pp. 299-370). Washington, D.C.: U.S. Department of Justice.
- Hemmens, C. & Del Carmen, R.V. (1997). The exclusionary rule in probation and parole revocation proceedings: Does it apply? Federal Probation, 61 (3), 32-40.
- Killinger, G. G. & Cromwell, P.F. (Eds.). (1978). Corrections in the community: Alternatives to imprisonment: Selected readings (2nd Ed.). St. Paul, MN: West Publishing Co.
- Morris, N. & Tonry, M. (1990). Between prison and probation: Intermediate punishments in a rational sentencing system. New York: Oxford University Press.
- The revocation process (2001). A guide and overview of the revocation process for victims of crime and potential revocation hearing witnesses. [Brochure]. Wisconsin: Author unknown.
- Stevens, D.N. (1999). Off the Mapp: Parole revocation hearings and the fourth amendment. Journal of Criminal Law and Criminology, 89 (3), 1047-1094.
- Wisconsin Department of Corrections (2001). Probation/parole rules. [document]. Wisconsin: Author unknown.