The University of New Hampshire Law Review

Volume 24 | Number 2 Article 3

5-2026

Revocation Reconsidered: Probation Advocacy Through a Litigation Lens

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24 U.N.H. L. Rev. 349 (2026).

ABSTRACT. Being found in violation of probation has dire consequences. The person found in violation can be imprisoned, upending them from their job, family, and community. Unlike incarceration after a criminal trial, a sentence after a violation of probation is not the result of a legal process characterized by robust due process protections. It is also often not the result of a forceful and thorough defense. It is instead the consequence of a hearing where lawyers with the fixed mindset of an inevitable finding of a violation don't engage in the same preparation that they would if it was a trial. My goal in this paper is to empower lawyers to rethink their approach to litigating these hearings.

For over 50 years, lawyers have interpreted U.S. Supreme Court jurisprudence as signaling to them that they can be less than zealous at a probation violation hearing because the different purpose of the hearing requires less due process than at a trial. This article argues that there is a need for lawyers representing clients at probation violation hearings to push back against this signal and reframe their advocacy by approaching their preparation and performance at these critical hearings with the same lens they use to approach advocating for their clients charged with criminal offenses. Various aspects of probation as a mechanism for criminal punishment need reform, and this shift in approach to advocacy is a worthy part of that transformation.

AUTHOR. Shira Diner is a Lecturer and Clinical Instructor in the Criminal Law Clinical Program at Boston University School of Law. She previously served as a public defender and public defender trainer for nearly two decades. This article is rooted in my experiences working alongside public defenders and the clients we serve. It is dedicated to the advocates who show up each day with courage, creativity, and compassion, as well as to the people whose lives are shaped by the criminal legal system but whose voices are too often excluded from the conversation.

I am deeply grateful to the many people who supported me throughout this process, including Kristen Braithwaite, Tigran Eldred, Caitlin Glass, Karen Pita Loor, Maddie Meth, Angelo Petrigh, Brian Wilson, and the participants in the BU Law Clinical Writing Workshop and the Clinical Law Review Writers' Workshop. I am especially indebted to Aoife Croucher, my outstanding research assistant, without whose efforts this article truly would not have been completed.

INTRODUCTION

Every day, people are ripped from their communities based on nothing more than the word of a probation officer. Concerns about mass incarceration have dominated the pages of newspapers and law reviews for decades, as 'tough on crime' policies put an increasing number of people—primarily Black and brown people—behind bars.[1] While scholars and commentators have addressed many factors contributing to the increasing size and scope of the carceral state through probation,[2] one aspect has received comparatively less attention: the role that

[1] *E.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW 70–73 (2010).

[2] *E.g.*, Fiona Dougherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104

defense lawyers play in perpetuating the status quo of probation violation hearings with little due process.

Probation is a well-established alternative to incarceration to resolve a criminal charge.[3] It is true that a probation sentence keeps the defendant in their community with greater opportunities for employment, medical and mental health supports, and less disruption to housing and relationships, while still addressing community safety needs by requiring probationers refrain from engaging in further criminal behavior.[4] But in most cases, a probationer must meet additional court-imposed conditions to complete their probation sentence, which makes it far more likely that an individual will find themselves incarcerated in the future.[5] If the probationer does not comply with the (often onerous) probation conditions or engages in new criminal conduct, the probation department can move to revoke their probation, and the revocation may lead to a period of incarceration.[6] And though probation is a common disposition, all too often the conditions imposed are not crafted with consideration of the ability of the probationer to comply, which leads to frequent allegations of violations.[7]

Much has been written about the myriad of problems with using probation as an alternative to incarceration.[8] State court probation and supervised release at the

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GEO. L.J. 291, 295–96 (2016) (arguing that standard probation conditions, which extend far beyond criminally proscribed behaviors, feed mass incarceration by broadening the definition of 'recidivism').

3 *See id.* at 354 ("Probation is, by far, the most commonly imposed criminal sentence in the United States. . .").

4 *See generally* Timothy P. Wile, *Goals of Supervision*, 12 WEST'S PA. PRAC., LAW OF PROBATION PAROLE § 10:1 (3d ed., Jan. 2026 update).

5 *E.g.*, Emily Widra, *One Size Fits None: How 'Standard Conditions' of Probation Set People Up to Fail*, PRISON POLICY INITIATIVE (Oct. 2024), https://www.prisonpolicy.org/reports/probation_conditions.html [https://perma.cc/EE5G-C2VE].

6 *See* ALEX ROTH, SANDHYA KAJEEPETA, AND ALEX BODIN, *The Perils of Probation: How Supervision Contributes to Jail Populations*, VERA INSTITUTE OF JUSTICE 4 (Oct. 2021).

7 *E.g.* Widra, *supra* note 5 (highlighting findings from a 50 state survey of probation conditions showing that, among the over thirty jurisdictions which include dependent support in their standard conditions, only 12 include language that allows the probation officer to use their discretion as to whether the probationer is providing financial support to legal dependents to the 'Best of [their] ability" or making a "very reasonable effort").

8 *E.g.*, Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*,

federal level have both been heavily scrutinized for the punitive and harsh treatment of people on probation.[9] The myth that probation is a collaborative process to bring about rehabilitation has been debunked. Like the criminal legal system, the system of probation perpetuates racial inequities and biases.[10]

This Article contributes to scholarship on probation by addressing a key dynamic of probation violation hearings: the nature of advocacy amongst lawyers representing clients at probation violation hearings, which can lead to immediate incarceration. Probation violation hearings provide fewer due process protections as compared to trials. The immense power of the probation officer makes the probation revocation process even more coercive than the dangerous process of prosecutors extracting pleas from presumed innocent individuals by way of mandatory minimum sentences, the so-called "trial tax," and pretrial detention. In these respects, taking people away from their communities on little more than the word of a probation officer is arguably more carceral than incarceration following a trial or a plea negotiation process. This article helps lawyers who represent people accused of probation violations understand why this phenomenon of practice exists and proposes a framework through which defense attorneys can effectively increase the level of due process at probation hearings. I call this the "litigation lens."

Two U.S. Supreme Court cases, *Morrissey v. Brewer* and *Gagnon v. Scarpelli*, set the floor for due process rights at probation violation hearings.[11] In both decisions,

58 HARV. C.R.-C.L. L. REV. 1, 23 (2023) ("Despite probation, parole, and monitoring being heralded as favorable alternatives to incarceration, these forms of criminal court control further entrench the race, class, gender, disability and sexuality-based subordination endemic to the carceral state").

9 *See generally* David J. Harding, Bruce Western & Jasmin A. Sandelson, *From Supervision to Opportunity: Reimagining Probation and Parole*, 701 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 8 (2022).

10 Danielle Kaeble, *Probation and Parole in the United States, 2022*, BUREAU OF JUSTICE STATISTICS (Revised Aug. 22, 2024), https://bjs.ojp.gov/document/ppus22.pdf; *QuickFacts: United States*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/RHI225223#RHI225223 [https://perma.cc/D2XF-J8MV] (As in other segments of the criminal legal system, Black people are overrepresented in probation. In its most recent report on probation and parole in the United States, the Bureau of Justice Statistics reported that Black people accounted for 22% of adults on probation, despite Black people accounting for only 13.7% of the U.S. population.).

11 Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

the Court distinguished probation revocation hearings from criminal trials.[12] [13] [14] Instead, the Court concluded that only the Due Process Clause, and no other constitutional protections, govern revocation hearings and, therefore, those accused of a violation are entitled to limited protections. [15]

In the 50 plus years since *Morrisey* and *Gagnon*, courts have provided some guidelines for effective advocacy in the probation context. The constraints set by these cases have been subject to much scrutiny but have shown no sign of requiring significant structural changes to probation violation hearings.

Since neither the courts nor the legislature will take the lead in slowing the conveyor belt from probation violation hearings to prisons, it is incumbent on defense attorneys to do so. This article focuses on the role of the defense lawyer: reframing how they approach clients' representation at probation revocation hearings, which will lead to probationers receiving improved representation and achieve better case outcomes, which will in turn lead to systemic change.

Under the current probation regime, attorneys generally accept that probation violation hearings amount to a kangaroo court. In light of the Supreme Court's case law and the informal tone of probation violation hearings, attorneys resign themselves to the presumption that the deck is stacked against their client and loss is a foregone conclusion.[16] While it is understandable to adjust expectations for the substantive outcome of a hearing based on the reduced procedural protections afforded at that hearing, this does not have to be the norm.

I argue that if lawyers exercise the rights of their clients by approaching probation revocation hearings with a "litigation lens," a more complete inquiry into the alleged violation will result. This proposed framework acknowledges the limited due process rights afforded to defendants at probation violation hearings but builds on effective advocacy strategies from representation in criminal cases. The

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12 *Morrissey*, 408 U.S. at 480; *Gagnon*, 411 U.S. at 782.

13 *Gagnon*, 411 U.S. at 789.

14 *Id.* at 782; *Morrissey*, 408 U.S. at 480.

15 *Gagnon*, 411 U.S. at 781–82.

16 This conclusion is based on my twenty years of practice as a public defender in Massachusetts. During this time, I have trained hundreds of lawyers and law students on the best ways to advocate for those accused of crimes and I have witnessed countless probation violation hearings.

litigation lens is both a tool for deeper analysis of the right presently recognized in the probation context and a roadmap for future representation that will produce a more just result for those accused of violating probation.

If lawyers capitalize on the rights that *are* afforded to those accused of violating their probation, the result will be fundamental changes for those clients in individual cases. Using the litigation lens will lead to better representation and results in each individual case. That in turn will lead to more robust hearings and more opportunities for appellate review of probation violation hearings. Changes to the existing law governing probation violation hearings will develop and subsequently lead to an improved standard for evaluating attorney performance.

This Article proceeds in five parts. Part I reviews the development of probation as an alternative to direct incarceration as a punishment and underscores both why a change in the norm of probation representation is necessary and how such a change would fit in with other proposals for probation reform. Part II examines the role that lawyers play in probation revocation proceedings and explores how the initial case law on the rights of those accused of violating their probation signaled to lawyers that they do not need to approach such representation with the same zeal as with criminal cases. Part II also discusses the sources of authority for the right to counsel at a non "criminal" proceeding and addresses effective assistance of counsel standards in the probation violation context. Part III explores the parameters of due process at probation violation hearings when examined through a litigation focused lens. This will involve a comparison of the rights and procedures for probation violation hearings as compared to the criminal trial process. Part IV analyzes how the proposed "litigation lens" framework can be implemented in practice for providing effective assistance of counsel at probation hearings. Using the criminal litigation context as a guide, this article illustrates how a litigation lens framework can inform methods for both legal and factual preparation for a probation hearing. Finally, Part V will answer questions likely to arise from a shift away from the fixed-mindset advocacy that often exists at probation hearings, towards a mindset informed by a litigation lens. Part V also emphasizes why, despite questions and potential obstacles, such change is necessary. This article offers not only a framework for improved advocacy at probation violation hearings but grounds the need for such a shift in the context of larger challenges to probation as an alternative to incarceration.

I. DEVELOPMENT OF PROBATION AS A CRIMINAL SENTENCE AND THE NEED FOR CHANGE

Probation has a long history in the United States legal system. In 1840, a shoemaker named John Augustus requested permission from the Boston Municipal Court to postpone the sentencing of a man convicted of being a "common drunkard," convincing the Court instead to release the offender to Augustus's care.[17] Augustus helped the offender locate a home and a job.[18] At the end of the probationary period, Augustus brought the offender back before the Court a changed man.[19] As Augustus wrote in his memoir, "[t]he Judge expressed himself much pleased with the account we gave of the man, and instead of the usual penalty, imprisonment in the House of Correction, he fined him one cent and costs, amounting in all to $3,76, which was immediately paid.[20] The man continued industrious and sober, and without doubt has been by this treatment, saved from a drunkard's grave."[21] This practice of releasing defendants to the community with conditions increased with the support of volunteer citizens, and in 1878, Massachusetts passed the first law enacting a statewide probation program.[22] Other states followed, creating a system of probation across the country. In 1925, President Calvin Coolidge signed the Probation Act of 1925, establishing probation as a sentence in the federal courts.[23]

Despite its lofty goals, probation has developed into a deeply flawed system. It is punitive and rigid and often does little to rehabilitate or improve the lives of those under its reach. Many incarcerated people are serving sentences imposed because of a probation violation finding, not a criminal guilty verdict. According to the Bureau of Justice Statistics, at the end of 2021, 3,745,000 adults were under

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[17] § 1:3, *History of probation and parole in the United States*, *in* 12 WEST'S PA. PRAC., LAW OF PROBATION & PAROLE (3d ed. 2023).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] JOHN AUGUSTUS, A REPORT OF THE LABORS OF JOHN AUGUSTUS, FOR THE LAST TEN YEARS, IN AID OF THE UNFORTUNATE, 5 (1852).

[22] Nina Pomponio, *Probation,* MASSACHUSETTS CRIMINAL LAW SOURCEBOOK & CITATOR 8-1 (MCLE 2023).

[23] Kellie Brady, *Some People Just Shouldn't Have Kids!: Probation Conditions Limiting the Fundamental Right to Procreate and How Texas Courts Should Handle the Issue*, 16 TEX. WESLEYAN L. REV. 225, 228 (2010).

community supervision.[24] A 2021 report from the Vera Institute of Justice examined how a rise in probation dispositions has contributed to mass incarceration. The study found that "[i]n 2019, one in 73 adults in the United States was on probation, representing more than 55 percent of people under any form of correctional control, and there were almost 1.5 million more people on probation than in jails and prisons combined."[25] "In 2018, more than 1.8 million people exited probation nationwide. Of those, 58 percent successfully completed probation, 16 percent had their probation revoked and were sentenced to incarceration, and 26 percent exited for other or unknown reasons."[26] Of people revoked to incarceration, approximately 24 percent had their probation revoked for new offense violations and 29 percent for unknown reasons. Also, 46 percent of the people who had their probation revoked were revoked to incarceration for technical violations.[27]

The process for revoking someone's probation begins when a probation officer believes that a probationer has violated a term of their probation and will typically move for a revocation of the probation.[28] A probation officer can move for a revocation based on their belief that the probationer has not complied with one of the conditions of probation—such as maintaining employment or attending treatment programs—or because they believe that the probationer has engaged in new criminal conduct.[29] While violation allegations can range in severity from missing an appointment to a murder arrest, any finding of violation by the judge can lead to incarceration.[30]

Probation as a form of punishment has been criticized for its lack of a standardized objective, creating a situation where individual judges are untethered in their imposition of lengths or conditions of probation.[31] This means that those on

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[24] Danielle Kaeble, *Probation and Parole in the United States, 2021*, BUREAU OF JUSTICE STATISTICS (2023).

[25] ROTH, KAJEEPETA, AND BODIN, *supra* note 6, at 3.

[26] *Id.* at 7.

[27] *Id.*

[28] *See* Kimberly C. Simmons, *Who May Institute Proceedings to Revoke Probation*, 21 A.L.R. 5th 275 (originally published in 1994).

[29] Neil P. Cohen, *§ 19:24. Examples of Conduct Justifying Revocation*, THE LAW OF PROBATION AND PAROLE (June 2025 update).

[30] *Id.*

[31] Wayne A. Lohan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 172 (2003).

probation often have little sense of what the judge will deem to be a successful period of probation or what type of punishment a judge will impose after a finding of violation. Since the basis for a violation can range from missing a meeting with a probation officer to committing a serious felony, a probationer and their lawyer will only be speculating as to whether there will be no consequence for a violation or a sentence to prison for the same violation. Further complicating this lack of standards for punishment after the finding of violations is the fact that probation officers in the federal system and in many states have the authority to impose sanctions short of incarceration without a hearing or notice to the court.[32]

The process of probation revocation happens through a probation violation hearing, sometimes called a probation surrender hearing or a probation revocation hearing. Numerous courts have held that probation violation hearings are not trials, and people accused of violating their probation are not entitled to the same rights as someone who the government is prosecuting for allegedly committing a crime.[33]

The violation proceeding is not a new criminal prosecution but a continuation of the original case that the client faced when put on probation.[34] Because a precondition to probation is an acknowledgment that the government has met its burden in the underlying criminal proceeding, courts have held that "a probationer need not be provided with the full panoply of constitutional protections applicable at a criminal trial."[35] The question before the court at a probation revocation hearing is, "[d]id the probationer violate their probation, either by not complying with a judicially ordered condition or by committing a new criminal act?"[36] And the standard for answering this question is lower than trial's requirement of proof beyond a reasonable doubt, with many states looking to a preponderance of the evidence, and the federal system using a "reasonably satisfied standard."[37] Cross-

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32 Dougherty, *supra* note 2, at 323–26.

33 *E.g.*, Commonwealth v. Jarrett, 203 N.E.3d 1164, 1169 (Mass. 2023) ("Probation violation hearings, however, are not one of the stages of a criminal prosecution. Thus, a probationer is not entitled to all of the due process protections applicable at a criminal trial" (internal citations omitted).).

34 Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

35 Commonwealth v. Durling, 551 N.E.2d 1193, 1195 (Mass. 1990).

36 *E.g.*, State v. Baird, 145 P.3d 995, 999 (Mont. 2006) ("a probation revocation hearing is not a trial, but rather a hearing to establish whether or not a probation violation has occurred").

37 *E.g.*, Heaton v. State, 984 N.E.2d 614, 617 (Ind. 2013) ("the correct burden of proof for a trial

examination and confrontation rights are limited at these hearings.[38] The adjudication process often moves quicker than the process for adjudicating a new criminal charge allegation.[39] This is true even if the basis for the allegation of violation is a new criminal offense charge.[40]

The person accused of violating their probation has rights at the hearing as articulated in *Gagnon*. The seven requirements for revocation hearings announced in *Gagnon* are: (1) written notice of the alleged violations; (2) disclosure of the evidence against the supervisee; (3) the opportunity to testify and present evidence; (4) the ability to confront witnesses absent a finding by the judge of good cause to disallow confrontation; (5) a neutral decisionmaker (e.g., a judge, parole board, or hearing officer); (6) a written statement of the reasons for revoking supervision; and (7) a preliminary hearing after the arrest but before the revocation hearing to determine whether there is probable cause for the violation.[41]

Much critique has been leveled against *Gagnon* for providing insufficient due process at probation revocation hearings.[42] These critiques are valid, and critics have offered solutions for expanding due process in the probation violation context. In his 2023 article, Professor Eric Fish, a scholar of criminal and constitutional law, identified a conflict between the practice of sentencing probationers to incarceration after the finding of a violation and the United States Supreme Court's sentencing jurisprudence in *Apprendi*, *Blakely*, and *Alleyne*.[43] In that line of cases, the Court held that the Sixth Amendment requires that any fact that increases the

court to apply in a probation revocation proceeding is the preponderance of the evidence standard"); United States v. Crawley, 836 F.2d 291, 292 (7th Cir. 1988) ("a district court may revoke probation if 'reasonably satisfied' that the probationer has violated a condition of his probation").

38 *Gagnon*, 411 U.S. at 786.

39 *See* State v. Brunet, 806 A.2d 1007, 1011–12 (2002) (noting that "revocation hearings are frequently held as expeditiously as possible, and the State often lacks the preparation that precedes a criminal trial").

40 *See id.* at 1011 (holding that collateral estoppel does *not* bar criminal prosecutions where facts were decided adversely for the government at a probation revocation hearing because "[t]he goal of a revocation hearing is not to decide guilt or innocence, but to determine whether the defendant remains a good risk for probation").

41 *Gagnon*, 411 U.S. at 786 (citing Morrissey v. Brewer, 408 U.S. 471, 489 (1972)).

42 *See, e.g.*, William F. Henderson, *Probation Detainers in Philadelphia: A Due Process Dud?*, 12 DREXEL L. REV. 129, 133 (2019) (over half of Philadelphia's jail population is incarcerated because of a probation detainer).

43 Eric Fish, *The Constitutional Limits of Criminal Supervision*, 108 CORNELL L. REV. 1375 (2023).

minimum or maximum sentence that a judge can impose on an offender must be found by the jury beyond a reasonable doubt.[44] These cases affirmed a constitutional right to a jury trial in some sentencing matters and ensured that any facts affecting a defendant's sentence were subject to jury scrutiny.[45] Fish argues that if facts triggering a higher sentence must be found by a jury in the trial context, the same standard should apply in the context of probation and other post-disposition violation hearings.[46] The article proposes a theory of conditional sentencing under which a judge at sentencing would impose an initial sentence and determine what the punishment will be for a potential future violation.[47] If a probationer is sentenced after a finding of violation under the original sentence, that would comply with the existing due process framework. But if the sentence after the finding of a violation was not contained in the original sentence, it could not be imposed without a jury trial or without the consent of the probationer.[48]

Still, the criticisms of probation go beyond *Gagnon* and the question of due process. Closer examination of what constitutes an alleged violation brings up another category of problems with the system of probation. Allegations of violations of probation are often divided into two categories, the first being called "technical violations" and the second being arrests for new alleged criminal conduct.[49] Both types of violations are problematic in different ways and lead to what Vincent Schiraldi aptly describes as "mass supervision" and a feeder to incarceration.[50]

Technical violations are violations of specific conditions of probation ordered by a judge at sentencing such as meeting with a probation officer, completing a treatment program, or not using drugs or alcohol.[51] The critique of incarceration as a consequence for these types of violations is grounded in the belief that it is inappropriate and harmful to incarcerate people for conduct that itself is not a

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[44] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

[45] *Id.*

[46] Fish, *supra* note 43, at 1415.

[47] *Id.*

[48] *Id.*

[49] ROTH, KAJEEPETA, AND BODIN, *supra* note 6, at 7.

[50] VINCENT SCHIRALDI, MASS SUPERVISION: PROBATION, PAROLE, AND THE ILLUSION OF SAFETY AND FREEDOM (The New Press 2023).

[51] ROTH, KAJEEPETA, AND BODIN, *supra* note 6, at 4.

criminal act.[52] Such sentences of incarceration do little for public safety while derailing any rehabilitation that the probationer has undertaken.[53]

This criticism is different when the violation is for new criminal conduct for which there is an automatic condition of probation against. In *Criminal Violations*, Jacob Schuman focuses on the problems of using the probation violation process as punishment for new criminal conduct.[54] As he describes, criminal violations of probation drive incarceration because it is easier to establish a violation of probation than convict someone of a crime for the exact same conduct.[55] As discussed throughout this paper, a person accused of violating their probation by engaging in criminal conduct has less due process than they would if that same conduct was evaluated under the due process rights at trial. It is easier to prosecute a criminal offense through a probation violation process.[56] Schuman argues that punishing violations amounts to a "double punishment" which runs afoul of constitutional safeguards.[57] He proposes that probation violation proceedings be used to punish non-criminal conduct and that criminal conduct be punished in the regular course of the criminal legal system.[58]

Many people on probation are required to wear a GPS or other electronic monitoring tools, raising yet another line of critique.[59] The ever-expanding use of electronically monitoring individuals on probation has led to widespread electronic

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[52] *See id.* at 7 ("the frequency of technical violations is not surprising considering the difficulty of complying with the numerous, vague and often conflicting conditions imposed on people under probation supervision").

[53] *See generally* Stephan R. Underhill, *Supervised Release Needs Rehabilitation*, 10 VA. J. CRIM. L. 1 (2024).

[54] Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, 1823–24 (2022).

[55] *Id.* at 1844.

[56] The burden of proof to establish a probation violation is a preponderance of the evidence in many states, with the federal system looking to the "reasonably satisfied" standard. *E.g.*, Heaton v. State, 984 N.E.2d 614, 617 (Ind. 2013) ("the correct burden of proof for a trial court to apply in a probation revocation proceeding is the preponderance of the evidence standard"); United States v. Crawley, 836 F.2d 291, 292 (7th Cir. 1988) ("a district court may revoke probation if 'reasonably satisfied' that the probationer has violated a condition of his probation").

[57] *Id.* at 1890.

[58] *Id.* at 1895.

[59] *See, e.g.*, Nazish Dholakia, *Electronic Monitoring Is an Extension of Mass Incarceration*, VERA INSTITUTE OF JUSTICE (Jan. 30, 2024), https://www.vera.org/news/electronic-monitoring-is-an-extension-of-mass-incarceration [https://perma.cc/Q5T6-DRYV].

shackling, serving to keep people under criminal supervision instead of reentering society. "Punitive surveillance," as described by Kate Weisburd, has created a system where the large number of probationers subject to electronic monitoring functions in the same way as incarceration.[60] By limiting movements, privacy, and rights, this type of monitoring serves to both "expand the footprint of the carceral state" and "evade close judicial scrutiny."[61] In her calls for reform, Weisburd suggests systems of surveillance should be recognized as carceral and limited.[62]

Probation as a form of punishment of course does not exist in a vacuum. It is deeply enmeshed in the criminal legal system. Racial disparities, mass incarceration, the immense power of prosecutors, and underfunding of indigent defense systems define the American criminal legal system and have created a structure that is deeply flawed. [63] On both an individual and a systemic level, the trial process of the criminal legal system is a faulty mechanism for administering justice. The structural obstacles and power dynamics of the trial process exist in the probation adjudication process as well. However, in the probation context, the unjust results come easier with the lower level of due process and the resulting muted advocacy.

There has been much assessment of probation by examining its operational flaws, its impacts on individuals and communities, and its lack of appropriate levels of due process.[64] Probation is carceral and coercive, and meaningful change is required. Schuman, Fish, Weisburd, and others imagine significant structural changes to bring about a more just probation system. However, applying the litigation lens to probation violation hearings will be a substantial step towards achieving these goals short of the major structural changes they propose. The litigation lens is a tool that we already have and would serve to complement other proposed reforms.

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[60] Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 147 (2022).

[61] *Id*. at 207.

[62] *Id*.

[63] Probation and parole violations are key drivers of mass incarceration. In 2020, for instance, supervision violations made up 42% of prison admissions. Leah Wang, *Punishment Beyond Prisons 2023: Incarceration and supervision by state*, PRISON POLICY INITIATIVE (May 2023), https://www.prisonpolicy.org/reports/correctionalcontrol2023.html [https://perma.cc/RN68-KWPF] (citing Dr. Jessica Saunders, *More Community, Less Confinement*, THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER (Sept. 2021), https://csgjusticecenter.org/publications/more-community-less-confinement/national-report/ [https://perma.cc/9Z66-T48V]).

[64] *See, e.g.*, Widra, *supra* note 5.

II. COUNSEL'S ROLE AT PROBATION VIOLATION HEARINGS

Embedded in a litigation lens approach to probation violation hearings is access to counsel. Challenging the norms of advocacy at a probation violation hearing via a trial-like litigation focus depends on the utilization of a lawyer in that hearing. A lawyer can assist in the client's representation by providing legal knowledge and strategies to challenge the allegations that a probationer violated their probation. Just as in a criminal case, having a lawyer creates accountability for the fact finder and provides a framework for the decision-making process. While the person accused of violating their probation is certainly the expert on their lived experiences that have led to their probation, lawyers have the potential to help shape the representation to better serve their client. An examination of the role of counsel in probation violation hearings is required for an understanding of due process at these hearings.

When the Court established due process parameters for probation hearings, it explicitly rejected finding a blanket constitutional right to counsel at probation revocation hearings.[65] Of course, this stands in contrast to the criminal prosecution which might ultimately end in a sentence of probation, where there is a well-established right to counsel.[66] Instead, the Court generally left the question of whether counsel is required at probation hearings to the states, providing a limited federal baseline for when counsel is required.[67] By doing so, the Court failed to see that probation revocation hearings are meant to actualize a probationer's due process rights and sent a message to defense lawyers that probation violation hearings require less zealous representation than at a criminal trial.

In grappling with the question of a right to counsel at probation revocation hearings, the Court stated:

> The introduction of counsel into a revocation proceeding will significantly alter the nature of the proceeding. If counsel is provided for the probationer or parolee, the State,

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[65] Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973) ("we think that the Court of Appeals erred in accepting the respondent's contention that the State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases").

[66] Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

[67] *Gagnon*, 411 U.S. at 790 ("counsel should be provided in cases where . . . the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present").

> in turn, will typically provide its counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their client's positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in *Morrissey* as being "predictive and discretionary" as well as factfinding, may become more akin to that of a judge at a trial and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its *quasi*-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation. Indeed, the decision-making process will be prolonged, and the financial cost to the State for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review -- will not be insubstantial.[68]

The Court was correct in this prediction. Having counsel changes the nature of the proceeding. What *Gagnon* got wrong was that an adversarial process *shouldn't* be the hearing's goal. Due process rights without counsel lose their value. And due process rights—with no means to litigate them—are not rights at all.

On the heels of the Court's decision in *Gagnon*, the Cleveland State Law Review published a note by Douglas Jenkins analyzing the Court's decision not to apply a per se rule to counsel at probation revocation hearings. Jenkins wrote that this decision "left the meaning and importance of Due process in grave doubt, has retarded the progress of penal-correction reform, and has ensured a heavy docket for an already overburdened appellate system by a return to the unworkable rule formulated in *Betts v. Brady*."[69] This critique of the Court's decision to not implement a per se rule for the appointment of counsel in probation violation hearings highlights the flaws in the Court's rationale and paints a clear picture of the complex criminal nature of the proceeding to revoke probation.

Under the baseline set out in *Gagnon*, counsel is constitutionally required in probation violation hearings if the probationer makes a colorable claim (1) that he did not commit the alleged violations; or (2) that there are justifying or mitigating circumstances that make revocation inappropriate, and these circumstances are difficult or complex to develop or present.[70] Counsel must also be appointed when the violation hearing is combined with a sentencing hearing.[71] This standard

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[68] *Id.* at 787–88.

[69] Douglas C. Jenkins, *Case Comment, The Right to Counsel and Due Process in Probation Revocation Proceedings: Gagnon v. Scarpelli*, 23 CLEV. ST. L. REV. 151 (1974).

[70] *Gagnon*, 411 U.S. at 790.

[71] *Id.* at 781 (citing Mempa v. Rhay, 389 U.S. 128 (1967)).

highlights the fundamental principles of representation under the litigation lens put forward in this article. Under a litigation lens, all cases would meet the *Gagnon* test. That is because the principle underlying the litigation lens is holding the government to its burden of proving the alleged violations, which meets the *Gagnon* due process test.

With the Supreme Court stopping short of finding a right to counsel in probation violation hearings, the inquiry as to the role of counsel then turns to other sources for guaranteeing counsel. Over half of the states have exceeded the federal baseline and codified a right to counsel by statute or case law.[72] Under 18 U.S.C. §3006A(b), a defendant is entitled to be represented by counsel whenever charged "with a probation violation" in United States district court.[73] In Massachusetts, Maryland, and Kansas, case law has made explicit that probationers are not only entitled to counsel in a probation violation proceeding, but that counsel must be effective.[74] States have further ensured the right to counsel at probation hearings by setting requirements for when a probationer can waive counsel.[75]

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[72] *See*, Alaska Stat. § 12.55.110 (2024) (Alaska); Ariz. R. Crim. P. 27.7 (Arizona); People v. Vickers, 8 Cal.3d 451 (1972) (California); Colo. Rev. Stat. § 16-11-206 (2024) (Colorado); Conn. Gen. Stat. § 53a-32 (2024) (Connecticut); State v. Hicks, 478 So.2d 22 (Fla. 1985) (Florida); Idaho Code § 19–852(2)(a) (Idaho); Iowa R. Crim. P. 2.28(1) (Iowa); 730 Ill. Comp. Stat. Ann. 5/5-6-4.1 (Illinois); Ind. Code Ann. § 35-38-2–3 (West 2024) (Indiana); Kan. Stat. Ann. § 22–3716 (Kansas); Me. Rev. Stat. Ann. tit. 17-A, § 1812 (2024) (Maine); S.J.C. Rule 3:10 (Massachusetts); Md. Code Ann., Crim. Proc. § 7-108 (LexisNexis 2024) (Maryland); MCR 6.445 (Michigan); Minn. Stat. § 609.14, subd. 2 (2002) (Minnesota); N.H. Const. pt. I, art. XV (New Hampshire); N.J. Stat. § 2C:45-4 (2024) (New Jersey); N.Y. Crim. Proc. Law § 410.70 (2024) (New York); N.C. Gen. Stat. § 15A-1345 (2024) (North Carolina); N.D.R. Crim. P. Rule 32 (North Dakota); Ohio Crim. R. 32.3 (Ohio); Or. Rev. Stat. Ann. § 144.343 (2025) (Oregon); Pa. R. Crim. P. 708(B)(1) (Pennsylvania Superior Court recognizes an absolute right to counsel); State v. Gilbert, 984 A.2d 26, 30 (R.I. 2009) (Rhode Island); Turner v. State, 384 S.C. 451, 454 (2009) (South Carolina); Tenn. Code Ann. § 40-35-311(b) (Tennessee); Parker v. State, 545 S.W.2d 151, 155 (Tex. Crim. App. 1977) (Texas); Vt. R. Crim. Proc. Rule 32.1 (Vermont); Pearl v. State, 996 P.2d 688, 688 (Wyo. 2000) (Wyoming).

[73] 18 U.S.C. § 3006A(b).

[74] Commonwealth v. Faulkner, 418 Mass. 352, 358–59 (1994); Flansburg v. State, 653 A.2d 966 (Md. Ct. Spec. App. 1995); State v. Galaviz, 296 Kan. 168, 176 (2012).

[75] *See* Commonwealth v. Pena, 462 Mass. 183, 195 (2012) (probationer waived counsel by conduct where probationer refused to proceed with appointed counsel, electing to retain private counsel, but probationer ultimately failed to secure a lawyer); *see also* Brady v. State, 910 So.2d 388, 390 (2005) (Fla. Dist. Ct. App. 2005) (finding probationer did not waive right to counsel where there was "no evidence that Brady knowingly and intelligently waived her right to counsel").

An examination of the question of counsel at parole revocation hearings is instructive in examining the right at probation violation hearings. Probation violation hearings are afforded the same due process rights as parole hearings.[76] In a 2022 article on the nature and consequences of parole hearings, Olinda Moyd began with a study on the evolution of the establishment of due process rights at parole revocation hearings.[77] She then urges the United States Supreme Court to answer the question she describes as having been left unresolved by *Morrissey* and determine that counsel appointment is a due process right that all parolees are entitled to during parole revocation proceedings.[78] After reviewing the spectrum of counsel in different states, she produces compelling examples of the significant impact of legal representation in guarding against the "administration of rogue justice."[79] In the same way, probation violation hearings are fundamentally unfair if effective counsel does not represent the accused.

While having counsel is a critical prerequisite for litigating probation violation hearings, it is not the end of the journey toward more substantial advocacy and fairness. Once counsel has been guaranteed either by state law or by meeting the *Gagnon* test, the second hurdle is making sure that counsel is effective and has the tools to advocate through a litigation focused lens.

A. *Effective Assistance of Counsel at Probation Violation Hearings*

Despite there being no constitutional right to counsel at probation violation hearings, the standard by which courts evaluate effective assistance of counsel at these hearings supports the proposition that there should be. Lawyers representing clients at probation violation hearings must be effective under the long-established standard set forth in *Strickland v. Washington*.[80] That is a standard of objectively

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[76] Since the due process frameworks for probation revocation in *Gagnon* and parole revocation in *Morrisey* were announced, the two proceedings have become intertwined in questions of due process. While the revocation hearings for these two forms of government supervision have much in common, the mechanism themselves are different. Probation is generally an alternative to incarceration and a violation can lead to a period of incarceration, while parole involves the early release from jail, and violating parole can lead to going back to prison to serve the remainder of a sentence.

[77] Olinda Moyd, *In the Shadow of Gideon: No Sixth Amendment Right to Counsel at Parole Revocation Hearings*, 6 HOW. HUM. & C.R.L. REV. 31 (2022).

[78] *Id.* at 51.

[79] *Id.* at 31–32.

[80] Strickland v. Washington, 466 U.S. 668, 687 (1984).

deficient performance and a reasonable probability that a competent attorney would have led to a different outcome.[81] Courts have found that the essential competencies required for lawyers representing clients at a probation violation hearing reflect the core competencies of defense lawyers.[82] While probationers may be entitled to less than the "full panoply of rights"[83] afforded at trial, courts have nonetheless found the performance of lawyers to be ineffective because of a failure to fully utilize the due process rights of the probationer at a violation hearing.[84]

In reviewing the performance of lawyers at probation violation hearings, courts have identified numerous situations where the performance was ineffective.

In *Medrano v. State*, the Florida District Court of Appeals vacated a probation revocation order that had imposed a fifteen-year prison sentence, finding that the probationer had received ineffective assistance of counsel during his probation revocation hearing.[85] Mr. Medrano argued in his appeal that counsel's failure to offer psychiatric evidence at the stage of the hearing where it was being decided if a violation occurred constituted ineffective assistance of counsel.[86] Under Florida law, "willfulness" is a defense to a probation violation, and the Court found that although his lawyer introduced the testimony of a psychologist and a licensed mental health counselor at the probation mitigation hearing that suggested that

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81 *Id.*

82 *E.g.*, Commonwealth v. Stancil, 524 A.2d 505, 507 (Pa. Super. Ct. 1987) (counsel was ineffective for an unexplained delay in holding the hearing, held three years after the end of the probationary period and five years after the conviction); Mikell v. State of Florida, 903 So.2d 1054 (Fla. Dist. Ct. App. 2005) (reversing the imposition of a sentence after the finding of a violation, determining that the defense lawyer was ineffective in not raising with the judge that the probationer did not have to be incarcerated after a finding of violation. Despite presenting mitigating evidence about the probationer to the judge, the lawyer did not correct the judge when she announced that if she did not impose the suspended ten-year sentence, she would "get appealed" and would "be reversed." The attorney's yielding to the Court's incorrect belief that it could not return the client to probation "fell below the standard expected of reasonably effective counsel." The Court also found that based on the record, it was clear that had the judge been aware that return to probation was an option, it would have considered that option, establishing that the probationer suffered prejudice by his lawyer's representation.); *see also* Commonwealth v. Patton, 584 Mass. 119, 129 (Mass. 2010) (trial counsel's failure to file a notice of appeal was ineffective assistance of counsel).

83 Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

84 *E.g.*, Cason v. State, 31 Md. App. 121, 125 (1976) (probationer denied effective assistance of counsel where judge advised counsel to remain at the table but 'take a passive role').

85 892 So.2d 508, 508 (Fla. Dist. Ct. App. 2004).

86 *Id.* at 509.

Mr. Medrano was "obsessive" about his former wife, the lawyer did not present this testimony at the hearing where the determination as to whether he had in fact violated probation was made.[87] The testimony about Mr. Medrano's mental health "should have been presented . . . as a defense to the willfulness of the underlying violation, rather than merely as a mitigating factor at the sentencing phase."[88]

Similarly, failing to properly confront the evidence presented by the State as the basis for a violation has been found to be ineffective. In *Commonwealth v. Ballard*, the probationer asserted a claim of ineffectiveness of counsel for failure to question the probation officer, a witness at the probation revocation hearing, who would have testified that she knew that the probationer was in a drug and alcohol treatment program, thereby explaining his failure to report.[89] The Court found that even though the probationer, through his lawyer, informed the Court of his reasons for failing to report, the probation officer's testimony would have bolstered his defense to the allegations that he failed to report.[90] This omission created a meritorious claim of ineffective assistance of counsel.[91] The Court held that they could "conceive of no reasonable strategic basis for counsel's failure to question Ms. Leone [probation officer], and there is a reasonable probability that, had Ms. Leone testified as to Appellant's [Mr. Ballard's] reason for not reporting, the outcome would have been different."[92] This failure, coupled with a failure of the Court to inquire into the Appellant's ability to pay court fees, was sufficient to reverse the finding of a violation.[93]

In *Lambert v. Florida*, the District Court of Appeals reversed an order revoking probation, finding that the lawyer was ineffective where s/he failed to move to suppress the evidence which made up the basis for the probationer's arrest on a subsequent charge.[94] It was that arrest that was the grounds for the revocation of probation.[95] Not all jurisdictions apply the exclusionary rule at probation violation

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87 *Id.*

88 *Id.*

89 814 A.2d 1242, 1243 (Pa. Super. Ct. 2003).

90 *Id.* at 1247.

91 *Id.*

92 *Id.*

93 *Id.*

94 811 So.2d 805, 806 (Fla. Dist. Ct. App. 2002).

95 *Id.*

hearings, but Florida does.[96] Further, the District Court of Appeals determined that the evidence would have been excluded from the revocation hearing had defense counsel asserted the applicability of the exclusionary rule to the probation hearing, and without that evidence, the State would have been unable to establish a violation of the condition that the probationer obey all laws.[97]

The court's decisions and analysis in these cases highlight why the presentation of evidence must be a critical aspect of every defense strategy going into a probation violation hearing.

This article argues that attorneys tend to approach probation violation hearings with less zeal and rigor than they do criminal trials because of the lower burden of proof and due process limitations of these hearings. *Morrisey* and *Gagnon* justify the limitations they impose on a probationer's constitutional rights by pointing to the purpose and potential outcome of the hearing, suggesting they implicate a lesser loss than the loss after a trial. The Court labels these hearings as inferior.[98] The substantive and normative effect of this labeling is that attorneys see probation violation hearings as bureaucratic processes over which their advocacy will have little impact. However, the fact that courts will analyze their performance under a criminal standard for effective assistance of counsel indicates that probation violation hearings must be approached in the same manner as a criminal case.

An analysis of the rights that do exist at probation violation hearings demonstrates that they remain significant. Attorneys do have the power and the responsibility to engage in zealous advocacy at probation violation hearings. To do so, they must acknowledge the lesser protections afforded at these hearings and operate with a litigation lens.

III. DUE PROCESS AT PROBATION VIOLATION HEARINGS THROUGH A LITIGATION LENS

Determining what attributes make counsel's representation effective through a litigation lens at a probation hearing merits an examination of the process and rights afforded to those accused of violating their probation in comparison to the

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96 *Id.* at 807.

97 *Id.*

98 *See generally* Morrissey v. Brewer, 408 U.S. 471, 480 (1972) ("Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions").

process and rights afforded to those accused of committing a crime. As discussed in the introduction,[99] probationers accused of violating their probation are entitled to due process before they can be found in violation.[100] Specifically, probationers are entitled to a preliminary hearing, written notice of the claimed violations, disclosure as to the evidence against them, the opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine, and written findings by a neutral and detached hearing body.[101] These requirements have led to a process for probation violation hearings, that, like the criminal trial process, has multiple stages with distinct purposes and ways for a lawyer to vindicate the accused probationer's rights.[102]

A closer look at the rights and procedures which define the process of a criminal prosecution are illustrative as context for an examination of the parallel rights and procedures in the probation context. While each state has implemented somewhat different procedures for protecting these rights, the core principles are the same. When the government charges a person with a crime, it is required to follow specific rules to protect that person's constitutional rights at each stage of the criminal process. The government must first bring charges against the defendant which lay out the allegations of the criminal conduct.[103] After an initial determination on the sufficiency of the evidence on the allegations, a criminal case will move to the pre-trial stage. This is a period during which each side prepares its case. The government must turn over discovery, the evidence that they have against the defendant, which often involves the judge deciding questions regarding the scope and format of the government's disclosure obligations.[104] A defendant might bring motions to suppress evidence obtained in violation of their rights or otherwise inadmissible. Often this process of preparing a case for a trial occurs simultaneously

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[99] Gagnon v. Scarpelli, 411 U.S. 778, 781–82 (1973).

[100] *See generally id.* at 778. The Court adopted the same requirements delineated a year earlier in the parole context under *Morrisey*.

[101] *Gagnon*, 411 U.S. at 786.

[102] *See* Black v. Romano, 471 U.S. 606, 611 (1985) ("decision to revoke probation typically involves two distinct components: (1) a retrospective factual question whether the probationer has violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation").

[103] Francis C. Amendola et. al., *§ 1641. Constitutional Rights With Respect to the Form and Contents of Indictments or Informations*, CORPUS JURIS SECUNDUM CONSTITUTIONAL LAW (Dec. 2025 update).

[104] Francis C. Amendola et. al., *§ 1688. Disclosure and Discovery, Generally*, CORPUS JURIS SECUNDUM CONSTITUTIONAL LAW (Dec. 2025 update).

to negotiations regarding a plea. This phase can last for months or even years before a case goes to trial.[105]

A defendant has the right to a trial by a jury where the jury decides questions of fact and the judge questions of law, or they can waive a jury trial and have a bench trial where a judge decides both questions of law and fact.[106] The government presents their case first since they have the burden of proving the allegations they have brought beyond a reasonable doubt. The defendant has a right to cross-examine the government's witnesses and put on its own case after the government has concluded.[107] At the close of evidence, the jury—or a judge in a bench trial—deliberates and renders a verdict of "guilty" or "not guilty."[108]

If the defendant is found guilty, the case will move to a sentencing stage where the judge will determine the punishment. A defendant may request review of their conviction by an appellate court if they allege specific errors or abuses of discretion by the judge. The appellate court may affirm the conviction, reverse it, or remand the case for retrial.[109]

With these guiding principles in mind, our inquiry can now shift to how the same rights and procedures are implemented in the context of a probation violation hearing.

A. *Pleas and Waiver at a Probation Violation Hearing*

Before exploring how the probation violation process correlates to the criminal trial process, it is illustrative to examine what occurs when someone does not want to exercise their rights and instead wants to resolve their matter by a plea or admission. In a criminal case, when a defendant wants to waive their constitutional trial rights and enter a guilty plea, they must go through a colloquy with the judge

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105 *See, e.g.*, Jeffrey A. Garland, *Recurring Pretrial Issues, in* MASSACHUSETTS CONTINUING LEGAL EDUCATION (MCLE), MASSACHUSETTS SUPERIOR COURT CRIMINAL PRACTICE MANUAL (Oct. 27, 2021).

106 *Amdt 6.4.1 Overview of Right to Trial by Jury*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt6-4-1/ALDE_00013124/ (last visited Dec. 17, 2025); *Juror Selection Process*, UNITED STATES COURTS, https://www.uscourts.gov/court-programs/jury-service/juror-selection-process [https://perma.cc/MS95-3XSL] (last visited Dec. 17, 2025).

107 *Stages of a Criminal Case*, JUSTIA (last updated Oct. 2025), https://www.justia.com/criminal/procedure/stages-criminal-case/ [https://perma.cc/P7NG-2RA5].

108 *Id.*

109 *Id.*

to satisfy a factual determination that the defendant committed the alleged crime and that the defendant's decision to plead guilty is being made voluntarily and intelligently.[110] The rationale for requiring a judge to make these findings before they can accept a guilty plea is similar in the context of an allegation of probation violation. Because there are fundamental rights afforded to a probationer before a finding of a probation violation, a number of jurisdictions have found that probationer's agreement to waive the violation hearing must be knowing and voluntary.[111] Unlike the waiver in the criminal context, in the probation context, a specific colloquy is not required. Instead, a judge should evaluate the waiver's validity in light of the totality of the circumstances.[112] This waiver process underscores the significance of the rights provided and the consequences of giving up those rights.

B. *Preliminary Probation Violation Hearing*

The first right to which probationers are entitled is the right to a preliminary hearing; "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."[113] The nature and details of this requirement are spelled out with specificity in *Morrissey*.[114] First, the person making this initial determination must be someone not directly involved with the case; "the officer directly involved in making recommendations cannot always have complete objectivity in evaluating them."[115] The probationer is entitled to notice of the alleged violations, and a preliminary hearing will occur.[116] The probationer is also entitled to know that the purpose of the preliminary hearing is to determine whether there is probable cause

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110 21 Am. Jur. 2d Criminal Law § 596 (May 2025 update).

111 US v. Correa-Torres, 326 F.3d 18, 20 (1st Cir. 2003); United States v. Hodges, 460 F.3d 646, 651 (5th Cir. 2006); United States v. Farrell, 393 F.3d 498, 500 (4th Cir. 2005) (upholding the requirement for a knowing and voluntary waiver in the context of supervised release).

112 United States v. LeBlanc, 175 F.3d 511, 517 (7th Cir. 1999); *see* Commonwealth v. Santana, 489 Mass. 211, 218 (2022) (adopting the position of the First Circuit: that a defendant's agreement to waive a probation violation hearing "must be knowing and voluntary and that such waiver can be assessed under the totality of the circumstances").

113 *Morrissey*, 408 U.S. at 485.

114 *Id.* at 485–87.

115 *Id.* at 485–86.

116 *Id.* at 486–87.

to believe he has committed a parole violation. The notice should also state what parole violations have been alleged.[117]

At the preliminary hearing, the probationer may appear and speak on his own behalf or submit supporting evidence or documentation. While not absolute, there is an expectation that the probationer can question the person giving evidence against them unless there is a risk of harm to that person.[118] After the preliminary hearing, the hearing officer must determine whether there is probable cause to hold the probationer in custody until the final hearing on revocation.[119] The hearing officer is responsible for recording what transpired at the hearing regarding witnesses and evidence. If there is no probable cause to believe a probationer violated the terms of his or her probation, the probationer must be released, and the allegations of violation dismissed. If the initial finding of a basis for a probation violation is found, the second and more in-depth process begins.[120]

The probable cause determination for probation violation hearings mirrors the requirements that precede bringing a defendant to trial. Criminal cases usually begin with a formal complaint against the defendant.[121] The defendant's first formal appearance in court to answer on the charges is usually an arraignment. At this point, the defendant has the right to be notified as to the charges against them and the judge may consider a motion from the government that they be held in custody or ordered to pay bail for their release while the case is pending.[122] The court may set dates for future proceedings and deadlines for motions and other filings. Most defendants answer "not guilty" to the charges at this early hearing, which moves the process into the pre-trial stage.[123]

It is unimportant to line up the preliminary probation hearing with an exact hearing in the context of an allegation of a criminal offense. What matters is that criminal cases do not start with a determination of the ultimate question of guilt,

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117 *Id.* at 487.

118 Neil P. Cohen, The Law of Probation and Parole § 21:31 (2d ed. 1999), Westlaw (database updated June 2025).

119 *Id.*

120 *See generally* Francis C. Amendola, J.D. et al., *16C Corpus Juris Secundum Constitutional Law § 1786*, Westlaw (database updated May 2025).

121 AMENDOLA ET AL., *supra* note 103.

122 JUSTIA, *supra* note 107.

123 *Id.*

and they don't begin with the discovery process or pretrial motion practice. They start with some determination that there is probable cause that the person accused committed an illegal offense. Different jurisdictions have varied rules and procedures for making this probable cause determination, but no criminal defendant can stand trial unless the probable cause determination has been made.[124] This is critically important since many criminal defendants will be held in custody while the case is pending. In addition to the defendant's constitutional rights, weeding out cases with no basis keeps the courts running efficiently. There is also an understanding that events are fresher in people's minds earlier in the process, so there is a critical need to make an initial determination as quickly as possible when allegations are brought. A lawyer who represented a defendant who was given a trial date without any preliminary determination of probable cause or an insufficient determination would rightfully object. So, too, should the lawyer who represents the probationer who was denied a preliminary hearing and preliminary finding of violation of probation.

C. Notice of the Probation Violation Allegations

The allegation of violation must begin with a notice.[125] The purpose of the notice requirement is the same for a probation violation hearing as it is for a charge of criminal conduct. In both cases, the notice requirement exists because a person accused of wrongdoing cannot defend themselves against that charge unless they understand what it is alleged they did.[126] In the context of an allegation of criminal conduct, the notice comes in the form of a complaint or indictment;[127] in the probation context, it comes in the form of a notice of violation. The purpose of the two forms of notice is the same. If a lawyer were to receive a complaint alleging their client had committed a crime, and the complaint did not specify what crime was allegedly committed or when that crime was allegedly committed, they would be unable to investigate its truth or prepare a defense. A competent lawyer would file a bill of particulars to learn that necessary information. It is impossible to defend

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[124] *See, e.g.*, *Understanding the Court Process*, COMMONWEALTH OF MASSACHUSETTS, https://www.mass.gov/info-details/understanding-the-court-process [https://perma.cc/S449-6WXD] (last visited Dec. 17, 2025); *Anatomy of a Prosecution*, COUNTY OF SANTA CRUZ, https://www.santacruzdistrictattorney.us/Home/CriminalProsecutions/AnatomyofaProsecution.aspx [https://perma.cc/7A6V-CWX2] (last visited Dec. 17, 2025).

[125] *Morrissey*, 408 U.S. at 486–87.

[126] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

[127] Mass. R. Crim. Proc. 3(a) ("A criminal proceeding shall be commenced in the District Court by a complaint and in the Superior Court by an indictment").

an allegation of a missed appointment with a probation officer or a missed meeting at the program unless the lawyer knows when the supposed violations occurred.

D. *Disclosure of Evidence at a Probation Violation Hearing*

Closely related to notice is the requirement that the probationer be provided with disclosure as to the evidence against them. At trial, a defendant is entitled to know what the government is accusing them of and what support they have for those allegations. The right to a trial is meaningless if the defendant cannot prepare a response to the allegations, and one cannot begin to formulate a response if they don't know what the government will use to prove their case. This process of pretrial disclosure also serves as a check on the charges the government is bringing. If the government has no evidence, then they can't bring the charges.

These concepts are the same at the probation violation hearing. Due process requires disclosure of the evidence against the probationer because it is the only way that the probationer can prepare to defend themselves. If a probation officer claims a failed drug test but has no evidence of that test, the probationer cannot be in violation. The probationer must know what evidence there is to support the allegation. Considering that there is a lower burden of proof for a violation of probation, it is even more critical for a probationer to have access to this information before the hearing.[128]

E. *Cross-Examination at a Probation Violation Hearing*

The right to confront one's accuser is a bedrock principle of the American criminal legal system. The right long predates the U.S. Constitution and dates to Roman times.[129] In *Crawford v. Washington*, the Supreme Court redefined the parameters of this right, rejecting the previous "reliability" test as a basis for admissibility and replacing it with a focus on whether the statement is "testimonial evidence." [130] If the statement is testimonial, the Confrontation Clause makes the statement inadmissible unless 1) the declarant was unavailable AND 2) the defendant had a prior opportunity to cross-examine the declarant.[131] This rejected

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[128] *See* NEIL P. COHEN, THE LAW OF PROBATION & PAROLE § 20:11 (2d ed. 1999), Westlaw (database updated June 2025) ("In general terms, most courts routinely admit hearsay evidence at probation and parole revocations.").

[129] Carroll v. State, 916 S.W.2d 494, 496 (Tex. Crim. App. 1996) (referencing the Roman Governor Porcius Festus's report to King Agrippa).

[130] 541 U.S. 36, 42, 68 (2004).

[131] *Id.* at 68.

the pre-*Crawford* approach in which courts could admit out-of-court statements if the hearsay statement fell within a "firmly rooted exception" or bore "particularized guarantees of trustworthiness."[132]

The decision in *Morrisey* lays out the right to confront and cross-examine adverse witnesses, though courts are empowered to prohibit confrontation where they find good cause to do so.[133] The right to confrontation in the probation context comes not from the Sixth Amendment guarantees, but from the fundamental fairness required by due process. Several courts have held that the Sixth Amendment right to confrontation does not apply to probation violation hearings, making the right announced in *Morrisey* certainly less absolute than *Crawford*.[134] Nevertheless, it is still an essential right that a probationer has before they can be found in violation.[135] While numerous state courts have found that *Crawford* does not apply at probation hearings, the United States Supreme Court has not directly addressed the question of *Crawford*'s application to probation violation hearings.[136] The right to confront the evidence being used against a probationer accused of violating their probation is not meaningless, and courts have found limiting such confrontation at a probation violation hearing to be error.[137] The 1993 comments on Federal Rule of Criminal Procedure 32.1 explain the rationale for requiring disclosure of witness statements for probation hearings under the same Rule as that for trial. This rationale illustrates the similarities between preparing for a trial and preparing for a probation violation hearing:

> As noted in the Committee Note to Rule 26.2, the primary reason for extending that Rule to other hearings and proceedings is the compelling need for accurate information affecting the witnesses' credibility. While that need is undoubtedly apparent in a trial on the merits, it is equally compelling, if not more so, in other pretrial and post-trial proceedings where both the prosecution and defense have high interests at stake. In the case of revocation or modification of probation or supervised release proceedings, not only is the defendant's liberty interest at stake, but the government also has a stake in protecting the community's interests.[138]

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132 Ohio v. Roberts, 448 U.S. 56, 66 (1980).

133 *Morrissey*, 408 U.S. at 489.

134 *See* Commonwealth v. Wilcox, 841 N.E.2d 1240, 1243 (Mass. 2006).

135 *Id.* at 1249.

136 *See* NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE § 21:33 (2d ed. 1999), Westlaw (database updated June 2025).

137 *E.g.*, State v. Coltrane, 299 S.E.2d 199, 202 (N.C. 1983); Grimes v. State, 875 S.E.2d 500, 503 (Ga. Ct. App. 2022).

138 FED. R. CRIM. P. 32 advisory committee's note to 1993 amendment.

One essential function of cross-examination is to bring to light information or biases that the witness would not testify to on direct examination. To evaluate their testimony, it is necessary to have a complete understanding of what it is they have testified to. Many probation hearings consist of only one witness: the probation officer. That person is never impartial and brings to their testimony all their experiences with the subject of the violation hearing. Certainly, those experiences have a bearing on the credibility of their testimony and should be subject to rigorous cross-examination. Additionally, the probation officer is unlikely to volunteer testimony about how the probationer has been following probation. Just as a trial cross-examination brings out biases and facts necessary to complete the direct testimony, so should the cross-examination at a probation violation hearing. Even with these limitations on confrontation and cross-examination, lawyers can still advance much advocacy if they approach the hearing through the litigation lens.

F. *Presenting Evidence at a Probation Violation Hearing*

Just as integral to the trial and probation process is the right to confront, so too is the flip side of the coin: the right of the accused to present evidence on their own behalf. Like the right to confront, the opportunity to be heard in person and to present witnesses and documentary evidence is a right given to those accused of violating their probation.[139] While closely related, the right to confront adverse witnesses and the right to present a defense are separate rights.[140] Utilizing a litigation lens approach, counsel must discuss with the client his or her successes and challenges while on probation. During this conversation, counsel should explore whether a violation occurred and, if so, explore any explanations regarding noncompliance. Counsel should also obtain records documenting treatment, employment, and any other successes the client has achieved. All this material is potential evidence that the probationer can present at the hearing to counter the probation department's allegation of a violation.

G. *Written Findings after a Probation Violation Hearing*

Finally, *Morrisey* establishes a right to written findings by a neutral and detached hearing body.[141] By requiring not only that probationers are entitled to present a defense, but further, that any decision that follows their hearing be committed to written findings by a neutral and detached hearing body, the picture

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139 *Morrissey*, 408 U.S. at 489.

140 Commonwealth v. Costa, 189 N.E.3d 284, 289 (Mass. 2022).

141 *Morrissey*, 408 U.S. at 486, 489.

of a broader case starts to emerge. It is not enough for the probation department to assert a violation; a judge must ultimately determine whether such a violation occurred. And it is not enough for such determination to be made in a vacuum; the decision must be committed to a reviewable form. In these two rights, we see the anticipation of an appeal or further review and an understanding that probation can't determine a violation; it has to be a judge. In most states, the probation department is part of the judicial branch, but the decision makers cannot be from the probation department.[142]

The lower than trial standards for finding a probation violation and the messaging that probation violation hearings are not criminal proceedings has resulted in many lawyers approaching these hearings as if a finding of violation is a forgone conclusion. But it does not have to be this way. Under a litigation lens, preparing for and executing a violation hearing is the same process that a lawyer would undertake in preparing for and executing a defense against allegations of a criminal charge.

IV. THE LITIGATION LENS IN ACTION

Under a litigation-focused view, defense counsel must prepare for the final probation revocation hearing in the same way they would prepare for a new criminal case. As explained in Section III, probationers facing an allegation that they have violated their probation are entitled to significant and specific due process. These due process rights should lead the attorney to approach their job of defending the person accused of the violation from the same place that they would defend a client accused of committing a crime. Once again, a look at how criminal defense lawyers approach representation is insightful in evaluating how lawyers can do the same in the probation context.

When a defense lawyer first takes on a new criminal case, they look carefully at the allegations the government is making against their client. They gather more information from the government through discovery litigation and from their client and third parties through investigations and record collections. They research and litigate legal issues in the case and develop a robust theory of their case. A compelling theory tells the story of innocence. It incorporates the case's law, facts,

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[142] *See, e.g.*, Colorado *Probation*, COLORADO JUDICIAL BRANCH, https://nebraskajudicial.gov/probation/adult-probation-services-division/adult-field-services (last visited Feb. 14, 2026); Nebraska *Adult Field Services*, STATE OF NEBRASKA JUDICIAL BRANCH, https://nebraskajudicial.gov/probation/adult-probation-services-division/adult-field-services (last visited Feb. 14, 2026).

and emotions into a cohesive explanation that guides the decision-making process and serves as a roadmap. A lawyer should engage in the same process for a probation violation hearing. One must effectively represent a client at a probation hearing by gathering information through investigation or motions and developing legal and factual challenges to the allegations. As in Section III, different jurisdictions have different rules and procedures for probation violations but the underlying principles for effective representation remain the same.

A. *Case Preparation and Strategy Under the Litigation Lens*

Like in a trial, counsel must prepare for the probation violation hearing by developing a theory of why the client did not violate probation. This argument needs to answer the following questions: Is the noncompliance alleged in fact accurate? If so, is there an explanation for the noncompliance with probation? And has the probationer otherwise followed probation?

At the outset of receiving a notice of surrender, counsel should get the docket sheet and other information from the case for which the client is on probation to determine the specific details of the conditions established by the sentencing judge. A careful review of the notice of violation to determine the specific allegations should be compared with the conditions set by the court. If, after reviewing the docket, there is lingering ambiguity about the conditions established by the sentencing judge, defense counsel investigates. Consider *Ex Parte Wayne*, where the Alabama Supreme Court found that the probationer's due process rights were violated where Wayne was informed in written notice, and at the initial hearing, that she violated her probation by failing to appear, failing to follow the court referral program, and other violations such as failure to pay fines.[143] After her final probation hearing, the judge found her guilty of absconding, a separate offense, which allowed for a much harsher penalty than the failures to appear violations would have allowed for.[144] The finding of violation was overturned because the written notice did not notify her that her probation was being revoked for absconding.[145] Similarly, in *McCarron v. State*, the court found that the probationer's due process rights were violated when McCarron was found in violation of probation for possessing six weapons, when the notice of violation only alleged

[143] 292 So.3d 1036, 1037, 1041 (Ala. 2019).

[144] *Id.* at 1038.

[145] *Id.* at 1041.

possession of one weapon.[146] The Court found that the procedure followed in the trial court deprived McCarron of his right to due process of law and constituted error.[147]

Counsel should investigate the facts surrounding the allegation of violation by talking to the client about their successes and challenges while on probation. Other people or documents may provide information regarding the alleged violations.

Probation departments keep files on individuals on probation. Counsel must obtain a copy of the client's probation file. The file may contain evidence of compliance or other exculpatory information otherwise missing from the proceedings. It can also include the probation officer's notes about the client's performance on probation, sometimes referred to as a "chronic," as well as other forms of documentation of the client's compliance with conditions.[148]

Counsel should look carefully and critically at supporting documentation provided by the probation officer. For example, if there is an allegation of a positive drug test, counsel should research the type of drug test used, how the test should be administered, the error rate, and the potential for false positives. Counsel should research these tests and obtain the test instructions. According to the test instructions, many tests used by the probation department are "screening" tests and are not intended to provide conclusive results.[149] Counsel should consider filing a motion to bar evidence of the drug testing. Suppose the allegation is one involving GPS or other electronic monitoring. In that case, counsel should be aware that these

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146 185 So.3d 666, 673, 675 (Fla. Dist. Ct. App. 2016).

147 *Id.*

148 *See* Leo Perez, *Why Chronological Documentation is Essential in Community Corrections*, CORRECTIONS1 (Jan. 9, 2024), https://www.corrections1.com/probation-and-parole/why-chronological-documentation-is-essential-in-community-corrections [https://perma.cc/GZG7-2BLT].

149 *See* Mandatory Guidelines for Federal Workplace Drug Testing Programs, 88 Fed. Reg. 70768 (Oct. 12, 2023) (to be codified at 42 C.F.R. ch. 1) (stating for a Department of Health and Human Services certified laboratory to report a specimen as positive for a specific drug or drug metabolite, both the initial drug test *and* the confirmatory drug test must be positive, in accordance with corresponding cutoffs in the drug testing panel); *see also* State v. Chipman, 31 P.3d 478, 483–84 (Or. Ct. App. 2001) (adopting parts of the Federal Workplace Drug Testing guidelines to drug tests in cases of driving under the influence of intoxicants (DUII), with courts upholding the exclusion from evidence of urine specimen tests that failed to conform with federal initial and confirmatory testing protocol).

devices generate many false alarms that are not the probationer's fault.[150] For this reason, counsel should investigate issues surrounding dead zones and charging problems, for example. It is crucial that any defense attorney be familiar with past challenges to the reliability of different types of evidence such as drug testing and GPS, and be prepared to confront issues of reliability when such evidence is part of the probationer's case. This may require counsel to hire an expert to assist with an explanation of the evidence or aid in preparing a cross-examination of the probation officer offering this evidence.

Underlying any question of access to documents or records in a probation case is the probationer's right to present a defense, highlighted in *Commonwealth v. Kelsey*.[151] In that case, Mr. Kelsey was facing a probation surrender hearing as a result of his arrest on a drug allegation.[152] The Massachusetts Supreme Judicial Court found that he was entitled to disclosure of the identity of the informant to whom Mr. Kelsey allegedly sold the drugs, because such disclosure was required by due process.[153] The Court affirmed that this information requires disclosure because it is crucial to the probationer's ability to prepare a defense.[154] This case is also an excellent reminder of the principle that a right should never be denied to a client in a probation violation proceeding simply because that right is routinely denied to probationers; as was the rationale of the trial judge who initially denied Mr. Kelsey the disclosure of the informant's identity.

Counsel also needs to anticipate how the probation department will attempt to prove that the client violated probation. In most probation violation hearings, the probation officer will testify about the probationer's noncompliance. Any

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[150] Cook County, Illinois—which includes the city of Chicago—is an illuminating case study on the fallibility of GPS tracking technology. Cook County transitioned their electronic monitors from radio-frequency identification (RFID) technology to electronic monitors outfitted with GPS beginning in 2020. For an in-depth analysis of widespread false positives due to "signal drift," see the *Chicago Reader*'s reporting, based on data from a University of Chicago analysis. For example, November 2021 data indicated that "alerts for people suspected of leaving their homes were incorrect a whopping 96 percent of the time." Shawn Mulcahy, *Economics Gone Wild: Steven Levitt Had a Plan to Revolutionize Electronic Monitoring. Did it Work?*, CHICAGO READER (Feb. 5, 2025), https://chicagoreader.com/news/electronic-monitoring-steven-levitt-freakonomics/ [https://perma.cc/B5DN-CYW5].

[151] 982 N.E.2d 1134, 1141 (Mass. 2013).

[152] *Id.* at 1138.

[153] *Id.* at 1143, 1147.

[154] *Id.*

information that the judge hears to counter the probation officer's claims will come into evidence either through counsel's cross-examination of the probation officer or other probation witnesses or through witnesses called by the defense or documents entered into evidence by the defense.

In re Carson demonstrates the critical importance of access to the evidence of an alleged violation and the right to confront that evidence. Mr. Carson was alleged to have violated his probation due to cocaine use.[155] The report provided to him prior to the hearing stated that Carson had violated his probation by testing positive for cocaine based on the results of a routine drug screen conducted on a urine sample provided by Carson.[156] Under a section of the report titled, "Particulars of Violation," the probation department stated that "a report from Upshur Laboratories was returned indicating that evidence was found, by the screening procedures used, to support the presence of the following: cocaine, confirmed positive."[157] The Missouri Court of Appeals found that the report was unreliable because it did not describe the testing completed or the basis for the conclusion.[158] Because the government did not introduce any other evidence or testimony, the probationer was denied his due process rights.[159]

Similarly, in *Bailey v. State*, a probation officer moved to revoke Mr. Bailey's probation based on an allegation that he avoided his required supervision.[160] At the probation violation hearing, Bailey denied that he absconded from supervision. There was no witness testimony or other evidence at the hearing.[161] While the probation officer and Bailey's lawyer both presented arguments and recommendations, those were insufficient to constitute a hearing in compliance with his due process rights.[162]

These cases and suggestions are not exhaustive or relevant in every allegation of violation of probation. However, they do provide important support for the

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155 *In re* Carson, 789 S.W.2d 495, 495 (Mo. Ct. App. 1990).

156 *Id.* at 496.

157 *Id.*

158 *Id.* at 496–97.

159 *Id.* at 497.

160 372 So.3d 560, 561 (Ala. Crim. App. 2022).

161 *Id.* at 563.

162 *Id.* at 563–65.

reframing of the preparation and litigation of probation violation allegations. They demonstrate how a narrow view of allegations of probation violations can be limiting, and how a more expansive view can provide tools for lawyers in challenging these allegations.

B. *Legal Challenges Under the Litigation Lens*

Underlying any litigation strategy is not just a factual strategy for theory development but a careful analysis of the legal and evidentiary issues in the case. Jonathan Rapping frames the defense lawyer's role in defending a client against allegations of a criminal charge as shaping "the facts of the case in a manner most favorable to her client."[163] Through pretrial litigation, motions in limine before trial, and objections during trial, defense lawyers engage in "evidence blocking," as a critical part of a trial strategy.[164] Constitutional violations such as an unlawful search, challenges to a proposed witness as not sufficiently knowledgeable to testify or protected by a privilege, and hearsay objections are all ways in which a defendant can prevent specific evidence from being used against them at trial and, therefore, lead to a more favorable outcome.

This is no different for probation violation hearings. Despite a lower standard for admission or exclusion of evidence, analyzing the government's evidence with an eye toward how it can be blocked is critical in probation litigation.[165] This type of evidence blocking can take different forms.

A probationer can, of course, only be found in violation of a lawfully imposed condition.[166] A careful review and analysis of whether the alleged violation was a condition of probation can lead to a ground for dismissal.[167] Like a motion to

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[163] Jonathan Rapping, *Evidence Blocking: How the Defense Can Define the Legal Landscape at Trial*, 33 AM. J. TRIAL ADVOC. 1, 4 (2009).

[164] *Id.* at 4–6.

[165] *See Morrissey*, 408 U.S. at 489–90 ("the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial").

[166] *See* Commonwealth v. MacDonald, 757 N.E.2d 725, 727 (Mass. 2001); *see also* People v. Aleksanyan, 180 Cal.Rptr.3d 375, 378 (Cal. App. Dep't Super. Ct. 2014) (holding, in agreement with defendant's challenge to validity of probation conditions, pure questions of law and constitutional challenges are not forfeited by failure to object in the trial court).

[167] *See* Commonwealth v. Lally, 773 N.E.2d 985, 987–88 (Mass. App. Ct. 2002) (stating only a judge has authority to impose conditions of probation, and any ambiguities in conditions are to be construed in favor of the defendant).

dismiss an indictment or complaint, a legal challenge based on an allegation of probation violation should be explored before determining whether the allegations are true.

Other restrictions exist on the scope of permissible conditions, and conditions that violate the rules around permissible conditions can be challenged in the revocation process.[168] For example, only a judge can set conditions of probation, and those conditions must be specific and reasonably related to the crime.[169] Conditions can restrict a probationer's fundamental rights only if they meet the "reasonably related" test.[170] The condition must give the probationer "fair warning" of the conduct that will trigger a violation.[171] Noncompliance must be willful.[172] The conduct must be during the probation term.[173] Like a challenge to a law that someone was charged with breaking, these types of probation challenges are most appropriately raised before the inquiry into whether there was a violation. In the context of a jury trial, these pretrial motions and rulings serve as gatekeepers to prevent the jury from considering improper or illegal testimony. Creating a mechanism by which a determination can be made into the legality of a probation condition before a determination of whether the probationer engaged in the conduct at issue is embedded in the principles of due process. Because the same person, namely the judge, is likely to make both findings, parsing them into separate inquiries prevents the judge from hearing about conduct that, even if true, could not be a basis for a violation.

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168 Illegal probation conditions can be appealed at a surrender hearing. However, acceptance of illegal conditions to avoid incarceration does not constitute a valid waiver of the right to appeal them. Commonwealth v. LaFrance, 525 N.E.2d 379, 381 (Mass. 1988).

169 *E.g.*, Williams v. State, 182 So.3d 912, 913–14 (Fla. Dist. Ct. App. 2016) (holding the trial court erroneously imposed a no alcohol probation condition where the no alcohol condition was not related to defendant's rehabilitation for the underlying crime of grand theft).

170 *E.g.*, United States v. Camp, 410 F.3d 1042, 1045 (8th Cir. 2005) ("We have rejected conditions of release that were imposed without any evidence of their need and were not reasonably related to deterrence, protecting the public, or providing necessary training or correctional treatment").

171 Commonwealth v. Ruiz, 903 N.E.2d 201, 206 (Mass. 2009); United States v. Gallo, 20 F.3d 7, 11 (1st Cir. 1994).

172 *See* Commonwealth v. Canadyan, 944 N.E.2d 93, 96 (Mass. 2010) (citing Bearden v. Georgia, 461 U.S. 660, 669 n.10 (1983)); *but see* U.S. v. Warner, 830 F.2d 651, 657 –58 (7th Cir. 1987) ("While good faith and lack of willfulness does not preclude finding a probation violation, defendant could and did raise his alleged good faith before the court as a factor for the court to consider in deciding whether to revoke probation").

173 Commonwealth v. Aquino, 838 N.E.2d 572, 574 (Mass. 2005).

A significant element of evidence blocking in defense trial strategy is using the exclusionary rule to prevent the government from using evidence gathered in violation of the United States Constitution.[174] Very few states allow for the application of the exclusionary rule at probation violation hearings, although some do.[175] Despite this, the circumstances of how physical evidence or statements were obtained can be important information for the judge to be made aware of as he or she is left to determine whether a violation occurred. The exclusionary rule developed as a deterrent to government misconduct, and that same misconduct is also relevant for bias and reliability.[176] Highlighting for a judge the way evidence was obtained in support of an accusation against the probationer may be extremely relevant to the judge's assessments of bias and reliability in a probation violation hearing. Even though the evidence will likely not be excluded from a probation violation hearing on exclusionary rule grounds, it might be excluded as unreliable or biased. Examining the evidence using the parameters of the exclusionary rule gives lawyers a tool for creative advocacy at a probation hearing.

The results of a probation violation hearing are not predetermined. Despite the lower standard and constitutional protections compared to a criminal case, these hearings are full of opportunities for advocacy if lawyers approach them through a litigation focused lens.

V. ANTICIPATED RESISTANCE TO THE LITIGATION LENS AND REASONS IT SHOULD NEVERTHELESS SUCCEED

As does any new approach to advocacy, the litigation lens approach to probation violation hearing advocacy is sure to raise questions, receive pushback, and encounter resistance. Here, the articulated concerns will likely be directed to both

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[174] *See* Mapp v. Ohio, 367 U.S. 643, 657–58 (1961) (holding that the exclusionary rule applies to evidence gained from an unreasonable search or seizure in violation of the Fourth Amendment); *see also* Miranda v. Arizona, 384 U.S. 436, 471–73 (holding that the exclusionary Rule applies to improperly elicited self-incriminatory statements gathered in violation of the Fifth Amendment and to evidence gained in situations where the government violated the defendant's Sixth Amendment right to counsel).

[175] Morse v. State, 604 So.2d 496, 504 (Fla. Dist. Ct. App. 1992) (Florida); State v. Marquart, 945 P.2d 1027, 1031 (N.M. Ct. App. 1997) (New Mexico); People *ex rel.* Johnson v. N.Y. State Div. of Parole, 750 N.Y.S.2d 696, 698 (N.Y. App. Div. 2002) (New York); Chambers v. State, 649 P.2d 795, 797 (Okla. Crim. App. 1982) (Oklahoma); State *ex rel.* Juv. Dep't of Multnomah Cnty. v. Rogers, 836 P.2d 127, 129–30 (Or. 1992) (Oregon).

[176] *Mapp*, 367 U.S. at 656–57.

the conceptual comparisons drawn between probation violation hearings and criminal trials *and* to the practicalities of this framework for representation.

Before turning to the specific resistance that the litigation lens will likely receive, it is useful to look more generally at the deep internal resistance to change of any kind in the practice of law. Asking lawyers to shift their thinking about the approach they utilize at probation hearings is a significant request. The myth that *Gagnon* so limits due process at probation hearings to make a finding of violation a foregone conclusion is so embedded in how lawyers practice that it can be difficult to make this conceptual shift. A critical prerequisite to acceptance of the proposed shift to probation practice under a litigation lens, is an understanding of where the resistance comes from. A shift in mindset must begin with a recognition of the internal thought obstacles faced by the lawyers representing people accused of violating their probation.

Most of the lawyers who provide this representation are public defenders or appointed counsel responsible for not just representing those accused of violating their probation, but also those accused of violating criminal laws.[177] That means that the many challenges faced by those providing indigent defense representation exist for those representing individuals at probation violation hearings. Public defenders work in a system that is consistently underfunded and always mentally difficult. They manage high caseloads representing people who haven't chosen them as their lawyers and who are facing the loss of liberty and autonomy.

In an exploration of criminal defense lawyers' self-awareness of subpar representation, Tigran Eldred explores the psychology of ethical decision making and how lawyers can be "ethically blind" to their less than zealous representation.[178] That is why lawyers don't see themselves as unethical when they are in situations where their own self-interest conflicts with their client's interests. Eldred identifies several factors that contribute to ethical blindness; ambiguity in controlling rules, cognitive load and time pressure, routinization, framing and social norms all

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[177] *See* Emily Widra & Alexi Jones, *Mortality, Health, and Poverty: The Unmet Needs of People on Probation and Parole*, PRISON POLICY INITIATIVE (Apr. 2023), https://www.prisonpolicy.org/blog/2023/04/03/nsduh_probation_parole/ [https://perma.cc/MC5D-4DQ3] ("3 out of 5 people on probation have incomes below $20,000 per year").

[178] Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 337, 339 (2013).

contribute to criminal defense lawyers individually and collectively failing to provide adequate representation to their clients.[179]

Lawyers representing clients in probation revocation hearings often believe that they are doing the best job that they can for their clients. That the deck is stacked against them and their client. They see other lawyers in the courthouse not aggressively litigating allegations of probation violations and receive pushback from judges and probation officers if they challenge the embedded norms of representation.[180] Eldred refers to this phenomenon as the "informal norms" that lawyers are confronted with in their practice.[181]

How others approach a hearing such as a probation violation hearing is impacted more by the way other lawyers approach the hearing and the way the court expects someone to approach the hearing and not what is necessary in the client's best interests.[182]

As discussed above, I attribute this fixed mindset to be a result of the way the Court drew the parameters of due process at probation violation hearings in the decisions of *Gagnon* and *Morrisey*. The tone those cases set instructed that people accused of probation violations are entitled to due process, but that the due process that they are entitled to is not the same rights as the rights of someone accused of committing a criminal offense. The language of the decisions and the contradictory messaging of acknowledging rights but not providing a mandate for counsel leads to confusion in what the role of a lawyer should be in defending individuals against these allegations. It is this confusion that set in motion a situation where the norm of probation violation hearings is not the contemplative and deliberate norm of preparation that is the standard in the representation of those accused of committing criminal offenses.

Public defender systems across the country lack sufficient resources to give all clients the zealous representation that they should receive. Crushing caseloads mean that public defenders and court appointed lawyers struggle everyday with the

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179 *Id.* at 378–84.

180 *Id.* at 348–56.

181 *Id.* at 352.

182 *Id.*

decisions of how much time they allocate to each of their cases.[183] Many have studied the phenomenon of public defender triage and the ways in which public defenders make decisions about how to manage their limited time and resources.[184] Sometimes the decisions are based on the strength of the government's case against the client, sometimes on the lawyer's belief in the client's innocence, and sometimes the decisions are made based on what case is up next on their over-scheduled calendar.[185] It is also apparent that implicit bias based on deep-rooted racial stereotypes has an impact on how public defenders make these decisions.[186] These triage decisions begin from the moment the public defender receives the case. Attorneys likely use several different criteria to make these decisions. For instance, they may prioritize cases based upon their assessment of whether the state can prove its case beyond a reasonable doubt. Or they may expend more effort on cases in which they believe their client is factually innocent. The lawyer representing someone at a probation violation hearing is a lawyer who has an excessive caseload and is likely looking for ways to triage their cases. It makes sense that a category of cases that have been deemed by the Court to be "not a part of a criminal prosecution" would then be relinquished to a lower level of priority.[187]

In this same vein, institutions that fund and support defense representation will also likely have resistance to changes that will result in a need to expend more resources. Applying a litigation lens for probation violation hearings will be more work for lawyers. As explained above, case preparation under a litigation lens involves significantly more pre-hearing work. The lawyer must investigate the allegations in the same way that they would a criminal charge. They also need to research legal challenges and prepare to confront evidentiary issues that arise in the hearing. More work for lawyers means more money required for indigent defendants.

In some jurisdictions, it will also require program changes in compensation for court-appointed counsel. For example, the current Criminal Justice Act (CJA) rate for non-capital criminal cases is $177 per hour, with maximum amounts of compensation for various types of representation. For regular criminal (felony,

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183 L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2631–32 (2013).

184 *Id.* 2628.

185 *Id.* at 2632, 2634.

186 *Id.* at 2636.

187 *Gagnon*, 411 U.S. at 781.

non-capital prosecution) cases, the case maximum is $13,800, meaning that the presumptive amount of hours per case is 78. For probation cases, there is a $3,000 maximum, meaning a presumptive 16.95 hour maximum that the lawyer can spend working on the case.[188] A move towards more trial-like litigation would necessitate the probation cap being raised to something closer to the 78 hour cap on a criminal case. Other non-criminal case categories, such as civil forfeiture, have the maximum criminal case cap because there is a recognition that to adequately represent someone facing a civil forfeiture a lawyer must spend the same amount of time as they would on the underlying criminal matter.

Organizations that support lawyers will need to adjust their training and assistance of lawyers engaging in probation advocacy. For example, the American Bar Association, which issues standards for different aspects of legal practice, has not issued standards relating to probation since 1970.[189] Furthermore, the National Legal Aid and Defender Association, which also issues standards, has no mention of probation in their most recent (2006) standards.[190]

These issues of cost and support are flagged with an understanding that pushback to new ideas often stem from financial or logistical obstacles. It is clear that a shift to the litigation lens will require a mindset shift from not only individual lawyers but from the courts and the legal community. The idea that it has always been done a certain way so it can't be changed is prevalent throughout legal history. Lawyers who employ a litigation lens will likely run into not only resistance from courts and other lawyers but also will likely face structural impediments ranging from payment to training and support. However, legal processes do change, and litigation strategies evolve, but they must start somewhere, and for probation violation hearings that someplace is the litigation lens.

With this insight into why it will be difficult to change the thinking that lawyers use when representing clients at probation violation hearings, an examination of

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[188] *See* COMPENSATION AND EXPENSES OF APPOINTED COUNSEL, CH. 2, § 230, U.S. COURTS, https://www.uscourts.gov/administration-policies/judiciary-policies/guidelines-administering-cja-and-related-statutes-6 [https://perma.cc/RJP9-PSAG] (last visited Dec. 17, 2025).

[189] Email from Shamika Dicks, Program Specialist at Am. Bar Ass'n, to Shira Diner, Lecturer and Clinical Instructor, B.U. School of Law (July 4, 2024, 19:48 EST) (on file with author).

[190] Email from Alison Bloomquist, Vice President of Strategic Alliances and Innovation at Nat'l Legal Aid and Def. Ass'n, to Shira Diner, Lecturer and Clinical Instructor, B.U. School of Law (July 21, 2024, 14:41 EST) (on file with author).

what will likely be the articulated resistance to the litigation lens is necessary before a mindset shift can set.

A. *Differences Between Probation Revocation Hearings and Trials Exist*

As discussed, this proposal to shift a fixed mindset will likely invoke resistance that is manifested in an argument that trials and probation violation hearings are in fact too different to warrant the likening of the two proceedings. There are aspects of the nature of probation generally and the confines of *Gagnon* that make probation hearings fundamentally different than trials which reenforce the resistance to such change. There are three specific differences between trials and probation violation hearings that need to be addressed before acceptance of practice through a litigation lens. The first is the absence of the right to a jury trial in probation violation hearings. The second is a question of separation of powers due to the fact that in many jurisdictions the probation department is part of the judicial branch, creating a situation where the judge who is tasked with the questions of if a violation occurred is organizationally grouped with the probation officer who is making the allegation. The third and more fundamental difference is a long held acceptance that the purpose of probation is different than the general justifications for punishing criminal conduct.

The most obvious structural difference between probation violation hearings and criminal cases is the Sixth Amendment guarantee to a jury trial for criminal allegations. While *Gagnon* articulates many rights for those facing a violation of probation, it clearly does not provide for the right to a trial by jury as is guaranteed by the Sixth Amendment for those accused of crimes.[191] In a probation hearing, the judge or other neutral fact finder, who hears the questions of fact portion of the proceeding is the same person who makes the determination as to the punishment if a violation is found.[192] At quick glance, the absence of the right to trial for the finding of a violation might seem to undermine a litigation focused shift to the hearings. The litigation lens does not purport to turn the violation hearing into a trial. It is a hearing in front of a neutral and detached fact finder and not a judge. Still, as discussed in Section III, the fundamental attributes of the trial process exist. And it is in those attributes where the comparison lies.

If every lawyer were to employ a litigation lens to their probation advocacy, all allegations of violation would not end in a hearing. Some significant number of

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[191] *See* 411 U.S. at 7889 (noting the difference between criminal trials and revocation hearings).

[192] *Id.* at 786.

allegations would still end in a stipulation or admission to the violation. Yet, this is no different than allegations of criminal conduct. Very few criminal cases go to trial. Ninety-five percent or more of criminal cases are resolved by way of a plea.[193] However, there is still an expectation that lawyers approach criminal cases with both a trial strategy and a plea strategy. The litigation lens does not suggest that all probation allegations will be resolved by way of a hearing, but rather, that one cannot make that decision without having questioned the government's case and explored all possible defenses.

Turning now to the separation of powers argument. One of the hallmarks of the criminal legal system is the separation of powers between the judiciary and the prosecutor, who is part of the executive branch. Whether this separation is successful in its quest to protect individual liberty is a question that has been debated in recent years.[194] There has also been attention on the blurring of the separation due to the immense sentencing power given to prosecutors with their ability to charge people for crimes that carry mandatory minimum sentences.[195] Yet the fact remains that prosecutors and judges serve in different branches of government and play different roles in a criminal prosecution.

Often, this is not true for probation violation hearings, where the person bringing the charges, the probation officer, is part of the judiciary or a part of a state department of corrections.[196] Even in states where probation is not directly located within the judicial branch, the court and probation have a close relationship by design. While the judge imposes a sentence of probation, it is up to the probation officer to effectuate the judge's vision for the defendant. The court depends on probation officers for access to information such as a defendant or a witness

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193 Lucian E. Dervan, *Fourteen Principles and a Path Forward for Plea Bargaining Reform*, A.B.A (Jan. 22, 2024) https://www.americanbar.org/groups/criminal_justice/resources/magazine/2024-winter/fourteen-principles-path-forward-plea-bargaining-reform/ [https://perma.cc/QH5N-W562] ("Plea bargaining accounts for almost 98 percent of federal convictions and 95 percent of state convictions in the United States.").

194 *See generally*, Carissa Byrne Hessick, *Separation of Powers Versus Checks and Balances in the Criminal Justice System: A Response to Professor Epps*, 74 VAND. L. REV. EN BANC 159, 159 (2021).

195 *"Truth in Sentencing": Paying More Money to Make Our Communities Less Safe*, FAMILIES AGAINST MANDATORY MINIMUMS, https://famm.org/wp-content/uploads/2024/04/FAMM-Truth-in-Sentencing-Fact-Sheet.pdf [https://perma.cc/77Z7-5PST] (last updated Apr. 22, 2024) (Truth in Sentencing Laws).

196 *See Probation Landscape Web Tool*, NAT'L ASS'N OF COUNTIES (Sep. 25, 2023) https://www.naco.org/resources/probation-landscape-web-tool#webtool [https://perma.cc/TC4P-LEC5].

criminal record in the court room and to implement the conditions set forth by the judge. It is probation officers that will administer a drug test or place a probationer in a program. In fact, when a person is facing a probation violation, a probation officer has decided that this person has not fulfilled the requirements set by the judge but administered by the probation office.[197]

This structural difference is one explanation for why so many lawyers see the results of a violation hearing as a forgone conclusion. They view probation and the judge as being on the same side against the probationer. While this phenomenon certainly exists in with the prosecution in criminal cases, it is well pronounced and validated in the probation context.

The litigation lens can't change this dynamic, but the existence of the dynamic doesn't make the litigation lens impractical. There is nothing about the judicial/probation relationship that diminishes the process suggested by the litigation lens. Lawyers can still approach their probation cases the same as for a trial, despite the relationship. Indeed, the dynamics of this relationship also make probation advocacy through the litigation lens even more critical.

The other distinction between probation and criminal trials that will likely cause pushback against using the litigation lens rests in the different purpose of probation as a form of punishment and the role of the probation officer in fulfilling the judge's purpose for punishment. This distinction in purpose could raise concerns about the usefulness of comparison between probation and trials. In *Obey All Laws and Be Good: Probation and the Meaning of Recidivism,* Fiona Doherty groups the legal justification for probation into three categories.[198] The benevolent supervisor theory, the privilege theory, and the contract theory are all justifications for the government to control the conduct of those under its reach.[199] The benevolent supervisor theory, Doherty explains, is a vestige of the progressive era where probation officers were tasked with reforming their charges as a "friend" in need of guidance and support.[200] Probation officers were trusted to know what any

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197 *See, e.g.*, M. ELAINE BUCCIERI ET. AL., 21 CORPUS JURIS SECUNDUM *Duties* § 126, Westlaw (database updated Dec. 2025).

198 Fiona Doherty, *Obey All Laws and be Good: Probation and the Meaning of Recidivism*, 104 GEO L.J. 291, 296–97 (2016).

199 *Id.*

200 *Id.* at 297.

actions are best and therefore this task would be in the best interests of the probationer.[201] This idea evolved into a role where the state takes care of those who can't take care of themselves.[202] Doherty describes probation under the privilege theory, as providing a better form of punishment as compared to incarceration.[203] As a result of being granted such a privilege, the probationer consents to the conditions and the intrusion into their private life.[204] Finally, the contract theory is used to justify onerous conditions as something that the probationer has "negotiated" for and in exchange is receiving a probationary sentence.[205] Despite the significant shortcoming that Doherty finds with each model, taken together they provide a revealing framework for examining the perspective that courts and probation officers have in assessing the conduct of those on probation especially the conduct when there is an allegation of violation.

In evaluating what role the probation officer plays in a specific case, it is helpful to examine the judge's purpose in placing a probationer on probation in the first place. The classic justifications for criminal punishment are deterrence, retribution, rehabilitation, and incapacitation.[206] Each one of these theories has its share of critique and there is much scholarship questioning if the traditional categories are in fact the correct way to view punishment.[207] Yet they remain an insightful framework for analyzing what the judge hopes a criminal defendant will get out of being on probation.

When a judge sentences someone to probation as punishment for criminal conduct, it can be under any of the traditional justifications. Probation can be viewed as a way to rehabilitate someone by forcing them to change their behavior, but probation can also be seen as a way to deter others from engaging in the same conduct or as retribution. Certainly, conditions of probation that involve staying away from a person or a location, or GPS monitoring are premised on the idea that such restrictions will prevent future criminal activity. Regardless of which rationale

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201 *Id.*

202 *Id.* at 332.

203 *Id.*

204 *Id.* at 334–35.

205 *Id.* at 343.

206 Jack Boeglin & Zachary Shapiro, *A Theory of Differential Punishment*, 70 VAND. L. REV. 1499, 1505 (2017).

207 *See, e.g.*, *id.* at 1501–02.

a judge may use in imposing probation instead of incarceration as a punishment, the judge is deciding that the defendant needs surveillance of their conduct outside a four-walled correctional facility. In this determination, the judge is deciding that their purpose for punishing the defendant is different than the purpose of incarcerating them.

When a probationer is back before a judge accused of violating their probation, the judge is not evaluating the conduct through the traditional justifications for punishment model as they would after a finding of guilt after a trial. Instead, they are looking at a person who has done something in contravention of the court's requirements as articulated in the order of probation. This difference is what justifies the determination that probation hearings are not criminal proceedings. The Court in *Gagnon*, leaning on their earlier decision in *Morrisey*, stated:

> "The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?"[208]

It is this rehabilitative purpose and the role of the probation officer in both supervising and bringing allegations of violations that has justified the lower level of due process at probation violation hearings and could serve as resistance to a litigation lens approach to representation at violation hearings. However, over the many decades since John August "reformed" the man who would become the first probationer, the continued use of probation has strayed from its rehabilitative purpose into a punishment that is both a mechanism for attempting to change individual behaviors and an attempt to reduce crime by surveilling those who may commit crimes. The consequence of a finding of violation is equal to or even more harsh than a finding of guilt, making the distinction of purpose irrelevant. The argument that probation violation hearings and trials are too different in purpose to justify the probation litigation lens is a distinction without a difference. In fact, like the separation of powers argument discussed above, these dynamics are further proof that a new approach to litigating allegations of violation of probation are needed.

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[208] *Gagnon*, 411 U.S. at 784 (quoting *Morrissey*, 408 U.S. at 479–80).

B. Why The Change Offered by The Litigation Lens Is Necessary

Despite this likely resistance, the litigation lens is a necessary shift for lawyers to make both for improved results for individual clients but also as a path towards reforming a broken probation system. There are two reasons why lawyers should adopt a litigation lens to their probation representation. First, the litigation lens vindicates the liberty interest that probationers have in the outcome of their probation violation hearing. Secondly, the litigation lens is a more client-centered approach to advocacy which has the potential to empower those affected while leading to better case outcomes. Taken together, both the vindication of the probationers' due process rights and the more client centered approach to advocacy will lead to better case outcome. In turn, these better case outcomes will lead to much needed systemic change in probation.

As explained in previous sections, lawyers must make use of the due process rights afforded to those charged with violations of probation to litigate the allegations being brought against their client. The pronouncement that probation violation hearing are not criminal proceedings does not negate the need to approach the hearings in the same manner as if the client was facing a new criminal charge because the consequence of a finding of a violation is as consequential as the result of a criminal case. Regardless of the classification "non-criminal" that probation violation hearings have been deemed, probation proceedings still require a significant level of due process before a violation can be found. This can only be actualized if lawyers approach the hearing through the litigation lens.

Section II of this article breaks down the various categories of rights given to probationers accused of violating their probation and compares them to the parallel trial right. Another tool for assessing the significance of the due process rights guaranteed in probation violation hearings is to compare the due process rights to the level of the due process in the larger framework of other "quasi-criminal" proceedings. In this comparison, it becomes clear that due process with no way to vindicate it renders the right hollow.

Quasi-criminal cases are cases that do not fit into the traditional definition of criminal (government bringing charges against an individual for allegedly violating a law) or civil (individual or entity files a legal action against another individual or entity).[209] Quasi-criminal cases, while civil, are characterized by the fact that a loss

[209] *See* John Kip Cornwell, *The Quasi-Criminality Revolution*, 85 UMKC L. Rev. 311, 312 (2017)

can result in a significant loss of liberty, livelihood, or property.[210] Because of the stakes, quasi-criminal hearings often provide greater procedural due process protections than a traditional civil case, but not the full range available in the criminal context.[211] There are many types of quasi-criminal hearings, including forfeiture,[212] involuntary commitment,[213] termination of parental rights,[214] sexual offender restrictions,[215] and contempt.[216] Each type of hearing affords a specific level of due process protection beyond what would be available in a civil case based on what rights are implicated by the proceeding. Some provide the right to notice, the right to present evidence, and the right to counsel.[217] Some require a higher burden of proof than a typical civil case. What is clear from even this passing consideration of these proceedings is that due process with no way to litigate it is meaningless. Vindicating the due process rights of someone accused of violating their probation through a litigation focused lens helps underscore that despite it not being classified as a criminal proceeding, it really is. The litigation lens is a direct and immediate tool that lawyers can use to ensure the due process rights of their clients at probation violation hearings, and therefore, is a reason why this shift is necessary.

The second reason why the litigation lens is necessary in probation violation hearings is because it is a more client-centered practice of representation. Client-centered lawyering is an approach to lawyering in which the client is the

(arguing "it is increasingly inaccurate to perceive our legal system as divided simply into civil and criminal branches").

210 *Id.* at 311–13.

211 *Id.* at 318.

212 *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965).

213 *See* Addington v. Texas, 441 U.S. 418, 425–26, 431–32 (1979) (noting involuntary commitment proceedings require 'clear and convincing' proof).

214 *See* Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (holding the burden of proof for terminating parental rights is clear and convincing evidence of parental unfitness).

215 *See* Kansas v. Hendricks, 521 U.S. 346, 356 (1997).

216 Michele M. Hughes, *§ 17:38. Evidence in Civil Contempt Proceedings; Burden of Proof,* FED. PROC., LAWS. EDITION, Westlaw (database updated Dec. 2025) (stating the burden of proof in civil contempt proceedings is 'clear and convincing' evidence).

217 *See* Cornwell, *supra* note 209, at 315–16 (discussing the range of procedural protections afforded in quasi-criminal proceedings such as forfeiture, pretrial detention of juveniles charged with delinquency, and paternity proceedings).

decisionmaker in their case and the lawyer works to carry out the client's choices.[218] Under a client-centered approach, the lawyer prioritizes the lived experiences and values of the client and does not impose their values on the client or substitute their experiences for the client's. Central to the client-centered approach to lawyering is a recognition that the role of the lawyer is to assist the client in areas beyond the legal matter at issue in each case.[219]

A litigation-centered approach to probation advocacy is ripe with opportunities for client-centered advocacy. Because lawyers often view the finding of a violation as a foregone conclusion, they are less likely to be open to clients' desires to challenge probation claims and the evidence that purports to support those claims. A client who is less enmeshed than their lawyer in the belief that lower due process means a lower chance of success can provide a valuable perspective on the best strategy for confronting the allegation of violation. Clients often see strategies or defenses that do not comport with a traditional legal view of case approaches, and the probation violation context is no different.

Furthermore, it is those who are subject to the sometimes harsh and inflexible conditions of probation that are best positioned to find creative arguments to challenge the allegations of violation. A probationer accused of missing a meeting with their probation office is significantly better positioned to explain that it takes them multiple buses to get to the probation office and that the bus routes are often significantly delayed or cancelled. And the person who lives in the neighborhood underserved by public transportation can recount their lived experiences of attempting to find stability without reliable transportation. It is those under the grasp of government control who have lived experience and a multidimensional understanding of the impacts of the many obstacles presented by that control. If a lawyer were to approach an allegation of a violation due to a missed meeting, they would surely learn during their investigation how difficult it is for their client to get to their probation meetings. They could cross-examine a probation officer about this difficulty or call their own witness to document the challenge. They might be able to make a legal argument that the violation is not a knowing violation. But if they don't approach the allegation of missed meetings from a litigation lens, they

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[218] Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 373 (2006).

[219] Connor M. Barusch, *Building A Relationship with Your Client*, MASSACHUSETTS DIST. CT. CRIM. DEF. MANUAL (2023).

will miss the opportunity to gain this information and therefore miss the opportunity to advocate for their client.

In many ways, probation's emphasis on rehabilitation and treatment makes the probation context one in which the client's experiences and values should be most centered. Making a change in behavior or choosing to address a medical condition in a different way, such as treatment for substance use disorder, is a deeply personal decision and its likelihood of success is dependent on the client's values and wishes for the treatment.

Marisol Orihuela has identified a "treatment paradigm" prevalent in the criminal legal system. The move towards more mental health treatment, often as a condition of probation, has been developed in a one size fits all model which is often in conflict with treatment models, creating a lawyering conflict.[220] Treatment for substance use disorder with punitive testing requirements has also been criticized as a form of treatment for this disease.[221] These examples of standard probation conditions being unaligned with medical best practices illustrate the shortcomings of probation as a form of medical treatment.

Client-centered representation is distinct from a lawyer's ethical obligations, but the Rules of Professional Conduct also support a litigation lens approach to probation advocacy. Lawyers have an ethical obligation to "act with reasonable diligence and promptness in representing a client."[222] A lawyer should represent their client "despite opposition, obstruction or personal inconvenience to the lawyer . . . ."[223] Taking this more expansive approach to probation violation hearings—while requiring more effort than the current approach—is necessary to vindicate the client against the allegation of violation.[224] As discussed in Section II, a lawyer's role

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[220] *See* Marisol Orihuela, *The Lawyer's Quandary: Client-Centered Lawyering in the Treatment Paradigm*, 102 N.C. L. Rev. 1655, 1656–58 (2024).

[221] *See* Tamar Ezer, et al., *A Misguided Approach to Drug Dependence: The Problems with Drug Courts in the United States*, Univ. of Miami Sch. of Law Hum. Rits. Clinic and The Drug Pol'y All. 1, 1 https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/Call/CSOs/Miami_Law_and_Drug_Policy_Alliance.pdf [https://perma.cc/PLT9-4L9A] (criticizing drug courts in the U.S. for putting "treatment in the hands of the criminal justice system, which lacks medical expertise, resulting in the denial of evidence-based treatment and punishment for relapses that are a normal part of recovery").

[222] Model Rules of Pro. Conduct r. 1.3 (A.B.A. 1983).

[223] Model Rules of Pro. Conduct r. 1.3 cmt. (A.B.A. 1983).

[224] *Id.*

in the probation hearing is critical. The litigation lens offers an opportunity to be diligent in advocating for clients, and that advocacy will lead to meaningful change.

CONCLUSION

This article has laid out a framework for improved advocacy at probation violation proceedings. Defense attorneys must shift from the mindset of an inevitable finding of a violation to a litigation centered approach, as a necessary part of probation reform. Advocacy under the litigation lens upholds the liberty interest that has long been recognized as guaranteed to probationers before their probation can be revoked. It moves forward a re-examination of the narrative that has been offered to explain why a lesser level of advocacy at these hearings is acceptable. The more zealous and client-centered approach to advocacy under the litigation lens has the potential to empower those affected while leading to better case outcomes, which will in turn bring much needed changes to the law surrounding probation violation proceedings.