

# Probation and Mass Incarceration: The Ironies of Correctional Practice



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The Wisdom of Sociology is this: things are not what they seem.

—Peter Berger (1963)<sup>1</sup>

The distinctive contributions of the sociologist are found in the study of unintended consequences.

—Robert Merton (1949)<sup>2</sup>

This article is intended as a homage to Gary T. Marx, Professor Emeritus, Massachusetts Institute of Technology. Professor Marx has been a strong influence on generations of sociologists and criminal justice practitioners, who have absorbed his teaching about the impact social science can have on social progress. Marx particularly encouraged his students to examine the underside of society, where noble aims become corrupted through blindness to the double-edged nature of all reforms and where progressive practice could be undone by the unforeseen and unplanned perversity of social engineering. Ever the progressive, Marx counseled a pragmatic approach, where efforts to do good were carefully studied and monitored for the dynamics that can throw even the best concepts awry, threatening the potential for doing good as ideas struggle to survive contact with reality. Marx encouraged his acolytes to go forward in their work unencumbered by the kind of naïveté that can afflict the well intentioned. But always go forward.

The Marxian perspective informs this article. It examines the way in which a classically derived progressive practice—sentencing offenders to a community sanction, that is, probation, in lieu of incarceration—came to present its own peril to those who eagerly accepted an apparently benign option and, in doing so, incredibly to many, became victims of the modern scourge referred to widely as “mass incarceration.” “So quick bright things come to confusion,” remarks Lysander in Shakespeare’s play *A Midsummer Night’s Dream*. Indeed.

The balance of this article will examine the sinister side of probation (a practice that nonetheless retains its significant promise in society’s treatment of offenders), where a humane alternative to the toxic effect of imprisonment becomes a kind of Trojan horse for too many probationers, where the promise of redemption is subverted by a lurking punitiveness.

## I. The Menace of Good Intentions

In one of his early works, Marx refers to the potential for well-designed research to powerfully illustrate “the gap between values and actual practices and, in questioning established orthodoxies,” serve as “a vehicle for social criticism and, hopefully, social change.”<sup>3</sup> In this vein, Marx was echoing the seminal writings of Columbia University sociologist Robert Merton, whose classic works introduced the notion of “unintended consequences,” a stealth threat in many efforts at social reform. The complexity of attempting to intervene in society would, Merton suggested, too frequently set off dynamics entirely unintended by the social planner and often directly undercutting the good being done.<sup>4</sup>

One very recent example from the educational field: As this article was being written, the January/February 2016 edition of the *Atlantic Monthly* carried an article by Yale Lecturer in Education Erika Christakis entitled “How the New Preschool is Crushing Kids,” which examined the impact of intensive preschool programs in developing educational readiness among young children.<sup>5</sup> Startlingly, she reports on a major evaluation of Tennessee’s publicly funded preschool program, which prioritizes hard skills such as vocabulary and literacy instead of the traditional soft skills emphasized in preschool such as talking, reading, and creativity. Students participating in the new preschool programs initially showed greater “school readiness” skills than the control group. However, by the time they entered first grade, their attitudes toward school were showing major negative features, and by second grade, they had fallen behind their control group peers in literacy, language, and math. In other words, the new preschool program actually caused students to regress—a classic Mertonian case of “unintended consequences.”

### A. Probation

How might this apply to probation? First, an examination of probation’s *intended* consequences is required. With its roots in mid-nineteenth century Massachusetts, probation represents the principal alternative to incarceration for a convicted offender. Prior to its inception, it was common for most offenders to pay a penalty involving imprisonment since no alternative was readily available and corporal

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punishment had succumbed to Enlightenment philosophy. Into this gap stepped John Augustus, who offered a Boston court the promise of daily supervision to instill temperance and industry in offenders released to his care. Beginning in 1878, “probation” became a recognized legal option, and the position of probation officer was created. The establishment was a hallmark creation of progressive thinking and led to the majority of offenders being diverted to a term of supervision in the community.<sup>6</sup>

What is the situation nearly 140 years later? Probation is still the sentence of choice for most offenders, with the numbers on probation at any one point in time representing roughly twice the number of individuals incarcerated.<sup>7</sup> Where then is the problem? It is necessary to step back for a moment and mention the emergence of “mass incarceration.”

### B. Mass Incarceration

In 2012, law professor Michele Alexander published *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.<sup>8</sup> Alexander’s book, more than any other publication, gave a name to the trend in the United States of tremendous growth in the number of individuals incarcerated, at rates unheard of in comparable Western democracies and the equal of few places outside Russia. The United States, with something short of 5 percent of the world’s population, accounts for nearly 25 percent of those incarcerated worldwide. At year-end 2014, 2.2 million Americans were incarcerated, representing a tripling of the count as recently as the 1980s.<sup>9</sup> Most commentators attribute the growth to the war on drugs and to an escalation in both the number of defendants incarcerated and the length of terms served. Alarm over this development is no longer the sole province of liberals. A number of prominent conservatives and conservative groups have embraced the issue of decarceration, calling for—along with their liberal counterparts—alternatives for drug offenders and more community-based alternatives for nonviolent offenders. The bipartisan nature of the movement to decarcerate is perhaps its most striking feature.<sup>10</sup>

The federal government has taken up this cause in a major way. By launching what is called the Justice Reinvestment Initiative (JRI), the Department of Justice, through its Bureau of Justice Assistance, has invested hundreds of millions of dollars, funneled through the Pew Center for the States, to assist the states in analysis of sentencing practices and development of strategies to lower prison counts through diversion of offenders to penalties served in the community, primarily in the form of probationary sentences with options such as GPS monitoring or day reporting centers. By late 2015, more than half the states were participating in JRI.<sup>11</sup>

### C. Probation’s Contribution to Mass Incarceration

An historical note of interest: Charlie Manson, perhaps the most notorious mass murderer in U.S. history, began his criminal career at an early age through an accumulation of

mostly petty crimes, for which he spent most of his young life in reformatories. As a young adult, on probation and recently married (a step research has shown can powerfully influence desistance from criminal behavior), Manson attempted to pass a bad check for \$49. He was prosecuted for this probation violation and given a sentence of ten years imprisonment, of which he served seven and a half.<sup>12</sup> Charlie Manson would be at the end of most lists of offenders deserving leniency, but this sentence was difficult even for his parole officer to fathom. How is it that passing a bad check for a modest amount of money could deserve a ten-year sentence? By what measures of rational public policy could this make sense? Somehow, because he was already on probation, to at least one judge, it seemed reasonable.

It is not the anomaly it may seem to be. There has been a dramatic growth in the incidence of probationers being returned to court, charged with a probation violation, having their probation revoked, and having a term of incarceration imposed. This is a logical consequence of the trend toward closer enforcement and increased requirements imposed on probationers. In the fourteen years between 1990 and 2004, the number of probationers revoked for noncompliance grew by 50 percent, increasing from 220,000 to 330,000.<sup>13</sup>

A 2007 report by the Pew Center on the States noted that “[h]alf the U.S. jail population is the consequence of failure under community supervision” (combining probation and parole), and referred to revocation as “one of the chief reasons for the rapid growth of prison and jail populations.”<sup>14</sup> A report published by the state of California in 2009 noted that 40 percent of new prison admissions were attributable to probation revocations.<sup>15</sup>

Since avoiding a new crime is perhaps the preeminent requirement of probationers, it could be said that public safety requires that those who are given the “second chance” of probation and then flout it should be imprisoned. What do we know, then, about the nature of this growing number of revocations? A study in Michigan in 1996 found that revocations based on new criminal offenses accounted for a mere 10 percent of all revocations.<sup>16</sup> Thus, 90 percent of those returned to prison were sent there for so-called “technical” violations—failed drug tests, failure to report, failure to meet financial obligations, and the like. The Pew Center on the States reported that, in some states, technical violations account for more than half of those revoked from community supervision.<sup>17</sup>

The clemency extended to offenders through the original grant of probation is undercut and traduced when the subsequent new penalty added for a probation violation exceeds what would have been seen as a fair punishment for the original offense. In this way, paradoxically, probation becomes a more severe punishment than the offender might have received if he or she requested a term of confinement in the first instance.

In a further irony, offenders currently do not always view probation as an act of grace or a second chance at

law-abiding living, but rather a staging area for eventual imprisonment. Ben Crouch reports that 66, 49, and 32 percent of Texas offenders would, as an example, prefer one year in prison to ten, five, and three years on probation, respectively.<sup>18</sup> This author has heard this sentiment expressed repeatedly by probationers in focus groups, where these probationers reason that the stiff enforcement of an impossibly demanding set of requirements will ultimately lead to incarceration. So, they ask, why postpone the inevitable and subject themselves to the steady drip-drip-drip of close monitoring of everyday behavior?

Tony Fabelo, researcher for the Council of State Governments, picks up this theme of the perverse effect of placement on probation in articles written for *Issues.org*, an electronic forum for the publication of public policy papers grounded in scientific findings. Fabelo reports that in the state of Texas, with one of the largest probation populations in the country, the rate of revocation of probation and subsequent imprisonment increased 18 percent from 1997 to 2006, surely a major factor in the state's bulging prisons. Fabelo also reports that in North Carolina, one of those states participating in JRI, a full 50 percent of new prison admissions were accounted for by probation revocations, the majority of which involved what are called "technical violations," which are those transgressions not involving a new crime but rather a failure to abide by one or more of the requirements of probation, such as paying a fee, observing a curfew, or failing a drug test. Hence, there appears to be a probation-to-prison pipeline, where prosecutions for failure to adhere to requirements become, in a head-scratching turnaround, a leading factor—at least in some places—in the excessive growth in prison populations.<sup>19</sup>

An additional piece of evidence supporting the notion that probation revocations are a significant catalyst for mass incarceration can be found in an article on the JRI initiative published by the Urban Institute (UI). Released in 2015, after the initiative had been underway for five years and reporting on the experience of seventeen states, UI lists the most common drivers of high prison populations derived from work in the JRI states. Listed first among four major drivers are "Parole and Probation Revocations." The article adds, "[A] substantial portion of revocations—sometimes greater than half—are technical violations rather than new crimes."<sup>20</sup> Finally, in 2012, *Governing* magazine reported that in a number of states, more than half the offenders entering state prisons were incarcerated for probation rule violations rather than the commission of a new crime.<sup>21</sup>

## II. The Path to Reform

The thesis of this paper is that a significant factor influencing mass incarceration is, surprisingly and in contradiction of original intents, the imprisonment of probationers when a violation of the terms of probation occurs. In a classic case of the "cure being worse than the sickness," offenders who were initially deemed appropriate for a community sentence are incarcerated for behavior that

is mostly noncriminal, involving breaches of such obligations as reporting for appointments, paying fees—which, frequently, their incomes do not allow them to pay—or violating the terms of an electronic monitoring program, whose strict requirements have been found to be beyond the capacity of youthful offenders to comply with, in the view of distinguished criminologist Franklin Zimring of the University of California at Berkeley.<sup>22</sup>

What can be done? The following is a series of suggestions that could mitigate the ironies of contemporary practice:

1. **Abolish Probation Revocation, as Currently Practiced.** If the original offense was deemed not to warrant a prison term, then, in accord with the principle of proportionality in sentencing, so much more should it be true that a technical violation of the probationary order should not lead to a prison term. What then would be the incentive for compliance with court-ordered terms? As the much celebrated and widely adopted HOPE program, developed by felony court Judge Steve Alm in Honolulu, has shown, *very* short—one- to two-day—periods of detention can be very effective in increasing compliance, reducing drug use, and lowering rates of reoffending. Pepperdine University has rigorously evaluated the HOPE program and in published studies documented remarkable results.<sup>23</sup> In this manner, the toxic effect of a state prison sentence, and the concurrent violation of the principle of proportionality, can be avoided.
2. **Implement Zero-Based Condition Setting.** At the moment an offender is placed on probation, the judge and the probation officer, working collaboratively to set appropriate conditions, would start with a blank sheet. Or almost blank—every probationer should be required to obey the law. Beyond that, any additional conditions would have to be deemed necessary, in the given case, in the service of appropriate sanctioning and treatment. Most importantly, the conditions would need to be determined to be reasonable for the offender. Standard conditions (save the one) would be eliminated, and conditions would optimally be few in number so that probationers (who are often broke and thoroughly preoccupied with survival, as discussed above) would have a decent chance to succeed. Setting conditions, the obtainment of which would be within the reach of the offender, would create opportunities for an experience so seldom available to probationers—a sense of accomplishment for those offenders in dire need of that experience, which would earn them the commendation of the authorities and the pleasure of early termination as a reward for full compliance.
3. **Focus on Administrative Sanctions for Most Violations.** Probation officers would be allowed, with supervisory review, to handle most technical violations with an administrative sanction—such as "grounding" through a time-limited curfew, the

addition of ten to twenty hours of community service, or more frequent attendance at Alcoholics Anonymous—provided these sanctions are determined to be within the capacity for the offender, would not disrupt a job or schooling, and are reasonably related to the violation that gave rise to the sanction. The right of appeal of the imposition of any such sanctions to a judge would be provided.

The following additional ideas have been proposed by Professor Klingele of the University of Wisconsin Law School, in a compelling article entitled *Rethinking the Use of Community Supervision*.<sup>24</sup>

4. **Limit the Sanction.** Klingele first imagines dispositions for minor offenders that would not involve a term of community supervision and not include any possibility of revocation. Rather they would constitute an “unconditional discharge.” Arguing that the process is often the punishment, and that convictions carry with them a variety of “collateral consequences” (e.g., loss of welfare benefits, ineligibility for a variety of jobs), which are reported to run into the hundreds, all serving as impediments to moving on in life, Klingele reasons that discharge may be enough and the court need go no further in sanctioning. Probation would be reserved for those who have committed a serious offense and who exhibit the need for assistance and supervision.
5. **Limit Release Conditions.** In line with above analysis, Klingele argues against imposing a host of boilerplate conditions, many of which serve no useful or relevant purpose. Legislatures should revise their promulgated list of mandatory probation conditions and exercise parsimony in their choice of requirements so that offenders are not exposed to the enforcement of a multitude of conditions that serve no compelling correctional goals.

### III. Robina Institute Initiative

In the many national efforts now underway to address the problem of mass incarceration, the heretofore stealth issue of probation revocations is getting considerable attention, as one leading factor in growing prison populations. However, the analysis is embedded in a discussion of a wide ranging set of issues—cost of imprisonment, sentencing guidelines, development of community alternatives, among many others—where it may not get the needed attention.

A new initiative of the Robina Institute at the University of Minnesota Law School may remedy this potential shortfall. The Institute launched a Probation Revocation Project in 2013, the purpose of which is to examine the variety of practices across the United States with respect to the handling of probation violations, to support experimentation with reform efforts aimed at reducing the incidence of incarceration, particularly for technical violations, and to aggregate the results from working with several states into policy prescriptions that are derived from the

experience with the jurisdictions involved. The Institute supports a companion effort in the area of parole decision making and revocation.

As one example, the Project is working with a southwestern state on the oversized role that financial penalties play in the life of probationers, and the difficulties and exposure probationers who are financially strapped experience. In a different jurisdiction, Robina will work with the site agency to review its use of administrative sanctions and incentives, with an eye toward looking for ways to increase appropriate use of both. In a third site, the focus will be on developing a protocol that will guide the imposition of proportional and evidence-based conditions of probation at the time of disposition.

At the conclusion of its efforts, the Robina Institute hopes that the sum of experience will be useful to practitioners, in providing a sense of the variety of practices nationally and the utility of “road-tested” innovation in probation violation practice.

### IV. Conclusion

In fealty to the example set and the guidance provided by Professor Gary T. Marx, this paper sheds light on the “unintended” but nonetheless striking consequences of an ostensibly progressive practice—the option of a sentence in the community for less serious lawbreakers. If sunlight is, as Justice Brandeis suggested, the best disinfectant, then perhaps, with our new insights in hand, we can retain the best in probation practice while divesting ourselves of some of the evident perversities.

### Notes

- \* This article draws in part on a previous article by the author, *The Burdens of Leniency: The Changing Face of Probation*, 99 Minn. L. Rev. 1697 (2015).
- <sup>1</sup> Peter L. Berger, *Invitation to Sociology* 23 (1963).
- <sup>2</sup> Robert K. Merton, *Social Theory and Social Structure: Toward the Codification of Theory and Research* 120 (1968).
- <sup>3</sup> Gary T. Marx, *Muckraking Sociology* 1 (1972).
- <sup>4</sup> Robert K. Merton, *Sociological Ambivalence and Other Essays* (1976).
- <sup>5</sup> Erika Christakis, *How the New Preschool is Crushing Kids*, 317 *Atlantic Monthly* 18 (2015).
- <sup>6</sup> See Howard Abadinsky, *Probation and Parole: Theory and Practice* (2011).
- <sup>7</sup> See Bureau of Justice Statistics, *Correctional Populations in the United States 2014* (2015).
- <sup>8</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012).
- <sup>9</sup> Bill Keller, *The Marshall Project, How the Right Got Religion on Justice 2* (June 22, 2015), at [www.themarshallproject.org](http://www.themarshallproject.org).
- <sup>10</sup> *Id.*
- <sup>11</sup> Tony Fabelo & Michael Thompson, *Reducing Incarceration Rates: When Science Meets Political Realities*, 32(1) *Issues in Science and Technology* (Fall 2015), at [issues.org](http://issues.org).
- <sup>12</sup> Dianne Sawyer, *Charles Manson Documentary*, available at <https://search.yahoo.com/yhs/search?p=Charlie+Manson+Documentary+youtube&ei=UTF-8&hsparm=mozilla&hsimp=yhs-001>.
- <sup>13</sup> The Pew Center on the States, *When Offenders Break the Rules: Smart Responses to Parole and Probation Violations* 3 (Nov. 2007), at [pewtrusts.org](http://pewtrusts.org).

- <sup>14</sup> *Id.* at 1.
- <sup>15</sup> Mac Taylor, LAO Report, *Achieving Better Outcomes for Adult Probation 20* (May 29, 2009), available at <http://www.lao.ca.gov/Publications/Detail/2074>.
- <sup>16</sup> Eric J. Wodah et al., *Revocation Trends: A Threat to the Legitimacy of Community-Based Corrections*, 91 *Prison J.* 207, 212–13 (2011).
- <sup>17</sup> Pew Center on the States, *supra* note 13, at 3.
- <sup>18</sup> Ben M. Crouch, *Is Incarceration Really Worse? An Analysis of Offender Preferences for Prison Over Probation*, 10 *Justice Q.* 67, 79 (1993).
- <sup>19</sup> See Fabelo & Thompson, *supra* note 11.
- <sup>20</sup> Urban Institute, Nancy G. La Vigne et al., *The Justice Reinvestment Initiative: Experiences from the States* (Aug. 1, 2013), at [urban.org](http://urban.org).
- <sup>21</sup> Susan K. Urahn, *The Power of Incentives for Performance*, *Governing* (Aug. 22, 2012), at [governing.com](http://governing.com).
- <sup>22</sup> See Julie Morse, *Wearing an Electronic Monitoring Device Might be Worse than Jail Time*, *Pac. Standard Mag.* (Dec. 15, 2015) (quoting Frank Zimring), at [psmag.com](http://psmag.com).
- <sup>23</sup> Philip Bulman, *In Brief: Hawaii Hope*, 266 *Nij Journal* (June 23, 2010).
- <sup>24</sup> Cecelia Klingele, *Rethinking the Use of Community Supervision*, *J. Crim. L. & Criminology* 1015 (2013).