

1988

## Postsentence Sentencing: Determining Probation Revocation Sanctions

Bradford Mank

*University of Cincinnati College of Law*, [brad.mank@uc.edu](mailto:brad.mank@uc.edu)

Follow this and additional works at: [http://scholarship.law.uc.edu/fac\\_pubs](http://scholarship.law.uc.edu/fac_pubs)

 Part of the [Courts Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

### Recommended Citation

Mank, Bradford, "Postsentence Sentencing: Determining Probation Revocation Sanctions" (1988). *Faculty Articles and Other Publications*. Paper 258.

[http://scholarship.law.uc.edu/fac\\_pubs/258](http://scholarship.law.uc.edu/fac_pubs/258)

This Article is brought to you for free and open access by the College of Law Faculty Scholarship at University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in Faculty Articles and Other Publications by an authorized administrator of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact [ken.hirsh@uc.edu](mailto:ken.hirsh@uc.edu).

# POSTSENTENCE SENTENCING: DETERMINING PROBATION REVOCATION SANCTIONS

BRADFORD C. MANK\*

Although procedural due process requirements govern the proof of a violation in a probation revocation hearing, judges exercise almost total discretion in deciding what sanctions to impose once a violation is established.<sup>1</sup> These postsentence judgments can be as important as the initial sentencing.<sup>2</sup> Sanctions for even minor probation violations

---

\* B.A. 1983, Harvard College; J.D. 1987, Yale Law School; Clerk, Justice David M. Shea, Connecticut Supreme Court. The author thanks Joseph F. Hunnicutt for his assistance in preparing this Article for publication.

<sup>1</sup> The Supreme Court extended procedural due process requirements to revocation hearings in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). See also Clarke, *Probation and Parole in North Carolina: Revocation Procedure and Related Issues*, 13 WAKE FOREST L. REV. 5 (1977). Obviously, many probationers who appear in a revocation hearing are guilty of a violation. For many, the issue is not whether they are guilty of a violation, but what sanction should be imposed. See *infra* note 5. This Article contends that the current procedural requirements are inadequate because judges exercise almost total discretion in deciding what sanctions to impose. A judge can punish a probationer for an unprovable violation by punishing him for a provable violation, and he can base the severity of the sanction on the unprovable violation. See *infra* note 21. It is clear that judges enjoy untrammelled discretion in determining probation revocation sanctions.

While probation and parole decisionmakers are often given much discretion in selecting from among a substantial array of possible sanctions for a revocation, few legislatures provide any significant guidance in making this decision. . . . Appeals from this decision are unlikely to succeed because appellate courts give great deference to the decisionmaker's judgment.

N. COHEN & J. GOBERT, *THE LAW OF PROBATION AND PAROLE* 647 (1983).

No article has specifically discussed the problem of how probation revocation sanctions are determined. Some commentators have discussed in general terms the vast discretion judges enjoy in probation revocation hearings. See Clarke, *What Is the Purpose of Probation and Why Do We Revoke It?*, 25 CRIME & DELINQ. 409 (1979) [hereinafter *Purpose of Probation*]; Dicerbo, *When Should Probation Be Revoked?*, in *PROBATION, PAROLE & COMMUNITY CORRECTIONS* 448-58 (R. Carter & L. Wilkins 2d ed. 1976). These two articles contain interesting examples of the kind of problems judges face in deciding whether to revoke probation. However, they fail to separate the revocation decision from the choice of sanctions determination, and, most importantly, they do not put forward any comprehensive proposal about reforming the process by which judges make sanction judgments.

<sup>2</sup> Over a million Americans are now on probation, and inevitably many of these probationers will commit a violation. In 1982, 1,335,359 Americans were on probation. Broder, *Use of Probation and Parole in the U.S.*, CRIM. JUST. NEWSL., Oct. 10, 1983, at 4. There are no comprehensive figures on the number of probation violations because different jurisdictions, localities, and even individual probation officers define differently what is a violation. Sometimes it is a conviction, an arrest, revocation followed by incarceration, or just a technical infraction of a probation condition. See

can range from obligating a probationer to meet with his probation officer more frequently to executing a suspended prison sentence.<sup>3</sup> The Supreme Court recognized in *Morrissey v. Brewer*<sup>4</sup> that the choice of sanctions is often more complex than the proof of a violation.<sup>5</sup> Principles must be developed to regulate postsentence sentencing.

Although judicial sentencing discretion and resulting sentence disparities have been the subject of major reform efforts, current sentencing reform movements have failed to understand that the determination of probation revocation sanctions is a major form of sentencing.<sup>6</sup> Considerable disparities may exist in how judges make sanction decisions; however, this question has received so little attention that the full extent of disparities is unknown.<sup>7</sup> This Article pro-

---

Boyd, *An Examination of Probation*, 20 CRIM. L.Q. 355, 370-71 (1978). A recent study of 1,672 California felony probationers found that in over a forty month period two-thirds of the probationers were arrested, and more than one-third had their probation revoked. J. PETERSILIA, S. TURNER, J. KAHAN & J. PETERSON, GRANTING FELONS PROBATION 20-26 (1985). While recent comprehensive statistics are lacking, it is clear that tens of thousands of probationers face revocation hearings and the loss of liberty each year. The question of determining probation revocation sanctions is of vital importance to the over one million on probation.

<sup>3</sup> Judges in probation revocation hearings can impose various sanctions.

[T]he decisionmaker may be authorized to order anything from lenient to harsh sanctions. The former include dismissal of all charges, the issuance of a warning and rerelease, modification of the conditions followed by a rerelease on probation or parole, or altering the term of probation or parole. The latter includes incarceration.

N. COHEN & J. GOBERT, *supra* note 1, at 646. Judges must retain a wide range of sanction options to fit individual circumstances. Also, they must improve the way they justify their sanction determinations to ensure that the sanctions imposed are mainly determined by the nature of the probationer's conduct rather than which judge happens to be conducting the revocation hearing.

<sup>4</sup> 408 U.S. 471 (1972).

<sup>5</sup> "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? The first step is relatively simple; the second is more complex." *Morrissey*, 408 U.S. at 479-80. This Article argues that courts have failed to establish adequate procedures to deal with the second or dispositional phase of the revocation hearing—what sanction should be imposed once a violation has been proven?

<sup>6</sup> Society's concern with the problem of sentence disparity is reflected in the legislative history of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987 (1984): "The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform." S. REP. NO. 225, 98th Cong., 2d Sess. 65, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4, 65. The question of postsentence sentencing—i.e., the determination of probation revocation sanctions—has not been addressed.

<sup>7</sup> Because the problem of probation revocation sanctions has been largely ignored, we do not have reliable data on what extent judicial discretion results in un-

poses a procedure that would require judges to produce a written explanation of why they chose a particular sanction; such would help curb judicial discretion as well as create a badly needed body of knowledge about this area.

### I. THE PROBLEM OF PROBATION REVOCATION SANCTION DECISIONS

Probation is often imposed in combination with a long prison sentence.<sup>8</sup> If a probationer commits a felony, it is often obvious that he must be incarcerated. When he commits a misdemeanor or a technical violation, however, the determination of probation revocation sanctions becomes a problem; what sanction is imposed largely depends on which judge conducts the revocation hearing.<sup>9</sup>

---

warranted postsentence sentencing disparities. Those observers who have touched on this issue have suggested that these disparities may be great. "Just as disparities in sentence have been of concern to judges and probation officers, so are the disparities in the revocation of probation. The criteria for revoking probation are not uniform in district courts throughout the country and, at times, not even among judges in the same district court." Dicerbo, *supra* note 1, at 448. "A constant problem in the revocation process, as in the sentencing process, is that of disparity, or inequity." L. CARNEY, *PROBATION AND PAROLE: LEGAL AND SOCIAL DIMENSIONS* 117 (1977). This Article will outline a set of procedures that will attempt to achieve two related goals. Judges must be required to explain the reasoning behind their sanction decisions so appellate courts can curb the disparities. Not until appellate courts engage in meaningful review of sanction decisions will there be a body of evidence showing to what extent disparities exist. The problem of judicial discretion in the determination of probation revocation sanctions is a serious one because revocation and incarceration can take place not only when the probationer commits a new criminal offense, but also when there is a technical violation. "A technical violation is distinguished . . . by the fact that the supervisee is in contact with the officer but exhibits such problems as failure to report as directed, drinking and/or drug usage but refusing to undergo treatment, leaving a job and failure to support his family." A. SMITH & L. BERLIN, *INTRODUCTION TO PROBATION AND PAROLE* 129 (1976). Judges have revoked probation and incarcerated a probationer because he failed to maintain regular employment. *See, e.g., Bass v. State*, 473 So. 2d 1367 (Fla. Dist. Ct. App. 1985); *State v. Coffey*, 74 N.C. App. 137, 327 S.E.2d 606 (1985). In 1983 more federal probationers had their probation revoked for technical violations (3,021) than for misdemeanors (461) or felonies (1,562). *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1984*, at 620 (T. Flanagan & M. McLeod ed. 1985). A recent study disclosed that forty-four percent of 34,600 parole revocations in ten large states were for technical violations. *Study Finds Many in Prison for Technical Parole Violations*, *CRIM. JUST. NEWSL.*, Jan. 16, 1986, at 5. In some circumstances, it is necessary to incarcerate a probationer who commits a technical violation, but the dangers of judicial discretion are especially great when revocation occurs and sanctions are imposed for a technical violation. *See infra* note 9.

<sup>8</sup> *See* N. COHEN & J. GOBERT, *supra* note 1, at 654 (explaining the different ways a suspended prison sentence can be imposed in combination with probation and can be activated if probation is revoked).

<sup>9</sup> The discretion of judges and probation officers to revoke probation is especially

Probationers must fulfill a number of probation conditions. These conditions are: (1) a general requirement that the probationer obey the law; (2) control conditions mandating that the probationer report to his probation officer; and (3) rehabilitative conditions such as maintaining employment, performing community service, or attending a drug treatment program.<sup>10</sup> The violation of the second or third condition is a technical probation violation. Proof of a violation does not automatically justify revocation and incarceration of the violator.<sup>11</sup> If the judge revokes probation, he has a wide range of sanctions from which to choose.<sup>12</sup> Appellate decisions and the legal literature provide almost no guidance concerning what probation revocation sanctions are warranted under a given set of circumstances.<sup>13</sup> Paradoxically, judicial discretion is greatest in the case of minor violations.<sup>14</sup> For many probationers, the existing structure of due process protections in probation revocation hearings is irrelevant because the real issue is not whether they are guilty of a violation, but rather what sanction the judge will impose for that violation.<sup>15</sup>

---

great in the case of technical violations because great deference is given to judges to consider the probationer's overall rehabilitative progress. "While presumably it would be inappropriate for a field agent *never* to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail." *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973) (quoting F. Remington, D. Newman, E. Kimball, M. Melli & H. Goldstein, *Criminal Justice Administration, Materials and Cases* 910-11 (1969)). Judges and probation officers need some freedom to consider a probationer's overall rehabilitative progress but there must be some limits on that discretion to prevent abuses.

<sup>10</sup> Judges have broad discretion to impose probation conditions, and only the most unreasonable ones will be overturned by appellate courts. *See, e.g., United States v. Gracia*, 755 F.2d 984, 991 (2d Cir. 1985). *See generally* N. COHEN & J. GOBERT, *supra* note 1, at 181-343; Jaffee, *Probation With a Flair: A Look at Some Out-of-the-Ordinary Conditions*, 43 *FED. PROBATION* 25, 25-36 (1979); Weissman, *Constitutional Primer on Modern Probation Conditions*, 8 *NEW ENG. J. ON PRISON L.* 367 (1982).

<sup>11</sup> "[T]he fact that a violation of a condition is a *permissible* basis for revocation does not support the idea that revocation should necessarily or automatically follow the establishment of a violation." ABA Project on Standards for Criminal Justice, *Standards Relating to Probation* 58 (Approved Draft 1970) (emphasis in original). Too often commentators or courts have focused on whether revocation is constitutionally valid rather than on what sanction is appropriate once a violation is proved.

<sup>12</sup> *See supra* note 3.

<sup>13</sup> *See supra* note 1.

<sup>14</sup> *See supra* note 7.

<sup>15</sup> *See supra* note 1.

### A. *Guilty Pleas and Probation Revocation Sanctions*

The problem of judicial discretion in determining probation sanctions is especially significant because most criminal convictions are obtained by guilty pleas. In a felony case in which the state may have difficulties winning a conviction, the prosecutor sometimes offers the accused a probation term in exchange for a guilty plea.<sup>16</sup> The accused may not worry about a suspended prison sentence imposed in addition to probation since the threat of going to prison seems remote at the time he accepts the plea bargain.<sup>17</sup> If, however, the accused commits a probation violation, he might actually serve a long prison sentence.

Before the 1970s, most courts ruled that probation was an act of grace; it, therefore, could be revoked without any protection because the probationer was simply receiving the sentence the court could have imposed in the first place. In *Morrissey*, however, the Supreme Court finally extended minimal due process to revocation hearings.<sup>18</sup> These minimal due process protections mean little if the judge in a revocation hearing can impose a sanction that is greatly disproportionate to the seriousness of the violation.<sup>19</sup> A clever prosecutor may occasionally offer a plea bargaining deal consisting of probation and a suspended prison term with the expectation that the accused probably will commit a probation violation and will likely be imprisoned sooner or

---

<sup>16</sup> In a plea bargain, a prosecutor offers a discounted sentence in exchange for a certain plea. A number of commentators have criticized plea bargaining on the ground that it is unfair to trade away one's constitutional right to a jury trial in response to an offer for a lower sentence. See, e.g., Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981). A case can be made in favor of plea bargaining on the ground that an adult should be able to choose a lesser sentence in favor of a jury trial if that is what the offender wants. Both the prosecutor and defendant can benefit from avoiding the time and expense of a trial. See, e.g., Church, *In Defense of "Bargain Justice"*, 13 LAW & SOC'Y REV. 509 (1979). Church's arguments make sense only if the defendant is fully aware of the possible adverse consequences of a guilty plea. A person who pleads guilty in exchange for probation, but does not fully understand the revocation process, may not realize the substantial possibility of revocation, which would result in a long prison sentence. This is a concern even though the judge is required to explain that probation may be revoked if a probationer fails to comply with judicially imposed conditions. Few people who are not heavily involved with the criminal justice system understand that probation is often but a suspended prison sentence that can be activated even if the probationer does not commit another criminal offense.

<sup>17</sup> See *supra* note 16.

<sup>18</sup> See *supra* note 1.

<sup>19</sup> See *supra* notes 1 & 7.

later.<sup>20</sup>

The existing system for determining probation revocation sanctions also allows judges in some circumstances to punish probationers for unproven violations. Judges can perform an end-run around the procedural due process requirements in probation revocation hearings by punishing a probationer far more severely than normal for a minor technical violation when it is impossible to prove a more serious violation.<sup>21</sup> If the police and prosecutor cannot prove

---

<sup>20</sup> Some commentators have argued that prosecutors can influence the way probation or parole officers treat their clients. See McCleary, *How Parole Officers Use Records*, 24 SOC. PROBS. 576, 587 (1977). There is at least the possibility that a prosecutor could convince a defendant to plead guilty in exchange for probation, and then pressure the probation officer to report a violation so that probation will be revoked, and the offender will be incarcerated. See *infra* note 21.

<sup>21</sup> A judge can bypass all of the elaborate due process protections mandated in a revocation hearing. He can revoke probation and incarcerate a probationer over a minor violation when a more serious charge cannot be proved. A prosecutor may act in league with a probation officer without the judge's knowledge to ensure that minor violations that are not ordinarily reported to the court by the officer are made a major issue. See *supra* note 20.

Oftentimes probation officers proceed on the basis of technical violation when new criminal offenses are suspected but cannot be easily proved. Police and prosecutors regularly call upon the probation officer to invoke some technical violation against a probationer who they believe has committed a new crime. It is patently easier to put a defendant behind bars as a result of a probation violation hearing than it is to send him to prison as a result of a full-fledged trial.

Czajkoski, *Exposing the Quasi-Judicial Role of the Probation Officer*, in PROBATION, PAROLE, & COMMUNITY CORRECTIONS 174 (R. Carter & L. Wilkins 2d ed. 1976). It is not necessary to secure a conviction to revoke probation for a criminal violation. "The judge may revoke probation when reasonably satisfied that a state or federal law has been violated, and conviction is not essential." *United States v. Guadarrama*, 742 F.2d 487, 489 (9th Cir. 1984) (citations omitted). Several commentators have criticized the judges' ability to revoke probation based on unproven criminal conduct, or even after an acquittal. See, e.g., Note, *Revocation of Conditional Liberty Following an Acquittal: Collateral Estoppel Implications*, NEW ENG. J. CRIM. & CIV. CONFINEMENT, Winter 1984, at 215. Whether the standards for revoking probation based on unproven criminal conduct are too low, it is still easier to revoke probation based on a technical violation. A prosecutor or probation officer may not be able to meet the standard of proof required to establish unproven criminal conduct even though evidentiary standards are much lower in a revocation hearing than a trial. Additionally, many jurisdictions require that the revocation hearing on unproven criminal conduct must follow the trial so that the probationer's right against self-incrimination is not infringed; however, such a rule may delay the revocation hearing for months while a revocation hearing on a technical violation can take place immediately. Note, *The Due Process Need for Postponement or Use Immunity in Probation Revocation Hearings Based on Criminal Charges*, 68 MINN. L. REV. 1077, 1077-78 (1984). On the other hand, most probationers constantly commit minor technical violations that are usually ignored, but which can serve as the basis for revocation and incarceration if probation officers and judges so desire. See, e.g., Czajkoski, *supra*, at 174; Dicerbo, *supra* note 1, at 448-58;

that a probationer committed a new criminal offense, a judge may revoke probation and incarcerate the probationer over a technical violation that normally would not result in any major punishment.<sup>22</sup> Procedural due process standards governing the proof of a probation violation in a revocation hearing are meaningless if the judge has the discretion to execute a suspended prison sentence even when the state cannot prove that the probationer committed a serious violation.<sup>23</sup>

## II. SENTENCE GUIDELINES AND PROBATION REVOCATION SANCTIONS

Sentence guidelines have been developed to restrain the discretionary authority of judges and to reduce sentence disparities.<sup>24</sup> The determination of probation revocation sanctions is a form of sentencing.<sup>25</sup> The creation of guidelines to regulate the imposition of such sanctions is a possibility that must be explored; however, the development of these guidelines is premature given our lack of knowledge about how judges currently make these decisions.<sup>26</sup> Until we require judges to provide written explanations for their probation revocation sanction decisions, it will be impossible to formulate guidelines or to be certain whether guidelines would work in this context. These problems are explored below.

### A. *Just Deserts, Guidelines, and Probation Revocation*

Many advocates of sentence guidelines stress a just deserts philosophy of punishment, which bases severity of punishment exclusively upon the seriousness of the crime and the offender's prior criminal record.<sup>27</sup> This theory ex-

---

McCleary, *supra* note 20, at 576-87; *Purpose of Probation*, *supra* note 1, at 412-13. Until the process for determining probation revocation sanctions is reformed, judges will be able to severely punish a probationer for a minor violation when a prosecutor or probation officer cannot prove a more serious violation.

<sup>22</sup> See *supra* note 21.

<sup>23</sup> See *supra* notes 3, 7 & 21.

<sup>24</sup> See *supra* note 6.

<sup>25</sup> See *supra* notes 1, 3, 6, & 7.

<sup>26</sup> See *infra* note 83.

<sup>27</sup> One of the major advantages of sentence guidelines is that they reduce the judges' ability to consider individual rehabilitative factors in arriving at a sentence. Advocates of a just deserts theory of punishment would probably support sentence guidelines because they would desire to formally exclude rehabilitative, incapacita-



cludes all rehabilitative criteria, although it is possible to construct guidelines that include both just deserts criteria and rehabilitative factors.<sup>28</sup> Two major questions arise in deciding whether guidelines are appropriate in the context of probation revocation sanctions. First, should these decisions be made with a heavy emphasis on punishing the violator based on the seriousness of the violation, that is, a just deserts emphasis? Second, if just deserts theory should not be applied, are the sort of rehabilitative factors that are essential in arriving at a probation revocation sanction decision the kind of rehabilitative criteria that are amenable to a guidelines approach? The answer to both questions is no, and guidelines are probably inappropriate in this type of sentencing.

A just deserts theory of punishment should not be the primary basis upon which probation revocation sanctions are chosen. Important differences between initial sentencing decisions and probation revocation sanction judgments make the just deserts theory far less appropriate in the latter kind of sentencing. Once a judge places a person on probation, the emphasis shifts from punishment to rehabilitation;<sup>29</sup> if punishment were the primary objective, then the

---

tive, and deterrent criteria from sentencing decisions, and the best way to ensure judicial adherence to just deserts sentencing is to implement guidelines requiring such an approach. See, e.g., A. VON HIRSCH, *DOING JUSTICE, THE CHOICE OF PUNISHMENTS* (1976); Frankel & Orland, *Sentencing Commissions and Guidelines*, 73 *Geo. L.J.* 225, 226 (1984); Ozanne, *Bringing the Rule of Law to Criminal Sentencing: Judicial Review, Sentencing Guidelines and a Policy of Just Deserts*, 13 *Loy. U. Chi. L.J.* 721 (1982).

<sup>28</sup> Minnesota, whose sentence guidelines are firmly rooted in a just deserts sentencing philosophy, allows judges in misdemeanor and less serious felony cases to consider an offender's social circumstances and rehabilitative prospects when they decide to incarcerate him or to place him on probation. See, e.g., *State v. Solomon*, 359 N.W.2d 19, 22 (Minn. 1984). Minnesota recognized that probation, unlike prison, contains an inherent rehabilitative element and, therefore, cannot be based on punishment alone. *Id.* Just deserts theory is inapplicable to probation because, if the primary focus of the sentence was on punishment to the exclusion of rehabilitative concerns, it would make more sense to incarcerate the offender rather than place him on probation. *Id.* Thus, the Minnesota Supreme Court in *Solomon* acknowledged that "whether a defendant is particularly amenable to treatment in a probationary setting" must remain an essential factor in deciding whether to grant probation. *Id.*

<sup>29</sup> One of the major advantages of probation over prison is that it offers a more favorable environment for assisting the rehabilitative development of the offender. Some scholars have found that when comparable groups of offenders, in terms of their criminal history and certain social characteristics, are placed either on probation or in prison, those placed on probation have lower recidivism rates. See Babst & Mannering, *Probation Versus Imprisonment for Similar Types of Offenders*, 2 *J. Res. Crime & Delinq.* 60 (1965) (two-year follow-up study of 7,614 felony offenders in Wisconsin found that among first-time offenders, after controlling for criminal history and mari-

judge would have incarcerated the offender.<sup>30</sup> Punishment concerns arise again if a probationer commits a new criminal offense, but the determination of what punishment is appropriate should be left to a new criminal trial rather than to a probation revocation hearing that lacks the procedural safeguards mandated in a criminal trial.<sup>31</sup> If a probationer is

---

tal status, probationers had lower recidivism rates, but second or multiple-time offenders did not); Bartell & Winfree, *Recidivist Impacts of Differential Sentencing Practices for Burglary Offenders*, 15 CRIMINOLOGY 387, 394 (1977) (controlled study of 100 New Mexico burglary offenders found that those placed on probation had lower recidivism during a four-year follow-up study); Levin, *Policy Evaluation and Recidivism*, 6 LAW & SOC'Y REV. 17, 24-25 (1971) (discussing a study by Beattie and Bridges involving 4,709 California offenders that, after controlling for several variables, found that probationers had lower recidivism during a one year follow-up study); Parisi, *A Taste of The Bars?*, 72 J. CRIM. L. & CRIMINOLOGY 1109 (1981) (a study of "shock" probation which shows that at the very least probation can be as effective as prison in reducing recidivism among some groups of offenders).

<sup>30</sup> "These comments relating to parole apply with even greater force to probation, for the chances of successful rehabilitation are substantially greater for the offender who is granted probation . . . ." *United States v. Reed*, 573 F.2d 1020, 1024 (8th Cir. 1978) (citation omitted).

Many judicial opinions emphasize that probation offers a superior rehabilitative environment compared to imprisonment; also they provide that a judge in a revocation hearing should consider the impact of revocation on the probationer's rehabilitative prospects. See *supra* notes 5 & 9. "The primary purpose of probation is to rehabilitate the offender. Therefore, the only factors which the trial judge should consider when deciding whether to grant probation are the appropriateness and attainability of rehabilitation and the need to protect the public by imposing conditions which control the probationer's activities." *Higdon v. United States*, 627 F.2d 893, 897 (9th Cir. 1980).

<sup>31</sup> "If the probationer's violation is a new crime, it is illogical from a retributive point of view to impose additional punishment (imprisonment) for the original crime, which is not made any more reprehensible by the later crime." *Purpose of Probation*, *supra* note 1, at 413. A probationer who commits a new criminal offense is more culpable because he has violated the trust of the court that granted him probation. There are two ways of examining the treatment of a criminal probation violation. First, the probationer could be punished more severely at the new trial because he has previously been given lenient treatment. *Id.* Second, his probationary status could be revoked because he has committed a criminal violation. This is simply activation of a suspended punishment for the previous conviction, which resulted in probation, plus a suspended prison sentence, not additional punishment for the new offense. In deciding whether to activate a suspended prison sentence because of a probation violation, a judge does not punish the probationer for the new offense; he determines whether the probationer can still benefit from probation, or whether his record is unsatisfactory in light of the public safety concerns raised by the violation. He also considers the probationer's rehabilitative progress because rehabilitation and public safety rather than punishment are the concerns of probation. "Our guide is the test set forth in *United States v. Consuelo-Gonzalez*, . . . in which the court held that probation conditions must be reasonably related to rehabilitation of the offender and protection of the public." *Higdon*, 627 F.2d at 897 (citing *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 263-64 (9th Cir. 1975)). "The primary purpose of probation . . . is to promote the rehabilitation of the criminal by allowing him to integrate into society as a constructive individual, without being confined for the term of the

convicted of a felony, and a prison sentence is imposed for the new offense, then probation will be revoked automatically. If he receives a probationary term for the new offense, then the issue is not punishment; a separate probation revocation hearing, however, may be held in addition to the new criminal trial to determine whether he is too dangerous to remain on probation.<sup>32</sup> No matter how serious the alleged probation violation, a revocation hearing should never focus on punishment. Instead, the hearing should balance the public safety concerns raised by the seriousness of a violation against the extent to which the probationer has taken advantage of the rehabilitative opportunities offered by probation.<sup>33</sup> Thus, just deserts guidelines are inappropriate for regulating probation revocation judgments.

### *B. Rehabilitative Guidelines and Probation Revocation Sanctions*

It is possible to construct sentence guidelines that rely on rehabilitative criteria such as socioeconomic status.<sup>34</sup> Predictive guidelines are also used by some parole boards.<sup>35</sup> Because institutional behavior is a poor predictor of post-prison conduct, parole guidelines attempt to select the best

---

sentence imposed." *United States v. Winsett*, 518 F.2d 51, 54 (9th Cir. 1975). "These conditions serve a dual purpose in that they enhance the chance for rehabilitation while simultaneously affording society a measure of protection." *Id.* at 54-55. Just deserts theory is inapplicable to the determination of revocation sanctions because punishment should not be a factor in probation revocation. The primary concerns are public safety and individual rehabilitation.

<sup>32</sup> See *supra* note 31.

<sup>33</sup> *Id.*

<sup>34</sup> Ozanne, *supra* note 27. The author makes much of the fact that it is difficult to construct guidelines based on rehabilitative factors because it is necessary for judges to make a subjective evaluation of the offender's social background and rehabilitative prospects if there is going to be any reason to include rehabilitative criteria in the sentencing decision. This author partly agrees with Ozanne's argument that rehabilitative factors are too subjective and individualized to be reduced to guidelines form. Of course, the incompatibility of guidelines with the inclusion of rehabilitative criteria may be an argument for not choosing guidelines if the individualized treatment of offenders is an important value.

<sup>35</sup> During the 1970s, the United States Parole Commission began using a set of predictive parole guidelines to decide which prisoners were suitable candidates for parole. Originally, the parole guidelines were based on factors including the offender's employment status before conviction, his education prior to conviction, and his marital status. See Hoffman & Beck, *Parole Decision-Making: A Salient Factor Score*, 2 J. CRIM. JUST. 195, 197-99 (1974). The use of socioeconomic criteria came under severe criticism. See *infra* note 37. Several years later the United States Parole Commission dropped the educational and marriage factors from the guidelines. See Hoffman & Adelberg, *The Salient Factor Score, A Nontechnical Overview*, FED. PROBATION, Mar. 1980, at 44, 47.

recidivism risks based on the prisoner's criminal record and his preconviction socioeconomic background.<sup>36</sup> Such predictive guidelines have been heavily criticized because they are frequently inaccurate, and they often disfavor racial minorities, who on average come from less affluent social backgrounds than whites.<sup>37</sup> Assuming these guidelines are of some value, however, their use is most appropriate when better information for predicting future behavior is unavailable.<sup>38</sup> Since judges in a probation revocation hearing are in a position to evaluate the violator's actual performance on probation, they need not rely on unreliable predictive guidelines based on general socioeconomic criteria.<sup>39</sup> Use

---

<sup>36</sup> See, e.g., Carroll, Wiener, Coates, Galegher & Alibrio, *Evaluation, Diagnosis, and Prediction in Parole Decision Making*, 17 *LAW & SOC'Y REV.* 199, 221 (1982) (prison conduct unrelated to known criminal conduct by released prisoners).

<sup>37</sup> Several commentators have argued against the use of socioeconomic criteria to predict recidivism in sentence or parole guidelines because such predictions are unreliable and disadvantageous to racial minorities. See, e.g., J. PETERSILIA & S. TURNER, *GUIDELINE-BASED JUSTICE: THE IMPLICATIONS FOR RACIAL MINORITIES* (1985); Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 *GEO. L.J.* 975, 1002-03, 1022-23 (1978).

<sup>38</sup> This Article maintains that there is a fundamental distinction between prediction of an offender's rehabilitative potential based on his socioeconomic status before he was convicted and judicial evaluation of his performance while he is on probation. There are strong philosophical reasons for rejecting predictions in favor of rewarding a person for his actual performance.

The use of predictive criteria for selection is subject to challenge not only on grounds of accuracy, however, but also on the ground that it conflicts with other important social values, involving respect for individual autonomy. The attempt to predict an individual's behavior seems to reduce him to a predictable object rather than treating him as an autonomous person. . . . To imprison a person because of crimes he is expected to commit denies him the opportunity to choose to avoid those crimes.

Underwood, *Law and the Crystal Ball, Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 *YALE L.J.* 1408, 1414 (1979). It is important to examine the probationer's actual performance on probation so those who perform well will be rewarded, and those who perform poorly will receive more severe sanctions if they commit the same probation violation. The overwhelming majority of probationers agree that they should be rewarded or punished according to their overall performance. This policy is attractive to society because it encourages probationers to behave well. See Allen, *The Probationers Speak: Analysis of the Probationers' Experiences and Attitudes*, *FED. PROBATION*, Sept. 1985, at 67, 72 ("The probation system should provide incentives and rewards for compliance.").

<sup>39</sup> Statistical methods may be more accurate than clinical methods of evaluation, but sometimes the clinical method is preferred to keep a human element in the process, which may aid in individual treatment. See Underwood, *supra* note 38, at 1420-32. Probation is an area where encouraging the individual rehabilitative progress of offenders is essential, and therefore it is crucial that clinical methods be selected over statistical ones.

of such guidelines is, therefore, inappropriate in the context of probation revocation decisions.

Guidelines are also inappropriate in this context because they do not mesh with the judge's task: balancing the public safety concerns raised by the violation against the violator's probation performance and rehabilitative needs.<sup>40</sup> Traditionally, judges in probation revocation hearings have employed the clinical method of subjectively evaluating the probationer's probation performance and his rehabilitative progress and prospects.<sup>41</sup> Guidelines are ill-suited to individualized clinical evaluation.<sup>42</sup> Because an individual probationer's rehabilitative progress and needs ought to be factors in determining sanctions, guidelines are unlikely to work in the context of probation revocation sanction determinations. There are ways to improve the present system for making probation revocation judgments without adopting a guidelines approach.

### III. IMPROVING THE POSTSENTENCE SYSTEM

The current probation revocation process could be improved without detracting from the ability of judges to consider the individual needs of each violator. One way to improve the process would be to require judges to provide written explanations of why a particular probation revocation sanction is most consistent with a violator's rehabilitative needs.<sup>43</sup> Moreover, both probation officers and appellate courts bear considerable responsibility for the existing deficiencies in probation revocation sanction decisions,<sup>44</sup> and an examination of their roles suggests additional ways to improve the process.

#### A. Probation Officers and Discretion

Probation officers exercise largely unreviewable discretion, both in enforcing judicially imposed conditions and in deciding whether to report a violation.<sup>45</sup> Another problem

---

<sup>40</sup> See Underwood, *supra* note 38, at 1414; *supra* notes 30-31; see also Allen, *supra* note 38, at 67, 72.

<sup>41</sup> See *supra* notes 30-31.

<sup>42</sup> See Allen, *supra* note 38; Underwood, *supra* note 38.

<sup>43</sup> See *infra* notes 60-82.

<sup>44</sup> See *infra* notes 45-59 & 74-82.

<sup>45</sup> The United States Supreme Court has declared:

Because the probation or parole officer's function is not so much to compel

is the lack of uniform requirements about what sort of information probation officers must report to the court regarding the probationer's general probation performance and his rehabilitative needs when they report a violation.<sup>46</sup> The probation reports submitted in revocation hearings are frequently inaccurate or incomplete,<sup>47</sup> and one cannot assume that counsel for a probationer in a revocation hearing will provide vital information about his client's rehabilitative development if the probation officer does not.<sup>48</sup> As a result of these deficiencies, the judge may not have enough information to impose an appropriate sanction.

A new presentence investigation (PSI) should be prepared for every disputed probation revocation hearing; however, only a few jurisdictions now require PSIs.<sup>49</sup> A new PSI is essential because a probationer's overall probation record should be evaluated, and many probation records are incomplete.<sup>50</sup> A neutral probation officer—not the one who

---

conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation.

Gagnon v. Scarpelli, 411 U.S. 778, 784 (1973). A number of commentators have discussed the broad discretionary powers exercised by probation and parole officers. See Cavender, *Parole and Rehabilitation: The False Link*, 5 NEW ENG. J. ON PRISON L. 1, 15-16 (1978); McCleary, *supra* note 20, at 576-87; Robison & Takagi, *The Parole Violator as an Organizational Reject*, PROBATION, PAROLE, & COMMUNITY CORRECTIONS 347-67 (R. Carter & L. Wilkins 2d ed. 1976). Any reform scheme seeking to reduce discretion and possible disparities within the probation revocation process must address the role of probation officers who control what violations are reported to courts.

<sup>46</sup> See *infra* notes 48-59.

<sup>47</sup> See N. COHEN & J. GOBERT, *supra* note 1, at 641 (inadequate probation records are commonplace); McCleary, *supra* note 20, at 587 (probation records cannot be trusted to be accurate). If judges are to make fair and equitable probation revocation sanction determinations, they need accurate information from probation officers.

<sup>48</sup> Even though no study explains how defense counsel act at probation revocation hearings, studies of how well defense counsel perform in the initial sentencing hearing suggest that many fail to investigate their clients' social history and emphasize essential mitigating factors. Counsel rely on probation officers to conduct the presentence investigation (PSI), and often counsel do not ensure that PSIs are accurate and as favorable as possible for their clients. See Dickey, *The Lawyer and the Accuracy of the Presentence Report*, FED. PROBATION, June 1979, at 28, 38 (significant number of Wisconsin lawyers did not bother to read PSI).

<sup>49</sup> Some courts have required that a new PSI be prepared for a probation revocation hearing. See, e.g., *People v. Crook*, 123 Mich. App. 500, 333 N.W.2d 317 (1983); *People v. Halaby*, 77 A.D.2d 717, 430 N.Y.S.2d 717 (1980). But see *People v. Higgins*, 92 Ill. App. 3d 27, 416 N.E.2d 9 (1980) (new PSI is not necessary for a probation revocation hearing if there is an old PSI from the initial sentencing hearing; testimony at the hearing served the purpose of a PSI).

<sup>50</sup> See *supra* note 48. One cannot trust defense counsel and probation reports to

reported the violation—should prepare the new PSI. Unfortunately, in some jurisdictions, the same officer who reports the violation and testifies against the probationer can also prepare the probation report.<sup>51</sup> The probation officer who reports a violation has a considerable stake in “winning” the revocation hearing, and he will often build a file full of unfavorable probation reports before he reports a violation.<sup>52</sup> The Supreme Court has mandated that a neutral probation officer conduct the preliminary hearing before the final revocation hearing, and the same reasoning should apply to the preparation of the new presentence investigation.<sup>53</sup>

The probation revocation sanction process cannot be considered fair as long as probation officers exercise considerable discretion in deciding whether to report a violation.<sup>54</sup> Obviously, disparities exist if two probationers commit exactly the same violation, but their probation officer reports only one of the violators, and *only one* violator faces sanctions. The discretion exercised by probation officers results from two sources. First, most judges are too busy to supervise probation officers.<sup>55</sup> Second, probation and parole departments indirectly encourage their officers to underreport violations because they promote officers who have the most “successful” clients on paper.<sup>56</sup>

---

provide all the essential information for a judge to make a proper probation revocation sanction decision.

<sup>51</sup> See *People v. Peacock*, 109 Ill. App. 3d 684, 440 N.E.2d 1260 (1982) (preparation of presentence report by same probation officer who initiated revocation proceedings and who testified at revocation hearing did not deny defendant impartial determination of her sentence).

<sup>52</sup> See McCleary, *supra* note 20, at 578.

<sup>53</sup> “The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them.” *Morrissey v. Brewer*, 408 U.S. 471, 486 (1972).

<sup>54</sup> See *supra* note 45.

<sup>55</sup> The prosecutor, defense attorney, and judge—in my experience—usually have little interest in what happens in probation supervision. The case is settled once the judgment is imposed, and they can move on to other cases. They give little attention to setting conditions of probation and prescribing the type of supervision the probationer is to receive because they expect the probation officer to take over at this point.

*Purpose of Probation*, *supra* note 1, at 411. Given time and money constraints, it is very unlikely that judges will ever have the inclination to undertake the arduous task of monitoring the work of probation officers.

<sup>56</sup> Despite the job-related advantages of under reporting violations, if the parole officer dislikes a client, he may report a violation that ordinarily would not be reported. See Cavender, *supra* note 45, at 15-16; McCleary, *supra* note 20, at 576-87; *Purpose of Probation*, *supra* note 1, at 412-13; Robison & Takagi, *supra* note 45, at 347-67. There is danger that the existence of considerable discretion in the hands of

Attempts to curb the discretion judges exercise in determining probation revocation sanctions will have only a limited impact on the probation system unless there is an accompanying effort to police the discretionary powers held by probation officers.<sup>57</sup> Judges are unlikely to undertake major responsibility for regulating the work of probation officers.<sup>58</sup> Probation and parole departments must change their institutional incentive structure by rewarding those officers who report the fullest possible information about the positive and negative behavior of their probationers.<sup>59</sup> Possessing the fullest information possible will allow judges to make better probation revocation sanction judgments.

### *B. Judges and Written Statement of Reasons*

There is an intermediate step between allowing judges total discretion to make sentence decisions and establishing sentence guidelines. Some jurisdictions require judges to issue a written statement of reasons to explain their initial sentencing decision.<sup>60</sup> This requirement is a prerequisite to effective appellate review of sentences.<sup>61</sup> However, this requirement's effect on sentence disparities and moderation

---

probation officers leads to unjust disparities in the probation revocation process. *See supra* notes 7 & 45.

<sup>57</sup> A major criticism of the sentence guidelines movement is that these guidelines simply shift the focus of discretion from judicial sentencing to the plea bargaining deals of prosecutors. *See, e.g.,* Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980) (discussing ways to control prosecutorial discretion and the need to accomplish this goal if sentence guidelines controlling judicial discretion are to have meaning).

It is far less clear in the context of probation revocation sanctions that efforts to curb judicial discretion would simply shift that discretion back to an earlier stage, i.e., to the reporting decisions of probation officers.

<sup>58</sup> *See supra* note 55.

<sup>59</sup> In plea bargaining, there are substantial cost savings associated with avoiding trials, and both sides gain a certain final outcome. *See supra* note 16. In parole and probation departments, there is a bureaucratic incentive structure that rewards offices for having the best clients on paper. *See supra* notes 45 & 56. While these departments have an understandable interest in looking good to the public and other actors in the criminal justice system, it is also likely these departments would respond to the demands of judges who wanted more information. *See supra* note 20. If judges were required to present a more elaborate written statement of reasons for their probation revocation sanction decisions, it is likely they would demand better information from probation officers than is usually provided today. *See supra* notes 48-51.

<sup>60</sup> *See, e.g.,* *Commonwealth v. Riggins*, 474 Pa. 115, 377 A.2d 140 (1977) (citing a broad list of commentators and caselaw supporting a statement of reasons requirement).

<sup>61</sup> The importance of requiring a written statement of reasons to facilitate appellate review of sentence decisions is discussed in *Riggins*, 377 A.2d at 140.



of judicial discretion has varied according to how strictly appellate courts enforce this requirement.<sup>62</sup> A system of written statements of reasons justifying a sentence can be a viable alternative to sentence guidelines only if appellate courts reverse a significant number of sentence decisions and establish broad principles to help guide trial judges in making similar sentence decisions in the future.<sup>63</sup> This requirement, combined with strict appellate enforcement, is the best means of regulating judicial discretion without unduly restricting how judges deal with the individual rehabilitative needs of probationers.

There is authority for the proposition that courts must, consistent with constitutional due process, issue a written statement explaining a revocation decision. The Supreme Court in *Morrissey* mandated a "written statement by the

---

<sup>62</sup> The appellate review of sentences is an alternative to sentence guidelines. The successes of appellate review of sentences has varied according to how strictly appellate courts review sentence decisions and whether appellate courts have articulated broad principles to assist both trial and appellate courts in making future sentence decisions. See Labbe, *Appellate Review of Sentences: Penology on the Judicial Doorstep*, 68 J. CRIM. L. & CRIMINOLOGY 122 (1977) (surveying the experience of the twenty-three states that had appellate review of sentences in 1977, and finding that the effectiveness of appellate review ranged from worthless to moderately successful). Many states that had appellate review *did not* require a written statement of reasons from sentencing judges. It is not surprising to find that appellate review of sentence decisions is perfunctory if trial judges are not obligated to explain the reason they chose a particular sentence. Some commentators have argued that appellate review of sentences *can* be an effective means of reducing sentence disparities. See, e.g., Erwin, *Five Years of Sentence Review in Alaska*, 5 U.C.L.A.-ALASKA L. REV. 1 (1975) (Justice of the Alaska Supreme Court praises Alaska's sentence review). But see Note, *Sentence Review in Alaska, The Continuing Controversy*, 6 U.C.L.A.-ALASKA L. REV. 129 (1977) (sentence review in Alaska has not lived up to its early promise because the Alaska Court has been too lenient in accepting the rationales of trial judges for sentences). The best way to sum up our experience on written statement of reasons and appellate review of sentences is that they have often failed to achieve the goals of reducing sentence disparities, but there is no inherent reason why they must fail. Given proper implementation, sentence review by appellate courts of written statements of reasons could be an effective alternative to sentence guidelines. See generally Zalman, *Appellate Review of Sentences and the Antimony of Law Reform*, 1983 DET. C.L. REV. 1513 (appellate review of sentences has generally not lived up to its potential, although its future cannot be discounted). This Article argues in favor of a written statement of reasons requirement and better appellate review of probation revocation sanction decisions because it is unlikely that courts will take the radical step of creating guidelines in this area until there is clear evidence of disparities. Such evidence will not be produced unless there are well-reasoned revocation and appellate decisions in this area. Sentence guidelines were not adopted until appellate review of sentences proved to be somewhat ineffectual, although it remains to be seen which of these two approaches is the best way of reducing sentence disparities.

<sup>63</sup> See *supra* notes 60-62.

fact-finders as to the evidence relied on and reasons for revoking *parole*.”<sup>64</sup> While *Morrissey*'s requirement addressed parole revocations, it has been applied to *probation* revocation decisions. Many courts, however, have interpreted *Morrissey* in different ways.<sup>65</sup> Some have held that the requirement of written findings in a probation revocation hearing can be met if the record of the hearing clearly shows evidence supporting proof of a violation.<sup>66</sup> Others, however, demand that the trial judge produce a separate written statement of reasons justifying the probation revocation.<sup>67</sup>

The extent of this required justification raises another problem. Appellate courts have been far more concerned with ensuring that trial judges establish a violation than with examining the justification for probation revocation.<sup>68</sup> The reporting requirement will not improve the probation revocation sanction process unless judges are obligated to explain why they chose a particular sanction in light of the probationer's rehabilitative history and needs and the public safety concerns raised by the violation.<sup>69</sup> The Supreme Court, however, in *Black v. Romano*,<sup>70</sup> argued that it would be extremely time consuming if judges were obligated to consider every possible alternative to incarceration in a written statement before they revoked probation.<sup>71</sup> *Romano* did not decide to what extent a judge must justify the actual pro-

---

<sup>64</sup> *Morrissey*, 408 U.S. at 489 (emphasis added).

<sup>65</sup> See N. COHEN & J. GOBERT, *supra* note 1, at 643 (appellate courts disagree as to what extent a trial judge must justify a probation revocation decision in writing); *infra* notes 66-67.

<sup>66</sup> See, e.g., *Morishita v. Morris*, 702 F.2d 207 (10th Cir. 1983) (the transcript of a probation revocation hearing is enough to satisfy the written statement of reasons requirement in *Morrissey*). But see *infra* note 67.

<sup>67</sup> See, e.g., *United States v. Smith*, 767 F.2d 521 (8th Cir. 1985) (explicitly rejecting the reasoning in *Morishita* and requiring a separate written statement of reasons justifying probation revocation in addition to the transcript of the hearing).

<sup>68</sup> Most appellate court decisions reviewing probation revocation judgments simply state that revocation is appropriate if there is sufficient evidence showing that the probationer committed violations; they do not discuss the sanctions issue. "Revocation of probation is appropriate if enough evidence exists for the District Court to conclude that the probationer failed to satisfy the conditions of his probation." *United States v. Young*, 756 F.2d 64, 65 (8th Cir. 1985) (citation omitted). Appellate courts must make a separate determination, after deciding that there is enough evidence to justify revocation, of whether the sanctions chosen were appropriate in light of the probationer's rehabilitative needs and public safety concerns raised by the violation. See *supra* note 38.

<sup>69</sup> See *supra* notes 30, 31 & 38.

<sup>70</sup> 471 U.S. 606 (1985).

<sup>71</sup> *Romano*, 471 U.S. at 613.

bation revocation sanction chosen, but ruled only that a judge need not list in a written document every sanction alternative he might have selected. The Ninth Circuit, on the other hand, has held that judges in probation revocation hearings are mandated by the due process clause to consider mitigating circumstances before deciding that a violation warrants revocation.<sup>72</sup> Minimal due process should obligate a judge to explain why he chose a particular sanction in view of the public safety concerns implicated by the violation and the probationer's rehabilitative needs.<sup>73</sup> Such a written explanation could be quite effective without considering *every* possible alternative sanction.

### C. Appellate Review of Probation Revocation Sanctions

As previously stated, a written reporting requirement is only useful when it is accompanied by effective appellate review.<sup>74</sup> Appellate courts have rarely even considered the appropriateness of a sanction once a violation has been established.<sup>75</sup> A few courts have recognized that the "decision to revoke probation should not merely be a reflexive reaction to an accumulation of technical violations of the conditions imposed upon the offender."<sup>76</sup> In *Morrissey*, the

---

<sup>72</sup> "Due process requires that a probationer at a revocation hearing be given the opportunity to show that mitigating circumstances suggest that the violation does not warrant revocation." *United States v. Furguson*, 624 F.2d 81, 83 (9th Cir. 1980) (citing *United States v. Diaz-Burgos*, 601 F.2d 983, 985-86 (9th Cir. 1979)). See *Morrissey*, 408 U.S. at 488 (parole revocation hearing). It is necessary to go beyond a mere requirement that the probationer be allowed to present mitigating evidence. If a judge does not explain in writing how he balanced the mitigating evidence against the seriousness of the violation, then there is no way of ensuring any uniformity in the judge's decisions.

<sup>73</sup> See *supra* notes 30, 31 & 38.

<sup>74</sup> See *supra* notes 60-62.

<sup>75</sup> See *supra* note 68.

<sup>76</sup> *United States v. Reed*, 573 F.2d 1020, 1024 (8th Cir. 1978). The need for flexibility in assessing the individual rehabilitative needs of offenders has been used to justify the discretion exercised by probation officers and judges in deciding whether to revoke probation.

In practice, not every violation of parole conditions automatically leads to revocation. . . . [T]he parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid anti-social activity. The broad discretion accorded the parole officer is also inherent in some of the quite vague conditions, such as the typical requirement that the parolee avoid 'undesirable' associations or correspondence.

*Morrissey*, 408 U.S. at 479. Some discretion is essential if probation is to meet the

Supreme Court acknowledged that the determination of probation revocation sanctions is often far more complex than deciding whether a violation occurred.<sup>77</sup> Appellate courts must review these sanction judgments at least as carefully as they now examine the evidence proving a violation.

There is at least one appellate decision that suggests how to review probation revocation sanction determinations. In *United States v. Rodgers*,<sup>78</sup> the Eighth Circuit upheld revocation, but vacated the sanction and remanded the case for resentencing.<sup>79</sup> The probationer in *Rodgers* failed to report a change in his address and employment, but otherwise had a model probation record.<sup>80</sup> The trial court revoked probation and ordered him to serve two and one-half years in prison.<sup>81</sup> The Eighth Circuit upheld revocation because a violation had occurred, but found the sanction to be exces-

---

individual rehabilitative needs of each probationer. The violation of the same probation condition, such as failing to attend alcohol therapy sessions, can be of varying consequences depending on personal rehabilitative needs. A larcenist may commit crime because he is an alcoholic; then, a judge should revoke probation if the alcoholic larcenist refuses treatment. Here, the danger to society is substantial, and the probationer is failing to take advantage of rehabilitative opportunities that justified his probation. See A. SMITH & L. BERLIN, *supra* note 7, at 129-30. If a judge imposes the same alcohol treatment condition on an alcoholic white-collar criminal, and the criminal activity was unrelated to drinking, and the violator at least tried to attend a few treatment sessions, a balancing of public safety and individual rehabilitative needs might lead to the conclusion that the appropriate sanction should be better counseling and renewed attempts at alcohol treatment. See *Purpose of Probation*, *supra* note 1, at 14-16. It is impossible to completely eliminate the subjective element in rehabilitative evaluations. See *supra* notes 30-34. The admission that some discretion must remain in the process of determining probation revocation and sanctions does not mean that there should be no controls on that discretion. A written explanation is not inconsistent with judicial discretion; it merely provides an appellate court grounds for reversal for abuse of discretion. There is already an abuse of discretion standard for appellate review of probation revocation decisions. See, e.g., *United States v. Young*, 756 F.2d 64, 65 (8th Cir. 1985). The problem is that almost all appellate court decisions have simply looked at whether there was enough evidence that there had been violations of conditions to warrant probation revocation. See *id.* Most appellate court decisions reviewing probation revocation judgments have failed to examine what sanctions are appropriate once a violation is proved. See *supra* notes 1 & 3.

<sup>77</sup> See *supra* note 5.

<sup>78</sup> 588 F.2d 651 (8th Cir. 1978).

<sup>79</sup> *Id.* at 651-54.

<sup>80</sup> *Id.* at 652-53. The Eighth Circuit emphasized that *Rodgers*' failure to report posed no danger to the public, and that *Rodgers* had remained living in the same city when he failed to report a change of address so there was no attempt to flee probation supervision.

<sup>81</sup> *Id.* at 653. The trial judge imposed the maximum possible sanction—the full length of the suspended prison sentence.

sive.<sup>82</sup> Appellate courts must follow the example of the *Rodgers* court and treat the sanction issue as a separate item for review.

### CONCLUSION

This Article advocates an intermediate approach to reforming the probation revocation sanction process. It is premature to implement guidelines because we do not know enough about how judges make these decisions. Judges clearly exercise great discretion in determining probation revocation sanctions, but we do not know the extent to which unwarranted disparities exist.<sup>83</sup> Until we understand this process better, judges should retain their traditional power to subjectively evaluate the rehabilitative needs of probationers in these hearings.<sup>84</sup> A reporting procedure

---

<sup>82</sup> The Eighth Circuit Court of Appeals noted in their per curiam opinion:

Appellant, except for the reporting requirements previously discussed, fully complied with the conditions of his original sentence. He had committed no new crimes, had been employed almost continuously during his unsupervised period of probation under his own name, and continued to reside in Little Rock, albeit at a new and undisclosed address. Under these circumstances we are concerned with the district court's failure to indicate why a lesser penalty was not considered.

*Id.* at 654. The *Rodgers* court upheld the revocation, but vacated and remanded the case for resentencing. "We suggest that the district court may desire to consider suspending the sentence imposed in whole or in part and place appellant on probation for an appropriate period." *Id.*

The decision that there is enough evidence of a violation to warrant revocation should not be the end of an appellate court's review of a probation revocation decision. A separate examination should be made of the appropriateness of the revocation sanction chosen. To facilitate appellate review of sanction decisions, trial judges should be required to submit a written explanation of why they chose that particular sanction. See *supra* notes 30-34. The Supreme Court in *Black v. Romano*, 471 U.S. 606 (1985), rejected the contention that the due process clause requires a judge in a probation revocation hearing to explore in writing every possible alternative to incarceration. The *Rodgers* court found that the trial court chose an excessive sanction without exploring every possible alternative. It is possible to require explanation and justification from trial judges and appellate courts without adopting the "all possible sanctions examination" approach that was rejected by the Supreme Court in *Black v. Romano*.

<sup>83</sup> One possible objection to the procedures proposed in this Article is that no changes should be made in the process of determining probation revocation sanctions until there is more substantial evidence that widespread disparities exist. We will never know the full extent of disparities unless we require judges to explain their reasoning process in the record; without this requirement, there can be no effective appellate review of probation sanction decisions. The tremendous discretion exercised by probation officers and trial judges in the probation revocation process may cause substantial disparities. See *supra* note 7.

<sup>84</sup> Although reform is needed to ensure effective appellate review, it would be

would better the existing system without radically changing it. Requiring better written statements of reasons and more thorough appellate review would generate a new body of knowledge about this area that would help us decide whether further reforms are necessary.

---

dangerous to impose a radical method of determining sanctions such as a just deserts guidelines approach because we know so little about how judges make decisions under a certain set of circumstances. Moreover, what we know about the probation revocation process suggests that judges need to retain some discretion to take into account the individual rehabilitative needs of violators. Society can always adopt more radical reform measures if these moderate reforms are not enough; however, adopting a guidelines approach in this area is premature.

