

SAFEGUARDING PERSONAL LIBERTY: PREVENTING ARBITRARY PROBATION DETENTIONS

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Abstract: Pre-revocation detention in probation enforcement represents a critical intersection between conditional liberty and procedural due process. Individuals on probation often face sudden incarcerations triggered by unverified technical violations without prompt judicial review or evidentiary hearings. This article examines the constitutional bounds of probation hold practices, the standard of proof required for pre-hearing detention, and the procedural protections mandated by international human rights standards and domestic constitutional frameworks. It argues for statutory limits on administrative probation detainers, mandatory prompt-hearing timelines, and non-carceral interventions for minor technical non-compliance.

Keywords: Probation revocation, procedural due process, personal liberty, arbitrary detention, conditional release, pre-trial detention, criminal procedure, human rights.

Annotatsiya: Probatsiya nazoratini amalga oshirishda jazo muddatidan ilgari bekor qilish oldidan ushlab turish — bu shartli erkinlik va tegishli protsessual kafolatlar o'rtasidagi muhim chorrahadir. Probatsiyadagi shaxslar ko'pincha tezkor sud ko'rib chiqishi yoki dalillarni eshitish bo'lmasdan turib, tasdiqlanmagan texnik qoidabuzarliklar sababli to'satdan qamoqqa olinishga duch kelishadi. Ushbu maqola probatsiya doirasida ushlab turish amaliyotining konstitutsiyaviy chegaralarini, eshituvgacha bo'lgan qamoq uchun talab qilinadigan isbotlash standartlarini hamda protsessual himoya vositalarini tahlil qiladi. Maqolada ma'muriy ushlab turish muddatlariga qonuniy cheklovlar qo'yish, majburiy tezkor sud eshituvlarini joriy etish va kichik texnik qoidabuzarliklar uchun qamoq bilan bog'liq bo'lmagan mezonlarni almashtirish taklif etiladi.

Kalit so'zlar: Probatsiyani bekor qilish, tegishli protsessual tartib, shaxsiy erkinlik, o'zboshimchalik bilan ushlab turish, shartli ozod qilish, sudgacha ushlab turish, jinoiy protsess, inson huquqlari.

Аннотация: Задержание до официальной отмены probation представляет собой ключевую точку пересечения условной свободы и надлежащей правовой процедуры. Лица, находящиеся под

пробацией, часто сталкиваются с внезапным лишением свободы из-за неподтвержденных технических нарушений без своевременного судебного контроля. В данной статье рассматриваются конституционные рамки применения мер пресечения при пробации, стандарты доказывания, необходимые для содержания под стражей до слушаний, и процессуальные гарантии. Утверждается необходимость законодательного ограничения административных задержек, введения обязательных быстрых сроков судебных слушаний и применения альтернативных мер при незначительных нарушениях.

Ключевые слова: Отмена пробации, надлежащая правовая процедура, личная свобода, произвольное задержание.

In 2010, the New York Police Department arrested sixteen-year-old Kalief Browder on suspicion of stealing a backpack.¹ New York City jailed Browder for three years without trial on Rikers Island, where he endured abuse by guards and other inmates and spent nearly two years in solitary confinement.² Though Browder's case was ultimately dismissed, his confinement was punishing. In 2015, Browder hanged himself.³ Since Browder's tragic death, waves of activism pushed New York to restrict long-term solitary confinement, ban solitary entirely for anyone under the age of twenty-two, and eliminate money bail for most misdemeanors and nonviolent felonies.⁴ But the bail reform would not have helped Browder, and little attention has been paid to why. For most of the three years, Browder was not held on money bail: he was stuck on Rikers because he was suspected of violating his probation.⁵

When someone is charged with a crime, the government can detain them prior to conviction on proof that release would either (1) interfere with the administration of justice or (2) pose a danger to the community.⁶ Indeed, the Supreme Court has explained that the "fundamental nature" of a person's "strong interest in liberty" requires that a governmental deprivation of that liberty have a "legitimate and compelling" justification that is "narrowly focused" on the purpose of the deprivation.⁷ Likewise, when the state seeks to civilly commit someone to a mental institution, it can overcome the "constitutional right to freedom"⁸ pursuant only to a "carefully limited" and "sharply focused" legislative scheme requiring clear and convincing proof of dangerousness due to mental illness.⁹ For the government to deprive someone of physical liberty, it must follow fair procedures — and it must also have a legitimate and compelling reason that is narrowly focused on the purpose of the confinement.



But no substantive justification is constitutionally required to jail any of the nearly four million adults¹⁰ on probation in this country if they are charged with a probation violation. Once a probationer is suspected of committing a new criminal offense (a “substantive violation”) or a noncriminal violation of a probation condition (a “technical violation”), their probation officer can trigger revocation proceedings.¹¹ Though the process differs by jurisdiction, the Supreme Court has mandated two hearings: a preliminary detention hearing and a final revocation hearing.¹² In the preliminary hearing, probationers are routinely detained until the final hearing based solely on allegations of a violation.¹³ As a result, probationers charged with a new crime can be granted pretrial release in the criminal proceeding just to be detained in the separate probation revocation proceeding.¹⁴ Preliminary probation detention can last for weeks or months. And in cases like Browder’s, where the probation detainer is tied to an underlying criminal charge, the incarceration can last years, even though the government never had to substantively justify the detention in the first place.¹⁵

Though probation is often seen as a way to combat mass incarceration, in some jurisdictions most people in jail are there because they are suspected of violating probation.¹⁶ In Philadelphia, for example, over fifty-six percent of the jail population was held on a probation detainer in September 2018.¹⁷ And because probation is now the most common criminal sentence in the United States, the specter of probation detention hangs over the nearly four million adults living under probation supervision.¹⁸ In the United States, “liberty is the norm”¹⁹ — unless you are on probation.²⁰

This Note argues that there is a substantive due process right to be free from arbitrary probation detention.²¹ This right derives from the Fourteenth Amendment’s protection of liberty and the corresponding requirement that deprivations of fundamental rights satisfy strict scrutiny.²² Physical liberty is undoubtedly a fundamental right, no less so when someone is serving a sentence of probation.²³ Though the Supreme Court has explained that the liberty of a probationer is conditioned on abiding by the terms of probation,²⁴ it has never said that a probationer’s liberty interest is not fundamental. Indeed, many of the Court’s cases have explicitly recognized that a fundamental liberty interest inheres in a sentence of probation.²⁵

To make the case for a right against arbitrary probation detention, this Note will, in Part I, introduce the problem with probation detention and survey a few probation detention schemes. Part II will explain how the Supreme Court has recognized a fundamental right to physical liberty that is protected by strict



scrutiny and argue that probationers do not lose this substantive due process right simply by being on probation. Part III will respond to the most plausible objections to the argument. Part IV will address the application and implications of the right to be free from arbitrary probation detention and conclude.

1. The Probation Detention Problem: Probation is a noncarceral criminal sentence enforced through close supervision and strict conditions.²⁶ In probation's early days, it was considered an act of grace, and, as a result, the Supreme Court held that the privilege of a probation sentence carried no constitutional protections.²⁷ By the 1970s, however, probation had become the most common criminal sentence in the United States, and it was no longer tenable to consider probation a privilege.²⁸ As Justice Douglas explained, probation is more than "episodic acts of mercy by a forgiving sovereign" because the state "depend[s] on probation ... as much as do those who are enmeshed in the system."²⁹

As probation became an integral part of the criminal legal system, the Supreme Court decided two cases, *Morrissey v. Brewer*³⁰ and *Gagnon v. Scarpelli*,³¹ that still provide the basic procedural rules for adjudicating suspected probation violations.³² The Court declared that once a probation officer initiates a revocation proceeding, a probationer has a right to a preliminary detention hearing and a final revocation hearing.³³ At the preliminary hearing, the court determines whether there is probable cause of a probation violation and, if so, whether to detain the probationer pending the final revocation hearing.³⁴ At the final hearing, the court will determine if there was a violation and, if so, whether to revoke probation.³⁵ Under *Morrissey* and *Scarpelli*, there is no constitutional limit to the judge's discretion to release or detain a probationer at the preliminary hearing,³⁶ meaning that the government need not provide a compelling reason justifying the detention unless a jurisdiction's own rules provide otherwise. A survey of a few probation revocation schemes shows that jurisdiction-specific protections against arbitrary probation detention range from the limited to the nonexistent, and that some systems essentially authorize probation officers to automatically detain anyone on suspicion of a probation violation.

In the federal system, judges at the preliminary hearing are authorized to "release or detain the [probationer] ... pending further proceedings."³⁷ The federal rules provide some guidance to judges by adopting the same standard that is used to determine whether to release a convicted defendant until sentencing.³⁸ Under these federal rules, a probationer must establish by clear and convincing evidence that they "will not flee or pose a danger to any other person or to the community."³⁹



Many state rules do not mention factors like flight risk and dangerousness at all. The New York rules of criminal procedure instruct only: If the court has reasonable cause to believe that [a probationer] has violated a condition of the sentence, it may commit such person to the custody of the sheriff, fix bail, release such person under non-monetary conditions or release such person on such person's own recognizance for future appearance at a hearing⁴⁰

These rules do not explain how the court is supposed to decide whether to detain the probationer.

In Massachusetts, the rules differ by court. The Superior Court guidelines, like the New York rules, merely say that judges "shall determine whether the probationer should be detained pending a final hearing, or whether bail or release on personal recognizance (with or without conditions) should be imposed."⁴¹ The Massachusetts District and Municipal Court rules similarly tell judges to determine whether the probationer should be detained until the final hearing, but also provide a list of six nonexclusive factors that the court must consider in making its detention decision.⁴² But there is no guidance on factor weight, nor the ultimate purpose of the detention, leaving vast room for arbitrary decisionmaking.⁴³

In Philadelphia, advocates recently accused the courts of not following their own rule in handling probation detainers.⁴⁴ In response, the court system abandoned the controversial rule altogether and adopted procedures that give probation officers total discretion to arrest and automatically detain any probationer who is suspected of either a technical or substantive violation.⁴⁵ Probationers are still guaranteed a preliminary probation hearing, but the rule requires only that the hearing "be held within a reasonable period" after the individual is initially detained.⁴⁶ Philadelphia tends to hold the hearings within ten days of arrest, but the hearings are before nonlawyer "trial commissioners" who lift detainers in only about twelve percent of cases.⁴⁷ The results are astonishing: on any given day, roughly half of the jail population in Philadelphia is made up of people held on probation detainers, and some probationers have been detained for months or years.⁴⁸ The situation is not much better outside of Philadelphia, where many Pennsylvania counties make probationers wait in jail for weeks or months until they have a preliminary hearing, if they hold a preliminary hearing at all.⁴⁹

Probation imposes burdensome conditions, onerous fees, and pervasive surveillance, all of which contribute to suspected probation violations.⁵⁰ New criminal violations will trigger probation revocation, even if the individual is



bound to be acquitted.⁵¹ Probation can also be revoked for noncriminal behavior. Probationers generally must obey all federal, state, and local civil laws, avoid “injurious and vicious habits” and “persons and places of disreputable or harmful character,” and work diligently to support their dependents.⁵² And the measure of one’s compliance with these conditions is judged by the “vague and moralistic standards” of a probation officer who can file a violation for as little as a missed meeting.⁵³ Unsurprisingly, the precarity and indignity of probation is not distributed equally. Probation disproportionately ensnares Black and poor people⁵⁴ and sets many up for failure by ignoring the structural realities of daily life for the poor and working class.⁵⁵ Sixty-six percent of probationers earn less than \$20,000 per year,⁵⁶ and Black people make up thirty percent of those sentenced to probation, despite making up only thirteen percent of the U.S. population.⁵⁷ Probation is also revoked for Black probationers at significantly higher rates than for their white and Hispanic counterparts, even when controlling for differences in probationer characteristics.⁵⁸

Probation is billed as an alternative to mass incarceration, and, in some ways, it is.⁵⁹ But probation also widens the net of incarceration, and the rules governing probation revocations are an important factor in determining whether probation will rehabilitate or punish.⁶⁰ Probation detention thus helps explain why probation is “a key driver of incarceration in the United States.”⁶¹ The experience of spending weeks or months in jail until an alleged probation violation is adjudicated puts immense pressure on probationers to stipulate to a violation in exchange for immediate release and a probation extension.⁶² But the longer probation lasts, the more likely it is that probation will eventually be revoked and replaced by a sentence of incarceration,⁶³ particularly now that the probation system has turned away from rehabilitation toward surveillance and violation detection.⁶⁴ Probation detention also inhibits probation completion more directly by interfering with employment — which is, ironically, a standard condition of probation.⁶⁵ All told, probation is revoked for forty percent of probationers because they either commit a new offense or a technical violation, meaning only sixty percent of people on probation successfully complete it.⁶⁶ And “[n]early a quarter of state prison admissions across the country are due to probation violations.”⁶⁷ It is no wonder that given the choice between a short jail sentence and a lengthy probation term, some people choose jail.⁶⁸

The probation revocation system rests on the widely held assumption that probationers have minimal rights. The next Part will explain why this assumption is wrong. At the very least, probationers have a right to be free from arbitrary



probation detention. II. Justifying the Right to Be Free from Arbitrary Probation Detention: The Constitution guarantees a fundamental substantive due process right to physical liberty that “protects against government power arbitrarily and oppressively exercised.”⁶⁹ Courts enforce fundamental rights through strict scrutiny, which requires deprivations of fundamental rights to be justified by a compelling governmental interest that is narrowly focused on the purpose of the deprivation.⁷⁰ This right to physical liberty provides a baseline protection against arbitrary incarceration. Of course, probation is a criminal sentence, so probationers are in a different legal position than someone who is not under community supervision. But, as this Part will explain, liberty actually *is* the norm — even on probation. That is, probationers do not lose the fundamental right to physical liberty simply by virtue of being on probation. It follows that probationers have a substantive due process right to be free from arbitrary probation detention.

A. The Fundamental Right to Physical Liberty

The Fourteenth Amendment says that no state shall “deprive any person of life, liberty, or property, without due process of law.”⁷¹ The Due Process Clause has been interpreted to provide two related but distinct forms of protection. Procedural due process, the more familiar one, is related to the adjudication used to deprive someone of life, liberty, or property. Procedural due process limits government power by requiring the state to follow certain procedures when it deprives someone of liberty.⁷² Substantive due process, on the other hand, limits government power by prohibiting the state from depriving someone of a liberty interest *even if* the adjudication meets the standards of procedural due process, unless the government provides a substantive justification.⁷³

The requisite strength of the justification depends on the strength of the right.⁷⁴ The Supreme Court has identified certain interests that are so “fundamental” that the government cannot infringe them “*at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest.”⁷⁵ In other words, a deprivation of a fundamental right is subject to strict scrutiny even if the deprivation was done pursuant to fair procedures.⁷⁶

The Supreme Court has long recognized that there is a fundamental right to physical liberty, explaining that “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”⁷⁷ And though the Court has not always been precise in its use of strict scrutiny’s language of “narrow tailoring” and “compelling interest,” it

has consistently applied the principles of strict scrutiny to pretrial detention and civil commitment schemes that impinge on physical liberty.

1. *Civil Commitment*. — The Supreme Court has recognized a “constitutional right to freedom” in the civil commitment context.⁷⁸ The Court first applied substantive due process to civil commitment in *O'Connor v. Donaldson*,⁷⁹ where it explained that psychiatric patient Kenneth Donaldson’s constitutional liberty interest triggered two substantive protections.⁸⁰ First, the government had to show a compelling purpose for the confinement, in this case dangerousness. Without proof of dangerousness, the government lacked “a constitutionally adequate purpose” and could not civilly commit someone suffering from mental illness.⁸¹ Second, the Court imposed a narrow tailoring requirement by reasoning that the existence of an alternative to confinement precluded civil commitment: “[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.”⁸² Thus, the government may commit a person to a mental institution in a civil proceeding only upon proof that mental illness makes them a danger to themselves or others.

Later, in *Foucha v. Louisiana*,⁸³ the Court explained that “[f]reedom from bodily restraint” is constitutionally protected from arbitrary government action.⁸⁴ As a result, the Court struck down a Louisiana civil commitment scheme that did not provide the opportunity for someone to prove their sanity and gain release following a successful insanity defense at trial.⁸⁵ Louisiana’s scheme, which allowed the state to confine someone indefinitely even if they were no longer mentally ill, violated the right to physical liberty because it was “not carefully limited” to and “sharply focused” on the government’s interest in public safety.⁸⁶ Together, *O'Connor* and *Foucha* confirm that the Constitution guarantees a right to physical liberty, and that strict scrutiny applies to infringements on this right, meaning that civil commitment schemes must have a compelling governmental purpose and be narrowly tailored.

2. *Pretrial Detention*. — The Supreme Court invoked its civil commitment decisions when recognizing a fundamental right to physical liberty in the pretrial detention context. In *United States v. Salerno*,⁸⁷ the Court considered a challenge to the federal Bail Reform Act of 1984,⁸⁸ which authorized pretrial detention based on dangerousness.⁸⁹ Though it reversed a Second Circuit decision holding that pretrial detention of someone based on suspicion of future crime violated substantive due process, the Court upheld the Bail Reform Act while invoking the familiar language of strict scrutiny.⁹⁰



Chief Justice Rehnquist recognized the right to pretrial physical liberty as “important[t] and fundamental,” though not inalienable.⁹¹ “[I]n circumstances where the government’s interest is sufficiently weighty,” the right to physical liberty can “be subordinated to the greater needs of society.”⁹² The Court reviewed the government’s purpose and the strength of its justification, explaining that the government’s interest in a pretrial deprivation of physical liberty must be “legitimate and compelling” and concluding that the government’s interest in crime prevention met that standard.⁹³ But a legitimate and compelling interest was not enough — the Court also emphasized that the Bail Reform Act “narrowly focuse[d] on a particularly acute problem.”⁹⁴ In other words, the Act was narrowly tailored because it applied only to people “arrested for a specific category of extremely serious offenses,” required a showing of probable cause that the defendant committed the serious offense, and imposed a standard of “clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.”⁹⁵

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