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The Parishioner & The Probationer: Make Probation Non-Profit Again

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The Parishioner & The Probationer: Make Probation Non-Profit Again

*James Rex Lee**

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INTRODUCTION

Probation officers are uniquely able to engage in both ends of the criminal justice system.¹ Not only are probation officers given back-end authority to monitor a probationer after judgement is imposed by a court, but they are also given front-end discretion to decide whether to reintroduce an offender back into the system.² This broad authority is especially worrisome in the context of

* Juris Doctor, Brigham Young University Law School, 2021. Many thanks to Professor John Fee and the BYU Law Review for their invaluable help.

1. Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679, 683 (1993).

2. *Id.* at 681-83.

private for-profit probation.³ Indeed, private probation officers currently exercise the executive function of prosecution and fee collection, the legislative function of budget management, and the judicial function of sentencing—and all with profit incentives that hardly coincide with the interests of their probationers.⁴

Accordingly, for-profit private probation practices may raise serious constitutional concerns. In fact, a unanimous Eleventh Circuit panel recently held that a private probation company had no constitutional right to independently modify probation conditions for purely financial reasons.⁵ And this decision will likely open the door for future challenges. Indeed, claimants are likely to continue challenging similar practices under both the Eighth Amendment, which prevents for-profit companies from excessively fining probationers, as well as the Due Process Clause of the Fourteenth Amendment, which similarly prohibits private probation companies from imposing sentencing enhancements solely to increase revenues.⁶

Moreover, for-profit probation companies may also raise serious ethical concerns. Indeed, scholarship continues to show that private probation companies have played an important role in the steady increase of probation fees over recent years,⁷ a trend which has undeniably stunted criminal rehabilitation.⁸ Accordingly, unethical private probation practices not only harm the individual, but they may also contribute to higher rates of recidivism.

In support of further efforts to improve the criminal justice system, Part I of this Note provides a historical account of the probation system, one which was created by non-profit,

3. See *United States v. Nash*, 438 F.3d 1302, 1306 (11th Cir. 2006) (holding that the district court committed plain error when it gave “ultimate responsibility” of one of a defendant’s probation conditions to the probation officer and emphasizing that the role of the probation officer should be primarily “ministerial”) (citations omitted).

4. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 885 (2009) (“This is particularly true where . . . there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias.”).

5. *Harper v. Pro. Prob. Servs. Inc.*, 976 F.3d 1236, 1244 (11th Cir. 2020).

6. See *Profiting from Probation: America’s “Offender-Funded” Probation Industry*, HUMAN RIGHTS WATCH 5 (Feb. 5, 2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry> [hereinafter *Profiting From Probation*].

7. See Paul Peterson, *Supervision Fees: State Policies and Practice*, 76 FED. PROB. 40, 44, (2012).

8. See Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1505–06 (2016).

religious actors. That system later became the exclusive domain of state and local governments, until it became prohibitively expensive following the massive increase in incarceration following the “War on Drugs.” Ironically, local governments have since returned probation authority to for-profit companies. In response to this history, Part II of this Note then proceeds by arguing that the current for-profit private probation system is unconstitutional under the Fourteenth and Eighth Amendments of the U.S. Constitution. Finally, Part III describes a modern non-profit private probation system in which local governments could offload some of their tremendous probation costs without violating the constitutional rights of probationers.

I. THE AMERICAN PROBATION SYSTEM

A. *The Religious Origins of Probation in the United States*

The first instance of probation in the United States occurred in 1841, when John Augustus, a Boston bootmaker, petitioned a local judge to release a man charged with the crime of public drunkenness into his custody.⁹ Deeply moved by the accused’s disheveled appearance while awaiting sentencing, Augustus expressed his concern that criminal charges would cause the drunkard to “never be a man again.”¹⁰ Following his petition and perhaps owing to Augustus’s prior experience helping alcoholics, the judge eventually agreed to defer sentencing for three weeks.¹¹ After the probationary period expired, the judge allowed the accused to go free with a nominal fine, finding that Augustus had sufficiently reformed the man.¹²

Today, a plaque on Boston’s Court Street memorializes John Augustus’s impact on the criminal justice system with the following inscription:

John Augustus—Moved by the plight of the unfortunate in the jails and prisons of his day a humble Boston shoemaker began a great movement in the reformation of offenders when in 1841 he

9. DAVID DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 22 (1962).

10. See Robert Panzarella, *Theory and Practice of Probation on Bail in the Report of John Augustus*, 66 FED. PROB. 38, 40 (2002).

11. See *id.* at 39.

12. DRESSLER, *supra* note 9, at 22–23.

took from the court for a period of probation one who, under his care and with his friendship *became a man again*.¹³

After helping his first client rediscover his humanity, Augustus would devote the rest of his life to serving the accused. Indeed, between 1841 and 1859, Augustus would spare almost 2,000 individuals from going to prison, spending his entire fortune in the process.¹⁴ Augustus not only helped many men, women, and children avoid prison, but he also helped them find shelter, clothing, food, community, and employment.¹⁵ Because according to Augustus, the purpose of the criminal justice system was “to reform criminals, and to prevent crime and not to punish maliciously, or from a spirit of revenge.”¹⁶

But not all Bostonians agreed with John Augustus’s criminal reformations. In particular, local police officers—who were receiving commissions for criminal convictions in the nineteenth century—“often suffered financially” from the evolving probationary system.¹⁷ Other members of the Boston gentry also disagreed with the idea of reintroducing the accused back into society on moral grounds. For example, one especially influential Bostonian published the following anonymous accusation in a local newspaper:

Mr. Augustus is undermining the foundations of the church, as well as the state What is to be done? I will suggest . . . that some of my aristocratic friends, go in a body to Mr. Augustus’s house after nightfall (he lives at 65 Chamber St.), and throw some bottles of coal tar through his parlor windows. If that don’t fix him, I don’t know what will.¹⁸

13. A photograph of the plaque may be found at FILE: BOSTON PUBLIC SCHOOLS HQ JOHN AUGUSTUS PLAQUE.JPG, WIKIMEDIA COMMONS, http://commons.wikimedia.org/wiki/File:Boston_Public_Schools_HQ_John_Augustus_plaque.JPG (last visited Mar. 30, 2022) (emphasis added).

14. Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 155–56 (1997).

15. Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 938 (1995).

16. JOHN AUGUSTUS, A REPORT OF THE LABORS OF JOHN AUGUSTUS 23 (Boston, Wright & Hasty 1852), Gale Nineteenth Century Collections Online.

17. Charles Lindner, *John Augustus, Father of Probation, and the Anonymous Letter*, 70 FED. PROB. 77, 77 (2006).

18. See Charles Lindner, *Thacher, Augustus, and Hill – The Path to Statutory Probation in the United States and England*, 71 FED. PROB. 36, 38 (2007) (quoting Anonymous Letter published in *Chronotype* (1847)).

Thus, “[a]s the number of cases accumulated with Mr. Augustus, so did his cares and troubles,” such that Augustus ultimately became destitute in his final years.¹⁹

Notwithstanding his unfair mistreatment, Augustus’s legacy and his idea of providing criminal defendants “a period of proving oneself” with a chance at “subsequent forgiveness” continued in the American legal system.²⁰ Most notably, not long after Augustus’s death, the State of Massachusetts created its own probation program for juvenile defendants in 1878.²¹ Following Massachusetts’s example, other governments began adopting probation systems in “attempts to avoid the mechanical application of the harsh and cruel precepts of a rigorous, repressive criminal law.”²² And by 1956, every U.S. state had adopted its own probation laws for adult and juvenile defendants.²³

Thus, private religious actors “were the early forerunners” of the probation system that exists today.²⁴ In fact, early probation officers were little more than volunteers from various religious sects—it was not until governments saw a “need for presentence investigations . . . [that] the volunteer probation officer was converted into a paid position.”²⁵

Following this era of volunteer-based, philanthropic probation, states began hiring a new probation workforce in the mid-twentieth century, consisting primarily of retired sheriffs and ex-policemen.²⁶ Unlike the previous system, these new probation officers exercised police powers.²⁷ And the transition was far from seamless. As at least one 1970s survey shows, some probation officers held largely

19. Lindner, *supra* note 17, at 78 (quoting Anonymous Letter Concerning the Labors of Mr. John Augustus (1858) (on file with the New York Historical Society)).

20. Lindner, *supra* note 18, at 38.

21. Petersilia, *supra* note 14, at 156.

22. U.N. Department of Social Affairs, *The Legal Origins of Probation*, in PROBATION, PAROLE AND COMMUNITY CORRECTIONS 81, 82 (Robert M. Carter & Leslie T. Wilkins eds., 2d ed. 1976). At common law, criminal punishments were extremely severe and conviction for any serious crime could lead to death; minor crimes were punished with beatings and mutilations. See also CHARLES LIONEL CHUTE & MARJORIE BELL, CRIME, COURTS, AND PROBATION 4 (1956).

23. Petersilia, *supra* note 14, at 156.

24. Christine S. Schloss & Leanne F. Alarid, *Standards in the Privatization of Probation Services: A Statutory Analysis*, 32 CRIM. JUST. REV. 233, 234 (2007).

25. Petersilia, *supra* note 14, at 156 (citation omitted).

26. See *id.* at 156–57.

27. *Id.*

ministerial positions, whereas others were responsible for as many as fifty different tasks, often with competing interests.²⁸

Perhaps owing to this uncertainty, some states began to reintroduce private companies back into the probation system in the mid-1970s. But it is likelier that private probation became even more attractive to states during the sharp increase of crime during the “War on Drugs” in the 1970s, as states began to realize that they could cut penal costs by outsourcing probation to private companies.²⁹ In particular, Florida was the first state to formally codify this new practice of costless probation, which authorized private entities—namely the Salvation Army—to supervise misdemeanor probationers in 1975.³⁰ Missouri, Colorado, and Tennessee followed suit in the 1980s.³¹

B. The Modern Probation Regime in the United States

Private probation took a different, and perhaps darker turn in the late 1980s, when states began to sell the debt that criminals incurred during sentencing proceedings to private companies.³² Because these private companies could use the power of local governments to secure their debts, this arrangement incentivized private businesses to increase the amount of fees and interest that each offender owed.³³ As a result, a recent study concluded that the probation practices developed during this period would eventually function as “a net-widener that played a role in the build-up of mass incarceration.”³⁴

For example, in 1990, the National Institute of Justice (“NIJ”) published an influential set of recommendations which encouraged local governments to “[m]aximize [c]orrectional [a]gencies’ [i]ncentives” to collect fines and fees from probationers; “[l]evy [f]ees on [l]arge [n]umbers of [o]ffenders” while restricting the

28. TIMOTHY L. FITZHARRIS, CA. PROB., PAROLE, & CORREC. ASSOC., PROBATION IN AN ERA OF DIMINISHING RESOURCES 19 (1979).

29. See generally Charles A. Lindquist, *The Private Sector in Corrections: Contracting Probation Services from Community Organizations*, 44 FED. PROB. 58 (1980).

30. See *id.* at 59–60; see also Schloss & Alarid, *supra* note 24, at 234.

31. See Schloss & Alarid, *supra* note 24, at 234–35.

32. *Id.*

33. See *id.* at 238–39.

34. See Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 L. & POL’Y 51, 64 (2013).

availability of fee waivers; and develop prompt and severe consequences for criminal debt.³⁵ These draconian suggestions were unfortunately adopted by many states.³⁶

In fact, by 2014, essentially every state would enact at least some form of offender-funded probation.³⁷ For example, at the low end of the spectrum, forty-nine states currently charge probationers for their electronic monitoring devices.³⁸ But many states give private probation companies a much more pronounced role in their criminal systems.

According to Human Rights Watch,³⁹ at least twelve states have given private companies near-total control over misdemeanor probationers: Alabama, Colorado, Florida, Georgia, Idaho, Michigan, Mississippi, Missouri, Montana, Tennessee, Utah, and Washington.⁴⁰ Even in states where probation is not completely privatized, for-profit businesses are often asked to provide partial probation services.⁴¹ Because most misdemeanor probation terms last anywhere between six months and several years, private companies often request warrants, commence trial proceedings, or otherwise threaten probationers with incarceration in order to ensure that each bill is paid.⁴²

Importantly, probation services are often expensive. For example, drug testing probation services, the most common probation service, carry mandatory testing fees of up to \$1,250 per year.⁴³ Another example is GPS monitoring, which usually costs

35. DALE PARENT, U.S. DEP'T OF JUST., NAT'L INST. OF JUST., RECOVERING CORRECTIONAL COSTS THROUGH OFFENDER FEES 23–24 (1990).

36. See Peterson, *supra* note 7, at 41.

37. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NAT'L PUB. RADIO (May 19, 2014), <https://perma.cc/XW4N-UWRC>.

38. *Id.*

39. *Profiting From Probation*, *supra* note 6, at 5.

40. *Id.* at 12 n.3.

41. *Id.* at 15–17.

42. Alexandra Natapoff, *Misdemeanors*, in 1 REFORMING CRIMINAL JUSTICE: INTRODUCTION AND CRIMINALIZATION 71, 83 (Erik Luna ed., 2017).

43. Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 503 (2016).

probationers \$400 to \$500 per month,⁴⁴ plus a \$179.50 setup fee.⁴⁵ Even after installation, devices such as ignition interlock machines often require monthly or bimonthly calibrations, which can cost between \$60 to \$150 each time.⁴⁶ All told, these private fees can amount to two or three times the cost that probationers were originally charged by the court,⁴⁷ sometimes requiring probationers to surrender as much as 35% of their income.⁴⁸

Moreover, these expensive fees entrench probationers in the criminal system. For example, consider the large portion of “pay only” probationers who remain in the probation system only because they “were sentenced to probation for failure to pay a fine or fee . . . [and until] a ‘pay only’ probationer settles his or her debt with the court, the probation sentence [will not] end[.]”⁴⁹ These individuals are especially vulnerable to the essentially limitless array of fines and fees at a for-profit company’s disposal, which allows the company “to offset public costs for virtually every stage, service, and component of criminal justice administration.”⁵⁰ California alone recognizes more than 3,000 fees.⁵¹

The perverse result is that private probation companies end up charging much more for the same services that used to be costless to the accused.⁵² And because local governments are the entities making these contracts, probationers are locked into expensive

44. *Set Up to Fail: The Impact of Offender-Funded Private Probation on the Poor*, HUMAN RIGHTS WATCH 44 (Feb. 20, 2018), <https://www.hrw.org/report/2018/02/20/set-fail/impact-offender-funded-private-probation-poor> [hereinafter *Set Up to Fail*].

45. Eric Markowitz, *Chain Gain 2.0: If You Can't Afford This GPS Ankle Bracelet, You Get Thrown in Jail*, INT'L BUS. TIMES (Sept. 21, 2015), <https://perma.cc/9N9J-VZ2V>.

46. *How Much Does An Ignition Interlock Device Cost?*, SMART START INC. (Oct. 22, 2020), <https://www.smartstartinc.com/blog/ignition-interlock-cost/>.

47. Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 475 (2011).

48. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 155 (2010).

49. Megan Grindstaff, *The Slow Death of a Government Contracting Model: “User-Funded” Contracts in Privatized Misdemeanor Probation Monitoring*, 48 PUB. CONT. L.J. 797, 802 (2019).

50. Darryl K. Brown, *The Case for A Trial Fee: What Money Can Buy in Criminal Process*, 107 CALIF. L. REV. 1415, 1429 (2019) (citing Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in Contemporary United States*, 115 AM. J. SOCIO. 1753, 1769–73 (2010)).

51. Harris et al., *supra* note 50, at 1759.

52. *Set Up to Fail*, *supra* note 44, at 53.

prices without the ability to select cheaper alternatives.⁵³ Indeed, many probationers end up paying off their criminal debts for the rest of their lives,⁵⁴ and if they stop paying their debts, they risk incarceration.⁵⁵

Accordingly, the ubiquitously philanthropic nature of probation is no more. In place of a system that was primarily focused on rehabilitating criminals for the sake of creating a better society, today's probation system is primarily concerned with alleviating overincarceration, a goal which has ironically resulted in unacceptably high rates of recidivism.⁵⁶ Indeed, the data confirm this trend.⁵⁷ While the probation population has increased by 329% since 1980, incarceration rates appear to be on the decline.⁵⁸ The reason for this trend may be due to the fact that probation is much cheaper than incarceration, as manifest by the astounding probationer-to-prisoner ratio in the United States: Approximately 3.6 million people are on probation,⁵⁹ whereas roughly 2.3 million people are incarcerated.⁶⁰

Tragically, the "system that was once . . . oriented by the idea of reintegration of prisoners into the community is now oriented toward isolating and containing this population."⁶¹ Accordingly, for-profit

53. See Sharon Cohen, *Poor Offenders Pay High Price When Probation Turns on Profit*, SPOKESMAN-REVIEW (Mar. 12, 2016), <http://www.spokesman.com/stories/2016/mar/12/poor-offenders-pay-high-price-when-probation-turns>.

54. Appleman, *supra* note 8, at 1485.

55. Phelps, *supra* note 34, at 64.

56. See COLUM. JUST. LAB, TOO BIG TO SUCCEED: THE IMPACT OF THE GROWTH OF COMMUNITY CORRECTIONS AND WHAT SHOULD BE DONE ABOUT IT 7 (2018), https://justicelab.columbia.edu/sites/default/files/content/Too_Big_to_Succeed_Report_FINAL.pdf.

57. See WENDY SAWYER & PETER WAGNER, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2019 (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>. This may also be because overcrowded prisons are unconstitutional. For example, in *Brown v. Plata*, the U.S. Supreme Court ruled that the overcrowded California prison, which was 300% over its capacity, violated the Eighth Amendment. 563 U.S. 493, 517-22 (2011).

58. U.S. DEPT. OF JUST., NJC 251148, PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018); U.S. DEPT. OF JUST., NJC 153849, CORRECTIONAL POPULATIONS IN THE UNITED STATES (1980).

59. ALEXI JONES, PRISON POL'Y INITIATIVE, CORRECTIONAL CONTROL 2018: INCARCERATION AND SUPERVISION BY STATE (2018), <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html>.

60. See SAWYER & WAGNER, *supra* note 57.

61. JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990, at 228 (1993).

private probation corporations do not merely supervise probationers, but rather they “mostly function as community surveillance workers” by exercising quasi-governmental authority to increase payouts.⁶²

II. FOR-PROFIT PRIVATE PROBATION: A POTENTIALLY UNCONSTITUTIONAL REGIME

Impoverished state and local governments are understandably eager to relinquish authority to private companies—after all, maintaining prisons and supervising probation is incredibly costly, while private probation is practically costless to taxpayers.⁶³ Several studies confirm this disparity. For example, the American Bar Association recently estimated that government probation services usually cost taxpayers an average of \$3,650 per probationer, per year.⁶⁴ In contrast, private probation companies have been known to charge double, triple, even *eight* times more than this amount, but to offenders rather than taxpayers.⁶⁵ And because private companies can alleviate the tax burden imposed by probation by maximizing profits, these companies have a strong incentive to “nickel and dime” their probationers for even relatively minor violations in order to maintain their job security.⁶⁶

Granted, the mere fact that private probation companies are pursuing more profits than their state-run counterparts is not enough to demonstrate a constitutional violation, as the Georgia Supreme Court recently held in 2014.⁶⁷ Unless a statute facially

62. TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE* 157 (2014).

63. Sarah Stillman, *Get Out of Jail, Inc.*, *NEW YORKER* (June 16, 2014), <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc>.

64. Kim Soffen, *The Price of Electronic Prison*, *HARV. POL. REV.* (July 14, 2014), <http://harvardpolitics.com/united-states/price-electronic-prison>.

65. Laura I. Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 *UTAH L. REV.* 579, 624 (2018) (suggesting private probation companies doubled the state’s fees); Brief for Southern Center for Human Rights as Amicus Curiae Supporting Cross-Appellant at 20, *Sentinel Offender Servs. v. Harrelson*, 286 Ga. 665 (2010) (suggesting private probation companies charge triple what the state charges); Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 *VAND. L. REV.* 71, 112 (2016) (discussing an outlier case of a private company charging eight times higher than the state’s rate).

66. Shane Bauer, *My Four Months as a Private Prison Guard—Chapter 2: Prison Experiments*, *MOTHER JONES* (July 2016), <https://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer/#chapter-2>.

67. *Sentinel Offender Servs. v. Glover*, 766 S.E.2d 456, 467 (Ga. 2014) (holding that “the mere act of privatizing these services does not violate due process” or *Bearden*).

allows a private probation company to violate due process, courts often presume that “the alleged injuries suffered by the plaintiffs are not a consequence of the privatization of probation services per se, but rather result from wrongful acts allegedly committed by [the company’s] employees.”⁶⁸

But much has changed since 2014. At the state level, the Georgia State Legislature recently began considering a bill to *statutorily* increase the monthly fees that private probation companies may charge.⁶⁹ This change could be the kind of facial hook that the Georgia Supreme Court held was lacking in 2014, especially considering that 80% of the state’s 200,000 probationers are now supervised by private companies.⁷⁰ Similarly, in 2016, two judicial candidates were elected by Arkansas voters after promising to abolish their county’s private probation system.⁷¹ As promised, these judges: (1) dissolved their county’s relationship with a private probation company, and (2) implemented an “Amnesty Days” program forgiving all fees that probationers owed to that private probation company.⁷² Accordingly, there may be a growing appetite for private probation reform at the local government level.

The federal government has also shown more interest in preventing private probation abuses since 2014. For example, in 2017, the U.S. District Court for the Middle District of Tennessee found a private probation company to be “[a]rresting and detaining probationers solely for failure to pay, without conducting an inquiry into whether the nonpayment is willful . . . precisely the conduct the Supreme Court rejected in *Bearden*.”⁷³

Given these recent developments, criminal justice claimants could see greater success in their actions against unlawful privation

68. *E.g., id.*

69. Hassan Kanu, *Constitutional Flaws in Private Probation Companies Laid Bare by 11th Circuit*, 3 WESTLAW TODAY (Oct. 2, 2020, 7:00 PM).

70. *Id.*

71. Grindstaff, *supra* note 49, at 809–10.

72. *Id.*; see also *Just. Network, Inc. v. Craighead County.*, No. 3:17CV00169 JM, 2017 WL 5762397, at *1–2 (E.D. Ark. Nov. 28, 2017), *aff’d*, 931 F.3d 753 (8th Cir. 2019).

73. *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 770 (M.D. Tenn. 2015) (citation omitted). The parties subsequently agreed to a \$14.3 million settlement. *\$14.3 Million Settlement For Probationers Subject to Extortion by Private Company*, PRISON LEGAL NEWS (May 7, 2018), <https://www.prisonlegalnews.org/news/2018/may/7/143-million-settlement-probationers-subject-extortion-private-company/>. For a more detailed discussion on *Bearden*, see *infra* at section II.A.2.

probation practices. If current trends continue, litigants are likely to challenge private probation systems under the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment of the U.S. Constitution.

A. *The Due Process Clause*

The Fourteenth Amendment guarantees probationers “due process of law” before the government may deprive them of “life, liberty, or property.”⁷⁴ In the context of private probation, challengers often bring two arguments under this clause. First, plaintiffs attempt to establish a Fourteenth Amendment violation by showing that a for-profit business⁷⁵ Second, because many judges allow private probation companies to prepare arrest warrants without even “inquir[ing] into the facts around a probationer’s alleged violation,”⁷⁶ Such state action violates *Bearden v. Georgia*, however, particularly its holding that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.⁷⁷ Each of these theories will be discussed in greater detail below.

1. *The Judicial Duty of Neutrality*

Probationers have a right to be sentenced by a fair and impartial tribunal.⁷⁸ Because most judges heavily rely on the testimonies of private probation case workers during probation hearings,⁷⁹ such reliance can become constitutionally problematic when for-profit probation officers testify out of financial self-interest.⁸⁰ Under these circumstances, an officer is more likely to recommend longer probation terms and heightened monitoring costs instead of seeking to efficiently rehabilitate probationers.⁸¹

74. U.S. CONST. amend. XIV.

75. See, e.g., *In re Murchison*, 349 U.S. 133 (1955).

76. *Profiting From Probation*, *supra* note 6.

77. 461 U.S. 660, 664 (1983) (alteration in original) (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)).

78. See, e.g., *In re Murchison*, 349 U.S. at 133.

79. *Profiting From Probation*, *supra* note 6.

80. See Joshua Holland, *Private Prison Companies Are Embracing Alternatives to Incarceration*, NATION (Aug. 23, 2016), <https://www.thenation.com/article/archive/private-prison-companies-are-embracing-alternatives-to-incarceration/>.

81. Appleman, *supra* note 65, at 591.

However, because courts have routinely determined that probation employees are officers of the court, private probation officers cannot make such self-interested recommendations. For example, in *United States v. Reyes*, the Second Circuit held that a federal probation officer functioned as the “eyes and ears” of the court, “a neutral information gatherer with loyalties to no one but the court.”⁸² And in *United States v. Espalin*, the Sixth Circuit established that when a probation officer “has an interest in the outcome of the case or some other conflict of interest, there likely would be a basis to question the probation officer’s objectivity.”⁸³ At least one state court has also held that probation officers cannot also be private investigators because such a combination would create an impermissible conflict of interest.⁸⁴

While courts have frequently held that probation officers must abide by the duty of neutrality as officers of the court, most courts have refused to recognize an inherent conflict of interest in the for-profit private probation regimes themselves.⁸⁵ For example, in Idaho, “a decade-long experiment with private probation collapsed following complaints of profiteering and illegal fees.”⁸⁶ Similarly, after a Tennessee judge illegally received tens of thousands of dollars in kickbacks from private probation companies,⁸⁷ many probationers were still afraid to leave their homes because they have seen the state’s corrupt system fine probationers for less.⁸⁸ Finally, the private probation companies “Red Hills Community Probation” and “Judicial Correction Services,” which have operations in Alabama, Georgia, and Mississippi, have been *repeatedly* sued for extortion, racketeering, and other charges.⁸⁹ And there are likely even more abuses that have not yet come to light, each of which would similarly show how private probation companies violate the judicial duty of neutrality.

82. *U.S. v. Reyes*, 283 F.3d 446, 455 (2d Cir. 2002) (internal quotation marks omitted) (citation omitted).

83. *U.S. v. Espalin*, 350 F.3d 488, 495 (6th Cir. 2003) (Lawson, J., concurring).

84. *See, e.g., Commonwealth v. Gregg*, 396 A.2d 797 (Pa. Super. Ct. 1979).

85. *See, e.g., Sentinel Offender Servs. v. Glover*, 766 S.E.2d 456, 467 (Ga. 2014) (holding that Georgia’s private probation system is not “so fundamentally unfair that it fails to comport with our notions of due process”).

86. Stillman, *supra* note 63.

87. *Id.*

88. Cohen, *supra* note 53.

89. *Id.*

An additional cause for concern is that many states permit private probation companies to be *totally exempt* from open records laws, meaning their potentially clandestine operations can be easily hidden from the public.⁹⁰ Although all fifty states plus D.C. have open records laws, each jurisdiction exempts private probation companies from such laws, except Connecticut, Florida, Tennessee, and South Carolina.⁹¹ Furthermore, “[s]tates rarely regulate the fees charged by private probation companies, allowing them to charge whatever amount they desire.”⁹² Even the cost of a single drug test imposed by a private probation company, for example, can range from \$5–50.⁹³ Therefore, without the ability to conduct thorough information requests, it is difficult to determine how much private probation companies profit over the routine management of their probationers.

This evidence suggests that many private probation companies are no longer “performing adjudicatory functions . . . under contract, set by a municipal judge or prosecutor.”⁹⁴ For example, the FBI recently filed a complaint alleging that “the significant extent to which revenue considerations have shaped court operation” in Missouri was enough to *infer* that the State had “undermine[d] the fundamental fairness and impartiality of the court in violation” of constitutional due process.⁹⁵ Thus, federal courts may have an appetite to begin inquiring into whether the fee-collecting incentives and other profit-maximizing strategies of private probation companies similarly shape court operations in violation of the Due Process Clause.⁹⁶

90. See, e.g., Geraghty & Velez, *supra* note 47, at 475-476 (discussing GA. CODE ANN. § 42-8-106 (2010)).

91. CITIZENS FOR RESP. & ETHICS IN WASH., PRIVATE PRISONS A BASTION OF SECRECY 19 (2014), https://www.prisonlegalnews.org/media/publications/CREW_Private_Prisons_FOIA_secrecy_report_02_18_2014.pdf.

92. Laura I. Appleman, *The Treatment-Industrial Complex: Alternative Corrections, Private Prison Companies, and Criminal Justice Debt*, HARV. C.R.-C.L. L. REV. 1, 7-8 (2020).

93. See TARA GAMBOA-EASTMAN, W. CENT. ON L. & POVERTY, THE PROBLEM WITH PROBATION: A STUDY OF THE RACIAL AND ECONOMIC IMPACT OF PROBATION FEES IN CALIFORNIA 9 (2018), https://wclp.org/wp-content/uploads/2018/06/TheProblemWithProbation_GamboaEastman_ForWCLP_Final.pdf.

94. Kanu, *supra* note 69, at 2.

95. See Complaint at 23, *United States v. City of Ferguson*, No. 4:16-cv-00180 (E.D. Mo. filed Feb. 10, 2016).

96. *Profiting From Probation*, *supra* note 6.

Regardless, although courts are somewhat hesitant to presume that profit-maximizing probation companies inherently violate the interests of probationers when they testify in hearings or prepare warrants,⁹⁷ courts are condemning several *specific* private probation practices. For example, a unanimous court for the Eleventh Circuit recently held that a private probation company violated the Due Process Clause because it could freely: (1) “extend[] the duration of probation,” such as when it changed a sentence from one year to two years; (2) “increase[] the fines that probationers owed,” by as much as \$100 in some cases; and (3) “add[] substantive conditions of probation,” including ad hoc requirements that probationers abstain from alcohol.⁹⁸ Accordingly, because the private company made these alterations without any meaningful review from a municipal judge, “its revenue depended directly and materially on whether and how it made sentencing decisions,” a textbook example of non-neutrality.⁹⁹

Therefore, private probation companies that similarly benefit “directly and materially” from their own sentencing recommendations may be held liable as well.¹⁰⁰

2. *Bearden v. Georgia*

Additionally, various private probation companies could also be violating the Supreme Court’s holding in *Bearden v. Georgia*.¹⁰¹ In *Bearden*, the Court held that the Fourteenth Amendment prevents courts from revoking probation merely for a defendant’s willful nonpayment of fines and restitution.¹⁰² More specifically, the *Bearden* Court determined that courts must make findings as to whether nonpayment was willful or whether “the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so” before revoking a defendant’s probation.¹⁰³

However, because *Bearden* also allows each state to determine what constitutes an individual’s willful refusal to pay, *Bearden*

97. *Id.* at 5.

98. *Harper v. Pro. Prob. Servs. Inc.*, 976 F.3d 1236, 1238–39 (11th Cir. 2020).

99. *Id.* at 1244.

100. *See id.*

101. 461 U.S. 660 (1983).

102. *Id.*

103. *Id.* at 672.

means different things to different courts,¹⁰⁴ making it relatively easy for some local governments to bypass.¹⁰⁵

For example, some courts have held that *Bearden* does not apply when defendants are given a choice between a large fine, jail time, or probation plus community service—which judges are often statutorily required to do.¹⁰⁶ According to these courts, *Bearden* “does not bar sentencing a defendant to probation or jail if the defendant is unable to pay a fine instead.”¹⁰⁷ Worse, according to the ACLU, a handful of states implementing private probation services do not even hold hearings to determine whether a probationer can pay at all.¹⁰⁸

This inconsistency is particularly concerning in the private probation context, where many courts rely on probation services to determine whether an offender is unable to pay fines or fees.¹⁰⁹ This reliance often takes the form of hearing testimonies from private probation officers at violation hearings, or allowing self-interested private probation officers to make *ex parte* recommendations and even draft their own warrants.¹¹⁰ Making matters worse, “[t]he concurrence between the probation officer’s recommendation and the actual sentence imposed in most cases underscores the federal courts’ heavy reliance on the probation officer’s expertise.”¹¹¹ Because it is much cheaper for a private probation company to request that a probationer be incarcerated than it is for a company to continue providing services for indigent probationers, private probation case workers have an incentive to violate *Bearden*.¹¹² Similarly, private probation companies have “little financial incentive” to report probationers who violate the conditions of their

104. See Shapiro, *supra* note 37.

105. CIV. RTS. DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 57–58 (2015) (describing municipal court practices as “directly at odds” with *Bearden*).

106. Brown, *supra* note 50, at 1433 (citing *Shanklin v. State*, 211 So. 3d 757, 760 (Miss. Ct. App. 2016)); see *Developments in the Law: Policing*, 128 HARV. L. REV. 1723, 1740–41 (2015).

107. Brown, *supra* note 50, at 1433 (emphasis added).

108. *State Bans on Debtors’ Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1027–28 (2016).

109. *Profiting From Probation*, *supra* note 6, at 68.

110. *Id.* at 70.

111. Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1613, 1668 (1980).

112. *Developments in the Law: Policing*, 128 HARV. L. REV. 1706, 1735 (2015).

release but consistently make their payments, which is equally constitutionally problematic.¹¹³

Thus, self-interested private probation officers can frustrate the kind of thorough inquiry required by *Bearden*.¹¹⁴ “‘Automatic’ conversion of a [defaulted] fine into a jail term is forbidden by the Equal Protection Clause.”¹¹⁵ Although *Bearden* only weakly constrains courts when they consider a defendant’s inability to pay in the context of public probation,¹¹⁶ perhaps *Bearden* should apply with even greater force in the context of private probation.¹¹⁷

In fact, at least one federal district court agrees with this argument. In September 2017, the U.S. District Court for the Middle District of Tennessee found that a private probation company was unconstitutionally “[a]rresting and detaining probationers solely for failure to pay, without conducting an inquiry into whether the nonpayment is willful[,] . . . precisely the conduct the Supreme Court rejected in *Bearden*”¹¹⁸ In particular, the court found that the private probation company was “trap[ping] probationers in a pernicious cycle for years on end” by conditioning probation on payment, seeking arrest warrants when payments were late, and then “settling” with criminal defendants by slapping on a longer probation term in lieu of prison time.¹¹⁹ And this was all done without ever inquiring into a probationer’s indigent status.

Therefore, for the reasons articulated above, *Bearden* could lend additional support to prospective challengers of for-profit private probation.¹²⁰

B. Excessive Fines

In *Timbs v. Indiana*, the U.S. Supreme Court recently held that the Eighth Amendment limits the ability of state and local

113. *Id.*

114. *Profiting From Probation*, *supra* note 6, at 5.

115. *Bearden v. Georgia*, 461 U.S. 660, 676 (1983) (White, J., concurring).

116. See Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 524 (2011); LAUREN-BROOKE EISEN, BRENNAN CTR. FOR JUST., CHARGING INMATES PERPETUATES MASS INCARCERATION 1–2 (2015).

117. *Brown*, *supra* note 50, at 1434.

118. *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 770 (M.D. Tenn. 2015).

119. *Id.* at 764.

120. *State Bans on Debtors’ Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1027 (2016).

governments to impose excessive fines on probationers.¹²¹ Writing for the majority, Justice Ginsburg noted that “[e]xorbitant tolls undermine other constitutional liberties . . . [as] fines may be employed ‘in a measure out of accord with the penal goals of retribution and deterrence,’ for ‘fines are a source of revenue,’ while other forms of punishment ‘cost a State money.’”¹²² Justice Thomas, in his separate concurring opinion, also noted how the Eighth Amendment was likely created in response to the English Stuarts, whose “strong interest” in criminal fines “had a tendency to aggravate the punishment” beyond what the law should have allowed.¹²³

Like the government actors addressed in *Timbs*, for-profit probation companies similarly have a “strong interest” in costs and fees, which in turn, likely “aggravate the punishment” imposed on probationers. This financial incentive offends “both the appearance and reality of fairness.”¹²⁴ Indeed, private probation companies have contributed to the constant rise in supervision fees charged to probationers and parolees over the last forty years,¹²⁵ all while state statutes frequently prohibit courts from considering an offender’s indigent status when imposing fees and collection costs.¹²⁶ It is therefore no wonder why a judge recently described a private probation company’s practices as “a judicially sanctioned extortion racket.”¹²⁷ At least to a certain extent, private probation companies *survive* by fining excessively—otherwise they could not turn a profit.¹²⁸

Crucially, private probation companies have many fees at their disposal. In particular, these companies can impose: (1) flat rate supervision fees per month,¹²⁹ (2) specific probation services fees

121. *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

122. *Id.* at 689 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991) (citations omitted)).

123. *Id.* at 694 (Thomas, J., concurring) (quoting 1 Hallam 490).

124. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

125. See Peterson, *supra* note 7, at 41.

126. Beth A. Colgan, *Revising the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 289 (2014).

127. Ethan Bronner, *Judge in Alabama Halts Private Probation*, N.Y. TIMES (July 13, 2012), <http://www.nytimes.com/2012/07/14/us/judge-in-alabama-halts-private-probation.html>.

128. Private probationary and parole supervision companies are thriving, even though their contracts attempt to limit their profits. Appleman, *supra* note 8, at 1497–98 (describing the mergers and acquisitions of several private firms and probationer monitoring companies).

129. Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L. J. 1381, 1407 (2018).

per drug test,¹³⁰ (3) fines owed for punishment, including any outstanding amounts owed by “pay only” probationers,¹³¹ (4) enrollment costs, and (5) other trumped-up surcharges.¹³² Regardless of the method of fee collection, these fees are *excessive*. For example, private probation companies “have been known to game the process to create extra costs, such as insisting that defendants serve their sentences consecutively, not concurrently[,]” and most private probation companies charge substantial interest on unpaid debts.¹³³

Moreover, these fees or “costs of probation” are also almost impossible for probationers to pay off. Only about half of private probationers successfully meet their supervision obligations—many of which pertain to the payment of supervision services—whereas the other half is either sentenced to jail or else enters into a settlement agreement with the private probation company, resulting in even more probation fees and time.¹³⁴ Failing probation is therefore so likely to result in incarceration that the majority of individuals charged with crimes are actually assessed as “economic sanctions.”¹³⁵

This self-perpetuating aspect of private probation fees was at the heart of the aforementioned case from the U.S. District Court for the Middle District of Tennessee.¹³⁶ In that case, the court found that a private probation company had unconstitutionally “trap[ped] probationers in a pernicious cycle for years on end” by conditioning probation on payment, seeking arrest warrants when payments were late, and then “settling” with criminal defendants by slapping on a longer probation term in lieu of prison time.¹³⁷ In fact, one of the plaintiff’s probation terms had “been extended at least five times” using this tactic, “leaving her trapped” by the private probation company for multiple years.¹³⁸

130. Grindstaff, *supra* note 49, at 802.

131. *Id.*

132. See Ronald F. Wright & Wayne A. Logan, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1177 (2014).

133. Appleman, *supra* note 8, at 1496–97.

134. JONES, *supra* note 59.

135. Harris et al., *supra* note 50, at 1785–86. See *supra* Section II.B on fees paid.

136. *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015).

137. *Id.* at 764.

138. *Id.*

This kind of “pernicious cycle” implicates the Eighth Amendment. Indeed, the U.S. Supreme Court has “always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty.”¹³⁹ This “sensitivity” would persist even if private probation officers only had an *indirect* pecuniary interest in the outcome of a case.¹⁴⁰ But many private probation companies often have *direct* incentives to delay probation and acquire more fees.¹⁴¹ Just look to the State of Georgia, where private probation companies collected more than \$120 million dollars in 2016 alone.¹⁴² This means that private companies collected 80% of all monies collected from probationers in Georgia courts that year.¹⁴³ Accordingly, such “[e]xorbitant tolls” are a much more substantial “source of revenue” than those in *Timbs*,¹⁴⁴ and should be subject to heightened Eighth Amendment scrutiny.

For these reasons, claimants should be able to challenge the particularly egregious practice of private probation companies under both the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment.

III. NON-PROFIT PRIVATE PROBATION: A LAWFUL & FRUITFUL ALTERNATIVE

A. *The Relative Advantages of Religious Non-Profit Probation*

Since its incipiency, American probation was created in response to “the harsh and cruel precepts of a rigorous, repressive criminal law.”¹⁴⁵ Even the word “probation” itself was deliberately selected to communicate society’s willingness to provide a “period

139. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987).

140. *See Ward v. Monroeville*, 409 U.S. 57, 61–62 (1972).

141. *See Carrie Teegardin, March Madness Bounty Put Squeeze on Sentinel Probationers*, ATLANTA J.-CONST. (Mar. 4, 2016), <https://www.ajc.com/blog/investigations/march-madness-bounty-put-squeeze-sentinel-probationers/6bjNWqlxQqv4cuMkr5SKP/>.

142. Akiva Freidlin, *The Poor Shouldn’t Pay for Punishment*, SLATE MAG. (Apr. 19, 2017, 3:57 PM), <https://slate.com/news-and-politics/2017/04/georgias-pay-only-systemfunded-government-at-the-expense-of-the-poor.html>.

143. RAY KHALFANI, GA. BUDGET & POL’Y INST., UNJUST REVENUE FROM AN IMBALANCED CRIMINAL LEGAL SYSTEM: HOW GEORGIA’S FINES AND FEES WORSEN RACIAL INEQUITY 7 (2021), <https://gbpi.org/wp-content/uploads/2021/12/FinesAndFees.pdf>.

144. *Timbs v. Indiana*, 139 S. Ct. 682, 684, 689 (2019).

145. *U.N. Department of Social Affairs, supra* note 22, at 81, 82.

of proving oneself” to the accused, with a chance of “subsequent forgiveness.”¹⁴⁶ Indeed, the “Father of Probation,” John Augustus, described the process of providing the first probation services in the United States as one in which: “Great care was observed . . . to take into consideration the previous character of the person, his age, and the influences by which he would in future be likely to be surrounded”¹⁴⁷ Most notably, Augustus primarily looked for probation workers who were known for having “a good heart.”¹⁴⁸ Thus, most of the early probation officers in the United States were “drawn from Catholic, Protestant, and Jewish church groups.”¹⁴⁹

Given this history, it is therefore tragic that a “system that was once for so long oriented by the idea of reintegration of prisoners into the community is now oriented toward isolating and containing this population.”¹⁵⁰ As mentioned in the beginning of this Note, since the states have preempted probation services, the only remaining private probation providers are *for-profit* companies, which, unlike their nineteenth century predecessors, are no longer “principally concerned with enhancing the public good.”¹⁵¹ Perhaps for this reason, for-profit probation officers are not typically immunized from liability, as “the public interest would be disserved by immunizing a profit-driven corporation because such immunity would enable the corporation to prioritize pennies over probationers without fear of accountability.”¹⁵²

Yet this Note is not anti-probation. Quite the opposite: Probation is a good cost-effective alternative to incarceration for most non-violent misdemeanants, which individually cost governments an average of \$33,274 per year.¹⁵³ Neither is this Note anti-private probation. Although the preceding Section shows how for-profit private probation companies are likely violating the Constitution, this Note ultimately concludes that *non-profit* private

146. Lindner, *supra* note 18, at 38.

147. AUGUSTUS, *supra* note 16, at 34.

148. Petersilia, *supra* note 14, at 156.

149. *Id.*

150. SIMON, *supra* note 61, at 228.

151. Wyatt v. Cole, 504 U.S. 158, 168 (1992).

152. Rodriguez v. Providence Cmty. Corr., Inc., 191 F.Supp.3d 758, 768 (M.D. Tenn. 2016).

153. *Prison Spending In 2015*, VERA INST. OF JUST., <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> (last visited Apr. 10, 2022).

probation institutions could fundamentally reduce criminal activity in the United States. Indeed, by safeguarding “[a] person’s connection to their community, through employment, family ties, religious practices, and social activities,” non-profit private probation could dramatically increase each probationer’s social capital: “one of the *strongest* protectors against criminal justice contact.”¹⁵⁴

Most notably, of the many potential non-profit interests, religious institutions are probably the best situated to continue John Augustus’s legacy of “reforming offenders” through friendship rather than through an exploitative payer-provider relationship.¹⁵⁵ Indeed, religious institutions are already playing an increasingly important role in the related area of jail bonds, which all kinds of misdemeanants access each year to achieve “the goal of moving towards larger changes in local criminal justice practices.”¹⁵⁶ Especially considering the important role that a diverse set of religious institutions played in *creating* the American probation system, there is good reason to believe that religious institutions could *continue* to serve secular and non-secular probationers today. For unlike their self-interested, for-profit counterparts, religious institutions have a legacy of advancing the interests of probationers per their “broader beliefs regarding the overuse of [criminal penalties] among particular neighborhoods, racial or socioeconomic groups”¹⁵⁷ The same can be said for non-religious, but philanthropic non-profits. But religious institutions have always played a unique role in American probation.

At the time of this Note’s publication, there are currently few – if any – religious probation services in operation. To surmise what non-profit, religiously funded private probation might look like, however, one need only examine the related sector of alternative conviction rehabilitation, where religions are sometimes allowed to operate.

Preliminarily, just as many probationers are required to use alcohol breathalyzers or take drug panel tests, many drug offenders are similarly required to receive addiction treatment care.

154. Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 680 (2019) (emphasis added).

155. See *supra* note 13 and accompanying text.

156. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 600 (2017).

157. *Id.*; see also ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY 49-50 (1999).

Indeed, roughly 80% of criminal offenders have abused drugs or alcohol on at least one occasion, and almost 50% struggle with ongoing addictions to the same.¹⁵⁸ Incarcerating these low-level drug offenders rarely results in rehabilitation, however, which is why several states such as California actually divert all drug court offenders to treatment programs instead of prisons.¹⁵⁹ Notably, most of these rehabilitation centers are for-profit: and they often cost hundreds of thousands of dollars and “have a poor track record, far worse than non-profit halfway houses and rehabilitation centers.”¹⁶⁰

Faith-based rehabilitation centers, by contrast, have an excellent addiction recovery record.¹⁶¹ In fact, some of the nation’s best-known recovery programs – Alcoholics Anonymous and Narcotics Anonymous – are expressly faith-based.¹⁶² Moreover, faith-based programs often boast lower recidivism rates than their state-run and for-profit counterparts.¹⁶³ For example, one study found that while graduates of a *religious* rehabilitation program had a three-year recidivism rate of 16%, graduates from a comparably similar *secular* program had a much higher rate of 36%.¹⁶⁴ These effects also improve over time. According to another study, even one faith-based session resulted in a recidivism rate of 18%, but 10 sessions lowered the rate to 9%.¹⁶⁵

These results apply to the specific context of private probation as well. For example, one study found that religious programs resulted in comparatively fewer infractions and misconduct,

158. *Drug Use and Crime: Drugs and Crime Facts*, U.S. BUREAU OF JUST. STAT., <https://bjs.ojp.gov/drugs-and-crime-facts/drug-use-and-crime> (last visited Apr. 10, 2022).

159. See, e.g., Cal. Penal Code §§ 1210(a)-(d), 3063.1.

160. Appleman, *supra* note 65, at 592.

161. U.S. DEP’T OF JUST. NAT’L INST. OF CORRS., RESIDENTIAL FAITH-BASED PROGRAMS IN STATE CORRECTIONS (2005), <https://s3.amazonaws.com/static.nicic.gov/Library/020820.pdf> (last visited Apr. 10, 2022).

162. See Max Dehn, *How It Works: Sobriety Sentencing, the Constitution, and Alcoholics Anonymous*, 10 MICH. ST. U. J. MED. & L. 255, 296 (2006).

163. See Lisa Hutchinson Wallace, Stacy C. Moak & Nathan T. Moore, *Religion as An Insulator of Delinquency in Schools*, 29 AM. J. CRIM. JUST. 217 (2005).

164. Byron R. Johnson, *Assessing the Impact of Religious Programs and Prison Industry on Recidivism: An Exploratory Study*, 28 TEX. J. CORR. 1, 7 (2002).

165. Byron R. Johnson, *Religious Programs and Recidivism Among Former Inmates in Prison Fellowship Programs: A Long-Term Follow-Up Study*, 21 JUST. Q. 329, 347 (2004). Like many social science studies, the true statistical significance of these studies may be open to some debate, however.

presumably including probation terms as well.¹⁶⁶ Additionally, one study found that the benefits from participating in religious programs persist even after controlling for religious belief, temperament, sex, race, and other factors.¹⁶⁷ Thus, even non-religious or atheist participants similarly benefit from faith-based programs as well.¹⁶⁸

At the very least, these studies demonstrate how “major religious organizations . . . are often intricately involved in post-incarcerative life.”¹⁶⁹ Indeed, religious organizations built the probation system, and that legacy has since become “hardwired into our historical and constitutional understanding of criminal justice.”¹⁷⁰ As such, religious organizations are uniquely able to make “the enforcement of criminal law more responsive to the values, priorities, and felt needs of local communities.”¹⁷¹ Because they have done so for centuries.

B. The Potential Pitfalls of Religious Non-Profit Probation

Admittedly, religious institutions are certainly capable of violating probationers’ First Amendment rights by forcing religious tenets on program participants. For example, religious institutions could potentially subvert the Thirteenth Amendment by “pervert[ing] prison reform into a neoliberal variation of convict leasing, in which industry and state collude to redeem

166. Scott D. Camp, Dawn M. Daggett, Okyun Kwon & Jody Klein-Saffran, *The Effect of Faith Program Participation on Prison Misconduct: The Life Connections Program*, 36 J. CRIM. JUST. 389 (2008).

167. Kent R. Kerley, Heith Copes, Richard Tewksbury & Dean A. Dabney, *Examining the Relationship Between Religiosity and Self-Control as Predictors of Prison Deviance*, 55 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY. 1251 (2011).

168. Melvina T. Sumter, *Religiousness and Post-Release Community Adjustment* (Aug. 3, 1999) (Ph.D. dissertation, Florida State University) <https://www.google.com/url?sa=t&rcct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewipttmX9un2AhVWg3IEHSFB1IQFnoECAgQAQ&url=https%3A%2F%2Fwww.ojp.gov%2Fpdffiles1%2Fnij%2Fgrants%2F184508.pdf&usg=AOvVaw3axHeyU-lqdcxX1HUunsFZ> (last visited Apr. 10, 2022).

169. Appleman, *supra* note 65, at 633.

170. *Id.* at 621.

171. Stephen F. Smith, *Localism and Capital Punishment*, 64 VAND. L. REV. EN BANC 105, 110 (2011).

society's undesirables."¹⁷² A similar argument was recently brought against the Oklahoma-based Christian Alcoholics & Addicts in Recovery (CAAIR),¹⁷³ a chicken ranch maintained by offenders who work there in lieu of prison, and who have the opportunity to receive a \$1,000 stipend upon completing its faith-based program.¹⁷⁴ Allegedly, these offenders "commonly suffer acid burns, machine injuries, and bacterial infections" without receiving proper medical attention, and are then threatened with prison time if they "work too slowly."¹⁷⁵ CAAIR has also been criticized for primarily using "work and prayer" to treat their probationers' drug and alcohol addictions,¹⁷⁶ when at least some of them probably require professional rehabilitation treatment.¹⁷⁷

Although CAAIR is still in operation today, this example shows how religious institutions might exploit convicts.¹⁷⁸ Although non-profit religious organizations may not have the same direct financial incentive to impose costly fees on probationers, non-profit organizations still have to balance their financial accounts like any other business. Thus, even religious organizations could theoretically exploit cheap convict labor to satisfy their own self-interest, or at least prescribe the relatively costless "work and prayer" solution on occasions where professional medical care is probably required.

Second, faith-based probation services could potentially violate the Establishment Clause of the First Amendment as well. For example, the Second Circuit has held that mandating Alcoholics Anonymous meetings can constitute an unconstitutional establishment of religion when "[n]either the probation

172. Michelle Chen, *How Prison Reform Could Turn the Prison-Industrial Complex into the Treatment-Industrial Complex*, NATION (Nov. 20, 2015), <https://www.thenation.com/article/archive/how-prison-reform-could-turn-the-prison-industrial-complex-into-the-treatment-industrial-complex/> (internal quotation marks omitted).

173. Amy Julia Harris & Shoshana Walter, *They Thought They Were Going to Rehab. They Ended Up in Chicken Plants*, REVEAL (Oct. 4, 2017), <https://www.revealnews.org/article/they-thought-they-were-going-to-rehab-they-ended-up-in-chicken-plants>.

174. In 2014, only 25% of probationers completed CAAIR's recovery program. *Id.*

175. Appleman, *supra* note 92, at 19.

176. Cory Doctorow, *Prisoners Sent to Christian "Rehab" Diversion Programs Find Themselves in Forced-Labor Camps*, BOINGBOING (Oct. 5, 2017), <https://boingboing.net/2017/10/05/exactly-what-jesus-would-do.html>. Church attendance is required the first four months. Harris & Walter, *supra* note 173.

177. See Doctorow, *supra* note 176.

178. *Id.*

recommendation, nor the court's sentence, offered [defendant] any choice among therapy programs."¹⁷⁹ Thus, because AA's twelve-step approach instructs its members to admit that only God can lead them to addiction recovery,¹⁸⁰ the Second Circuit found that the defendant was unconstitutionally "coerced into participating in these religious exercises by virtue of his probation sentence."¹⁸¹

On balance, however, these potentially unconstitutional practices are unlikely to occur in the context of religious, non-profit private probation for the following reasons.

First, unlike the highly deferential rational basis standard that governs most contracts between governments and private probation companies,¹⁸² contracts with religious actors are often subject to heightened scrutiny.¹⁸³ This fact alone, in addition to the high probability that religious organizations would lose their congregants if they violated the law, makes it relatively unlikely that religious probation services would be able to exploit their probationers in violation of the First, Eighth, Thirteenth, and Fourteenth Amendments.

Moreover, unlike private probation companies, religious probation services would not depend on the fees charged to their probationers. Rather, given that American religions are already able to spend \$1.2 trillion on other publicly available programs and services each year without exploiting the populations they serve, it is unlikely that things would be any different in the private probation context.¹⁸⁴ Indeed, religious organizations have consistently spent more money on charitable endeavors than the combined annual revenues of the ten largest tech companies in the United States (including Amazon, Apple, and Google).¹⁸⁵

179. *Warner v. Orange Cnty. Dep't of Prob.*, 115 F.3d 1068, 1075 (2d Cir. 1996).

180. *Id.* at 1070; *see also Kerr v. Farrey*, 95 F.3d 472, 479–80 (7th Cir. 1996) (holding the same, but in the context of an inmate's requirement to attend Narcotics Anonymous meetings).

181. *Warner*, 115 F.3d at 1075.

182. *E.g.*, *Sentinel Offender Servs. v. Glover*, 766 S.E.2d 456, 470 (2014) (holding that "the only restriction" between the private company and the government "is that the conditions of probation it imposes be reasonable").

183. *E.g.*, *Warner*, 115 F.3d at 1076 (holding that "the non-sectarian nature of the A.A. experience" ensures that its practices are subject to "Establishment Clause scrutiny").

184. *See* Brian J. Grim & Melissa E. Grim, *The Socio-Economic Contribution of Religion to American Society: An Empirical Analysis*, 12 *INTERDISC. J. RES. ON RELIGION* 2, 24–25 (2016).

185. *Id.* at 2; *see also* Margaret Visnji, *US Top 10 Technology. Companies by 2016 Revenue, REVENUES AND PROFITS* (Feb. 23, 2019), <https://revenuesandprofits.com/us-top-10-technology-companies-by-2016-revenues/>.

Several years ago, the Catholic Church reaffirmed that “prisoners must be respected and treated humanely,”¹⁸⁶ and that each offender must always retain “the possibility of redemption.”¹⁸⁷ Compare that supportive statement to an Alabama judge’s relatively recent description of a for-profit probation service, calling it a “disgraceful” and “judicially sanctioned extortion racket” against probationers.¹⁸⁸

Second, the Establishment Clause is not implicated where probationers have a “genuine and independent private choice. . . . without regard to the sectarian-nonsectarian, or public-nonpublic nature” of the probation service at issue.¹⁸⁹ Thus, so long as probationers maintain some private choice, religious institutions should be able to provide non-profit probation services. The necessary extent of the probationer’s choice is not very demanding either: courts may compel participation in faith-based programs such as those provided by Alcoholics Anonymous so long as the religious *aspects* of the program remain optional.¹⁹⁰

Moreover, the fact that “Catholic, Protestant, and Jewish church groups”¹⁹¹ have provided probation services long before the government ever became involved is significant under the Court’s recent Establishment Clause holding in *American Legion*.¹⁹² Indeed, “[c]haritable organizations with religious affiliations historically have provided social services with the support of their communities and without controversy.”¹⁹³ And religious organizations should continue to provide such services so long as the beneficiaries are free to opt for secular alternatives.

Therefore, given the relative advantages of non-profit religious probation over for-profit probation, states should seriously

186. See CATECHISM OF THE CATHOLIC CHURCH § 2313 (discussing the treatment of prisoners of war).

187. See also CATECHISM OF THE CATHOLIC CHURCH § 2267.

188. *Burdette v. Town of Harpersville*, No. CV 2010-900183, 2012 WL 2995326 (Ala. Cir. Ct., Shelby Cnty. July 11, 2012).

189. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 425 (8th Cir. 2007) (citing *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 488 (1986)) (citations omitted); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002) (citing *Comm. for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)).

190. *Gray v. Johnson*, 436 F. Supp. 2d 795, 802 (W.D. Va. 2006).

191. *Petersilia*, *supra* note 14, at 156.

192. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019).

193. *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) (citing S. Rep. No. 98-496, p. 10 (1984)).

consider returning the reins to the selfless and community-minded religious actors who created the American probation system in the first place.¹⁹⁴

CONCLUSION

According to the U.S. Supreme Court, the law has “always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty.”¹⁹⁵ Indeed, the Due Process and Excessive Fines Clauses of the Constitution prohibit the ways in which many for-profit companies “trap probationers in a pernicious cycle for years on end.”¹⁹⁶

In addition to these constitutional requirements, there are also important *moral* obligations to continue John Augustus’s “great movement in the reformation of offenders.”¹⁹⁷ Like the common law precedents establishing prisoner rights, this moral legacy of restoring each offender’s sense of humanity is equally “hardwired into our historical and constitutional understanding of criminal justice.”¹⁹⁸ As such, the religious institutions that initially created this morality-based probation system should continue to play a role in ensuring that “the enforcement of criminal law [is] more responsive to the values, priorities, and felt needs of local communities.”¹⁹⁹

Indeed, “[c]haritable organizations with religious affiliations historically have provided social services with the support of their communities and without controversy,” and they should continue to do so as long as their beneficiaries are free to decide between secular or non-secular alternatives.²⁰⁰ Granted, some may argue that this practice risks allowing faith-based programs to accomplish their “ulterior motives and intentions” of coercing religious expression.²⁰¹ But for the reasons articulated *supra*, such contentions are ultimately misguided.

194. Petersilia, *supra* note 14, at 156.

195. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987).

196. *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 763 (M.D. Tenn. 2015).

197. *See supra* text accompanying note 13.

198. Appleman, *supra* note 65, at 621.

199. Smith, *supra* note 171, at 110.

200. *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988).

201. Christopher M. Meissner, *Prayer or Prison: The Unconstitutionality of Mandatory Faith-Based Substance Abuse Treatment*, 54 CLEV. ST. L. REV. 671, 710 (2006).

First, the private choice of probationers to choose between sentencing options—as many statutes already require judges to do—eliminates any Establishment Clause concerns.²⁰² Second, there are sound policy reasons to support religious probation services: Studies have shown that religious programs more effectively reform criminals than their for-profit and state-run counterparts, and for both religious and non-religious offenders alike.²⁰³ Finally, religious organizations have almost always been “intricately involved in post-incarcerative life,”²⁰⁴ and a probationer’s connection to her community through religious services continues to be “one of the strongest protectors against criminal justice contact.”²⁰⁵ Thus, the uniquely important role that religious organizations have played in the criminal justice system should be formally re-recognized in the probation services context.

Consequently, we should not forget that the whole reason that probation exists in the first place is because a group of religious actors wished to disrupt the government’s “mechanical application of the harsh and cruel precepts of a rigorous, repressive criminal law.”²⁰⁶ Yet only a few decades after probation was invented to provide relief *from* the government, the states took that system back for themselves, only delegating their authority to for-profit actors after concluding it would allow them to eliminate their government debts. But probation still exists to provide relief from “repressive criminal law” —from the government itself and from the for-profit entities that do the government’s bidding. The call for probation reform is therefore just as necessary in our day as it was in John Augustus’s time. For in the words of Thomas Jefferson: “The boisterous sea of liberty is never without a wave.”²⁰⁷ And given the recent number of successful challenges against probation companies, the tides are already turning. Let’s make probation non-profit again.

202. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 425 (8th Cir. 2007); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

203. *See supra* notes 168.

204. Appleman, *supra* note 65, at 633.

205. Arnett, *supra* note 154, at 680.

206. *U.N. Department of Social Affairs*, *supra* note 22, at 81–82.

207. Letter from Thomas Jefferson to Richard Rush (Oct. 20, 1820), in FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/98-01-02-1599>.

