

**SAMPLE LEGISLATION**

# **SAMPLE LEGISLATION ON PROBATION**

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## This is the product of The Justice Collaborative Sentencing Task Force

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## Background Information on Probation

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### INTRODUCTION

This nation's probation system was devised as an alternative to incarceration that permitted convicted individuals to remain in their communities while participating in rehabilitative interventions. By addressing the root causes of crime, targeted interventions were able to keep individuals out of jail on two fronts—by avoiding incarceration initially and reducing recidivism in the longer term. These are worthwhile goals and for many offenses that now result in incarceration, probation should instead be the presumptive sentence.

However, the probation system as it currently operates must be changed back to what it was originally intended to do: a system to address people's needs in order to reduce crime in the community. In the last decades, probation in this country has transformed into a system focused on control and supervision, rather than rehabilitation. Most people on probation are saddled with lengthy terms of supervision, coupled with numerous requirements designed to control noncriminal behavior. These requirements of supervision are entirely ineffective at reducing recidivism, addressing criminogenic needs, and keeping our communities safe. States must take a new approach to probation, focusing on interventions and practices that evidence and research demonstrate lead to improved outcomes for people on probation and reduced crime in the community.

This policy advances community safety by changing the manner in which states and counties utilize probation. Because research has demonstrated the close monitoring of individuals, standing alone, actually increases, rather than decreases, the likelihood of reoffending, probation will no longer be utilized as a surveillance tool. Instead, we will return to a model that uses probation only when community safety can be enhanced by addressing the criminogenic needs of probationers and focusing only on the time period that probation can be of the most benefit.

### BACKGROUND

The massive expansion of our criminal justice system since the 1980s is well-documented. While much attention has been paid to the growth of the incarcerated population, “the number of people on probation or parole has also skyrocketed to more than 5 million, up from 1.6 million just 25 years ago.”<sup>1</sup> A much wider range of individuals are now placed on probation, including those who have only committed minor offenses and those who pose a minimal risk to community safety. At the same time, investments in probation have fallen dramatically (with most criminal justice funding paying for more prisons), producing a system where probation officers are required to supervise greater numbers of individuals with fewer resources.<sup>2</sup>

1. Joan Petersilia, “Community Corrections: Probation, Parole, and Prisoner Reentry,” in James Q. Wilson and Joan Petersilia, eds, *Crime and Public Policy* (New York: Oxford University Press 2d. Ed. 2011) at 509.
2. *Id.* at 511.

Probation, when first devised, was lauded as “one of the highest forms of social service work,’ designed to assist the wayward in recommitting themselves to a law-abiding life.”<sup>3</sup> This mission is consistent with a focus on the well-being of the community. When people are rehabilitated through community supervision and imprisonment is avoided, the criminal court system protects public safety most effectively and efficiently. Scholarly estimates demonstrate that “[t]he average annual per person cost of incarceration is approximately fifteen times higher than the cost of community supervision.”<sup>4</sup>

In the past several decades, however, declining resources and a punitive political climate have combined to shift the aims of probation away from rehabilitation and towards a “nearly unilateral focus on punishment and control.”<sup>5</sup> Probation officer caseloads are much too high to allow officers to effectively assist their clients with rehabilitative goals.<sup>6</sup> Neither do officers have the resources to productively supervise the individuals most in need of their assistance: those with a high risk of recidivism and a high level of need for treatment interventions.<sup>7</sup> Therefore, probation officers primarily serve a surveillance role. Unfortunately, attempts to reduce reoffending by monitoring and controlling people on probation have proven ineffective and fail to protect the community.

Although the average person on probation is subjected to around 15 different conditions,<sup>8</sup> often including requirements that he or she obey all criminal and civil laws, submit to surveillance by his or her officer (e.g., abide by curfews, submit monthly financial forms with supporting documentation, and obtain permission before traveling outside the jurisdiction or changing residence),<sup>9</sup> and otherwise demonstrate good behavior (by, for example, avoiding “injurious and vicious habits, avoid[ing] persons and places of disreputable or harmful character, [and] work[ing] diligently at a lawful occupation”),<sup>10</sup> these extensive requirements have not produced lower rates of reoffending among the supervised population. On the contrary, studies show that modern community supervision has no beneficial impact on rates of reoffending and may, for some people, actually increase the rate of recidivism.<sup>11</sup>

3. Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1024 (2013), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7463&context=jclc>.

4. *Id.* at 1019.

5. William R. Kelly, *The Future of Crime and Punishment: Smart Policies for Reducing Crime and Saving Money* (Rowman & Littlefield, Lanham, MD 2016) at 146; Columbia University Justice Lab, *Too big to succeed: The impact of the growth of community corrections and what should be done about it* (January 2018) at 4-5, [https://justicelab.columbia.edu/sites/default/files/content/Too\\_Big\\_to\\_Succeed\\_Report\\_FINAL.pdf](https://justicelab.columbia.edu/sites/default/files/content/Too_Big_to_Succeed_Report_FINAL.pdf); Klingele, *supra* note 3 at 1028, citing Nat’l Research Council, Committee on Community Supervision and Desistance from Crime, *Parole, Desistance from Crime, and Community Integration* (2008) at 36.

6. See Michael P. Jacobson, Vincent Schiraldi, Reagan Daly, and Emily Hotez, *Less Is More: How Reducing Probation Populations Can Improve Outcomes*, Program in Criminal Justice Policy and Management, Harvard Kennedy School (2017) at 9, [https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less\\_is\\_more\\_final.pdf](https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less_is_more_final.pdf).

7. *Id.*

8. *Id.* at 3

9. Klingele, *supra* note 3 at 1035.

10. Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEORGETOWN L.J. 291, 295 (2016), <https://ssrn.com/abstract=2726740>.

11. Amy L. Solomon, et. al., *Does Parole Work? Analyzing the Impact of Postprison Supervision on Rearrest Outcomes*, Urban Institute (2005) at 8, <https://www.urban.org/research/publication/does-parole-work> (finding no differences in recidivism between parolees released with or without community supervision); James Bonta et al., *Exploring the Black Box of Community Supervision*, 47 J. OFFENDER REHABILITATION 248, 251 (2008) (reporting study findings that indicated no statistically significant relationship between community supervision and the incidence of violent recidivism).

Because the conditions of supervision are so onerous, people on probation face greater challenges securing employment and maintaining familial connections, two factors that have been shown to correlate with desistance from criminal activity.<sup>12</sup> These effects are particularly pronounced for people who have a low risk of recidivism initially. For these individuals, supervision “enhances, rather than reduces, the risk of recidivism, while providing tripwires to unnecessary violations and incarceration and distracting community corrections agencies from focusing on those most in need of supervision and support.”<sup>13</sup>

Neither does the surveillance of people on probation increase the likelihood that new crimes will be detected and prosecuted. Research shows that probation and parole officers are unlikely to uncover criminal activity that would not otherwise be revealed through standard policing.<sup>14</sup>

Community supervision, in its current form, has also proven largely ineffective at reducing imprisonment rates. While many advocates point to probation as an alternative to confinement that may ameliorate mass incarceration, in reality, community sanctions often result in violations, revocation, and incarcerative sentences.<sup>15</sup> “Estimates suggest that half of the people admitted to U.S. jails, and more than one-third of those admitted to prison, arrive there as a result of revocation from community supervision.” Rather than an alternative to incarceration, “community supervision often is no more than a deferred sentence of incarceration.”<sup>16</sup>

In response to the failures of community supervision and in recognition of the fact that “the fundamental mission of community corrections as well as the broader system of criminal justice is the well-being and safety of American communities,”<sup>17</sup> community corrections supervisors, prosecutors, scholars, law enforcement personnel, leaders of social service organizations, and multiple state legislatures, have advocated for and implemented a number of reforms.

12. Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 448 (2011).

13. Executive Session on Community Corrections, *Toward an Approach to Community Corrections for the 21st Century: Consensus Document of the Executive Session on Community Corrections*. Program in Criminal Justice Policy and Management, Harvard Kennedy School (2017) at 4, <https://www.hks.harvard.edu/centers/wiener/programs/criminaljustice/research-publications/executive-session-on-community-corrections/publications/toward-an-approach-to-community-corrections-for-the-21st-century>.

14. Klingele, *supra* note 3 at 1062.

15. *Id.* at 1031.

16. *Id.* at 1020.

17. Executive Session on Community Corrections, *supra* note 13 at 2.

These principles of reform include:

- ▶ Probation, not incarceration, should be the presumptive sentence for many offenses.<sup>18</sup>
- ▶ Individuals who have a low risk of reoffending should not be placed on community supervision at all.<sup>19</sup>
- ▶ Supervision should focus on rehabilitative, rather than surveillance, goals.<sup>20</sup>
- ▶ Probation should not be revoked nor should people be incarcerated for asserted technical violations (i.e. violations that are non-criminal in nature) of probation conditions;<sup>21</sup>
- ▶ “Supervision periods should have a relatively short maximum term limit — generally not exceeding two years—but should be able to terminate short of that cap when people under supervision have achieved the specific goals mapped out in their individualized case plans.”<sup>22</sup>
- ▶ Supervision practices and required interventions should be driven by “scientific evidence about what is effective at reducing reoffending and improving life outcomes.” Selection of appropriate interventions should be driven by the demonstrated needs of the person.<sup>23</sup>
- ▶ Probation supervision should be focused on those with a high risk of recidivism and substantial criminogenic needs.<sup>24</sup>
- ▶ To allow for the adequate supervision of the targeted population, efforts should be made to reduce probation caseloads by 50%.<sup>25</sup>

While this policy may require an increase in local probation services, the expansion can be offset with savings from shorter supervision terms, reduced “jail churn,” and lower prison and jail populations. Examples of redirecting savings can be found in reports by the [Texas Public Policy Foundation](#) and [Prison Policy](#).

States have already begun to implement some of these reforms. In California, AB 1950, authored by Assemblymember Sydney Kamlager, was enacted in September 2020. This legislation limits the term of misdemeanor probation to 1 year and felony probation to 2 years in most cases.<sup>26</sup>

18. See Pew Charitable Trusts, *35 States Reform Criminal Justice Policies Through Justice Reinvestment*, July 2018 (9 states have instituted presumptive probation for certain offenses); see also California Committee on Revision of the Penal Code, *Alternatives to Incarceration and Short Sentences*, September 14, 2020,

19. *Id.* at 3; Klingele, *supra* note 3 at 1055-56; Michelle Phelps, *Ending Mass Probation: Sentencing, Supervision, and Revocation*, 28 FUTURE OF CHILDREN 125, 136 (2018), <https://files.eric.ed.gov/fulltext/EJ1179164.pdf>.

20. Executive Session on Community Corrections, *supra* note 13 at 4; Phelps, *supra* note 20 at 136-37.

21. See Pew Charitable Trusts, July 2019, *To Safely Cut Incarceration, States Rethink Responses to Supervision Violations*

22. Executive Session on Community Corrections, *supra* note 13 at 4.

23. *Id.* at 8.

24. *Id.*; Phelps, *supra* note 21 at 136-37.

25. Jacobson, et. al, *supra* note 6 at 1; Kelly, *supra* note 5 at 148; Columbia University Justice Lab, *supra* note 5.

26. Assembly Bill 1950 (Kamlager) available [here](#).

## SAMPLE PROBATION LEGISLATION

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A bill to promote community safety by reducing recidivism and offering support to people who are on probation.

### Section I. Presumption of Probation

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1. It is the intent of the legislature that incarceration be used as a last resort.
2. In the following cases, there shall be a presumption that probation is the appropriate sentence for:
  - a. All misdemeanor cases;
  - b. Offenses that may either be charged as a felony or as a misdemeanor;
  - c. All non-violent [or may be defined by classes of felonies in some states] felony offenses;

This presumption may be overcome in felony cases by clear and convincing evidence that the defendant presents a threat of physical harm to another.

### Section II. Term of Supervision

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1. The court, or judge thereof, with jurisdiction to impose punishment in felony cases, may suspend the imposing or execution of the sentence and may make and enforce a term of probation for a period of time, not exceeding one year, except as stated below.
  - a. In unusual circumstances in felony cases, a court or judge thereof may impose a term of probation for up to two years.
  - b. In all cases, the probationary terms should be only long enough to allow the probationer to accomplish the rehabilitative goals of probation.
2. In cases of the most serious misdemeanors, or when the defendant has suffered multiple convictions for misdemeanors, as an alternative to incarceration, the court may suspend the imposing or execution of the sentence and may make and enforce a term of probation for a period of time, not exceeding six months.
3. [In states that allow early termination] The court will include terms that allow for early termination in the order granting probation.
4. The non-payment of any monetary sanction or court costs shall not be grounds for denying early termination of probation.

## Section III. Conditions of Supervision

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1. In setting the terms of probation, the court must consider public safety and the needs of the probationer.
2. The court may not impose non-criminal conditions of supervision relating to conduct unless the court makes specific findings on the record that such conditions meet the needs of the probationer and are necessary for public safety. Additionally, when the probationer is willfully failing to comply with conditions of probation, the court may, upon request of the probation officer, modify the conditions of probation to impose appropriate interventions that address specific criminogenic needs.
3. Conditions that a court may impose include:
  - a. restrictions on travel;
  - b. a requirement for in-person reporting for a period of time;
  - c. a requirement that the person to seek employment, maintain employment or to maintain or commence an educational program if the court has evidence before it that these goals are currently attainable;
  - d. a requirement that the person to refrain from possessing a firearm or other deadly weapon and, if necessary, to surrender to law enforcement all firearms currently registered to the person or in the person's custody or control;
  - e. in cases involving driving under the influence of substances, a requirement that the probationer the use of electronic monitoring of drug or alcohol use, location, or ignition interlock devices;
  - f. in cases involving repeated instances of serious domestic violence when the home is shared with the victim, a requirement that the person to move out of the home;
  - g. a requirement that the person undergo available medical, psychological, or psychiatric treatment, including treatment for substance use disorder and remain in a specified institution if required for that purpose (note: N/A or A/A will be acceptable alternatives if the person does not have insurance or treatment is otherwise unavailable); or
  - h. a requirement that the person be placed in a pretrial home supervision capacity with or without the use of an electronic monitoring device.
4. Before imposing such additional conditions on a person during the course of probation, the court must find, based on clear and convincing evidence, that the probation department has repeatedly attempted to address the person's particular needs, including but not limited to housing, employment, education, substance use counseling, or mental health counseling

5. The court must consider an individual's ability to pay and an individual's other financial circumstances and obligations when setting fines and fees. The court must waive fines and fees for indigent individuals and those who have a court-appointed attorney or receive government benefits. Direct restitution to the victim, when applicable, takes precedence over the payment of any other fines and fees.

## Section IV. Detainers/Warrants

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1. People subject to probation may only be detained on an alleged violation if the violation is a new and serious felony offense or when the person on probation poses a substantial risk to the physical safety of another person.
  - a. When a violation is alleged to have occurred and the probation department has already signed a warrant to detain pending the revocation hearing, the court will lift the detainer and restore the person to probation, if the underlying basis for the violation was:
    - i. a violation of a "non-criminal" or technical condition of probation;
    - ii. the violation is not supported by probable cause; or
    - iii. the person was arrested for a charge the prosecutor has decided not to prosecute and has no other violations.
  - b. When a violation is alleged to have occurred and a warrant has already issued based on the allegations of the probation department, the court may not set aside the warrant except in the following circumstances:
    - i. The person has willfully absconded. A person who has changed his address without notifying his probation officer and failed to report for at least two consecutive months may be considered to have absconded from probation.
      1. In all cases in which a person is alleged to have absconded, the burden shall be on the probation department to prove by clear and convincing evidence that the probationer has fixed, permanent, housing; an ability to be contacted; and that the probation department has made repeated diligent efforts to contact the probationer.
      2. If the probation department has failed to meet this burden, or the probationer has introduced evidence to rebut it, the court shall set aside the warrant.
    - ii. The new arrest is for a [first degree/violent] felony.
    - iii. The nature of the alleged violation demonstrates that the probationer poses a substantial threat to the physical safety of other persons.

## Section V. Probation Revocation

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1. The court will impose non-carceral sanctions for violations unless prohibited by law or incompatible with public safety. Alternatives to jail for probation violations include sanctions such as:
  - a. counseling when the person on probation is amenable;
  - b. substance-use treatment when the person on probation agrees; or
  - c. in cases where an individual has violated three or more times, electronic monitoring for a period not to exceed 14 days.
2. The court may impose short jail sentences, beginning with 1 day and not to exceed 14 days, as an extreme sanction measure. To impose any length of jail sentence, the court must make a specific finding as to the probationer's substantial threat to public safety.
3. There is a presumption against probation revocation in all cases.
  - a. In rare circumstances, the court may revoke probation to protect public safety, including when the individual is convicted of a new criminal offense reflecting a substantial risk to the physical safety of other persons.