

**ADMINISTRATIVE RESPONSES TO PROBATION VIOLATIONS:  
DUE PROCESS AND SEPARATION OF POWERS ISSUES**  
National Center for State Courts

As of the end of 2010, more than 4 million adults in the United States were on probation, representing well over half of all persons under correctional supervision.<sup>1</sup> Many of these offenders will violate the conditions of their probation, posing a challenge for supervising authorities: when a violation is not severe enough to warrant the revocation of probation, how can the offender be held accountable? Administrative responses programs are a potential solution to this problem.<sup>2</sup> When contemplating such a program, however, policymakers must be careful to avoid legal issues related to due process of law, the right to appointed counsel, and the separation of powers.

**Probation: The Basics**

Probation is a form of community supervision typically ordered by a judge at the time of sentencing as an alternative to incarceration.<sup>3</sup> Probation is designed to promote public safety while providing the probationer with an opportunity for rehabilitation. It is also intended to serve as a meaningful punishment that deters criminal behavior and to achieve cost savings in comparison to imprisonment. A probationer is typically required to report to a probation officer on a regular basis and to abide by a variety of conditions that may include paying restitution,

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<sup>1</sup> Persons under correctional supervision include probationers, parolees, and jail and prison inmates. LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, NCJ 236319, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010 3 (2011).

<sup>2</sup> Administrative responses include both sanctions for violations of the conditions of supervision and incentives for good performance. This document focuses on the legal issues associated with administrative sanctions, which are more likely to produce legal challenges. Although this document refers primarily to the use of administrative sanctions in the context of probation violations, the majority of the analysis is also applicable to administrative sanctions for parole violations. *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (finding no “difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation”).

<sup>3</sup> Probation differs from parole in that probation is ordered by the sentencing judge, typically in lieu of incarceration but sometimes following a period of incarceration, whereas parole is granted by the parole board following release from incarceration. PEGGY BURKE, PEW CENTER ON THE STATES, PUBLIC SAFETY POLICY BRIEF NO. 3, WHEN OFFENDERS BREAK THE RULES 3 (2007).

abstaining from alcohol and drug use, maintaining employment, obtaining permission for any change in residence, obeying all laws, and attending treatment programs. In some states, supervision of probationers is the responsibility of the executive branch of government; in other states, probation supervision is handled by the judicial branch.

In many states, when a probationer violates a condition of probation, the probation officer's only possible response is to return the probationer to court so that the judge can impose a sanction, modify the conditions of probation, or revoke probation and send the probationer to jail or prison. Because it is not feasible to initiate court proceedings for every minor infraction such as a missed appointment or positive drug test, probation violations often go unaddressed. Furthermore, decisions about when it is appropriate to seek a sanction or revocation may vary widely among probation officers. When probationers observe that violations are routinely ignored and that the conditions of probation are enforced only on a selective basis, they may come to expect that bad behavior will be tolerated. Such inconsistency decreases probationers' motivation to comply with the conditions of probation, undermining probation's rehabilitative, public safety, and deterrence values.<sup>4</sup>

### **Administrative Sanctions for Probation Violations**

In order to improve compliance with the conditions of probation, a number of states have adopted administrative systems for sanctioning probation violations. These systems are designed to provide swift, certain, and proportionate responses to a well-defined set of violations, without the delay or expense of a court proceeding. Administrative sanctions programs are often based upon a structured list of violations and their associated sanctions. Commonly used sanctions include community service, more frequent drug testing or supervisory visits, electronic

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<sup>4</sup> Faye Taxman, David Soule & Adam Gelb, *Graduated Sanctions: Stepping Into Accountable Systems and Offenders*, 79 PRISON J. 182, 185, 188-89 (1999).

monitoring, day reporting to the probation office, and short jail stays. More serious violations are associated with more severe sanctions. Some states specify a narrow range of possible sanctions for each type of violation, whereas others provide more flexibility. States also limit the length of each period of incarceration (e.g., 10 days), as well as the total amount of time a probationer may spend in jail on administrative sanctions (e.g., 30 days). When a probation officer believes that a violation has occurred, the officer notifies the probationer of the alleged violation and the proposed sanction. The probationer may choose to admit the violation, accept the sanction, and waive the right to have the fact of the violation determined in a formal hearing. If the probationer denies the violation, refuses to accept the sanction, or does not wish to waive the right to a hearing, formal judicial or administrative proceedings are instituted. Under some systems, this means that the matter proceeds to a probation revocation hearing.

Research indicates that quickly and uniformly sanctioning violations deters probationers from violating the conditions of supervision and provides additional opportunities for rehabilitation. By clearly defining what constitutes a violation of probation, specifying how each type of violation will be punished, and constraining the discretion of probation officers and judges, administrative sanctions programs may also encourage probationers to perceive the sanctioning process as neutral and fair, rather than arbitrary and inconsistent.<sup>5</sup> Such perceptions of procedural justice enhance the legitimacy of the court and probation authorities in the eyes of probationers, improving compliance.<sup>6</sup> Finally, it is hoped that administrative sanctions will produce cost savings for taxpayers by reducing the number of probation revocation hearings,

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<sup>5</sup> Taxman et al., *supra* note 4, at 186-87. See also *Morrissey v. Brewer*, 408 U.S. 471, 496 (1972) (“And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.”).

<sup>6</sup> See TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

decreasing the need to incarcerate technical violators whose probation has been revoked and improving probation's effectiveness in rehabilitating probationers and averting future crimes.

To help ensure the success of an administrative response program, any state implementing such a program should take steps to ensure that its program meets constitutional standards regarding due process of law, the right to counsel, and separation of powers. By carefully structuring administrative sanctions systems, policymakers and agency leadership should be able to obviate any constitutional issues. These simple steps may also reinforce the program's effectiveness in deterring violations and rehabilitating probationers.

### **Due Process in Administrative Sanctioning**

The Fifth Amendment to the United States Constitution provides that no person "shall be deprived of life, liberty, or property, without due process of law"; the due process clause of the Fourteenth Amendment explicitly applies this guarantee against the states.<sup>7</sup> State constitutions contain similar guarantees of due process of law. To date, there exists no case law that directly addresses the question of due process in administrative sanctioning systems, either finding such a system to be constitutional or determining that a particular state's administrative sanctioning procedures are inadequate. States must therefore look to analogous cases for guidance. Two landmark Supreme Court cases, *Morrissey v. Brewer* and *Gagnon v. Scarpelli*, define the meaning of due process of law in the context of proceedings to revoke parole and probation. Although they deal specifically with revocation rather than with lesser sanctions, these two cases are the closest applicable precedents and set up the framework for the due process inquiry that would most likely be applied to an administrative sanctions program.

In the 1973 case *Gagnon v. Scarpelli*, the Supreme Court held that because probation revocation results in a loss of liberty, a probationer facing revocation is entitled to due process of

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<sup>7</sup>U.S. CONST. amend. V, amend. V; U.S. CONST. amend. XIV, § 1.

law. Because probation is very similar to parole, the due process requirements for probation revocation proceedings are identical to those required in parole revocations.<sup>8</sup> The Court had laid out the requirements for parole revocations in detail in *Morrissey v. Brewer*, decided one year earlier. In both *Gagnon* and *Morrissey*, the Court conducts a two-step inquiry into the question of due process, first examining the purposes of supervision, the nature of the liberty interest at stake, and society's interests in the revocation decision before delineating what procedures are required to ensure due process of law. Although the answer to the question of exactly what process is due may be different in administrative sanctions proceedings than in probation revocation proceedings, the structure of the constitutional inquiry is the same, and much of the *Gagnon/Morrissey* analysis is applicable.

The first step in the inquiry is to examine the purposes of supervision and the nature of the interests at stake. According to *Gagnon* and *Morrissey*, the purposes of probation and parole are to “help individuals reintegrate into society as constructive individuals as soon as they are able” and to “alleviate the costs to society of keeping an individual in prison.”<sup>9</sup> The conditions of probation or parole are imposed in order to aid in probationers’ reintegration into “normal society,” and to provide the probation or parole officer with the opportunity to advise the probationer.<sup>10</sup> The probation or parole officer’s primary goal should be to assist in the probationer’s rehabilitation while ensuring public safety, and the officer should seek revocation only as a last resort when supervision has failed.<sup>11</sup> The Court notes that “[b]ecause the probation or parole officer’s function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion

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<sup>8</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

<sup>9</sup> *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972).

<sup>10</sup> *Id.* at 478.

<sup>11</sup> *Gagnon v. Scarpelli*, 411 U.S. at 783-85.

to judge the progress of rehabilitation in individual cases[.]”<sup>12</sup> This discretion includes substantial latitude in interpreting the conditions of probation or parole, as well as in decisions about whether to seek revocation.<sup>13</sup> Under administrative sanctions programs, probation officers’ authority to recommend sanctions is consistent with the broad discretion they have traditionally been granted.

As long as he or she abides by the conditions of supervision, the probationer or parolee enjoys a limited liberty to remain free in the community and engage in many of the activities available to persons who are not under supervision. Unlike a prisoner, a probationer or parolee is free to maintain employment, spend time with family and friends, and live a “relatively normal life.” Although limited, this liberty interest is valuable and falls within the protection of the Fourteenth Amendment’s due process guarantee.<sup>14</sup> At the same time, a probationer or parolee has already been convicted of the underlying crime, and revocation is not a stage of a criminal prosecution subject to the same due process requirements as a criminal trial.<sup>15</sup> Because the probationer has already been convicted, the state has a legitimate interest in “being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole” or probation. On the other hand, society has an interest in the probationer’s rehabilitation and therefore in the accuracy of the revocation decision. Society also has an interest in treating the probationer or parolee with “basic fairness,” because fairness in revocation decisions will “enhance the chance of rehabilitation by avoiding reactions to arbitrariness.”<sup>16</sup>

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<sup>12</sup> *Id.* at 784.

<sup>13</sup> *Morrissey v. Brewer*, 408 U.S. at 479.

<sup>14</sup> *Id.* at 482-83.

<sup>15</sup> *Id.* at 480; *Gagnon v. Scarpelli*, 411 U.S. at 782. Note, however, that a sentencing that occurs upon the revocation of parole or probation rather than at the time of trial *does* constitute a stage of a criminal proceeding. *See Mempa v. Rhay*, 389 U.S. 128 (1967).

<sup>16</sup> *Morrissey v. Brewer*, 408 U.S. at 483-84.

After defining the nature of the interests at stake, the Court turns in *Morrissey* to the question of “what process is due” in order to protect these interests.<sup>17</sup> When revocation is the proposed response to a probation or parole violation, the probationer or parolee must be afforded an informal hearing designed to verify that the alleged violation did in fact occur, and that revocation is an appropriate response to the violation.<sup>18</sup> Because a probation or parole revocation is not part of a criminal prosecution, and the liberty interest at stake is a limited one, the “full panoply of rights due a defendant” in a criminal proceeding does not apply, and the rules of evidence and procedure for revocation proceedings may be less formal. Nevertheless, certain procedural safeguards are required in order to ensure due process of law.<sup>19</sup> *Morrissey v. Brewer* lays out these safeguards in detail.<sup>20</sup> They include “(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . .; (e) a ‘neutral and detached’ hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.” The rules of evidence should be flexible, allowing the use of “evidence including letters, affidavits,

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<sup>17</sup> *Id.* at 481.

<sup>18</sup> *Id.* at 484.

<sup>19</sup> *Id.* at 480-82; *Gagnon v. Scarpelli*, 411 U.S. at 782.

<sup>20</sup> In advance of the final revocation hearing described here, *Morrissey* and *Gagnon* also identify the need for a preliminary hearing to determine whether there is probable cause to believe that the probationer has violated the conditions of supervision, to be held as soon as possible after the alleged violation is reported. In the case of administrative sanctions, this preliminary hearing will typically be unnecessary. The two-stage hearing process is contemplated where the alleged violator is being held in custody awaiting the final revocation hearing, often for a substantial amount of time and possibly at some distance from the location where the final hearing will be held. *Morrissey v. Brewer*, 408 U.S. at 485. Administrative sanctions occur in a much different context: the probationer is not likely to be outside the supervising jurisdiction, and the sanctioning process is designed to function as quickly as possible.

and other material that would not be admissible in an adversary criminal trial.” The probationer or parolee may waive his right to a revocation hearing.<sup>21</sup>

In seeking guidance from *Gagnon* and *Morrissey* in the application of federal due process requirements to administrative sanctions proceedings, we observe that the interests of society and the state in administrative sanctioning procedures are similar to those in revocation proceedings: society has an interest in fairness and accuracy, and the state has an interest in avoiding overly burdensome procedures. In the context of administrative sanctions proceedings, the state and society have an additional interest in establishing an expedited sanctioning process, as the effectiveness of administrative sanctions in promoting probation compliance and probationer rehabilitation depends in large part on the immediacy of the response to noncompliant behavior. For probationers, on the other hand, the liberty interest at stake is more limited. Although the extent of liberty at risk will vary depending on the type of sanction proposed, the most severe potential sanction (a short period of incarceration) results in less deprivation of liberty than commitment to prison for a longer period of time upon revocation, and a non-custodial sanction presents even less risk to the probationer’s liberty interest.

The Court emphasizes in *Morrissey* that “the concept of due process is flexible,” and that “not all situations calling for procedural safeguards call for the same kind of procedure.”<sup>22</sup> Because not all administrative sanctions curtail the probationer’s liberty to the same degree, they may not all require the same types of procedures. In the case of a jail sanction, the probationer’s physical liberty—and, potentially, other interests such as employment—is at risk, and the notice and hearing requirements are likely to be similar to, but somewhat less rigorous than, the requirements for probation revocation enumerated in *Morrissey* and *Gagnon*. For less

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<sup>21</sup> *Morrissey v. Brewer*, 408 U.S. at 487-89.

<sup>22</sup> *Id.* at 481.



burdensome sanctions such as electronic monitoring or more frequent drug testing, a lower level of procedural protection is likely required. Although existing case law provides little guidance as to precisely what procedures might be required for non-custodial sanctions, it is likely that notice of the claimed violation and an opportunity for administrative review by a neutral third party of the sanction imposed should suffice.

In practice, administrative sanctions programs typically address the issue of due process in one of two ways. Some programs require the probationer to waive the right to a probation revocation or modification hearing under established procedures in order to accept an administrative sanction. In other states, the enabling statute for the administrative sanctions program also establishes a framework for informal sanctions hearings within the probation agency, permitting but not requiring probationers to waive these hearings.

In states that require waiver of a judicial hearing, concern may arise over the voluntariness of the waiver. The argument is that the waiver is not truly voluntary because the probationer will fear that failure to waive the hearing and accept the administrative sanction will lead to revocation, a more severe sanction, or arrest and confinement prior to a formal revocation hearing—a period of confinement that might well be longer than the administrative sanction itself.<sup>23</sup> This situation, however, is analogous to plea bargaining, a widely accepted practice in which defendants routinely waive their right to a trial in exchange for a more favorable case resolution. As long as the defendant fully understands the proposed sanction and the consequences of the waiver, and the waiver is not induced by threats or misrepresentation, a waiver requirement should meet the requirements for due process of law.<sup>24</sup> Practical precautions to ensure the voluntariness of the waiver might include providing the probationer with a written

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<sup>23</sup> Posting of Jamie Markham to North Carolina Criminal Law, <http://nccriminallaw.sog.unc.edu/> (Oct. 2., 2012).

<sup>24</sup> See *Brady v. United States*, 397 U.S. 742 (1970).

explanation of the proposed sanction and the consequences of the waiver, securing a written waiver, and, for sanctions of incarceration, requiring a person other than the probationer's own probation officer (e.g., the field supervisor) to secure the waiver.

In states that choose to establish a separate hearing procedure for administrative sanctions, administrative due process protections need not be overly burdensome, and may also serve as a practical means to enhance the effectiveness of the administrative sanctions program. Written notice of the claimed violation, the supporting evidence, and the proposed sanction can be accomplished by having the probation officer fill out a simple form and present a copy to the probationer, which would likely be necessary for operational reasons even if due process were not a concern. Written notice may also aid in rehabilitation by improving probationers' understanding of the connection between their behavior and its consequences. Given the need for swiftness and the limited burden imposed upon probationers by most administrative sanctions, a very informal hearing procedure would most likely be acceptable. On a practical level, when the probationer is given the option to waive the hearing, waiver is likely to be the most common outcome even when it is not required. Moreover, the establishment of fair and transparent procedures for imposing administrative sanctions is likely to improve perceptions of procedural fairness, making probationers more willing to waive the hearing on a voluntary basis.

### **Right to Appointed Counsel in Administrative Sanctions Proceedings**

The Sixth and Fourteenth Amendments to the United States Constitution require states to provide indigent defendants with counsel in criminal proceedings.<sup>25</sup> No existing case law specifically addresses the right to counsel as it relates to administrative sanctions. As with other due process concerns, the closest analogue to a state administrative sanctions proceeding addressed in federal case law is the probation revocation hearing. In *Gagnon v. Scarpelli*, the

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<sup>25</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Supreme Court held that because a probation revocation hearing is not part of a criminal proceeding, the appointment of counsel for an indigent defendant is not automatically required. Rather, federal due process requires the appointment of counsel in probation revocation proceedings only in those rare cases in which “fundamental fairness” necessitates it. The Court suggests that counsel should be appointed when the probationer makes a timely request for counsel, along with a timely assertion that the alleged violation was not committed or that revocation is inappropriate under the circumstances; however, even under these circumstances, the Court allows that it may not be necessary to appoint counsel if the probationer is capable of adequately representing his interests on his own. The decision to appoint counsel is to be made by the state probation authority, rather than by a court.<sup>26</sup>

Under *Gagnon v. Scarpelli*, it is reasonable to assume that the United States Constitution does not require the appointment of counsel in the vast majority of administrative sanctions proceedings, although it may be prudent for any state implementing an administrative sanctions program to provide a mechanism for probationers to request counsel in those exceptional cases in which either the violation or the sanction is contested, a custodial sanction is at stake, and the probationer demonstrates that he is incapable of representing his own interests.<sup>27</sup> Most states, however, do provide a statutory right to appointed counsel in probation revocation and/or modification proceedings that occur in court. In these states, it may be necessary either to require the probationer to waive the statutory right to counsel in order to accept an administrative sanction, or to establish a separate statutory framework for administrative hearings on sanctions that explicitly specifies that there is no state statutory right to counsel at such hearings.

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<sup>26</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 786-92 (1973).

<sup>27</sup> The appointment of counsel is not required unless the defendant is subject to incarceration. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972).

## Separation of Powers

Another legal question that requires consideration is whether the imposition of sanctions by the probation department violates any separation of powers doctrine. As with due process and the right to counsel, there is virtually no existing case law that directly addresses the issue of separation of powers as it relates to administrative sanctions programs, so it is necessary to look to analogous cases. At the federal level, probation revocation proceedings again provide the closest equivalent. As the Seventh Circuit points out, “nothing in the federal Constitution forbids a state from providing for administrative revocation of probation imposed by a court.”<sup>28</sup>

According to the Supreme Court, questions of separation of powers in state government arise under the state constitution—not the Constitution of the United States—and are to be answered by the state’s own courts.<sup>29</sup> The answers to these questions will therefore vary from state to state. Some states may also have existing statutes defining or limiting the authority of probation officers to impose conditions or sanctions, or to revoke probation.

In Wisconsin, the legislature’s delegation of the probation revocation decision to the executive branch rather than the judicial branch was found not to violate the separation of powers.<sup>30</sup> In states where administrative revocation is permitted, administrative sanctions programs should also withstand any separation of powers challenge. In Iowa, on the other hand, a pilot project statute delegating revocation authority to the probation agency in one judicial district was struck down as a violation of the separation of powers clause in the state

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<sup>28</sup> *Ware v. Gagnon*, 659 F.2d 809, 812 (7th Cir. 1981).

<sup>29</sup> “Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty.” *Dreyer v. Ill.*, 187 U.S. 71, 84 (1902).

<sup>30</sup> *State v. Horn*, 594 N.W.2d 772 (Wis. 1999).

constitution.<sup>31</sup> Although separation of powers claims in most states will involve the authority of probation employees to administer sanctions that are viewed as the responsibility of the judicial branch, claims may also be raised that the program interferes with the discretion of the prosecutor to seek probation revocation. The Supreme Court of Illinois has recently rejected this argument.<sup>32</sup>

Defendants challenging administrative sanctions may also argue that these sanctions actually constitute new conditions of probation. On separation of powers grounds, one state court has rejected the authority of probation officers to set *new* conditions of probation (in contrast to conditions that enhance *existing* probation conditions), in response to violations or for other reasons.<sup>33</sup> Other state courts have permitted judges to delegate the authority to set conditions of probation to the probation department, as long as the conditions set by the probation department support those set by the judge, and the judge retains final authority to review such conditions of probation.<sup>34</sup> States can strengthen administrative sanctions programs against such challenges by including in their enabling legislation a clear delegation of sanctioning authority to the probation department. This delegation of authority should include the power to impose as sanctions new or additional conditions of probation, subject to possible judicial review.

Finally, several state courts have rejected the judicial practice of allowing the probation department to determine whether, or how long, a defendant will be incarcerated.<sup>35</sup> In each of these cases, however, authority over the sentence was delegated to the probation department not by the legislature but by the sentencing judge, and the judge's delegation of authority was

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<sup>31</sup> *Klovda v. 6th Judicial Dist. Dept.*, 642 N.W.2d 255 (Iowa 2002).

<sup>32</sup> *People v. Hammond*, 959 N.E.2d 29 (Ill. 2011).

<sup>33</sup> *See, e.g., State v. Stevens*, 646 S.E.2d 870 (S.C. 2007); *State v. Archie*, 470 S.E.2d 380 (S.C. 1996).

<sup>34</sup> *See, e.g., State v. Merrill*, 999 A.2d 221 (N.H. 2010).

<sup>35</sup> *See, e.g., State v. Paxton*, 742 N.E.2d 1171 (Ohio Ct. App. 2000); *State v. Fearing*, 619 N.W.2d 115 (Wis. 2000); *State v. Hatfield*, 846 P.2d 1025 (Mont. 1993); *People v. Thomas*, 577 N.E.2d 496 (Ill. App. 4th Dist. 1991); *State v. Lee*, 467 N.W.2d 661 (Neb. 1991).

overturned on statutory rather than separation of powers grounds.<sup>36</sup> Where there is statutory authority specifically permitting the trial court judge to make this delegation, or there is a statute that directly delegates discretion over a defendant's incarceration to the probation department, a reviewing court is likely to uphold the delegation of authority. A state that wishes to use incarceration as an administrative sanction for probation violations should therefore specify in the program's enabling legislation that incarceration is among the sanctions that may be imposed by the probation department.

### **Implications for Policy and Practice**

In constructing an administrative sanctions program for probation violations, states have taken a variety of steps to address due process of law and other legal issues. Practical approaches include:

1. The program's enabling legislation should clearly define the concept of an administrative sanction (including whether incarceration may be used as a sanction, as well as the maximum periods of incarceration that can be imposed) and delegate sanctioning authority to the probation department. In the absence of such legislation, the court's sentencing order should clearly authorize the supervising agency to impose administrative sanctions in response to violations of the conditions of probation.
2. The probationer should be provided with written notice of the claimed violation, the supporting evidence, and the proposed sanction.

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<sup>36</sup> See *State v. Paxton*, 742 N.E.2d at 1173 (“Since the sentence imposed does not comply with statutory requirements of the laws of Ohio, we need not reach the constitutional questions raised.”); *State v. Fearing*, 619 N.W.2d at 117 (“Nowhere in this statutory scheme is DOC given the authority to impose or modify a condition of probation, nor, more specifically, is it given the authority to decide to impose jail confinement as a condition of probation or the length of that confinement.”); *People v. Thomas*, 577 N.E.2d at 497-98 (“Since there is no authorization to delegate the decision to incarcerate a defendant, that part of defendant's sentence is void and must be vacated.”); *State v. Hatfield*, 846 P.2d at 1029 (“Furthermore, no statute specifically authorizes a district court to delegate sentencing discretion to a probation officer.”). In *State v. Lee*, 467 N.W.2d 661, the court cites both the state constitution and state statutes in support of its conclusion, implying but not explicitly stating that its reasoning is statutory.

3. Where a sanction of incarceration is proposed, the probationer should be provided with the opportunity to request a judicial or administrative hearing, or to waive the right to such a hearing. This hearing may be an informal hearing conducted by a supervisory employee of the probation department. The probationer should have the right to appear at the hearing and present evidence, and should be provided with a written statement of the decision that cites the evidence relied upon and the reasons for imposing the sanction. If a state does not wish to establish a separate administrative hearing procedure for administrative sanctions, the opportunity for a hearing may also be provided by allowing the probationer to choose whether to waive the right to a hearing and accept the administrative sanction, or to proceed to a judicial hearing following the standard procedures for probation violation or revocation proceedings.
4. If the probationer contests the violation or the proposed sanction, and the proposed sanction does not include incarceration, the probationer should be accorded an opportunity for independent administrative review of the probation officer's decision by another agency employee serving at the supervisory level. The procedures for this review may be informal.
5. To the extent required by state law, the probationer should be provided with counsel unless the right to counsel is waived. To comply with federal due process requirements, it may also be prudent for states to furnish counsel for indigent probationers in the exceptional case where a custodial sanction is at stake, the fact of the violation or the appropriateness of the sanction is contested, it is manifest that the probationer is unable to represent his or her own interests adequately, and the probationer has not waived the right to counsel.

6. Steps should be taken to ensure that any waiver of the right to a hearing or the right to counsel is knowing and voluntary.
  - a. A clear written explanation of the consequences of the waiver should be provided.
  - b. The waiver should be in writing.
  - c. For sanctions of incarceration, the waiver should be obtained by a person other than the probationer's supervising officer, preferably a probation department employee in a supervisory position.

In addition to preserving due process of law and the separation of powers, the availability of these procedures should increase probationers' perceptions of fairness in the sanctioning process. If probationers feel that they are treated fairly throughout the sanctioning process, research and experience suggest that the majority will voluntarily waive the hearing and accept the sanction, helping to realize the goals of swiftness, certainty, and proportionality and improving probation's effectiveness in rehabilitating offenders and deterring future crime.