

The Development of a Juvenile Electronic
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of Prisons Programming
ates *Peter C. Kratcoski*
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Corrections and the
Rights of Prisoners *Harold J. Sullivan*

Revision Fees: Shifting
Offender *Charles R. Ring*

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This Issue in Brief

The Development of a Juvenile Electronic Monitoring Program.—Author Michael T. Charles reports on a research project concerning the juvenile electronic monitoring program undertaken by the Allen Superior Court Family Relations Division, Fort Wayne, Indiana. Reviewing the planning and implementation phase of the program, the author discusses (1) the preplanning and organization of the program; (2) the importance of administrative support; (3) the politics and managerial issues faced during program development, implementation, and management; and (4) the role and function of surveillance officers.

Morrissey Revisited: The Probation and Parole Officer as Hearing Officer.—Author Paul W. Brown discusses the Federal probation officer's role as hearing officer in the preliminary hearing stage of the parole revocation process. This role was largely created by the landmark Supreme Court case of *Morrissey v. Brewer* in which the Court indicated a parole officer could conduct the preliminary hearing of a two-step hearing process possibly leading to a parole revocation and return to prison. How this role was created in *Morrissey* and how it has been carried out by the Federal probation officer are examined.

Defense Advocacy Under the Federal Sentencing Guidelines.—This article sets forth the duties and responsibilities of defense counsel in effectively representing clients in all phases of the criminal process under Federal sentencing guidelines. Author Benson B. Weintraub offers practice-oriented tips on arguing for downward departures, avoiding upward departures, and negotiating plea agreements under the guidelines and discusses procedures to employ in connection with the presentence and sentencing stages of a Federal criminal case.

Federal Bureau of Prisons Programming for Older Inmates.—The "graying" of our society is creating a change in our prison populations. More sentenced offenders will be older when they enter

the institutions, and longer sentences will result in more geriatric inmates "behind the walls." Balancing the needs and costs of geriatric care is a critical issue to be addressed. In this article, authors Peter C. Kratcoski and George A. Pownall discuss various attributes of criminal behavior of older persons and the distribution of older offenders within the Federal Bureau of Prisons. They also discuss the complete health care programming that correctional systems must provide to meet legal mandates already established in case law. According to the authors, significant programming adaptations have taken place in the past several years at the Federal level; more are anticipated in the near future.

Privatization of Corrections and the Constitutional Rights of Prisoners.—Many in the legal and corrections community have presumed that "private" correctional facilities will be held to the same constitutional standards as those directly administered by the state itself. Author Harold J. Sullivan

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Probation Supervision Fees: Shifting Costs to the Offender*

BY CHARLES R. RING

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Introduction

PROBATION IS now the most commonly used criminal sanction in the United States, with nearly three times as many offenders placed on probation each year as are sentenced to prison and jail combined. Many experts are concerned by the steady rise in probation caseloads in recent years since, as noted by James M. Byrne of the University of Lowell, "[while] prison crowding draws national attention and increased resources, 'probation crowding' poses a more immediate threat to the criminal justice process and to community protection."¹

It was probably inevitable that at a time when many jurisdictions are struggling to maintain basic services, educate their children, and care for their elderly, proposals to shift the cost of probation programs from the taxpayer to the offender would generate increasing support. The best evidence of this support is the rapid spread of fees for probation services in recent years. Initiated in Michigan and Colorado in the 1930's and 1940's, probation fee programs had been adopted in only 10 states by 1980. This number has more than doubled in the intervening years, and at least 26 states have now authorized the imposition of some form of probation fee.

As user fees proliferate and a pay-your-own-way philosophy of government holds sway, the question begins to change from whether to charge, to when and how much? Some states collect fees for a variety of probation-related services and programs including: the preparation of presentencing reports; electronic surveillance programs; ignition interlock devices; and work release programs. By far, the most common practice is to impose a monthly fee, often within some statutorily established range, upon all probationers.

Deciding to Charge

In recent years, the emphasis upon rehabilitation and alternatives to incarceration, which helped shape

the evolution of the criminal justice system during much of the 20th century, has begun to erode in the face of a renewed emphasis upon incapacitation and retribution: prison sentences have become more severe and more frequent; mandatory and determinate sentencing laws have curtailed the use of alternative sentences; and parole boards are tightening their standards to placate a crime-weary public.

Nowhere are the repercussions of this change in attitudes towards crime and punishment more apparent than in the operation of state and local probation systems. The social worker/assistance orientation towards probationers which had long guided probation officers' relationships with their "clients" has given way to a surveillance/control model of managing offenders. In the process, the goal of helping the "client" (with its emphasis upon counseling and assistance) has become secondary to community protection (with its stress upon surveillance and revocation) as the fundamental mission of the probation officer.²

One can only speculate as to what impact this change in mission will ultimately have on public safety and offender rehabilitation. At least in the short term, however, the effect will probably be to increase support for the adoption of probation fee requirements among policymakers and, even more so, the public at large.

When to Charge

The poor, the uneducated, and the unemployable are all disproportionately represented among probation populations. Many of these individuals are already subject to fines, restitution charges, victim/witness fees, and court costs assessments. Thus, probation fees would in many cases be competing with these prior claims for probationers' often meager resources.

The potential for conflict between probation fee collections and other court-ordered financial obligations is one of the issues jurisdictions contem-

*This article is based on a report published by the Massachusetts Legislative Research Bureau. Copies of the full report may be obtained free of charge from the Legislative Research Bureau, 30 Winter Street, 11th Floor, Boston, Massachusetts 02108.

¹James M. Byrne, *Probation*, National Institute of Justice, 1988.

²James M. Byrne, "The Control Controversy: A Preliminary Examination of Intensive Probation Supervision Programs in the United States," *Federal Probation*, June 1986, pp. 4-16.

plating fee programs must resolve at the outset. Critics charge that probation fee obligations will divert revenues from restitution payments, victim/witness fees, and other more important uses. If this is allowed to occur, they point out, probation fee programs could deteriorate into a court-ordered system of "robbing Peter to pay Paul."

Many states with fee programs have already recognized and responded to this problem by stipulating (either by statute or administratively) what priority should be given to probation fee collections in relation to other court-ordered payments. Although jurisdictions differ with respect to the priority they assign each obligation, most place probation fees somewhere in the middle or at the bottom of the list.

In Colorado, for example, probation fees are collected only after victim compensation payments, restitution charges, and court costs assessments have all been satisfied. Approximately 50 percent of respondents to a recent national survey reported that probation fees are assigned a lower priority than restitution or fines, 40 percent ranked fees on a par with restitution and fines, while only 10 percent indicated that fees are the highest priority.³

Another concern raised by opponents is that while most probationers would pay their fees, some might resort to illegal activities to do so. Though this concern certainly has some basis in fact, it should not be accorded great weight when balancing the potential problems and benefits of fee programs.

The imposition of any financial sanction (whether it be a fine, a victim/witness fee, or a probation fee) could induce some individuals to commit new crimes in search of funds. Thus, probation fees, like attorney fees, or any other cost borne by offenders, will sometimes be paid with monies raised through illegal acts. But it is alarmist to suggest that significant numbers of otherwise law abiding probationers will commit new crimes solely to pay probation fee charges of \$10-\$50 per month.

With few exceptions, persons who commit crimes to pay their probation fees will be the same individuals who will commit crimes to pay the rent, buy a car, go to the movies, or get a fix. In short, they will be the very persons whose presence among probation caseloads pose the greatest threat to life and property. What impact the obligation to pay probation fees might have upon these individuals' propensity

to commit further crimes is unknown. On balance, the risk of fee-induced crime appears to be insignificant when measured against the revenues at stake. In any event, the critical public policy choice raised by this risk is not whether or not to impose fees, but whether or not persons so easily provoked to commit additional crimes should be placed on probation in the first place.

This is not to say that fees should be imposed without regard for individual needs or circumstances. One of the central tenets of modern criminal law is the need for proportionality between punishments and crimes. In the case of indigent probationers, the imposition of even token probation fees may violate this principle.

It would not be difficult to show, for example, that what advocates of probation fees sometimes refer to as "beer and cigarette money" is actually "milk and eggs money" for many probationers and their families. The extraction of fees from persons already so impoverished would resemble a community-based derivative of the debtors' prison systems from a shameful past. Such a system would not only be reprehensible but in most states illegal.

It is imperative, therefore, that fee programs be designed to ensure that individuals are neither denied probation nor have their probation revoked because of inability to pay. Fortunately, there are at least two simple, equitable means of achieving this end. The first approach—and the one most commonly used by jurisdictions with fee programs—is to utilize a means test whereby indigent and other needy persons can be excused from their fee obligation. The second approach—which can be used in conjunction with the first—is to provide a community service alternative in lieu of fee payments.

Some states' supervision fee statutes include very specific criteria for exempting individuals from all or any part of their fee obligation. Florida's law, for example, permits exemption if the offender: (a) has diligently attempted, but has been unable, to obtain employment which provides sufficient income to make such payments; (b) is a student in a program designed to prepare him or her for gainful employment; (c) has an employment handicap; (d) is prevented by age from securing employment; (e) is responsible for the support of dependents, and the payment of a fee would constitute an undue hardship; (f) has been transferred outside the state; or (g) there are other extenuating circumstances.⁴ Other states' statutes incorporate a general guideline for exemption, such as the Texas law which provides that "[t]he court may waive or suspend a monthly payment of the fee

³Christopher Baird, Douglas A. Holien, and Audrey J. Hall, *Fees for Probation Services*, National Council on Crime and Delinquency, January 1986.

⁴Florida Statutes Annotated, Title XLVII, s. 945.30.

if it determines that payment of the fee would cause the probationer a significant financial hardship."⁵

Setting Fees

Probation officers perform several functions, the cost of which could be charged to the probationer. In many jurisdictions, probation officers often prepare presentencing reports for use by judges when setting the term and conditions of an offender's probation. Some or all of the expense incurred in preparing these reports could either be charged to the individual offender or added to the base from which average monthly fees for all probationers are calculated.

Similarly, the cost of providing alcohol and drug counseling referrals, employment assistance, and other nonsupervisory services could either be billed to individuals in need of such services or spread among the entire probation population. Supervisory costs could, likewise, either be charged on an individual basis, perhaps reflecting the degree of supervision required by each probationer, or collected as a flat fee on an average cost basis.

While a few states charge for specific programs or services, the most common practice is to require all probationers to pay a monthly probation supervision fee. In some states fee amounts are set at a flat rate, such as \$15 per month. In other jurisdictions, fee amounts can be imposed within some statutorily established range, for example, \$10-\$50 per month. California's fee statute does not specify fee amounts, requiring instead that judges determine defendants' ability to pay all or a portion of the "reasonable cost of probation" provided that the "reasonable cost . . . not exceed the actual average cost thereof."⁶

A recently enacted Massachusetts statute introduces a new twist to the issue of setting probation fees by subjecting each probationer to a monthly "probation day supervision fee" equal to "not less than one day's net wages nor more than three days' net wages."⁷ Supporters of this approach contend that it introduces a progressive element to fee requirements by linking fee amounts and offenders' incomes.

Actually, the term "probation day supervision fee" is a misnomer. The word fee, after all, implies the existence of some relationship between the amount charged to the recipient and the cost of providing the goods or services in question. The so-called "pro-

bation day supervision fee" approach ignores this critical link between costs and charges, relying instead upon an ability-to-pay criterion for setting fee amounts. Consequently, there will be numerous instances where the probation fee assessed against an individual offender will far exceed any reasonable estimate of the cost of providing probation supervision services.

Fee Disposition

Probation fee revenues can either be retained by the probation department or paid into the general fund. The relative advantages and disadvantages of these two approaches are open to interpretation.

It is often suggested that the introduction of fees could give rise to a revenue driven probation system wherein the welfare of offenders, perhaps even public safety, becomes secondary to revenue enhancement. For example, the link between caseloads and revenues could encourage the placement of more individuals on probation for longer periods of time. Operating in such a system, probation officers may, intentionally or unintentionally, place too much emphasis upon fee collection to the detriment of their other responsibilities.

Such concerns were raised by the authors of a National Institute of Corrections-sponsored study who warned:

Lacking the quasi-market effects of a real user fee, the charge for supervision may have some undesirable effects. Without a direct connection between supply and demand for service, there could be a tendency to increase the number of people to whom supervision is 'supplied'. If probation were to become an even marginally profitable venture through what amounts to a fine on individuals supervised, it would hardly be surprising if the 'net' were to widen, taking in many who otherwise might have received no services.⁸

The prospect of persons who would not otherwise be placed under supervision of the court being placed upon probation solely as a revenue raising measure would of itself be sufficient cause to reject probation fee proposals. Such a turn of events, however, seems highly unlikely. In the first place, it would spark an overwhelming surge of opposition from defense attorneys, civil rights groups, elected officials, and the media. In the second place, it borders on the absurd to suggest that responsible members of the judiciary would be swayed in their sentencing decisions by the opportunity to impose probation fees. Judges who abuse their authority to impose fines, restitution charges, and other economic sanctions would very likely abuse probation fees. The problem in such cases lies not with the concept of probation fees, but with the judge, and should be dealt with in the same man-

⁵Texas Code of Criminal Procedure, Art. 42.12, Sec. 6a(a).

⁶California Penal Code s. 1203.1b(a).

⁷Massachusetts General Laws Annotated, c. 276, s. 87A.

⁸Nora Harlow and E. Kim Nelson, *Management Strategies for Probation in An Era of Limits*, National Institute of Corrections, March 1982, p. 65.

ner as any other abuse of judicial discretion.

Actually, it seems far more likely that probation fees will have just the opposite effect by encouraging judges to impose probation in instances where incarceration might formerly have been the sentence of choice. For instance, in Georgia, probation fee revenues are being used to fund the state's intensive probation program whereby offenders who would otherwise be locked up are diverted into a lower cost and seemingly successful community-based intensive probation program. In other states, fee revenues have supported the hiring of additional probation officers to supervise larger probation populations.

Alternatively, fee revenues can be used to provide, improve, or expand a host of social services that are presently unavailable to many probationers. For example, a recent evaluation of the Massachusetts probation system identified serious deficiencies in both the scope and variety of services available to probationers. Among the services needed most were counseling, job training, drug and alcohol treatment, and shelters for battered spouses. According to the report, "only a patchwork system of services within and outside the probation system has been developed with the Commonwealth."⁹

Commenting on this lack of services, one obviously frustrated probation officer observed:

What are we doing? Over one half (of our clients) go to jail or surrender. We do not have the backup services to make it work. There is no priority for drug, mental health, sex offender treatment, employment services, etc. What is our function other than to watch them fail as predicted?¹⁰

Judge Albert Kramer of the Massachusetts District Court, a nationally recognized expert on alternative sentencing, has also addressed the problems raised by lack of services:

... probation isn't probation without a program ... Probation intercedes in peoples' lives without really offering them any help with the problems that caused them to commit their crimes ... That's totally immoral. It's pretending an involvement that doesn't occur.¹¹

In most states, additional general revenue funding for the types of services needed by probationers is extremely unlikely in the near (even not so near) future. Probation fees, on the other hand, would provide a ready and very appropriate source of such funding.

Fee revenues are an attractive means of funding

probation-related services and programs for several reasons. By providing a new revenue source, they would permit programs and services to be introduced or expanded without resorting to general tax increases or the shifting of resources from alternative uses. At the same time, fee programs forge a link between those who benefit from enhancing probation department support services and those who pay for such improvements. Of course, not all probationers are in need of additional services, but as one probation official argues: "Even probationers who do not directly benefit from fee expenditures should be required to help the person down the road who may need assistance." Finally, probation officials in many states with fee programs believe that fee requirements have been a tremendous help in garnering public and legislative support for their departments.

Another frequently raised objection to probation fees is that they will encourage expectations that probation departments can be, at least in part, self-supporting. As a result, financial support from general tax revenues would begin to decline. According to this scenario, each dollar of fee revenue would displace a dollar of general revenue funding. The final result is that probation departments may find themselves in the position of having to rely on an uncertain revenue base while expending scarce resources on fee collection activities.

The extent to which this has actually occurred is unclear. In some states, probation fee revenues are paid into the general fund. Other jurisdictions provide for revenues to be paid into a revolving fund to be used for salaries of probation officers, administrative expenses, travel allowances, educational programs, and other general operating costs. In other instances, as in Georgia, probation fees are used to fund policy innovations such as that state's intensive probation program.

Probation officials appear to be divided in their opinions as to whether probation fee revenues have supplemented or supplanted general revenue financing. Most believe that their departments' status as a revenue producer is a definite advantage in the competition for funds among government agencies and has led to larger appropriations than would otherwise have been the case.

In the final analysis, it probably makes little difference whether a statute stipulates that fee revenues be retained by probation departments, paid into the general fund, or earmarked for special programs. If state policymakers are determined to use fee programs for general revenue purposes, even the most carefully worded statute will not prevent them from

⁹The Spangenberg Group, *Assessment of the Massachusetts Probation System*, a report prepared for the Office of the Chief Administrative Justice of the Trial Court, October 1987, p. 129.

¹⁰Op. cit., p. 129.

¹¹Kevin Krajick, "Probation: The Original Community Problem," *Corrections Magazine*, December 1980, p. 7.

realizing that goal. If, instead, there is deep-rooted support for utilizing fee revenues to expand or enhance probation department operations that too can easily be achieved.

Sanctions

Most probationers will probably pay their fees with little or no prodding. In other cases, probation officers will have to exert pressure ranging from friendly persuasion to aggressive browbeating. Even the latter will sometimes prove ineffective, and sanctions, including the threat of incarceration, are an essential element of successful fee programs.

In most states, failure to pay probation fees is punishable in the same manner as is violation of any other condition of probation. Recognizing that incarceration should be used only as a last resort, most jurisdictions favor a "talk tough, act forgiving" approach to dealing with individuals who fall behind in their payments. For example, in some states persons whose financial situation takes a turn for the worse can either have their fee obligations reduced or forgiven or be granted a grace period until they get back on their feet. In other instances, a community service obligation can be substituted for the fee requirement.

Of course, failure to pay fees is not always involuntary, and willful refusal to satisfy probation fee obligations is often dealt with harshly. In Colorado, for example, it is not uncommon for persons who are able but refuse to pay their fees to be brought back before the court and given a work release sentence. Usually, the mere threat of having to spend nights in jail for the next 6 months elicits prompt payment.

Florida employs what can be described as a "three strikes and you're in" approach to dealing with probationers who fail to pay their fees. The first missed payment is dealt with informally by the probation officer, either over the telephone or during a regularly scheduled meeting. Failure to pay a second time elicits a letter, thus establishing a written record, warning of the potential consequences of further delinquency. A third missed payment results in the person being brought back before the court, at which time incarceration is a very real possibility.

In contrast, California's probation fee statute prohibits incarceration for failure to pay by limiting fee enforcement motions to civil court actions and specifically excluding contempt findings. Other sanctions which could be used to enforce fee requirements,

short of incarceration, include attachment of assets, garnishment of wages, or withholding of tax refunds.

Even states which strongly enforce fee obligations are reluctant to revoke an individual's probation for simple failure to pay. Fortunately, according to officials in several states, they are seldom forced to go to such lengths. Indigency exclusions, adjustments to fee amounts, temporary suspension of fee obligations, and other need-based accommodations have proven to be very effective at ensuring that persons obligated to pay fees have the means to do so. Probationers who refuse to pay fees despite their ability to do so are most often the same individuals who are unable or unwilling to abide by other conditions of probation. Consequently, failure to pay fees is usually just one item on a list of offenses which result in probation being revoked.

Administering Fee Programs

Probation officers already labor under heavy paperwork and caseload burdens. Some critics contend that time spent collecting probation fees would be better devoted to counseling and surveillance activities. Surely, they argue, we should be striving to reduce, not increase, paperwork and administrative requirements. A collateral concern is that collection activities, by casting officers in the role of bill collectors, will have a deleterious effect on officer/client relations and undermine professionalism among probation staff.

Collecting fees will require extra effort on the part of line officers, their superiors, central office staff, and the courts. Judging by the experience of other jurisdictions, this extra workload can be accommodated at acceptable cost and with little difficulty. Indeed, according to one study, while "the problems associated with fee collection are stressed by those who do not already have fee programs in place, [m]anagers with some first-hand experience in this area tend to emphasize the benefits."¹²

The impact of collection activities upon probation agency functions was one of the issues addressed by a 1986 report on fees for probation services prepared by the National Council on Crime and Delinquency (NCCD).¹³ That study found that time required by probation fee collection activities was minimal, usually involving less than 10 percent of total time. Even more telling are the results of an earlier NCCD study which concluded that time devoted to *all* collection activities (including restitution) rarely amounted to more than 2 percent of officers' time.

The earlier study also examined the impact of fees (i.e., all fees, not just fees for probation services) on

¹²Harlow, op. cit., p. 65.

¹³Baird, op. cit., p. 22.

the amount of time officers devoted to basic supervision activities. Based upon data from 16 jurisdictions, the NCCD concluded that the only discernible difference between agencies that collected fees versus those which did not was that the former averaged approximately 20 minutes less per month on maximum supervision probationers. Time spent on medium and minimum cases was virtually identical for both the collecting and noncollecting agencies.

Fees can be collected by probation officers or administrative personnel. While states with fee programs use both approaches, there are good reasons for utilizing administrative personnel whenever possible. First, and most importantly, it reduces the paperwork and administrative burden placed upon probation officers, thereby minimizing potential conflict between fee collection activities and their other responsibilities. Another advantage is that using administrative employees, who are paid considerably less than probation officers, helps hold down collection costs. Finally, administrative employees, many of whom are already involved with various collection activities, are more familiar with record keeping and data entry procedures.

Whatever approach is used, it is imperative that proper safeguards be employed to prevent misappropriation of funds or inadvertent failure to record all payments received. For this reason alone, it may be advisable to require that all payments be made in person or by mail to a central office or designated individual within each courthouse or probation department. Probation officers would simply monitor probationers' payment history based upon some easily accessed central file.

To further ensure a proper auditing trail, it is prudent to require, as many states do, that fees be paid by money order, certified check, or personal check rather than cash. As one state official observed, the problem with cash is that "it has a tendency to grow legs and walk away." Some states also have experienced problems with burglaries at local probation offices where large amounts of cash are known to be kept.

Although probation officers' involvement in the actual collection of fees can be minimized, they will have to be relied upon to distinguish between cases where individuals are unwilling, as opposed to unable, to meet their fee obligation. Therefore, even if administrative personnel are utilized whenever feasible, probation officers will remain the critical link between the imposition and collection of fee obligations. Where officers resent having to collect fees, revenues will be lost, morale will suffer, and admin-

istrative problems will be commonplace. In a more supportive environment, fee enforcement responsibilities appear to engender little opposition from probation officers and cause few administrative problems while ensuring high collection rates.

Conclusion

Persons on both sides of the debate over probation fees advance strong arguments in support of their respective positions. Too often, however, this debate merely reflects basic philosophical and policy considerations over which reasonable persons will always differ. For example, many individuals are convinced that charging fees inevitably undermines probation departments' emphasis upon rehabilitation and assistance. For that reason alone, they will oppose fees even in the face of the most enthusiastic revenue projections or a desperate need for new funds. By the same token, persons who are determined to punish probationers more severely or shift costs to the offender whenever possible are often willing to support even the most ill-conceived fee proposals. In between these two extremes there is ample room for compromise.

This middle ground is where the claims and counterclaims, charges and countercharges, can best be evaluated and resolved. It is here that important questions such as how to deal with probationers who are unable to afford fees or what priority should be given to fees in comparison to other obligations can be asked and answered.

On balance, it appears that most of the objections raised against probation fees can be addressed either in the enabling legislation or the actual administration of the fee program. Concerns that individuals might be incarcerated solely for inability to pay their fees can be resolved with provisions for indigency exclusions and community service alternatives. Fears that probation fees will compete with and sometimes displace restitution payments, victim/witness fees, or other court-ordered payments can be allayed by establishing a formal procedure for determining the order in which various financial obligations shall be satisfied.

In other instances the objections raised by opponents are simply not borne out by the experience of states which are currently operating fee programs. While collecting and administering fees are not without problems, there is no evidence to support claims that such activities will be excessively time consuming, difficult, or costly. Quite the contrary. Officials in most jurisdictions with fee programs report few problems and substantial benefits.