
Article

**Testing Periods and Outcome
Determination in Criminal Cases**

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INTRODUCTION

The operation of the criminal justice system has shifted dramatically without the change drawing widespread attention. To a significant extent, decisions about whether an accused will go to prison no longer depend on an adjudication of the facts underlying the criminal charge. Instead, such decisions rest on a defendant's ability to follow the rules of a future-oriented testing period created and overseen by the presiding court.

In this modern testing system, judges and prosecutors prescribe the prospective rules that defendants must follow in order to avoid prison. Typical rules include: do not use drugs or alcohol, do not get rearrested, stay away from a specific person, do not associate with criminals, follow the requirements of your treatment program, and get yourself to appointments on time. The procedural opportunity created by the test is framed as a promise: Defendants are promised that they will remain at liberty if they can follow the rules during the allotted period. The incentive posed by this promise often proves irresistible, even when the price of participating is high.

This method of testing defendants, while sidestepping trials, is deeply compatible with plea bargaining; the tests increase the range of options defendants can consider as alternatives to invoking their jury trial rights. At the same time, the tests ratchet up the authority available to prosecutors and judges in what the U.S. Supreme Court has termed our "system of pleas."¹

1. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

The popularity of these tests is shifting the orientation of decision-making in criminal cases from a retrospective analysis, to a prospective one. In each of the testing arrangements I explore in this Article, the locus of the punishment inquiry shifts towards the results of a forward-looking test—and away from a backward-looking evaluation of the facts of the criminal charge. This transformation alters the societal, personal, and other factors that determine who goes to prison and why, but little analysis or conversation has occurred about the consequences of this shift.

This Article sets out to identify the core features of this modern testing system, which is transforming decision-making in criminal cases and turning criminal procedure on its head. Under this system, it is defendants' characters, not their crimes, that go on trial. But to date, no one has catalogued the changes the system has wrought or isolated the factors that now impact outcomes for defendants on a mass scale.

Part of the problem is that testing mechanisms go by many different names, including probation, problem-solving courts, conditional plea agreements, deferred adjudication, caps, conditional discharge, and the fully suspended sentence. The use of dissimilar names for similar mechanisms hides the connections among states' practices, and among the procedures employed within a state. Weeding out the parallels (and differences) can be a dizzying and complex task.

In this Article, I introduce the concept of "Testing Periods" to help create order out of this chaos. By Testing Period, I mean the time period during which a criminal defendant undergoes a test in the hopes of achieving a desired outcome in his or her case. Under the standard arrangement, the defendant agrees to plead guilty and to undergo the test, and the judge agrees not to send the defendant to prison if he or she succeeds during the Testing Period.²

To elucidate the concept of the Testing Period, I draw on the history and theory of probation, one of the earliest and most

2. The Testing Periods I analyze in this Article require upfront guilty pleas, but the Testing Period framework applies to other testing devices used to sort people in the criminal justice system, including bail conditions, protective order conditions, pre-plea diversionary programs, and parole conditions. Each of these mechanisms creates a Testing Period that allows system administrators to sort people for the necessity of conviction and/or for the appropriate degree of punishment. I would like to investigate these Testing Periods in future work.

prominent testing methods. The dictionary defines probation as an “act of testing”³ because at its core, probation has always represented the chance to avoid prison by passing a test. The criminal justice system uses probation to set up a Testing Period in which a defendant has the opportunity to demonstrate that his or her punishment should not include prison.

The central role that Testing Periods now play in the criminal justice system was foretold by the early history of plea bargaining in U.S. courts. Indeed, as George Fisher has observed, prosecutors used the original Testing Period (probation) to invent plea bargaining in the first instance.⁴ In a celebrated account of the historical rise of plea bargaining, Fisher explained how probation emerged “in symbiosis with plea bargaining” and established itself as one of plea bargaining’s “most dependable foot soldiers” by the end of the nineteenth century.⁵ Plea bargaining came into being by offering defendants the opportunity to “test” their way out of prison; plea bargaining and probation took shape together as two sides of the same coin. As plea bargaining has increasingly displaced adjudication in the criminal justice system, it should not be surprising that the use of Testing Periods has similarly exploded.

A wide range of contemporary Testing Periods can be traced back to the early alliance between plea bargaining and probation. For the purposes of this Article, I divide these Testing Periods into two categories: those that operate between the guilty plea and the sentence, and those that operate as the sentence. I use the term “on-file model” to characterize Testing Periods that operate between the guilty plea and the imposition of sentence. I do so because the first recorded examples of probation in the 1830s operated in this manner and were known as putting cases “on file.”⁶ I use the term “sentenced model” to characterize Testing Periods that sort defendants through the sentence itself. A 1900 Massachusetts statute created a new form of “probation” that allowed courts to impose a Testing Period as a sentence in its own right.⁷ Because this form of probation spread rapidly

3. See *Probation*, DICTIONARY.COM, <http://www.dictionary.com/browse/probation> (last visited Mar. 14, 2019).

4. George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 942, 1044 (2000).

5. *Id.* at 860, 866.

6. See discussion *infra* Part I.A.

7. See discussion *infra* Part I.A.

among the states, the word “probation” is now linked more closely to the “sentenced” model than to the “on-file” model. Whenever courts impose a sentence that creates a Testing Period, they are following the “sentenced” model.

Ironically, many of the newest sorting mechanisms in the criminal justice system—including those used in a range of problem-solving courts (like drug courts)—follow the old “on-file” model. Defendants typically have to plead guilty as the price of entering these courts. They then undergo a Testing Period in advance of sentencing so that the court can sort them into one of two categories—those who will go to prison and those who will not.

This Article is the first to articulate the framework of Testing Periods and to illuminate the critical intersection between plea bargaining and the broad range of testing mechanisms that have arisen in conjunction with guilty pleas. Mapping this intersection is arguably the most important challenge facing those seeking to understand the criminal justice system today. Ninety-four percent of state convictions are now the result of guilty pleas,⁸ and the vast majority of those who plead guilty do so in exchange for a Testing Period, not a term of incarceration.⁹

Using Connecticut as an entry point, I identify six different mechanisms that create Testing Periods: probation, conditional discharge, plea-and-withdraw offers, caps, drug courts, and conditional plea agreements. These mechanisms vary in their details and are not routinely viewed as similar structures, but in fact they share essential traits: (1) defendants must follow rules (such as staying away from drugs or alcohol) to pass a court-monitored test; and (2) the inquiry for the court’s incarceration decision is based on the defendant’s performance on the test, not on the underlying facts of the alleged criminal conduct. After examining the impact of these mechanisms in Connecticut, I extend my analysis to other key states, including New York, California, and Texas, to lay out the scale of the shift that has occurred in criminal law determinations nationwide.

Importantly, in examining Testing Periods, I am concerned with both the dynamics that surround the decision to plead guilty, and the dynamics created as a consequence of the plea.

8. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

9. Probation is just one form of Testing Period, and the probation population (standing alone) far exceeds the prison population. *See* discussion *infra* Part I.A.

As I shall demonstrate, prosecutors and judges have been able to mold Testing Periods in ways that maximize their decision-making authority not only in the present, but also in the future.

Testing Periods facilitate guilty pleas because they allow prosecutors and judges to dangle the possibility of no prison time in front of a defendant. It turns out that defendants will accept nearly any arrangement as long as it provides them the opportunity to avoid going to prison. The possibility of avoiding prison is so strong an incentive for defendants that little else is required to counteract the scope of the concessions that judges and prosecutors have been able to demand from defendants in exchange.¹⁰

The Testing Period tool, by giving defendants a chance to avoid prison, has greased the wheels of many different plea bargaining arrangements. In particular, the tantalizing prospect of a fully suspended sentence has encouraged people to gamble with their ability to stay out of trouble in the future in exchange for the certainty of avoiding prison today. In taking this gamble, defendants can make themselves easy targets for punitive action down the road.

To be clear, for the right defendants in the right circumstances, Testing Periods open up an otherwise unavailable pathway out of prison.¹¹ But for defendants facing addiction, mental health issues, or disadvantaged social circumstances, the “test” may be stacked against them from the beginning.¹² Given the high stakes, careful attention needs to be paid to the criteria that are being used in Testing Periods to sort defendants into the system’s winners and losers.

My analysis of modern Testing Periods reveals many surprising parallels with a much older method of resolving criminal

10. See discussion *infra* Part II.A.2.

11. Many defendants successfully navigate the terms of their Testing Periods, and many defendants do not. Because defendants generally do not appeal successful Testing Periods, these Testing Periods are not as likely to show up in the case law.

12. See, e.g., Michelle S. Phelps, *Mass Probation and Inequality: Race, Class, and Gender Disparities in Supervision and Revocation*, in 2 HANDBOOK ON PUNISHMENT DECISIONS: LOCATIONS OF DISPARITY 43, 44 (Jeffery T. Ulmer & Mindy S. Bradley eds., 2018) (discussing research showing that adults with more privilege are better equipped to meet the requirements of probation and analyzing the role of probation “in stratifying outcomes in the criminal justice system, providing an off-ramp for some and a conveyer belt toward prison for others”).

cases: the testing models manifested through the medieval ordeal.¹³ The accused who underwent a medieval ordeal was known as a “proband,” a word that comes from the same root as probation. Both words are based on the Latin “probare,” which means to test or to prove.¹⁴ A proband, like a probationer, was the person being tested.

As I will demonstrate at the end of this Article, trial by ordeal was a method of testing accused people (and particularly low-status accused people) to reveal whether they were “dirty” or “clean.” In administering an ordeal, priests would engage in a careful inspection of the proband’s body to report if the proband was “clean,” and thus vindicated by God’s judgment, or if it was necessary for the proband to be led away “guilty and unclean” for punishment.¹⁵

Modern Testing Periods also focus heavily on divining whether the accused should be labeled dirty or clean.¹⁶ In today’s world, probationers (and drug court defendants) routinely urinate into cups in front of court officers so that their urine can be inspected and catalogued as “dirty” or “clean.” As in the days of the ordeal, the results of that test allow the unclean to be led away for punishment.

This Article has four parts. In Part I, I explore the history of Testing Periods and their role in shaping decision-making in criminal cases. In Part II, I draw on a concrete analysis of Testing Periods in Connecticut to demonstrate how they are deployed to: (1) facilitate guilty pleas; and (2) fashion outcomes for defendants based on their ability to follow a set of prospective rules. In

13. See discussion *infra* Part IV (examining the use of the ordeal as a procedural tool to sort defendants for punishment).

14. See *Proband (n.)*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/search?q=proband> (last visited Mar. 14, 2019); *Probation (n.)*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/probation#etymonline_v_2591 (last visited Mar. 14, 2019).

15. See *infra* Part IV.

16. See, e.g., Transcript of Record at 2–4, *State v. Jones*, Nos. N23N-CR18-0186054S & N23N-CR18-0186942S (Conn. Super. Ct. Oct. 4, 2018) (reflecting that the court informed the defendant that it “is critical that you have good attendance record [at drug treatment] and that your urinalysis comes back clean” in order to maintain release status on bond and warned the defendant that “depending on how you do going forward will impact the type of sentence you get in this case”); Transcript of Record at 8, *State v. Nicholson*, No. N23N-CR17-0174135-S (Conn. Super. Ct. July 20, 2017) (indicating that the defendant confirmed his understanding that “[n]ot showing up” and “[d]irty urines” are violations of probation conditions).

Part III, I show how the Testing Period dynamics I highlight in Connecticut also shape outcomes in other states across the country. In Part IV, I rely on scholarship about the medieval ordeal to raise questions about the purposes that Testing Periods serve, the criteria they use to sort defendants, and the societal players they empower and disempower.

I. THE HISTORY AND IMPACT OF TESTING PERIODS

In George Fisher's seminal work on the triumph of plea bargaining, he argued that plea bargaining came to dominate the criminal courts because "it served the interests of the powerful."¹⁷ In particular, plea bargaining increased the power available to prosecutors and judges to control case outcomes—most visibly by removing the jury, the most democratic element of the system, from the equation. The ability to control case outcomes, however, requires power along two dimensions: the power to persuade defendants to plead guilty *and* the power to set the terms of their sentences. Since its earliest days, plea bargaining has served both ends; it operates as a mechanism for convincing defendants to waive their jury trial rights, and as a font of the power that has always "mattered most" in "the battlefield of the criminal courts": the authority to dictate sentences.¹⁸

Fisher's account of how prosecutors and judges developed the ability to control case outcomes is inextricably linked with the history of probation. He explains that "the birth of probation" was in significant measure "the work of prosecutors who sought a new way to expand their power to bargain for pleas."¹⁹ Backed by judges as well as prosecutors, probation rose in tandem with plea bargaining and ripened into "one of the most useful tools of lawyers cutting deals."²⁰

In the next Section, I draw on the history of probation, which Fisher used to illuminate the power dynamics behind plea bargaining's rise, but I reframe that history as the history of the Testing Period. I do so because a broad range of contemporary testing instruments, which are not called "probation" within state systems or analyzed in state case law as "probation," derive from this same essential history. Although probation continues

17. Fisher, *supra* note 4, at 859.

18. *Id.*

19. *Id.* at 860.

20. *Id.* at 860, 866.

to play a key role as the foundational (and arguably most important) Testing Period, the use of Testing Periods extends far beyond what is characterized as “probation” within state systems. For this reason, “probation” is too limited a term to capture the plethora of sorting devices that courts now use to determine case outcomes.

A. THE DEVELOPMENT OF TESTING PERIODS

The modern history of Testing Periods begins with the emergence of probation in Massachusetts. Massachusetts is known as the birthplace of probation because the earliest recorded examples of probation have been found in its records.²¹ In Fisher’s words, “prosecutors [in Massachusetts] raised up probation as a sibling of plea bargaining and shaped it to do plea bargaining’s bidding.”²²

Scholars have cited the arrangement that lay behind an 1830 guilty plea—by a defendant named Jerusha Chase in Massachusetts—as the first recorded example of probation, although the word “probation” was not in use at the time.²³ Chase was charged in the old Municipal Court of Boston with stealing a plaid cloak from a dwelling house.²⁴ On February 8, 1830, she agreed to plead guilty to that charge, and the prosecutor agreed not to move for her sentencing in the wake of her guilty plea.²⁵ Instead, the case was put “on file” and Chase was released on the condition that she “come when sent for and in the meantime keep the peace and be of good behavior towards all the Citizens” of the Commonwealth.²⁶ Two of her supporters stood as sureties on the

21. 2 U.S. DEPT OF JUSTICE, THE ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES: PROBATION 16 (1939) (“[P]robation in the United States has no early history apart from the development of the Massachusetts system.”).

22. Fisher, *supra* note 4, at 942.

23. See GEORGE FISHER, PLEA BARGAINING’S TRIUMPH 64, 68, 76, 83–84 (2003); Frank W. Grinnell, *The Common Law History of Probation: An Illustration of the Equitable Growth of Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 15, 22 (1941). From my review of records in the Boston archives, it is apparent that cases were placed on file earlier than 1830, but the practice was litigated in the Chase case. See, e.g., Commonwealth v. Grace Gale, Docket Book, Municipal Court of Boston, August Term 1829 (case ordered to lay on file on August 13, 1829) (on file with author).

24. Indictment against Jerusha Chase, Commonwealth of Massachusetts, January 1830 (on file with author).

25. Grinnell, *supra* note 23, at 23.

26. Indictment against Jerusha Chase, *supra* note 24; see also PETER OXENBRIDGE THACHER, REPORTS OF CRIMINAL CASES, TRIED IN THE MUNICIPAL

deal, agreeing to forfeit \$200 if she violated these conditions.²⁷ The case was then “suffered to sleep upon the files of the court” unless and until the prosecutor decided to move for her sentencing at a later date.²⁸

As I will describe below, this “on file” mechanism was the earliest iteration of a practice that the authorities in Massachusetts would later refer to as “probation.”²⁹ As exemplified by the Chase case, the “on file” mechanism operated between the guilty plea and the sentence. The defendant would agree to plead guilty, and the prosecutor would agree to put the case on file, which meant allowing the defendant to stay out of prison subject to a set of conditions. To be eligible for this arrangement, the defendant would have to produce a surety willing to stake money on the defendant’s ability to meet the conditions. If a prosecutor later came to believe that a defendant had violated one of the conditions, that prosecutor could move for the defendant to be sentenced on the guilty plea.

The ability to put a case on file was a useful procedural device for prosecutors on many levels, as it gave them a highly efficient tool to encourage defendants to plead guilty. By entering a guilty plea, the defendant eased the prosecutor’s workload, protected the prosecutor from making mistakes at trial, and foreclosed the possibility of acquittal.³⁰ Guilty pleas also shielded prosecutors from having to subpoena witnesses who were reluctant to testify at trial. The fact that defendants admitted their guilt, moreover, served to eliminate any formal doubt that they were in fact guilty. These admissions increased the legitimacy of prosecutors’ victories, heightening their prestige and advancing their overall professional reputations.³¹

By the 1840s, the opportunity presented by the “on file” methodology began to spread to more marginalized defendants, those with no surety to stand for them. In 1841, John Augustus, a Boston cobbler, volunteered to serve as a surety for an indigent

COURT OF THE CITY OF BOSTON, BEFORE PETER OXENBRIDGE THACHER 267–68 (Horatio Woodman ed., 1845).

27. Grinnell, *supra* note 23, at 23.

28. THACHER, *supra* note 26, at 268.

29. Fisher, *supra* note 4, at 941–42 (“For putting cases on file was probation. It was not merely an ideological forebear of the system of probation that first found expression in a Massachusetts statute of 1878. It was, as a matter of court procedure, the selfsame thing.”).

30. FISHER, *supra* note 23, at 16.

31. *Id.* (laying out the benefits of plea bargaining for prosecutors).

defendant whom he met in court one morning.³² Augustus's decision to fill in as surety—for a defendant whom he did not know personally—was a critical step in the early expansion of the “on-file” methodology.³³

Augustus's first case involved a man who was accused of being a “common drunkard.”³⁴ Augustus was in court when he saw this “ragged and wretched looking man” sitting on a bench allotted for prisoners.³⁵ The man's offense was “yielding to his appetite for intoxicating drinks,” but he told Augustus that he “never again would taste intoxicating liquors” if he could be saved from the House of Correction.³⁶ Augustus agreed to serve as his surety, and the man was released and ordered to appear in court in three weeks.³⁷ According to Augustus, the defendant “signed the pledge and became a sober man.”³⁸ The judge was so pleased by this transformation that he imposed a fine of one cent and costs (\$3.76), rather than the usual term of incarceration.³⁹

In the ensuing years, Augustus stepped in as surety for many other impoverished defendants in the Boston courts.⁴⁰ This intervention made it possible for prosecutors to place these cases on file during what Augustus termed “a season of probation.”⁴¹ For this reason, scholars have credited Augustus with introducing the word “probation” into the criminal law.⁴² Because of his role, Augustus is known as the “first probation officer” and the “father of probation.”⁴³

These titles are appropriate not only because Augustus sought to extend what he called probation to the poor, but also

32. JOHN AUGUSTUS, JOHN AUGUSTUS: FIRST PROBATION OFFICER 4–5 (1972).

33. FISHER, *supra* note 23, at 85, 280–81 n.105 (analyzing Augustus's practices as in line with the on-file system); Grinnell, *supra* note 23, at 24–25.

34. AUGUSTUS, *supra* note 32, at 5.

35. *Id.* at 4.

36. *Id.* at 5.

37. *Id.*

38. *Id.*

39. *Id.*

40. *See generally id.*

41. Fisher, *supra* note 4, at 959.

42. *See, e.g.,* PAUL F. CROMWELL, JR. ET AL., PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM 10 (2d ed. 1985) (noting that Augustus “was the first to apply the term ‘probation’” to his method).

43. AUGUSTUS, *supra* note 32, at ix; CROMWELL, *supra* note 42, at 10. As I explain in Part IV, however, the term “proband” dates back to the medieval trial by ordeal.

because of his focus on temperance. After the success of his first case, Augustus continued to work exclusively on drunkard cases for the next two years.⁴⁴ From its earliest days, probation has been used as a tool to sort (mostly indigent) defendants for their ability (or inability) to abstain from intoxicants.

Augustus's role in facilitating a testing process for defendants on this basis is reflected in a contemporaneous account of his methodology in court.⁴⁵ In a case he later highlighted as representative, Augustus volunteered to be the surety for a man whom a witness indicated "generally gets drunk in the morning and commences a new drunk before the old one is half over."⁴⁶ The judge was skeptical that this man was capable of change, asking Augustus: "Do you think it worth while to give him a trial? He appears to be a broken down man."⁴⁷ Augustus replied that he was willing to take a chance: "I will be his bail for three weeks, from this day at eleven o'clock . . . and if at that time he is not an altered man, I will willingly consent to his becoming an inmate of the House of Correction."⁴⁸

This approach, as framed by the first volunteer probation officer, would become the defining philosophy of probation-derived systems. If a defendant could obey the rules of the Testing Period going forward, that defendant would not go to prison. But failure permitted the judge and prosecutor to wash their hands of the matter: semantically, by failing the test, the defendant had *earned* his or her own place in prison.

In the late nineteenth century, Massachusetts began to standardize the use of probation by statute, while professionalizing the probation officer's role. An 1878 act, the first statute to contain the word "probation," allowed Boston's mayor to appoint a paid probation officer to assist the courts.⁴⁹ The officer would recommend defendants for "plac[ement] on probation."⁵⁰ The officer would also work to ensure that probationers met the conditions that formed their obligations under the deal.⁵¹

44. AUGUSTUS, *supra* note 32, at x.

45. *See id.* at 56.

46. *Id.* at 47, 55.

47. *Id.* at 56.

48. *Id.* at 57.

49. Grinnell, *supra* note 23, at 28.

50. Act of Apr. 26, 1878, ch. 198, § 1, 1878 Mass. Acts 146, 147.

51. *Id.*

As probation was codified into statute, the Massachusetts legislature began granting judges more power over the decision to place a defendant on probation.⁵² The inaugural 1878 act, which focused on the Boston area, referred to “offenders placed on probation by the court.”⁵³ A subsequent 1880 statute, which extended the availability of probation throughout the state, authorized courts to “permit the accused to be placed on probation, upon such terms as it may deem best.”⁵⁴

Importantly, as more statutes were enacted, probation evolved to become a sentence in its own right, in addition to serving as a mechanism for staving off a sentence. The initial statutes in Massachusetts did nothing to alter the early practice of placing defendants in a Testing Period after they had pled guilty, but before they were sentenced by the court—the “on-file” model.⁵⁵ A 1900 statute, however, authorized Massachusetts judges to also *sentence* a defendant to probation.⁵⁶ This new model involved imposing a prison sentence and then suspending execution of that sentence while the defendant served a period of probation.⁵⁷ If the defendant met the court’s conditions, the prison sentence would remain suspended.⁵⁸ But if the defendant failed to meet those conditions, the court could revoke probation and execute the prison term.⁵⁹

Over time, this model of imposing probation in conjunction with a suspended sentence appeared more regularly in legislation than the “on-file” model.⁶⁰ By 1925, all forty-eight states and

52. Whether the prosecutor or the judge had unilateral, exclusive, or shared authority to place a case on file and/or proceed to sentencing (based on an alleged violation of an on-file condition) evolved over time and place. See FISHER, *supra* note 23, at 67–89 (discussing and parsing evidence on the balance of authority between the prosecutor and judge in controlling the use of the on-file mechanism in Massachusetts). By the end of the 19th century, “[a] fair amount of evidence suggests” that “the judge had more power than before to place a case on probation in the face of the district attorney’s opposition.” *Id.* at 87. “[T]he probation statutes of the last quarter of the century tipped the balance of probationary power toward the court.” *Id.*

53. Ch. 198, § 1, 1878 Mass. Acts at 147.

54. Act of Mar. 22, 1880, ch. 129, § 4, 1880 Mass. Acts 87, 87; FISHER, *supra* note 23, at 87 (discussing early statutes in Massachusetts).

55. Frank W. Grinnell, *Probation as an Orthodox Common Law Practice in Massachusetts Prior to the Statutory System*, 2 MASS. L.Q. 591, 614 (1917).

56. *See id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *See id.* (reporting that the change in practice that authorized courts to

the federal government had enacted probation statutes.⁶¹ The prevailing model authorized judges to sentence a defendant to a term of probation while simultaneously suspending the imposition or the execution of a prison term.⁶² This is what I call the “sentenced” model, to distinguish it from the older “on-file” model.

Once probation’s availability became more predictable, the opportunities and costs presented by probation were incorporated into the negotiation process. After a while, “no defendant needed to be told that a guilty plea was the purchase price of the hope of probation.”⁶³ The rules of the game had become obvious to all of the actors in the court.⁶⁴

Probation’s effectiveness in facilitating guilty pleas served the interests of judges, as much as of prosecutors. Guilty pleas were much less taxing on judicial resources than trials, with

suspend the execution of a prison sentence became “general *under statutory systems* in the country”).

61. See CROMWELL, *supra* note 42, at 12.

62. *Id.* at 12–17 (discussing early probation statutes in the federal government, California, Illinois, New York, and Texas); KELLY LYN MITCHELL ET AL., ROBINA INST. OF CRIMINAL LAW & CRIMINAL JUSTICE, PROFILES IN PROBATION REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN 21 STATES 6 (2014) (“In a majority of states surveyed in this report, probation is understood to be a component of a suspended (or stayed) prison sentence—and usually states have more than one way to suspend a sentence. Less commonly, probation is considered to be a free-standing sanction in its own right, and may be imposed by sentencing courts without pairing it with a suspended prison term. Some states allow for both suspended sentences and free-standing probation.”).

63. FISHER, *supra* note 23, at 89.

64. See, e.g., MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT 9 (1979) (describing the prevailing methodology of resolving cases in New Haven during the 1970s: “I can get you a suspended sentence if you’ll cop the plea.”); LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870–1910, at 181 (1981) (“Clearly, a guilty plea opened the doors to probation. Word of this must have gotten around to defendants and defense. The message—‘plead guilty’—rang through loud and clear.”); *id.* at 226–27 (describing the “unwritten rule” that “for any reasonable chance at probation, you *must* plead guilty”; quoting a defendant tell a judge in 1910 in Alameda County, California that “I pleaded guilty because you can’t try to get probation otherwise”; and concluding that probation “gave the guilty plea a powerful thrust”); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 78 (1980) (“[M]any persons, perhaps even most, faced with a choice between probation and a trial with the possibility of a prison sentence, would accept the bargain: better to suffer the inconvenience of reporting to a probation officer than to risk incarceration.”).

their cumbersome adversarial procedures and complex evidentiary rules.⁶⁵ They also protected judges, as well as prosecutors, from the risk of reversal on appeal.⁶⁶ The conditional nature of probation, moreover, preserved for judges the ultimate power over defendants who were alleged to have violated the rules of the Testing Period: judges retained the right to send probationers to prison for violating any of the conditions that judges, themselves, had the authority to devise. By feeding into the incentives of the courtroom's most powerful actors, probation created a sentencing structure that allowed plea bargaining to thrive.⁶⁷

Once plea bargaining—and its instrument, probation—gained a foothold in the courts, they rose to dominance in tandem. By 1968, approximately ninety percent of defendants were being convicted by guilty plea, and that number would only continue to rise.⁶⁸ By 2012, ninety-four percent of state convictions were the result of guilty pleas.⁶⁹ And most of the people who were agreeing to plead guilty did so in exchange for probation, rather than for a reduced sentence of incarceration. The chart below, which relies on data from the Bureau of Justice Statistics (BJS), reflects this reality.⁷⁰

65. See, e.g., John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 206 (1979) (“The vast elaboration of adversary procedure and the law of evidence has made [U.S.] constitutionally guaranteed trial procedure so costly that it can be used in only a tiny fraction of cases of serious crime.”).

66. Fisher, *supra* note 4, at 1042–43.

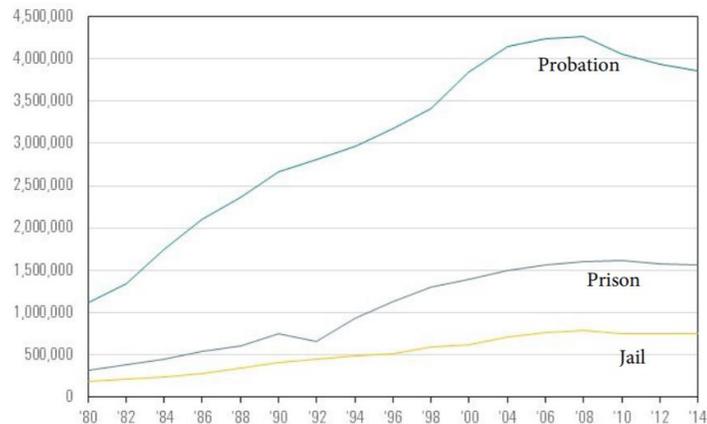
67. FISHER, *supra* note 23, at 90.

68. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 50 (1968).

69. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

70. MICHAEL P. JACOBSON, VINCENT SCHIRALDI, REAGAN DALY & EMILY HOTEZ, HARVARD KENNEDY SCH., LESS IS MORE: HOW REDUCING PROBATION POPULATIONS CAN IMPROVE OUTCOMES 7 fig.1 (2017). It should be noted that most of the jail inmates are pretrial inmates. TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, NCJ 250394, JAIL INMATES IN 2015, at 4–5 tbls.3 & 4 (Brigitte Coulton ed., 2016) (reporting that 37.3% of 693,300 jail inmates were convicted).

National Trends in Probation, Prison, and Jail Populations
(Based on Bureau of Justice Statistics (BJS) Data, 1980–2014)



BJS’s probation tally, however, does not capture the full extent of the relationship between Testing Periods and plea bargaining. In gathering its probation statistics, BJS asks jurisdictions to include “all adults regardless of conviction status, who have been placed under the supervision of a probation agency as part of a court order.”⁷¹ This definition, which references the involvement of a probation agency, means that the statistics on probation underrepresent the correlation between plea bargaining and the range of Testing Periods that I am exploring in this Article.

The BJS statistics on “probation” exclude people in both the “sentenced” model and the “on-file” model. First, the BJS definition of probation does not explicitly include sentencing devices like a conditional discharge that do not come under the supervision of a probation agency.⁷² As I will explain in Part II, a conditional discharge is a sentence used in some states to impose conditions on a defendant without the involvement of a probation

71. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, OMB No. 1121-0064, FORM CJ-8 2015 ANNUAL PROBATION SURVEY 1 (2015), https://www.bjs.gov/content/pub/pdf/cj8_15.pdf.

72. *Id.* (asking states to include probationers on both active and inactive supervision status, but not directing states to include people subject to conditions, imposed as part of the sentence, that are outside the jurisdiction of a probation agency).

agency.⁷³ The judge imposes these conditions to maintain a “jurisdictional hold” over the defendant,⁷⁴ creating a Testing Period that operates as the sentence.

Second, the BJS definition of probation fails to capture many of the “on-file” models that now pervade state plea bargaining practices. As I will explore in detail, many plea bargaining systems—including those deployed in a range of problem-solving (or alternative) courts—follow the “on-file” model.⁷⁵ Applying classic “on-file” methodology, many of these courts accept only defendants who agree to plead guilty and use the defendants’ performance in the Testing Period to determine (and justify) their sentences. But states often do not count defendants in problem-solving courts (and other on-file systems) as “on probation,” if they count them at all.⁷⁶

A related and ongoing problem is the lack of coherence surrounding the word “probation,” which makes it an unruly category on which to base data collection.⁷⁷ Probation has become a term of art within individual jurisdictions, which have different understandings of who is on probation and who is not.⁷⁸ The absence of standardized definitions and practices across jurisdictions has prompted BJS to launch a census of adult probation supervising agencies in an attempt to enable more accurate data

73. See, e.g., N.Y. PENAL LAW § 65.05 (McKinney 2017) (explaining that a court may impose conditional discharge upon determining probation supervision is unnecessary). Some states call a similar mechanism a conditional sentence. See, e.g., CAL. PENAL CODE § 1203(a) (West 2017).

74. CONN. GEN. STAT. ANN. § 53a, ch. 952, pt. II, Refs & Annos (West 2019) (Comm’n Comment 1971).

75. See *infra* Part II.B.

76. Telephone interview by Elizabeth Leiserson with Thomas Bonczar, Statistician, Bureau of Justice Statistics (Oct. 19, 2015) [hereinafter Bonczar Interview] (noting that BJS cannot guarantee jurisdictions are reporting from alternative courts and that BJS does not count those who are not under the jurisdiction of a probation agency in the probation tally); Email from Danielle Kaeble, Statistician, Bureau of Justice Statistics, to Fiona Doherty (June 30, 2017) (on file with author) [hereinafter Kaeble Email] (noting that BJS cannot control who is considered “on probation” from state to state).

77. MITCHELL ET AL., *supra* note 62, at 6 (“The legal conception and status of probation sentences is one of the most difficult things to determine accurately when looking at states across the country.”).

78. See, e.g., discussion *infra* Parts II.B & III.B (describing how one jurisdiction might call an on-file Testing Period “interim probation,” while another jurisdiction might call a similar Testing Period a “cap” or “deferred adjudication”).

collection.⁷⁹ However, even this census, which was launched in 2014 but then delayed,⁸⁰ does not include probation agencies that supervise only misdemeanor cases, as the sheer number of these agencies made the project unwieldy.⁸¹ Probation will remain a messy category for many years to come.

The complexities and caveats that accompany the word “probation” render it an inadequate vehicle upon which to build an analysis of modern testing systems. While probation inevitably sets up a Testing Period, many key Testing Periods are neither referred to nor conceived of as “probation.” I therefore depart from Fisher’s reliance on the word “probation” as an encapsulating term and use the concept of “Testing Periods” to facilitate a more comprehensive analysis across state systems.

B. HARNESSING THE POWERS OF INDETERMINATE SENTENCING

The reliance on Testing Periods to determine outcomes in criminal cases changes the orientation of decision-making in these cases from a retrospective analysis, to a prospective one. I argue that the shift from retrospective to prospective decision-making has produced indeterminate sentencing authority for prosecutors and judges.

My focus on indeterminate sentencing represents a radical departure from Fisher’s formative account of the rise of plea bargaining in U.S. courts.⁸² In tracing the history of plea bargaining, Fisher relied on two interrelated factors to chart the growing tide of plea bargaining’s influence: the compatibility between plea bargaining and probation, and the incompatibility between plea bargaining and the indeterminate sentence.⁸³ In Fisher’s telling, probation flourished because it increased the power of prosecutors and judges to control outcomes when negotiating cases.⁸⁴ The indeterminate sentence, meanwhile, disappeared because it threatened to diminish the power of prosecutors and

79. See Kaeble Email, *supra* note 76.

80. See *Census of Adult Probation Supervising Agencies, 2014*, BUREAU JUST. STAT., U.S. DEPT JUST., <https://www.bjs.gov/content/capsa.cfm> (last visited Mar. 14, 2019).

81. Bonczar Interview, *supra* note 76.

82. See Fisher, *supra* note 4, at 859–65.

83. *Id.* at 860, 942 (“The demise of the indeterminate sentence, one of the most promising of the late nineteenth century’s progressive brainchildren, bears the mark of plea bargaining’s malice.”).

84. *Id.* at 867.

judges to control those very same outcomes. Thus, according to Fisher, “[p]robation’s rise and the indeterminate sentence’s fall” are “two of plea bargaining’s victories.”⁸⁵

The notion that plea bargaining killed the indeterminate sentence, however, relies on an outdated understanding of indeterminacy. It is true that early forms of indeterminate sentencing—in which a parole board could shorten a prison sentence imposed by a judge—did not coexist easily with plea bargaining. As Fisher has explained, any system that relegated the power to determine the length of the sentence to a parole board would have “stripped both judges and prosecutors of the power to bargain over the length of terms and would have hobbled the plea-bargaining regime.”⁸⁶ This mode of indeterminacy, in which a parole board has the power to adjust the length of the prison term, however, is not the only form of the indeterminate sentence.

A sentencing system is indeterminate to the extent that judgments about punishment are forward-looking in nature.⁸⁷ A system is indeterminate, for example, if the length and nature of the penalty for a crime can be adjusted on the basis of prospective (and renewable) “assessments of the rehabilitative progress of the offender and the danger posed to the public by his or her presence in the community.”⁸⁸ The identity of the party empowered to make these assessments—whether it is the parole board or some other body—does not affect whether or not the sentence is indeterminate. Indeterminacy rests on whether the penalty for a crime can be adjusted based on events that occur in the future, not on the identity of the party who is designated to make those adjustments.

Different models of testing have enabled prosecutors and judges to claim for themselves the powers inherent in the indeterminate sentence. Under these models, a parole board does not decide when a defendant has become sufficiently rehabilitated to merit the end of his or her punishment. Instead, prosecutors and

85. *Id.* at 860.

86. *Id.*

87. U.N. DEPT OF SOC. AFFAIRS, THE INDETERMINATE SENTENCE 1, 4 (1954); Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 298 (1974).

88. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 961, 963–96 (2013) (tracing the history and theory of indeterminate sentencing).

judges retain direct control over the case while the defendant undergoes a Testing Period that will determine the length and character of his or her punishment. This type of indeterminate sentencing, far from diminishing the influence of prosecutors and judges, provides them with new lines of authority to affect case outcomes.

The sentencing process created by these Testing Periods is indeterminate. The scale of the punishment is determined not primarily by the defendant's past conduct (i.e., the offense of conviction), but by the defendant's future conduct (i.e., the extent to which the defendant obeys the rules of the game going forward). The amount of the punishment, in other words, is not knowable at the time the defendant pleads guilty to a crime. Instead, the punishment will vary depending on how the defendant performs during the Testing Period, and, more specifically, on the extent to which the defendant is deemed compliant with the post-plea requirements laid out by the prosecutor or judge.⁸⁹

The first hints at the consequences of this change in orientation are contained in a critical, but unexamined, aspect of the Jerusha Chase case.⁹⁰ Scholars have cited this case as the first recorded example of probation, but no one has emphasized that the case also contains the first recorded example of a prosecutor and judge deciding that a defendant has *failed* the test of probation. The particulars of Chase's violation reveal the kinds of authority created by the shift in emphasis towards compliance with prospective rules.

In the court's May 1831 term, more than a year after Chase's conviction for stealing a cloak went "on file," the prosecutor charged Chase with a new count of larceny.⁹¹ The record reflects that Chase was indicted on this charge, "and upon her trial, was acquitted."⁹² Following the acquittal on the larceny charge, however, the prosecutor moved for Chase to be sentenced on her

89. These dynamics reflect what Issa Kohler-Hausmann has termed the "managerial model" of criminal law adjudication. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 614 (2014).

90. THACHER, *supra* note 26, at 267.

91. *Id.*

92. *Id.* The circumstances surrounding this "acquittal" are unclear. In a May 5, 1831 motion filed with Judge Thacher, Chase's lawyer recounted that Chase had been in pretrial detention to "answer for a supposed larceny from Mrs. Catherine Dexter in Boston." Petition of Jerusha Chase, Commonwealth v. Chase, (Bos. Mun. Ct. 1831) (on file with author). She remained in pretrial detention "until the Grand Jury had presented all their indictments at this

prior February 8, 1830, guilty plea—the one that had remained “on file”—on the basis that she had violated the rules of her Testing Period by getting into trouble again.⁹³ In granting this motion, the court determined that the prosecutor had retained full authority to move for Chase to be sentenced at any time, and that the acquittal on the larceny charge was not relevant.⁹⁴ The court also emphasized that it had retained the power, upon motion, to sentence Chase on the old conviction.⁹⁵ Exercising this power, the court sentenced Chase to five days solitary confinement and six months of hard labor in the house of correction based on the guilty plea from the previous year.⁹⁶

In this way, probation had unleashed a system that would allow the prosecutor and judge to evade the jury twice over. The on-file mechanism helped persuade Chase to give up her jury trial rights in the first case. The breadth of the conditions governing the on-file Testing Period then enabled the prosecutor and judge to disregard the outcome of the jury system in the second case.⁹⁷

II. TESTING PERIODS IN CONNECTICUT

I begin my study of how Testing Periods shape outcomes in criminal cases by focusing on Connecticut’s courts. I do so because a detailed analysis of the role and impact of Testing Periods must rise from a study of a particular place and in choosing that place, access is the leading consideration.⁹⁸ Because I teach in Connecticut and practice in the superior court of New Haven—a famously busy courthouse in a representative town⁹⁹—the advantages of access situate my study in Connecticut.

term, when she was brought from prison into this Court, & informed by the Clerk thereof that she was discharged from said supposed offence of larceny from Ms. Dexter.” *Id.*

93. Petition of Prosecutor, *Commonwealth v. Chase*, (Bos. Mun. Ct. 1831) (on file with author).

94. THACHER, *supra* note 26, at 267–68.

95. *Id.*

96. *Commonwealth v. Chase*, Docket Book, Municipal Court of Boston, July Term 1831 (on file with author); THACHER, *supra* note 26, at 267.

97. See, e.g., FISHER, *supra* note 23, at 77–78 (“Although a jury acquitted [Chase] of the second crime, prosecutor Austin apparently believed strongly in her guilt. He concluded that she had violated her pledge to keep the peace and therefore moved that she be sentenced on the original indictment.”).

98. FEELEY, *supra* note 64, at xx.

99. *Id.* at xx–xxii (discussing a celebrated study of the New Haven courthouse); Jed Kolko, ‘*Normal America*’ Is Not a Small Town of White People,

Part II of this Article therefore seeks to illuminate the devices that encourage defendants in Connecticut to plead guilty in exchange for a chance to avoid prison by passing a test. Connecticut utilizes both categories of Testing Periods that I discuss in Part I: the “on-file” model and the “sentenced” model.

I first explore the dynamics of the “sentenced” model. In Connecticut, this sentence will take the form of either probation or a conditional discharge.¹⁰⁰ As I will explain below, if a judge imposes either sentence, that judge must impose a suspended prison term at the same time.¹⁰¹ The suspended prison term is important because it hangs over the defendant’s head while the defendant is on probation or a conditional discharge.¹⁰² In Connecticut, the defendant is said to “owe” the length of the suspended prison term during the Testing Period.¹⁰³ The fact that the suspended prison term is framed in the language of debt is a marker of the defendant’s poor bargaining position in the event of an alleged rule violation.

After analyzing the “sentenced” model, I explore various “on-file” arrangements in Connecticut that now operate between the guilty plea and the sentence. Under these arrangements, defendants agree to plead guilty and then undergo a post-plea Testing Period to try to earn a sentence of probation or (less commonly) the right to withdraw their guilty plea. These post-plea testing arrangements go by short-hand names in Connecticut,

FIVETHIRTYEIGHT (Apr. 28, 2016), <https://fivethirtyeight.com/features/normal-america-is-not-a-small-town-of-white-people> (identifying New Haven as the metropolitan area that is most demographically representative of the U.S. population overall).

100. See CONN. GEN. STAT. ANN. § 53a-28(b) (West 2016).

101. *Id.*

102. See, e.g., Transcript of Record at 3, *State v. Francis*, No. N23N-CR17-0179808-S (Conn. Super. Ct. Mar. 16, 2018) [hereinafter Transcript of *Francis*] (recording a judge explaining in a guilty plea hearing: “I’m going to hold five years over your head” during a “two-year conditional discharge”); Transcript of Record at 7, *State v. Nicholson*, No. N23N-CR17-0174135-S (Conn. Super. Ct. July 20, 2017) (documenting a judge explaining in a guilty plea hearing that a sentence of probation would come with “up to seven years over your head”).

103. See, e.g., *Brandy v. Comm’r of Corr.*, 873 A.2d 1061, 1062 n.3 (Conn. App. Ct. 2005) (“On the [violation of probation] he owes five years . . .”) (alteration in original); *State v. Grant*, 874 A.2d 330, 334 (Conn. App. Ct. 2005) (noting that the defendant “was serving a suspended sentence under which he owed three years and three months”); Transcript of Record at 1, *State v. Langlais*, No. NNH-CR18-0188802-S (Conn. Super. Ct. Nov. 19, 2018) [hereinafter Transcript of *Langlais*] (reporting that the defendant is on a probation where “she owes five years on an underlying violation of protective order” conviction).

such as the “plea and withdraw” offer, pleading to a “cap,” drug court, and a conditional plea agreement. I take each of these arrangements in turn.

As I shall demonstrate, most of these “on-file” models are now doubly indeterminate, involving two distinct Testing Periods. Defendants must first pass a test during the on-file period to escape prison and, usually, earn a sentence of probation. After earning a sentence of probation, they must then abide by the rules of the sentenced period and pass a second test in order to avoid being sent to prison.

A. SENTENCED MODEL TESTING PERIODS

1. Using Suspended Sentences to Sort People for Prison

Sentenced model Testing Periods in Connecticut depend on the use of suspended prison sentences. The suspended prison sentence comes in two forms in Connecticut, depending on whether the prison term is fully suspended or partially suspended. For a fully suspended sentence, the judge takes three steps: he or she imposes a definite prison term (measured in days, months, or years), fully suspends that prison term, and orders a period of probation or a conditional discharge.¹⁰⁴ For a partially suspended sentence, the judge similarly imposes a definite prison term, but only partially suspends that term, and then adds the period of probation or conditional discharge.¹⁰⁵ In this latter option, the defendant serves part of the prison term upfront and the unserved portion of the term continues to dangle over the defendant’s head during the Testing Period.

This Article focuses primarily on the inducement provided by the fully suspended sentence. The fully suspended sentence accounts for more than seventy-five percent of all of the suspended sentences imposed in Connecticut.¹⁰⁶ It is a leading inducement in plea bargaining.

In deciding to suspend the sentence, the judge must choose between two kinds of Testing Periods: probation or a conditional discharge. The key difference is that a conditional discharge does

104. CONN. GEN. STAT. ANN. § 53a-28(b) (West 2015).

105. *Id.*

106. Letter from the State of Connecticut, Judicial Branch, Court Support Servs. Div., Response to Data/Policy Questions (Apr. 7, 2017) (on file with author) [hereinafter Response to Data/Policy Questions].

not involve the supervision of a probation officer.¹⁰⁷ The absence of a probation officer means there is no specially designated person outside the courthouse charged with: (1) the task of monitoring the defendant for compliance with the rules imposed, or (2) the authority to widen the net of control that a defendant must navigate. But a conditional discharge nonetheless sets up a Testing Period because the defendant is required to follow conditions with the threat of prison hanging overhead.¹⁰⁸

The size of Connecticut's probation and conditional discharge population is several times larger than its prison population,¹⁰⁹ underscoring the importance of understanding the Testing Periods that these systems create. The sentenced probation population alone exceeds the sentenced prison population by a measure of over three hundred percent.¹¹⁰ At the same time, however, mass incarceration and suspended prison terms are tightly linked in Connecticut, because violations of probation and conditional charge are a leading cause of incarceration in the state.¹¹¹ In 2015, for example, roughly thirteen percent of Connecticut's inmate population was in prison for a violation of probation or conditional discharge.¹¹² The next most prevalent

107. CONN. GEN. STAT. ANN. § 53a-29(b).

108. See, e.g., *Ebron v. Comm'r of Corr.*, 992 A.2d 1200, 1207 (Conn. App. Ct. 2010) (noting that a prosecutor "believed that because the petitioner owed six years on the conditional discharge, that was the appropriate starting point for an acceptable plea agreement").

109. See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 251149, PRISONERS IN 2016, at 6 (Caitlin Scoville & Jill Thomas eds., 2018); STATE OF CONN. JUDICIAL BRANCH, COURT SUPPORT SERVS. DIV., ADULT PROBATION – QUARTERLY CASELOAD SNAPSHOT (2017) [hereinafter ADULT PROBATION], https://www.jud.ct.gov/statistics/probation/AdultProbation_040117.pdf.

110. See CRIMINAL JUSTICE POLICY & PLANNING DIV., CONN. OFFICE OF POLICY & MGMT., MONTHLY INDICATORS REPORT 2 chart 2 (Dec. 2018) (reporting a "sentenced prisoners" population of 9504 and an "adult probation" population of 39,407), <https://www.portal.ct.gov/-/media/OPM/CJPPD/CjResearch/MonthlyIndicators/2014-2018/2018MonthlyIndicatorsReport/MonthlyIndicatorsReport-DEC-2018-draft.pdf?la=en>.

111. IVAN KUZYK & MIKE LAWLOR, CRIMINAL JUSTICE POLICY & PLANNING DIV., CONN. OFFICE OF POLICY & MGMT., RECIDIVISM IN CT, 2008 RELEASES 6 (2015).

112. CRIMINAL JUSTICE POLICY & PLANNING DIV., CONN. OFFICE OF POLICY & MGMT., TOTAL POPULATION BY CONTROLLING OFFENSE MARCH 12, 2015 (2015), http://www.ct.gov/opm/lib/opm/cjppd/cjabout/mainnav/total_pop_by_controlling_offense_20150312.pdf.

offense was the sale of drugs, which accounted for less than half as many people in prison.¹¹³

2. The Inducement of the Fully Suspended Sentence

In this Section, I focus on the dynamics surrounding an agreement to plead guilty in exchange for a fully suspended sentence. The offer of a fully suspended sentence is particularly attractive to defendants because of the interplay of a number of “psychological pitfalls.”¹¹⁴ These pitfalls have been explored extensively in the literature on plea bargaining, but not in the context of Testing Periods.

In a fully suspended sentence, a defendant pleads guilty to a suspended time arrangement in order to avoid the immediate prospect of going to prison. In the negotiations leading up to the plea, the prosecutor secures a promise that the defendant will plead guilty to this or that charge. In return, the defendant secures a promise that he or she will not be sent to prison as a consequence of the plea, without some other triggering event.

Fully suspended plea offers are so common in Connecticut that they have their own shorthand lingo, instantly recognizable to insiders in the courthouse.¹¹⁵ A defendant might be offered a 4-0-2, for example, in exchange for a plea to a certain crime. An insider to the system knows that this offer represents a fully suspended sentence, because the defendant has the opportunity to serve zero days of the four-year term if he or she survives a two-year Testing Period. Under a 4-0-2, the court imposes a four-year prison term but this term remains fully suspended as long as the defendant follows the rules of the court for two years.

113. *Id.*

114. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2496 (2004).

115. See, e.g., Transcript of Record at 1–2, *State v. Irizarry*, No. N23N-CR18-0187517S (Conn. Super. Ct. Oct. 4, 2018) [hereinafter *Transcript of Irizarry*] (documenting statements in plea canvass, with the judge and prosecutor each noting that the defendant was pleading guilty to two counts of possession of a controlled substance for “1-0-2 on each”); Transcript of Record at 2, *State v. Bastek*, No. N23N-CR18-0182989-S (Conn. Super. Ct. June 27, 2018) [hereinafter *Transcript of Bastek*] (recording the court explaining that the sentence being imposed under the plea agreement was “[o]ne, zero, two CD on the interfering. One, zero, two CD on the criminal trespass. Consecutive. Total effective, two, zero, two CD”); Transcript of Record at 1, *State v. McGibony*, No. N23N-CR17-0176555-S (Conn. Super. Ct. Jan. 31, 2018) (detailing a defense attorney explaining that the current offer from the state involved “a total effective sentence of four, zero, two and probation” on stacked misdemeanors).

By agreeing to the suspended time framework on the day of the plea—in order to avoid the immediate possibility of going to prison—defendants place themselves in a position of great vulnerability going forward. That period of vulnerability lasts as long as the Testing Period that the court orders as part of the deal. The parameters of the test itself depend on the nature of the conditions imposed, as *any* violation of a condition can be used to justify imposition of the suspended prison term.¹¹⁶

Broad conditions expand the universe of potential rule violations, escalating the indeterminacy of the system. For a sentence of conditional discharge, as reflected in the table below, there are only two default rules (the starred rules), although judges have the power to supplement these rules on a case-by-case basis.¹¹⁷ But a sentence of probation comes with a host of pre-printed rules, which put the defendant under the direct control of a probation officer.¹¹⁸ These rules make clear, for example, that probation officers have extensive search powers, beyond those that normally apply in the criminal justice system.¹¹⁹ To invoke these powers, the probation officer need only have reasonable suspicion that the person is violating a condition of probation (such as leaving the state or failing to report), rather than reasonable suspicion that the person is committing a new crime.¹²⁰

116. See CONN. GEN. STAT. ANN. § 53a-32 (West 2017).

117. STATE OF CONN. SUPERIOR COURT, JD-CR-17, ORDER OF CONDITIONAL DISCHARGE (revised Oct. 2011); see also Transcript of Record at 5, *State v. Fincher*, Nos. N23N-CR18-0187298S & N23N-CR18-0186715S (Conn. Super. Ct. Oct. 4, 2018) (showing the judge accepting a guilty plea on an assault in the third degree charge and sentencing the defendant to be “committed to the custody of the Commissioner of Corrections for one year, fully suspended, two year’s conditional discharge. Conditions being no new arrests and you are not to contact this individual, the victim”); Transcript of *Irizarry*, *supra* note 115, at 7 (documenting the court noting that the defendant received a “total effective sentence of two years, fully suspended, two years conditional discharge. Conditions being no new arrest”); Transcript of Record at 9, *State v. Francis*, No. N23N-CR17-0179808-S (Conn. Super. Ct. Mar. 16, 2018) (recording the judge imposing a sentence of “five, zero, two CD” with conditions of “[n]o new crimes and stay away from that particular location”).

118. STATE OF CONN. SUPERIOR COURT, COURT SUPPORT SERVICES DIVISION – ADULT PROBATION, JD-App-110, CONDITIONS OF PROBATION (revised July 2011) [hereinafter CONDITIONS OF PROBATION].

119. *Id.* (“Submit to a search of your person, possessions, vehicle or residence when the Probation Officer has a reasonable suspicion to do so.”).

120. See *State v. Moore*, 963 A.2d 1019, 1023 (Conn. App. Ct. 2009).

Key Standard Conditions of a Sentence of Probation in Connecticut
<ul style="list-style-type: none"> • Do not violate any federal or state law.* • Provide a DNA sample (in felony cases).* • Report as the PO tells you. • Keep the PO informed of where you are. • Allow the PO to visit you as he or she requires. • Do not leave the state without the PO's permission. • Submit to any medical or psychological examination, urinalysis, alcohol and/or drug testing, and/or counseling sessions required by the Court or the PO. • Submit to a search of your person, possessions, vehicle, or residence if the PO has reasonable suspicion for the search.

The default rules apply automatically in every case of probation, but they are not the only rules that apply. The form leaves a space that invites the court to fashion special conditions for each defendant.¹²¹ The court can require the defendant to abide by any condition “reasonably related to the defendant’s rehabilitation.”¹²² The most commonly imposed special conditions of probation, which focus heavily on substance abuse, are noted in the table below.¹²³

Connecticut Sentence of Probation – 2016 Most Commonly Imposed Special Conditions (In Order of Frequency)	
1. Substance Abuse Treatment	9. Mental Health Treatment
2. Substance Abuse Evaluation	10. No Possessing Weapon, Beeper, and/or Cell
3. Community Service	11. Mental Health Evaluation
4. Restitution Payments	12. Counseling (other than mental health)
5. No Operating Under Suspended License	13. Seek Employment
6. No Contact with Designated Person(s)	14. Ignition Interlock Device
7. Drug Urinalysis	15. Alcohol Treatment
8. Stay Away from Designated Place(s)	16. Alcohol Evaluation

121. CONDITIONS OF PROBATION, *supra* note 118.

122. CONN. GEN. STAT. ANN. § 53a-30(a) (West 2017).

123. Response to Data/Policy Questions, *supra* note 106, at 2.

The pre-printed form also makes clear that the probation office can itself augment the broadly-worded discretion that the standard rules grant a probation officer over a defendant.¹²⁴ The form notes that probation “may require you to follow any or all conditions which the court could have imposed which are not inconsistent with any condition actually imposed by the court. These conditions may include anything reasonably related to your rehabilitation.”¹²⁵

A number of psychological factors combine to encourage defendants to accept broad (and expandable) conditions in exchange for the chance to avoid prison. Stephanos Bibas has explained, for example, how overconfidence bias, the discounting of future costs, loss aversion, and framing can all affect decision-making in plea bargaining.¹²⁶ Overconfidence can be a particularly significant factor for defendants evaluating how they might succeed at a difficult task, such as making it through the Testing Period without a violation.¹²⁷ Bibas notes that overconfidence is “exceptionally strong when people have some control: they are overly optimistic about how well they can exercise that control to avoid bad outcomes.”¹²⁸ Defendants are also prone to discount future costs, privileging a day of freedom today more than a day of freedom in the future.¹²⁹ This focus on securing freedom today leads defendants to discount the stakes involved in pleading guilty under a suspended time arrangement, which leaves the prospect of prison seemingly far off in the future.

Loss aversion is another powerful force that pushes people toward outcomes that preclude the immediate prospect of prison. Bibas has explained how “avoiding loss seems to matter even more to people than avoiding risk”—“many would rather take big gambles than accede to losses.”¹³⁰ The prospect of moving from freedom to incarceration represents one of the biggest losses imaginable. Deals built around a fully suspended sentence play into defendants’ determination to avoid this kind of loss, encouraging people to gamble with their ability to stay out of

124. CONDITIONS OF PROBATION, *supra* note 118.

125. *Id.*; *see also* State v. Faraday, 842 A.2d 567, 574 (Conn. 2004) (noting probationer must “accept” that conditions can be enlarged in the future).

126. Bibas, *supra* note 114, at 2501–15.

127. *Id.* at 2501.

128. *Id.*

129. *Id.* at 2504.

130. *Id.* at 2508.

trouble in the future in exchange for the certainty of avoiding prison today.

Framing is also a significant factor in how these deals are presented to defendants. Probation and conditional discharges are packaged as gains for defendants relative to the possibility of prison. This positive framing encourages defendants to be risk-adverse about losing the opportunities that probation or a conditional discharge represent.¹³¹ Indeed, these suspended time arrangements are officially marketed as a way to *avoid* punishment.

As in other states, courts in Connecticut are explicit in their categorization of probation as a means of escaping punishment.¹³² This framing first appeared in a 1914 Connecticut Supreme Court case:

[Probation] is not ordered for the purpose of punishment for the wrong for which there has been a conviction or for general wrongdoing. Its aim is reformatory and not punitive. It is to bring one who has fallen into evil ways under oversight and influences which may lead him to a better living. The end sought is the good of the individual wrongdoer, and not his punishment.¹³³

Over the years, the Connecticut Supreme Court has continued to emphasize that probation is not punishment, but a way “to provide a period of grace in order to aid the rehabilitation of a penitent offender.”¹³⁴ Defendants are more likely to agree to an option framed in this manner, even if it requires an upfront guilty plea and comes with a broad set of prospective rules.

3. The Dynamics of Violation, Revocation, and Owing Time

If a defendant is accused of violating a rule during a Testing Period and formal revocation proceedings are initiated, the same legal framework applies to an alleged violation of probation and of a conditional discharge.¹³⁵ This framework is deeply disadvantageous to the defendant.

The key to understanding how much leverage the defendant has lost by agreeing to a suspended-time arrangement lies in ap-

131. *Id.* at 2512 (emphasizing “[o]ptions that are packaged as gains” induce risk aversion; “when the very same choices are packaged as losses” they “induce risk taking because of loss aversion”).

132. *Belden v. Hugo*, 91 A. 369, 370 (Conn. 1914).

133. *Id.*

134. *State v. Faraday*, 842 A.2d 567, 574 (Conn. 2004).

135. CONN. GEN. STAT. ANN. § 53a-32(a) (West 2013).

preciating the interplay between three factors: (1) the low adjudicative standards that apply to revocation proceedings; (2) the framework that the defendant already “owes” prison time; and (3) the broad range of conduct that can justify a violation.

In order to justify revoking probation or a conditional discharge, the state need only prove that the defendant violated one of the conditions of the Testing Period by a fair preponderance of the evidence, not beyond a reasonable doubt.¹³⁶ This standard applies equally to the adjudication of technical violations and criminal violations. Judges must be satisfied by a preponderance of the evidence that the defendant violated a condition, thereby “abus[ing] the opportunity given him to avoid incarceration.”¹³⁷

The language of debt that suffuses these cases is perhaps even more prejudicial to a defendant than the low adjudicative standards that apply to a violation. In the colloquial language that pervades the courthouse, the defendant “owes” the suspended time that he or she agreed to at the time of the plea on the underlying crime.¹³⁸ Thus, any sentence that the defendant bargains for short of the time already “owed,” is presented as an act of favorable discretion by the prosecutor or judge.

Generally speaking, the defendant did not have much negotiating power at the time of the plea over the length of the suspended sentence (i.e. the amount of time that might be “owed” in the future). At the time of the plea, the focus of the defense was on avoiding the immediate prospect of prison. In achieving that goal, and in buying into the framework that the defendant would satisfy whatever terms the court set during the Testing Period for the privilege of avoiding incarceration, the defense had little

136. *Id.* § 53a-32(d).

137. *Payne v. Robinson*, 523 A.2d 917, 921 (Conn. App. Ct. 1987) (quoting *Roberson v. Connecticut*, 501 F.2d 305, 308 (2d Cir. 1974)).

138. Over the course of one afternoon in the New Haven courthouse, for example, the framing of defendants “owing” time while on probation or a conditional discharge was invoked repeatedly in cases. *See, e.g.*, Transcript of *Langlais*, *supra* note 103, at 1 (noting that the defendant is on a probation “where she owes five years on an underlying violation of protective order” conviction); Transcript of Record at 2, *State v. Mendoza*, No. NNH-CR18-0188779-S (Conn. Super. Ct. Nov. 19, 2018) (indicating that the defendant “is on a CD” for an assault third conviction and “he does owe a year” on the conditional discharge); Transcript of Record at 2, *State v. Sandillo*, No. N23N-CR17-0179662-S (Conn. Super. Ct. Nov. 19, 2018) (detailing a court official noting that the defendant “does owe two years” on a violation of probation charge out of a neighboring court and “on our file, she does owe two years on an underlying larceny” charge).

room to quibble with the terms of the opportunity that the defendant received.

Once a violation is alleged, however, the abstract length of the suspended prison term takes on great significance. It now marks the depth of the hole that the defendant is in: a hole that the defendant has little (to no) independent leverage to escape.

A central dynamic of being on probation is that many violation proceedings involve easy-to-prove conduct. Many conditions, for example, require a defendant to take a series of concrete and affirmative steps. Typical obligations include attending a weekly treatment session;¹³⁹ reporting to the probation office on a certain day at a certain time;¹⁴⁰ calling into a daily hotline as part of a drug testing program;¹⁴¹ and/or testing negative for drugs.¹⁴² Any failure to meet these kinds of affirmative obligations provides a basis for a violation for which there is, generally speaking, no defense.¹⁴³ The most common technical violations that result in incarceration in Connecticut are outlined in the table below.¹⁴⁴

139. PROB. & PRETRIAL SERVS. OFFICE, ADMIN. OFFICE OF THE U.S. COURTS, OVERVIEW OF PROBATION & SUPERVISED RELEASE CONDITIONS 42, 47 (2016) [hereinafter OVERVIEW].

140. *Id.* at 16.

141. *Id.* at 42, 46; *see also, e.g., Probation Drug Testing*, U.S. DRUG TEST CENTERS, <https://www.usdrugtestcenters.com/probation-drug-testing.html> (last visited Mar. 14, 2019).

142. OVERVIEW, *supra* note 139, at 42.

143. *See, e.g., State v. Smith*, 769 A.2d 698, 702, 708 (Conn. 2001) (upholding an eight year prison sentence for a probationer who was late for two appointments); *State v. Workman*, 944 A.2d 432, 434–35, 437 (Conn. App. Ct. 2008) (upholding a two year prison sentence for a homeless probationer who failed to report and keep the probation office updated as to his whereabouts); Transcript of Record at 1–3, *State v. Pintek*, No. A22M-CR150088955S (Conn. Super. Ct. Dec. 10, 2018) (documenting a defense attorney reporting that his client, whom the attorney had met just that day, would accept the state’s offer and admit to violations of probation for missing treatment appointments and failing to pay restitution and receive forty-five days in jail followed by twenty-one months of probation).

144. Response to Data/Policy Questions, *supra* note 106, at 5.

Connecticut Probation – 2016 Most Common Technical Violations Leading to Incarceration (In Order of Frequency)	
1.	Failing to submit to any medical/psychiatric/substance abuse evaluation/treatment/urinalysis as required.
2.	Absconding from supervision (failing to report to PO).
3.	Failing to report as PO directs or failing to give immediate notice if arrested.
4.	Failing to abide by requirements of substance abuse treatment.
5.	Failing to keep PO informed of whereabouts or failing to give immediate notice of change.
6.	Failing to meet restitution obligations.
7.	No contact with designated persons.

Disputing one's conduct with respect to these kinds of requirements, moreover, is not only difficult; it can make it seem that one is not accepting the rehabilitative framework. Given the power dynamics at play, it might be counterproductive for a defendant to argue that he or she made it to a probation appointment on time, for example, or did not in fact use drugs. As Francis Allen has observed, "assumptions of benevolent purpose in penal regimes with strong rehabilitative bents" can have a distorting influence: "The willingness of the accused to assert adversary positions against the state may be taken as the strongest evidence of the accused's need for rehabilitation."¹⁴⁵

Another consequence of having agreed to a suspended sentence is that new criminal charges are treated differently. A low-level charge, which might have been ignored if it required an actual criminal proceeding, can be dealt with more severely if the person is in a Testing Period. Even the smallest new case is harder to let go when the proof standards are so low, the person already "owes" the time, and the person is explicitly being tested.

Moreover, as in the Jerusha Chase case, an acquittal on a new criminal charge provides no protection to defendants in Testing Periods. The appellate courts have stressed that "[i]t is

145. FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 48 (1981); *see also* ROTHMAN, *supra* note 64, at 80 (noting that in indeterminate sentencing systems, protest from prisoners "only made . . . reform seem all the more desirable: if prisoners did not like the medicine, it must be especially good for them").

well settled that even when the defendant is acquitted of the underlying crime leading to the probation revocation proceeding, probation may still be revoked.”¹⁴⁶

The defendant’s leverage in any new criminal case is also weakened by the practice of incorporating previously uncharged technical violations into the violation petition. Typically, a probation officer has been keeping track of any and all previous instances of noncompliance, even if these failings were not enough by themselves to spur the probation officer to initiate violation proceedings. But once the probation officer decides to file a violation petition, the officer will generally include every other failure to comply with the rules during the Testing Period. Thus, a petition might allege that the defendant was arrested—perhaps for shoplifting or selling marijuana—and also include a list of every time the defendant missed a treatment appointment over the last year, even though the defendant did make most of his or her treatment appointments. Because a single missed appointment is both easy to prove and sufficient to sustain the violation petition, any documented act of noncompliance in the past diminishes the leverage the defendant has in fighting his or her new criminal violation.

This diminished leverage works against the defendant both in fighting the new substantive criminal charge and in fighting the violation petition. If the defendant owes four years in any event, the easiest course for the prosecutor to pursue is to deal with the new criminal case in the context of the violation proceedings. If the state thinks that the new case merits eighteen months in prison (for a person with the defendant’s criminal history and probationary status), the defendant has little option but to go along. At best, the defendant might hope to convince the prosecutor that a sentence below eighteen months is appropriate. But fighting the new criminal case in a violation proceeding is very difficult because of the low burden of proof and the fact that the state can also rely on an easy-to-prove technical violation to seek the same result. The state can get its eighteen-month prison sentence *without* needing to rely on a criminal charge to get it.

The defendant’s leverage is further undercut by the fact that the state does not necessarily need to prove that a violation was

146. State v. Durant, 892 A.2d 302, 307 (Conn. App. Ct. 2006).

willful.¹⁴⁷ The Supreme Court of Connecticut, for example, has held that willfulness is not an element of a probation violation.¹⁴⁸ To sustain a violation, “the state needs only to establish that the probationer know of the condition and engaged in conduct that violated the condition.”¹⁴⁹ In one case, for example, the court reasoned that a probationer who did not attend meetings required by his probation officer, because those meetings conflicted with his job, had violated the conditions of his probation.¹⁵⁰ “The choice to perform his job rather than to attend the scheduled meetings simply was not the defendant’s to make.”¹⁵¹

The requirements imposed on the defendant, moreover, may not be spelled out in detail before the defendant pleads guilty—or even elaborated on the record at the time of the plea. The Connecticut Supreme Court has held that a judge need not lay out the full parameters of a probation condition at the time of the plea in order for a violation of that condition to be upheld.¹⁵² In one case, for example, the trial court sentenced a defendant to twelve years in prison, fully suspended, with five years of probation (or a 12-0-5).¹⁵³ In exchange for this suspended sentence, the defendant entered an *Alford* plea to a charge of sexual assault in the third degree and a charge of risk of injury to a child.¹⁵⁴ Because the defendant entered his plea through the *Alford* doctrine, he was “not required to admit his guilt” as part of the deal.¹⁵⁵ One of the conditions of the defendant’s probation, however, was that “he attend “[s]ex offender treatment as deemed

147. See, e.g., *Bearden v. Georgia*, 461 U.S. 660, 668 n.9 (1983) (“We do not suggest that, in other contexts [i.e., outside the failure to pay a fine], the probationer’s lack of fault in violating a term of probation would necessarily prevent a court from revoking probation.”).

148. *State v. Hill*, 773 A.2d 931, 937 (Conn. 2001) (discussing *Bearden* as limited to fines and emphasizing that the legislature did not make willfulness an element of a probation violation and perceiving “no public policy that would be served by such a requirement”).

149. *Id.* at 940.

150. *Id.* at 942.

151. *Id.*

152. *State v. Faraday*, 842 A.2d 567, 587 (Conn. 2004).

153. *Id.* at 571–73.

154. *Id.* at 573.

155. *Id.* at 588 (citation omitted) (noting that the trial court had explained the *Alford* doctrine in the following terms: “And you plead guilty under the *Alford* doctrine. That means you plead guilty but you don’t agree necessarily with everything that the state claims that you did or what they claim they could prove at trial. But you would rather plead guilty rather than run the risk of

appropriate by the office of probation.”¹⁵⁶ Although the defendant did enroll in the mandated treatment, it turned out that one of the rules of the treatment program was that he admit guilt to the underlying charges.¹⁵⁷ Because the defendant refused to admit guilt, he was discharged from the treatment program and his probation was revoked.¹⁵⁸ In upholding the revocation sentence, the Connecticut Supreme Court found that the trial court had fulfilled its obligation by telling the defendant to attend the treatment specified by probation.¹⁵⁹ The court reasoned that “it was not incumbent upon the trial court also to list all the potential conduct that could result in a discharge from [the treatment] program.”¹⁶⁰ Moreover, because the department of probation was “free to modify the terms of the defendant’s probation at any time,” the court considered it “unrealistic to expect the [judge] to canvass a defendant regarding the conduct necessary to comply with those terms.”¹⁶¹ The violation, therefore, was used to justify the imposition of the twelve-year prison sentence, even though the conduct at issue—admitting the charge—explicitly was not part of the “deal” to which the defendant agreed.¹⁶²

having another trial.”). For other examples of how courts explain the *Alford* doctrine, see Transcript of Record at 2, *State v. Bland*, No. N23N-CR18-0187034-S (Conn. Super. Ct. Nov. 19, 2018) (“Your counsel’s indicating you’re entering this plea under what’s called the *Alford* doctrine. What that tells the Court is you agree with some of [the prosecutor’s] facts but not all of them, nevertheless you don’t want to go to trial and possibly face a stiffer penalty so you’re accepting this plea, but I’m still finding you guilty of these two charges.”); Transcript of *Francis*, *supra* note 102, at 8 (“You pled under the *Alford* doctrine on the possession charge. When you do that, you’re saying you don’t agree with the facts, but you’re willing to plead guilty because you know that there’s evidence against you on other files and you don’t want to take a chance and go to trial on the likelihood you’ll lose on something and get a worse penalty.”).

156. *Faraday*, 842 A.2d at 573.

157. *Id.*

158. *Id.*

159. *Id.* at 587.

160. *Id.*

161. *Id.* at 588–89.

162. The other probation violation upheld in *Faraday* also raised questions about the scope of the conditions imposed. The defendant was ordered not to have unsupervised contact with children under sixteen, but the court made an exception for contact with his wife and her child, unless the probation department decided it was inappropriate. Connecticut’s Appellate Court initially held that some affirmative “wrongdoing” was required before the defendant could be revoked on the basis of this condition, but the Supreme Court disagreed. *Id.* at 577–82.

B. ON-FILE MODEL TESTING PERIODS

1. Framework of Supercharged Indeterminacy

Other arrangements have developed around routine plea bargaining in Connecticut that require defendants to undergo more concentrated Testing Periods. The procedures behind these Testing Periods follow the “on-file” model because they operate between the guilty plea and the sentencing hearing. This Section explores four mechanisms that I identify as creating “on-file” Testing Periods: plea and withdraw, caps, drug court, and *Garvin* agreements.

With the exception of drug courts, none of these “on-file” mechanisms appears on Connecticut’s statute books. They are therefore much less visible than a *sentence* of probation or conditional discharge. Except for the drug courts, moreover, the judicial branch does not keep statistics about how often these mechanisms are used—or what outcomes have resulted from their use over time.¹⁶³ But they are accepted and standardized features of everyday practice in the courthouse.

These “on-file” mechanisms create what I call a period of supercharged indeterminacy. The rules are announced in court at the time of the guilty plea, and the stakes are high. The defendant must abide by the rules or be prepared to suffer the consequences at sentencing. Significantly, because “on-file” Testing Periods operate in a hazy period between guilty plea and sentencing, courts do not always apply even the meagre protections that are required for the “sentenced” model. In certain circumstances, for example, a Connecticut trial court need only find a rule violation by a “minimum indicia of reliability.”¹⁶⁴

2. Plea and Withdraw

One mechanism for creating a period of supercharged indeterminacy involves having the defendant plead guilty to a crime with the opportunity to later withdraw or change the plea.¹⁶⁵

163. See Interview with Data Specialist, Conn. Judicial Branch (Mar. 2017).

164. See *infra* Part II.B.5.

165. See, e.g., *State v. Lopez*, 822 A.2d 948 (Conn. App. Ct. 2003) (outlining the legal structure of a plea and withdraw offer); Transcript of Record at 2–3, *State v. Kendrick*, No. N23N-CR17-0175113-S (Conn. Super. Ct. Apr. 27, 2017) (reflecting that the defendant pleaded guilty to two misdemeanors with the understanding that if he completed a treatment program, he could withdraw the

This mechanism requires the agreement of the prosecutor in Connecticut, as a judge does not have the authority to force a prosecutor to decline to pursue (or “come off”) any particular charge.

A plea and withdraw offer can be built around any kind of Testing Period endorsed by the prosecutor, such as one that requires a defendant to test negative for drugs going forward. In a case involving a defendant with a substance abuse problem, for example, the prosecutor might give the defendant a chance to avoid both a conviction and a prison sentence by proposing a plea and withdraw arrangement. Under a typical scenario, the defendant might agree to plead guilty to two misdemeanor charges upfront. He would then be allowed to try to maintain “clean” urines during a Testing Period. If he was successful in testing negative for drugs, he could withdraw the guilty pleas and the prosecutor would nolle (decline to prosecute) all of the charges. On the other hand, if the defendant had a positive urine test during the Testing Period, then the convictions would stand, and he would receive a two-year fully-suspended prison sentence and one year of probation (a 2-0-1).¹⁶⁶ The prosecutor might require the defendant to “accept or reject” the deal by a certain date. The structure of this offer would mean that the defendant would have to come to a quick decision on whether to gamble on his ability to stay “clean” during a Testing Period.

A failed plea-and-withdraw deal can draw defendants into a world of sharply escalating penal consequences. For example, a prosecutor might want an indigent defendant to pay a small amount of restitution to resolve a larceny in the sixth degree misdemeanor charge, a low-level misdemeanor in Connecticut. At first, the prosecutor might give the defendant the opportunity to make the restitution payment by a certain date in return for a nolle of the charge. If the defendant cannot pay by this date,

guilty pleas and the charges would be dismissed; however, if he failed to complete the program, the guilty pleas would stand and the judge could sentence him to up to two years in prison); Transcript of Record at 1–2, *State v. Martinez*, No. N23N-CR15-0162186-S (Conn. Super. Ct. Feb. 8, 2016) (indicating that the defendant, who had no criminal record, would plead guilty to felony counts with the understanding that if he was successful in treatment, he would be allowed to withdraw the felony guilty pleas, re-plead to misdemeanors, and receive a fully suspended prison sentence; however, if he wasn’t compliant with treatment, the felony convictions would stand and the court could “automatically” sentence him to “up to three years in prison”).

166. The example of this “plea and withdraw” arrangement is based on cases I have encountered in the Connecticut courts.

the prosecutor might offer a plea and withdraw arrangement. Under the terms of the arrangement, the defendant would enter a guilty plea to the larceny in the sixth degree charge, but she could withdraw this plea as long as she paid the restitution by a certain date. If she failed to pay by that date, she would receive a ninety-day prison sentence (the statutory maximum for larceny in the sixth degree), but this sentence would be fully suspended during a year of probation. A defendant who failed to meet the payment deadline would receive the designated sentence. Once she was on probation, she might continue to miss the payment deadlines and as a consequence, also fail to report to her probation officer. The probation officer could then initiate revocation proceedings against her on both grounds. Because the defendant did not succeed in the Testing Period, she would now “owe” the full statutory maximum prison sentence available on the original charge.¹⁶⁷

3. Cap

A cap is a mechanism in Connecticut that allows defendants to *try* to earn a fully suspended sentence after they plead guilty to a crime. By agreeing to plead guilty under a cap arrangement, the defendant gets an opportunity to avoid any prison time for the crime to which he or she has just pleaded guilty.¹⁶⁸ Contrary to the plea and withdraw arrangement, the defendant generally cannot withdraw the guilty plea even if he or she succeeds during the Testing Period.¹⁶⁹

167. The description of this sequence of events is based on my experience of cases in the Connecticut courts. For an example of escalating consequences in another context, see Transcript of Record at 1–9, *State v. Duchnowsky*, No. A22M-CR170094371S (Conn. Super. Ct. Dec. 10, 2018) (showing that the prosecutor and judge initially agreed to let a defendant who was a victim of domestic violence enter a diversionary program that did not require a guilty plea; however, after the defendant missed three intake appointments, the agreement changed to a six-month fully-suspended prison sentence and eighteen months of probation on an upfront misdemeanor guilty plea).

168. See, e.g., Transcript of Record at 1, *State v. Cobb*, No. N23N-CR18-0182469-S (Conn. Super. Ct. Sept. 25, 2018) (detailing plea agreement under a “five-year cap” in which prosecutor agreed to recommend a suspended sentence if the defendant did “well with his treatment”).

169. See, e.g., *State v. Ramos*, No. CR07237195, 2008 WL 5220934, *1 (Conn. Super. Ct. Nov. 18, 2008) (noting that the defendant would receive a fully suspended sentence—not the right to withdraw his guilty plea—if he succeeded in a drug treatment program pursuant to a cap arrangement). It is important to note that a negotiated arrangement can rely on a combination of procedural devices. In an arrangement that combines a cap with a plea-and-withdraw offer,

In essence, a cap sets a ceiling on the defendant's exposure at sentencing should the defendant fail to abide by the conditions set by the prosecutor or the judge.¹⁷⁰ For example, if the defendant is charged with a count that has a ten-year statutory maximum, the prosecutor may allow the defendant to plead guilty to this count under a five-year cap arrangement. The deal would typically follow a set structure: (1) if the defendant abides by the rules of the Testing Period, the prosecutor will agree to recommend a fully suspended sentence to the judge (accompanied by a period of probation or conditional discharge) or (2) if the defendant fails to meet these requirements, the prosecutor will seek a prison sentence.

The defendant would "be on" what is colloquially known as a cap and "a watch."¹⁷¹ The Testing Period is typically a few months,¹⁷² and the stakes are high: If the judge decides that the defendant failed to meet any of the imposed requirements, the defendant is said to have "blown the cap."¹⁷³

for example, the court would allow the defendant to withdraw the guilty plea (following a successful Testing Period) or would let the guilty plea stand and sentence the defendant under the cap (following an unsuccessful Testing Period). *See, e.g.*, Transcript of Record at 1–2, 5–6, *State v. McGibony*, No. N23N-CR17-0176555-S (Conn. Super. Ct. Jan. 31, 2018) (reflecting an arrangement in which the defendant who had earlier pleaded guilty under a cap to a felony charge was allowed to withdraw the felony plea and plead guilty to "stacked misdemeanors" for a fully suspended sentence as a consequence of having succeeded in drug treatment).

170. *See, e.g.*, Transcript of Record at 1–2, *State v. Wells*, No. N23N-CR15-0159926 (Conn. Super. Ct. Jan. 11, 2019) [hereinafter Transcript of *Wells*] (reflecting that the judge explained that the defendant would admit to a violation of a conditional discharge and "I'm gonna let you go to a program" with a "four year cap over your head" which means if you do not "follow the directives" of the program, "the Court can put you in jail for up to four years[;]" however, "if you go to this program and you don't commit any new crimes and you're successful, then you're guaranteed to get a suspended sentence at the end of it").

171. *See, e.g.*, Transcript of *Bastek*, *supra* note 115, at 1 (noting at a sentence hearing that the defendant pleaded guilty at a prior date and "has been on a watch," but because the defendant "has not offended during the period of time the defendant was on a watch," defendant had earned a fully suspended two-year prison sentence and a two-year conditional discharge).

172. *See, e.g.*, Transcript of *Wells*, *supra* note 170, at 1 (recording the judge noting that on a cap guilty plea: "I normally do three months.").

173. To have "blown the cap" is a colloquial expression I have often heard in the courts.

One brand of a cap deal provides defendants with what is known as a “right to argue” should they fail to meet the conditions during the Testing Period.¹⁷⁴ A right to argue means that the penalty for violating the conditions is not pre-determined as the amount of time specified in the cap.¹⁷⁵ If the cap is five years, the defendant can bring forward mitigating evidence and try to convince the judge to impose less than five years in prison in the event of a violation.

The case law demonstrates the magnitude of the stakes during the Testing Period—even in a right to argue case, generally the most favorable cap arrangement for a defendant. In one typical case, for example, the defendant pleaded guilty to the possession of narcotics under a cap deal of “seven years with a right to argue for less.”¹⁷⁶ Following his guilty plea, the defendant was supposed to attend and follow the conditions of a drug treatment program, as well as “show up in court as required by the plea agreement.”¹⁷⁷ As long as he fulfilled these conditions, the defendant would earn a fully suspended sentence.¹⁷⁸ The defendant, who had been “dealing with substance abuse issues for his entire life,” did not meet the requirements of the deal: he failed to show up in court and did not comply with the conditions set by the drug program.¹⁷⁹ As a consequence, the court held a sentencing hearing, affording the defendant the chance to ask for less than seven years in prison.¹⁸⁰ The court ultimately imposed five years in prison and two years of special parole (a form of judge-imposed post-incarceration supervision, overseen by the parole board).¹⁸¹

The stakes are even higher in cases involving no right to argue, as the defendant essentially agrees to forfeit all future leverage if there is a violation. If there is no right to argue, the defendant is “agreeing” up front to the imposition of the full cap sentence for any violation of any term of the agreement.

174. See, e.g., *State v. Leggett*, No. H15NCR21263030, 2013 WL 4504805, at *1 (Conn. Super. Ct. Aug. 5, 2013).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

In one such case, for example, the defendant received ten years in prison after he left a drug treatment program.¹⁸² The man had pleaded guilty to four crimes under a ten-year cap agreement.¹⁸³ He pleaded guilty to stealing a snow blower from a residence, failing to appear in court, possessing a crack pipe, and interfering with the police officers who sought to serve a warrant on him.¹⁸⁴ The trial court laid out the contours of the plea agreement on the record:

THE COURT: What's going to happen is you're going to plea [sic] to the charge that your lawyer has worked out with the State. And the condition then when they get a bed available for you at DAYTOP, I'm going to give you a promise to appear to go to DAYTOP with a cap of 10 years over your head. I'm going to bring you back like every six weeks, or every two months. If you leave the program, get a dirty urine, or you pick up a new arrest, ten years in jail. Do well the first year, you'll get 10 suspended and probation, condition: to complete the program; do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Is that what you want to do?

THE DEFENDANT: Sure.

THE COURT: But if you drop the ball, it's 10 years of your life.¹⁸⁵

This arrangement provided little flexibility to the defendant. Succeeding required following the pre-set terms of the deal: remaining at the Daytop program in particular, rather than remaining in drug treatment more generally. As it turned out, the defendant left Daytop after about two months, because “he could not abide by the strict rules of the program.”¹⁸⁶ After leaving Daytop, he voluntarily enrolled in a different drug treatment program, run by the Salvation Army.¹⁸⁷ The court gave the defendant one more chance to fulfill the agreement by returning to Daytop. The defendant left Daytop again, however, “because he could not comply with program rules.”¹⁸⁸ After leaving Daytop, he returned to the Salvation Army program.¹⁸⁹ The state moved

182. *State v. Quattrucci*, No. CR03187707, 2006 WL 618415, at *1 (Conn. Super. Ct. Feb. 21, 2006).

183. *Id.* at *1–2.

184. *Id.* at *1.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at *2.

189. *Id.*

for sentencing on the grounds that the defendant had violated the terms of the cap plea deal.¹⁹⁰

In sentencing the defendant to the full ten years in prison, the judge expressed sympathy for the defendant's struggles with addiction but stressed the importance of enforcing the deal that was struck.¹⁹¹ The judge sentenced the defendant to five years on the snow blower charge and a consecutive five years on the failure to appear charge.¹⁹²

The court's opinion hints at just how big of a reach this deal was for the defendant. It notes that the defendant had unsuccessfully attempted the Daytop program several years before.¹⁹³ Despite this history, the defendant agreed to sacrifice all future leverage should he fail at the same program again. Lured by the hope of a completely suspended sentence, the defendant (a person suffering from a long-term addiction) agreed to enter Daytop with the specter of a ten-year prison term hanging over his head.¹⁹⁴ The little background information revealed about the defendant indicates that it is no surprise that he lost that bet.

A cap deal can lengthen the prison sentence that the defendant would have faced absent such a deal. In one case, for example, the state offered the defendant four-and-a-half years in prison to resolve a number of charges, including a drug possession count.¹⁹⁵ The court suggested an alternative deal, one that doubled the defendant's exposure through a nine-year cap, but also offered the possibility of the defendant avoiding prison altogether.¹⁹⁶ To take advantage of this deal, the defendant would have to plead guilty to the drug possession charge and three probation violations.¹⁹⁷ Following the plea, the court would monitor the defendant for four months for compliance with three requirements: (1) "follow all of the A.I.C.'s rules [a court-mandated supervision program], (2) not be arrested, (3) and not test positive

190. *Id.*

191. *Id.* (stressing that the judge could not allow the defendant to change the terms of the deal midstream or else "we lose all credibility and all of our integrity").

192. *Id.* at *1.

193. *Id.* at *2.

194. *Id.* at *1.

195. *Black v. Warden*, No. CV054000290S, 2006 WL 695669, at *1 (Conn. Super. Ct. Feb. 28, 2016).

196. *Id.* at *2.

197. *Id.*

for illegal narcotics.”¹⁹⁸ If the defendant “was successful after four months,” the court would place him back on a sentence of probation; “but if he was unsuccessful, the court would give him nine years to serve with no right to argue for less.”¹⁹⁹

The defendant in this case blew the cap when he tested positive for cocaine on one occasion, even though he then tested negative for cocaine the following week.²⁰⁰ The court received the results of both tests at the same time.²⁰¹ It relied on the positive test to sentence the defendant to nine years in prison.²⁰²

The conditions laid down in these cases are typical of those required through cap deals in Connecticut. The conditions regularly relate to drug abstinence or the successful completion of a treatment program. The defendant is often told that he or she has to follow all of the rules of the program, whatever those rules might be.²⁰³ The defendant may also have to undergo drug and/or alcohol testing, with the expectation that these tests must come back negative.²⁰⁴

4. Drug Court

The drug court model in Connecticut presents another variation on the same formula: a supercharged Testing Period enforced through a cap. Drug courts are “available to offenders who could benefit from placement in a substance abuse treatment program.”²⁰⁵ The expressed vision is that the “court, courthouse

198. *Id.*

199. *Id.*

200. *Id.* at *3.

201. *Id.*

202. *Id.*

203. *See, e.g.*, Transcript of Record at 6, State v. Torres, No. N23N-CR16-0169471-S (Conn. Super. Ct. Dec. 18, 2016) [hereinafter Transcript of *Torres*] (telling the defendant he must “comply with all the rules and regulations of th[e] treatment program”).

204. *See, e.g.*, Transcript of Record at 3–6, State v. Odom, No. N23N-CR18-0184353-S (Conn. Super. Ct. Nov. 16, 2018) (indicating that defendant pleaded guilty to a violation of probation and a risk-of-injury-to-a-child charge under a six-year-cap plea deal; the prosecutor stated that under the deal, the defendant would attend two treatment programs and “if she successfully completes both of these she will receive a suspended sentence with probation[;]” and the judge added in two conditions during the plea colloquy: “I’m gonna order random urines just to make sure that there’s no substance abuse issues here” and “I believe in addition that there should be an order that you cooperate with DCF while the case is pending.”).

205. CONN. GEN. STAT. ANN. § 51-181b(a) (West 2016).

staff, treatment, and social service staff” will work together to monitor the defendant’s progress in treatment.²⁰⁶ Two jurisdictions in Connecticut operate drug court dockets: New Haven and Danielson.²⁰⁷

In order to be eligible for drug court, a defendant must agree to plead guilty under a cap plea deal, which creates an “on-file” Testing Period.²⁰⁸ Defendants who agree to this deal typically do so to avoid an immediate sentence of incarceration. The understanding is that by succeeding in drug court, the defendant “may get a better result in his or her case, such as getting a suspended sentence instead of having to go to jail.”²⁰⁹

The drug court framework amplifies the intensity of the Testing Period in a number of ways. First, the cap exposure is typically higher than it would be if the defendant were not in drug court. Second, the Testing Period in drug court is generally twelve months, much longer than the standard period that applies to cap pleas.²¹⁰ Third, the court can sanction the defendant along the way as an additional mechanism to try and force the defendant to comply with the program.²¹¹ Fourth, a set number

206. JUDICIAL BRANCH OF THE STATE OF CONN., JDP-CR-137C, DRUG INTERVENTION PROGRAMS (2014), <http://www.jud.ct.gov/Publications/CR137C.pdf>.

207. CHRISTOPHER REINHART, OFFICE OF LEGISLATIVE RESEARCH, CONN. GEN. ASSEMBLY, CONNECTICUT’S DRUG COURTS 1 (2016), <http://www.cga.ct.gov/2016/rpt/pdf/2016-R-0048.pdf>.

208. *See, e.g.*, State v. Olson, No. N23NCR0656513, 2008 WL 5481291 (Conn. Super. Ct. Nov. 28, 2008) (reflecting that the defendant pleaded guilty under a six-year cap as part of a drug court plea).

209. JUDICIAL BRANCH OF THE STATE OF CONN., *supra* note 206; *see also* Transcript of Record at 5, State v. Langlois, No. W11D-CR16-0158726-S (Conn. Super. Ct. Aug. 2, 2017) [hereinafter Transcript of *Langlois*] (indicating that the drug court defendant would receive a fully suspended sentence if successful in drug court or up to five to seven years in prison if unsuccessful); Transcript of Record at 5, State v. Knighton, No. W11D-CR16-0158977 (Conn. Super. Ct. May 17, 2017) (recording that the defendant pleaded guilty in a drug court canvass to selling a small amount of heroin, and the judge explained that the defendant would receive a fully suspended sentence if successful in drug court or, if unsuccessful, a prison sentence of between four and six years).

210. *See, e.g.*, Transcript of Record at 8–9, State v. Bojka, No. N23N-CR18-0182387-S (Conn. Super. Ct. July 11, 2018) [hereinafter Transcript of *Bojka*] (showing the judge warning a drug court defendant who was entering guilty pleas under a six-year cap that the judge would monitor the defendant in treatment for a year and under the plea agreement: “You’re saying, okay, if I violate any of the rules or I mess up in any way, I’m agreeing to a two-week sanction, jail sanction, two times. If it happens a third time then you could face the six years, okay, which is what the agreement is.”).

211. *See, e.g., id.*

of rule violations is supposed to trigger sentencing under the cap because the defendant has failed to graduate from drug court.²¹²

The rules of the Connecticut drug courts are very broad. The basic rules, which are put on the record during the guilty plea hearing, typically require the defendant to comply with treatment, comply with program rules and regulations, render negative urines, and not get rearrested.²¹³ The defendant has to appear before the judge regularly to allow the court to “track his or her behavior.”²¹⁴

The drug court’s sanctioning scheme heightens the defendant’s vulnerability during the Testing Period. Drug courts set a two-week jail sanction for each positive drug test or any other rule violation.²¹⁵ Under the formal structure, the defendant is permitted two sanctions before the court schedules a sentencing hearing.²¹⁶ Thus, the framework provides that the court should abandon its treatment methodology after a third violation of the rules and proceed to sentence the defendant under the cap.²¹⁷

212. See, e.g., Transcript of *Langlois*, *supra* note 209, at 7 (indicating that the judge warned the defendant who was entering the drug court docket: “Violations of any of the program rules may result in a strike. If you get three strikes, you’ll be terminated from the program.”).

213. See, e.g., Transcript of *Bojka*, *supra* note 210, at 10 (showing the judge explaining that the rules of drug court include having negative urines, not having any new arrests, abiding by all the rules and regulations of the program (such as a prohibition on the use of cell phones), and participating in treatment); Transcript of *Langlois*, *supra* note 209, at 6–7 (indicating that during the one-year drug court program, the defendant had to attend court on a regular basis; had to fully participate in all treatment and services provided; had to agree to unannounced home visits and warrantless searches of his person; had to sign any release of information as directed; had to submit to “any drug or alcohol test at any time” by any police officer or anyone else appointed by the state or the court; could not use illegal substances, prescription narcotics, or alcohol; and could not “eat anything that might induce a false positive in a urine test, including poppy seeds”); Transcript of Record at 3, *State v. Roberts*, No. N23N-CR16-0169782-S (Conn. Super. Ct. July 20, 2017) (recording the fact that the judge gave the defendant one more chance to succeed in drug court by putting him on zero tolerance status and explaining: “You must comply with every rule of the program. If they tell you to go in and scrub the bathroom floor, you go in and scrub the bathroom floor. All right. They—if they tell you that you have to be on time for meetings or stay after or help—I don’t care what they tell you to do. At this point in time, do it.”).

214. REINHART, *supra* note 207, at 2.

215. See Transcript of *Bojka*, *supra* note 210, at 8–9 (explaining the penalty system within drug courts).

216. See, e.g., *id.*

217. For an example of the language of “owing” time in the drug court context, see Transcript of Record at 1, *State v. Turner*, No. N23N-CR17-0177074-S

The possibility of avoiding jail altogether is the sizable carrot that induces defendants to enter drug court, although this bet does not pay off for many people. The New Haven and Danielson drug courts both have been operating since 2004, although their effectiveness has never been formally evaluated.²¹⁸ In New Haven, the reported graduation rate (over a twelve-year period) was fifty-five percent.²¹⁹ In Danielson, the comparable graduation rate was forty-nine percent.²²⁰

The case law demonstrates that defendants may receive more time as a result of failing to graduate from drug court than if they had accepted a definite sentence at the time of the plea.²²¹

5. *Garvin* Agreements

a. *Parameters and Impact*

Judges in Connecticut have devised an important mechanism—known as a *Garvin* agreement—to create an “on-file” Testing Period that is firmly under their own control. A *Garvin* agreement is a type of conditional plea agreement.²²² Under the arrangement, when the judge accepts the defendant’s guilty plea (as negotiated with the prosecutor), the judge adds conditions

(Conn. Super. Ct. July 20, 2017) (showing the prosecutor explaining that a drug court defendant who pleaded guilty under a three-year cap and subsequently failed to complete the drug court’s outpatient program successfully “does owe the three-year cap”).

218. REINHART, *supra* note 207, at 2–3.

219. *Id.* at 3.

220. *Id.*

221. *See, e.g.*, State v. White, Nos. CR0865595 & CR0883079, 2010 WL 2109150, at *1 (Conn. Super. Ct. Mar. 23, 2010) (noting that the length of the defendant’s four-year prison sentence after failing in drug court was justified in part by her “insincere efforts to get treatment”); State v. Forant, Nos. CR06005116 & CR060233201, 2008 WL 4151316, at *1–2 (Conn. Super. Ct. Aug. 22, 2008) (rejecting the defendant’s argument that the fifteen-year prison sentence he received after failing in drug court was disproportionate to the “less severe” sentences his co-defendants received; noting that the co-defendants had “accepted definite sentences,” while the defendant had “voluntarily agreed to have his case adjudicated in drug court with the hopes of avoiding jail altogether”).

222. *See* State v. Stevens, 895 A.2d 771, 775 (Conn. 2006) (“A *Garvin* agreement is a conditional plea agreement that has two possible binding outcomes, one that results from the defendant’s compliance with the conditions of the plea agreement and one that is triggered by his violation of a condition of the agreement.” (quoting State v. Wheatland, 888 A.2d 1098, 1100 n.3 (Conn. App. Ct. 2006))).

that the defendant must follow during the Testing Period.²²³ A defendant who satisfies these conditions receives the bargained-for sentence.²²⁴ A defendant who does not satisfy these conditions is no longer entitled to the benefit of the bargain with the prosecutor.²²⁵ Even though the benefit no longer applies, however, that defendant cannot withdraw the guilty plea.²²⁶ Unlike conditions attendant to a cap, which both judges and prosecutors can negotiate, judges maintain exclusive control over *Garvin* conditions.²²⁷

Garvin agreements take their name from a 1997 Connecticut case.²²⁸ The defendant pleaded guilty to a set of crimes that included a sexual assault and a conspiracy to commit robbery.²²⁹ He pleaded guilty pursuant to a plea agreement that specified that he would receive a total sentence of fifteen years, execution suspended after eight years in prison, followed by three years of probation.²³⁰ At the time of the guilty plea, the court let the defendant know that if he failed to appear on the date set for the sentencing hearing, the court would no longer be bound by the sentence contained in the plea agreement.²³¹

The defendant in *Garvin* did not appear on the date set for the sentencing hearing, and he received an extra four years to serve in prison as a result.²³² The Connecticut Supreme Court upheld the enhanced sentence by relying on contract principles and emphasizing that fulfillment of the condition had been “within the defendant’s control.”²³³ The court noted that the defendant had received “consideration” for his guilty plea “in the form of the agreed upon sentence.”²³⁴ The fact that this consideration later vanished, when the defendant received more than the agreed-upon sentence, was a consequence of the defendant’s own failings.²³⁵

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *State v. Garvin*, 699 A.2d 921 (Conn. Super. Ct. 1997).

229. *Id.* at 922–23.

230. *Id.* at 923.

231. *Id.*

232. *Id.* at 924.

233. *Id.* at 929–30.

234. *Id.* at 929.

235. *Id.* at 930.

In the wake of the *Garvin* decision, courts have imposed a broad array of prospective conditions to create *Garvin* Testing Periods. These conditions include: making restitution payments,²³⁶ attending court-ordered treatment programs,²³⁷ passing drug tests,²³⁸ not making any contact with a victim,²³⁹ and not getting arrested with probable cause.²⁴⁰ Any failure to abide by these conditions during the pre-sentence Testing Period exposes the defendant to a prison term above and beyond the bargained-for sentence.²⁴¹

The strictness that can accompany a *Garvin* Testing Period is illustrated by a case that required a defendant to appear at his sentencing hearing on a specific date at 10 AM²⁴² The defendant was not present in the courtroom at 10 AM on the appointed day.²⁴³ His exact time of arrival was subject to dispute, but he “arrived no earlier than 10:55 [AM] and perhaps as late [as] 2:20 [PM]”²⁴⁴ As a consequence of his late arrival, the defendant had to serve an extra two years in prison.²⁴⁵

For some *Garvin* agreements, the bargained-for sentence is a fully-suspended sentence, creating many of the same dynamics that accompany pleas to a cap.²⁴⁶ The defendant will only earn

236. *E.g.*, *Fulton v. Comm’r of Corr.*, 12 A.3d 1058, 1061 (Conn. App. Ct. 2011).

237. *E.g.*, *State v. Dzwonkowski*, 94 A.3d 657, 661–62 (Conn. App. Ct. 2014); *State v. Brown*, 75 A.3d 713, 716 (Conn. App. Ct. 2013); *State v. Rosado*, 887 A.2d 917, 918 (Conn. App. Ct. 2006).

238. *State v. Trotman*, 791 A.2d 700, 702 (Conn. App. Ct. 2002).

239. *State v. Small*, 826 A.2d 211, 213 (Conn. App. Ct. 2003).

240. *Id.*; *State v. Ramon*, No. H12MCR140248936S, 2015 WL 9242051, at *1 (Conn. Super. Ct. Nov. 12, 2015).

241. *See, e.g.*, Transcript of Record at 4–6, *State v. Lamson*, No. N23N-CR18-0182063-S (Conn. Super. Ct. Feb. 22, 2018) (showing that the judge explained to the defendant that if the defendant failed at a drug treatment program but came back to court, the “most I’m going to give you is five, one, three,” but “if “you leave and you don’t come back, I will tune you up. . . . Up to ten years. You understand?”); Transcript of Record at 7–9, *State v. Nicholson*, No. N23N-CR17-0174135-S (Conn. Super. Ct. July 20, 2017) (indicating that the judge explained that if the defendant failed at a treatment requirement under a seven-year cap, “I can sentence you up to that seven years and you can’t complain,” but that if defendant failed to appear or got rearrested, the court could sentence him up to twelve years in prison for violating the court’s *Garvin* conditions).

242. *Dawson v. Comm’r of Corr.*, 942 A.2d 519, 521 (Conn. App. Ct. 2008).

243. *Id.*

244. *Id.* at 522–23.

245. *Id.* at 522.

246. *See supra* Part II.B.3.

the suspended sentence if he or she completes the treatment program or passes drug screens during the *Garvin* Testing Period.²⁴⁷

One illustrative (and oft-cited) case, *State v. Trotman*, shows how the promise of fully suspended time is invoked in the *Garvin* context.²⁴⁸ Ms. Trotman pleaded guilty under the *Alford* doctrine to a charge of possessing narcotics and admitted a violation of probation.²⁴⁹ Under the terms of the plea deal, the case was continued for four months after the guilty plea to allow Ms. Trotman time to enroll in a drug treatment program.²⁵⁰ In ratifying the deal, the judge imposed several *Garvin* conditions for the on-file Testing Period: she had to render “clean urines,” “cooperate” with the program, and not get re-arrested.²⁵¹ If she satisfied these conditions, she would earn a four-year, fully-suspended sentence with three years of probation.²⁵² If she failed to comply with the conditions, she was warned: “the court will sentence you to four years to serve. And your attorney does not retain the right to argue for anything less than that.”²⁵³

Ultimately, the drug testing condition tripped up Ms. Trotman, converting her sentence from four years of suspended time

247. See, e.g., *State v. Trotman*, 791 A.2d 700, 702 (Conn. App. Ct. 2002) (showing the judge granting the defendant a suspended sentence if she “submits to random urine samples for drug testing” through a treatment program). For a case example that combines many of the different procedural devices discussed so far, see Transcript of *Torres*, *supra* note 203, at 5–8, where a defendant pleaded guilty under the *Alford* doctrine to a felony count under a three-year cap agreement that specified that if the defendant succeeded in an inpatient and outpatient drug treatment program (including by complying with “all the rules and regulations” of the program), he would be allowed to withdraw the felony plea, re-plead to stacked misdemeanors, and receive a three-year fully suspended prison sentence with two years of probation; however, if he did not successfully complete the treatment program, the felony guilty plea would stand and the court could sentence him to up to three years in prison under the cap. In addition, the court imposed *Garvin* conditions during the plea colloquy, specifying that if the man were to be “charged with a new arrest based on probable cause” or if the man violated a protective order before sentencing, the court could “hold [him] to [his] plea of guilty” and impose a prison sentence of up to five years. *Id.*

248. *Trotman*, 791 A.2d at 702.

249. *Id.*

250. *Id.* at 704.

251. *Id.*

252. *Id.*

253. *Id.*

to four years to serve.²⁵⁴ Three months into the four-month period, her urine sample tested positive for an opiate.²⁵⁵ She was brought before the court and denied using any drugs during the Testing Period.²⁵⁶ She said that poppy seeds might have caused the positive test or that there was a mix-up in the samples.²⁵⁷ She brought a letter to the judge from her program counselor.²⁵⁸ This letter indicated that “because the defendant had no prior record of using opiates,” the counselor “personally felt that the drug test was ‘questionable.’”²⁵⁹ As “sole arbiter of the testimony,” however, the judge did not believe the defendant’s claim not to have used drugs and “was not persuaded that the viability, reliability, or accuracy of the test results should be called into question.”²⁶⁰ He therefore sentenced her to four years in prison, a sentence that was upheld by the appellate court.²⁶¹

b. The Low Evidentiary Standard Applicable to Garvin Testing Periods

Despite the high stakes, the evidentiary standards for adjudicating a *Garvin* violation are notably low. Judges may impose an enhanced sentence under a *Garvin* agreement if there is “minimum indicia of reliability” that the defendant violated one of the *Garvin* conditions.²⁶² The shallowness of this evidentiary standard creates additional vulnerability for defendants during the *Garvin* Testing Period. The “minimal indicia of reliability” standard is significantly lower, for example, than the preponderance of the evidence standard that applies to an alleged violation of probation.²⁶³

The Connecticut Supreme Court, for example, has found that a probable cause determination can satisfy the “minimal indicia of reliability” standard.²⁶⁴ In a 2006 case, *State v. Stevens*,

254. *Id.* at 702.

255. *Id.*

256. *Id.* at 703.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 705.

262. *State v. Brown*, 75 A.3d 713, 722 (Conn. App. Ct. 2013).

263. *Id.*

264. *State v. Stevens*, 895 A.2d 771, 776 (Conn. 2006).

the Court endorsed a *Garvin* condition that prohibited the defendant from being arrested if a judge found that the arrest was based on probable cause.²⁶⁵ This condition, which is also used in the context of cap deals and drug court, is known colloquially as a “no arrest” condition.²⁶⁶

Although the Connecticut Supreme Court ultimately upheld the “no arrest” condition in *Stevens*, the case sparked a debate over what conditions are truly within a defendant’s control.²⁶⁷ The appellate court had overturned the condition, emphasizing that in its view, “being arrested, similar to being struck by lightning, can be the result of being in the wrong place at the wrong time.”²⁶⁸ In reversing the appellate court, the Connecticut Supreme Court relied on the fact that the trial court had made a probable cause finding for the arrest, and there was no record of the defendant disputing the allegations surrounding the arrest.²⁶⁹ Accordingly, the Court found that the breach of the condition created a sufficient basis for imposing an enhanced sentence.²⁷⁰ It upheld the trial court’s decision to impose a seven-year prison sentence, four years more than the three-year prison sentence the defendant had negotiated.²⁷¹

One justice would have found the “no arrest” condition unconstitutional in part because of real-world disparities in how it would apply.²⁷² His opinion emphasized:

The undeniable reality is that, like the defendant in the present case, many criminal defendants reside in disadvantaged urban environments and are not strangers to a heightened police presence. Thus, to take the Appellate Court’s lightning analogy one step further, many defendants are released pursuant to *Garvin* agreements into situations that are akin to walking on an open field with a metal tipped umbrella in a thunderstorm.²⁷³

265. *E.g., id.* at 779; *see also, e.g., State v. Hudson*, 191 A.3d 1032, 1036 (Conn. App. Ct. 2018) (emphasizing that in context of enforcing a no arrest condition, relevant inquiry is whether there was probable cause for new arrest, not whether defendant is guilty of charges underlying the new arrest).

266. *Stevens*, 895 A.2d at 773.

267. *State v. Stevens*, 857 A.2d 972, 975–76 (Conn. App. Ct. 2004).

268. *Id.*

269. *Id.* at 972–73.

270. *Id.* at 976.

271. *Id.*

272. *State v. Stevens*, 895 A.2d 771, 783 (Conn. 2006) (Norcott, J., concurring).

273. *Id.*

To mitigate these disparities, the justice sought unsuccessfully to prohibit the use of a “no arrest” condition, replacing it with one that banned the defendant from actually committing a new crime.²⁷⁴ Equating the *Garvin* Testing Period to “a form of probation,” he also pushed his colleagues (to no avail) to incorporate the preponderance of the evidence standard into the *Garvin* process.²⁷⁵

In the wake of *Stevens*, courts have used both the “minimum indicia of reliability” standard and the “probable cause” standard to adjudicate alleged violations of *Garvin* conditions.²⁷⁶ In one case, for example, the court used the probable cause standard to find that a defendant had breached a *Garvin* condition that required him to comply with a curfew.²⁷⁷ In another case, the court used the minimum indicia of reliability standard to determine that the defendant had breached a *Garvin* condition by “failing to abide by the rules and regulations” of a year-long behavior modification program.²⁷⁸ Although the defendant completed the program, he had unexcused absences and engaged in disruptive behavior along the way.²⁷⁹ If he had succeeded during the *Garvin* Testing Period, the defendant would have received a fully suspended sentence.²⁸⁰ Instead, he was sentenced to eighteen months in prison.²⁸¹

C. KEY FEATURES OF TESTING PERIODS IDENTIFIED

In this Part, I identified and analyzed six mechanisms in Connecticut that create Testing Periods. Two of these mechanisms create “sentenced” Testing Periods (probation and conditional discharge), and four create “on-file” Testing Periods (plea-and-withdraw, caps, drug court, and *Garvin* agreements). While these mechanisms differ in their details, and are not traditionally analyzed as similar structures, they share fundamental characteristics: (1) a test is imposed on defendants; (2) defendants agree to plead guilty to become eligible for the procedural

274. *Id.* at 779.

275. *Id.* at 780.

276. *State v. Brown*, 75 A.3d 713, 716 (Conn. App. Ct. 2013); *State v. Petaway*, No. CR040028093, 2007 WL 901648, at *5 (Conn. Super. Ct. Mar. 5, 2007).

277. *Petaway*, 2007 WL 901648, at *5.

278. *Brown*, 75 A.3d at 716.

279. *Id.*

280. *Id.*

281. *Id.* at 717.

opportunity that the test represents (the opportunity to avoid prison); (3) the locus of inquiry for the incarceration decision shifts away from the facts underlying the charge, towards whether the defendant can pass the test by following a set of prospective rules for a defined period; and (4) similar (often identical) rules establish the criteria for what it means to succeed or to fail at these tests, and thereby to decide which defendants should go to prison, and for what reasons.

III. TESTING PERIODS IN OTHER STATES

These testing devices are in no way unique to Connecticut. Uncovering parallels in state practices, however, requires an in-depth examination of individual state case law. To begin to illuminate the connections across state lines, I show how the same kinds of Testing Periods I have highlighted in Connecticut also shape outcomes in criminal cases across the country.

As in Part II, I begin by exploring the dynamics created by the “sentenced” model and then turn to the “on-file” model. I keep the discussion of the “sentenced” model relatively short, because I have analyzed its legal framework extensively in other work.²⁸² Instead, I focus on examples of the “on-file” model, which has been much less studied, but which I argue forms another key component of the Testing Period methodology.

A. SENTENCED MODEL TESTING PERIODS

To illustrate parallels in the “sentenced” model, I draw primarily from cases in Texas and California. I do so because Texas and California are the two states with the largest overall correctional populations.²⁸³ In both states, moreover, the size of the probation population significantly exceeds the size of the prison population.²⁸⁴

Prosecutors and judges in Texas and California use fully-suspended time arrangements much like their counterparts in

282. See generally Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291 (2016) (analyzing how the conditions of probation contribute to overcriminalization).

283. DANIELLE KAEBLE & MARY COWHIG, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 251211, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, at 12 (Caitlin Scoville & Jill Thomas eds., 2018).

284. *Id.*; DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 251148, PROBATION AND PAROLE IN THE UNITED STATES, 2016, at 13–14 tbl.2 (Caitlin Scoville & Jill Thomas eds., 2018).

Connecticut: to facilitate guilty pleas and to sort defendants for either custodial or non-custodial outcomes.²⁸⁵ A defendant agrees to plead guilty in return for a sentence that sets up the Testing Period. In California, judges commonly create this Testing Period through a sentence of probation.²⁸⁶ Underscoring the confusion in terminology, the equivalent device is called “community supervision” in Texas, rather than probation, although those on community supervision do report to “probation officers.”²⁸⁷ As part of the plea deal in both states, the judge sentences the defendant to a fully-suspended prison term, which hangs over the defendant’s head during the Testing Period.²⁸⁸ Defendants plead guilty in return for the assurance that they will not go to prison as a consequence of that plea—unless they violate a condition of the Testing Period.²⁸⁹

As I have explored elsewhere, conditions in the “sentenced” model are particularly broad in Texas and California, as they are in many other states.²⁹⁰ Defendants must follow conditions like obey all laws, avoid injurious and vicious habits, stay away from

285. See, e.g., *Ex parte Gonzalez*, 402 S.W.3d 843, 844 (Tex. App. 2013) (noting that defendant had pleaded guilty “in accordance with a plea bargain agreement” and that in “exchange for his guilty plea, the trial court suspended” the defendant’s ten-year prison sentence and placed him on community supervision); *Woodard v. State*, No. 14-08-00606-CR, 2008 WL 2841593, at *1 (Tex. App. July 24, 2008) (suspending a prison term and ordering community supervision “[i]n accordance with the terms of a plea bargain agreement with the State”).

286. See, e.g., CAL. PENAL CODE § 1203(a) (2018) (“[P]robation’ means the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer.”); *People v. Kropp*, No. C065098, 2011 WL 1459686, at *1 (Cal. Ct. App. Apr. 18, 2011) (imposing a fully-suspended prison term of four years and four months after finding that the probationer failed to keep the probation department accurately advised of his address and failed to timely report any arrests). It is important to emphasize, however, that suspension arrangements are only one form of probation in California; many people now begin probation supervision only after completing a custodial term. See, e.g., VIET NGUYEN, RYKEN GRATTEY & MIA BIRD, PUB. POLICY INST. OF CAL., CALIFORNIA PROBATION IN THE ERA OF REFORM 3 (2017) (noting that after the Public Safety Realignment Act took effect in 2011, more people entered probation supervision after serving a state prison term or after serving the jail portion of a split sentence).

287. See, e.g., *McCain v. State*, No. 14-16-00254-CR, 2017 WL 3927486, at *1 (Tex. App. Sept. 7, 2017) (noting that the probation officer oversaw the defendant on community supervision).

288. *Kropp*, 2011 WL 1459686, at *1; *McCain*, 2017 WL 3927486, at *1.

289. *Kropp*, 2011 WL 1459686, at *1; *McCain*, 2017 WL 3927486, at *1.

290. Doherty, *supra* note 282, at 305–13, 316, 322.

drugs and alcohol, work faithfully at suitable employment, report to the probation officer as required, abide by the rules of a treatment program, and avoid persons and places of disreputable or harmful character.²⁹¹ The breadth of these conditions provides judges and prosecutors with the power to sort those who can follow the rules from those who cannot. The deepest expression of this power lies in the ability to decide how closely to monitor a defendant for compliance and how seriously to treat a violation.²⁹²

In Texas, as in other states, a sentence of community supervision has been used to sort defendants on the basis of addiction.²⁹³ In one case, the defendant agreed to plead guilty to a driving while intoxicated count in exchange for a sentence of five years of community supervision and a ten-year fully suspended prison term.²⁹⁴ According to his probation officer, he told her in a meeting that he had used drugs over a four-day period.²⁹⁵ He later insisted that he had admitted to using drugs on only one of those dates.²⁹⁶ In upholding the imposition of the ten-year prison sentence, the appellate court emphasized that any violation at all was sufficient to support the revocation of his community supervision.²⁹⁷

Testing Periods can also be used to identify defendants who are not making sufficient progress in treatment in the opinion of their treatment providers.²⁹⁸ The provider might decide to expel

291. *Id.* at 316–17.

292. Importantly, in an effort to begin addressing some of the problems discussed in this Article, some jurisdictions are experimenting with measures like reducing conditions, incentivizing positive behavior, and curbing the penalties available for the revocation of probation. *See* COLUMBIA UNIV. JUSTICE LAB, TOO BIG TO SUCCEED: THE IMPACT OF THE GROWTH OF COMMUNITY CORRECTIONS AND WHAT SHOULD BE DONE ABOUT IT 7 (2018).

293. *See, e.g.*, *People v. Lindsey*, No. D048683, 2006 WL 3602920 (Cal. App. Ct. Dec. 12, 2006) (imposing a fully-suspended four-year prison term after probationer tested positive for crack cocaine and possessed a razor blade that contained crack residue); *Jones v. State*, No. 10-17-00118-CR, 2018 WL 327501, at *1 (Tex. App. May 23, 2018) (revoking community supervision and imposing a sixty-year prison sentence in part because the defendant failed to complete outpatient drug treatment after a positive test for cocaine).

294. *Parker v. State*, No. 05-13-01535-CR, 2014 WL 7497800, at *4 (Tex. App. Dec. 29, 2014).

295. *Id.*

296. *Id.*

297. *Id.*

298. *See, e.g.*, *People v. Odom*, No. D064625, 2014 WL 6630107, at *1–2 (Cal. Ct. App. Nov. 24, 2014) (imposing fully-suspended five-year prison term after

a defendant from a program, even though completing that program was a condition of the sentence. In one such case in Texas, the treatment provider expelled a defendant from a sex-offender counseling program in part because of his “secretiveness about his sexual behavior.”²⁹⁹ One basis for this conclusion was that the defendant had refused to tell his fiancée that he was having an affair, even though the therapist had encouraged him to do so.³⁰⁰ As a result of his expulsion from the program, the court revoked the defendant’s community supervision and imposed a ten-year prison term, which had been fully suspended at the time of his plea.³⁰¹ In upholding this outcome, the appellate court noted: “Successful completion of a court-ordered sex offender treatment program necessarily requires more than mere participation in the program; it requires improvement, or—at the very least—demonstration of an attempt to improve through implementation of the skills imparted in therapy.”³⁰²

Like in Connecticut—and many other states—the defendant’s probation or community supervision can be revoked based on conduct for which the defendant was acquitted by a jury.³⁰³ The California Supreme Court has held that a “prior acquittal in a criminal proceeding does not bar subsequent [probation revocation] proceedings based upon the same underlying facts.”³⁰⁴ Appellate courts in Texas have similarly upheld revocation sentences that are based on acquitted conduct.³⁰⁵

the defendant tested positive for drugs, missed drug testing, and a drug treatment provider indicated his attendance and participation at treatment were “unsatisfactory”).

299. Kelly v. State, No. 08-12-00291-CR, 2014 WL 3853872, at *2 (Tex. App. Aug. 6, 2014).

300. *Id.* at *1 (finding other bases for the conclusion such as a hearsay statement from the defendant’s therapist that she “became aware of sexual actions” the defendant took towards his sleeping wife and defendant’s failure to improve in penile plethysmography testing).

301. *Id.*

302. *Id.* at *2.

303. People v. Crawley, No. B243199, 2013 WL 6632013, at *1 (Cal. App. Ct. Dec. 16, 2013).

304. *In re Coughlin*, 545 P.2d 249, 253 (Cal. 1976); *see also Crawley*, 2013 WL 6632013, at *1 (upholding a revocation where the probationer “was found not guilty after a jury trial; but the court, based upon the same evidence, found he had violated his probation and imposed the previously suspended five-year prison term”).

305. *See, e.g., Lopez v. State*, No. 13-15-00074-CR, 2016 WL 836695, at *2–3 (Tex. App. Mar. 3, 2016); *Black v. State*, 411 S.W.3d 25, 30 (Tex. App. 2013).

Like their counterparts in Connecticut, courts in California and Texas encourage defendants to agree to Testing Periods in plea deals by marketing them as a way for defendants to escape punishment. California courts, for example, emphasize that probation is “not punishment but is instead an ‘act of clemency in lieu of punishment.’”³⁰⁶ Texas courts characterize community supervision as an act of clemency that suspends punishment.³⁰⁷ These framing techniques help to mask the hefty risks and diminished leverage that accompany every such sentence.

The Rhode Island Supreme Court has characterized the depths of these risks in perhaps the most vivid terms. Rhode Island is an important state in the world of probation because it uses probation so heavily as a sentence. One in every thirty-five adult residents of Rhode Island is on probation, the second highest rate in the United States.³⁰⁸

In 2004, the Rhode Island Supreme Court relied on an ancient tale, “The Sword of Damocles,” to illustrate the precarious position of those on probation.³⁰⁹ It did so in a case in which the defendant, who had agreed to plead *nolo contendere* to criminal charges, was originally sentenced to a fully-suspended ten-year prison term with ten years of probation.³¹⁰ Eight years later, the trial court revoked the sentence of probation and executed the ten-year prison term.³¹¹ In upholding this outcome, the Supreme Court analogized the plight facing probationers to that facing Damocles in Cicero’s long-ago tale.³¹² Damocles had gotten himself into a predicament when he switched places with King Dionysus II for a day—and was busy reveling in the luxuries of the palace—when he looked up and saw a sword suspended over his

306. *People v. Superior Court*, 7 Cal. Rptr. 3d 440, 442–43 (Cal. Ct. App. 2003).

307. *Speth v. State*, 6 S.W.3d 530, 533–34 (Tex. Crim. App. 1999) (emphasizing that probation is a privilege, rather than a right, and benefits the probationer); *Pedraza v. State*, 562 S.W.2d 259, 260 (Tex. Crim. App. 1978) (“Probation is not such an assessment of punishment; it suspends punishment and is in the nature of clemency.”).

308. See DANIELLE KAEBLE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 250230, PROBATION AND PAROLE IN THE UNITED STATES, 2015, at 17 tbl.2 (Caitlin Scoville & Jill Thomas eds., 2017) (noting that 2822 people per 100,000 adult residents are on probation in Rhode Island).

309. *State v. Parson*, 844 A.2d 178, 180–81 (R.I. 2004).

310. *Id.* at 179.

311. *Id.*

312. *Id.* at 180–81.

head by a thread.³¹³ The court used the threat represented by this sword to explain what it meant to be on probation: “Like the sword of Damocles, the unexecuted portion of a probationer’s suspended sentence hangs over his or her head by the single horsehair of good behavior, until such time as the term of probation expires.”³¹⁴ The court went on to emphasize that by violating the conditions of his probation, the defendant had “severed the horsehair” and “the sword of incarceration fell upon his head.”³¹⁵

The Damocles analogy only works, however, if defendants understand—and can meaningfully control—the risks they face while on probation. As the court notes in its opinion, Damocles had the advantage of seeing with his own eyes the “sharp sword” that was “dangling above him” and realizing that there was “danger every moment” that the hair would break.³¹⁶ This danger caused the “smile to fade from his lips” and his face to turn “ashy pale.”³¹⁷ The risks were too much for him, and he begged to leave the palace in order to escape the ever-present threat of the sword.³¹⁸ Unlike many people in Testing Periods, he came to appreciate the dangers before it was too late.³¹⁹

B. ON-FILE MODEL TESTING PERIODS

In this Section, I provide a comparative analysis of state “on-file” Testing Periods to show how they shape outcomes in cases across the country through the use of the same criteria (such as the ability to maintain clean screens for drugs or alcohol). I draw from Texas case law, for example, to showcase plea deals that use a variation of the plea and withdraw offer. I then use New York law to illuminate a parallel version of caps and *Garvin* agreements, including the imposition of “no arrest” conditions.

313. Evan Andrews, *What Was the Sword of Damocles?*, HIST. (Feb. 17, 2016), <https://www.history.com/news/what-was-the-sword-of-damocles>.

314. *Parson*, 844 A.2d at 180.

315. *Id.*

316. *Id.* at n.2.

317. *Id.* at 180.

318. *Id.* at 180–81.

319. See Timothy Baldwin & Olin Thompson, *More Horse-Hair for the Sword of Damocles? The Rhode Island Probation System and Comparisons to Federal Law*, 21 ROGER WILLIAMS L. REV. 244, 253 (2016) (“The Rhode Island practice of long suspended sentences coupled with long periods of probation looks innocuous on paper and has an indicia of leniency. Ultimately, however, the framework leads to significantly reduced due process for the many criminal defendants that cycle through the probation violation system.”).

Finally, I show how the legal framework of various alternative courts relies on the same supercharged indeterminacy structure. Because alternative courts are exploding in popularity across the country, I provide examples from states with large numbers of these courts, including California, Georgia, Michigan, and Illinois.

1. Deferred Adjudication in Texas

Texas courts operate an “on-file” testing system called “deferred adjudication.”³²⁰ Deferred adjudication operates after a guilty plea but before sentencing.³²¹ It is similar to the plea and withdraw model in Connecticut, although with wider application.³²² Deferred adjudication accounts for nearly sixty percent of community supervision placements in Texas.³²³

Under deferred adjudication, the defendant must agree to plead guilty in order to secure the chance of earning an eventual dismissal of the case.³²⁴ In return, the judge agrees to put off (or defer) accepting the guilty plea, while the defendant undergoes the post-plea Testing Period.³²⁵ To set up this Testing Period, the court places the defendant on “deferred adjudication community supervision.”³²⁶ If the defendant follows the court’s conditions during the required interval, the judge never formally records the guilty plea.³²⁷ But if the defendant violates one of the conditions, the judge can enter a finding of guilt and proceed to sentence the defendant on the plea.³²⁸

The delayed entry of the guilty plea facilitates plea bargaining because it makes the guilty plea seem less real, even as the defendant is actually pleading guilty. The guilty plea—in addition to the sentence—now hangs in the air, as the defendant is put to the test. Defendants know that as long as they pass the test, the guilty plea will vanish for good.

320. TEX. CODE CRIM. PROC. ANN. art. 42A.101(a) (West 2017).

321. *Id.*

322. *Supra* Part II.B.2.

323. TEX. DEPT’ OF CRIMINAL JUSTICE, FY 2017 STATISTICAL REPORT 7 (2017).

324. TEX. CODE CRIM. PROC. ANN. art. 42A.101(a).

325. *Id.*

326. *Id.*

327. *Id.*

328. TEX. CODE CRIM. PROC. ANN. art. 42A.110(a).

Violating a condition of the deferred adjudication period, however, can mean the difference between no conviction at all and a lengthy prison sentence.³²⁹ In one case, for example, a defendant agreed to plead guilty to possessing cocaine and codeine under a deferred adjudication arrangement.³³⁰ The judge laid out the stakes in the following terms:

The Court: While you're under our supervision, you must comply with all of the conditions that are set.

[Defendant]: Yes, sir.

The Court: If you do that, your cases will be dismissed—completely wiped off. But, if you don't, if you break a condition, you could get up to 20 years in the penitentiary. That's what is at stake. Do you understand that completely?

[Defendant]: Yes, sir.³³¹

This defendant did not make it through the Testing Period, and he received twenty years in prison as a result.³³²

Deferred adjudication shifts power to trial judges by allowing them both to create a test and to decide what it means to fail. A 2015 Texas case illustrates just how much discretion courts have in making this judgment.³³³ The defendant was charged with possessing less than one gram of cocaine and tampering with evidence because cocaine was found on the ground after she was told to exit a car during a traffic stop.³³⁴ She agreed to plead guilty to the charges under a deferred-adjudication arrangement, which came with a five-year Testing Period.³³⁵ She was later charged with violating the conditions of her supervision, including by failing to report to her probation officer, failing to

329. See, e.g., *Sanchez v. State*, No. 13-16-00500-CR, 2018 WL 2979827, at *1, 4 (Tex. App. June 14, 2018) (sentencing the defendant to twenty years in prison in a deferred adjudication case for violating the terms of his probation); *Hammack v. State*, 466 S.W.3d 302, 304 (Tex. App. 2015) (sentencing the defendant to six months in prison in a deferred adjudication case in which the defendant had violated a rule of the treatment program prohibiting “romantic/sexual relationships with peers or staff”); *Patterson v. State*, No. 14-09-00277-CR, 2010 WL 1406322, at *2–3 (Tex. App. Apr. 8, 2010) (sentencing the defendant who had pleaded guilty to a deferred adjudication arrangement to twenty years in prison for violating the terms of his community supervision).

330. *Green v. State*, 242 S.W.3d 215, 218 (Tex. App. 2007).

331. *Id.*

332. *Id.* at 217.

333. *Pena v. State*, No. 13-14-00291-CR, 2015 WL 3634463, at *1 (Tex. App. Dec. 16, 2015).

334. *Id.* at *1.

335. *Id.*

submit to urinalysis testing, and failing to attend treatment.³³⁶ She was taken into custody and wrote to the judge saying that she needed an early court date because she was a single mother with three children.³³⁷ On the court date, she admitted to the violations.³³⁸ She also told the court that she shared custody of the children with their father, who lived separately from her.³³⁹ She explained that her situation was urgent because the children had reported being neglected and abused at their father's house, and these reports were being investigated by Child Protective Services.³⁴⁰ The record reflects that the judge got angry upon hearing that the defendant shared custody of the children with their father, deciding that she had deliberately misrepresented her custody status in the letter to the court.³⁴¹ Although the state had recommended that the defendant be allowed to enter another program, the judge adjudicated her guilty (based on her earlier guilty pleas) and sentenced her to two years in prison.³⁴²

Because Texas uses community supervision (its standard probation system) to monitor defendants on deferred adjudication, it has incorporated the protections that apply to sentences of probation into the deferred adjudication model. The state must prove violations of a condition of deferred adjudication by a preponderance of the evidence.³⁴³ As discussed below, however, other states have used the “on-file” methodology to decline to apply the preponderance standard and other due process protections.³⁴⁴

2. On-File Testing Periods and *Outley* Standards in New York

New York case law reveals a host of “on-file” testing arrangements that bear a striking resemblance to their Connecticut counterparts. New York has an “interim probation” system,

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at *2.

341. *Id.*

342. *Id.* at *1–3.

343. *See Sadler v. State*, No. 08-12-00203-CR, 2014 WL 3887963, *2 (Tex. App. Aug. 8, 2014).

344. *See infra* Part III.B.2.

for example, that largely mirrors the cap plea structure in Connecticut.³⁴⁵ Many New York drug courts function on plea-and-withdraw³⁴⁶ and cap-like models.³⁴⁷ The New York version of the *Garvin* agreement operates through what are known as “*Outley*” hearings.³⁴⁸

The similarities in plea structure are illustrated by a New York drug court case in which a defendant agreed to plead guilty to two misdemeanor counts of petit larceny in exchange for the chance to earn a conditional discharge in drug court.³⁴⁹ After he pleaded guilty, he told the judge that he did not “plan on goofin’ up,” but then asked:

THE DEFENDANT: If I goof up, is there a time cap on that?

THE COURT: Yeah, two years.

THE DEFENDANT: Well, Your Honor—

THE COURT: Do you want to go to trial?

THE DEFENDANT: No, I’ll take it.

THE COURT: Just to ease your pain, if you fail Drug Court, I’m going to put you in jail for two years. Do you understand that?

THE DEFENDANT: Yes.³⁵⁰

The defendant did not succeed in drug court, and the court sentenced him to two years in jail, the longest possible sentence the court had the authority to impose.³⁵¹

New York judges, like judges in Connecticut, can impose a “no arrest” condition during an “on-file” Testing Period, provoking a similar debate about whether being arrested is within a defendant’s control. In 1993, in *People v. Outley*, the New York

345. See, e.g., *People v. Gilliam*, 162 A.D.3d 1413 (N.Y. App. Div. 2018); *People v. Savage*, 70 N.Y.S.3d 602 (N.Y. App. Div. 2018); *People v. Scott*, 63 N.Y.S.3d 629 (N.Y. App. Div. 2017); *People v. Kocher*, 984 N.Y.S.2d 244 (N.Y. App. Div. 2014).

346. *People v. Nedlik*, 144 A.D.3d 1324 (N.Y. App. Div. 2016); *People v. Mills*, 52 Misc. 3d 1209(A), at *1 (N.Y. Sup. Ct. 2016); *People v. Radonich*, No. 5361/14, 2015 WL 6700874, at *1 (N.Y. Sup. Ct. Oct. 27, 2015).

347. *People v. Braye*, 161 A.D.3d 1456 (N.Y. App. Div. 2018); *People v. Cynanik*, 154 A.D.3d 1336 (N.Y. App. Div. 2017). Another model in New York is to have defendants participate in drug court as a condition of probation. See, e.g., *People v. Sumter*, 157 A.D.3d 1125 (N.Y. App. Div. 2018) (specifying that the defendant must successfully complete drug court as a condition of probation or else probation would be revoked and the defendant would be sentenced to a prison term of no less than seven years and no more than eight years, with three years of post-release supervision).

348. *People v. Outley*, 610 N.E.2d 356, 361 (N.Y. 1993).

349. *People v. Miller*, 15 Misc. 3d 1127(A), at *1–2 (Monroe Co. Ct. 2006).

350. *Id.* at *1.

351. *Id.* at *2.

Court of Appeals endorsed a no arrest condition in enforcing New York's version of the *Garvin* agreement (or conditional plea agreement).³⁵² The defendant had agreed to plead guilty to endangering the welfare of a child in hopes of receiving a sentence of probation.³⁵³ At the time of the plea, the judge agreed to sentence the defendant to a period of probation "not to exceed three years provided that defendant 'not be arrested on any other charges during [the] adjournment period.'"³⁵⁴ The defendant was arrested in the adjournment period (the Testing Period) because he returned to his former home in violation of protective orders that had been issued against him.³⁵⁵ Although the circumstances were disputed, the judge sentenced the defendant to one year in custody, instead of probation, in light of the arrest in the Testing Period.³⁵⁶

In upholding the enhanced sentence, the *Outley* court found that enforcing a "no arrest" condition did not require any finding that the defendant had actually committed a crime.³⁵⁷ The defense had asked that the trial court be forced to conduct an evidentiary hearing to at least satisfy itself by a preponderance of the evidence that the defendant had committed the new crime.³⁵⁸ The state appellate court rejected this argument on the grounds that imposing such a rule "would have the effect of changing the condition of the plea bargain from *not being arrested for a crime to not actually committing a crime*."³⁵⁹ It would have the "undesirable consequence" of requiring a "mini-trial" on the defendant's guilt or innocence on the new charge.³⁶⁰

The *Outley* court adopted a standard for evaluating the new arrest that is very similar to Connecticut's probable cause standard. While proof that the defendant committed the new crime

352. *Outley*, 610 N.E.2d at 358. For examples of similar devices in other jurisdictions, see, *People v. Masloski*, 25 P.3d 681, 688 (Cal. 2001); *People v. Turner*, 924 N.E.2d 1, 2 (Ill. App. Ct. 2010); and *State v. Foy*, 574 N.W.2d 337, 338 (Iowa 1998).

353. *Outley*, 610 N.E.2d at 358.

354. *Id.* (alteration in original).

355. *Id.*

356. *Id.*

357. *Id.* at 361.

358. *Id.* at 358.

359. *Id.* at 361.

360. *Id.*

was not necessary, the court had to give the defendant an opportunity to show that the arrest was without foundation.³⁶¹ The court could impose the enhanced sentence if it was satisfied “not of defendant’s guilt of the new criminal charge but of the existence of a legitimate basis for the arrest on that charge.”³⁶²

A 2000 case in the U.S. Court of Appeals for the Second Circuit highlighted the problem raised by the *Stevens* concurrence in Connecticut: the defendant’s inability to control whether or not he was arrested. In this Second Circuit case, *Spence v. Superintendent*, the defendant had agreed to plead guilty to a robbery in New York state court and to accept an “on-file” Testing Period of one year.³⁶³ If the defendant succeeded during the Testing Period, he would receive probation and “probably” be given youthful offender status.³⁶⁴ But if he failed, he would be sentenced to imprisonment for a term of eight-and-a-third to twenty-five years, the maximum possible sentence for the robbery offense.³⁶⁵

The trial judge had imposed a no arrest condition on the defendant for the Testing Period, but the judge had muddied the waters by suggesting that getting arrested was a choice within the defendant’s control.³⁶⁶ The judge told the defendant:

If you get rearrested, that’s a voluntary choice you made by going out and doing something which you should not have been doing. It rests solely with you. If you get rearrested . . . I’m going to sentence you up to the maximum time allowed by law—again it’s eight and a third to 25.³⁶⁷

When the defendant did get arrested during the Testing Period, he denied guilt and claimed to have five alibi witnesses, including two city probation employees.³⁶⁸ The court refused to adjourn sentencing on the original plea, however, and imposed the promised eight-and-a-third to twenty-five-year sentence on the basis of the new arrest.³⁶⁹

361. *Id.*

362. *Id.*; *see also* *People v. Terry*, 830 N.Y.S.2d 659, 659 (N.Y. App. Div. 2007) (holding that the fact a grand jury did not indict does not preclude an enhanced sentence).

363. *Spence v. Superintendent*, 219 F.3d 162 (2d Cir. 2000).

364. *Id.* at 166.

365. *Id.* at 166–67.

366. *Id.* at 167–68.

367. *Id.* at 167.

368. *Id.* at 168.

369. *Id.* at 166.

The Second Circuit relied on the court's confusing language about an arrest being within the defendant's control to grant his habeas petition.³⁷⁰ In the meantime, a jury had acquitted the defendant of the charge underlying the new arrest. However, by the time the habeas case made it up to the Second Circuit, the man had already been imprisoned for eight years.³⁷¹

A 2003 Second Circuit case, *Torres v. Berbary*, once again addressed an "on-file" Testing Period in New York state court, attempting to impose a preponderance standard for violations of *Outley* conditions during this period.³⁷² The Second Circuit's opinion was met with outright rebellion by state trial courts, egged on by federal trial courts in New York.

Berbary was an "on-file" case that required a New York defendant to complete a drug treatment program as a condition of his plea agreement.³⁷³ The defendant had agreed to plead guilty to the sale of a controlled substance in the third degree (a felony) in exchange for the chance to get the felony plea reduced to a misdemeanor and a time-served sentence.³⁷⁴ The state judge explained the deal to the defendant in the following terms:

THE COURT: Okay. I am going to sentence you. I will release you on the 23rd to Phoenix House [the drug treatment program]. If you work out, you will be allowed to come back, re-plead to a misdemeanor, and I will sentence you [to] time served. If you don't work out, you will get at least four and a half to nine years in jail. Do you understand?

THE DEFENDANT: Yes.

THE COURT: Is that satisfactory to you?

THE DEFENDANT: Yes.³⁷⁵

The defendant was subsequently ejected from the drug treatment program based on a claim that other residents of the program had overheard him discussing the possibility of making drugs available for sale within the facility.³⁷⁶ Based on this claim, the state judge sentenced the defendant to the "promised" term: four-and-a-half to nine years in jail.³⁷⁷

370. *Id.* at 168.

371. *Id.*

372. *Torres v. Berbary*, 340 F.3d 63 (2d Cir. 2003).

373. *Id.* at 64.

374. *Id.* at 64–65.

375. *Id.*

376. *Id.* at 65.

377. *Id.* at 66.

The Second Circuit granted the defendant's writ of habeas corpus, finding that the state court should not have relied exclusively on double and triple hearsay reports.³⁷⁸ Extrapolating from the law governing the sentenced model, the Second Circuit held that the trial court should have applied a preponderance of the evidence standard in deciding whether a condition of the "on-file" model had been violated.³⁷⁹

The push back from trial courts was immediate. Two weeks after the Second Circuit issued its *Berbary* opinion, a federal district court in the Eastern District of New York (EDNY) raised the alarm about its implications for state trial judges.³⁸⁰ It did so while denying a habeas petition that had raised a due process challenge to a similar "on-file" arrangement. The EDNY opinion began by decrying the "serious problem about what some might see as attempts by the Court of Appeals for the Second Circuit to impose federal standards on state sentencing procedures."³⁸¹ The court emphasized that the U.S. Supreme Court had never required state courts to use the preponderance standard when deciding on an appropriate sentence. Indeed, the Supreme Court had recognized that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all."³⁸²

Subsequent trial court decisions have followed the EDNY's *Coleman* opinion in criticizing the Second Circuit's approach in *Berbary*. In a 2004 case, for example, a New York state court imposed an enhanced sentence on a defendant for the violation of a "no-arrest" condition without holding a fact-finding hearing on whether the defendant had committed the crime.³⁸³ In determining whether the defendant had violated the "no arrest" condition in the plea agreement, the court applied the *Outley* "legitimate basis" standard, quoting *Coleman*'s characterization of the Second Circuit's approach in *Berbary* as "unfounded."³⁸⁴ Subse-

378. *Id.* at 71.

379. *Id.*

380. *Coleman v. Rick*, 281 F. Supp. 2d 549 (E.D.N.Y. 2003).

381. *Id.* at 552–53.

382. *Id.* at 560 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986)).

383. *People v. Bennett*, 777 N.Y.S.2d 285, 288–89 (N.Y. Sup. Ct. 2004).

384. *Id.* at 289 (quoting *Coleman*, 281 F. Supp. 2d at 560). The court also found, however, that the defendant's claim would fail under a preponderance of the evidence standard. *Id.*; see also *Janick v. Superintendent*, 404 F. Supp. 2d

quent courts have continued to use the legitimate basis standard.³⁸⁵

3. Problem-Solving Courts

Many drug courts—and other problem-solving courts—have come to rely on the “on-file” testing models I am exploring in this Article. The first generation of drug courts operated largely on a pre-plea basis; a defendant did not have to plead guilty to a crime in order to get admitted into the court. Over the years, however, drug courts have largely abandoned the pre-plea diversionary formula. According to the latest figures, only six percent of drug courts now operate on a pre-plea model.³⁸⁶

Instead, a huge number of drug courts now run on the “on-file” model. The defendant agrees to plead guilty to a crime in exchange for the same tantalizing prize, the chance to avoid prison.³⁸⁷ Sometimes, defendants are also told that the guilty plea will be vacated when they graduate from drug court: an iteration of the plea and withdraw offer.³⁸⁸ The conditions of the Testing Period are broad, and the penalties for failure can be extremely high.

A 2014 Illinois drug court case, which involved the retroactive imposition of a no arrest condition, provides an example of

472, 480–81 (W.D.N.Y. 2005) (finding violation of a no arrest condition “[w]ithout conceding” that the preponderance standard was appropriate).

385. See, e.g., *People v. Reynolds*, 55 N.E.3d 1036, 1038 (N.Y. 2016); *People v. Fiammegta*, 923 N.E.2d 1123, 1128–29 (N.Y. 2010); *People v. Smith*, 80 N.Y.S.3d 514, 516 (N.Y. App. Div. 2018); *People v. Hook*, 27 N.Y.S.3d 859, 860 (N.Y. App. Div. 2016); *People v. Bracy*, 15 N.Y.S.3d 397, 399 (N.Y. App. Div. 2015); *People v. Driscoll*, 14 N.Y.S.3d 596, 597–98 (N.Y. App. Div. 2015); *People v. Paneto*, 976 N.Y.S.2d 745, 747 (N.Y. App. Div. 2013); see also *People v. Love*, 28 N.Y.S.3d 479, 481 (N.Y. App. Div. 2016) (applying the legitimate basis standard to the violation of a condition of interim probation); *People v. McDevitt*, 948 N.Y.S.2d 768, 770 (N.Y. App. Div. 2012) (same).

386. DOUGLAS B. MARLOWE ET AL., NAT’L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURTS IN THE UNITED STATES 40 fig.5 (2016).

387. *Id.* at 40–41; see also, e.g., LAUREN ALMQUIST & ELIZABETH DODD, COUNCIL OF STATE GOV’TS JUSTICE CTR., MENTAL HEALTH COURTS: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 13 (2009) (reporting that most felony mental health courts require up-front guilty pleas).

388. *State v. Merritt*, 705 N.W.2d 105 (Iowa Ct. App. 2005) (noting that guilty pleas would be dismissed upon successful completion of a drug court program, but the defendant would be sent to prison for failing the program and the prison sentences on each charge would run consecutively); MARLOWE ET AL., *supra* note 386, at 40–41.

a defendant ceding all future leverage in exchange for the chance to earn a conditional discharge.³⁸⁹ The defendant had agreed to plead guilty to one count of burglary to enter a drug court program. Under the plea agreement, success in drug court would result in a conditional discharge. But failure would mean ten years in prison. The plea agreement further provided: "If the defendant commits a new felony offense, or DUI, the [S]tate shall immediately file a Petition to Unsuccessfully Discharge the defendant from the program. The case shall proceed to the sentencing hearing pursuant to the plea and predetermined sentence."³⁹⁰ As a prerequisite of entering drug court, moreover, the defendant had to sign away all of his appeal rights: "I waive any and all rights to appeal I may have in the event I am dismissed from the DeKalb County Drug Court, and understand and consent to the Court and DeKalb County Drug Court Team being the sole authority for determining such dismissal."³⁹¹ Approximately one year later, the defendant was arrested and charged with a new theft offense.³⁹² The state moved to terminate him from drug court on account of this new arrest. The defendant protested that, under the terms in the plea agreement, the State had to show that he had actually committed a new felony offense, not that he had been charged with a new felony offense.³⁹³ The trial court did not dispute this language, but it granted the State's termination petition anyway, finding that "past practices" have been that "[a]ny individual who has been charged with a felony offense has been discharged unsatisfactorily from the program based on that offense."³⁹⁴ The court imposed the ten-year prison term, and the appellate court refused to consider the defendant's argument because of the waiver of appeal.³⁹⁵

Defendants in problem-solving courts routinely agree to forfeit an extraordinary number of rights for the chance to avoid prison. The rights waivers are generally listed in pre-printed "contracts" that defendants must sign as a condition of entry into a problem-solving court. In some jurisdictions, the scope of the waivers seems to be limited only by the inventiveness of the

389. *People v. McCaslin*, 30 N.E.3d 1104 (Ill. App. Ct. 2014).

390. *Id.* at 1106.

391. *Id.*

392. *Id.*

393. *Id.* at 1107.

394. *Id.* at 1106.

395. *Id.* at 1110.

judges and prosecutors in devising ways to shift power to themselves. The fact that defendants sign these contracts shows how much they are willing to give up for the chance to avoid prison.

A plea agreement from California illustrates how some problem-solving courts have gone about getting defendants to forfeit protections that would otherwise apply. In *People v. Freeman*, a 2012 case, the defendant pleaded guilty to a drug possession crime and was “granted drug court probation.”³⁹⁶ Although the defendant was entering a drug court that was referred to as a form of probation, the court required him to waive most of the rights that are attendant to the “sentenced” model of probation in California.³⁹⁷ In particular, the court made him waive any right to a hearing if he was alleged to have violated a condition that applied in drug court.³⁹⁸ He was also required to waive the “Court Reporter’s presence for all proceedings” and the requirement that the department of probation file a formal petition to revoke his probation.³⁹⁹

The vulnerability of the defendant’s position was highlighted when the judge used his “disrespectful” attitude to impose a three-month jail sanction and change the terms of the deal to include a nine-year suspended prison term.⁴⁰⁰ Approximately a year after the defendant first entered drug court, and after he had successfully completed the residential treatment component, the court concluded that he had not been sufficiently cooperative in treatment.⁴⁰¹ The court congratulated the defendant for achieving eight months of sobriety, but then faulted him for his attitude in treatment: “It’s been brought to my attention that

396. *People v. Freeman*, No. E052780, 2012 WL 174833, at *1 (Cal. Ct. App. Jan. 23, 2012).

397. The 2011 Realignment reforms that apply to post-custodial probation supervision do not apply to drug court models that rely on deferred entry of judgment. See CHIEF PROB. OFFICERS CAL., CRIMINAL JUSTICE REALIGNMENT: WHAT COUNTIES NEED TO KNOW TO IMPLEMENT 14 (2011), <https://www.cproc.org/sites/main/files/file-attachments/whatcountiesneedtoknow.pptx> (noting that Realignment reforms do not apply to “existing alternatives” like “deferred entry of judgment”).

398. *Freeman*, 2012 WL 174833, at *1.

399. *Id.*; see also *People v. Dowd*, No. E067332, 2018 WL 1615869, at *1 (Cal. Ct. App. Apr. 4, 2018) (finding that the defendant had waived the right to a *Vickers* hearing in the context of a drug court violation); *People v. Sukane*, Nos. E042078 & E042952, 2008 WL 2898659, at *3 (Cal. Ct. App. July 29, 2008) (same).

400. *Freeman*, 2012 WL 174833, at *1–2.

401. *Id.*

you are at times disruptive, acting very juvenile in class, in meetings. You're disrespectful. You're defiant. You question everything. And it appears to me you need an attitude adjustment."⁴⁰² To punish the defendant for this attitude problem, the court placed him in prison for three months; it then released him back on a probationary Testing Period only after imposing a nine-year fully-suspended prison term to provide additional leverage against the defendant going forward.⁴⁰³

In the end, the judge ordered the defendant to serve the full nine years in prison under circumstances that illustrate the dynamics of the Testing Period. The court imposed this sentence because it found that the defendant had failed to obey the court's order not to reside with his "girlfriend or wife."⁴⁰⁴ The defendant argued that although he did keep items at his girlfriend's house, he did not live with her. Without conducting a fact-finding hearing to resolve the dispute, the court refused to allow the defendant to complete the drug court program and imposed the full nine years, even while recognizing the defendant as "one of the hardest workers in the program."⁴⁰⁵

In another California case, the defendant waived not only the right to a violation hearing, but also "the right to challenge any drug test" as part of the "Drug Court Application and Agreement."⁴⁰⁶ The defendant had agreed to plead guilty to drug possession charges and enter a drug court Testing Period in the hopes of earning three years' probation. The defendant was later terminated from the drug court because he was found to have manipulated a drug test. Instead of probation, the defendant was sentenced to six years in prison.⁴⁰⁷

Problem-solving courts in Michigan have likewise demanded that defendants give up rights that normally accompany the "sentenced" model, including the right to be represented by counsel. The manual on "Developing and Implementing a Drug Treatment Court in Michigan" emphasizes:

Program violations are not treated like probation violations. Once an offender agrees to participate in drug court, he or she waives the right

402. *Id.* at *1.

403. *Id.* at *2.

404. *Id.* at *1.

405. *Id.*

406. *People v. Eidson*, No. E052160, 2012 WL 1414020, at *1 (Cal. Ct. App. Apr. 24, 2012).

407. *Id.* at *2.

to counsel at review hearings that may involve administering a sanction. The sanction may be a loss of liberty. Should the participant object to the imposed sanction, the court must advise the participant that a formal objection is equivalent to withdrawing from the program.⁴⁰⁸

The Ingham County veterans' treatment court, a type of drug court in Michigan, routinely requires participants to sign contracts with provisions like: "My attorney will no longer represent me;" and "I understand that sanctions may be imposed at any time by the [judge] without formal violation charge and/or hearing. I waive the right to formal charge, a hearing, and representation by an attorney."⁴⁰⁹

The guiding philosophy of these "on-file" court systems is to ensure that participants are staying "clean" from alcohol or drugs, while externalizing the risk of error onto the participants, themselves. A standard-issue participant handbook from Michigan, for example, asserts that the court's drug and alcohol testing procedures are "scientifically reliable," while advising defendants that a wide array of medications, hygiene products, and food substances may cause a 'false' positive test result.⁴¹⁰ The handbook tells participants: "It is your responsibility to avoid or limit your exposure to these products."⁴¹¹ It then provides a list of potentially problematic products that includes cold and allergy medications, sleeping aids, weight loss products, vitamins, bread containing poppy seeds, non-alcoholic beverages, and solvents and lacquers. The manual warns: "If you ingest or expose yourself to these substances, a positive result will receive a sanction."⁴¹²

The National Drug Court Resource Center maintains an even more extensive list of products that participants must assume responsibility for avoiding. In addition to the above products, the list requires participants to agree to avoid substances such as almond and vanilla extract, communion wine, creams or

408. MICH. SUPREME COURT ADMIN. OFFICE, DEVELOPING AND IMPLEMENTING A DRUG TREATMENT COURT IN MICHIGAN 19, 42 (2012) (providing a model participation contract with the following waiver: "I agree that my attorney will not be present at any drug court proceedings.").

409. INGHAM CTY. VETERANS TREATMENT CTR., PARTICIPANT HANDBOOK 10–12 (2014).

410. 20TH JUDICIAL CIRCUIT COURT OTTAWA CTY. MICH., ADULT DRUG TREATMENT COURT: PARTICIPANT HANDBOOK 9–10, http://www.miottawa.org/Courts/20thCircuit/pdf/Participant_Handbook.pdf (last visited Mar. 14, 2019).

411. *Id.*

412. *Id.*

gels that contain alcohol, food cooked with wine, bug spray, cologne, and hair sprays.⁴¹³ The contract also notes that participants must agree to “regulate their fluid intake to avoid dilute urine samples.”⁴¹⁴

The conditions (or rules) that justify revocation, meanwhile, can extend far beyond the requirement to personally abstain from drugs and alcohol.⁴¹⁵ In a 2005 case, for example, a Georgia appeals court upheld a five-year prison term based on a violation of a broad associational restriction that was part of a drug court contract.⁴¹⁶ The defendant had originally pleaded guilty to possessing marijuana and cocaine and entered a county drug court with the “understanding that if [he] failed to comply with any provision of the Drug Court Contract, the trial court would sentence him on the drug possession charges.”⁴¹⁷ The standard contract required him “to avoid people or places of disreputable or harmful character. I understand this to include people currently on probation or parole and people with felony convictions, *drug users and drug dealers*.”⁴¹⁸ After signing the contract, the defendant agreed to give a ride to a person he had known for several months, and this person was arrested for possessing drugs.⁴¹⁹ Although the defendant was not arrested, the drug court judge sentenced him to five years in prison and five years of probation as a result of the associational violation during the Testing Period.⁴²⁰

Judges in problem-solving courts have extended the testing parameters to cover requirements like the defendant’s style of dress and the respect that must be afforded to the drug court “team.” The chart below provides some rules from a drug court

413. NAT’L DRUG COURT RES. CTR., URINE ABSTINENCE TESTING AND INCIDENTAL ALCOHOL EXPOSURE CONTACT (2009), <https://nderc.org/resource/urine-abstinence-testing-and-incident-alcohol-exposure-contact>.

414. *Id.* at 2.

415. *See, e.g.*, CHESTER CTY. COURT OF COMMON PLEAS, ADULT DRUG COURT PROGRAM PARTICIPANT HANDBOOK 11 (2017) (“Do not associate with people who use or possess drugs or be in areas known to have drug activity.”); TULSA COURTS PROGRAMS, TULSA COUNTY VETERANS TREATMENT COURT PARTICIPANT HANDBOOK 31 (2012) (“I will not associate with anyone who has a felony conviction, pending felony, who is currently on parole/probation or who is currently using alcohol and/or drugs . . .”).

416. *Andrews v. State*, 623 S.E.2d 247, 247 (Ga. Ct. App. 2005).

417. *Id.* at 249.

418. *Id.*

419. *Id.* at 249–50.

420. *Id.* at 250.

in Athens, Georgia.⁴²¹ These provisions, which were incorporated into the drug court contract,⁴²² are representative of the kinds of rules that have found their way into drug court proceedings in many states.⁴²³

Athens-Clarke County, Georgia Felony Drug Court Participant Handbook	
Clothing Rule Examples	<p>No ladies see-through blouses.</p> <p>No ladies mini-skirts or skirts with high slits.</p> <p>No sagging pants that hang below the waist.</p> <p>No jackets with hoods.</p> <p>Have shirts tucked into pants.</p>
Associational Restriction Examples	<p>I will avoid persons or places of disreputable or harmful character, including those on probation or parole and drug users.</p> <p>Interpersonal/sexual relationships (dating, up to sex) between participants in any phase of the drug court program will not be tolerated and such actions are sanctionable.</p>

The pre-printed contract for the same Georgia court requires its participants to waive due process rights upfront, while also

421. W. JUDICIAL CIRCUIT FELONY DRUG COURT, STATE OF GA., PARTICIPANT HANDBOOK 15, 17, 19, 38, 41 [hereinafter GA. HANDBOOK], <https://www.accgov.com/DocumentCenter/View/9400/Participant-Handbook?bidId=> (last visited Mar. 14, 2019).

422. *Id.* at 41 (provision 23, page incorrectly numbered 38).

423. *See, e.g.*, CHESTER CTY. COURT OF COMMON PLEAS, *supra* note 415, at 8 (banning, for example, sagging pants, unbuttoned shirts, shorts, tank tops and noting that if a participant “wears any of the above to the courtroom, they may be sent home and it will be counted as a court absence and appropriate sanctions imposed”); HAMILTON CTY. DRUG COURT, STATE OF TENN., PARTICIPANT HANDBOOK 11, <https://jpo.wrlc.org/bitstream/handle/11204/2072/3443.pdf?sequence=1&isAllowed=y> (last visited Mar. 14, 2019) (prohibiting, for example, tank tops, unbuttoned shirts, mini skirts, clothes with flirtatious language, facial or tongue jewelry, and sagging pants, while noting: “If the participant wears any of the above to the courtroom, you will be sent home and it would be counted as a court absence and appropriate sanctions imposed.”).

requiring them to accept that the conditions that apply during the Testing Period may change over time.⁴²⁴ Under the contract, defendants must agree to follow any new rule that is announced while they are in the program.⁴²⁵ They must also authorize the judge to impose sanctions for any contract violation or “*other* instruction provided by the Drug Court Judge/Staff/Treatment Provider.”⁴²⁶

A huge number of people fail in drug courts, a fact that is not always reported in drug court studies. Drug court completion rates in the United States have ranged from between thirty and seventy percent.⁴²⁷ Predictably, the more serious a person’s addiction, the more likely he or she is to fail in drug court. Many drug court studies, however, have been criticized for including only those who graduate from the program and excluding those who fail.⁴²⁸

Advocates of drug courts have been forced to acknowledge the disparate impact these courts have had on historically disadvantaged groups. According to the National Association of Drug Court Professionals, “[n]umerous studies show a significantly smaller percentage of African Americans and Hispanic participants graduated from Drug Court compared to non-Hispanic Caucasians.”⁴²⁹ The reported differences in graduation rates by race were “as high as 25% to 40%.”⁴³⁰ In general, people of color and those with low incomes are more likely to be kicked out of drug courts.⁴³¹ And being kicked out of drug court often means higher penalties than would have applied if the defendant had never enrolled.⁴³²

424. GA. HANDBOOK, *supra* note 421, at 41 (provisions 22, 23, & 26).

425. *Id.* (provision 26).

426. *Id.* (provision 24) (emphasis added).

427. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 62 (2005).

428. *See, e.g.*, JUSTICE POLICY INST., ADDICTED TO COURTS: HOW A GROWING DEPENDENCE ON DRUG COURTS IMPACTS PEOPLE AND COMMUNITIES 10 (2011) (reporting that many drug court studies are based on people who complete drug court); REGINALD FLUELLEN & JENNIFER TRONE, VERA INST. OF JUSTICE, DO DRUG COURTS SAVE JAIL AND PRISON BEDS? (2000) (discussing deficiencies in drug court studies).

429. CAROLYN D. HARDIN, NAT’L ASS’N OF DRUG COURT PROF’LS, ADDRESSING THE DISPARITIES IN DRUG COURTS 21 (2016).

430. *Id.*

431. JUSTICE POLICY INST., *supra* note 428, at 23.

432. *Id.* at 24 (failing results in harsher sanctions).

IV. A RETURN TO TRIAL BY ORDEAL?

A. TESTING THE PROBAND

This Part compares Testing Periods with the testing models manifested by the medieval ordeal. Such comparisons may seem far-fetched, given the extent to which ordeals “have lodged themselves in the popular mind, as prime examples of the vivid barbarism of the Middle Ages.”⁴³³ Images from days gone by—of priests forcing a trembling suspect to pick up a burning hot iron or lowering the body of the accused into a pool of cold water—fight against any notion of instructive comparison.

But the judicial ordeal put the defendant through a test to determine what kind of justice should be done. According to its classic formulation, the ordeal was “an ancient . . . mode of trial, in which a suspected person was subjected to some physical test fraught with danger, . . . the result being regarded as the immediate judgment of the Deity.”⁴³⁴ Defendants who passed the test established themselves as innocent or as deserving of mercy.⁴³⁵ Those who failed the test heralded their own guilt and unworthiness, revealing the necessity of punishment.⁴³⁶

The ordeal was in regular use between the ninth and twelfth centuries “in every part of Latin Christendom . . .”⁴³⁷ Over this period, for example, English laws prescribed the ordeals of hot iron and cold water for a broad range of criminal offenses, from murder to simple theft.⁴³⁸ The ordeal functioned in these cases as a mode of proof.

433. JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT* 60 (2008). In a 2008 article, Josh Bowers suggested the medieval ordeal as an analogy to New York City drug-court practice, but he did not develop this analogy through a similarly detailed examination of scholarship on the ordeal. Josh Bowers, *Contraindicated Drug Courts*, 55 *UCLA L. REV.* 783, 821–28 (2008).

434. Paul Hyams, *Trial by Ordeal: The Key to Proof in the Early Common Law*, in *THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE* 90, 92 (Morris S. Arnold et al. eds., 1981) (citation omitted).

435. *Id.* at 93–94.

436. *Id.*

437. ROBERT BARTLETT, *TRIAL BY FIRE AND WATER* 34 (1986).

438. *Id.* at 25 (noting that the ordeals of hot iron and cold water were “prescribed for a wide range of offenses, including murder, fire-raising, witchcraft, and forgery, as well as simple theft”).

Although ordeals were conventional features of the judicial system, they were reserved for cases in which other forms of acceptable proof were lacking.⁴³⁹ For this reason, defendants of low status or bad reputation were particularly vulnerable to being sent to the ordeal. These defendants were subjected to the ordeal at higher rates because the law did not consider them “oath-worthy.”⁴⁴⁰

In the British Isles, trial by ordeal was the precursor to the modern system of trial by jury.⁴⁴¹ As James Whitman has emphasized: “Historians have long recognized that jury trial first emerged as an alternative to the judicial ordeal. Strange as it may sound, our law began to take shape when the church set out to abolish the painful and frightening ordeals of the hot iron and the cold water.”⁴⁴² In 1215, a decree of the Fourth Lateran Council formally ended the use of the ordeal system in England, with jury trial taking its place.⁴⁴³

Given that jury trial replaced the ordeal, it is important to investigate whether modern methods of replacing the jury have recreated any of the dynamics of the ordeal. This Part analyzes how contemporary Testing Periods compare with the ancient models that jury trial was designed to replace. The goal is to unsettle the notion that the procedures used within the criminal justice system have developed along a linear path. Because jury trial is now used in only a tiny fraction of cases, the outcome-determination mechanisms that most reflect our criminal justice system are not the trials that involve either a jury or the reasonable doubt standard. Instead, they are the Testing Periods that, like the medieval ordeals before them, put the defendant to the test, a test that does not evaluate the evidence of the underlying criminal allegations.

The accused who underwent a medieval ordeal was known as the “proband,” a word that comes from the same root as probation.⁴⁴⁴ Both words derive from the Latin “probare,” which

439. *See id.* at 26 (noting that the ordeal “coexisted with many other forms of proof”).

440. *See id.* at 30–33 (“The higher an individual’s status, the more ‘oath-worthy’ he would be.”).

441. *See id.* at 9–12 (outlining the history of trial by ordeal).

442. WHITMAN, *supra* note 433, at 7.

443. BARTLETT, *supra* note 437, at 2, 34, 125, 144–52 (noting that the ordeal was subsequently used in witchcraft cases, but it is not clear if these cases involved a survival or revival of the ordeal model).

444. *See supra* note 14 and accompanying text.

means to test or to prove.⁴⁴⁵ A proband (like a probationer) was the person being tested. The outcome of that test determined the outcome of the case.

This Section draws from scholarship on the medieval ordeal to provide insights into modern testing arrangements. The Section compares the character of the Testing Periods used in each system, the purpose and impact of their sorting procedures, and the broad discretion afforded test administrators to tilt the outcome toward either mercy or cruelty.

B. CHARACTER OF THE TESTING PERIOD

The ordeal of the hot iron was among the most common forms of the medieval ordeal.⁴⁴⁶ To prepare for this ordeal, the accused would fast and pray for three days. On the day of the ordeal, which took place in a church, the priest would pick up the iron, carry it to a fire, and sprinkle it with holy water.⁴⁴⁷ As the iron was heating, the priest would celebrate mass, calling upon “God, the just judge” to “bless and sanctify this fiery iron, which is used in the just examination of doubtful issues.”⁴⁴⁸ At the appointed moment, the accused would pick up the hot iron, walk a set number of paces, and put the iron down.⁴⁴⁹ The person’s hand would then be sealed with bandages.⁴⁵⁰ After three days, priests would inspect the wound. If the wound was “clean”—without discoloration or other marks of infection—the accused was deemed vindicated by God’s intervention.⁴⁵¹ But if “diseased discharge” was “found in the mark of the iron,” the accused would be “led forth guilty and unclean” for punishment.⁴⁵²

445. *Proband*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016).

446. BARTLETT, *supra* note 437, at 1–2.

447. Margaret H. Kerr, Richard D. Forsyth & Michael J. Plyley, *Cold Water and Hot Iron: Trial by Ordeal in England*, 22 J. INTERDISC. HIST. 573, 588 (1992).

448. BARTLETT, *supra* note 437, at 1.

449. *Id.*

450. *Id.*

451. *Id.*; Kerr, Forsyth & Plyley, *supra* note 447, at 588 (noting that if the hand was found “clean,” “promise and glory” would be given to God).

452. Kerr, Forsyth & Plyley, *supra* note 447, at 573, 588 (quoting DIE GESATZE DER ANGELSACHSEN 427–29 (Liebermann ed., reprint 1960) (1903)) (noting that prayers accompanying early forms of this ritual seem to require that the hand not be injured at all by the contact with the hot iron).

The medieval ordeals of the hot cauldron and cold water also were cloaked in layers of religious ceremony.⁴⁵³ In the ordeal of the hot cauldron, the oldest recorded form of the ordeal, the accused was required to reach into a cauldron of boiling water and extract a ring or a stone from its depths.⁴⁵⁴ As part of the lead-up to the ordeal, the water was “exorcised” to ensure that “he who shall place his hand in thee, if his cause be just and true, shall receive no hurt; but if he be perjured, let his hand be burned with fire”⁴⁵⁵ After recovering the object, the person’s hand was bound up. If the hand appeared unharmed after three days, the person was innocent. If the hand showed signs of festering, it was proof that God had proclaimed the person guilty.⁴⁵⁶

The ritual accompanying the ordeal of the cold water allowed for a more public and immediate verdict. After the requisite period of fasting and prayer, the accused would be led in a religious procession toward a pool of water. A priest would bless the water, and the accused would be lowered in. Those who floated were deemed guilty, while those who sank were innocent.⁴⁵⁷ The water was said to reject the body of the person who floated.⁴⁵⁸

As the historian Robert Bartlett has explained, the ordeals of fire and water were premised on the idea that natural elements would behave in a predetermined (often unnatural) manner in order to vindicate the accused.⁴⁵⁹ Through divine intervention, boiling water and red-hot irons would fail to burn the hands of the innocent. Divine intervention would also prevent water, which had been blessed, from permitting the innocent to float to its top. The ordeals relied on divine proof to protect the innocent and expose the guilty.

In describing the grisly details of these ordeals, Bartlett declared that trial by ordeal has “no real counterpart in the modern

453. Peter T. Leeson, *Ordeals*, 55 J.L. & ECON. 691, 693 (2012).

454. BARTLETT, *supra* note 437, at 4; Leeson, *supra* note 453, at 694.

455. HENRY C. LEA, SUPERSTITION AND FORCE: ESSAYS ON THE WAGER OF LAW—THE WAGER OF BATTLE—THE ORDEAL—TORTURE 246 (1878) (citation omitted).

456. Leeson, *supra* note 453, at 694.

457. Kerr, Forsyth & Plyley, *supra* note 447, at 582–83.

458. LEA, *supra* note 455, at 280 (explaining the basis of the cold water ordeal was that “the pure element would not receive into its bosom any one stained with the crime of a false oath”).

459. BARTLETT, *supra* note 437, at 2 (reporting that trial by ordeal “required that the natural elements behave in an unusual way”).

world,” and that it is therefore necessary to “stretch our minds to understand this custom.”⁴⁶⁰ Although ordeals by fire and water “have been employed by peoples in many different parts of the world and throughout history,” these ancient methods of trial have long been abandoned by modern society.⁴⁶¹ Looking at these “dramatically alien practices” through today’s eyes requires an “imaginative leap into a past society.”⁴⁶²

And yet, while the particulars are much less vivid, routine forms of plea bargaining continue to subject defendants to a test: one that can be both painful and demanding. Like probands of long ago, defendants must show that they can submit themselves fully to a higher authority, represented by the courts in this context. Defendants must also demonstrate sufficient fortitude to make it through the test, no matter what terms are set for them. The mechanisms described in Parts II and III are deployed regularly, for example, to test whether a defendant can overcome a physical addiction to alcohol or drugs.⁴⁶³ Although relapse is common among addicts,⁴⁶⁴ the defendant must be able to overcome his or her addiction within a set timeframe.⁴⁶⁵ In order to

460. *Id.* at 1.

461. *Id.* at 2.

462. *Id.* at 1.

463. *See, e.g.*, U.S. DEP’T OF HEALTH & HUMAN SERVS., FACING ADDICTION IN AMERICA: EXECUTIVE SUMMARY OF THE SURGEON GENERAL’S REPORT ON ALCOHOL, DRUGS, AND HEALTH, at ES-3 (2016), <https://addiction.surgeongeneral.gov/sites/default/files/executive-summary.pdf> (“Historically, our society has treated addiction and misuse of alcohol and drugs as symptoms of moral weakness or as a willful rejection of societal norms, and these problems have been addressed primarily through the criminal justice system.”).

464. *See, e.g., id.* at I, ES-6 (2016) (finding that addiction is a “chronic neurological disorder” and emphasizing that even if people with addictions “can resist drug or alcohol use for a while, at some point the constant craving triggered by the many cues in their life may erode their resolve, resulting in return to substance use, or *relapse*”); Alan I. Leshner, *Addiction Is a Brain Disease, and It Matters*, 278 *SCIENCE* 45, 45–47 (1997) (describing addiction as a brain disease that is chronic and relapsing in nature); A. Thomas McLellan, et al., *Drug Dependence, a Chronic Medical Illness*, 284 *JAMA* 1689, 1691, 1693 (2000) (describing “loss of control” as a “hallmark” of drug and alcohol dependence and a forty to sixty percent relapse rate post-treatment).

465. *See, e.g.*, MARIANNE MOLLMANN ET AL., PHYSICIANS FOR HUMAN RIGHTS, NEITHER JUSTICE NOR TREATMENT: DRUG COURTS IN THE UNITED STATES 16 (2017), https://phr.org/wp-content/uploads/2017/06/phr_drugcourts_report_singlepages.pdf (emphasizing that positive drug tests still result in punishment in many drug courts, despite medical recommendations to the contrary).

prevail, the defendant must behave in a manner that defies the normal expectations about what it means to be addicted.⁴⁶⁶

A preoccupation with sorting people for being “clean” pervades both systems. In the ordeals of the hot iron and hot cauldron, the priests administering the ordeal inspected the probands’ wounds to see whether they were clean. The ordeal of the cold water used water that had been blessed—a symbol of purity and cleanliness—to identify and expel the guilty. In a parallel fashion, modern testing models monitor whether or not a defendant’s body is “clean” from drugs and alcohol. The defendant urinates into a cup at regular intervals in front of a probation officer to be tested for intoxicants. The probation officer is then charged with overseeing the examination of the urine and reporting if it is dirty or clean. A failed test is referred to as a “dirty urine.”⁴⁶⁷

The administration of the medieval ordeal was sensitive to the status and reputation of the accused. An accused of high status might avoid the ordeal altogether by swearing an oath to establish his or her innocence.⁴⁶⁸ But the lower a person’s status and the more doubtful his or her character, the more likely that an ordeal would be required.⁴⁶⁹

The difficulty of the ordeal could also be increased, depending not only on the severity of the allegations but on the “extent

466. For a judge who has taken a different approach by deciding to avoid “punishment by incarceration merely for habitual marijuana use” in supervised release cases, see *United States v. Trotter*, 321 F. Supp. 3d. 337, 339 (E.D.N.Y. 2018) (Weinstein, J.).

467. See, e.g., *Lunsford v. United States*, No. 2:13-CV-25090, 2015 WL 7871355, at *8 (S.D. W. Va. Dec. 4, 2015) (describing a positive drug test as “dirty urine”); *Commonwealth v. Herring*, No. 871 WDA 2013, 2014 WL 11022459, at *6 (Pa. Super Ct. Jan. 24, 2014) (recounting a judge warning that “even one dirty urine test would result in incarceration”); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1615 (2012) (referring to a positive drug test as “dirty urine test”).

468. See, e.g., BARTLETT, *supra* note 437, at 33.

469. See *id.* (emphasizing that an important dimension of the ordeal was “its use against the servile classes. Unless special arrangements were made for the lord to stand for them, the unfree were not allowed to enter fully the legal world of oath-swearing and compurgation”); Kerr, Forsyth & Plyley, *supra* note 447, at 574 (“Hurnard has argued convincingly that compurgation, the swearing of an oath by the accused and a prescribed number of reputable oath-helpers (often twelve), was until 1166, the normal method of proof, replaced by the ordeal only in certain circumstances; for example, when the accused was not of good character.”); Leeson, *supra* note 453, at 695 (noting that unfree persons, foreigners, persons who had perjured themselves, those who had failed in a legal contest, and those with tarnished reputations had unacceptable oaths).

of the defendant's disrepute."⁴⁷⁰ In the ordeal of the hot iron, for example, the proband might have to walk for nine paces with a one-pound iron (the "simple ordeal"), a two-pound iron (the "two-fold ordeal") or a three-pound iron (the "threefold ordeal").⁴⁷¹ In the ordeal of the hot cauldron, the proband might need to submerge a hand into the boiling water and continue up to the wrist (the "simple ordeal"), continue up to a point between the wrist and the elbow (the "twofold ordeal"), or continue up to the elbow (the "threefold ordeal").⁴⁷² A person's low status was used both to trigger the need for the ordeal and to intensify the nature of the test.

A similar framework of escalating challenge, contingent on the defendant's status and reputation, is imposed in modern-day testing models. The difficulty of the test can be adjusted simply by imposing more conditions or heightening the level of supervision.⁴⁷³ A judge or prosecutor might require more frequent drug testing, set a curfew, impose a no-arrest condition, forbid the person from associating with anyone with a felony conviction, prohibit any contact with a spouse (even when the spouse actively seeks such contact), enforce a no-lateness policy for all court dates and treatment appointments, or require the person to live in a house where no other resident possesses alcohol. The intensity of supervision for a violation can then be enhanced through measures like increased reporting, unpredictable searches, irregular home visits, surprise work visits, GPS monitoring, probation sweeps, and the use of lie-detector tests.

The contemporary version of measuring a defendant's status and reputation is done largely through risk assessment tools.⁴⁷⁴

470. Leeson, *supra* note 453, at 694 n.7.

471. RICHARD HART, *ECCLESIASTICAL RECORDS OF ENGLAND, IRELAND, AND SCOTLAND FROM THE FIFTH CENTURY TILL THE REFORMATION* 362 (1876).

472. *Id.*; LEA, *supra* note 455, at 253.

473. See, e.g., Jennifer L. Doleac, *Study After Study Shows Ex-Prisoners Would Be Better Off Without Intense Supervision*, BROOKINGS (July 2, 2018), <https://www.brookings.edu/blog/up-front/2018/07/02/study-after-study-shows-ex-prisoners-would-be-better-off-without-intense-supervision> (criticizing intensive supervision—in the form of more rules and more enforcement of those rules—because requiring “lots of meetings, drug tests, and so on can complicate a client’s life, making it more difficult to get to work or school or care for family members (meetings are often scheduled at inconvenient times and may be far away)”).

474. See, e.g., DANIELLE KEHL ET AL., *RESPONSIVE COMMUNITIES INITIATIVE*, BERKMAN KLEIN CTR. FOR INTERNET & SOC’Y, HARVARD LAW SCH., ALGO-

Factors that can increase a defendant's risk score include prior convictions,⁴⁷⁵ lack of employment,⁴⁷⁶ poor educational history,⁴⁷⁷ evidence of juvenile delinquency, and an unstable living environment.⁴⁷⁸ Risk scores can also go up if defendants have parents or friends with criminal records⁴⁷⁹ or if they voice an opinion that a probation officer believes is representative of "criminal thinking."⁴⁸⁰ On the other hand, high status markers such as being married, having a college education, or owning one's own home are used to lower a defendant's risk score.⁴⁸¹

RITHMS IN THE CRIMINAL JUSTICE SYSTEM: ASSESSING THE USE OF RISK ASSESSMENTS IN SENTENCING (2017); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 805 (2014) (noting that some jurisdictions are "directing sentencing judges to explicitly consider a variety of variables that often include socioeconomic status, gender, age, family, and neighborhood characteristics . . . routinely, in all cases" through risk assessment tools).

475. See, e.g., Melissa Hamilton, *Back to the Future: The Influence of Criminal History on Risk Assessments*, 20 BERKELEY J. CRIM. L. 75, 77 (2015) ("[A] personal history of criminal conduct is the most common type of factor across risk assessment tools.").

476. Wisconsin's Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) Risk Assessment questionnaire asks whether the defendant currently has a job, how much he or she has worked in the last twelve months, whether he or she has ever been fired, how often he or she has "barely enough money to get by," how often he or she has trouble paying bills, and how often he or she worries about financial survival. NORTHPOINTE, SAMPLE COMPAS RISK ASSESSMENT 5-6 (2011) [hereinafter COMPAS], <https://assets.documentcloud.org/documents/2702103/Sample-Risk-Assessment-COMPAS-CORE.pdf>.

477. See, e.g., LATESSA ET AL., CTR. FOR CRIMINAL JUSTICE RESEARCH, UNIV. OF CINCINNATI, CREATION AND VALIDATION OF THE OHIO RISK ASSESSMENT SYSTEM FINAL REPORT 51 (2009) [hereinafter ORAS], https://cech.uc.edu/content/dam/uc/ccjr/docs/reports/project_reports/ORAS_Final_Report.pdf (weighing whether defendants have a high school diploma and whether they have a history of suspension or expulsion); COMPAS, *supra* note 476, at 5 (asking questions about education level, suspension or expulsion history, grades in school, conflicts with teachers, skipping classes, and fights at school).

478. See ORAS, *supra* note 477, at 29, 49, 52, 57 (weighing factors like whether the defendant has lived in the same residence for the past six months, whether the defendant lives in a high crime area, and whether drugs are readily available in the neighborhood); COMPAS, *supra* note 476, at 4 (asking whether defendant has moved in the last few months, has a regular living situation, and has a telephone).

479. ORAS, *supra* note 477, at 29, 52-53, 55; COMPAS, *supra* note 476, at 3.

480. See, e.g., COMPAS, *supra* note 476, at 7-8 (questioning individuals about "criminal personality," "anger," and "criminal attitudes").

481. See NATHAN JAMES, CONG. RESEARCH SERV., R44087, RISK AND NEEDS

Like in the ordeal model, the results of a risk assessment instrument can affect both whether the defendant has to undertake *any* Testing Period at all and the terms to which a defendant must submit. Courts use risk assessment instruments to decide what sentence is necessary, including whether or not to require a Testing Period and under what terms.⁴⁸² Once a person is in a Testing Period, probation officers can use risk assessment instruments to decide how closely to monitor the person for a violation and what treatment (or other) obligations to impose.⁴⁸³ These decisions are deeply significant because of the evidence demonstrating that more surveillance leads predictably to more violations.⁴⁸⁴

The result is an elaborate virtue-testing system that is deeply contingent on status. Defendants must demonstrate their virtue by achieving standards of conduct that are not imposed on the rest of society.⁴⁸⁵ And people of the lowest status are subject to the highest standards of all.

C. FUNCTION OF THE TESTING PERIOD

Many of the purposes served by the ordeal are also served by the various testing mechanisms I have discussed in this Article.

James Whitman has explained how premodern law, including the law of the ordeal, relied heavily on what he called “moral comfort procedures.”⁴⁸⁶ A key feature of the ordeal was that God

ASSESSMENT IN THE CRIMINAL JUSTICE SYSTEM 11 (2015) (noting that most instruments “punish people for choices that people are allowed to make in a free society (e.g., whether to get married, live in a stable residence, or have a regular job)”); James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 FED. SENT’G REP. 194, 197 tbl.5 (2004) (noting that being unmarried at the time of the offense or never having been married are factors used in predicting recidivism and that a higher education level means a lower rate of recidivism); Starr, *supra* note 474, at 813 (“An unemployed high school dropout will score three points worse than an employed high school graduate.”).

482. Doherty, *supra* note 282, at 353.

483. *See id.* at 308.

484. MICHAEL TONRY & MARY LYNCH, INTERMEDIATE SANCTIONS 101 (1996).

485. In the words of one drug court judge, “The whole idea is to see if you can do things like follow rules, because if you can follow rules, then that gives the court some hope that you can do things like obey laws.” Shaila Dewan, *Probation May Sound Light, but Punishments Can Land Hard*, N.Y. TIMES (Aug. 2, 2015), <http://www.nytimes.com/2015/08/03/us/probation-sounding-light-can-land-hard.html>.

486. WHITMAN, *supra* note 433, at 13.

would participate directly in the events and issue the final judgment against a proband.⁴⁸⁷ This framework functioned as a responsibility-shifting measure that protected those who had administered the ordeal from considering themselves accountable for the outcome.⁴⁸⁸ It provided moral comfort by allowing these administrators to deny their agency even when a proband was put to death or lost a limb as a consequence of failing the ordeal.⁴⁸⁹

Modern testing models also function as moral comfort procedures. Instead of God issuing the final judgment, however, the system is engineered to ensure that defendants bear sole moral responsibility for the outcome of their cases. They are given an opportunity to “escape” prison as long as they follow an agreed-upon set of rules. If they lack the “self-discipline” or “will” to follow these rules, the system semantically places responsibility for the failure squarely on their own shoulders.

These testing models provide judges and prosecutors with a method of sorting cases for punishment in a manner that allows them to deny their own agency in the outcome. The defendant is said to have “agreed” to the rules, even when it is clear that the defendant had no power to shape the content of those rules or to control their application. Imprisoning a defendant for a violation is then seen by the judge and prosecutor as the dispassionate enforcement of a contract, one in which they are morally distanced from the outcome. Indeed, the judge and prosecutor can continue to see themselves as progressive actors, the ones who gave the defendant a chance.

One outwardly distinctive feature of modern testing models—the frequent requirement that a defendant plead guilty before undergoing the Testing Period—does not distinguish them from the ordeal upon closer analysis. Scholarship on the ordeal has revealed that most people sent to the ordeal were already believed to be guilty.⁴⁹⁰ As Roger Groot has demonstrated, the legal framework of the ordeal came to incorporate a jury of presentment that was charged with two functions: “identif[ying]

487. *Id.* at 17.

488. *Id.* at 16–17.

489. *Id.*

490. WHITMAN, *supra* note 433, at 66 (“[Evidence] suggest[s] that these low-status persons [sent to the ordeal] were often regarded as obviously guilty.”); Kerr, Forsyth & Plyley, *supra* note 447, at 578 (“Arguably, only those generally believed by the jurors to be guilty went to the ordeal . . .”).

persons about whom there was suspicion” and forming an opinion upon “the accuracy of the accusation[s].”⁴⁹¹ Thus, in Groot’s words, “the suspect was not adjudged the ordeal until there was a jury ‘verdict’ that he was guilty.”⁴⁹² Contrary to popular understandings of the ordeal, it was not used primarily to resolve factual uncertainties about a proband’s guilt.⁴⁹³ Indeed, scholars have emphasized that “[a]lmost none of the ‘uncertainty’ that supposedly drove the courts to ask God’s opinion is visible” in the records of these courts.⁴⁹⁴

Instead, the ordeal, like modern day testing models, was used to sort people for punishment. Those who failed the ordeal would be put to death or ordered to forfeit an arm or a foot.⁴⁹⁵ But those who succeeded did not necessarily escape all punishment. Individuals who passed the ordeal, but who had the “worst reputation[s],” were still forced to abjure the realm.⁴⁹⁶ Those presented on minor offenses were allowed to remain in the country upon passing the ordeal, as long as they could find “pledges” for their future good conduct.⁴⁹⁷

God’s intervention exposed whether the proband was deserving of mercy. The ordeal was meant to illuminate the true content of a person’s character, rather than to uncover any particular fact about this or that crime.⁴⁹⁸ As Peter Brown has emphasized, within the “controlled miracle” of the ordeal, “God is revealing ‘truth,’ not any specific fact. He was judging the status of a person or of a group, whether they and their claims were

491. Roger D. Groot, *The Jury of Presentment Before 1215*, 26 AM. J. LEGAL HIST. 1, 2 (1982).

492. *Id.* at 2.

493. WHITMAN, *supra* note 433, at 73; Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 SYRACUSE L. REV. 109, 123 (2000).

494. Kerr, Forsyth & Plyley, *supra* note 447, at 577.

495. Naomi D. Hurnard, *The Jury of Presentment and the Assize of Clarendon*, 56 ENG. HIST. REV. 374, 396, 400–01 n.3 (1941); Kerr, Forsyth & Plyley, *supra* note 447, at 578–79.

496. Hurnard, *supra* note 495, at 396.

497. *Id.*

498. WHITMAN, *supra* note 433, at 80 (citation omitted); *see also* Olson, *supra* note 493, at 121 (“Historians’ insistence that the medieval Deity was a fact-finder leaves unfathomable a host of literature, which speaks of the Divine protecting the guilty proband by cloaking evidence or ensuring that he succeeded at his ordeal.”).

'pure' and 'just.'⁴⁹⁹ The ordeal revealed "things that are hidden or unknown," through "the judgments of Him who alone knows the hearts of the sons of men."⁵⁰⁰ By revealing the "heart" of the accused, God was exposing whether the accused was worthy of mercy or deserving of punishment.

Modern Testing Periods are likewise vehicles for sorting people for punishment. The loose process and standards that apply during revocation hearings⁵⁰¹ make clear that the core function of these proceedings is not the rigorous adjudication of fact. Instead, the testing process is meant to reveal the "truth" about the defendant's character, establishing what (if any) punishment is merited.

A more ominous interpretation of this "truth-seeking" function was suggested by Hermann Nottarp, an influential German scholar of the Nazi era.⁵⁰² In a book published in 1949, Nottarp argued that the real purpose of the ordeal was to uncover "degenerate" members of the Volk so that they could be excluded from the medieval Teutonic community.⁵⁰³ Under this theory, degenerate people could be identified through the ordeal because they were unable to withstand the pain and horror it entailed, unlike healthier members of the community.⁵⁰⁴

Using this framework, it could be argued that plea bargaining models that are built around substance abuse testing are a method of identifying "degenerates" who are hopelessly addicted to drugs or alcohol. Beginning with Augustus, probation-derived pleas have allowed courts to identify those individuals who continue to use drugs or alcohol *even when they know they are being watched*.⁵⁰⁵ Courts can then use these markers of true addiction to support lengthy prison terms that remove these "broken down" people from the community.

499. Peter Brown, *Society and the Supernatural: A Medieval Change*, 104 DAEDALUS 133, 137 (1975).

500. WHITMAN, *supra* note 433, at 80 (citation omitted).

501. See *supra* Parts II & III for a discussion of legal standards. See also Doherty, *supra* note 88, at 990 ("The rights adopted in *Morrissey v. Brewer*, 408 U.S. 471 (1972) did not include the presumption of innocence or a requirement that a parole [or a probation] violation be proved beyond a reasonable doubt. There was no right to a jury determination, no compulsory process, no exclusionary rule requirement, and no double jeopardy protection.").

502. WHITMAN, *supra* note 433, at 68–69 (citation omitted).

503. *Id.*

504. *Id.* at 69.

505. See discussion of Augustus's methodology *supra* Part I.

Drug courts have been criticized for operating along these lines, deploying a bait and switch approach to addiction. In an analysis of New York drug courts, for example, Josh Bowers has described how addicts are induced to participate by “overly sunny images of seemingly inevitable therapeutic success: [t]he interactive and personable judge, the kinder and gentler prosecutor, and the rhetoric of disease and cure.”⁵⁰⁶ But once the addict begins to fail in treatment, a “switch is thrown” and the court reverts back to its traditional punishment frame.⁵⁰⁷ Studies of New York’s drug courts have shown that those who revealed themselves to be true addicts have been subjected to prison sentences two to five times longer than those applied to conventionally adjudicated defendants.⁵⁰⁸

In this context, the requirement of an upfront guilty plea can be seen as serving a moral comfort function, in addition to all of its other functions. As previously noted, requiring a defendant to plead guilty in order to receive the fixed opportunity of avoiding prison is useful on many levels: it avoids the need for costly jury trials, results in reliable “wins” for prosecutors, protects prosecutors and judges from the possibility of reversal on appeal, and eases the workload for all system players.⁵⁰⁹ But the upfront guilty plea also takes moral pressure off judges and prosecutors during the Testing Period. From an ethical perspective, it is much easier to insist on adherence to a set of demanding rules when dealing with the already guilty, rather than with the presumptively innocent. The guilty plea creates a psychic distance that facilitates the administration of the test.

At the same time, however, it is important to emphasize that modern Testing Periods—like the ordeal—are attractive because they do create a real procedural opportunity for the accused. Seen from a wide vantage point, the ordeal was a liberalizing mechanism because it allowed a low-status person, a person who was not considered “oath-worthy,” to “take God as his witness.”⁵¹⁰ As Whitman has noted: “[A]wful as it was, the ordeal actually conferred a procedural benefit on its low-status victims,

506. Bowers, *supra* note 433, at 812; *see id.* at 808–16 (analyzing how addicts are particularly vulnerable to making inadvisable decisions about their likelihood of success in these courts).

507. *Id.* at 788.

508. *Id.* at 792.

509. *See* Fisher, *supra* note 4, at 1040–43.

510. WHITMAN, *supra* note 433, at 63.

allowing them to give testimony, with God as their witness, as though they were persons of high social standing.”⁵¹¹ In a similar vein, modern Testing Periods create a procedure that allows defendants to avoid the uncertainties and dangers of jury trial. In its place, defendants are offered a structured opportunity through plea bargaining to avoid the thing they fear most: being sent to prison.

D. CONTROLLING THE PENDULUM BETWEEN MERCY AND CRUELTY

Despite its fearsome reputation, the medieval ordeal was mainly a vehicle of mercy.⁵¹² Most people who underwent the ordeal made it through successfully.⁵¹³ The high passage rate has long puzzled scholars; it is not clear how so many probands managed to avoid infection after submerging their hands into boiling water or after carrying a burning hot iron. As discussed below, the recorded outcomes have led to speculation that the priests, who were in charge of administering the ordeal, found ways to manipulate the results to allow probands to succeed.⁵¹⁴

If ordeals were trials in which God mostly chose mercy, it is not clear that modern Testing Periods have achieved the same ratio of mercy to harshness. In part, this ratio is unclear because state courts often do not publish (or even keep) statistics on the use of “on-file” mechanisms, making it impossible to evaluate their overall impact. But judging from the experience of problem-solving courts, a subset that does track outcomes, the failure rates can be very high.⁵¹⁵ Data tracking with regard to sentences of probation is also difficult because probation systems mostly

511. *Id.* (citation omitted); see also Colin Morris, *Judicium Dei: The Social and Political Significance of the Ordeal in the Eleventh Century*, in 12 *CHURCH SOCIETY AND POLITICS* 96 (Derek Baker ed., 1975) (“[W]hen a defendant could not prove his innocence by oath, he could resort to the ordeal, and thus call God to witness . . .”).

512. WHITMAN, *supra* note 433, at 65; Kerr, Forsyth & Plyley, *supra* note 447, at 574.

513. F.W. Maitland, *Introduction to 1 SELDON SOC’Y, SELECT PLEAS OF THE CROWN, VOL. I, A.D. 1200–1225*, at xxiv (F.W. Maitland ed., 1888) (explaining that “success at the ordeal” was “far commoner than failure”); Kerr, Forsyth & Plyley, *supra* note 447, at 580.

514. FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I VOL. II*, at 599 (2d ed. 1959) (1898); Leeson, *supra* note 453, at 705.

515. See *supra* Parts II.B.4 & III.B.3.

operate on a county-by-county basis.⁵¹⁶ The information that does exist indicates that probation revocation is a leading cause of incarceration in the United States.⁵¹⁷

One explanation for the high failure rates is the freewheeling indeterminacy that has been built into the system.⁵¹⁸ In many states, judges are permitted to impose any condition that they believe “relates to” a defendant’s “rehabilitation.”⁵¹⁹ To complement this broad mandate, judges are also permitted to ratchet up the punishment for any failure to meet one of these conditions. The swings in punishment discussed in this Article have been as long as ten or twenty years.⁵²⁰

“Rehabilitation,” meanwhile, is a notoriously slippery concept. Its ambiguity preoccupied the leading critics of America’s last great experiment with indeterminate sentencing, between the 1870s and the 1970s.⁵²¹ In pushing for a more determinate sentencing regime, these critics warned that the failure to set limits on the definition of rehabilitation meant there were no boundaries on what could be demanded in its name.⁵²²

Scholars warned that indeterminate sentences were being used to exact even more punishment in the guise of “therapy” or

516. See MITCHELL ET AL., *supra* note 62, at 5.

517. See *id.* at 4 (noting thirty to forty percent of prison admissions over the last twenty years have been attributable to “recalls” from probation and parole revocations).

518. The risk aversion of administrators also factors in high failure rates. See Cecelia Klingele, *Rethinking the Use of Community Supervision* 103 J. CRIM. L. & CRIMINOLOGY 1015, 1061 (2013) (“In a world where risk aversion defines supervisory practices in many jurisdictions, allowing boilerplate rules to be imposed on probationers and parolees creates conditions in which costly and unnecessary revocation can occur.”).

519. See, e.g., *State v. Pieger*, 692 A.2d 1273, 1277 (Conn. 1997) (“By allowing the trial court to impose ‘any other conditions reasonably related to [the defendant’s] rehabilitation’ . . . the legislature authorized the court to impose any condition that would help to secure the defendant’s reformation. This broad power is consistent with the general goals of probation.” (alteration in original)).

520. See, e.g., *State v. Quattrucci*, No. CR03187707, 2006 WL 618415, at *1 (Conn. Super. Ct. Feb. 21, 2006) (ten year swing in Connecticut); *People v. McCaslin*, 30 N.E.3d 1104, 1106 (Ill. App. Ct. 2014) (ten year swing in Illinois); *Green v. State*, 242 S.W.3d 215, 218 (Tex. App. 2007) (twenty year swing in Texas).

521. See generally Fisher, *supra* note 4, at 1046 n.731, 1056 (noting that the first substantial experiment with indeterminate sentencing occurred in New York in 1877, and that there was very little indeterminacy left when California “abandoned its experiment with the indeterminate sentence in 1976”).

522. PAUL LERMAN, *COMMUNITY TREATMENT AND SOCIAL CONTROL* 80 (1975).

“benevolence” or “helping.” Writing in 1981, for example, Francis Allen (the preeminent scholar of the “rehabilitative ideal”) dissected the problems generated by “[t]he assumption of the benevolent purpose of the rehabilitative regime and the highly subjective and ill-defined notions of how rehabilitation is to be achieved and of what it consists[.]”⁵²³ In an earlier book, Allen emphasized that “in practice, there is a strong tendency for the rehabilitative ideal to serve purposes that are essentially incapacitative rather than therapeutic in character.”⁵²⁴ Rehabilitative theory serves as a camouflage for punitive measures because of “the tendency of those engaged in rehabilitative efforts to define as therapy anything that a therapist does.”⁵²⁵ As a consequence, rehabilitative regimes tend to “inflict larger deprivations of liberty and volition” on their subjects than programs that are more overtly punitive.⁵²⁶

The tendency of indeterminate regimes to drift toward the use of unchecked discretion was another area of concern. In an influential 1969 book, Kenneth Culp Davis railed against the “completely unstructured discretionary power” exercised by the federal parole board at the time.⁵²⁷ Davis, a leading administrative law scholar, stressed that “[d]iscretion is a tool only when properly used; like an axe, it can be a weapon for mayhem or murder.”⁵²⁸ Ernest van den Haag was similarly critical of allowing decisions about the rehabilitative “needs” of a convict to be derived from the administrators’ “own notions about proper behavior and lifestyle.”⁵²⁹

On the other hand, one need not delve very far into the history of the ordeal to discover how important discretion can be in the administration of a difficult test. In the ordeal of the cold water, it was not self-evident how far beneath the water the proband needed to remain in order to show that God was on his or her side.⁵³⁰ Some judges decided that it was enough if the proband’s body was covered by water; they did not agree with those

523. ALLEN, *supra* note 145, at 48.

524. FRANCIS A. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 35 (1964).

525. ALLEN, *supra* note 145, at 48, 54.

526. *Id.* at 49.

527. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 126 (1969).

528. *Id.* at 25.

529. ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS: CONCERNING A VERY OLD AND VERY PAINFUL QUESTION* 186 (1975).

530. LEA, *supra* note 455, at 280.

who insisted that the accused must sink all the way down to the bottom of a pool.⁵³¹ Some judges also chose to overlook the problems created by the buoyancy of human hair. They concluded that because the hair was an “excrement of the body,” it had the “privilege of floating without convicting its owner[.]”⁵³²

Priests also found other ways of tilting the ordeal to the proband’s advantage. Peter Leeson has explained, for example, that a priest, who wanted a proband to succeed, could simply manipulate the strength of the fire that lay underneath the cauldron or iron.⁵³³ The ritual accompanying these hot ordeals also gave priests wide latitude to determine whether a proband’s wounds were “clean or foul,” permitting a sympathetic priest to influence the results.⁵³⁴ Margaret Kerr has suggested that the cold water ordeal was rarely deployed against women in practice because women’s bodies were more likely than men’s bodies to float.⁵³⁵

When administering a difficult test, discretion was (and is) essential for both mercy and cruelty. A prosecutor in a modern day Testing Period might agree to look the other way if a defendant, who is generally doing ok, continues to test positive for marijuana. A judge might refuse to go along with a system in which the punishment for a homeless defendant’s crime depends (even in the abstract) on whether he or she can make it to an appointment on time.

Judges and prosecutors can also decide to exercise discretion on a more systematic level.⁵³⁶ They could decline to use the fact of an arrest to justify enhanced punishment or opt out of “model” contracts that require vulnerable defendants to waive their due process rights upfront. They could also refuse to rely on risk assessment instruments that measure people’s “risk scores” by factors like whether a parent has a criminal record—or that depend on some unaccountable person’s views of whether a defendant exhibited “criminal thinking” during an interview.⁵³⁷

531. *Id.*

532. *Id.*

533. Leeson, *supra* note 453, at 697–98.

534. *Id.* at 698.

535. Kerr, Forsyth & Plyley, *supra* note 447, at 581–82.

536. For an example of this kind of agency, see *United States v. Trotter*, 321 F. Supp. 3d 337, 339 (E.D.N.Y. 2018) (“I, like other trial judges, have provided unnecessary conditions of supervised release and unjustifiably punished supervisees for their marijuana addiction, even though marijuana is widely used in the community and is an almost unbreakable addiction or habit for some.”).

537. See ALLEN, *supra* note 524, at 36 (warning against persons who believe

For in the end, it was a concern about the church's own sin that put an end to the ordeal. In 1215, the Fourth Lateran Council prohibited members of the clergy from participating in the ordeal.⁵³⁸ As Bartlett explains, there had been a rising discomfort in certain ecclesiastic circles about whether it was right to use the ordeal as a method of trial.⁵³⁹ The principal objections were that the ordeal did not have a basis in scripture and that it was sinful to use a manufactured test to try to force God's hand.⁵⁴⁰

A similar reawakening about moral responsibility—of the test's administrators, rather than its subjects—could be useful in reevaluating modern-day testing systems. Because discretion makes it lawful to be either merciful or cruel, the people who exercise that discretion must see themselves as morally responsible for the decisions that they make. In moral terms, for example, it is problematic to defend harsh outcomes as the product of a freely negotiated "contract." Given the depths of the power they have accumulated, those who create and oversee modern Testing Periods are (and must be publicly viewed as) morally accountable for the terms that they have set.

As I have explored elsewhere, the founding theorists of indeterminate sentencing would have never supported testing models that were so loose or so broad.⁵⁴¹ Although they believed that penal programs could be designed in a manner that would inspire defendants to achieve meaningful reform, they were adamant about imposing rigorous standards on program administrators to ensure their accountability and transparency.⁵⁴² In particular, the "architect of the indeterminacy movement,"⁵⁴³ Alexander Maconochie, emphasized how wrong it would be to subject people to conditions that would leave them exposed to the discretionary will of a "malicious constable, or a single irritable

that "a devotion to science" provide[s] "sufficient protection against unwarranted invasion of individual rights").

538. Kerr, Forsyth & Plyley, *supra* note 447, at 573.

539. BARTLETT, *supra* note 437, at 70.

540. *Id.* at 86.

541. *See* Doherty, *supra* note 88, at 963–73.

542. *See id.* at 1018 (describing the "marks" program, which was developed by the founding theorists of indeterminate sentencing "as a means of creating transparency and certainty for prisoners and as a mechanism for reducing discretionary authority").

543. *Id.* at 964.

magistrate.”⁵⁴⁴ These concerns, as voiced in the 1830s, are still just as vital today, although they have never succeeded in holding lasting sway over the many decades of experiments with the indeterminate sentencing model.

CONCLUSION

Through this Article, I have illuminated the role of Testing Periods in shifting the orientation of decision making in criminal cases and setting the criteria that determine case outcomes. I have shown how Testing Periods expand the range of options in plea negotiation, help sideline the jury by encouraging guilty pleas, and create indeterminate sentencing authority for judges and prosecutors. The use of Testing Periods is now so pervasive that the day-to-day operations of the criminal justice system focus heavily on sorting defendants for their ability to comply with a set of prospective rules, rather than on laying out evidence for a jury (or judge) to consider.

This Article has focused on Testing Periods that follow guilty pleas, but these Testing Periods are only part of the puzzle. The same rules that I consider in this Article appear in many other testing regimes, including those set up by pretrial diversionary programs, bail systems, protective orders, and parole boards.⁵⁴⁵ The rules and dynamics of all such Testing Periods deserve careful analysis and scrutiny.

There must be a renewed emphasis on examining what we are testing people for—and whether the criteria governing Testing Periods are defensible, and if so, how. It is essential to consider, for example, how the inability to conquer an addiction should relate to the punishment that a person receives and under what terms it is appropriate to use a new arrest (standing alone) as the basis for sorting someone into prison. Who should bear responsibility for the possibility of error in the administration of these kinds of Testing Periods? And are the same standards applicable to all, and equally?

544. *Id.* at 969 (quoting ALEXANDER MACONCHIE, AUSTRALIANA: THOUGHTS ON CONVICT MANAGEMENT AND OTHER SUBJECTS CONNECTED WITH THE AUSTRALIAN PENAL COLONIES 75 (1839)).

545. Prosecutors and judges can use a defendant’s ability (or inability) to comply with bail conditions, for example, as a sorting mechanism to decide how to handle that defendant’s criminal case. Violations of bail conditions can also provide prosecutors with the basis for a new criminal charge and easy conviction, such as for the “crime” of failure to appear in court.

Moral responsibility means providing clear answers to these types of questions before subjecting others, especially the most vulnerable, to an ordeal. As Bartlett emphasized when studying the history and purpose of the medieval ordeal system, “a true grasp of [the system’s] nature” provides “a deep and penetrating insight into the society which practised it.”⁵⁴⁶

546. BARTLETT, *supra* note 437, at 1.