THE RIGHT TO BE FREE FROM ARBITRARY PROBATION DETENTION

In 2010, the New York Police Department arrested sixteen-year-old Kalief Browder on suspicion of stealing a backpack. New York City jailed Browder for three years without trial on Rikers Island, where he endured abuse by guards and other inmates and spent nearly two years in solitary confinement. Though Browder’s case was ultimately dismissed, his confinement was punishing. In 2015, Browder hanged himself. Since Browder’s tragic death, waves of activism pushed New York to restrict long-term solitary confinement, ban solitary entirely for anyone under the age of twenty-two, and eliminate money bail for most misdemeanors and nonviolent felonies. But the bail reform would not have helped Browder, and little attention has been paid to why. For most of the three years, Browder was not held on money bail: he was stuck on Rikers because he was suspected of violating his probation.

When someone is charged with a crime, the government can detain them prior to conviction on proof that release would either (1) interfere with the administration of justice or (2) pose a danger to the community. Federal constitutional law currently allows for money bail, and money bail systems “are far more common than systems in which judges order a defendant’s release or detention based on flight risk and dangerousness.”

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1 Jennifer Gonnerman, Before the Law, NEW YORKER (Sept. 29, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law [https://perma.cc/K3WV-776H]. Browder maintained his innocence throughout the case, and evidence suggested the police arrested the wrong person. See id.


5 Wendy Sawyer, Alexi Jones & Maddy Troilo, Technical Violations, Immigration Detainers, and Other Bad Reasons to Keep People in Jail, PRISON POL’Y INITIATIVE (Mar. 18, 2020), https://www.prisonpolicy.org/blog/2020/03/18/detainers [https://perma.cc/22WV-4DP2]. Browder was held without bail as soon as the Department of Probation filed a probation violation against him. Gonnerman, supra note 1.

6 See United States v. Salerno, 481 U.S. 739, 753–55 (1987). Federal constitutional law currently allows for money bail, and money bail systems “are far more common than systems in which judges order a defendant’s release or detention based on flight risk and dangerousness.” Kellen Funk, The Present Crisis in American Bail, 128 YALE L.J.F. 1098, 1100 (2019); see id. at 1099. That said,
“nature” of a person’s “strong interest in liberty” requires that a governmental deprivation of that liberty have a “legitimate and compelling” justification that is “narrowly focuse[d]” on the purpose of the deprivation.

Likewise, when the state seeks to civilly commit someone to a mental institution, it can overcome the “constitutional right to freedom” pursuant only to a “carefully limited” and “sharply focused” legislative scheme requiring clear and convincing proof of dangerousness due to mental illness. For the government to deprive someone of physical liberty, it must follow fair procedures — and it must also have a legitimate and compelling reason that is narrowly focused on the purpose of the confinement.

But no substantive justification is constitutionally required to jail any of the nearly four million adults on probation in this country if they are charged with a probation violation. Once a probationer is suspected of committing a new criminal offense (a “substantive violation”) or a noncriminal violation of a probation condition (a “technical violation”), their probation officer can trigger revocation proceedings.

Though the process differs by jurisdiction, the Supreme Court has mandated two hearings: a preliminary detention hearing and a final revocation hearing. In the preliminary hearing, probationers are routinely detained until the final hearing based solely on allegations of a violation. As a result, probationers charged with a new crime can be granted pretrial release in the criminal proceeding just to be detained in the separate probation revocation proceeding. Preliminary probation detention can last for weeks or months. And in cases like Browder’s, where the probation detainer is tied to an underlying criminal charge, the incarceration can last years, even though the government never had to substantively justify the detention in the first place.

advocates are beginning to win due process and equal protection challenges to wealth-based detention schemes. E.g., ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1060 (S.D. Tex. 2017); In re Humphrey, 482 P.3d 1008, 1012–13 (Cal. 2021); see also Funk, supra, at 1101.


11 See Gonnerman, supra note 1.
Though probation is often seen as a way to combat mass incarceration, in some jurisdictions most people in jail are there because they are suspected of violating probation.16 In Philadelphia, for example, over fifty-six percent of the jail population was held on a probation detainer in September 2018.17 And because probation is now the most common criminal sentence in the United States, the specter of probation detention hangs over the nearly four million adults living under probation supervision.18 In the United States, “liberty is the norm”19 — unless you are on probation.20

This Note argues that there is a substantive due process right to be free from arbitrary probation detention. 21 This right derives from the Fourteenth Amendment’s protection of liberty and the corresponding requirement that deprivations of fundamental rights satisfy strict scrutiny.22 Physical liberty is undoubtedly a fundamental right, no less so when someone is serving a sentence of probation.23 Though the Supreme Court has explained that the liberty of a probationer is conditioned on abiding by the terms of probation, 24 it has never said that a probationer’s liberty interest is not fundamental. Indeed, many of the Court’s cases have explicitly recognized that a fundamental liberty interest inheres in a sentence of probation.25

16 For an explanation of how probation can widen the net of mass incarceration, see generally Michelle S. Phelps, The Paradox of Probation: Community Supervision in the Age of Mass Incarceration, 35 LAW & POL’Y 51 (2013).
20 Or if you are on parole or supervised release. See infra section III.B, pp. 1142-44.
21 This Note uses the term “probation detention” to refer to incarceration imposed at the preliminary, prerevocation probation hearing. The term does not refer to incarceration imposed after an individual’s probation has been formally revoked at the final probation revocation hearing. This Note uses the word “arbitrary” to describe unconstitutional detention because “the substantive due process guarantee protects against government power arbitrarily and oppressively exercised.” County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)). Probation detention is arbitrary when it is not justified by a legitimate, compelling, and narrowly focused governmental interest. See infra Part II, pp. 1133–40.
22 U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .”); see Reno v. Flores, 507 U.S. 292, 301–02 (1993) (citing, inter alia, Salerno, 481 U.S. at 746). For an explanation of why the right derives from the Fourteenth, rather than the Fifth, Amendment, see Ryan C. Williams, The One and Only Substantive Due Process Clause, 120 YALE L.J. 408, 512 (2010).
23 See Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982))).
To make the case for a right against arbitrary probation detention, this Note will, in Part I, introduce the problem with probation detention and survey a few probation detention schemes. Part II will explain how the Supreme Court has recognized a fundamental right to physical liberty that is protected by strict scrutiny and argue that probationers do not lose this substantive due process right simply by being on probation. Part III will respond to the most plausible objections to the argument. Part IV will address the application and implications of the right to be free from arbitrary probation detention and conclude.

I. THE PROBATION DETENTION PROBLEM

Probation is a noncarceral criminal sentence enforced through close supervision and strict conditions. In probation’s early days, it was considered an act of grace, and, as a result, the Supreme Court held that the privilege of a probation sentence carried no constitutional protections. By the 1970s, however, probation had become the most common criminal sentence in the United States, and it was no longer tenable to consider probation a privilege. As Justice Douglas explained, probation is more than “episodic acts of mercy by a forgiving sovereign” because the state “depend[es] on probation . . . as much as do those who are enmeshed in the system.”

As probation became an integral part of the criminal legal system, the Supreme Court decided two cases, Morrissey v. Brewer and Gagnon v. Scarpelli, that still provide the basic procedural rules for adjudicating suspected probation violations. The Court declared that once a probation officer initiates a revocation proceeding, a probationer has a right to a preliminary detention hearing and a final revocation hearing. At the preliminary hearing, the court determines whether there is probable cause of a probation violation and, if so, whether to

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26 Doherty, supra note 18, at 292.
29 Morrissey, 408 U.S. at 493 n.3 (Douglas, J., dissenting in part) (quoting FRED COHEN, THE LEGAL CHALLENGE TO CORRECTIONS 32 (1969)).
30 408 U.S. 471.
32 Under Morrissey and Scarpelli, a probationer has the right, before probation is revoked, to written notice, disclosure of evidence, an opportunity to be heard and present witnesses and evidence, a “neutral and detached” arbiter, and a conditional right to confront and cross-examine witnesses, and, if probation is revoked, to a written statement. Morrissey, 408 U.S. at 489; see Scarpelli, 411 U.S. at 782.
33 Scarpelli, 411 U.S. at 782; see Morrissey, 408 U.S. at 485, 487–88.
detain the probationer pending the final revocation hearing. 34 At the
final hearing, the court will determine if there was a violation and, if so,
whether to revoke probation. 35 Under Morrissey and Scarpelli, there is
no constitutional limit to the judge’s discretion to release or detain a
probationer at the preliminary hearing, 36 meaning that the government
need not provide a compelling reason justifying the detention unless a
jurisdiction’s own rules provide otherwise. A survey of a few probation
revocation schemes shows that jurisdiction-specific protections against
arbitrary probation detention range from the limited to the nonexistent,
and that some systems essentially authorize probation officers to auto-
matically detain anyone on suspicion of a probation violation.

In the federal system, judges at the preliminary hearing are author-
ized to “release or detain the [probationer] . . . pending further proceed-
ings.” 37 The federal rules provide some guidance to judges by adopting
the same standard that is used to determine whether to release a con-
victed defendant until sentencing. 38 Under these federal rules, a proba-
tioner must establish by clear and convincing evidence that they “will
not flee or pose a danger to any other person or to the community.” 39

Many state rules do not mention factors like flight risk and danger-
ousness at all. The New York rules of criminal procedure instruct only:

If the court has reasonable cause to believe that [a probationer] has violated
a condition of the sentence, it may commit such person to the custody of the
sheriff, fix bail, release such person under non-monetary conditions or re-
lease such person on such person’s own recognizance for future appearance
at a hearing . . . . 40

These rules do not explain how the court is supposed to decide whether
to detain the probationer.

In Massachusetts, the rules differ by court. The Superior Court
guidelines, like the New York rules, merely say that judges “shall deter-
mine whether the probationer should be detained pending a final hear-
ing, or whether bail or release on personal recognizance (with or without
conditions) should be imposed.” 41 The Massachusetts District and
Municipal Court rules similarly tell judges to determine whether the

34 Morrissey, 408 U.S. at 485. Though this Note will refer to “courts” and “judges” throughout,
under Morrissey the hearing officer need not be a judge or even a lawyer. Id. at 486.
35 Id. at 487-88.
36 See Scarpelli, 411 U.S. at 784–86; Morrissey, 408 U.S. at 485–87.
37 FED. R. CRIM. P. 32.1(a)(6).
38 See id. 46(c).
39 Id. 32.1(a)(6).
40 N.Y. CRIM. PROC. LAW § 410.60 (McKinney 2020).
41 Guidelines for Probation Violation Proceedings in the Superior Court § 5, MASS.GOV (Feb.
1, 2016), https://www.mass.gov/info-details/guidelines-for-probation-violation-proceedings-in-the-
superior-court#section-5-initial-violation-hearing- [https://perma.cc/V45E-9WN9].
probationer should be detained until the final hearing, but also provide a list of six nonexclusive factors that the court must consider in making its detention decision. But there is no guidance on factor weight, nor the ultimate purpose of the detention, leaving vast room for arbitrary decisionmaking.

In Philadelphia, advocates recently accused the courts of not following their own rule in handling probation detainers. In response, the court system abandoned the controversial rule altogether and adopted procedures that give probation officers total discretion to arrest and automatically detain any probationer who is suspected of either a technical or substantive violation. Probationers are still guaranteed a preliminary probation hearing, but the rule requires only that the hearing “be held within a reasonable period” after the individual is initially detained. Philadelphia tends to hold the hearings within ten days of arrest, but the hearings are before nonlawyer “trial commissioners” who lift detainers in only about twelve percent of cases. The results are astonishing: on any given day, roughly half of the jail population in Philadelphia is made up of people held on probation detainers, and some probationers have been detained for months or years. The situation is not much better outside of Philadelphia, where many Pennsylvania counties make probationers wait in jail for weeks or months until they have a preliminary hearing, if they hold a preliminary hearing at all.

42 MASS. DIST./MUN. CT. R. PROB. VIOLATION PROC. §(c). The factors are: i. the probationer’s criminal record; ii. the nature of the offense for which the probationer is on probation; iii. the nature of the offense or offenses with which the probationer is newly charged, if any; iv. the nature of any other pending alleged probation violations; v. the likelihood of probationer’s appearance at the probation violation hearing if not held in custody; and vi. the likelihood of incarceration if a violation is found following the probation violation hearing. Id. Until 2015, the District Court rules specifically prohibited bail and other conditions of release. Id. § 2015 cmt.

43 See id. § 5.


45 See PHILA. CNTY. CT. COM. PL. LOC. CRIM. R. 708(B)(1) explanatory cmt.

46 PHILA. CNTY. CT. COM. PL. LOC. CRIM. R. 708(B)(1) explanatory cmt.


49 See Melamed, Purcell & Williams, supra note 47.
Probation imposes burdensome conditions, onerous fees, and pervasive surveillance, all of which contribute to suspected probation violations.\textsuperscript{50} New criminal violations will trigger probation revocation, even if the individual is bound to be acquitted.\textsuperscript{51} Probation can also be revoked for noncriminal behavior. Probationers generally must obey all federal, state, and local civil laws, avoid “injurious and vicious habits” and “persons and places of disreputable or harmful character,” and work diligently to support their dependents.\textsuperscript{52} And the measure of one’s compliance with these conditions is judged by the “vague and moralistic standards” of a probation officer who can file a violation for as little as a missed meeting.\textsuperscript{53} Unsurprisingly, the precarity and indignity of probation is not distributed equally. Probation disproportionately ensnares Black and poor people\textsuperscript{54} and sets many up for failure by ignoring the structural realities of daily life for the poor and working class.\textsuperscript{55} Sixty-six percent of probationers earn less than $20,000 per year,\textsuperscript{56} and Black people make up thirty percent of those sentenced to probation, despite making up only thirteen percent of the U.S. population.\textsuperscript{57} Probation is also revoked for Black probationers at significantly higher rates than for their white and Hispanic counterparts, even when controlling for differences in probationer characteristics.\textsuperscript{58}

Probation is billed as an alternative to mass incarceration, and, in some ways, it is.\textsuperscript{59} But probation also widens the net of incarceration,
and the rules governing probation revocations are an important factor in determining whether probation will rehabilitate or punish. Probation detention thus helps explain why probation is “a key driver of incarceration in the United States.”

The experience of spending weeks or months in jail until an alleged probation violation is adjudicated puts immense pressure on probationers to stipulate to a violation in exchange for immediate release and a probation extension. But the longer probation lasts, the more likely it is that probation will eventually be revoked and replaced by a sentence of incarceration, particularly now that the probation system has turned away from rehabilitation toward surveillance and violation detection. Probation detention also inhibits probation completion more directly by interfering with employment — which is, ironically, a standard condition of probation. All told, probation is revoked for forty percent of probationers because they either commit a new offense or a technical violation, meaning only sixty percent of people on probation successfully complete it. And “[n]early a quarter of state prison admissions across the country are due to probation violations.” It is no wonder that given the choice between a short jail sentence and a lengthy probation term, some people choose jail.

The probation revocation system rests on the widely held assumption that probationers have minimal rights. The next Part will explain why this assumption is wrong. At the very least, probationers have a right to be free from arbitrary probation detention.

II. JUSTIFYING THE RIGHT TO BE FREE FROM ARBITRARY PROBATION DETENTION

The Constitution guarantees a fundamental substantive due process right to physical liberty that “protects against government power

prison that pushes individuals deeper into the criminal justice continuum”); see also Phelps & Ruhland, supra note 50 (manuscript at 2) (describing focus group analysis suggesting “that mass probation does more harm than good in adding fiscal, time, and emotional burdens to already legally and socially precarious lives”).

60 See Phelps, supra note 16, at 53.
61 JACOBSON ET AL., supra note 11, at 4.
62 See Ewing, supra note 13; Melamed, Purcell & Williams, supra note 47.
63 Cf. Phelps, supra note 16, at 53 (“[O]n average, expanding probation rates leads to slightly greater incarceration rates.”).
64 JACOBSON ET AL., supra note 11, at 6.
65 See id. at 2; Doherty, supra note 18, at 310.
66 JACOBSON ET AL., supra note 11, at 4.
67 SCHENWAR & LAW, supra note 10, at 89. Nearly a quarter of those admissions are due to noncriminal technical violations. See Phelps & Ruhland, supra note 50 (manuscript at 3).
68 See MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 87–88 (2020); see also Ben M. Crouch, Is Incarceration Really Worse? Analysis of Offenders’ Preferences for Prison over Probation, 10 JUST. Q. 87, 84–85 (1993).
arbitrarily and oppressively exercised.” Courts enforce fundamental rights through strict scrutiny, which requires deprivations of fundamental rights to be justified by a compelling governmental interest that is narrowly focused on the purpose of the deprivation. This right to physical liberty provides a baseline protection against arbitrary incarceration. Of course, probation is a criminal sentence, so probationers are in a different legal position than someone who is not under community supervision. But, as this Part will explain, liberty actually is the norm — even on probation. That is, probationers do not lose the fundamental right to physical liberty simply by virtue of being on probation. It follows that probationers have a substantive due process right to be free from arbitrary probation detention.

A. The Fundamental Right to Physical Liberty

The Fourteenth Amendment says that no state shall “deprive any person of life, liberty, or property, without due process of law.” The Due Process Clause has been interpreted to provide two related but distinct forms of protection. Procedural due process, the more familiar one, is related to the adjudication used to deprive someone of life, liberty, or property. Procedural due process limits government power by requiring the state to follow certain procedures when it deprives someone of liberty. Substantive due process, on the other hand, limits government power by prohibiting the state from depriving someone of a liberty interest even if the adjudication meets the standards of procedural due process, unless the government provides a substantive justification.

The requisite strength of the justification depends on the strength of the right. The Supreme Court has identified certain interests that are so “fundamental” that the government cannot infringe them “at all . . . unless the infringement is narrowly tailored to serve a compelling state interest.” In other words, a deprivation of a fundamental right is

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71 U.S. CONST. amend. XIV, § 1.
72 See Williams, supra note 22, at 419.
73 See Sacramento, 523 U.S. at 845–46 (explaining that “[t]he touchstone of due process is protection of the individual against arbitrary action of government,” id. at 845 (alteration in original) (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)), including “the exercise of power without any reasonable justification in the service of a legitimate governmental objective,” id. at 846).
subject to strict scrutiny even if the deprivation was done pursuant to fair procedures.  

The Supreme Court has long recognized that there is a fundamental right to physical liberty, explaining that “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” And though the Court has not always been precise in its use of strict scrutiny’s language of “narrow tailoring” and “compelling interest,” it has consistently applied the principles of strict scrutiny to pretrial detention and civil commitment schemes that impinge on physical liberty.

1. Civil Commitment. — The Supreme Court has recognized a “constitutional right to freedom” in the civil commitment context. The Court first applied substantive due process to civil commitment in O’Connor v. Donaldson, where it explained that psychiatric patient Kenneth Donaldson’s constitutional liberty interest triggered two substantive protections. First, the government had to show a compelling purpose for the confinement, in this case dangerousness. Without proof of dangerousness, the government lacked “a constitutionally adequate purpose” and could not civilly commit someone suffering from mental illness. Second, the Court imposed a narrow tailoring requirement by reasoning that the existence of an alternative to confinement precluded civil commitment: “[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.” Thus, the government may commit a person to a mental institution in a civil proceeding only upon proof that mental illness makes them a danger to themselves or others.

Later, in Foucha v. Louisiana, the Court explained that “[f]reedom from bodily restraint” is constitutionally protected from arbitrary

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79 See id. at 564, 576.
80 See id. at 571, 576.
81 Id. at 574; see id. at 573-75.
82 Id. at 576.
government action. As a result, the Court struck down a Louisiana civil commitment scheme that did not provide the opportunity for someone to prove their sanity and gain release following a successful insanity defense at trial. Louisiana’s scheme, which allowed the state to confine someone indefinitely even if they were no longer mentally ill, violated the right to physical liberty because it was “not carefully limited” to and “sharply focused” on the government’s interest in public safety.

Together, O’Connor and Foucha confirm that the Constitution guarantees a right to physical liberty, and that strict scrutiny applies to infringements on this right, meaning that civil commitment schemes must have a compelling governmental purpose and be narrowly tailored.

2. Pretrial Detention. — The Supreme Court invoked its civil commitment decisions when recognizing a fundamental right to physical liberty in the pretrial detention context. In United States v. Salerno, the Court considered a challenge to the federal Bail Reform Act of 1984, which authorized pretrial detention based on dangerousness. Though it reversed a Second Circuit decision holding that pretrial detention of someone based on suspicion of future crime violated substantive due process, the Court upheld the Bail Reform Act while invoking the familiar language of strict scrutiny.

Chief Justice Rehnquist recognized the right to pretrial physical liberty as “important and fundamental,” though not inalienable. “[I]n circumstances where the government’s interest is sufficiently weighty,” the right to physical liberty can “be subordinated to the greater needs of society.” The Court reviewed the government’s purpose and the strength of its justification, explaining that the government’s interest in a pretrial deprivation of physical liberty must be “legitimate and compelling” and concluding that the government’s interest in crime prevention met that standard. But a legitimate and compelling interest was

84 Id. at 80 (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).
85 See id. at 86 (plurality opinion).
86 Id. at 81; see id. at 82.
89 See Salerno, 481 U.S. at 742–43.
90 See id. at 744–45, 749–50. As one commentator has noted, the Salerno Court “came right up to the precipice of engaging in a substantive due process analysis without explicitly invoking those terms.” Funk, supra note 6, at 1106. The opinion’s ambiguity allows for competing interpretations of why the Bail Reform Act survived. For an interpretation contrary to the one advanced in this Note, see Walker v. City of Calhoun, 901 F.3d 1245, 1262–63 (11th Cir. 2018).
91 Salerno, 481 U.S. at 750; see Salil Dudani, Note, Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences, 129 YALE L.J. 2112, 2128 (2020) (explaining that the Court “considered it obvious that some substantive right to physical liberty inheres in due process”).
92 Salerno, 481 U.S. at 750–51.
93 Id. at 749; see id. at 750.
not enough — the Court also emphasized that the Bail Reform Act “narrowly focuse[d] on a particularly acute problem.”94 In other words, the Act was narrowly tailored because it applied only to people “arrested for a specific category of extremely serious offenses,” required a showing of probable cause that the defendant committed the serious offense, and imposed a standard of “clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.”95

B. The Fundamental Right to Physical Liberty on Probation

Because substantive due process protects “fundamental” rights, strict scrutiny applies to probation detention decisions only if probationers have a fundamental right to liberty while on probation. They do. Since the advent of the modern probation system, the Supreme Court has consistently recognized two things: (1) there is a liberty interest in probation, and (2) substantive due process imposes some limit on governmental deprivations of that interest at the final probation revocation hearing.

Probationers do not lose their fundamental right to physical liberty by virtue of being on probation. In Morrissey v. Brewer and Gagnon v. Scarpelli, the Supreme Court explained that “the liberty of a [probationer], although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a ‘grievous loss’ on the [probationer] and often on others.”96 Since then, the Supreme Court has stopped short of saying that a probationer’s liberty interest is “fundamental” for the purpose of a substantive due process analysis. However, the Court has recognized the substantive due process rights of probationers by reversing probation revocations that lacked a compelling and legitimate justification that was narrowly focused on the purpose of the revocation.

In Douglas v. Buder,97 decided the same year as Scarpelli, the Court issued a per curiam opinion reversing an arbitrary probation revocation. James Douglas, the probationer, was accused of violating a condition of probation that required him “to report ‘all arrests . . . without delay’” to his probation officer.98 After Douglas failed to promptly report a traffic citation, a Missouri judge revoked his probation and sentenced him to two years on his original criminal charges.99 The Supreme Court reversed because “the issuance of the traffic citation was not an ‘arrest’ under” the relevant state laws100 and thus the revocation “was so totally

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94 Id. at 750.
95 Id. (citing 18 U.S.C. § 3142(f)).
97 412 U.S. 430 (1973) (per curiam).
98 Id. at 432; see State ex rel. Douglas v. Buder, 485 S.W.2d 609, 609 (Mo. 1972).
99 Douglas, 412 U.S. at 431.
100 Id.
devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment.”

Though the revocation violated procedural due process in failing to give Douglas fair notice, this was merely an alternative ground for the decision. The holding therefore rested at least in part on substantive due process — a determination that the state had no compelling or legitimate interest in revoking probation for no reason, regardless of the fairness of the procedure.

The Supreme Court discussed the application of substantive due process to probation in more depth a decade later in *Bearden v. Georgia*. *Bearden* asked whether a state could properly revoke an indigent man’s probation and incarcerate him for failure to pay a fine and make restitution. The Court considered the question on both equal protection and due process grounds, but ultimately invoked due process to impose a substantive limit on probation revocation. The Court explained that probationers have a significant liberty interest because a sentence of probation “reflects a determination by the sentencing court that the State’s penological interests do not require imprisonment.” Given this interest, the Court required that any attempt to revoke an indigent person’s probation be made only if there is a finding that the probationer is responsible for the lack of payment or that “alternative measures are not adequate to meet the State’s interests in punishment and deterrence.” Thus, *Bearden* reiterated the *Douglas* principle that a state has no compelling interest in revoking someone’s probation absent proof of an actual violation. And *Bearden* also spoke to the “narrow focus” aspect of strict scrutiny by imposing a rule of necessity where a probationer is not responsible for nonpayment: the probation of an indigent person cannot be revoked absent a finding that the revocation is necessary to meet the state’s interest in punishment or deterrence.

Finally, in *Black v. Romano*, the Supreme Court stated that “[t]he Due Process Clause of the Fourteenth Amendment imposes procedural

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101 Id. at 432.
102 See id.
105 See id. at 663.
106 See id. at 666 & nn.7–8.
107 Id. at 670 (emphasis added).
108 Id. at 672. The Court also rejected Georgia’s attempt to justify the revocation on specious grounds of a purported correlation between poverty and crime. Id. at 671 (“[T]he State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous.”).
109 See id. at 672. The narrow tailoring aspect of the strict scrutiny test can be reformulated as a question of whether a deprivation is necessary. *Dudani*, supra note 91, at 2123.
and substantive limits on the revocation of the conditional liberty created by probation,”111 but declined to find that due process required a court explicitly to “consider[] alternatives to incarceration before revoking probation.”112 While the automatic revocation in *Bearden* was constitutionally impermissible, the Court rejected the argument that *Morrissey* and *Scarpelli* further restricted the substantive grounds for probation revocation.113

Though the *Romano* majority did not think the case presented the occasion to decide whether due process limited the automatic revocation of probation in any context besides the one identified in *Bearden*,114 two Justices explicitly endorsed a broad application of substantive due process to probation. Concurring in *Romano*, Justice Marshall, joined by Justice Brennan, rejected the idea that “the Constitution allows probation to be revoked for any reason at all or for any probation violation.”115 Justice Marshall explained that his reading of *Bearden* required that “the decision to revoke probation must be based on a violation that logically undermines the State’s initial determination that probation is the appropriate punishment for the particular defendant.”116 By this logic, some violations of probation could not constitutionally lead to a probation revocation, because a minor traffic violation or other technical probation violation, for example, may not “rationally justify a conclusion that the probationer is no longer a good rehabilitative risk.”117 And, if Justice Marshall is correct, state statutes authorizing revocation “for any cause” may violate substantive due process principles.118

If the Constitution imposes substantive due process limits on the final revocation hearing, then substantive due process must also apply — in a stronger form — at the preliminary hearing. To be sure, the Supreme Court has never recognized ironclad substantive due process guarantees at the probation revocation stage. But the case for a fundamental right to liberty is greater at the preliminary hearing stage than at the final revocation stage. In *Bearden* and *Romano*, both defendants were found to have violated their probation; the only question was whether their probation could constitutionally be revoked. And yet the Court still recognized that probationers have a liberty interest. Since a probationer’s liberty interest is conditioned on compliance with the terms of the probation, the Court imposed only minor substantive limits

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111 Id. at 610 (emphasis added) (citing *Bearden*, 461 U.S. at 666 & n.7).
112 Id. at 607; see id. at 611.
113 Id. at 611.
114 Id.
115 Id. at 620 (Marshall, J., concurring).
116 Id.
117 Id. at 622; see id. at 623 (“To the probationer, who is integrating himself into a community, it is fundamentally unfair to be promised freedom for turning square corners with the State but to have the State retract that promise when nothing he has done legitimately warrants such an about-face.”).
118 See id. at 623 n.21.
on the actual revocation. But a probationer’s liberty interest is at its peak prior to a finding of a violation and is diminished after a violation has been found. Probationers have not lost the fundamental right to physical liberty at the preliminary hearing stage. The next Part will address arguments to the contrary.

III. ANSWERING POSSIBLE OBJECTIONS

Physical liberty is a core constitutional value protected from arbitrary deprivations by substantive due process. So why haven’t courts recognized a right to be free from arbitrary detention in preliminary probation hearings? If substantive due process protects criminal defendants at pretrial detention hearings, but not probationers at preliminary detention hearings, then something about the nature of probation must explain the disparate treatment. Ultimately, none of the possible explanations are availing.

A. Lesser Right to Liberty

Perhaps the most plausible objection to this Note’s argument is the claim that probationers simply do not have a right to liberty that is fundamental enough to trigger the application of strict scrutiny. This objection seemingly has support in case law because probationers do have a lesser right to liberty than those not on probation. Probation liberty is “conditional liberty properly dependent on observance of special . . . restrictions.” Does the conditional nature of a probationer’s liberty justify the lack of a substantive due process right to physical liberty at the preliminary hearing? The answer must be no.

“Conditional liberty” means that the liberty enjoyed by the probationer is conditioned on adherence to the terms and conditions of probation. The conditional nature of the right has two implications. First, it empowers the state to revoke probation if the conditions are breached. Second, it justifies limited procedural due process at the final hearing. It does not mean, however, that the probationer lacks a substantive liberty interest prior to revocation.

It is important not to conflate the final revocation hearing with the preliminary detention hearing. The state may, consistent with the Constitution, revoke someone’s probation and sentence them to a suspended term of imprisonment when it proves a violation of probation, subject to the limited due process protections of a probation revocation.

119 Cf. Sandra G. Mayson, Dangerous Defendants, 127 YALE L.J. 490, 519 (2018) (considering the argument that “defendants simply have a lesser right to liberty than other people”).

Similarly, the state may sentence a criminal defendant to prison when it secures a lawful guilty verdict at trial. But it does not follow that probationers lack a robust liberty interest prior to a finding of a probation violation, just like the law of criminal sentencing does not mean that defendants lack substantive due process rights at a pretrial detention hearing. Chief Justice Burger explained the same principle in the context of parole, noting that “[t]he parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions.” Thus, while the liberty of a parolee (and probationer) is “indeterminate, [it] includes many of the core values of unqualified liberty.”

But the nature of conditional liberty is such that a probationer enjoys limited procedural due process rights at the final revocation hearing: the rules of evidence are relaxed, the right to confrontation and cross-examination is conditioned on the arbiter’s approval, and counsel are guaranteed only on a case-by-case basis. If we accept the limited rights at the final hearing, the argument might go, why should we object to limited rights at the preliminary hearing?

This prong of the objection confuses procedural due process and substantive due process. Substantive due process requires the government to justify a deprivation of liberty (or life, or property) with a sufficient purpose, whereas procedural due process ensures that the government follows appropriate procedures when it performs the deprivation. The Court has long understood that procedural “due process is flexible and calls for such procedural protections as the particular situation demands.”

The flexibility of procedural due process helps explain the Court’s analysis in Morrissey. Chief Justice Burger balanced the state’s “overwhelming interest in being able to return” a parolee to prison without holding a new criminal trial against the shared interest of the parolee and society in liberty, rehabilitation, and a fair and accurate hearing. In the Court’s judgment, the balancing of those interests called for procedures that would ensure “an effective but informal hearing.”

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121 But see Romano, 471 U.S. at 620 (Marshall, J., concurring).
124 Morrissey, 408 U.S. at 482 (emphasis added).
125 Id.
127 Williams, supra note 22, at 419.
128 Morrissey, 408 U.S. at 481; see also id. (calling the proposition that due process is flexible so frequently stated “as not to require citation of authority”).
129 Id. at 483; see id. at 484.
130 Id. at 485; see id. at 484.
the fact that a probationer enjoys the limited procedural due process measures of informal preliminary and final revocation hearings does not mean that they do not have a substantive due process right. Where a “fundamental” right like physical liberty is at stake, substantive due process is not as flexible — it requires deprivations to satisfy strict scrutiny.

A related objection is that probationers might have limited physical liberty interests because of their limited privacy rights.\(^{131}\) It is true that a consequence of probation is a limited expectation of privacy.\(^{132}\) The Supreme Court has held that the Fourth Amendment allows states to authorize searches of probationers’ homes based on a “reasonable grounds” standard\(^ {133}\) and permits law enforcement to conduct warrantless searches of probationers’ homes if “supported by reasonable suspicion and authorized by a condition of probation.”\(^ {134}\)

Courts may impose reasonable conditions that limit a probationer’s freedom, but probation does not eliminate the right to physical liberty. In *Morrissey*, *Scarpelli*, and *Bearden*, the Court acknowledged that probationers retain an important interest in physical liberty. Just because a probationer’s expectation of privacy is reduced for the purpose of the Fourth Amendment reasonableness analysis does not mean that the state is free to detain them absent substantive justification.

### B. Other Exceptions to Strict Scrutiny of Liberty Deprivations

Skeptics might also note that probation detention is not the only type of liberty deprivation that is seemingly immune from substantive due process. First, the Due Process Clause is not generally thought to impose substantive limits on other postincarceration forms of community supervision, like parole and federal supervised release. In *Morrissey*, the Court mentioned, almost in passing, that a probable cause finding “would be sufficient to warrant the parolee’s continued detention and return to the state correctional institution pending the final decision.”\(^ {135}\)

The practical explanation for the current probation detention system can therefore be traced back to that sentence and the Court’s casual application of *Morrissey* to probation in *Scarpelli*, where the Court addressed the difference between parole and probation by simply saying that “[p]etitioner does not contend that there is any difference relevant

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\(^{131}\) Cf. Mayson, *supra* note 119, at 527 (considering the argument that “if defendants have uniformly reduced privacy rights, they might also have uniformly reduced liberty interests”).


\(^{134}\) *Knights*, 534 U.S. at 122.

\(^{135}\) *Morrissey*, 408 U.S. at 487.
to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one.\textsuperscript{136}

Even if the Court were correct that there is no relevant difference between probation and parole for procedural due process purposes, it would be incorrect to reach the same conclusion in a substantive due process analysis, because probation carries a more significant liberty interest than parole does. As opposed to probation, a sentence of community supervision in lieu of incarceration, parole is an early release from a sentence of incarceration.\textsuperscript{137} A prerequisite of probation is a court’s formal determination “that the State’s penological interests do not require imprisonment” at all, whereas a court’s formal determination that the State’s penological interests do require imprisonment is a prerequisite to parole.\textsuperscript{138} As the Court recognized in Douglas and Bearden, the probationer’s interest in nonimprisonment carries with it some substantive due process right not to have probation revoked without adequate justification.\textsuperscript{139} Thus, the sentence must carry with it some entitlement not to be incarcerated, subject, of course, to the conditions of probation.

Second, there is no substantive due process right against arbitrary criminal sentencing. In Chapman v. United States,\textsuperscript{140} the petitioner challenged a mandatory five-year minimum sentence for a federal drug distribution offense by arguing that his due process was violated by the arbitrariness of his sentence being tied to the weight of the drug carrier, rather than the weight of the drug itself.\textsuperscript{141} The Court held, without much explanation, that a person’s “fundamental right to liberty” ends once the state has “prove[d] his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees.”\textsuperscript{142} Therefore, “the court may impose[] whatever punishment is authorized by statute for his offense” after a lawful criminal conviction so long as the sentence does not offend the Eighth Amendment’s prohibition on cruel and unusual punishments nor the Constitution’s equal protection guarantee.\textsuperscript{143}

There is good reason to think that Chapman was wrong and strict scrutiny should apply to criminal sentencing.\textsuperscript{144} But even if Chapman was right, it does not preclude the argument that substantive due pro-

\begin{footnotes}
\item[138] Bearden v. Georgia, 461 U.S. 660, 670 (1983); see Morrissey, 408 U.S. at 487.
\item[139] See Bearden, 461 U.S. at 667; Douglas v. Buder, 412 U.S. 430, 432 (1973) (per curiam).
\item[141] Id. at 455–56, 464.
\item[142] Id. at 465 (citing Bell v. Wolfish, 441 U.S. 520, 535–36, 535 n.16 (1979)).
\item[143] Id.
\item[144] See generally Dudani, supra note 91 (making this argument).
\end{footnotes}
cess protects probationers from arbitrary deprivations of liberty. A sentence of probation “includes many . . . core values of unqualified liberty” that are not shared by someone subject to a carceral sentence.145 Just because due process scrutiny does not apply to a duly authorized criminal sentence of incarceration does not mean that probation detention can be imposed arbitrarily.

C. Probable Cause

Another objection to strict scrutiny of probation detention is that the Supreme Court got the law right in *Morrissey* and *Scarpelli*. In other words, a finding of probable cause is both necessary and sufficient to overcome a probationer’s limited interest in freedom at the preliminary hearing stage. After all, probation officers cannot jail just anyone on probation. They can deprive someone of liberty only after probable cause of a violation is proven to an independent officer’s satisfaction.146

But if there is a substantive due process right against arbitrary probation detention, then probable cause cannot be a sufficient justification. In *Salerno*, the Court justified pretrial detention under the Bail Reform Act by explaining that “[t]he Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough.”147 The government must also make an individualized determination that detention is necessary by “convinc[ing] a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.”148

*Salerno*’s treatment of probable cause makes good sense given the requirements of substantive due process. Because physical liberty is a fundamental right, any infringement on it must be narrowly focused to promote a compelling state interest. The probable cause bar is simply too low to satisfy the narrowly focused prong of the substantive due process inquiry. The exact meaning of probable cause is famously murky,149 but the standard generally requires only that the government present facts providing reason to believe “an offense has been or is being committed.”150 The *Salerno* Court rejected such a low level of suspicion as a basis for pretrial detention because it would facilitate “scattershot

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146 *See Morrissey*, 408 U.S. at 486–87.
148 *Id.* (citing 18 U.S.C. § 3142(f)). Because the Court was analyzing the Bail Reform Act, it did not necessarily expound a constitutional requirement here. But the Court suggested that the dangerousness finding is constitutionally required because otherwise the statute would have impermissibly authorized “a scattershot attempt to incapacitate those who are merely suspected of . . . serious crimes.” *Id.*
149 *See Andrew Manuel Crespo, Probable Cause Pluralism, 129 YALE L.J. 1275, 1280 (2020).*
attempt[s] to incapacitate” anyone suspected of a serious crime.\footnote{Salerno, 481 U.S. at 750. Though Salerno never explicitly rejected probable cause alone as a sufficient basis for detention, the opinion would have looked much different if probable cause alone could constitutionally authorize detention on the basis of dangerousness.} Probable cause is a necessary but not sufficient condition of pretrial preventative detention, and, if there is a right against arbitrary probation detention, the standard should be the same in preliminary hearings.

### D. Criminal Conviction and Custody

Another justification of arbitrary probation detention might be that people on probation enjoy fewer rights than do those not on probation because they have been lawfully convicted of the crime for which they are serving their sentence of probation. But the Supreme Court has made clear that certain liberty interests survive even carceral prison sentences. In \textit{Vitek v. Jones},\footnote{445 U.S. 480 (1980).} the Court held that prison inmates have a right against arbitrary institutionalization. As the Court explained: “[C]riminal conviction and sentence of imprisonment extinguish an individual’s right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment” absent due process protections.\footnote{Id. at 493–94.} A conviction and sentence of probation limit an individual’s liberty, but not entirely. And because a sentence of probation “reflects a determination by the sentencing court that the State’s penological interests do not require imprisonment,”\footnote{Bearden v. Georgia, 461 U.S. 660, 670 (1983).} the sentence carries with it a right not to be arbitrarily detained.

Alternatively, arbitrary probation detention might be permissible because probationers are essentially in the custody of the state by virtue of being on probation.\footnote{See Mayson, supra note 119, at 520 n.171 (suggesting that a “quasi-custody rationale” for probation is “still plausible if release on probation or parole is a privilege the state grants in lieu of lawful detention, rather than a right”).} But this objection relies on an outdated understanding of the nature of probation. Though early parole schemes understood parolees as formally being in the custody of the state during the pendency of their supervision,\footnote{Morrissey v. Brewer, 408 U.S. 471, 492–93, 493 n.3 (1972) (Douglas, J., dissenting in part).} the Supreme Court rejected the custody theory in the parole context when it said that “[a]lthough the parolee is often formally described as being ‘in custody,’ the argument cannot even be made here that summary treatment is necessary as it may be with respect to controlling . . . prisoners in actual custody.”\footnote{Id. at 483 (majority opinion).} If parolees are not in custody, then probationers, too, are more than prisoners living outside the penitentiary walls by the grace of the state — they have a distinct legal status that carries distinct legal rights.
IV. CONCLUSION

This Note has argued that probationers have a substantive due process right to be free from probation detention absent a compelling and narrowly focused governmental justification. The Fourteenth Amendment protects against arbitrary and capricious deprivations of physical liberty, and a right to liberty inheres in a sentence of probation. Though probationers are not on identical constitutional footing to pretrial defendants, they do not lose the basic right against arbitrary detention simply by virtue of being on probation. And because substantive due process applies at the probation revocation hearing, 158 it ought to also apply at the preliminary detention hearing.

How would the right to be free from arbitrary probation detention apply in practice? Because physical liberty is a fundamental due process right, government action that infringes on this liberty should be subject to strict scrutiny, which requires that the action be narrowly tailored to promote a compelling state interest.159 The right to be free from arbitrary probation detention would have a few significant implications. First, strict scrutiny would require invalidation of statutory schemes that purport to allow preliminary probation detention without a compelling justification. Second, prior to imposing probation detention, courts would have to make individualized determinations that probation detention is necessary to effectuate a compelling governmental interest.

Recall the statutory probation schemes discussed earlier. The New York statute would be unconstitutional to the extent it allows a judge to “commit [a probationer] to the custody of the sheriff” absent any compelling justification.160 Likewise, the Massachusetts scheme would be unconstitutional to the extent it authorizes judges to “determine whether the probationer should be detained pending a final hearing” without imposing any requirement that the detention be linked to a compelling justification.161

A rule authorizing automatic detention would also be unconstitutional. In Salerno, the Court suggested that the requirement of an individualized determination of dangerousness was “central” to the Bail Reform Act’s constitutionality.162 The government not only had to prove probable cause of a criminal violation but also had to hold “a full-blown adversary hearing” to “convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.”163 The Court rejected blanket attempts to incarcerate criminal suspects, emphasizing that

158 See Bearden, 461 U.S. at 672–73.
159 See Fallon, supra note 70, at 1268–69.
160 N.Y. CRIM. PROC. LAW § 410.60 (McKinney 2020).
161 Guidelines for Probation Violation Proceedings in the Superior Court, supra note 41, § 5.
162 Dudani, supra note 91, at 2150.
“the arrestee” specifically has to “present[] a demonstrable danger to the community.” The same would be true for probation detention.

Current pretrial detention procedures provide a model of how a constitutional probation detention scheme might look. It is beyond question that courts can lawfully detain defendants before trial to prevent flight and witness tampering. And, after Salerno, the state can also detain defendants before trial to prevent other, unrelated criminal conduct after a finding of dangerousness. Those justifications would presumably also satisfy strict scrutiny in a probation detention hearing. Thus, the test applied in a constitutional probation detention hearing would likely resemble the one applied in a pretrial bail hearing. This is not to say that the outcomes of a pretrial detention and probation detention proceeding would always be identical. One can imagine the government arguing that some probationers pose a significant flight risk because they are aware that they might face “possible incarceration[] in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply.” At the same time, because so many probation violations are technical, one hopes that courts would recognize that the government’s interest in detaining someone on suspicion of a noncriminal act is minimal.

By reducing the largely unbounded discretion judges and probation officers have over the liberty of the nearly four million probationers in the United States, substantive due process could help prevent the significant misery inflicted by arbitrary probation detention and mitigate probation’s substantial contribution to mass incarceration. But courts will not recognize a new substantive due process right on their own. Advocates should, using both federal and state constitutional law, start defending the substantive liberty interests of probationers during revocation proceedings. And hopefully, before long, courts will begin to recognize that a sentence of probation does not extinguish the fundamental right to physical liberty.

164 Id.
165 Mayson, supra note 119, at 510.
166 See Salerno, 481 U.S. at 755 (Marshall, J., dissenting); see also Mayson, supra note 119, at 520 (arguing that “there is no constitutional, moral, or practical” justification for distinguishing defendants from equally dangerous nondefendants for the purpose of preventative detention).
167 In the case of a suspected substantive probation violation, the preliminary probation detention hearing would likely be superfluous — if a judge already found that a suspect was neither dangerous nor a flight risk, the government would presumably not deserve a second bite at the detention apple.
169 See Aime v. Commonwealth, 611 N.E.2d 204, 213 n.18 (Mass. 1993), and state courts have recently relied on both state and federal constitutional principles to limit wealth-based pretrial detention, see In re Humphrey, 482 P.3d 1008, 1018–19 (Cal. 2021); Brangan v. Commonwealth, 80 N.E.3d 949, 961, 964 (Mass. 2017).