IMPROPER IMPLEMENTATION: MISSISSIPPI HOUSE BILL 585'S MISSED OPPORTUNITY FOR FUNDAMENTAL FAIRNESS AND OPEN DOOR FOR LITIGATION

INTRODUCTION

Recently, a small number of states have begun examining how their prison systems run.[1] This is due largely to prison overcrowding.[2] A number of states have looked into expanding

[1] *See, e.g.*, VT. STAT. ANN. tit. 28, § 256 (2014); KY. REV. STAT. ANN. § 439.3107 (LexisNexis 2014); MISS. CODE ANN. § 47-7-38 (2014). A Westlaw search yielded only Vermont, Kentucky, and Mississippi as specifically implementing graduated sanctions policies. As prison overcrowding becomes a bigger issue, more states are revising their probation and prison policies. Texas, for instance, is using private prisons to outsource some offenders in combination with policy revisions. However, Texas has begun shutting these private prisons down. *See* Elizabeth Koh, *TDCJ to Close Two Privately Run Jails in August*, TEX. TRIB. (June 11, 2013), http://www.texastribune.org/2013/06/11/tdcj-shutters-private-jails/.

[2] *See* MISS. CORR. & CRIMINAL JUSTICE TASK FORCE, FINAL REPORT 7 (2013) [hereinafter FINAL REPORT], *available at* http://www.legislature.ms.gov/Documents/MS

probation for non-violent offenders as an option to allow more bed space for other offenders.[3] Other states have expanded drug court systems to allow for reform of non-violent drug offenders.[4] Mississippi utilizes a combination of these two reforms to help with the overcrowding issue.[5] On July 1, 2014, the state of Mississippi implemented a plan to increase probation use and shorten the length of time served for probation revocations.[6] The new policy calls for graduated sanctions for technical violations of probation.[7] While the new policy aims to correct the serious problem of prison overcrowding, the way it has been implemented can result in violations of probationers' rights. The potential rights violations call for a change in the way probation officers, in combination with the circuit courts of Mississippi, revoke probation for technical violations. Additionally, in order for the new policy to achieve its intended purpose, the law should apply retroactively to reach back for probationers currently in the custody of the Mississippi Department of Corrections (MDOC).[8]

Currently, Mississippi is among a minority of states that have implemented a graduated sanctions system for probation

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TaskForce_FinalReport.pdf. The report found that, at the current rate that offenders were being sentenced, the Mississippi prison system would have to house an additional 1,990 inmates by the year 2024. *See id.* at 3.

[3] *Id.* at 6-7.

[4] *See, e.g.*, *HOPE Probation*, HAW. ST. JUDICIARY, http://www.courts.state.hi.us/special_projects/hope/about_hope_probation.html (last visited Apr. 5, 2015). Hawaii uses a similar system to Mississippi in that it uses a drug court system to help curb recidivism among non-violent first time offenders. The Final Report also looks at how expanding the drug court system in Mississippi can help reduce recidivism and further reduce prison space needed. *See* FINAL REPORT, *supra* note 2, at 14, 20-21.

[5] *See* FINAL REPORT, *supra* note 2, at 13-14; MISS. CODE ANN. § 47-7-38 (2014) (the codified version of graduated sanctions that Mississippi uses).

[6] MISS. CODE ANN. § 47-7-38 (2014).

[7] *Id.*; *see also* MISS. DEP'T OF CORR., SOP NO. 37-20-02, FIELD SERVICES GRADUATED SANCTIONS & INCENTIVES 1 (2014) [hereinafter GRADUATED SANCTIONS MATRIX] (on file with author). The author obtained a copy of the Graduated Sanctions Matrix from the MDOC by following the procedures listed at this website: http://www.mdoc.ms.gov/Admin-Finance/Documents/PublicAccessPolicies_Website.pdf.

[8] The MDOC has further stated that they have no intention of applying the new law retroactively. *See* MISS. DEP'T OF CORR., SELECT SENTENCING SCENARIOS 36 (2014), *available at* https://web.archive.org/web/20150221001715/http://www.mdoc.state.ms.us/PDF%20Files/Select%20Sentencing%20Scenarios.pdf.

violations.[9] The system is best explained by an anecdotal example.[10] The offender is initially sentenced by the judge to ten years, eight of which are suspended, leaving two years to serve. The offender would then be given five years of post-release supervision or probation. If the offender violates the terms of their probation, the probation officer then fully investigates the violation. The graduated sanctions system then takes over. The probation officer does a risk assessment and classifies the probationer as low, medium, or high risk.[11] Then, to determine the proper sanction, the risk level is combined with the number and severity of technical violations committed by the probationer.[12] The probation officer does this by using a matrix that then gives the judge various options for revocation or sanctions to be handed down to the probationer.[13]

The key for effectively utilizing the graduated sanctions system is to properly assess and categorize the probationer by risk level. The probation officers were given limited training in how to properly assess probationers as low, medium, or high risk.[14] Additionally, the probation officers or judges were not trained on how to properly apply the sanctions matrix before it was

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[9] A Westlaw search yielded few states that specifically refer to "graduated sanctions"; however, the Final Report recognizes that probation system reform is a growing trend in the United States. *See* FINAL REPORT, *supra* note 2, at 6-7.

[10] This example is purely hypothetical. It is being used to illustrate the process of how an offender gets into the probation system. It is not meant to show a factual situation nor is it modeled after a real case.

[11] *See* GRADUATED SANCTIONS MATRIX, *supra* note 7, at 6-8.

[12] *Id.* The risk level assessment is crucial in determining what eventual punishment, if needed, will be given to a probationer if probation is revoked for a technical violation.

[13] *Id.* The eventual punishment is up to the sole discretion of the judge. This means that while the matrix sets out a specific punishment, the judge has the option to only use the matrix as a suggestion and revoke probation as before.

[14] *See* Interview with Anonymous Field Officer, Miss. Dep't of Corr., in Tupelo, Miss. (July 1, 2014) [hereinafter Anonymous Interview]. According to a probation officer who wishes to remain anonymous, the training consisted of an hour and a half seminar on how to apply the new matrix system. Additionally, the only clarification provided in mass form was a frequently asked questions section of the MDOC monthly newsletter. *See Frequently Asked Questions About House Bill 585*, RESOURCE, July 2014, at 23 [hereinafter *Frequently Asked Questions*], *available at* https://web.archive.org/web/20150221020947/http://www.mdoc.state.ms.us/News%20Letters/2014NewsLetters/July2014.pdf.

implemented.[15] Issues arise because the differences in the risk assessment lead to different punishments handed down by the court.[16] The arbitrary nature of punishments in the court system has recently been brought to light in Mississippi.[17] A recent *New York Times* article reported on the arbitrary nature of indictments and jail time by county prisons in Mississippi.[18] The article traced this arbitrariness to the lack of a state law governing bond limits and jail time before indictments, even though a public defender can be appointed at any time.[19] The same could be said for the new graduated sanctions policy. While no case has become ripe in the state as a challenge to the sanctions, the way in which probationers are classified gives rise to concern.[20]

The risk assessment directly affects every probationer under MDOC control. The risk level, in part, determines the punishment that a probation officer or the court will hand down if a technical violation of probation occurs.[21] If the probationer is incorrectly classified, the probationer could then face months in prison, when they could have received community service. If a mistake is made in the classification process, the probationer can then be held in prison illegally, with a further set back to their probation. Additionally, the reform to the probation system fails to reach back retroactively to apply to probationers that had probation revoked before July 1, 2014.[22] The intent of House Bill 585 was to

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[15] *See Frequently Asked Questions*, *supra* note 14, at 23-24.

[16] *See* GRADUATED SANCTIONS MATRIX, *supra* note 7, at 6-8.

[17] *See* Campbell Robertson, *In a Mississippi Jail, Convictions and Counsel Appear Optional*, N.Y. TIMES, Sept. 25, 2014, at A15.

[18] *Id.*

[19] *Id.* The article discusses how the rights of offenders were violated by being held for months at a time in a county jail without being indicted. *Id.* When the district attorney was questioned about a particular case, he did not know what the offender had been charged with, let alone when he was to be indicted. *Id.* at A18. The article hinted that these incidents were not isolated. *Id.* The same problems can arise with the new graduated sanctions system if precautions are not taken.

[20] While there is no case yet in Mississippi, a Kentucky case raises potential constitutional issues with the classification process. *See* Jarrell v. Commonwealth, 384 S.W.3d 195, 200 (Ky. Ct. App. 2012) (holding that the probationer could not sue the state when the probation officer did not give the probationer papers explaining the limits of his probation because the judge explained the limits at his sentencing and that the lack of paper did not violate the constitutional rights of the probationer).

[21] *See* GRADUATED SANCTIONS MATRIX, *supra* note 7, at 6-8.

[22] *See Frequently Asked Questions*, *supra* note 14, at 23-24.

decrease prison populations and ignores an obvious way to do so. The law should reach back to treat all probationers who committed technical violations in the same way, which requires that the law apply retroactively.

The commentary on this new law will offer a solution to the problems with the law. This solution will not look to do away with the new law but instead focus on proper implementation. First, because the role of the probation officer is critical in effective management of probation and post-release supervision, the training policies of probation officers, specifically how the officers were trained on how to handle the assessments and graduated sanctions, will be examined to determine their effectiveness. Second, for the new law to truly achieve its purpose of decreasing prison populations, this Comment will examine the use of retroactive application of the policy to reach back to probationers whose petitions were filed before the July 1, 2014, implementation. A combination of these two policy revisions will create revisions to House Bill 585 and allow for its proper and legal implementation.

I. BACKGROUND LAW

A. Probation Essentials

In order to understand why House Bill 585's graduated sanctions system has flaws, the probation system must first be explained in general terms. There are three basic types of probation: non-adjudicated probation, adjudicated probation, and post-release supervision.[23] All three forms of probation involve a suspended sentence that can be given to the offender if the terms

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[23] *See* MISS. DEP'T OF CORR., ALTERNATIVES TO INCARCERATION 4 (2007) [hereinafter ALTERNATIVES TO INCARCERATION], *available at* http://www.mdoc.ms.gov/Admin-Finance/Documents/alternatives_incarceration.pdf. Non-adjudicated probation is only available for first time, non-violent offenders. *Id.* at 6. Non-adjudication is also used in the drug court program set up by the legislation as a means for expunging felony records. *Id.* at 6, 8. Adjudicated probation, or suspended sentence probation, is up to the judge's discretion. *Id.* at 7. Adjudicated probation may not exceed five years, but if all monies have been paid to the court, and the probation officer believes that the probationer is well situated, the probationer can be released early. *Id.* Post-release supervision is limited to a maximum of five years and is treated the same way as adjudicated probation. *Id.* at 12.

of probation are violated.[24] Non-adjudicated probation is when an offender is sentenced to a suspended sentence and given probation, and, if they complete the probation, the offender's record is expunged.[25] Adjudicated probation works the same way, but the record is not expunged, the offender just avoids prison.[26] Post-release supervision is probation after the offender serves time in prison.[27] All three work in the same way but are classified by when they take effect and how the offender is affected.[28]

All three forms of probation still exist but are now handled in a different way by the probation officer.[29] Before the graduated sanctions system, the offender would be sentenced to a term in prison, with a portion of that sentence suspended, and then serve a number of years on post-release supervision.[30] After the offender was released from prison, he or she would meet with a probation officer who would explain the process and the limitations of probation.[31] Depending upon the terms of the offender's probation, the probation officer might look into the living situation of the offender, and, once the situation was deemed acceptable, the offender would be released back into the community.[32] The probationer then would report monthly, take random drug tests, and pay back all monies owed to the court system.[33] If the probationer did all of this, there was never an issue, and, when their post-release supervision was complete, they were free to do as they liked.

The biggest problem with the old probation system was how probation officers had to handle violations of probation.[34] If the probationer committed a new crime, it was a simple answer: probation was revoked, and the probationer had all or a portion of

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[24] *Id.* at 6-7, 12.

[25] *Id.* at 6.

[26] *Id.* at 7.

[27] *Id.* at 12.

[28] *Id.* at 6-7, 12.

[29] *See* MISS. CODE ANN. §§ 47-7-33, 47-7-34, 47-7-37 (2014).

[30] *Id.*

[31] *See* ALTERNATIVES TO INCARCERATION, *supra* note 23, at 12.

[32] MISS. CODE ANN. § 47-7-2(p) (2014).

[33] *See* ALTERNATIVES TO INCARCERATION, *supra* note 23, at 12; MISS. CODE ANN. § 47-7-35 (2014).

[34] *See* FINAL REPORT, *supra* note 2, at 16.

his or her suspended sentence imposed and returned to prison.[35] However, technical violations were a different story.[36] A technical violation is defined as any violation of the terms of probation that is not a new crime.[37] If the probationer committed just one technical violation, it was within the probation officer's prerogative to revoke probation and ask the judge to impose the suspended sentence.[38] This was impractical and burdensome though, so many times the probation officers would allow a few mistakes before filing a petition to revoke.[39]

This lack of choice in how to sanction or punish probationers that were committing technical violations led to a large portion of the prison population in the custody of the MDOC being there for technical violations of probation.[40] The large number of inmates created a budget strain and lack of bed space for the massive number of prisoners.[41] In order to make changes in the prison system, the Mississippi legislature formed a task force comprised of twenty-one individuals familiar with the prison system to find out where problems were and how the state could combat these issues.[42]

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[35] MISS. CODE ANN. § 47-7-37 (2014).

[36] *See* FINAL REPORT, *supra* note 2, at 16.

[37] MISS. CODE ANN. § 47-7-2(q) (2014).

[38] *See* FINAL REPORT, *supra* note 2, at 16. The all-or-nothing approach to technical violations led to confusion and unintended leniency by the MDOC. One failure to report could technically result in a full revocation of probation. However, many probation officers would grant a certain degree of leniency to the probationers but could not dole out punishment on their own. The Final Report saw a need for intermediate sanctions prior to a full revocation to give the probation officers greater control over the probationers, while at the same time giving clarity to the punishments. *Id.*

[39] *Id.*

[40] *Id.* at 9. In 2012, for the first time more inmates were incarcerated for revocation of probation than for new crimes. *Id.* In fact, there were 5,481 prisoners entering the system from revocations from supervision versus 4,973 for new criminal activity. *Id.*

[41] *Id.* at 4-5. Mississippi would have had to use $266 million to house all of the inmates by 2024. *Id.* The money saved from reforming the probation policy can now be used for other state needs, as well as increasing the budget for the community supervisor officers (probation officers). *Id.* at 20-21.

[42] *Id.* at 3-6. The Task Force was a bipartisan group tasked with identifying problems within Mississippi's courts and prisons and then making suggestions to the legislature on what could be done to correct the issues. *Id.* The Task Force met regularly over a six month time period and released a Final Report in December of 2013. *Id.*

B. Graduated Sanctions and House Bill 585

The Final Report released by the Task Force showed that Mississippi has the second highest number of prisoners per capita in the United States, trailing only Louisiana.[43] Additionally, if the number of inmates continued to increase at the current rate, the state would have to pay over $250 million in additional funds to house all the inmates.[44] The Task Force surveyed states across the nation facing similar issues, specifically looking at what states in the Southeast are doing.[45] The most effective measures from other states would then be suggested to the Mississippi legislature to form a new policy on how to curb inmate numbers, ultimately saving the state the $266 million price tag.[46]

States around the Southeast have begun to expand their probation and drug court programs as early intervention tools for keeping offenders out of prison and preventing recidivism.[47] Mississippi had an existing drug court program and now has a drug court in every judicial circuit in the state.[48] However, the Task Force found that the effective use of probation was greatly underused.[49] The Task Force also realized that the lack of efficiency in the probation system would not be able to handle an increased usage of probation.[50] The lack of sanctions and options

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[43] *Id.* at 4. Mississippi has 717 prisoners per every 100,000 residents of the state. *Id.* The average for the United States is 418 per every 100,000. *Id.*

[44] *Id.* at 5.

[45] *Id.* at 6-7. Many southern states, such as Georgia and South Carolina, amended the statutes for crimes against property and what constituted a felony crime against property. *Id.* at 14. Mississippi's statute for crimes against property had not been raised in over a decade and had a low threshold comparatively. *Id.* The lower threshold for dollar amounts for crimes against property means that more people are convicted of a felony crime, when in a neighboring state, the same act would have been a misdemeanor. *Id.*

[46] *Id.* at 5-6. The goal of the Task Force was to make unique suggestions for the legislature to act on. *Id.* The Task Force drew greatly from other states in various areas of prison reform. *Id.* at 6-7.

[47] *Id.* at 7. For example, Texas has greatly expanded their use of probation as an effective measure to curb the growing prison population. *Id.*

[48] *Id.* at 14. The drug court program has been in place in Mississippi for some time now and is a form of non-adjudicated probation. *Id.* The drug courts help to cut prison populations by keeping first-time, non-violent drug offenders out of prison and in an intensive rehabilitation program. *Id.* The drug court program also helps to reduce recidivism by treating the root addiction that led to the illicit activity. *Id.*

[49] *Id.* at 13.

[50] *Id.* at 21.

at the disposal of the probation officers was key to reforming and eventually expanding the use of probation.[51] The all-or-nothing approach to probation that was used would simply continue to grow the prison population.[52] The Task Force then looked at states that reformed and expanded their probation programs.[53] A popular and seemingly effective approach used by many states is the use of graduated sanctions. Numerous states use these sanctions, but the Mississippi system is most analogous to the systems in place in Texas, Vermont, and Kentucky.[54] The graduated sanctions give probation officers many different ways to sanction a probationer before a full revocation is reached.[55] Additionally, the Task Force suggested the use of early intervention programs that could be used in conjunction with the sanctions to get at the root of crime.[56]

When an offender is released from prison, he or she is assigned a probation officer from their judicial circuit that will handle all aspects of their probation or post-release supervision.[57] As part of the offender's initial meeting with the probation officer, the officer is to do an initial risk assessment on the probationer to determine their risk level for violating probation.[58] The probationer is then labeled as low, medium, or high risk for

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[51] *Id.* at 16. If expanding the probation program was truly going to cut down on prison populations, the manner in which probation was run had to be changed as well. One of the biggest influxes of inmates came from probation revocations caused by the all-or-nothing nature of the old law. Therefore, the Task Force had to change the actual probation system before expanding the use of probation could have any effect. *Id.*

[52] *Id.* at 9.

[53] *Id.* at 6-7. A growing number of states are starting to use graduated sanctions as a means of reforming probation. *Id.* at 11.

[54] *See* Anonymous Interview, *supra* note 14. The anonymous probation officer stated that they were told that the system is based largely off of the Texas system, but the statutes have similar wording to the Vermont and Kentucky systems.

[55] *See* GRADUATED SANCTIONS MATRIX, *supra* note 7, at 6-8.

[56] *See* FINAL REPORT, *supra* note 2, at 10. One message the Task Force was adamant about was trying to prevent recidivism. *Id.* Many of their suggestions to the legislature were aimed at getting prisoners and offenders counseling or treatment for the root of their criminal activity. *Id.* Currently, there are prison-based alcohol and drug treatment programs, but they are not as readily used by inmates. *Id.*

[57] MISS. CODE ANN. § 47-7-35 (2014).

[58] *See* GRADUATED SANCTIONS MATRIX, *supra* note 7, at 2.

violation purposes.[59] If a probationer does not have any violations of probation, the risk level assessment does not become a factor.[60] However, if there is a violation of probation, the risk levels are highly important.[61]

There are two types of violations that a probationer can commit, a technical violation and a non-technical violation.[62] A non-technical violation is a new crime.[63] A new crime results in an immediate revocation of probation, and the offender goes to prison for at least a portion of their suspended sentence for the original crime.[64] As defined by House Bill 585, a technical violation is "an act or omission by the probationer that violates a condition or conditions of probation placed on the probationer by the court or the probation officer."[65] This could be anything from a failure to report to a failed drug test.[66] When a probationer commits a technical violation under the graduated sanctions system, the probation officer has a variety of options based on a matrix that the MDOC developed for reference by the officers.[67]

To use the matrix, the probation officer applies the risk level of the probationer and the severity of the violation and then cross-references with how many violations have occurred.[68] The officer finds the appropriate grid square on the matrix and is given options for how to sanction the probationer.[69] The matrix was

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[59] MISS. CODE ANN. § 47-7-2(t) (2014). The probation officer is supposed to consider the nature of the crime, home life, past record, and a number of other risk factors when determining the risk level for probationers. *Id.*

[60] *Id.* § 47-7-37. If a probationer pays back all monies owed to the court and the justice system, the probationer can actually be released early from supervision. *Id.*

[61] *See* GRADUATED SANCTIONS MATRIX, *supra* note 7, at 6-8. The risks levels, when combined with the number of violations that a probationer has, determines the severity of the sanction that the probationer will receive for a technical violation. *Id.*

[62] *See* Anonymous Interview, *supra* note 14.

[63] *See* GRADUATED SANCTIONS MATRIX, *supra* note 7, at 1. A new crime automatically disqualifies the use of the graduated sanctions matrix and is an automatic revocation of probation. The full suspended sentence can then be imposed on the offender. *See* Anonymous Interview, *supra* note 14.

[64] MISS. CODE ANN. § 47-7-37 (2014).

[65] *Id.* § 47-7-2(q).

[66] *See* GRADUATED SANCTIONS MATRIX, *supra* note 7, at 6-8.

[67] *Id.*

[68] *Id.*

[69] *Id.* For the first few technical violations, the probation officer has three to five options on how to sanction the probationer. But when violations become more frequent,

intended to be used by the probation officer as a step program and to administer clear and decisive sanctions against a non-compliant probationer.[70] The severity of the sanction is dependent upon the risk level of the probationer, severity of the violation, and how many violations have occurred.[71]

For example, suppose an offender is arrested for a crime and enters a guilty plea. The circuit court judge sentences the offender to ten years in the custody of the MDOC, suspends five of the years, and gives five years of post-release supervision, leaving five years to serve. After the prisoner is released from prison, he or she is assigned a probation officer who does a risk level assessment. Six months into his or her probation, the probationer commits a variety of technical violations ranging from a failed drug test to not reporting. Under the old system, the risk assessment would be irrelevant, and the probation officer would file a petition to revoke probation.[72] The probationer could then be sent back to prison for at least part of the five years that were suspended.[73]

With the graduated sanctions system, when utilized properly, the first technical violation that the probationer had can be handled entirely by the probation officer.[74] If the probationer is low risk, the sanction could be a few hours of community service.[75] If the probationer is a high risk level, the probation officer could require extra reporting or another more serious sanction.[76] If technical violations keep adding up, the sanctions get more severe, eventually leading to a revocation.[77] On the first revocation, a judge can sentence a probationer to a maximum of ninety days in a technical violation center.[78] These centers are designed to treat

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the sanctions are more restrictive and point toward revocation or time in a technical violation center. *Id.*

[70] *See* FINAL REPORT, *supra* note 2, at 16.

[71] *See* GRADUATED SANCTIONS MATRIX, *supra* note 7, at 6-8. The step program is supposed to be used in conjunction with the sentencing circuit court so that revocation becomes more of a last resort effort. *Id.* The risk level and number of violations determine what steps the probation officer or judge needs to take. *Id.*

[72] MISS. CODE ANN. § 47-7-37 (2014).

[73] *Id.*

[74] *See* GRADUATED SANCTIONS MATRIX, *supra* note 7, at 6-8.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 8.

probationers for addiction and give counseling and have become a last resort effort to prevent recidivism.[79] If the probationer continues to commit technical violations, they can be sent to a technical violation center for a maximum of 180 days.[80]

C. 42 U.S.C. § 1983

The law that could be used to attack House Bill 585 involves a complex mix of government immunity and civil rights issues, but the most feasible attack on the bill would be by using 42 U.S.C. § 1983.[81] This section states that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any [s]tate . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .[82]

On the face of this law, it would seem that any state employee that causes constitutional injury to any person would be liable.[83] In *Imbler v. Pachtman*, the Supreme Court stated "[t]he statute thus creates a species of tort liability that on its face admits of no immunities."[84] The Court went on to imply that the majority view of courts does not suggest that this is so.[85]

The language "every person" raises two questions that the courts have attempted to answer.[86] These are (1) whether government immunity applies to all government employees, and (2) whether respondeat superior can lead to the agency being sued

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[79] *See* FINAL REPORT, *supra* note 2, at 16-17.

[80] *See* GRADUATED SANCTIONS MATRIX, *supra* note 7, at 8.

[81] *See* 42 U.S.C. § 1983 (2012).

[82] *Id.*

[83] *Id.* This comes from "[e]very person"; however, courts have determined that qualified immunities still apply even though the language says that every person can be held liable.

[84] Imbler v. Pachtman, 424 U.S. 409, 417 (1976). This case expressed the concerns that § 1983 can lead to tortious litigation from plaintiffs and is not focused on civil rights litigation. *Id.*

[85] *Id.* Specifically, the Court stated, "[b]ut that view has not prevailed," when expressing the view that some courts believe that the law should be applied as strictly as the language implies. *Id.*

[86] *Id.*

and not just the agent of the government.[87] The courts have held that government agents and employees still enjoy a great deal of qualified immunity for their actions.[88]

For a government employee to raise the qualified immunity defense, the court must use a two-prong test, a subjective prong and an objective prong.[89] If the employee passes both of these prongs, the qualified immunity defense is successfully raised, and the government agent cannot be sued.[90] The subjective prong is if the agent acted "'with the malicious intent to cause a deprivation of constitutional rights or other injury' to the plaintiff."[91] Malicious intent has been interpreted as proof of the agent's intent to intentionally cause harm or to take action that may have not been intended to do harm but was so likely to cause harm that the agent should have known that harm would result.[92] Furthermore, the plaintiff must show that malicious intent was the cause of the injury and not mere negligence.[93] Negligence does not meet the malicious intent prong for qualified immunity.[94]

The Supreme Court has defined the objective prong of the qualified immunity test as whether or not the agent "'knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of' the person affected."[95] This test essentially boils down to if the person knew or should have known that the actions they

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[87] *See* Bohannan v. Doe, 527 F. App'x 283, 291, 299 (5th Cir. 2013).

[88] *See Imbler*, 424 U.S. at 417-18. So long as the government agent is acting reasonably within their prerogative, the agent can keep their immunity. *Id.* This is so that government employees do not have to continually worry about liability as a result of them acting in their official capacity. *Id.* This means that a government employee cannot get sued for tortious conduct if they are within the normal bounds of their official capacity. *Id.*

[89] *See* Fowler v. Cross, 635 F.2d 476, 482 (5th Cir. 1981).

[90] *Id.* While the Fifth Circuit used the two prongs and applied them to the government defendant, it did not appear that the plaintiff had the duty to prove that the government agent had passed both prongs but that the government agent had to use it as an affirmative defense. *Id.*

[91] *Id.* (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).

[92] *Id.* Basically, if the action of the agent was fairly certain to cause harm, then the agent passes the malicious intent prong and can be held liable.

[93] *Id.*

[94] *Id.* Negligence does not meet the malicious intent standard. Malicious intent infers a conscious decision of what the defendant knew or should have known. *Id.*

[95] *Id.* (quoting *Wood*, 420 U.S. at 322).

were taking were affecting the constitutional rights of another person.[96] If a government agent successfully shows the court that they pass both of the prongs for qualified immunity, then the case is dismissed.[97] However, if the court is not convinced, the veil of government immunity can be pierced for the government agent.[98]

For a § 1983 case to be successful, there are four criteria that a plaintiff must meet: "(1) a specific constitutional right; (2) the defendant's intent to retaliate for the exercise of that right; (3) a retaliatory adverse act; and (4) causation."[99] These are the four prima facie elements that the plaintiff must prove to claim damages. If any of the four are missing, the claim will fail.[100]

II. ARGUMENT

As stated previously, this Comment does not contend that change was not needed in how Mississippi ran its prison system.[101] Simply put, this will serve as a critique of how House Bill 585 was implemented and potential problems that are presented by the new law.[102] First, the arbitrary nature of the classifications is due to a lack of training of MDOC officers. Second, retroactive application of the probation reforms should be applied to achieve the true purpose of the bill.[103] Third, a § 1983 case could be possible to show the ineptitudes of the implementation of House Bill 585. Finally, with a few revisions and training requirements, House Bill 585 can become a groundbreaking law for probation reform. The correct way to achieve prison reform is possible, and there are numerous ways to achieve this without potential civil rights violations.

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[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *See* Bohannan v. Doe, 527 F. App'x 283, 291 (5th Cir. 2013). This case involved police retaliation, but the prima facie elements of a § 1983 case still hold true.

[100] *Id.*

[101] *See supra* notes 23-42 and accompanying text.

[102] *See supra* notes 43-80 and accompanying text.

[103] *See supra* note 8 and accompanying text.

A. The Graduated Sanctions and Risk Assessments Lead to Arbitrary Classifications

The graduated sanctions were set up as a way to combat prison overcrowding in the state of Mississippi.[104] According to the Final Report released by the Prison Reform Task Force enacted by Mississippi in 2013, Mississippi would not be able to house or pay for the prison system as it then existed by 2024.[105] This was largely due to the growing number of non-violent offenders and probationers serving time under the MDOC in the prisons.[106] In 2012, the MDOC housed more prisoners that were incarcerated because of probation revocations than prisoners that were incarcerated for new crimes.[107] A large portion of probationers were incarcerated for technical violations.[108]

A technical violation is simply any violation of the terms of probation (or any form of supervised release) that does not constitute a new crime.[109] These can range from a failure to report to a failed drug test.[110] Before House Bill 585 was enacted, a probation officer had two options to deal with technical violations—note them in the probationer's file and ignore the violation, or a full revocation of probation.[111] A full revocation

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[104] *See supra* notes 2-3 and accompanying text.

[105] *See supra* notes 45-46 and accompanying text. The Task Force was made up of twenty-one persons and was meant to be a bipartisan effort to curb prison overcrowding and prevent further increases in the prison population of Mississippi. The Task Force was made up of persons familiar with the criminal procedure in the state, such as judges, attorneys, and legislators.

[106] *See supra* notes 40-41 and accompanying text. Non-violent offenders outnumbered violent offenders at the time the Final Report was released. The report concentrated on not only saving money and cutting prison populations, but made an effort to effectively rehabilitate non-violent offenders. The rise in non-violent offenders was particularly worrisome to the members of the task force because studies have shown that prison can increase criminal ties. *See supra* note 47 and accompanying text.

[107] *See supra* note 40 and accompanying text.

[108] *See supra* note 40 and accompanying text.

[109] *See supra* note 37 and accompanying text.

[110] *See supra* note 37 and accompanying text.

[111] *See supra* notes 38-39 and accompanying text. The Task Force noticed that there was a lack of options for the probation officers to use to properly punish the probationers. For instance, if a probationer failed to report once, the officer could technically revoke probation for that one violation. However, one missed meeting does not necessarily constitute a revocation and imposing a suspended sentence. Therefore, the probation officers would often ignore smaller violations and could not effectively

means that the probationer could then face the entirety of the suspended sentence from their original offense.[112] Due to the large number of probationers in the state, a large number of probationers were being put back into the prison system for technical violations.[113]

The Final Report, and eventually House Bill 585, sought to curb the large numbers of probation violators from returning to MDOC control.[114] To do so, House Bill 585 created a matrix of graduated sanctions for technical violations that accounts for risk level and number of violations.[115] When used effectively, the probation officer, in conjunction with the circuit courts, will use the sanctions to prevent probation revocations.[116] However, the risk assessment of the graduated sanction system has fundamental flaws that create civil rights violations of the individual probationers.

Upon release from MDOC custody, an offender is assigned a probation officer that will handle their post-release supervision or probation.[117] The probation officer then assigns a risk level for the probationer based on their criminal record, living situation, and a number of other factors.[118] The probationer is then assigned as low, medium, or high risk.[119] The risk level then affects how the probation officer is to handle the sanctions prescribed by the graduated sanctions matrix if technical violations arise.[120] A probationer that is classified as a low risk probationer has much

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control the probationers. This is why the graduated sanctions system was implemented. *See supra* notes 38-39 and accompanying text.

[112] *See supra* note 38 and accompanying text.

[113] *See supra* notes 40-42 and accompanying text.

[114] *See supra* note 56 and accompanying text.

[115] *See supra* notes 11-13 and accompanying text.

[116] *See supra* notes 67-71 and accompanying text. The system is meant to be used as a guideline for probation officers in how to administer clear and swift sanctions for technical violations. In my personal experience, the probation officers would simply count the number of violations, then file a petition for revocation, essentially guaranteeing that the probationer would then immediately get the strongest possible punishment. This is due largely to the lack of training by the MDOC for its probation officers. *See supra* notes 67-71 and accompanying text.

[117] *See* ALTERNATIVES TO INCARCERATION, *supra* note 23, at 12.

[118] *See supra* note 32 and accompanying text.

[119] *See supra* note 59 and accompanying text.

[120] *See supra* notes 67-71 and accompanying text.

more lenient potential sanctions for technical violations than a high risk probationer.[121]

The aforementioned Final Report called for detailed and extensive training for all probation officers on how to handle the classification of probationers.[122] However, the reality was that the probation officers received little training on how to classify and apply the graduated sanctions.[123] In order to combat the confusion, the MDOC released a brief question-and-answer formatted article in their monthly newsletter.[124] However, probation officers are still classifying probationers with little training on how to do so.

Furthermore, the section of the MDOC that is now tasked with dealing with the graduated sanctions is understaffed and underfunded.[125] There are currently almost 40,000 probationers that have to be classified and sometimes sanctioned by a department within the MDOC that receives little more than $20 million annually out of an over $300 million budget.[126] This is largely due to the issue that began the need for prison reform: prison overcrowding.[127] The more than $250 million that is not going toward the probationers and probation officers is going toward the costs of housing prisoners.[128]

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[121] *See supra* note 68 and accompanying text. According to the matrix, a low risk probationer starts at community service and can only get ninety days in a technical violation center for multiple violations and a revocation. However, a high risk probationer starts with much more severe sanctions and can get up to 180 days in a technical violation center for the same number of violations. *See supra* notes 74-80 and accompanying text.

[122] *See* FINAL REPORT, *supra* note 2, at 18. The report called for yearly training on how to classify probationers, similar to CLEs for lawyers. *Id.* The report suggested training on how to handle each case and how to properly assess risk levels; however, the MDOC has only provided minimal guidance and training to its officers. *Id.*

[123] *See* Anonymous Interview, *supra* note 14. The anonymous probation officer suggested that there was only an hour and a half of total training in how to apply the new law, and there was much confusion on how to treat probationers when the new law came into effect. *Id.*

[124] *See supra* note 14.

[125] *See* FINAL REPORT, *supra* note 2, at 5.

[126] *Id.* In comparison to the prison funds, the supervision area of MDOC is vastly underfunded, which also means understaffed. *Id.* The Final Report estimates that over two hundred million dollars will be saved by cutting back on the prison population, which is money that should go directly to effectively running the probation system. *Id.*

[127] *See supra* notes 2-5 and accompanying text.

[128] *See supra* notes 41-43 and accompanying text.

The arbitrary nature of Mississippi's prisons has recently been brought to light by a *New York Times* article.[129] The article references a recently filed suit against Scott County, Mississippi: "The suit, brought by the American Civil Liberties Union and the MacArthur Justice Center, says that when [citizens] are arrested, steep and 'arbitrary' bail amounts are set, with no consideration of a person's ability to pay."[130] This article specifically dealt with county jails illegally holding offenders in jail without indicting them.[131]

> Legal experts said such circumstances were widespread, even if this was an extreme example. Steep bail amounts and long jail stays without access to a lawyer are particularly common for those charged with misdemeanors, said Alexandra Natapoff, a professor at Loyola Law School in Los Angeles.[132]

While the county prisons are not run by the MDOC, the article noted a lack of state run oversight and no central authority controlling how indigent offenders are handled in the court system.[133] The lack of training coupled with the arbitrary classifications make a civil rights lawsuit extremely likely.[134]

B. House Bill 585 Should Be Applied Retroactively to Achieve the Legislative Intent of the Bill

The Final Report stated that the core reason for prison policy reform was overcrowding.[135] The overcrowding and lack of future bed space for prisons would have been a financial drain on

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[129] *See* Robertson, *supra* note 17, at A15.

[130] *Id.*

[131] *Id.* The article specifically mentioned inmates of the county jail that had been held without an indictment for months. *Id.*

[132] *Id.*

[133] *Id.* at A18. When asked about the illegal incarceration of a specific inmate, the district attorney's office for the county did not even have an open file on the inmate being held. *Id.* This lack of communication between the courts and the jails evidently is widespread, according to the article. *Id.*

[134] *See* 42 U.S.C. § 1983 (2012). With the broad wording of this statute, it appears that any discrepancies that result in a harsher sentence could end in a suit being brought by a probationer. Therefore, the MDOC needs to ensure that the probation officers are very well trained in how to classify probationers.

[135] *See supra* notes 2-8 and accompanying text.

taxpayers in an amount over $250 million.[136] However, the Final Report, and ultimately House Bill 585, did not apply the new policy retroactively.[137] In order to truly achieve the purpose and legislative intent of both the Final Report and House Bill 585, the graduated sanctions for technical violations must be applied retroactively.

Retroactive application of criminal law has always been an issue due to the Constitution's ban of ex post facto laws.[138] Applying House Bill 585 will not violate the Constitution for a simple reason. The ex post facto ban means that someone cannot be charged with a crime after it is made a crime, if the act was legal at the time committed.[139] Retroactively applying House Bill 585 simply lessens the prison sentences of offenders already in custody.

In *United States v. Reynard*, the Southern District of California held that a retroactive application of a policy change to probation did not create an ex post facto problem and did not violate the due process of the probationer.[140] In *Reynard*, the court analyzed whether a more restrictive policy could be retroactively applied to a federal probationer.[141] The court applied a two-prong test: (1) whether the legislature clearly stated that the law was to be applied retroactively, and (2) whether the new law would have adverse effects if applied retroactively.[142]

In June of 2011, Attorney General Eric Holder stated in a United States Sentencing Commission hearing that the Fair Sentencing Act needed to be applied retroactively in order to ensure fundamental fairness for all prisoners under the federal system.[143] Attorney General Holder stated:

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[136] *See supra* notes 41-43 and accompanying text.

[137] *See supra* note 8 and accompanying text.

[138] U.S. CONST. art. I, § 9, cl. 3.

[139] *Id.*

[140] United States v. Reynard, 220 F. Supp. 2d 1142, 1157-62 (S.D. Cal. 2002).

[141] *Id.*

[142] *Id.* at 1147. HB 585 gives no guidance on if it can be retroactively applied; therefore, it fails the first test. However, the legislative intent of decreasing prison populations certainly implies that it can be applied retroactively.

[143] Eric H. Holder Jr., U.S. Attorney Gen., Statement Before the United States Sentencing Commission in the Hearing on Retroactive Application of the Proposed Amendment to the Federal Sentencing Guidelines Implementing the Fair Sentencing Act of 2010, 2 (June 1, 2011), *available at* http://www.ussc.gov/sites/default/files/pdf/

> But I am here today because I believe—and the Administration's viewpoint is that—we have more to do. Although the Fair Sentencing Act is being successfully implemented nationwide, achieving its central goals of promoting public safety and public trust—and ensuring a fair and effective criminal justice system—requires the retroactive application of its guideline amendment.[144]

The same principal should apply in the state of Mississippi. While the safety and well-being of the citizens of the state are the utmost responsibility of the government, making sure that every citizen, even those in the custody of the prisons, receives fair treatment is highly important as well.[145] Attorney General Holder addressed this point as well in his statement to the United States Sentencing Commission:

> The Commission's Sentencing Guidelines already make clear that retroactivity of the guideline amendment is inappropriate when its application poses a significant risk to public safety—and the Administration agrees. In fact, we believe certain dangerous offenders—including those who have possessed or used weapons in committing their crimes and those who have significant criminal histories—should be categorically prohibited from receiving the benefits of retroactivity, a step beyond current Commission policy.[146]

Attorney General Holder's argument should apply to Mississippi when reforming the prison system. The intent of House Bill 585 was never to ease punishment for violent offenders but instead to create a program for non-violent offenders that deals fairly with violations of probation. Public safety is always of utmost concern, but retroactivity of House Bill 585, to probationers who deserve it, would ensure fundamental fairness to all.

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amendment-process/public-hearings-and-meetings/20110601/Testimony_AG_Eric_Holder.pdf.

144 *Id.*

145 *Id.*

146 *Id.* at 2-3.

C. Possible Attacks to House Bill 585

A Kentucky case, *Jarrell v. Commonwealth*, challenged the definition of technical violations as a violation of the defendant's Fourteenth Amendment due process rights.[147] The defendant argued that because technical violations were not defined to him, his drug use called for a graduated sanction instead of a probation revocation.[148] This argument would not be persuasive in Mississippi because technical violations are clearly defined by House Bill 585 and by the MDOC.[149] Therefore, a probationer would have trouble raising this argument. However, because of the lack of training in how to properly assess probationers, a case under § 1983 could become ripe in Mississippi in the near future.

A lawsuit brought by a probationer against the MDOC would have to be brought under § 1983 of the United States Code. This would require a probationer to get past the probation officer's qualified immunity as a state employee.[150] As stated above, this would require the officer to show that they can pass the two-prong test.[151] The probation officer would have to show that they did not act with malicious intent that resulted in a violation of constitutional rights.[152] Then the probation officer has to show that they did not know or should not have known that their actions would result in a violation of a probationer's rights.[153] This would be hard to achieve for any plaintiff seeking to sue a probation officer.[154]

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147 *See* Jarrell v. Commonwealth, 384 S.W.3d 195, 198-99 (Ky. Ct. App. 2012). The offender never received a paper copy of the terms of his probation and, when it was revoked, he argued that, because it was not made clear to him in paper that drug charges were not technical violations, revoking his probation instead of using a graduated sanction violated his Fourteenth Amendment rights. *Id.* The Court of Appeals of Kentucky found that, while it was not given to him in paper, the no drug policy was made clear to him during his sentencing, and therefore no rights were violated. *Id.* This case did not challenge the classifying of the probationers themselves but showed that the potential for litigation is there when the judges and officers are inexperienced in dealing with the new law.

148 *Id.* at 198-99.

149 *See supra* note 37 and accompanying text.

150 *See supra* note 88 and accompanying text.

151 *See supra* notes 87-98 and accompanying text.

152 *See supra* notes 87-98 and accompanying text.

153 *See supra* notes 87-98 and accompanying text.

154 *See supra* notes 87-98 and accompanying text. This is hard because it partially deals with the mental state of the probation officer. This is difficult to prove because no

As hard as it would be to pierce the qualified immunity veil of a probation officer as an employee of the state, reaching the MDOC once the veil is pierced would be far easier. The probation officer would have failed to show that they were not acting with malicious intent and that they did not know that their actions would result in constitutional violations of rights.[155] This means that either the officer in question was not qualified for their position, or they were improperly trained on how to handle classifying probationers by the MDOC.[156] Both would be damning for the MDOC, as each of those scenarios shows at least some form of negligence on their behalf.[157] However, malicious intent is more than mere negligence.[158] Therefore, a probationer would have to show that the MDOC knew or should have known that their actions would have adverse effects on their constitutional rights.

This argument is made by showing the lack of training the probation officers had in how to classify probationers.[159] The classification ultimately decides the types of sanctions that a probationer faces if they commit technical violations.[160] Therefore, the MDOC should have known that poorly trained probation officers would violate the rights of probationers.[161] Bad classifications lead to illegal incarceration, which leads to § 1983 litigation. The MDOC did not take the proper steps to ensure that

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one knows the thoughts of a private individual but that individual. *See supra* notes 87-98 and accompanying text.

[155] This is a hypothetical situation to illustrate the point that the MDOC veil would not be as hard to breach as an individual's. This is due to the fact that the MDOC's policies are all public record, whereas the officer's thoughts are only known by that officer.

[156] The improper training that is constantly mentioned is known because of personal experience by the author. A probation officer in the northern part of Mississippi told the author that he received one and a half hours on what to do about the classifications and sanctions. Then, when questions were raised, the MDOC officer in charge of the training session could not answer but said, "We'll get back to you." *See* Anonymous Interview, *supra* note 14.

[157] *See supra* notes 87-98 and accompanying text. Negligence is not good enough, as mentioned earlier. The probationer would still have to show that the MDOC had malicious intent.

[158] *See supra* notes 87-98 and accompanying text.

[159] *See supra* note 123 and accompanying text.

[160] *See supra* notes 58-61 and accompanying text.

[161] *See supra* notes 91-94 and accompanying text. The standard for malicious intent is whether the officer knew or should have known that it would cause injury. *See supra* notes 91-94 and accompanying text.

probation officers could correctly classify probationers, and that qualifies as malicious intent for § 1983 purposes.[162]

The probationer that has been injured would then have to prove the four prima facie elements of a § 1983 claim: (1) a specific constitutional right, (2) the officer's suppression or violation of that right, (3) an adverse act that furthers the violation, and (4) causation.[163] The specific constitutional violation could vary; however, more than likely it would implicate the Eighth Amendment because of illegal incarceration.[164] This would occur when a probationer was classified as a high risk but was truly a medium or low risk.[165] The high risk classification leads to harsher punishments and longer time in jail. The officer would violate that right by mishandling the classification that lead to harsher punishment. The adverse act is not revisiting the classifications and revoking probation. By triggering the sanctions or revoking probation, the probation officer adversely affects the probationer that has been wrongly classified. The causation is the lack of training and mishandling of classifications.

This is a hypothetical situation because a case has not been brought forward. However, these hypotheticals are all extremely likely. A probationer that was wrongly classified and faced sanctions would have a legitimate case against both their probation officer and the MDOC at large. However, the prima facie elements mentioned above are not all that the probationer would have to show. In order for the probationer to be successful, the probationer would have to show that a probation officer was acting under color of a state law or code when the probationer's rights were violated.[166] Because the MDOC has power granted by

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[162] *See supra* notes 91-94 and accompanying text.

[163] *See supra* note 99 and accompanying text.

[164] *See supra* note 99 and accompanying text.

[165] *See supra* note 58 and accompanying text. The risk levels affect punishments in the graduated sanctions system.

[166] *See* Polk County v. Dodson, 454 U.S. 312, 317-18 (1981). "Under color of state law" means that a state employee or contractor must be acting in their official capacity when the probationer's rights were violated. The *Polk County* case dealt with a public defender that was contracted by the state. However, the Court held that the public defender was not acting under color of state law because lawyers are afforded different leniencies than other state employees. *Id.* at 317-18, 320-21. An MDOC probation officer now has to classify their probationers by order of state law, which firmly fits within the § 1983 mandate.

the state of Mississippi and its officers are treated as state employees, this would not be an issue.[167] The arbitrary classifications combined with the lack of training could end up being a curse for the MDOC.

D. Model for Improvement

The graduated sanctions system implemented in Mississippi is a step in the right direction to combat a serious problem. The state would have had no money or room for inmates by 2024, and the prisons would have undoubtedly been poorly run on such a limited budget. The new law implemented in House Bill 585 certainly serves its purpose, but the door is open to litigation for violations of the rights of probationers. Therefore, this solution will seek to correct the issues pointed out above.

By expanding the use of probation and cutting back on the prison population, the MDOC will save $266 million by the year 2024. The money would have gone to house the approximately 10,000 inmates in the state's various prisons. The state currently has nearly 40,000 probationers being served on a budget of less than $30 million. Therefore, with the money saved from the prisons, the MDOC can reinvest into the vastly underfunded and undermanned supervision division of the MDOC. This money can go toward hiring more qualified probation officers and better training of new and existing probation officers.

To further the savings to the state, the sanctions and the maximum sentences that come with them should be applied retroactively to reach back to probationers that had probation revoked before July 1, 2014. By doing so, the MDOC will free up more bed space and budget room. The legislative intent of the changes to House Bill 585 was to save the state money and prevent prison overcrowding. Simply applying the new law to probationers currently in prison would free up thousands of beds in the state prisons. Those free beds represent millions of dollars saved by the MDOC and the state of Mississippi.

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[167] This logical jump is made through the *Polk County* case. An MDOC officer has power granted by the state of Mississippi and is acting "under color of state law" when classifying probationers. It is critical for the officer to be acting under color of state law to reach the state of Mississippi as a potential defendant in a § 1983 action.

Obviously, throwing money at a problem will not always solve it. However, the money saved by the MDOC on the prisons can go toward effectively training all of its probation officers by implementing annual training in accurate classification of probationers. The MDOC probation officers would have to take a mandatory number of training hours on the classification process and how to apply the matrix. At first these classes would need to be extensive and thorough, but as time moves away from the enactment of the sanctions and classifications, a yearly refresher hour would be all that is needed. The training would move into the hiring process for probation officers, and from the first day on the job, probation officers would be able to correctly and effectively classify and sanction the probationer.

The training does not matter if there is no accountability within the MDOC; therefore, there should be a peer review process in place. This could be achieved in a variety of ways. The easiest way would be to have someone in each circuit that reviews each classification and sanction. This person (or people) would need to be familiar with the law and would more than likely need at least a juris doctor to be adequately qualified. This system would serve as a check to prevent errant or illegal classifications and sanctions. If nothing else, it would give the MDOC a second opinion on each classification, making a § 1983 case harder to prove.

The second option for the MDOC is derived from the "secret shopper" concept in grocery stores and restaurants. Once a quarter, an MDOC officer would pose as a probationer getting assigned to a probation officer for the first time. After the risk assessment, the MDOC officer would reveal him or herself and give feedback on how to improve the probation officer's work. This would provide instant feedback to officers on how they are handling classifications. This system would also allow the MDOC to self-regulate and "weed-out" weak probation officers. These systems would work most effectively when used together, but separate operation would at least bring some mistakes to light.

To think that any system would stop all litigation for the MDOC would be naïve. However, these suggestions would shore up weaknesses in House Bill 585 and within the MDOC. The retroactive application of the graduated sanctions system coupled

with the extensive overhaul of the training procedures within the MDOC would make any case based on the classifications as a violation of a probationers rights extremely difficult to win.

CONCLUSION

This critique is not solely for Mississippi, but for all states that are facing similar problems as Mississippi. Prison overcrowding and policy reform is an extremely hot topic in the legal and political spheres. The expansion of probation and reforming the sanction policies were meant to reduce the prison population in Mississippi and save the state over $260 million over the next decade. However, it could potentially come at a cost. The probation officers are already understaffed and overworked. The MDOC woefully underprepared those same probation officers to properly implement the policies that were meant to solve problems for the state. The classification system is arbitrary and vulnerable to litigation. Finally, the policy reforms that are meant to reduce prison populations and save millions of dollars are being undercut by not allowing the policies to be retroactively applied. Retroactive application of House Bill 585 would free up hundreds more beds in the Mississippi prison system and achieve the true purpose of the bill.

No system is perfect and there will always be litigation no matter how sound a law seems when drafted and passed. However, House Bill 585, especially in how it deals with probation reform, has left the state of Mississippi open to litigation. In order to help combat this possibility, the MDOC needs to reinvest money that it is saving back into the probation system. This money could go toward hiring more and better qualified probation officers, proper classification training of existing probation officers, and implementation of a peer review system to ensure that classifications are as accurate as possible. A combination of these further reforms to Mississippi's probation system with the retroactive application of House Bill 585 to reach back to

probationers already incarcerated would truly achieve what House Bill 585 wanted to accomplish from the outset: reform.

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