UIC Law Review

Volume 19 | Issue 3 Article 1

Spring 1986

Crime without Conviction: Supervision without Sentence, 19 J. Marshall L. Rev. 547 (1986)

Alfred B. Teton

ARTICLES

CRIME WITHOUT CONVICTION: SUPERVISION WITHOUT SENTENCE

THE HONORABLE ALFRED B. TETON*

Changes in the field of sentencing have made alternatives to incarceration the standard sentence in criminal cases for a number of reasons, philosophical and practical. Chief among these are overcrowded conditions in prisons, reluctance to incarcerate first offenders, avoidance of associations that could prove a hardening and embittering experience, and "because it does not involve the complete dislocation of the offender from the community in which he will ultimately have to live."[1] The best known of these alternatives is "probation," a generic term that has become a ready reference to all non-confinement options without regard to differences in their history and impact. Another alternative to confinement is supervision, a penalty which was not added to the Illinois Unified Code of Corrections ("the Code")[2] until 1976.

---

* The author is currently a Judge in the Circuit Court of Cook County, Illinois. B.A. University of Chicago; J.D. University of Chicago; L.L.M. Yale.

1. *Sentencing Alternatives and Procedures*, A.B.A. INST. ON JUD. AD. (2d ed. 1979).

2. ILL. REV. STAT. ch. 38, §§ 1001-1-1 to 1008-6-1 (1985). Under Illinois law, a court may impose either alone, or in combination, the following dispositions for all felonies and misdemeanors:

1. probation,
2. periodic imprisonment,
3. conditional discharge,
4. imprisonment,
5. that the offender clean up and repair the damages,
6. that the offender make restitution to the victim.

Id. § 1005-5-3(6). The legislature has, however, limited the court's discretion in imposing these alternatives to imprisonment in specified circumstances. *Id.* § 1005-5-3(c). For example, probation, periodic imprisonment or conditional discharge can not be imposed for murder, attempted murder, residential burglary, and criminal sexual assault, as well as specified other crimes. *Id.* § 1005-5-3(c)(2).

Apart from the Unified Code of Corrections, ILL. REV. STAT. ch. 38, §§ 1001-1-1 to 1008-6-1 (1985), conditional discharge or supervision is authorized under other Illinois statutes. *See* ILL. REV. STAT. ch. 56 ½, § 1410 (1985) (supervision allowed for first offenders of possessory offenses for cannibis or controlled substances); ILL. REV. STAT. ch. 37, §§ 704-7, 705-2(d), 705-4, 705-6 (1985) (supervision allowed under the Juvenile Court Act).

Before 1978, the annual reports of the Administrative Office of the Illinois Courts to the Supreme Court included all dispositions of probation, conditional discharges, and supervision under one heading: probation.[3] Since then, these annual reports have become more particularized and demonstrate an overwhelming acceptance of supervision as the preferential mode of disposition in misdemeanor, ordinance, and conservation charges (not cases) in the Municipal Department of the Circuit Court in Cook County.[4] This is illustrated in the following table which includes all such dispositions except those involving only fines:

Table of Dispositions[5]

	1982	1983	1984	Totals Number	%
Conditional Discharge	2522	2154	3441	8117	4.9
Imprisonment*	13862	16954	15036	45852	27.3
Probation	6165	6059	3780	16004	9.5
Supervision	28723	35394	33800	167890	100

*Includes periodic imprisonment.

Extrastatutory Period

Although serving as an instrumentality of punishing offenders without confinement, the utility of probation is attenuated for those defendants whose crimes do not warrant their being stigmatized with a record of conviction. In response to the demands of bar and bench, and the perceived interests of society, "supervision" evolved into an amalgam of probation and postponement. It was initially used only for minors, but once tried and found acceptable, "supervision" broke the age barrier. It became available to all defendants who are guilty of misdemeanors that do not warrant incarceration or the generation of a criminal record.[6]

In *People v. Parr*,[7] the Illinois Appellate Court for the First District declared supervision "an effective and useful tool in the administration of justice."[8] The court justified the practice of placing minors on supervision in these terms:

---

3. *Compare* ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS, 156 (1974) *and id.* at 172 (1975) *with* ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS, 210 (1978).

4. *See, e.g.* ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS, 210 (1978).

5. The data in this table was drawn from THE ANNUAL REPORTS TO THE SUPREME COURT OF ILLINOIS, (1982 ed. at 240; 1983 ed. at 246; 1984 ed. presently not in print).

6. *See* Sullivan, SUPERVISION COMES TO ALL OF ILLINOIS, 65 ILL. B.J. 190, 190-91 (1976).

7. 130 Ill. App. 2d 212, 264 N.E.2d 850 (1st Dist. 1970).

8. *Parr*, 130 Ill. App. 2d at 217, 264 N.E.2d at 853.

> When a trial court places a minor on supervision, it is with the hope of rehabilitating him. If at the termination of the supervision period, there is reason to believe that the defendant has been rehabilitated, the finding of guilty is not entered and the defendant is discharged, for the purpose of supervision is to save the minor a criminal record. However, if the court is advised at any time during the period of supervision of activities which demonstrate a defendant's misbehavior or lack of cooperation with an appointed supervisory agency, the court may then enter its finding of guilty on the date for which supervision was to terminate or at any time prior thereto.[9]

In another context, another appellate court characterized such action as "judge made law developed to meet social need."[10]

The Illinois Supreme Court reviewed the validity of supervisory orders in *People v. Breen*,[11] although the issue before the court was only the appealability of the order. The court described the procedure in the following terms:

> The practice of placing a defendant on supervision . . . apparently is fairly common. In one form, social service supervision, a defendant is ordered to report regularly to a social service agency during the period of his supervision, generally six months to a year, during which time his case is continued. When that period expires without further incident, the defendant is discharged from supervision and the criminal charge dismissed. In another form, court supervision, the case is similarly continued during the period of supervision, but the defendant is under no obligation other than to refrain from further criminal conduct. Apparently under both forms of supervision, the trial judge hears the evidence, satisfies himself of guilt and then either refrains from entering a finding of guilty or enters a finding, immediately vacates it and enters an order for supervision.[12]

The general acceptance of the practice notwithstanding, the Illinois Supreme Court unanimously found that the authority to determine "the nature, character and extent of the penalties" for criminal offense was legislative, not judicial," and held that "absent appropri-

---

9. *Id.* (cited with approval in People v. Jonas, 4 Ill. App. 3d 297, 299-300, 280 N.E.2d 731, 734 (1st Dist. 1972)).

10. Gronek v. Neuman, 52 Ill. App. 2d 250, 252, 201 N.E.2d 617, 618 (1st Dist. 1964).

11. 62 Ill. 2d 323, 342 N.E.2d 31 (1976). In *Breen*, the defendant had been found guilty of theft and was sentenced to the House of Correction for 90 days. *Id.* at 325, 342 N.E.2d at 32. Breen offered to repay the amount he had allegedly taken, so the trial court vacated its initial finding and placed Breen under "social service supervision." *Id.* Breen was thereby to replace and repay the sum of $180.00. *Id.* Breen appealed this disposition, but the trial court dismissed the appeal because there was no final judgment from which to appeal. People v. Breen, 26 Ill. App. 3d 547, 325 N.E.2d 738 (1st Dist. 1975). Breen's appeal to the Illinois Supreme Court was, however, accepted. *Breen*, 62 Ill. 2d at 325, 342 N.E.2d at 32.

12. *Breen*, 62 Ill. 2d at 326, 342 N.E.2d at 32. After the Code authorized supervision, the entry of an order of supervision, immediately vacated, was held impermissible. People v. Scognamiglio, 119 Ill. App. 3d 747, 752, 457 N.E.2d 99, 102 (2d Dist. 1983); People v. Oswald, 106 Ill. App. 3d 645, 650, 435 N.E.2d 1369, 1373 (2d Dist. 1982).

ate legislation, a trial judge is without authority to place a defendant on supervision."[13] Accordingly, the court commended "the subject to the consideration of the General Assembly."[14]

The Supreme Court's rejection of extrastatutory supervision in *Breen* inspired the legislature, which had been engaged in twenty years of contemplative thought about supervision,[15] to amend the Code[16] and create a statutory haven for supervision. The statute so swiftly enacted, within little more than six months after the *Breen* decision, blended the "sociological" and "court" forms of supervision described in *Breen*. This was accomplished by authorizing the trial court to impose conditions of supervision specifically itemized in the Code, or other conditions which the court found in its discretion to be appropriate.[17]

The Code defines the available non-confining dispositions as:

Probation: "a conditional revocable release under the supervision of a probation officer."[18]

Conditional discharge: "conditional and revocable release without probationary supervision."[19]

Supervision: "conditional and revocable release without probationary supervision for a period of time, at the successful conclu-

---

13. *Breen*, 62 Ill. 2d at 327-28, 342 N.E.2d at 33-34.
14. *Id.* at 328, 342 N.E.2d at 34.
15. Sullivan, *Supervision Comes to All of Illinois*, 65 ILL. B.J. 190 (1976).
16. ILL. REV. STAT. ch. 38, § 1005-1-21 (1985) (effective Aug. 2, 1976).
17. ILL. REV. STAT. ch. 38, § 1005-6-3.1 (1985). In particular, a court may:
[I]n addition to other reasonable conditions . . . as determined . . . in the proper discretion of the court . . . require that the person:
(1) make a report to and appear in person before or participate with the court or such courts, person, or social service agency as directed . . .;
(2) pay a fine and costs;
(3) work or pursue a course of study or vocational training;
(4) undergo medical, psychological or psychiatric treatment; or treatment for drug addiction or alcoholism;
(5) attend or reside in a facility . . . for the instruction or residence of defendants on probation;
(6) support his dependants;
(7) refrain from possessing a firearm or other dangerous weapon;
(8) and in addition, if a minor:
(i) reside with his parents or in a foster home;
(ii) attend school;
(iii) attend a non-residential program for youth;
(iv) contribute to his own support at home or in a foster home; and
(9) make restitution or reparation . . .;
(10) perform some reasonable public service work . . .;
(11) comply with the terms and conditions of an order of protection. . . .
Id. § 1005-6-3.1(c). The period of supervision must be reasonable, and may not exceed two years. *Id.* § 1005-6-3.1(b).
18. ILL. REV. STAT. ch. 38, § 1005-1-18 (1985).
19. ILL. REV. STAT. ch. 38, § 1005-1-4 (1985).

sion of which the charges are dismissed."[20]

The essential differences and similarities among these dispositions are clear: all involve prescribed but varying periods of supervision. Probation, however, must be served under a probation officer and both probation and conditional discharge, whether or not the prescribed periods are successfully completed, result in records of conviction. Conditions of probation and conditional discharge may include terms of periodic imprisonment. Supervision on the other hand, is limited to defendants not charged with felonies.[21] It does not require reporting or surveillance and, if the conditions thereof are complied with, no sentence is entered, the defendant is discharged, and the charges are dismissed. Two years after discharge of a successfully completed supervision, the record of arrest may be expunged except that an expungement for driving while under the influence of alcohol ("DUI") must await the passage of five years.[22] Moreover, a defendant previously convicted or assigned to supervision for DUI is precluded from securing a new order of supervision during a five-year moratorium.[23]

CONDITIONS OF SUPERVISION

Paragraph 1005-6-1(c) of the code provides that upon accepting a plea of guilty, or upon finding a defendant guilty, whether by jury, court,[24] or on stipulated facts, the trial court may enter an order of supervision if it believes that the offender will not commit further crimes and that the order would be in the best interests of justice, the public, and the defendant.[25] Once the court has determined that supervision will satisfy these awesome considerations and their manifestly unpredictable consequences, an order with appropriate conditions may be entered, further proceedings deferred, and entry of judgment postponed until either the conclusion of the supervisory period[26] or the revocation of supervision in accordance with the

20. ILL. REV. STAT. ch. 38, § 1005-1-21 (1985).

21. ILL. REV. STAT. ch. 38, § 1005-6-1(c) (1985). "The court may . . . enter an order for supervision of the defendant if the defendant is not charged with a felony. . . ." *Id.*.

22. ILL. REV. STAT. ch. 38, § 1005-6-3.1(f) (1985). Probationers, however, cannot have their sentence of probation expunged. People v. Bushnell, 101 Ill. 2d 261, 266, 461 N.E.2d 980 (1984). Regarding the DUI statute, see *infra* note 23.

23. A defendant who has been convicted or assigned supervision for violating Section 11-501 of the Illinois Vehicle Code, ILL. REV. STAT. ch. 95-½, § 11-501 (1985) (driving under the influence of alcohol), or a similar provision in a local ordinance, within the past five years, cannot be given supervision. ILL. REV. STAT. ch. 38, § 1005-6-1(d) (1985). The Illinois Supreme Court recently upheld the constitutionality of this moratorium. People v. Coleman, 111 Ill.2d 87, 488 N.E.2d 1009 (1986).

24. *See* People v. Boykin, 94 Ill. 2d 138, 445 N.E.2d 1174 (1983).

25. ILL. REV. STAT. ch. 38, § 1005-6-1(c) (1985).

26. ILL. REV. STAT. ch. 38, § 1005-6-3.1(d) (1985). Supervision has often been

statute.[27]

In discussing the determination of "appropriate" conditions, frequent reference to probation is unavoidable. For in the area of probation, precedent is plentiful and its applicability to supervision persuasive. In probation as well as supervision, both parties share a common objective in obtaining a written order that specifies the conditions. Colloquy among the parties and the trial judge is no substitute for a court order. In *People v. Susberry*,[28] the defendant was convicted of criminal housing management and sentenced to probation. The common law record reflected that the order provided: "Condition of probation is that building is to be reinspected six months from today and reports forwarded to the defendant, State's Attorney, and to the Court."[29] During the proceedings, the trial court said: "In six months if he violates probation by not having the building in good repair, he will serve the remaining six months in the House of Correction."[30] The appellate court stated that these proceeding and provisions of the Probation Act, including the requirement that an offender sentenced to probation shall be given a certificate setting forth the conditions, "makes the situation plain that conditions of probation should not be orally stated but should be spelled out in the probation order in clear and unmistakable detail."[31]

Although the Code does not provide that a certificate of conditions must be given concurrently with the order of supervision, repeated references to the entry of supervision orders, and the need to memorialize the conditions imposed, makes a written order of supervision indispensable.[32] The First Municipal District of the Circuit Court of Cook County has recently issued a directive for this purpose.[33] Moreover, a form of order with standard conditions is usually submitted by the State's Attorney, and additional conditions that are relevant to the offense may be added thereto.

---

analogized to a continuance because of the postponement of an entry of final judgment. *E.g.*, People v. Roper, 116 Ill. App. 3d 821, 824, 452 N.E.2d 748, 750 (1st Dist. 1983). As a consequence, the appealability of an order of supervision was debatable, People v. Tarkowski, 100 Ill. App. 3d 153, 160, 426 N.E.2d 631, 636 (2d Dist. 1981), until the Illinois Supreme Court amended its Rule 604(b). ILL. REV. STAT. ch. 110A, § 604(b) (1985). *See infra* note 110.

27. ILL. REV. STAT. ch. 38, §§ 1005-6-4 to 1005-6-4.1 (1985). For a discussion of revocation, see *infra* notes 61-70 and accompanying text.

28. 68 Ill. App. 3d 555, 386 N.E.2d 361 (1st Dist. 1979).

29. *Susberry*, 68 Ill. App. 3d at 559, 386 N.E.2d at 364.

30. *Id.*

31. *Id.* at 561, 386 N.E.2d at 365.

32. *Compare* ILL. REV. STAT. ch. 38, § 1005-6-3.1 (1985) (written certificate of conditions to supervision order not required) *with Susberry*, 68 Ill. App. 3d at 561, 386 N.E.2d at 365 (requiring written conditions of supervision).

33. Memorandum, Office of the Supervision Judge, Municipal Department of the Circuit Court of Cook County, Illinois (Sept. 11, 1985).

The Code itemizes[34] more than ten conditions of supervision that the court may impose, and authorizes the addition of "other reasonable conditions related to the nature of the offense or the rehabilitation of the defendant."[35] Significantly, however, one condition that may not be imposed is imprisonment. Despite some views that it is unwise to so limit the fashioning of a sentence,[36] the reviewing courts regard imprisonment incompatible with the purpose and philosophical inspiration of the legislation.[37] The attachment of any term of incarceration would irreconcilably contradict the determination made before supervision was imposed; to wit, that confinement is not required. Thus, the imposition of 24 hours in jail was overturned as unauthorized by statute and inappropriate.[38] The court that is moved to give a defendant placed on supervision a flavor of confinement appears to be inviting the favor of reversal.

Another condition the Code explicitly authorizes is restitution in an amount not exceeding the actual property or pecuniary loss.[39] "Restitution" is distinctly not to be equated with damages.[40] Efforts to expand a statute to permit the collection of damages in criminal proceedings have failed for the statute does not permit such enlargement of the remedy.[41]

When shall the financial capacity of the defendant to make restitution be determined? The statute is silent and the decisions have gravitated to the conclusion that the determination need not be made when the condition is imposed.[42] At that time, the order for restitution represents a goal for achievement, not a prediction of collectability.

The reason for urging that the ability to make restitution be determined when the order is entered, is that the hearing thereon will create more realistic expectations of both benefits and obliga-

---

34. *See supra* note 17 and accompanying text.

35. *See supra* note 17 and accompanying text. *See also* People v. Edwards, 135 Ill. App. 3d 671, 679, 482 N.E.2d 137, 142 (4th Dist. 1985) (the trial court has broad discretion in imposing conditions to supervision).

36. *See* Sullivan, *supra* note 15, at 192.

37. People v. Roper, 116 Ill. App. 3d 821, 452 N.E.2d 748 (1st Dist. 1983).

38. *Id.*

39. ILL. REV. STAT. ch. 38, § 1005-6-3.1(c)(9) (1985). *See also supra* note 17 and accompanying text.

40. Harland, *Monetary Remedies for the Victims of Crimes: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 113 n.344 (1982).

41. *See* People v. Chacon, 125 Ill. App. 3d 649, 657, 466 N.E.2d 374, 379 (2d Dist. 1984) (order of restitution must be adequately supported under restitution statute); People v. Prell, 299 Ill. App. 130, 133, 19 N.E.2d 637, 638 (1st Dist. 1939) (nothing in the probation law grants the power to use criminal process to collect damages).

42. *Chacon*, 125 Ill. App. 3d at 657, 466 N.E.2d at 379; *Edwards*, 135 Ill. App. 3d at 679, 482 N.E.2d at 142. *See also* People v. Maldonado, 109 Ill.2d 319, 487 N.E.2d 610 (1985) (requiring a consideration of ability to pay before a fine is imposed on conviction).

tions. Whatever time be elected for determining ability to pay, lump sum payments should not be ordered unless payable concurrently with the entry of the order; if not paid immediately, all financial obligations should be payable on an installment basis in accordance with a specific schedule. Monitorship of a default and payment program would not only improve the prospects for collection, but would also present opportunities to adjust the amount of the installments if changed conditions warrant.

If restitution is not made, supervision may not be revoked *unless* the failure to comply is due to a willful refusal to pay, with the burden of proof on the State.[43] Proof of nonpayment and "willful refusal" are not synonymous.[44] Imprisonment for involuntary nonpayment of fines has been held violative of the Equal Protection Clause.[45] The United States Supreme Court, in *Beardon v. Georgia*,[46] stated that "imprisonment may befall the probationer who fails to make sufficient bona fide efforts to pay restitution."[47] The *Beardon* Court reversed an order of revocation and a sentence of imprisonment because there was insufficient proof that the probationer had failed to make a bona fide effort to pay.[48] The Code, in requiring proof of a "willful refusal" to pay the fine, or to make restitution as a basis for revocation, appears to be in comfortable, constitutional compliance.[49]

Among the specific, optional conditions permitted in the Code[50] is that for "reasonable public service" such as "picking up of litter in public parks or along public highways or the maintenance of public facilities." Fashioning an appropriate public service assignment presents a challenge in both definition and disposition. What is "public service?" The term is not defined in the Act. When asked for an interpretation, the Illinois Attorney General, citing "the somewhat analogous provisions in Federal law for alternative work for conscientious objectors,"[51] concluded that the county board and

---

43. ILL. REV. STAT. ch. 38, § 1005-6-4.1(d) (1985). *See also* People v. Yantis, 125 Ill. App. 3d 767, 770, 466 N.E.2d 603, 605 (4th Dist. 1984) (it is the state which must prove that the defendant failed to comply with financial conditions of probations); People v. Mowery, 116 Ill. App. 3d 695, 703, 452 N.E.2d 363, 370 (4th Dist. 1983) (the state must pursue its civil remedies to collect money judgments).

44. People v. Harder, 59 Ill. 2d 563, 322 N.E.2d 470 (1975) (noncompliance not evidence of willfulness alone). The Illinois Constitution requires that allowances of adequate time for payments be made, in installments if necessary. ILL. CONST. art. I, § 14.

45. Bearden v. Georgia, 461 U.S. 660 (1982); Tate v. Short, 401 U.S. 395 (1971).

46. 461 U.S. 660 (1982).

47. *Id.* at 670.

48. *Id.*

49. *Id.*

50. ILL. REV. STAT. ch. 38, § 1005-6-3.1 (1985). *See supra* note 17 and accompanying text.

51. 1978 Op. Ill. Att'y Gen. 130 (no. S-1369).

circuit court could establish a program "either limited to work for governmental units or also including work for private nonprofit agencies."[52] The federal regulation referred to in the opinion considers appropriate alternate work to include: services to any governmental unit or political subdivision, and to nonprofit organizations primarily engaged in charitable activities for the benefit of the general public or for the improvement of public health of welfare.[53]

By law, the county boards in the several counties, in cooperation with the circuit courts, are authorized to develop programs of public service employment.[54] Until that is done, trial courts appear to have the authority to impose conditions for public service of far wider scope and substance than picking up litter. In particular, one might consider the effectiveness of applying this broad interpretation to dispositions of charges for violations of the motor vehicle laws. Conditions of supervision requiring those with skills and specialties, whether in business, entertainment, the professions or sports, to utilize them in public service assignments, might enhance ongoing programs to reduce the incidence and tragedy of motor vehicle episodes. The performance of conditions of service should be regularly, even rigorously, policed and no supervision should be terminated without a report on compliance.[55]

There is an amplitude of conditions that have been formulated in the trial courts under their discretionary powers to impose additional conditions. The touchstone of their propriety is relevance to the offense and the Code. Satisfying this test have been orders that a defendant guilty of aggravated battery and diagnosed as having a "paranoid stance" may be directed to remain at a designed hospital for psychiatric therapy and to refrain from making threatening telephone calls;[56] that one guilty of fraud in a business could not maintain a proprietary interest in a similar business;[57] that a defendant convicted of a stabbing was not to have any sharp instruments;[58] and that an offender remain within the state, a condition that is now specifically authorized for probationers.[59] Failing the test of rele-

52. *Id.* at 132.

53. 32 C.F.R. § 1660.5 (1977). This regulation was part of the Selective Service System, and stated which types of alternative service would be allowed in lieu of induction into the Armed Forces. *Id.*

54. ILL. REV. STAT. ch. 38, § 204(a)(1) (1985).

55. *See* Sullivan, *supra* note 15, at 152.

56. People v. McDonald, 52 Ill. App. 2d 298, 202 N.E.2d 100 (1st Dist. 1964).

57. United States v. Alexander, 743 F.2d 472 (7th Cir. 1984) (applying Illinois law).

58. People v. Nard, 32 Ill. App. 3d 634, 335 N.E.2d 790 (2d Dist. 1975).

59. People v. Ragen, 2 Ill. 2d 124, 117 N.E.2d 390 (1954). *See also* ILL. REV. STAT. ch. 38, § 1005-6-3(a)(4) (1985). However, an order requiring the defendant to leave the state for the period of probation is not valid. People v. Baun, 251 Mich. 187, 231 N.W. 95 (1930).

vance were conditions that one guilty of aggravated battery could not work in a tavern and that one convicted of a motor vehicle violation must get a haircut.[60]

VIOLATION OF CONDITIONS OF SUPERVISION

1. Violation Discovered During Supervision

When a violation of the conditions in a misdemeanor case is ascertained before the period of supervision expires, a petition charging the violation may be filed. The circuit court clerk may be ordered to issue notice of the charge to the offender. Concurrently, a warrant or summons, depending upon the circumstances, will then be issued. If the petition is personally served or the notice, warrant or summons is issued, the period of supervision is tolled and the term does not run until the disposition of the charges of violation.[61] The State has the burden of proving the violation "by the preponderance of the evidence."[62] The rationale for application of the civil standard of proof in revocation proceedings is that in such proceedings the issue is not the defendant's guilt; that was established when the order of supervision was entered.[63] Ranging even more broadly are those who do not regard an inquiry into revocation as criminal in nature, and assert that many evidentiary rules do not apply thereto.[64]

The scope of such generalizations would probably be narrowed when their application is sought. For example, it has been asserted that insanity is not a defense in a revocation proceeding.[65] It seems most likely that the insanity defense would not be disregarded when a determination is to be made of a "willful refusal" to pay.[66] The Illinois Supreme Court has indicated that a defendant who is not

---

60. People v. Dunn, 43 Ill. App. 3d 94, 356 N.E.2d 1137 (4th Dist. 1976) (haircut); People v. Brown, 133 Ill. App. 2d 861, 272 N.E.2d 861 (1st Dist. 1971).

61. ILL. REV. STAT. ch. 38, § 1005-6-4(a) (1985). Thus, when the defendant was in custody and appeared in court, neither a summons nor warrant was required. People v. Speight, 72 Ill. App. 3d 203, 389 N.E.2d 1342 (1st Dist. 1976). Furthermore, a court has permitted a petition amendment after the probationary period expired. People v. Owens, 116 Ill. App. 3d 51, 451 N.E.2d 988 (2d Dist. 1983).

62. ILL. REV. STAT. ch. 38, § 1005-6-4(c) (1985). *See also Owens*, 116 Ill. App. 3d at 54, 451 N.E.2d at 990.

63. People v. Allegri, 127 Ill. App. 3d 1041, 1045, 469 N.E.2d 1126, 1129 (4th Dist. 1984) (probation case), *aff'd*, 109 Ill. 2d 309, 486 N.E.2d 606 (1985).

64. *Allegri*, 127 Ill. App. 3d at 1042, 469 N.E.2d at 1128. *But cf.* Judge Trapp's dissent, in which it is recognized that a revocation proceeding greatly affects personal rights and liberties and should therefore afford the defendant the protections granted to criminal prosecution defendants. *Id.* at 1049, 469 N.E.2d at 1132 (Trapp, J., dissenting).

65. *Allegri*, 127 Ill. App. 3d at 1047, 469 N.E.2d at 1132 *aff'd*, 109 Ill.2d 309, 486 N.E.2d 606.

66. *See supra* note 44 and accompanying text.

represented by counsel in a proceeding for revocation of probation, may be entitled to an admonition as to his right to silence.[67] The privilege against self incrimination was later said to be of "undoubted existence" in an opinion which unequivocally declared that except for the lesser burden of proof, civil rules do not apply to revocation proceedings.[68] However, the application of rules that are basic to an original criminal proceeding has been denied in revocation proceedings.[69] The reconciliation of these opinions must recognize the difference between the rhetoric and reality. The reality is that the constitutional rights and procedures that have a direct influence on the fairness and due process of the revocation proceeding have been enacted in the Code and enforced in the courts. Thus, unless waived, open court hearings, presence of counsel, and the rights of confrontation and cross examination are procedural imperatives.[70]

If the defendant is found to have violated the conditions imposed, whether or not the violative acts are criminal in character, the court, after a sentencing hearing, may continue the defendant on supervision with or without modifying the conditions, or may impose any sentence that was available at the time of the original "sentencing."[71] A surprising clause appears in Paragraph 1005-6-4(h) of the Code; to wit, that *"Resentencing* after revocation" shall be in accord with Paragraph 1005-5-3. The reference to "resentencing" is alien to supervision, for the Code provides that when an order of supervision is entered, the imposition of sentence shall be deferred.[72] The legislative intent is clear. A challenge to the use of "resentence" or its concept should result in giving the word "resentence" its obvious intended meaning as describing the sentencing process after revocation. And the primary concern of that process is that the punishment fit the crime; the original crime, that is.[73]

---

67. People v. Robertson, 30 Ill. 2d 168, 170, 195 N.E.2d 722, 723 (1964).

68. People v. Yantis, 125 Ill. App. 3d 767, 466 N.E.2d 603 (4th Dist. 1984). *See also* People v. Coffman, 83 Ill. App. 2d 272, 227 N.E.2d 108 (4th Dist. 1967), where standards of due process were applied though the new criminal code had not readopted the due process standards. *Cf.* People v. Forman, 108 Ill. App. 2d 482, 247 N.E.2d 917 (4th Dist. 1969) (permitting consideration of "rap sheets" even if hearsay evidence).

69. People v. Beard, 59 Ill. 2d 220, 319 N.E.2d 745 (1974).

70. People v. Speight, 72 Ill. App. 3d 203, 389 N.E.2d 1342 (1st Dist. 1976). *See also* People v. Paxton, 135 Ill. App. 3d 680, 683-84, 482 N.E.2d 180 (3d Dist. 1985) (lacking minimal due process for number of infringements, including admission of speculative and hearsay evidence).

71. ILL. REV. STAT. ch. 38, §§ 1005-6-4(e); 1005-6-4.1(e) & 1005-5-3 (1985).

72. ILL. REV. STAT. ch. 38, § 1005-6-1(c) (1985). Yet, the imposition of a sentence will not be deferred for probationary orders. *Allegri*, 127 Ill. App. 3d at 1045, 469 N.E.2d at 1129.

73. People v. Hoga, 109 Ill. App. 3d 258, 264, 440 N.E.2d 411, 415 (5th Dist. 1982). The process of probation, too, is concerned that the punishment fit the original crime. People v. Clark, 97 Ill. App. 3d 953, 424 N.E.2d 9 (1st Dist. 1981); People v. Matlock, 97 Ill. App. 3d 842, 423 N.E.2d 976 (4th Dist. 1981).

The code establishes a two-year limit for the period of supervision.[74] If that period has not expired, the resentence may prolong the existing supervision. If the two-year period has already expired, options remain open for punishing the offender for violation of supervision.[75] When the punishment for the original offense warrants, the defendant may be sentenced, alone or in combination, to probation, periodic imprisonment, conditional discharge and imprisonment and other penalties of a nonconfining nature listed in paragraph 1005-5-3(b) of the Code. Extending the supervision period for another two years may violate the two-year limit. Moreover, if additional time for supervision is tacked on and regarded as the initial "sentence," it might violate the five-year moratorium for a DUI offender.[76]

The punitive elements of "resentencing" could be manifold: a sentence of probation limited to one year;[77] or an extension of the supervisory period, but this time with probationary supervision and with additional conditions that could include periodic imprisonment and home confinement;[78] or even imprisonment. Probation, of course, creates a record of a conviction, perhaps bearing a more severe stigma than an adjudication of guilt after supervision. Imprisonment and periodic imprisonment can only be imposed if the offender has not been on supervision for six months if imprisonment is ordered, or for twelve months if periodic imprisonment is ordered, unless the trial court orders that the offender shall not receive credit for time spent in supervision.[79] In any event, the "resentencing" is subject to the maximum periods of imprisonment and periodic imprisonment, as set forth in the Code[80] for the offense with which the supervisee was first charged.[81]

2. Violations Discovered After Supervision

Revocation proceedings that are instituted before the period of supervision ends may obviously result in additional penalties. When prosecutors discovered violations of conditions after the period of supervision had ended, they nonetheless sought to initiate revoca-

74. ILL. REV. STAT. ch. 38, § 1005-6-3.1(b) (1985).
75. ILL. REV. STAT. ch. 38, 1005-6-4.1 (1985).
76. *See supra* note 22 and accompanying text.
77. ILL. REV. STAT. ch. 38, § 1005-6-2(b)(3) (1985).
78. ILL. REV. STAT. ch. 38, § 1005-6-3 (1985).
79. ILL. REV. STAT. ch. 38, § 1005-6-4.1(h) (1985).
80. ILL. REV. STAT. ch. 38, §§ 1005-7-1 & 1005-6-3(d) (1985).
81. *See supra* note 73 and accompanying text. § 1005-5-4, which proscribes the imposition of a "more severe" sentence on "resentencing except for conduct occurring after the original sentence, should not affect the penalties for violations of a supervisory order because when it was entered, the defendant was neither convicted nor sentenced. *See* ILL. REV. STAT. ch. 38, § 1005-6-1(c) (1985).

tion proceedings.[82] They were, and perhaps were doomed to be, unsuccessful.[83] This result was reached because of precedent in probation cases[84] and because logic compels the conclusion that a nonexistent condition cannot be modified or revoked.

The question naturally arises: what causes the State to permit the expiration of the supervisory period without acting to revoke the supervision? There are at least two answers. First, the defendant's violation of the conditions may be unknown during the supervisory period. Second, the order of supervision may have been entered without setting a new court date before the end of the prescribed period. To avoid this eventuality,[85] the Circuit Court of Cook County adopted Rule 11.6, which provides:

> 11.6 Termination of Supervision
> a. Whenever a defendant is charged with a crime that has the potential of a jail sentence he shall be required to return to court on the date set for the termination of supervision.
> b. The court, on the record, shall inquire of the prosecuting authority whether or not there is any objection to the termination.[86]

This rule will apply not only to all felonies but also to all misdemeanors that carry a term of imprisonment.[87] Faithful compliance with Rule 11.6 should reduce the possibilities of having the end of a supervisory period lapse without notice, and noncompliance escape without detection.

Noncompliance and Adjudication of Guilt

When the period of supervision ends, but the defendant has not complied with the conditions of supervision and time has effectively foreclosed opportunities for revocation,[88] the order of supervision abides a final disposition. Paragraph 1005-6-3.1 of the Code provides that at the conclusion of the period of supervision, the court shall

---

82. *See, e.g.*, People v. Hayslette, 107 Ill. App. 3d 647, 437 N.E.2d 1261 (3d Dist. 1982).

83. *Id.*

84. *E.g., In re* Pacheco, 67 Ill. App. 3d 96, 384 N.E.2d 986 (1st Dist. 1978). The *Pacheco* court viewed the need to hold revocation hearings prior to the expiration of the probationary period as different than the statutory code requirements for petition filing and service tolling during that probationary period. *Id. See also In re* Sneed, 72 Ill. 2d 326, 381 N.E.2d 272 (1978) (held that probation may not be extended or revoked without notice and a hearing and a finding that defendant has violated a condition of probation); People v. Randolph, 98 Ill. App. 3d 696, 424 N.E.2d 893 (1st Dist. 1981) (unless the state acts to toll the statute prior to the termination of the period of probation, the probation cannot be revoked because it has, in fact, ended).

85. *See* Sullivan, *supra* note 15, at 192.

86. Cir. Ct. of Cook Cty. Ill. R. 11.6 (effective May 1, 1985).

87. *See id.* (rule indicates that it will apply to any crime "that has the potential of a jail sentence").

88. People v. Hayslette, 107 Ill. App. 3d 674, 437 N.E.2d 1261 (3d Dist. 1982).

discharge the defendant who has successfully complied, and "enter a judgment dismissing the charges," which shall "not be termed a conviction."[89] The obverse of this provison is not explicitly expressed in the statute, therefore relegating the fate of the defendant who has not successfully complied, to the penumbra of judicial construction.

Precedent from supervision cases under the Code is lacking. However, decisions interpreting the "first offender" provision of the Cannabis Control Act[90] indicate that there is both jurisdiction and authority to enter an adjudication of guilt after the supervisory term has ended. This "first offender" provision, which contains language comparable to that facing a defendant placed on supervision under the Code, has been interpreted to confirm jurisdiction to enter an adjudication of guilt following the expiration of the first offender's probation.[91] The reason is the need for the court to determine whether conditions have been fulfilled. The Illinois Supreme Court, in *People v. Du Montelle*,[92] also considered the status of first offenders and expressed its view that *"after the probationary status expires*, the Court must determine whether or not an adjudication of guilt is to be entered based on the defendant's noncompliance or compliance with the probationary period."[93]

To regard a defendant placed on supervision as akin to a first offender is appropriate, for both are likely to be youthful and nonviolent offenders. Allowing for an adjudication of guilt after the period of supervision expired would comport with the precedent established for first offenders. The passage of time unquestionably deprives the court of authority to revoke the supervision of a noncompliant offender or to resentence him, but it would be unnecessary and unfortunate to conclude that the court lacks jurisdiction to make an adjudication of guilt for noncompliance after supervision terminated; unnecessary because, as in the case of first offenders, the court is explicitly required to determine whether there has been compliance[94] and must make the obvious choice between satisfactory and unsatisfactory compliance; unfortunate because a denial of jurisdiction to enter an adjudication of guilt would give sanction to noncompliance.

---

89. ILL. REV. STAT. ch. 38, § 1005-6-3.1 (1985).

90. ILL. REV. STAT. ch. 56-½, § 710 (1985).

91. People v. Glidden, 33 Ill. App. 3d 741, 338 N.E.2d 204 (3d Dist. 1975).

92. 71 Ill. 2d 157, 374 N.E.2d 205 (1978).

93. *Du Montelle*, 71 Ill. 2d at 164, 374 N.E.2d at 208 (emphasis added).

94. ILL. REV. STAT. ch. 38, § 1005-6-3.1(e) (1985). *See also* People v. Majer, 131 Ill. App. 3d 80, 84, 475 N.E.2d 269 (2d Dist. 1985); *Hayslette*, 107 Ill. App. 3d at 650-51, 437 N.E.2d at 1264.

No Compliance; No Contempt

May a defendant who has not complied with the orders of the trial court be held in contempt of court? In *People v. Mowery*,[95] this question was answered affirmatively as to a defendant on probation. The court observed:

> It has been established that the contempt power of a trial court may be exercised as a sanction for violation of probation. (*People v. Patrick* [1980], 83 Ill. App. 3d 951, 404 N.E.2d 1042). *Patrick* dealt with a failure to report to the probation officer, hence the court interpreted it as an indirect criminal contempt and explained the difference between direct and indirect criminal contempt. In the instant case we have a failure to pay costs and restitution. As suggested by the specially concurring justice in *Patrick*, this constitutes a civil contempt.[96]

The *Mowery* decision does not, however, constitute precedent when a defendant is charged with violating conditions of supervision. In probation proceedings, sentences are imposed without deferment, thus encumbering the probationer with an immediate record. On the other hand, in supervision the proceedings are deferred, the sentence is in a state of suspense, and no sentence or judgment will ever be entered if the defendant complies with the conditions.[97] The crucial differences between violations of probation orders and conditions of suspended sentences has been explained in the following manner:

> The distinction between restitution as a sentence and as a condition of probation or suspended sentence is important in several respects. First, the alternatives in the event of default in payment are quite different, consisting of contempt proceedings in the former and revocation and imposition of a sentence in the latter.[98]

The statutory scheme has provided a reward for compliance with the conditions of supervision: a discharge that is not to be termed a conviction. As such, it may be analogized to contractual conditions, which are clearly different from direct undertakings. This distinction has been elucidated in Williston on Contracts:

> The distinction between a promise or covenant on the one hand and a condition on the other, both in their legal effect and in their wording, is obvious and familiar. Breach of promise subjects the promisor to liability in damages but does not necessarily excuse the performance on the other side. Breach or nonoccurrence of a condition prevents the promisee from acquiring a right or deprives him of one but subjects him to no liability.[99]

---

95. 116 Ill. App. 3d 695, 452 N.E.2d 363 (4th Dist. 1983).
96. *Mowery*, 116 Ill. App. 3d at 701, 452 N.E.2d at 368.
97. Ill. Rev. Stat. ch. 38, § 1005-6-3(e) to 1005-6-3(f) (1985).
98. Harland, *supra* note 40, at 72.
99. 5 S. Williston, A Treatise on the Law of Contracts § 665 (3d ed. 1961).

In at least one criminal case,[100] a court applied this rationale to a condition for restitution in an order of supervision, explaining:

> No judgment is rendered for, nor could a writ of execution issue to enforce collection of the sum specified. A defendant in such instance is simply given the alternative of abiding by the conditions imposed or else suffering the imposition and execution of a sentence which ordinarily follows a verdict of guilty . . . he was given the additional privilege of avoiding the usual penalty of his crime by the payment of a sum of money and the observance of the other conditions attached to his probation.[101]

If the contract theory prevails, a failure to make restitution or to pay fees or costs, which were designated as conditions of supervision, would not create independent liabilities giving rise to responsibility for contempt or for consequent money judgments.[102] This would insulate the offender from "resentencing" for noncompliance in those courts which do not require a compliance hearing to be held before the supervisory period has terminated.[103] The practice of holding final hearing, as Circuit Court of Cook County Rule 11.6 now requires, would preclude inadvertent immunity for violators of supervisory conditions, for the hearing would offer the State both time and opportunity to petition for revocation if the hearing points to a need therefor.[104] The occasion for pressing a contempt of court petition would then be unnecessary in fact and inappropriate in theory.

Does denial of contempt powers[105] constitute a legislative impingement upon the inherent powers of the judiciary? There are a number of reasons for denying that there is any legislative intrusion into the judicial function. The supervision statute was enacted when the legislature followed the Illinois Supreme Court's recommendation that it do so.[106] The penalties are those set forth in the enactment, and the court is limited by them.[107] If the order is interpreted as establishing conditions rather than expressing commands, the conclusion that the penalties for violation of the conditions are limited to those set by the court after the revocation hearing would be solely judicial and free from legislative denigration of the power of

---

100. People v. Good, 287 Mich. 110, 282 N.W. 920 (1938).

101. *Id.* at 115, 282 N.W. at 923.

102. People v. Mowery, 116 Ill. App. 3d 695, 705, 452 N.E.2d 363, 370 (4th Dist. 1983). In *Mowery*, which was a contempt action for violation, the state was relegated "to its civil remedies for the collection of money judgments." *Id.*

103. People v. Hayslette, 107 Ill. App. 3d 647, 437 N.E.2d 1261 (3d Dist. 1982).

104. People v. McMurray, 391 Ill. 271, 62 N.E.2d 793 (1945).

105. Legislatures may enlarge, but not restrict, the exercise of the contempt powers of the courts. *In re* G.B., 88 Ill. 2d 36, 430 N.E.2d 1096 (1981); People v. White, 334 Ill. 465, 166 N.E. 100 (1929).

106. *See* People v. Breen, 62 Ill. 2d 323, 342 N.E.2d 31 (1976).

107. People v. Penn, 302 Ill. 488, 495, 135 N.E. 92, 95 (1922).

contempt.[108]

NEVER ACQUITTED; NEVER CONVICTED

Supervision is defined in the code in more than 40 words.[109] Rather than repeat this evident wordiness, writers and courts have oft-times elected to substitute words which, being more commonly known, do not require 40 word definitions. Thus, supervision has been called or analogized to, "deferment,"[110] or "continuance" or "acquittal."[111] The unfolding law on supervision suggests that it is all of them and none of them and the shorthand analogies that emerge in dicta must ever yield to the specific analysis in decisions. Thus, the general belief that an offender who complies with the conditions of supervision will not have a record of conviction, cannot be applied in every case.[112] The statutory point of reference[113] is short but not simple. The Code provides that on successful conclusion of supervision, the discharge and dismissal "shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime."[114] The parameters of conviction, innocence or guilt after supervision has ended, have required determination in a variety of contexts.

As Evidence at Sentencing Hearings

When a defendant is before the court for sentencing, after con-

---

108. On the other hand, "conditions" in probation orders have been construed as mandatory, subjecting the violator to penalties for contempt. People v. Patrick, 83 Ill. App. 3d 951, 404 N.E.2d 1042 (4th Dist. 1980). In a concurring opinion, Judge Trapp noted that the contempt penalty should not be imposed for cases arising after the *Patrick* decision, but rather probationary violations should be prosecuted according to statute. *Id.* at 957, 404 N.E.2d at 455-56.

109. ILL. REV. STAT. ch. 38, § 1005-1-21 (1985) provides:

> "Supervision" means a disposition of conditional and revocable release without probationary supervision, but under such conditions and reporting requirements as are imposed by the court, at the successful conclusion of which disposition the defendant is discharged and a judgment dismissing the charges is entered.

110. *See* ILL. REV. STAT. ch. 38, § 1005-6-1(c) (1985) (order of supervision *defers* further proceedings). *See supra* note 26.

111. *Compare* People v. Roper, 116 Ill. App. 3d 821, 824, 452 N.E.2d 748, 750 (1st Dist. 1983) (supervision is continuance) *with* People v. Tarkowski, 100 Ill. App. 3d 153, 157, 161, 426 N.E.2d 631, 634, 637 (2d Dist. 1981) (uncompleted supervision is continuance, and termination of supervision is judgment of acquittal). *But see* People v. Oswald, 106 Ill. App. 3d 645, 435 N.E.2d 1369 (2d Dist. 1982) (termination of supervision with finding of guilt is not acquittal for purposes of appeal).

112. *See* People v. Hightower, 138 Ill.App.3d 5, 12-13 (Stouder, J., dissenting).

113. ILL. REV. STAT. ch. 38, § 1005-6-3.1(f) (1985).

114. *Id.*

viction or plea of guilty, may evidence be introduced of a supervision that was successfully completed? In *People v. Calvert*,[115] the Appellate Court for the Fourth District found the introduction of such evidence to be error but harmless.[116] In *People v. Talach*,[117] the Appellate Court for the Second District, expressing disagreement with *Calvert*, found that the defendant's prior supervision successfully completed, could be considered in a hearing on sentencing, and stressed that the "important considerations are relevance and accuracy of the information."[118]

The *Talach* opinion reiterated that the defendant's supervision had not been expunged.[119] The implications of this emphasis on expungement are not clear, but expungement would seem to have little relevance to helping a court determine an appropriate sentence. The effect of successfully completing supervision should be determined without regard to an inadvertent failure to complete the expungement process. If the defendant's record was not expunged, the reason for denying expungement may be a relevant consideration in determining the defendant's sentence, but the expungement itself should not affect the admissibility of evidence as to the successful completion of supervision.

More crucial is the statutory language that successfully completed supervision shall not be termed a conviction "for purposes of disqualification or disabilities imposed by law upon conviction of crime."[120] This clause, *Talach* stated,[121] refers to the loss of the right to hold public office, to vote, to possess firearms or (a most remote event) to practice medicine. The *Talach* court, therefore, concluded that the disposition of a supervision successfully completed could be considered at a sentencing hearing.[122] In so deciding, *Talach* followed *People v. LaPointe*,[123] which enunciated an even broader rule; to wit, that after exercising caution to assure that the information proffered was accurate, no trial judge may "properly receive proof of criminal conduct for which no prosecution and conviction ensues."[124] The latitude for the introduction of impositions and dispositions of

115. 100 Ill. App. 3d 510, 426 N.E.2d 1218 (4th Dist. 1981).
116. *Calvert*, 100 Ill. App. 3d at 512, 426 N.E.2d at 1220.
117. 114 Ill. App. 3d 813, 448 N.E.2d 638 (2d Dist. 1983).
118. *Talach*, 114 Ill. App. 3d at 827, 448 N.E.2d at 648. *See also* People v. Hightower, 138 Ill.App.3d 5, 10 (3d Dist. 1985).
119. *Id.* at 827, 448 N.E.2d at 647. *See also supra* note 22 and accompanying text (expungment discussed); ILL. REV. STAT. ch. 38, § 206-5 (1985) (expungement procedure under Illinois law).
120. ILL. REV. STAT. ch. 38, § 1005-6-3.1(f) (1985).
121. *Talach*, 114 Ill. App. 3d at 826, 448 N.E.2d at 647.
122. *Id.* at 826, 448 N.E.2d at 648.
123. 88 Ill. 2d 482, 431 N.E.2d 344 (1981).
124. *La Pointe*, 88 Ill. 2d at 498-99, 431 N.E.2d at 344, *cited with approval in Talach*, 114 Ill. App. 3d at 826-27, 448 N.E.2d at 648.

supervision in post-trial sentencing hearings has not been accorded to proffers of like proof during trials.

As A Basis for Impeachment and Admissions

In *People v. Schuning*,[125] the defendant was tried for rape and unlawful restraint. There was evidence admitted of, *inter alia*, a conviction statement for the offense of retail theft, for which the defendant had been placed on, and discharged from, supervision. The prosecutor urged the jury to consider the effect of the "conviction" on credibility. The court stated that "the successful completion of a period of supervision does not result in a conviction . . . and therefore is not a proper basis for impeachment."[126]

In *Brown v. Green*,[127] the United States Court of Appeals for the Seventh Circuit ruled on the propriety of introducing evidence of a prior order of supervision in a civil proceeding as *prima facie* evidence of the facts on which the finding of guilty was based. Brown asserted that proof of the supervision was not admissible because it had been successfully completed and hence the "conviction was in any event erased."[128] The Seventh Circuit disagreed, stating: "Although the [Illinois] supervision statute required that after successful conclusion of his supervision the charges against Brown be dismissed and his conviction erased for *some* purposes, this was not true for *all* purposes."[129]

The Seventh Circuit's narrow interpretation of the statutory language that defines the effect of a successful supervision[130] should not have a substantial impact on misdemeanor prosecutions. If it were held that successfully completed supervision would not be automatically rejected as establishing a "no conviction" situation for all purposes, the record of supervision would not only be available as an admission, but would also be available for purposes of impeachment if it met the requirement announced in *People v. Montgomery*;[131] to wit, that evidence of criminal conviction for the purpose of impeachment is only admissible if (1) the crime was punishable by death or confinement for more than one year or (2) the crime involved dishonesty or false statements; unless (3) the judge deter-

125. 106 Ill. 2d 41, 476 N.E.2d 423 (1985).

126. *Shuning*, 106 Ill. 2d at 48, 476 N.E.2d at 426. *See also* People v. Miller, 101 Ill. App. 3d 55, 427 N.E.2d 987 (1981) (successful supervision is not a conviction for impeachment purposes); CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE, § 609 (4th ed. 1984) (use of convictions for impeachment).

127. 738 F.2d 202 (7th Cir. 1984).

128. *Green*, 738 F.2d at 207-08.

129. *Id.* at 208.

130. The statutory language appears *supra* text accompanying note 114.

131. 47 Ill. 2d 510, 268 N.E.2d 695 (1971).

mines that the danger of unfair prejudice substantially outweighs the probative value of the evidence.[132]

By reason of restricting the availability of supervision to nonfelony offenses and by limiting the maximum term of imprisonment for misdemeanors to less than one year,[133] the first requirement of *Montgomery* could not be met. The alternative requirement, that the crime for which the defendant was convicted involved dishonesty or false statements, would effect the exclusion of supervision granted for motor vehicle violations and a myriad of petty or other misdemeanor offenses. The misdemeanor cases involving dishonesty or false statements require a court determination that the probative value of the conviction-evidence outweighs the danger of unfair prejudice. The principal requirement remaining is that conviction has not been the subject of a "certificate of rehabilitation" or other equivalent procedure acquired after "a substantial showing or rehabilitation."[134]

A supervisory proceeding should culminate in a court made determination of the defendant's compliance or noncompliance with the conditions of supervision. Because the objective of supervision is rehabilitation, it does not appear unreasonable to suggest that completing the period of supervision and complying with all the conditions of the court order, should constitute not only proof of compliance, but also proof that the supervisee has made a substantial showing of rehabilitation. If the *Montgomery* rule permits this construction, the successful conclusion of supervision would be denied admissibility to impeach credibility because even if it were a conviction, it would fail to meet the requirements of *Montgomery*.

As a Basis for Fines and Costs

In *People v. Du Montelle*,[135] the action of the appellate court in affirming the imposition of a fine and costs on a "first offender" probationer who pleaded guilty to the possession of cannabis was in issue. The Illinois Supreme Court decided that the criminal cost statute[136] is limited to assessment of costs against persons "convicted of an offense," and that a "first offender," who successfully completes probation, obtains a dismissal of the charge, and a discharge, is not

132. *Montgomery*, 47 Ill. 2d at 516, 268 N.E.2d at 698. Although not included in the statement of the general rule, the effect of pardons, anullments, and rehabilitations must also be considered. *Id.*

133. ILL. REV. STAT. ch. 38, § 1005-6-2(b)(3) (1985).

134. *Montgomery*, 47 Ill. 2d at 516, 268 N.E.2d at 699, *quoting* rule 609 of the Rules of Practice and Procedure of the Judicial Conference of the United States.

135. 71 Ill. 2d 157, 374 N.E.2d 205 (1978).

136. ILL. REV. STAT. ch. 38, § 180-3 (1985).

convicted within the meaning of the cost statute.[137] The Cannabis Control Act (the "Act") authorized a defendant to be placed on probation "upon reasonable terms and conditions."[138] The *Du Montelle,* court declared that a fine was a "primitive measure" that did not comport with the "general lenient purpose of the Act," and was not, under the circumstances, a reasonable term and condition.[139] The provisions of the Code that explicitly include costs and fines as segments of dispositions in probation cases were quoted, but not questioned in *Du Montelle.*[140]

The constitutionality of the Code's sanctions,[141] which impose fines and costs in supervision cases, was contested to a "no decision" finish in *Morgan v. Finley.*[142] The defendant, after supervision was terminated, challenged the constitutionality of assessing a fine and costs against one not convicted of any offense.[143] The defendant relied on a United States Supreme Court decision,[144] which held that neither penalty nor costs could be imposed upon a defendant "whom the jury found not guilty. . . ."[145] Manifestly, the status of a defendant found not guilty by a jury is unrelated to that of a second defendant who pleaded guilty or was found guilty. The defendant who complies with the conditions of supervision, which might include a fine and costs, does not thereby cleanse his record to the equivalence of innocence and become entitled to a refund.

In *Du Montelle,*[146] the Illinois Supreme Court found incongruity and unreasonableness in a court's imposing a fine and costs on a first-offender probationer when the Act did not include express provisions therefor. That disapprobation is not likely to apply to conditions that are the product of legislative deliberation.

As a Basis for Malicious Prosecution

Some offenders, who have completed their assigned period of supervision and have been discharged, have taken literally the myth that on completing supervision, a defendant escapes a record of conviction and acquires a cloak of innocence. Thereafter, when the of-

137. *Du Montelle,* 71 Ill. 2d at 165-66, 374 N.E.2d at 208.
138. *Id.* at 164-65, 374 N.E.2d at 207 (citing the Cannabis Control Act, ILL. REV. STAT. ch. 56-½, § 704 (1985)).
139. *Du Montelle,* 71 Ill. 2d at 165, 374 N.E.2d at 208.
140. *Id.*
141. ILL. REV. STAT. ch. 38, § 1005-6-3.1(c)(2) (1985).
142. 105 Ill. App. 3d 80, 433 N.E.2d 1047 (1st Dist. 1982). The constitutionality of monetary sanctions was also challenged, with equal results, in Malone v. Consentino, 99 Ill. 2d 29, 475 N.E.2d 395 (1983).
143. *Finley,* 105 Ill. App. 3d at 81, 433 N.E.2d at 1048.
144. Giacio v. Pennsylvania, 382 U.S. 399 (1966).
145. *Id.* at 404-05.
146. People v. Du Montelle, 71 Ill. 2d 157, 374 N.E.2d 205 (1978).

fender becomes convinced of "wronged innocence," an action for malicious prosecution is initiated. The keystone questions are whether the criminal proceeding was terminated[147] and whether it was terminated in favor of the defendant in the criminal case.[148] The entry of an order of supervision on a finding or plea of guilty, whether the conditions are light or lenient, can hardly be the basis for supporting an action for malicious prosecution. A psychologist might urge, having in mind the alternate possibilities, that the order of supervision is a disposition favorable to the defendant. The courts have not accepted such sophisticated and speculative contentions.

The Illinois Supreme Court, in *Joiner v. Benton Community Bank*,[149] made a felicitous restatement of the basic rule, which dispels any ambiguity that attaches to the language requiring "a favorable termination."[150] In *Joiner*, the court stated: "It is clear that the settled law bars a malicious prosecution action predicated upon criminal proceedings which were terminated in a matter not indicative of the innocence of the accused."[151]

The *Joiner* rule was followed in *Hajawii v. Venture Stores, Inc.*,[152] wherein a complaint for malicious prosecution was filed by Hajawii, who had been placed on three months' supervision after being found guilty of retail theft in a criminal prosecution. After termination of the supervision, the criminal charges were dismissed. Hajawii contended that the criminal proceeding should be regarded as having been favorably terminated because of the successful conclusion of the supervision, but this contention was rejected.[153] There is little prospect that any court will decide that an opportunity offered for rehabilitation may be converted into an occasion for retaliation.

As a Basis for Defamation

The following is a hypothetical scenario in which the issue of "conviction" appears in another context and once more presents perplexing problems as to guilt, innocence, and conviction. On one fine day, defendant Fingers was found guilty of retail theft and placed on supervision. That evening Fingers visited a tavern to celebrate. After a few drinks, bar-mate Gabby learned of Fingers' expe-

147. Blalock v. Randall, 76 Ill. 224 (1875).
148. 52 Am. Jur. 2d *Malicious Prosecution* § 29 (Supp. 1985).
149. 82 Ill. 2d 40, 411 N.E.2d 229 (1980).
150. *Joiner*, 82 Ill. 2d at 45, 411 N.E.2d at 232.
151. *Id.*
152. 125 Ill. App. 3d 22, 465 N.E.2d 573 (1st Dist. 1984).
153. *Hajawii*, 125 Ill. App. 3d at 24-25, 465 N.E.2d at 575-76. *See also* Stranger v. Felix, 97 Ill. App. 3d 585, 422 N.E.2d 1142 (1st Dist. 1981) (supervision termination not grounds for malicious prosecution action).

rience with the law, jumped on the bar, and in stentorian tones proposed a toast to Fingers "who was convicted of retail theft in open court and is smart enough to be free on supervision." Unbeknown to Gabby, Fingers' employer overheard the toast and fired Fingers. Fingers promptly filed a slander action alleging that Gabby's assertion that he was convicted was false and slanderous and that the imputation of conviction for crime is as actionable as an imputation of the commission of crime.[154] There are two possibilities that may result.

First, Fingers successfully completed supervision, and his case was dismissed. Two years thereafter, before the action came to trial, Fingers' record of arrest was expunged. Will Fingers win his defamation suit?

Second, before the period of supervision ended, Fingers was charged with violating the conditions of supervision. At a hearing, the court found Fingers guilty of the violation and entered an adjudication of guilt. Will Fingers win his defamation suit?

The schizophrenic character of supervision beclouds the answer. The word "convicted" was used by Gabby in its popular sense as descriptive of an event that occurs before a court enters a punitive order.[155] Gabby was unaware that an order of supervision is not accompanied by an adjudication of guilt or a sentence. When the toast was proposed, no adjudication of guilt had been made, even though there was a finding of guilt, and no conviction had been entered. May Fingers therefore prevail because the statement was legally inaccurate? In the second example, the supervision was revoked and a judgment of guilty entered. Presumably, the defamatory statement, false when made, became true. Was Gabby purged of the slander? Does that purification operate retroactively to exculpate Gabby?

Thus ends the tale of Janus-faced supervision. Neither face can be called "acquittal" or "conviction."

CONCLUSION

Few issues in criminal justice generate more heat and less consensus than making the punishment fit the crime. The overcrowding of jails, the desire to reserve imprisonment for the dangerous and hardened, and the reticence to incarcerate first offenders, especially white-collar criminals, led to increasing emphasis on alternative sentences. These included combinations of conditions such as com-

154. 53 C.J.S. *Libel and Slander* § 54 (Supp. 1985).

155. For a publisher's unsuccessful effort to define "convicted" in a popular sense rather than the legal definition (after court order), see Norton v. Livingston, 64 Vt. 473, 24 A. 247 (1892).

munity service, restitution, and a myriad of other alternatives which are limited only by the Code,[156] creativity, and the obligation to make the penalty relevant to the statutory objectives. The introduction into the Code of supervision orders for nonfelony offenders legitimized a practice which permitted—without confinement, without a disposition, and without a record of conviction—a disposition of supervision carrying little sting and little stigma. Public charges of leniency, complaints against mild sentences for financial crimes, and questions about "tougher sentences for crime in the streets than for crime in the suites"[157] have led to increasing use of imprisonment as the ultimate sanction. Notwithstanding the current emphasis on incarceration, the nonconfinement alternatives available with orders of supervision appear to have an assured future.

156. *See supra* note 17 and accompanying text.

157. *See* WALL. ST. J., Oct. 30, 1985, at 31, col. 4. *See also id.*, Nov. 14, 1985, at 1, col. 1, in which a defendant found guilty for accepting "kickbacks" thanked the American probationary system, but endorsed a "strong judicial system" like that "in Saudi Arabia, [where] when you steal, you get your hand cut off." *Id.*, Nov. 14, 1985, at 25, col. 1.