

# Obey All Laws and Be Good: Probation and the Meaning of Recidivism

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*Probation is the most commonly imposed criminal sentence in the United States, with nearly four million adults currently under supervision. Yet the law of probation has not been the focus of sustained research or analysis. This Article examines the standard conditions of probation in the sixteen jurisdictions that use probation most expansively. A detailed analysis of these conditions is important, because the extent of the state's authority to control and punish probationers depends on the substance of the conditions imposed.*

*Based on the results of my analysis, I argue that the standard conditions of probation, which make a wide variety of noncriminal conduct punishable with criminal sanctions, construct a definition of recidivism that contributes to overcriminalization. At the same time, probationary systems concentrate adjudicative and legislative power in probation officers, often to the detriment of the socially disadvantaged. Although probation is frequently invoked as a potential solution to the problem of overincarceration, I argue that it instead should be analyzed as part of the continuum of excessive penal control.*

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#### INTRODUCTION

Probation plays a dominant role in the operation of the U.S. criminal justice system. Approximately four million adults in the United States are now on probation,<sup>1</sup> a court-ordered sentence that provides for a period of community supervision as a penalty for a crime. In sentencing a person to probation, a court imposes a battery of conditions intended to regulate that person’s behavior during the period of supervision. Probation officers supervise probationers for compliance with the conditions imposed.

Probation should not be confused with parole, which involves community supervision as a function of an inmate’s early release from prison. Unlike parole, probation is an independent criminal sentence imposed and administered by a judge.<sup>2</sup> The judge, assisted by the probation officer, retains jurisdiction during the period of the sentence.

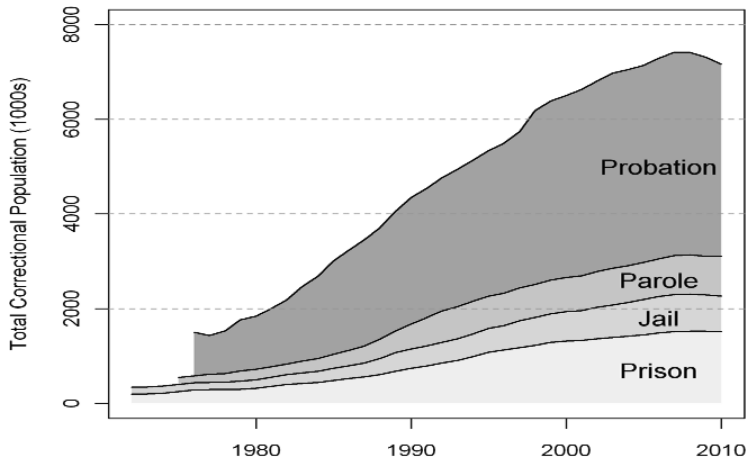
The law of probation has not received attention commensurate with its enormous role in the criminal justice system. Mass incarceration casts a long shadow, deflecting focus away from probation and toward the more “serious”

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1. LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013, at 2, tbl.1 (2014) (noting that 3,910,600 people were on probation at year-end 2013).

2. *See, e.g.*, 1 NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE § 1:1 (2d ed. 1999) (observing that probation is “a sanction imposed by a court as punishment for a criminal offense,” whereas parole is an “administrative rather than a judicial procedure”).

condition of imprisonment.<sup>3</sup> This state of affairs is exemplified by the accompanying graph, which is excerpted from a 2014 National Research Council (NRC) report on the growth of incarceration in the United States.<sup>4</sup> The graph, which appears in a chapter titled “Rising Incarceration Rates” in the NRC report, reveals the extent to which increases in the U.S. probation population have dwarfed increases in the prison and parole populations.<sup>5</sup> At year-end 2013, there were approximately 2.2 million inmates in U.S. prisons and jails.<sup>6</sup> This figure, although breathtaking in its scope, is still only roughly half the number of U.S. adults who were on probation at the time.



My long-term project is to reframe the debate and to enlarge its focus so that we examine systems of penal control holistically, with the understanding that incarceration is just one part of a continuum of punishments. When considered from the perspective of overall penal control, mass incarceration represents only the tip of the iceberg: a huge percentage of the population has been swept up in the criminal justice system through mechanisms other than prisons or jails. The phenomenon of hypersupervision outside of prisons must be scrutinized accordingly.

This Article is part of that larger project. In an earlier piece, I analyzed federal supervised release, a form of postincarceration supervision that has

3. See, e.g., Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL'Y 51, 52 (2013) (“As mass incarceration boomed, scholars largely lost interest in probation, . . . rarely engaging with it seriously as an important institution.”).

4. NAT'L RES. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 41 figs.2-4 (Jeremy Travis et al. eds., 2014).

5. *Id.*

6. GLAZE & KAEBLE, *supra* note 1.

become nearly universal in the federal system.<sup>7</sup> I now take a broader look at probation systems, state and federal, around the country. These systems wield an almost farcical level of control over people's lives but, as I previously discovered with respect to supervised release, diverge radically from the conceptual and jurisprudential underpinnings that are invoked to justify them. Ultimately, I hope to explore how all of these systems of community supervision and control—supervised release, probation, and parole—can be reformed to make them coherent, transparent, and aligned with societal values and goals.

The task is vital because the pressure to expand probation continues to build. Despite the huge number of people already on probation, it is often invoked as an attractive solution for addressing the problem of mass incarceration.<sup>8</sup> Groups as varied as Right on Crime and the ACLU have been pushing for more probation.<sup>9</sup>

It is not clear that probation's advocates fully appreciate the substantive impact of the system, however. Courts, legislators, and scholars have devoted almost no attention to analyzing (or even acknowledging) the conditions of probation that are routinely imposed on probationers in state after state, year after year.<sup>10</sup> These conditions articulate the standards and obligations that determine what it means to be on probation, but they are not even publicly accessible in most places.

This Article aims to address that problem by doing three things. First, it draws on original research to expose this hidden body of law and presents a wide-ranging study of the most common conditions of probation in the jurisdictions that use probation most heavily. By excavating the language of these conditions, I reveal how the law (a) sets standards for the conduct and character of people on probation, and (b) creates an enforcement structure to monitor and penalize probationers for behavior that falls short of those standards.

Mapping out the legal contours of probation creates the data necessary to achieve the second objective of this Article. Once the conditions of probation have been made visible, it becomes possible to cross-check the prevailing theoretical justifications for probation against the system as it actually exists. I therefore analyze the substance of the conditions, along with the process by which those conditions are enforced, against the backdrop of the theories that

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7. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958 (2013). Among other things, I unearthed the history of supervised release and argued that reforms that were intended to implement a determinate federal sentencing system instead resulted in the implementation of an indeterminate sentencing regime.

8. See, e.g., Phelps, *supra* note 3, at 51 (“One of the most popular reform suggestions is to expand probation supervision in lieu of incarceration.”).

9. See AM. C.L. UNION, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 11 (2011) (advocating probation as alternative to incarceration for low-level drug offenders); *Priority Issues: Adult Probation*, RIGHT ON CRIME, <http://www.rightoncrime.com/category/priority-issues/adult-probation/> (last visited Sept. 7, 2015) (same).

10. See COHEN, *supra* note 2, § 7:1 (discussing how “surprisingly little judicial or legislative attention has been devoted to analyzing” the purposes behind probation conditions).

courts have relied on to justify the legal structure of probation. I have identified three such theories of probation, which I call the benevolent supervisor theory, the privilege theory, and the contract theory.

The third goal of this Article is to help promote a conversation about the law of probation similar to the discourse that has developed around other once-neglected but crucial dimensions of the criminal justice system. I argue that, like plea bargaining, probation is a shadow system of law enforcement and adjudication that actually drives how the criminal justice system operates in practice.

To isolate the core legal framework of probation, this Article focuses on the standard conditions of probation: the conditions that set the baseline requirements for every person who receives probation within a given system. Standard conditions are the conditions that judges and probation departments impose automatically upon probationers in their jurisdictions.

As measured by standard conditions, probation systems have broad and at times surprising expectations for those under their control: probationers must be good people, in addition to being law-abiding people. Avoiding new criminal activity is just one component of the conditions imposed. In many jurisdictions, probationers must also obey all variety of civil laws (federal, state, or local) as a standard condition of their probation. And moving beyond the requirements of law, probation systems also include conditions that instruct probationers to conduct themselves properly or to remain on good behavior. Other typical conditions include:

- Avoid injurious and vicious habits;
- Avoid persons and places of disreputable or harmful character;
- Work diligently at a lawful occupation as directed by your probation officer;
- Support your dependents to the best of your ability, as directed by your probation officer.

Thus, the state seeks to regulate many aspects of a probationer's behavior—far beyond what is covered by the criminal law—as a consequence of being on probation.

Because standard conditions reach beyond the criminal law, they necessarily also broaden the behavior that constitutes recidivism. Any violation of a probation condition is an act of recidivism that can result in a custodial sentence, whether the violation is substantive (a new crime) or technical (any other behavior that violates a condition of probation).<sup>11</sup> To avoid the threat of

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11. *See, e.g.*, NANCY LAVIGNE ET AL., URBAN INST., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT 8 (2014) (noting definition of recidivism for probationers as “a new crime or a technical violation of supervision”); *see also* CAL. PENAL CODE § 1203.2(a) (West 2015), *amended by* 2015 Cal. Legis. Serv. ch. 61 (S.B. 517) (West) (providing that probationers can be arrested and sentenced for violating any term or condition of their supervision, but giving courts power to order their release); TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 21(b), 23(a) (West 2015) (to be recodified as TEX. CODE

incarceration, a probationer must follow all of the conditions of probation, and not just be deterred from committing a new criminal act.

The use of vague and moralistic standards in the conditions of probation raises important questions. Whose morals provide the yardstick by which recidivism is judged? What does it mean to be on good behavior? Who decides when the friend or family member of a probationer is a disreputable influence? When is someone trying hard enough to find work while on probation? What are the class and race implications of setting these kinds of requirements, given that probationers are mostly poor<sup>12</sup> and are disproportionately racial minorities?<sup>13</sup>

These questions become all the more important when considered in conjunction with the strong policing powers that probation officers have to enforce compliance with the conditions of probation. Probation officers can conduct unannounced visits to a probationer's home or work, for example, and can carry out warrantless searches of a probationer's person, home, or other personal property. They can force probationers to respond to detailed questions and require them to be truthful in how they respond. And they can sanction probationers administratively for violating any condition of probation. These administrative sanctions, which are imposed in a nonpublic setting, typically range from increased reporting requirements to confinement in a probation detention center. As part of a new deterrence-oriented philosophy, probation departments are increasingly instructing their officers to respond to each and every violation of a condition of probation.

Having laid bare the core legal structure of probation, I argue that none of the three theories that courts have traditionally used to justify the law of probation fits the system that has come to exist.

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CRIM. PROC. ANN. art. 42A, §§ 751(b), 755(a) (West 2017)) (authorizing judges to order the arrest of a defendant for a "violation of any of the conditions" of community supervision and to impose a custodial sentence upon revocation); St. of Ga., Final Disposition Felony Sentence with Probation, SC-6.2 [hereinafter Ga., SC-6.2] ("The Defendant is subject to arrest for any violation of probation. If probation is revoked, the Court may order incarceration."); St. of Ga., Final Disposition Misdemeanor Sentence, SC-6.3 [hereinafter Ga., SC-6.3] (same); Adult Prob. Dep't, Allen Cnty., Ind., Order of Probation ("I understand that a failure to obey any condition of probation means that I can be sent to prison."); Prob. Dep't, Ct. of Common Pleas, Cuyahoga Cnty., Ohio, Rules of Probation and Community Control ("[F]ailing to comply with one or more conditions may result in my arrest, a violation hearing, and imposition of jail or prison sentence."); Adult Prob. & Parole Dep't, Montgomery Cnty., Pa., Probation/Parole and Intermediate Punishment Rights, Waiver, and Acknowledgment ("If the Court decides that I have violated one or more conditions of my probation . . . I may be committed to prison for such time as may be specified by the Court . . ."); Adult Prob. & Parole, R.I. Dep't of Corr., Conditions of Supervised Probation ("Failure to follow each and every one of the Conditions of Probation could result in further Court action. If I violate my Probation, the Court could impose the sentence allowable by law.").

12. Approximately 80%–90% of criminal defendants are poor enough to qualify for court-appointed counsel. ALICIA BANNON ET AL., BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4 (2010).

13. In 2013, for example, approximately 30% of adult probationers were black. ERINN J. HERBERMAN & THOMAS P. BONCZAR, BUREAU OF JUST. STAT., PROBATION AND PAROLE IN THE UNITED STATES, 2013, at 17, app. tbl.3 (2014).

*The Benevolent Supervisor Theory.* Many of the current conditions of probation are relics of an era in which the probation officer was meant to be an enlightened and benevolent figure: a person who could humanely elevate members of the disadvantaged classes. But if courts once counted on the benevolent intentions of probation officers, however paternalistic that framework might have been, modern day probation systems focus heavily on enforcement and deterrence, not on a mission of benevolence. The public (or rather, public safety) has displaced the probationer as the true client of probation systems.

*The Privilege Theory.* Although probation was once considered a special act of grace, it is now often the default sentence, rather than a discounted sentence. And courts are increasingly using probation as a method of supplementing incarceration, rather than as a method of avoiding incarceration altogether.

*The Contract Theory.* This theory rests heavily on the validity of the privilege theory: a person agrees to be bound by the requirements of probation in return for the privilege of being on probation. To the extent that probation can be conceptualized as a contract, however, it is a contract of adhesion, rather than a negotiated contract. And the only way to opt out of the contract is to insist on incarceration, even if no one else would be incarcerated for the same crime.

Many of the questions raised by exposing the legal structure of probation share common ground with scholarship on other important aspects of the criminal justice system. I argue that probation systems constitute particularly strong (but neglected) examples of practices—such as overcriminalization, the shifting of power toward the system’s law enforcers, and the unequal treatment of the poor—that have been criticized and reevaluated in other parts of the criminal justice system. In particular, I argue that the role and power of the probation officer deserves as much scrutiny as scholars have given to the role and power of the prosecutor.

Through this Article, I hope to prompt a reexamination of two important aspects of the law of probation: (1) a broad and undertheorized definition of recidivism that lays tripwires for the poor and disadvantaged; and (2) the huge grant of discretionary power made to probation officers to enforce the antirecidivism agenda.

This Article has five Parts. Part I sets forth my methodology, explaining how I chose the jurisdictions studied. Part II examines the standard conditions of probation in these jurisdictions to tease out the baseline definition of recidivism. Part III analyzes the enforcement structure of probation, including the policing powers granted to probation officers through the standard conditions of probation. Part IV examines the three theories that courts have used to justify the state’s powers over probationers. Part V analyzes how the law of probation exemplifies and perpetuates key problems that legal scholars have identified elsewhere in the criminal justice system.

## I. METHODOLOGY

To study the legal framework of probation, I needed to gather together the standard conditions that courts and probation departments impose on probation-

ers. To do so, I had to find out what conditions courts were including on their preprinted judgment forms. And if these judicial forms did not list the standard conditions of probation, I had to get the supervision forms that probation departments provide to their probationers. Many probation departments create a basic instructions form, distributed to their own probationers, which lists the standard conditions of probation for that jurisdiction.

Although applied routinely, the standard conditions of probation are not easily accessible. Very few jurisdictions make the forms available on their websites. For most jurisdictions, retrieving these documents requires a huge investment of time. The first step is determining which form is used. The next step is finding out who can provide a copy of the form. Then, that clerk or probation officer has to be persuaded to provide a copy of the form. In many probation departments, the head of the office has to approve the request. As a result, retrieving the forms is time-consuming even if a clerk's office or probation department is trying to be helpful.

To make matters more complicated, many probationers are supervised through county-based probation departments, rather than state-based probation departments. State-administered systems have a single, unified structure. They typically use the same set of standard conditions throughout the state. In county-based systems, however, each county has its own probation department and its own set (or sets) of standard conditions. Studying standard conditions in these states requires obtaining forms from multiple counties.

The resulting complexity explains, in significant part, why so little is known about the actual conditions that are imposed on probationers.<sup>14</sup> As Joan Petersilia has noted, “[p]robation receives little public scrutiny, not by intent but because the probation system is so complex and the data are scattered among hundreds of loosely connected agencies, each operating with a wide variety of rules and structures.”<sup>15</sup> But without a detailed grasp of the conditions imposed, it is not possible to understand the kinds of power that probation systems are authorized to exercise.

To uncover precisely these details, this Article examines the standard conditions of probation in the U.S. jurisdictions that use probation most heavily. To do so, I study the probation conditions imposed in two different categories of states. The first category, captured in Figure 1, consists of the ten states that currently have the greatest number of adults under probation supervision: Georgia, Texas, California, Ohio, Florida, Michigan, Pennsylvania, Illinois, Indiana, and New Jersey.<sup>16</sup> Together, these ten states have 2,401,478 adults on

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14. The Robina Institute at the University of Minnesota has reported on some discretionary conditions of probation suggested by state statute, but its report does not document the actual conditions imposed via court forms. See ROBINA INST. OF CRIM. L. & CRIM. JUST., PROFILES IN PROBATION REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN 21 STATES (2014).

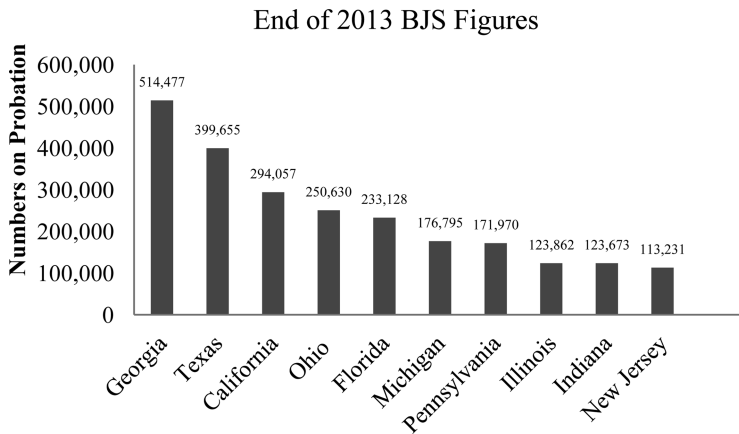
15. Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 153 (1997).

16. HERBERMAN & BONCZAR, *supra* note 13, at 16, app. tbl.2.

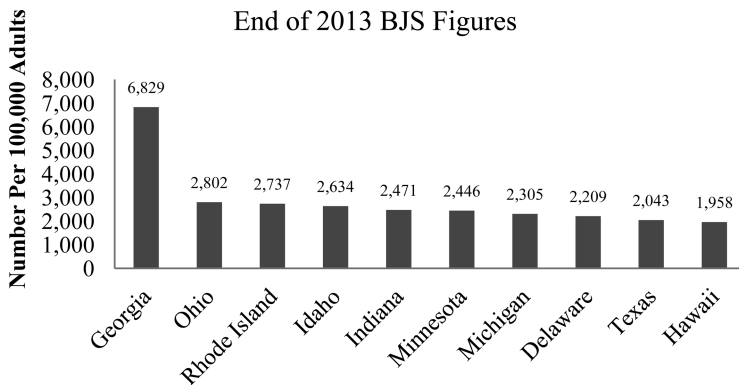


probation, more than half of the country's total probation population.<sup>17</sup> The second category, captured in Figure 2, consists of the ten states that currently have the highest percentage of their adult residents on probation: Georgia, Ohio, Rhode Island, Idaho, Minnesota, Indiana, Michigan, Delaware, Texas, and Hawaii.<sup>18</sup> Georgia, which leads both categories, has one in 14.6 adults on probation.<sup>19</sup>

**Figure 1**  
**Ten States with the Most People on Probation**



**Figure 2**  
**Ten States with the Greatest Percentage of Adults on Probation**



Four other states fall into both of the categories in my study: Texas, Ohio, Michigan, and Indiana. Accordingly, the study includes the standard conditions

17. *Id.*

18. *Id.*

19. *Id.* (noting that Georgia has 6,829 on probation for every 100,000 adult residents).

used in a total of fifteen states. These fifteen states are roughly split between state-based probation systems and county-based systems.<sup>20</sup> Because county-based systems are so diffuse, I focus on the standard probation conditions imposed in the three largest counties in each of the county-based states.

In addition to the fifteen states in Figures 1 and 2, I also look at the standard conditions of probation imposed in the federal system. I do this for two reasons. First, the federal conditions have a wide geographic reach.<sup>21</sup> Second, the federal system has significantly undercounted the number of people it has on probation.<sup>22</sup> When the figures are properly tabulated, the federal system is among the heaviest users of probation.

The statistical anomaly derives from the federal definition of probation. In the federal system, the term probation is used narrowly in its traditional sense: it describes community supervision imposed as a pure alternative to incarceration, rather than a supplement to incarceration. Unlike in most state systems, federal judges cannot sentence defendants to a term of incarceration followed by a term of probation. As defined by the federal system, it is one or the other: probation or incarceration.

But the federal system does have a program of what is in effect postincarceration probation. In the federal system, postrelease supervision is called supervised release, rather than probation. I have described elsewhere how supervised release has evolved over the last twenty-five years to embrace the powers claimed by probation systems.<sup>23</sup> Federal judges use supervised release to impose exactly the same kinds of split sentences routinely imposed in state systems. Supervised release is simply the form of probation used to supplement incarceration in the federal system.

When supervised release is counted as a kind of probation, the federal supervision figures become substantial. With 130,214 people under supervision,<sup>24</sup> the federal system falls between Pennsylvania and Illinois on Figure 1. I am therefore including federal probation and supervised release in my study.

## II. CONDITIONS AS THE MEASURE OF RECIDIVISM

The conditions of probation provide a detailed record of the legal parameters of recidivism. Probationers are expected to adhere to the conditions to demonstrate their rehabilitation and avoid the threat of having their probation revoked.

Although this Article focuses on standard conditions, I should note that separating out standard conditions provides only a narrow window into the

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20. The states with largely county-based systems include Texas, California, Ohio, Pennsylvania, Illinois, Indiana, and Minnesota.

21. AO-245B (Rev. 9/11) Judgment in a Criminal Case.

22. See HERBERMAN & BONCZAR, *supra* note 13, at 18, app. tbl.4 (counting supervised release as a form of parole, rather than probation).

23. Doherty, *supra* note 7, at 1012–13.

24. See ADMIN. OFF. OF THE U.S. CTS., FEDERAL JUDICIAL CASELOAD STATISTICS 2014 app. tbl.E-2 (2014).

content of recidivism. Judges often impose special conditions of probation, tailored to the individual circumstances of a defendant. Because judges can impose an endless variety of special conditions, a detailed study of special conditions is beyond the scope of this Article.

Instead, I focus on the categories of standard conditions that I find most problematic. These include proscriptions to obey all laws, be good and associate with good people, work and support one's family, and pay a host of fees to the probation department and the court.

At this stage, I am concerned primarily with highlighting the power structures that the law creates by adopting these requirements as conditions of probation. I also begin to examine how such conditions operate in practice, but much more research needs to be done in this regard. Understanding how the law of probation functions on the ground is particularly challenging given the multiplicity of jurisdictions, the rarity of documented probation decisions in written opinions,<sup>25</sup> and a general lack of public oversight over the daily work of probation officers. As I will emphasize, however, broad conditions, combined with supercharged enforcement powers, create an almost unlimited amount of power for these officers.

#### A. COMMIT NO CRIME/OBEY ALL LAWS

In theory, avoiding recidivism could require only that a person who is convicted of a crime not commit any new crime. But this vision—living a life free from crime—is only the beginning of how most jurisdictions define the obligations of being on probation.

Every jurisdiction in my study includes a condition that instructs probationers not to violate the criminal law. As indicated on Table 1, several jurisdictions (including Georgia and Michigan) specifically instruct probationers not to violate a criminal law of any unit of government.<sup>26</sup> Although phrased broadly to capture all variety of criminal acts, this condition is confined to the limits of the criminal law.

Marion County, Indiana, arguably has the most expansive form of a commit-no crime condition. In Marion County, a probationer shall “not be charged with any new criminal offense based on probable cause.”<sup>27</sup> This condition is pointedly phrased to make probationers vulnerable to revocation because of a new prosecution, whether the prosecution proves successful or not.

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25. See, e.g., Interview with Pub. Defender, DeKalb Cnty., Ga. (Sept. 30, 2014) (on file with author) (noting that she had never seen a judge write out an opinion on a violation of probation); Interview with Pub. Defender, L.A. Cnty., Cal. (Dec. 18, 2014) (on file with author) (observing that judges rule from the bench and do not write decisions in probation proceedings).

26. See Ga., SC-6.2, *supra* note 11; Ga., SC-6.3, *supra* note 11; Judicial Cir. Ct., State of Mich., Order of Probation, CC 243(a); Judicial Cir. Ct., State of Mich., Order of Probation (Misdemeanor), DCC 243.

27. Superior Ct., Marion Cnty., Ind., Order of Probation.

Most jurisdictions go beyond criminal violations, forbidding any violation of the criminal or civil law within the same condition of probation. Some, such as the three largest counties in Texas, mandate that a probationer obey all state and federal laws—with no distinction between the civil and the criminal.<sup>28</sup> Others, such as counties in Ohio and Pennsylvania, specify that a probationer violate no local, state, or federal law.<sup>29</sup> A last group of jurisdictions, including Rhode Island and Los Angeles County, California, uses language that is even more general. In these jurisdictions, probationers must simply “obey all laws” as a condition of their probation.<sup>30</sup>

My study reveals that the most standard-of-standard conditions—that a probationer not commit a new crime—is often encapsulated in language that demolishes any distinction between the civil and criminal law. By failing to set apart civil from criminal wrongdoing, these jurisdictions bring the entire remit of civil law within the legal definition of recidivism. The most extreme version of this condition is represented by the standard condition used in Lake County, Illinois. In Lake County, probationers must obey all laws or ordinances (civil or criminal) of any jurisdiction, specifically defined to include traffic regulations.<sup>31</sup> In this context, speeding or bad parking become acts of recidivism.<sup>32</sup>

This wholesale incorporation of the civil into the criminal law is an indicator of the lack of rigor that has accompanied the development of probation.

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28. Dallas Cnty., Tex., Conditions of Community Supervision [hereinafter Dallas Cnty., Tex., *Community Supervision*]; Dallas Cnty., Tex., Condition of Supervision, Unsupervised Misdemeanor Probation [hereinafter Dallas Cnty., Tex., *Misdemeanor Probation*]; Harris Cnty., Tex., Conditions of Community Supervision; Tarrant Cnty., Tex., Conditions of Community Supervision [hereinafter Tarrant Cnty., Tex., *Community Supervision*] (order used for felony probation); Tarrant Cnty., Tex., Deferred Adjudication Order [hereinafter Tarrant Cnty., Tex., *Deferred Adjudication*] (order used for misdemeanor probation).

29. Cuyahoga Cnty., Ohio, *supra* note 11; Adult Prob. Dep’t, Ct. of Common Pleas, Franklin Cnty., Ohio, Conditions of Supervision; Adult Prob. Dep’t, 5th Judicial Dist., Allegheny Cnty., Pa., General Rules and Conditions of Probation, Parole and Intermediate Punishment; Adult Prob. & Parole Dep’t, Montgomery Cnty., Pa., Rules and Conditions Governing Probation/Parole and Intermediate Punishment; Adult Prob. & Parole Dep’t, 1st Judicial Dist., Phila. Cnty., Pa., Rules of Probation and Parole.

30. Superior Ct., L.A. Cnty., Cal., Felony Sentencing Memorandum [hereinafter L.A. Cnty., Cal., *Felony*]; Superior Ct., L.A. Cnty., Cal., Misdemeanor Sentencing Memorandum-General Misdemeanors [hereinafter L.A. Cnty., Cal., *Misdemeanor*]; Superior Ct., L.A. Cnty., Cal., Misdemeanor Sentencing Memorandum-Vehicle Code [hereinafter L.A. Cnty., Cal., *Vehicle*]; R.I. Dep’t of Corr., *supra* note 11.

31. Cir. Ct. of the 19th Judicial Cir., Lake Cnty., Ill., Order and Certificate of Felony Probation [hereinafter Lake Cnty., Ill., *Felony*]; Cir. Ct. of the 19th Judicial Cir., Lake Cnty., Ill., Order and Certificate of Misdemeanor Probation/Supervised Supervision [hereinafter Lake Cnty., Ill., *Misdemeanor*].

32. *See, e.g.*, United States v. Carter, 408 F.3d 852, 853 (7th Cir. 2005) (noting eight month revocation sentence based on a series of violations that included “receipt of traffic citations”); People v. Ward, No. B233006, 2012 WL 3332367, at \*2 (Cal. Ct. App. Aug. 15, 2012) (recounting that the trial judge had emphasized that revocation did not depend on the seriousness of the violation because if the defendant “got a speeding ticket, theoretically he’d be in violation”); State v. Rutledge, No. E2006-00954-CCA-R3-CD, 2007 WL 924124, \*1–2 (Tenn. Crim. App. Mar. 28, 2007) (upholding eight year revocation sentence for violations that included a speeding citation); *see also* Johnson v. United States, 179 F. App’x 246 (6th Cir. 2006) (upholding forty-eight month revocation sentence for two violations of supervised release: failure to timely report a speeding citation and failure to follow the rules of a halfway house).

Jurisdictions that do not differentiate between criminal and civil law in their standard conditions have radically expanded the scope of potential technical violations with just a few chosen words. Indeed, a violation based on a civil infraction is the very essence of a technical violation: a violation that is not itself criminal. By swallowing the civil law wholesale, an “obey the law” condition provides countless new grounds for probationers to violate the terms of their probation. And these are all violations that the courts—and perhaps more importantly, probation officers—have the power to sanction.

B. “BE GOOD” AND ASSOCIATE WITH “GOOD” PEOPLE

Many jurisdictions also include what I call a “be good” condition among their standard conditions of probation.<sup>33</sup> As shown in Table 2, a form of this condition appears in all three states with the largest numbers of people on probation: Georgia, Texas, and California. It also appears in the three states with the greatest percentage of their adults on probation: Georgia, Ohio, and Rhode Island.

This condition takes different forms in different states. Georgia’s statewide disposition documents, for example, instruct felony and misdemeanor probationers to “be of general good behavior” and “[a]void injurious and vicious habits” as “[g]eneral [c]onditions of [p]robation.”<sup>34</sup> In California, a state statute allows for revocation if a probationer has “become abandoned” to a “vicious life.”<sup>35</sup> In Rhode Island, the courts characterize “[k]eeping the peace and remaining on good behavior” as the two key conditions of probation.<sup>36</sup>

These kinds of be good conditions are so broad that they defy basic due process requirements. In 1972, the Supreme Court held that “an enactment is void for vagueness if its prohibitions are not clearly defined.”<sup>37</sup> A law must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.”<sup>38</sup> Instructions to be good or to conduct oneself properly are so inherently subjective that they do not and cannot have a defined or unified meaning.

Modern challenges to these kinds of conditions are surprisingly rare, however, despite the strong basis for objection and the signaling function the conditions perform for defendants about the power relationships inherent in

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33. See, e.g., *Allen Cnty., Ind.*, *supra* note 11 (“You shall behave well . . .”); *Superior Ct., Lake Cnty., Ind.*, *Formal Probation Conditions* (“I shall conduct myself as a good citizen.”).

34. Ga., SC-6.2, *supra* note 11; Ga., SC-6.3, *supra* note 11.

35. CAL. PENAL CODE § 1203.2(a) (West 2015), *amended on other grounds by* 2015 Cal. Legis. Serv. ch. 61 (S.B. 517) (West).

36. *State v. Hazard*, 68 A.3d 479, 499 (R.I. 2013) (alteration in original) (quoting *State v. Gromkiewicz*, 43 A.3d 45, 48 (R.I. 2012)) (internal quotation marks omitted).

37. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

38. *Id.*

**Table 1: “Obey the Law” Conditions**

<b>Standard “Obey the Law” Condition</b>	<b>Jurisdiction</b>
Do not commit another federal, state, or local crime	Federal
Do not commit a federal or state crime or engage in conduct abroad that would be a crime under Hawaii law	Haw.
Violate no criminal law of any unit of government	Ga. Cook & DuPage Cntys. (Ill.) Monroe Cnty. (Ind.) Mich. Montgomery Cnty. (Pa.)
Do not be charged with a criminal offense based on probable cause	Marion Cnty. (Ind.)
Do not commit a criminal offense or moving motor vehicle offense	Del.
Obey all federal, state, and county criminal laws and city ordinances	Phila. (Pa.)
Obey all state and federal laws	Dakota Cnty. (Minn.)
Violate no federal, state, or local law	Idaho (felony form) Ramsey Cnty. (Minn.) Cuyahoga & Franklin Cntys. (Ohio) Allegheny Cnty. (Pa)
Violate no law of this state, any other state, or the United States	Dallas, Harris, & Tarrant Cntys. (Tex.)
Violate no local, state, or federal law or ordinance	Hennepin Cnty. (Minn.) N.J.
Obey all laws. Minor traffic infractions will not affect probation status.	Kootenai Cnty. (Ind.) (misdemeanor form) San Diego Cnty. (Cal.) (check box)
Obey all laws	L.A. and Orange Cntys. (Cal.) (check box) Fla. Canyon Cnty. (Idaho) (misdemeanor form) Dakota Cnty. (Minn.) Hamilton Cnty. (Ohio) R.I.
Do not violate any laws or ordinances of any jurisdiction, including traffic regulations	Lake Cnty. (Ill.)
Comply with all municipal, county, state, and federal laws, ordinances, and orders	Lake Cnty. (Ind.)

**Table 2: “Be Good” Conditions**

Conditions	Georgia	Texas	California	Ohio	Rhode Island
Keep the Peace and Remain on Good Behavior					Statewide
Be of General Good Behavior	Statewide				
Avoid Injurious and/or Vicious Habits	Statewide	Dallas, Harris, and Tarrant Cntys. (Tex.)			
Do Not Become Abandoned to a Vicious Life			Statewide		
Conduct Oneself Properly				Hamilton Cnty.	

probation.<sup>39</sup> Over time, the conditions became embedded in the routine landscape of the law, in part because courts historically waved off arguments that did raise vagueness challenges without engaging in any extended analysis.<sup>40</sup> In 1971, for example, the Court of Appeals of Georgia acknowledged concerns about a probation condition requiring “general good behavior.”<sup>41</sup> The court noted that even though such conditions “border on the fuzzy and would be open to differing interpretations, they still pertain to social behavior—in which society, acting through its courts, has a legitimate interest.”<sup>42</sup> In 1968, a Court of Appeal in California held that it saw “no vagueness” in conditions requiring a probationer to “conduct himself in a law-abiding manner,” not to engage in “criminal practices,” and not to become “abandoned to improper associates or a vicious life.”<sup>43</sup> Without further elaboration, the court simply held that such terms were not unconstitutionally vague.<sup>44</sup> Other courts have held that probationers waive all capacity to challenge conditions on vagueness grounds once they have agreed to accept a sentence of probation that incorporates those conditions;<sup>45</sup> this reasoning is a version of the contract theory of probation discussed in Part IV.C.

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39. It is not uncommon for judges to warn probationers, for example, that they will deal harshly with a violation of any condition of probation. *See, e.g.*, *Swanson v. State*, No. 12-01-00132-CR, 2002 WL 335306, at \*1–2 (Tex. App. Feb. 28, 2002) (observing that the trial judge had warned the defendant that a violation of any condition of probation would result in a sentence of 25–99 years); *Hernandez v. State*, No. 14-96-00546-CR, 1998 WL 3641, at \*3 (Tex. App. Jan. 8, 1998) (noting that the trial judge warned the defendant that a violation of any of the rules of probation would likely result in a prison term).

40. *See, e.g.*, *Rowland v. State*, 184 S.E.2d 494, 495 (Ga. Ct. App. 1971) (dismissing a vagueness challenge to a probation condition that prohibited “indulging in any unlawful, disrespectful or disorderly conduct or habits”).

41. *Inman v. State*, 183 S.E.2d 413, 415 (Ga. Ct. App. 1971).

42. *Id.*

43. *People v. Jones*, 70 Cal. Rptr. 13, 17 (Cal. Ct. App. 1968).

44. *Id.*

45. *See, e.g.*, *Simmons v. State*, No. 06-08-00099-CR, 2008 WL 4587282, at \*2 (Tex. Ct. App. Oct. 16, 2008) (holding defendant had “waived any ambiguity argument” with respect to an “[a]void injurious or vicious habits” in signing off on probation order imposing the condition (alteration in

The current usage of the “avoid injurious or vicious habits” condition in Texas illustrates how confusing these conditions are in practice. The state’s probation statute authorizes the use of this condition, but the statute itself provides no indication of its meaning.<sup>46</sup> I therefore compare its semantic presentation in the state’s three most populated counties. Table 3 provides examples of how the condition appears on the counties’ respective judgment forms and probation websites.

**Table 3: “Injurious or Vicious Habits” by Texas County**

Texas County	Standard Condition
Harris County (includes Houston)	Avoid injurious or vicious habits. (The use of illegal drugs and alcohol.)
Dallas County	Avoid injurious or vicious habits.
Tarrant County (includes Fort Worth)	Avoid injurious or vicious habits and abstain from the illegal use of controlled substances or consumption of any alcoholic beverage.

A probationer reading the text of the condition, as laid out in these three counties, could not come away with a clear understanding of what it means to avoid injurious or vicious habits. In Dallas County, the misdemeanor probation form simply recites the condition in all its vagueness, offering neither context nor clarification.<sup>47</sup> In Harris County, the parenthetical suggests that “[a]void-[ing] injurious or vicious habits” means avoiding the “use of illegal drugs and alcohol.”<sup>48</sup> But in Tarrant County, probationers who have been convicted of a felony must “[a]void injurious or vicious habits” and “abstain from the illegal use of controlled substances, marijuana, cannabinoids or consumption of any alcoholic beverage.”<sup>49</sup> Thus, avoiding injurious and vicious habits seems to mean the one thing in Harris County that it cannot mean in Tarrant County. To the extent that any guidance is provided, that guidance is oppositional.

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original) (internal quotation mark omitted)); *Douthitt v. State*, No. 06-10-00024-CR, 2010 WL 2477866, at \*4 (Tex. Ct. App. June 21, 2010) (same).

46. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 11(a)(2) (West 2015).

47. Dallas Cnty., Tex., *Misdemeanor Probation*, *supra* note 28.

48. See *Frequently Asked Questions*, HARRIS CNTY. CMTY. SUPERVISION & CORR. DEP’T, <http://www.harriscountytexas.gov/CSCD/faq.aspx> (last visited Sept. 1, 2015) (listing standard conditions of probation in Harris County).

49. Tarrant Cnty., Tex., *Community Supervision*, *supra* note 28. The misdemeanor form for Tarrant County simply states: “Avoid injurious or vicious habits . . .” Tarrant Cnty., Tex., *Deferred Adjudication*, *supra* note 28. Meanwhile, the county-issued handbook for probationers states that standard conditions of probation can include an order to “avoid injurious or vicious habits” and “abstain from the illegal use of controlled substances or excessive consumption of alcoholic beverages.” CMTY. SUPERVISION & CORR. DEP’T OF TARRANT CNTY., TEX., *PROBATIONER HANDBOOK* (2012) (emphasis added).



Reviewing the implementation of the same condition in other Texas counties only deepens the confusion. Travis County, the fifth most populous county in Texas, requires probationers to “[a]void injurious or vicious habits” as the second condition on a list of “General Conditions of Community Supervision.”<sup>50</sup> The third condition requires probationers to “[a]void the use of all narcotics, habit forming drugs, alcoholic beverages, and controlled substances.”<sup>51</sup> Thus, Travis County’s form not only provides no explanation for what it means to “[a]void injurious or vicious habits,” but makes clear that avoiding the use of drugs and alcohol is an entirely separate prohibition from avoiding “injurious or vicious habits.”<sup>52</sup>

In addition to the be good conditions, many jurisdictions require probationers to associate with only “good” people.<sup>53</sup> As shown on Table 4, this kind of broad associational limitation appears in four of the five states that use probation most heavily.<sup>54</sup> In Georgia, Texas, and California, the phrasing is particularly expansive. In these states, probationers are variously instructed to avoid all disreputable, harmful, or improper persons. The probationer is permitted to associate only with good people, who are presumably the reputable, the harmless, and the proper.

These conditions run into the same due process problems as the be good conditions discussed above. Each of the chosen terms is as vague and subjective as the next. The instructions are purposefully—indeed, rigorously—unclear.

To the limited extent such conditions have been challenged, appellate courts have tended to uphold the associational prohibitions in terms nearly as broad as the conditions themselves.<sup>55</sup> In a 2002 case, for example, a Texas court found that a probationer had failed to “avoid persons or places of disreputable or

50. TRAVIS CNTY., TEX., GENERAL CONDITIONS OF COMMUNITY SUPERVISION (2015), available at [https://www.traviscountytexas.gov/images/adult\\_probation/docs/basic\\_conditions.pdf](https://www.traviscountytexas.gov/images/adult_probation/docs/basic_conditions.pdf).

51. *Id.*

52. *Id.*

53. See, e.g., FLA. R. CRIM. P. 3.986(e)(3)(6) (“You will not associate with any person engaged in any criminal activity.”); Lake Cnty., Ind., *supra* note 33 (“I shall avoid former inmates or penal institutions, and individuals of bad reputation.”).

54. See CAL. PENAL CODE § 1203.2(a) (West 2015) amended on other grounds by 2015 Cal. Legis. Serv. ch. 61 (S.B. 517) (West); Ga., SC-6.2, *supra* note 11; Ga., SC-6.3, *supra* note 11; Dallas Cnty., Tex., *Community Supervision*, *supra* note 28; Dallas Cnty., Tex., *Misdemeanor Probation*, *supra* note 28; Harris Cnty., Tex., *supra* note 28; Tarrant Cnty., Tex., *Community Supervision*, *supra* note 28; Cuyahoga Cnty., Ohio, *supra* note 11.

55. See, e.g., *People v. Moses*, 131 Cal. Rptr. 3d 106, 111–12 (Cal. Ct. App. 2011) (upholding a condition of probation that defendant not associate with persons he “knows or reasonably should know” to be “parolees, convicted felons, users or sellers of illegal drugs or otherwise disapproved by probation” (emphasis omitted)); *Boatner v. State*, 717 S.E.2d 727, 728–30 (Ga. Ct. App. 2011) (holding sufficient evidence to revoke probation when probationer failed to avoid his brother-in-law, who he knew was on parole); *Scroggins v. State*, 815 S.W.2d 898, 899 (Tex. Ct. App. 1991) (rejecting vagueness challenge to probation condition requiring defendant to avoid persons of harmful or disreputable character). *But see* *People v. Mohrmann*, No. H034459, 2010 WL 4720263, at \*4–5 (Cal. Ct. App. Nov. 22, 2010) (striking probation condition that ordered defendant not to “associate with persons whose behavior might lead to criminal activities”).

harmful character” because he had been seen “at” a crack house.<sup>56</sup> Although the court did not indicate that the probationer was ever inside the house, he was seen “hanging around” the house on one occasion and parked outside the house on a different occasion.<sup>57</sup> At the revocation hearing, the probation officer testified that probationers are “not to associate with people who possibly sell drugs or having [sic] parties, associate in illegal activities or not to go to places that there is an illegal activity going on.”<sup>58</sup> Based on this explanation of the condition’s meaning, the court revoked the man’s probation and sentenced him to four years in prison.<sup>59</sup>

These two sets of conditions—be good and associate with good people—are designed to leave power firmly in the hands of the probation officer. The probation officer can decide if the probationer is keeping the peace or remaining on good behavior. The probation officer can decide who might be a positive influence and when a relationship should be cut off.

In this sense, the standard Ohio condition included in Table 4 also provides a great deal of discretion to probation officers, although its language is much more concrete. In Cuyahoga County, the general rules of probation include the following condition: “Do not associate with persons having known criminal records (including convicted co-defendants in your case).”<sup>60</sup> By these terms, the condition seems to ban all communication with anyone who has been convicted of even the smallest criminal offense, no matter how many years in the past. But the probation officer can decide how narrowly to inquire into the probationer’s activities or how strictly to enforce the rule.

**Table 4: Limits on Association by State and County**

Conditions	Georgia	Texas	California	Ohio	Rhode Island
Avoid persons or places of disreputable or harmful character	Statewide	Dallas, Harris, & Tarrant Cntys.			
Refrain from becoming abandoned to improper associates			Statewide		
Do not associate with persons having known criminal records				Cuyahoga Cnty.	

56. Willard v. State, No. 07-01-0438-CR, 2002 WL 1807143, at \*2 (Tex. Ct. App. Aug. 7, 2002).

57. *Id.*

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

59. *Id.* at \*1.

60. Cuyahoga Cnty., Ohio, *supra* note 11.

Other jurisdictions have different forms of associational conditions, although not all jurisdictions explicitly include these kinds of restrictions. In the federal system and in Marion County, Indiana, probationers may not associate with a convicted felon without the approval of the probation officer, a more targeted version of the Cuyahoga County condition.<sup>61</sup> Another Indiana jurisdiction, Lake County, is even more expansive: probationers must avoid all former inmates and “individuals of bad reputation.”<sup>62</sup> The Idaho Department of Correction has arguably the most intrusive standard condition in light of the explicit power that it confers on its officers. It provides that a “defendant shall not associate with any person(s) designated by any agent of the Idaho Dep[artment] of Correction.”<sup>63</sup>

Examples drawn from the federal supervised release system illustrate how associational limitations can be enforced in practice.<sup>64</sup> In 2014, a judge in the Eastern District of New York sentenced a defendant to eighteen months in prison and three additional years of supervised release for associating with a convicted felon.<sup>65</sup> The defendant pleaded guilty to speaking to a member of his treatment group on the subway following a treatment session, while “knowing the person had been convicted of a felony, and knowing that he was not supposed to have contact with other group members outside the treatment program.”<sup>66</sup> In 2014, a judge in the Eastern District of Oklahoma sentenced a defendant to twelve months in prison for associating with a convicted felon, even though the defendant argued in mitigation that he had lived with the felon for fifteen years and considered him “to be family.”<sup>67</sup> In 2010, a judge in the Central District of California sentenced a defendant to nine months in prison for a number of associational violations.<sup>68</sup> The defendant, who had recently completed a lengthy prison term, was found guilty of working for a convicted felon and communicating with federal inmates by phone and e-mail.<sup>69</sup>

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61. AO-245B, *supra* note 21; Marion Cnty., Ind., *supra* note 27.

62. Lake Cnty., Ind., *supra* note 33.

63. Idaho Dep’t of Corr., Revised Agreement of Supervision, condition 13 (applicable to felony probation); *see also* People v. Curiel, No. G032061, 2003 WL 22478155, at \*2 (Cal. Ct. App. Nov. 3, 2003) (upholding probation condition: “Do not associate with anyone you know your Probation Officer disapproves of.” (internal quotation marks omitted)).

64. *See, e.g.*, United States v. Miller, 608 F. App’x 707, 709 (10th Cir. 2015) (mem.) (upholding thirty-six-month revocation sentence based on supervised release violations that included associating with a convicted felon); United States v. Talksabout, No. 10-79-GF-DLC-RKS-01, 2014 WL 103774, at \*4 (D. Mont. Jan. 8, 2014) (imposing a six month revocation sentence for defendant’s use of alcohol and association with a convicted felon).

65. *See* United States v. Aldeen, 792 F.3d 247, 250–51 (2d Cir. 2015).

66. *Id.* at 250. The Second Circuit remanded the case for a fuller explanation of why the judge decided to sentence the defendant so far above the advisory guidelines range of four-to-ten months imprisonment. *See id.* at 249–51, 255–56.

67. United States v. Osborn, 611 F. App’x 939, 940–41 (10th Cir. 2015) (affirming the sentence).

68. United States v. King, 608 F.3d 1122, 1125–26 (9th Cir. 2010).

69. *Id.*

## C. WORK AND SUPPORT YOUR FAMILY

In nearly every jurisdiction in my study, working or going to school is a central requirement of being on probation. Being productively occupied is part of the definition of what it means not to recidivate.

Some jurisdictions require only that probationers try to work or go to school. The language used in these jurisdictions, the first group outlined in Table 5, allows for the possibility that some probationers might not be able to find work or afford school. Probationers are to go to work or school “insofar as may be possible,” using their best efforts.<sup>70</sup> As long as they are trying their hardest, they are not violating the conditions of their probation.

In each of these jurisdictions, however, the terms used in the condition give the probation officer the power to decide if the probationer is truly making a sufficient effort. In Georgia, for example, the probation officer decides whether the person is doing everything “possible” to “[w]ork faithfully” at a “suitable” employment.<sup>71</sup> In Pennsylvania and Rhode Island, the probation officer can judge whether or not a person is making “every” effort to find and maintain a job.<sup>72</sup> Words like every and possible give the officer a great deal of leverage to enforce his or her own views about how hard a particular probationer is trying.

A second group of jurisdictions hands over control more assertively to the probation officer. In Florida and the two largest California counties, probationers must work (or go to school) “as directed by [the probation] officer.”<sup>73</sup> In Idaho, Delaware and the federal system, the officer can decide whether the person works, goes to school, or perhaps attends some form of job search program.<sup>74</sup>

Some jurisdictions in this second category offer more detail on the kinds of control a probation officer might wield over a person’s employment decisions. In Idaho, for example, a probationer “shall not accept, cause to be terminated from, or change employment without first obtaining written permission from his/her supervising officer.”<sup>75</sup> In Monroe County, Indiana, the probation officer

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70. See, e.g., Ga., SC-6.2, *supra* note 11 (“Work faithfully at suitable employment insofar as may be possible.”).

71. Ga., SC-6.2, *supra* note 11; Ga., SC-6.3, *supra* note 11.

72. Allegheny Cnty., Pa., *supra* note 29; Montgomery Cnty., Pa., *supra* note 29; Phila. Cnty., Pa., *supra* note 29; R.I. Dep’t of Corr., *supra* note 11.

73. FLA. R. CRIM. P. 3.986(e)(3)(8); L.A. Cnty., Cal., *Felony*, *supra* note 30; Superior Ct., San Diego Cnty., Cal., Order Granting Formal Probation; see also Interview with L.A. Pub. Defender (Dec. 18, 2014) (on file with author) (noting this condition is standard for formal probation); Interview with San Diego Dist. Atty’s Office (Dec. 18, 2014) (on file with author) (same).

74. AO-245B, *supra* note 21; Del. Dep’t of Corr., Conditions of Supervision, Level 3 Addendum; Idaho Dep’t of Corr., *supra* note 63. For case examples, see *United States v. Cofield*, 233 F.3d 405, 407 (6th Cir. 2000) (upholding two-year prison term based on supervised release violations that included “failing to maintain gainful employment” and failing to follow “other instructions of his probation officer”); *United States v. White*, No. 02-CR-47-BBC-02, 2008 WL 4449980, at \*3 (W.D. Wis. Apr. 22, 2008) (imposing a twelve-month prison sentence because the defendant had ignored the directions of his supervising probation officer to find a job and support his dependents).

75. Idaho Dep’t of Corr., *supra* note 63.

may order a probationer to “participate in classes regarding employment” if the officer thinks that the person is “under-employed.”<sup>76</sup> These conditions give the probation officer significant power to judge the quality and social worth of the work that a probationer does.

In a final group of jurisdictions, the probationer must go to work as a condition of probation, apparently without limitation or exception. Harris and Tarrant Counties (the first and third largest counties in Texas, respectively) require the probationer to “[w]ork faithfully at suitable employment.”<sup>77</sup> Similarly, a probationer in New Jersey must “maintain gainful employment.”<sup>78</sup> As presented to a probationer, these conditions do not make any allowance for best efforts or the inability to find a job. Failing to work is a violation of a clear condition of probation.<sup>79</sup>

Many jurisdictions in my study also include supporting dependents as a condition of probation. As indicated on Table 6, this condition is somewhat less common than the work or go to school condition. However, it is a condition in all five states that have the greatest numbers of people on probation: Georgia, Texas, California, Ohio, and Florida.

The “support your dependents” conditions fall into the same three categories as the “go to work or school” conditions. In essence, depending on the jurisdiction, the language instructs the probationer: (1) to support your dependents as much as you possibly can; (2) to support your dependents as much you can at the direction of your probation officer; or (3) to support your dependents without regard to what is possible for you right now.

Conditions in the first two categories present the same dynamic in which the ambiguity of the chosen language transfers power to the probation officer. The officer gets to decide whether the probationer is trying hard enough to provide some support (or perhaps full support) to his or her dependents.

The conditions in the third category seem to provide no apparent leeway if the probationer cannot make ends meet. Dallas and Tarrant Counties simply instruct the probationer to support his or her dependents (as well as to hold down a “suitable” job).<sup>80</sup> In the federal system, New Jersey, and Lake County, Indiana, the probationer must also meet his or her “family responsibilities,” with

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76. Prob. Dep’t, Monroe Cir. Ct., Ind., Conditions of Probation.

77. Harris Cnty., Tex., *supra* note 28; Tarrant Cnty., Tex., *Community Supervision*, *supra* note 28.

78. N.J. Judiciary, Standard Conditions of Adult Probation (2007).

79. *See, e.g.*, United States v. Johnson, No. 02-20390-CR, 2008 WL 2704454, at \*1 (S.D. Fla. July 7, 2008) (upholding thirty-day revocation sentence for “failing to maintain full-time legitimate employment” and failing to support dependents by paying court-ordered child support); Ramirez v. State, No. 08-09-00245-CR, 2011 WL 241954, at \*1 (Tex. Ct. App. Jan. 26, 2011) (upholding a ten-year revocation sentence based partly on defendant’s “failing to maintain suitable employment as required by term 8”).

80. Dallas Cnty., Tex., *Community Supervision*, *supra* note 28; Tarrant Cnty., Tex., *Community Supervision*, *supra* note 28.

**Table 5: Probation Conditions Related to Employment and Schooling**

<b>Standard Employment and Schooling Condition</b>	<b>Jurisdiction</b>
Work faithfully at suitable employment in so far as possible	Ga.; Franklin Cnty. (Ohio); Dallas Cnty. (Tex.); Tarrant Cnty. (Tex.) (misd. prob.)
Make every effort to obtain and maintain employment	Allegheny, Delaware, Montgomery, Phila. Cntys. (Pa.)
Make every effort to keep steadily employed or attend school	R.I.; Hamilton Cnty. (Ohio)
Maintain verifiable, sustained, gainful employment or participate in educational program. A search for employment will be done in full earnest.	Kootenai Cnty. (Idaho) (misd. prob.)
Work or go to school as directed by PO	Marion Cnty. (Ind.) Check Off: L.A. Cnty. (Cal.) (fel. prob.); San Diego Cnty. (Cal.)
Work diligently at a lawful occupation as directed by PO	Fla.
Work full-time or do education program, as directed by PO	Ada Cnty. (Idaho) (misd. prob.); Canyon Cnty. (Idaho) (misd. prob.)
Maintain gainful, verifiable, full-time employment or alternative schooling/employment plan approved by PO	Idaho (fel. prob.)
Work or go to school full-time or attend a job search program or community service as directed by PO	Del. (level 3 supervision)
Work regularly at a lawful occupation, unless excused by PO for schooling or other acceptable reason	Federal
Obtain/continue employment and/or attend educational programs unless otherwise ordered by the Court	Lake Cnty. (Ill.)
Work at a lawful occupation and/or further your education	DuPage Cnty. (Ill.)
Seek and maintain gainful employment	N.J.
Work faithfully at suitable employment or faithfully pursue study/training that will equip you for employment	Lake Cnty. (Ind.)
Work faithfully at suitable employment	Harris Cnty. (Tex.); Tarrant Cnty. (Tex.) (fel. prob.)
You shall be employed full-time	Allen Cnty. (Ind.)

the meaning of that term left to the interpretation of the probation officer.<sup>81</sup>

**Table 6: Dependent Support Conditions**

<b>Standard Support Condition</b>	<b>Jurisdiction</b>
Support your legal dependents to the best of your ability	Ga.
Make every effort to support your dependents	Hamilton Cnty. (Ohio); Delaware & Montgomery Cntys. (Pa.)
Support your dependents as required by law	Harris Cnty. (Tex.)
Support your dependents to the best of your ability, as directed by PO	Fla.
Support your dependents as directed by PO	Check Off: L.A. Cnty. (Cal.)
Support your dependent children	Marion Cnty. (Ind.)
Support your dependents	DuPage Cnty. (Ill.); Allen Cnty. (Ind.); Dallas & Tarrant Cntys. (Tex.)
Support your dependents and meet your family responsibilities.	Federal; N.J.; Lake Cnty. (Ind.)

Of course, the stark language of these conditions is meant to create flexibility in their enforcement. None of the authorities drafting these conditions (whether they relate to employment or the support of dependents) could assume that all probationers will satisfy the stated requirements if they only try their very best. By framing the requirements in absolute terms, the jurisdictions provide the probation officer with wide latitude in deciding how to press for compliance.

A case from Harris County, Texas, demonstrates how probation officers can adapt and administer outwardly inflexible conditions in practice. To enforce the condition that probationers work faithfully at suitable employment, the Harris County probation department developed a policy that unemployed probationers “must apply to four jobs each weekday to show sufficient efforts to obtain employment.”<sup>82</sup> In 2013, the Court of Appeals of Texas upheld a two-year prison term imposed on a probationer who had failed to meet this application quota.<sup>83</sup> The probationer was faulted in part for being too choosy by applying

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81. AO-245B, *supra* note 21; N.J. Judiciary, *supra* note 78; Lake Cnty., Ind., *supra* note 33. For examples of judges finding violations of the condition requiring the support of dependents, see *United States v. Lancaster*, 319 F. App’x 886, 887 (11th Cir. 2009) (upholding revocation of supervised release and prison term of eleven months based in part on the failure to support dependents); *United States v. Cruel*, No. 6:08-CR-00797-1-JMC, 2013 WL 5522885, at \*1–2 (D.S.C. Oct. 4, 2013) (imposing prison term of twenty-one months based in part on failure to pay child support).

82. *Reese v. State*, No. 01-11-00360-CR, 2013 WL 174562, at \*1 (Tex. Ct. App. Jan. 17, 2013).

83. *Id.* at \*3.

“only to jobs related to his trade.”<sup>84</sup>

#### D. PAY PROBATION FEES

Nearly every jurisdiction in my study has standard conditions of probation requiring that probationers pay for—or at least contribute to—the costs of their own supervision. I found provisions for monthly supervision fees in every jurisdiction except for the federal system.

The exact amount of these fees can be difficult to decipher because the authorities within a given jurisdiction do not necessarily use a single set of rates for all probationers. At the low end of the spectrum, as represented by Rhode Island<sup>85</sup> and New Jersey,<sup>86</sup> the rates are around \$20 per month. The highest range is represented by jurisdictions including Tarrant County, Texas (\$60 per month),<sup>87</sup> Idaho’s statewide probation system for felony offenders (\$60 per month),<sup>88</sup> and Ada County, Idaho (\$75 per month).<sup>89</sup>

Courts also routinely impose other fees on top of the monthly supervision payments. Courts in Marion County and Allen County, Indiana, for example, charge probationers an initial user fee and an administrative fee on top of the monthly supervision fees.<sup>90</sup> Many jurisdictions also assess fees for the use of a public defender.<sup>91</sup>

My study reveals how endemic fees are in state probation systems, not just in the jurisdictions that contract with private probation companies. Although the impact of these fees has come under significant criticism in recent years, the focus has been heavily skewed toward the role of private probation companies.<sup>92</sup> The widespread imposition of these fees as standard conditions of probation, however, must be examined in a broader context, as a function of both private and state-run supervision.

#### E. STANDARD CONDITIONS FOR SPECIALIZED CASELOADS

Many probation departments have specialized units that impose their own sets of standard conditions. Some of the probation departments in my study have specialized units, for example, for intensive supervision programs, sex

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84. *Id.*

85. *Probation and Parole: FAQ*, R.I. DEP’T OF CORR., <http://www.doc.ri.gov/probation/faq.php> (last visited Sept. 10, 2015).

86. See N.J. REV. STAT. § 2C:45-1(d)(1) (2013) (authorizing fee of up to \$25 per month).

87. Tarrant Cnty., Tex., *Community Supervision*, *supra* note 28.

88. *Cost of Supervision*, IDAHO DEP’T OF CORR., [https://www.idoc.idaho.gov/content/probation\\_and\\_parole/offender\\_resources/cost\\_of\\_supervision](https://www.idoc.idaho.gov/content/probation_and_parole/offender_resources/cost_of_supervision) (last visited Sept. 10, 2015).

89. See Ada Cnty., Idaho, Supervised Misdemeanor Probation Order.

90. See Allen Cnty., Ind., *supra* note 11; Marion Cnty., Ind., *supra* note 27.

91. See, e.g., Canyon Cnty., Idaho, Judgment (stating the Defendant shall “Reimburse for atty or P.D.”); Allen Cnty., Ind., *supra* note 11 (providing for a Public Defender fee); Marion Cnty., Ind., *supra* note 27 (assessing either a \$50 or \$100 “Public Defender” fee, depending on crime of conviction).

92. See, e.g., HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY (2014) (focusing on the fees charged by private probation companies).



offender programs, and domestic violence programs.<sup>93</sup> Probationers in these units are often subject to a unit-specific set of standard conditions on top of the regular standard conditions—all in addition to whatever individually tailored special conditions the judge might craft for a particular probationer.

A comprehensive review of program-specific standard conditions is outside the scope of this Article. I will use the example of alcohol proscriptions, however, to illustrate the extent to which program-specific standard conditions can escalate the constraints on probationers.

Many of the jurisdictions in my study impose a standard condition that prevents anyone on probation from using or possessing alcohol<sup>94</sup> or using alcohol to excess.<sup>95</sup> Some jurisdictions go further and prohibit probationers, whatever their crime of conviction, from entering any establishment that serves alcohol as its main source of revenue.<sup>96</sup>

The supplemental alcohol conditions that apply to the Intensive Probation Supervision Unit in Lake County, Illinois, show just how much a specialized unit can intensify the nature of these requirements. This unit is theoretically for people the court would most likely have sent to prison, were it not for the availability of intensive supervision.<sup>97</sup> However, low-level offenders do sometimes end up in the unit.<sup>98</sup> The unit description says nothing about any particular focus on people with alcohol problems.<sup>99</sup> Nevertheless, the list of standard conditions applied through this program includes the following alcohol-related requirements. The probationer, according to the form, “MUST”:

- A. Not use, ingest or consume any over-the-counter medication, hygiene product or other compound or product that contains alcohol.
- B. Not reside in any house, apartment unit, condominium unit or other location where alcoholic beverages are present or regularly consumed.<sup>100</sup>

On their face, these standard conditions have tremendous implications for a probationer’s daily life. The conditions prohibit a probationer from staying with any friend or relative who keeps even a bottle of wine in the house. And given

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93. See, e.g., *CSCD Programs and Services*, TARRANT CNTY., TEX., <http://access.tarrantcounty.com/en/community-supervision-corrections/cscd-programs-and-services.html>. (last visited Sept. 15, 2015) (listing specialized supervision caseloads).

94. See, e.g., Kootenai Cnty., Idaho, Supervised Probation Order; Prob. Dep’t, Cleveland Mun. Ct., Ohio, Rules of Community Control Supervision; Harris Cnty., Tex., *supra* note 28; Tarrant Cnty., Tex., *Community Supervision*, *supra* note 28.

95. See, e.g., AO-245B, *supra* note 21; FLA. R. CRIM. P. 3.986(e)(3)(7).

96. See, e.g., Idaho Dep’t of Corr., *supra* note 63.

97. *Our Organization*, NINETEENTH JUD. CIR. CT. OF LAKE CNTY., ILL., DIV. OF ADULT PROB. SERVS., [http://19thcircuitcourt.state.il.us/Organization/Pages/adtprob\\_home.aspx#ip](http://19thcircuitcourt.state.il.us/Organization/Pages/adtprob_home.aspx#ip) (last visited Sept. 15, 2015).

98. Interview with Prob. Officer, Lake Cnty., Ill. (Dec. 4, 2014) (on file with author).

99. *Id.*; see also Lake Cnty., Ill., *Felony*, *supra* note 31.

100. See Sex Offender Unit, Lake Cnty., Ill., Additional Conditions of Probation/Supervised Supervision, conditions A & B.

the wide variety of daily products that contain alcohol—such as deodorants, shampoos, toothpastes, soaps, cleaners, and makeup—any probationer would be hard-pressed to comply with the instruction not to use these products and compounds. The items defined as contraband have moved far into the realm of products contained in almost every American house.

### III. ENFORCEMENT POWERS TO CONTROL RECIDIVISM

The conditions of probation are enforced through a shadow policing and adjudication system. These enforcement powers bear little relation to the regular criminal justice system, even though the same judges preside over both systems.

The enforcement mechanisms that apply to probationers differ from the normal criminal justice system in three important respects. First, probation officers have extensive police powers to investigate whether probationers are complying with the conditions of probation. These powers, which are imposed as conditions of probation, largely exempt probationers from Fourth Amendment protections. Second, few of the rights fundamental to the criminal justice system apply in revocation proceedings, the court hearings in which a judge decides whether a person has violated a condition of probation. Third, probation officers have extensive powers to punish probationers for a violation of probation through what are called graduated sanction systems; these systems are separate from the judicial revocation process.

#### A. STANDARD POLICING CONDITIONS

##### 1. Monitoring, Reporting, and Visiting Powers

Standard conditions of probation facilitate proactive monitoring by requiring probationers to report to the probation officer. None of the standard conditions I uncovered provides any definition of what it means to report: the content of reporting is left to the discretion of the officer. At a minimum, the reporting requirement provides the officer with an opportunity to check on compliance with the other conditions of probation.

In nearly every jurisdiction, the standard reporting condition requires the probationer to report “as directed” by the probation officer.<sup>101</sup> Most courts do not specify any particular reporting interval; instead, they order the probationer to follow the probation officer’s instructions in this regard. In so doing, courts give the officers the power to decide how often, if at all, the person must report in person or by some other means, such as by phone or by mail. Thus, although the fact of surveillance is imposed as a standard condition, the intensity of the surveillance mechanism is left to the discretion of the probation department.

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101. *See, e.g.*, Ga., SC-6.2, *supra* note 11; Ga., SC-6.3, *supra* note 11; Harris Cnty., Tex., *supra* note 28.

Tied to the reporting requirement is another common enforcement tool: a condition requiring a probationer to be “truthful” in all dealings with the probation office. Courts in at least nine of the jurisdictions I studied—Hamilton County (Ohio), Florida, Michigan, Marion County (Indiana), New Jersey, Idaho, Ramsey County (Minnesota), and the federal system—include a “be truthful” requirement as a standard condition of probation.<sup>102</sup> This condition creates more leverage for probation officers in asking questions about compliance, as any failure to tell the truth can be its own subject of disciplinary enforcement.<sup>103</sup>

Most jurisdictions in my study also allow for unannounced visits from a probation officer as a standard condition of probation. As reflected on Table 7, a small number of jurisdictions limit the visit condition to home visits by a probation officer. But many explicitly contemplate, and therefore promote, visits at a probationer’s place of employment. Still others—indeed, the largest group—authorize a probation officer to visit a probationer anywhere at all, including at home or at work.

It is not hard to imagine how these surveillance powers might interfere with a probationer’s ability to maintain a job (another core requirement of probation).<sup>104</sup> A probation officer decides when the probationer must report, including in-person reporting. But very few people (especially poor people) have flexible work schedules. The probation officer decides when to visit a probationer at work. While there, the officer might introduce himself to a boss or insist on being shown around. Such actions, although consistent with the policing powers of probation, could damage a probationer’s standing at work or the security of her position.

## 2. Search Powers

Many courts also impose expansive search conditions to ramp up the investigative and surveillance powers of probation officers. At the narrowest end of this spectrum, probationers in Hamilton County, Ohio, are subject to a standard condition that requires them to submit to a search of their person and any bag or package in their possession.<sup>105</sup> At the other end of the spectrum, as exemplified by a standard condition in Idaho, courts mandate that people give up all of their

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102. See AO-245B, *supra* note 21; FLA. R. CRIM. P. 3.986(e)(3)(9); Idaho Dep’t of Corr., *supra* note 63; State of Mich., CC 243(a), *supra* note 26; N.J. Judiciary, *supra* note 78; Marion Cnty., Ind., *supra* note 27; Cmty. Corr., Ramsey Cnty., Minn., General Conditions of Probation; Prob. Dep’t, Hamilton Cnty., Ohio, General Rules for Probationers.

103. See, e.g., *People v. Dighera*, No. 305220, 2012 WL 4093702, at \*8 (Mich. Ct. App. 2012) (upholding prison sentence in revocation proceedings based on defendant’s failure to be truthful with his probation officer, even though defendant had passed a polygraph test indicating that he had not lied and argued that the allegations were based on a miscommunication).

104. See Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 447–48 (2011) (examining how parole conditions can interfere with reintegration, including employment options).

105. Hamilton Cnty., Ohio, *supra* note 102.

**Table 7: Officer Visit Conditions**

<b>Standard “Probation Officer Visit” Condition</b>	<b>Jurisdiction</b>
You must allow your PO to visit you at your home.	Hawaii; Marion Cnty. (Ill.); Allegheny Cnty. (Pa.); Montgomery Cnty. (Pa.)
You are subject to field contacts.	Allen Cnty. (Ind.)
You must allow your PO to visit you at your home or place of employment.	Del.; Phila. Cnty. (Pa.)
You must allow your PO to enter your home, other real property, place of employment, or vehicle for the purpose of visitation, inspections, and other supervision functions.	Idaho
You must allow your PO to visit you at your home, place of employment, or elsewhere.	Fla.; Harris Cnty. (Tex)
You must allow your PO to visit you at your home or any other suitable place.	N.J.
You must allow your PO to visit you at your home or elsewhere.	Federal; Ga.; DuPage & Lake Cntys. (Ill.); Dallas Cnty. (Tex.) (fel. prob.); Tarrant Cnty. (Tex.)

Fourth Amendment rights as a condition of being on probation.<sup>106</sup>

Conditions that diminish (or eviscerate) Fourth Amendment rights allow for deep intrusions into a probationer’s privacy, typically permitting searches of a probationer’s home, for example, at any time without notice. The standard conditions I discovered through my research are meant to ensure that the enforcement powers of probation are not constrained by normal Fourth Amendment limitations. Representative examples of these conditions are included in Table 8.

In two important decisions, the U.S. Supreme Court upheld a warrantless search of a probationer when the person was subject to a search condition. The Court relied on the existence of the search condition in these two cases, which encourages jurisdictions to adopt these kinds of conditions as standard conditions of probation.

In *Griffin v. Wisconsin*, a 1987 case, the Supreme Court upheld a probation regulation that permitted a warrantless search of a probationer’s home.<sup>107</sup> This

106. See, e.g., Idaho Dep’t of Corr., *supra* note 63.

107. 483 U.S. 868, 874 (1987).

**Table 8: Standard Search Conditions**

<b>Sample Standard Search Conditions</b>	<b>Jurisdiction</b>
Upon reasonable suspicion, a PO can search you, your vehicle, and your home without a warrant.	Allegheny & Montgomery Cntys. (Pa.)
You are subject to a person search or property search, including vehicle, if there is a reasonable suspicion that you have violated any condition of supervision	Ramsey Cnty. (Minn.); Phila. Cnty. (Pa.);
On order of my PO, I will submit to a search of my person and any purse, bag, or packages in my possession.	Hamilton Cnty. (Ohio)
You will submit to a search of your person, vehicle, or property at any time.	Marion Cnty. (Ind.)
You must consent to searches of your person, residence, papers, automobiles, any device capable of accessing the internet or storing electronic data, other personal/real property, emails, texts, social media websites, cellphones, at any time a PO requests.	Lake Cnty. (Ill.)
You shall submit at any time to a search conducted by a PO without a warrant, of your person, place of residence, vehicle, or other personal property.	N.J.
You shall consent to search and seizure by any PO or law enforcement officer. Any search may be done without a warrant and include your person, property, place of residence, vehicle, or personal effects.	Cuyahoga Cnty. (Ohio)
You shall submit your person and property to search at any time of day or night, by any PO or other peace officer, without a warrant, probable cause, or reasonable suspicion.	L.A. Cnty. (Cal.) (felony probation) (Check Box)
You shall consent to the search of your person, vehicle, real property, and any other property at any time and at any place by any law enforcement officer, peace officer, or PO, and you waive your constitutional right to be free of such searches.	Canyon Cnty. (Idaho) (misdemeanor probation)
You shall consent to search of your person, residence, vehicle, personal property, and other real property or structures (owned or leased) conducted by any agent of the Idaho DOC or law enforcement officer. You waive your Fourth Amendment rights concerning searches.	Idaho (felony probation)

regulation authorized a probation officer to conduct a warrantless search as long as a supervisor approved and there were “reasonable grounds” to “believe the presence of contraband,” defined to include “any item that the probationer cannot possess under the probation conditions.”<sup>108</sup> The Court found that the regulation was justified by the “special needs” of the probation system to monitor compliance with the conditions of probation.<sup>109</sup> In so holding, the Court emphasized that probationers “do not enjoy ‘the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.’”<sup>110</sup>

In *United States v. Knights*, a 2001 case, the Supreme Court held that no more than “reasonable suspicion” is required for a police or probation officer to conduct a warrantless search of a probationer pursuant to a search condition.<sup>111</sup> The Court used the reasonable suspicion standard as a ceiling in *Knights*, leaving open the question of whether anything less than reasonable suspicion might be sufficient in the future.

A reasonable suspicion benchmark, although a lesser standard than probable cause, does provide some check on the warrantless search of probationers. The reasonable suspicion standard requires “at least a minimal level of objective justification.”<sup>112</sup> The officer conducting the search must know that the search raises “a moderate chance of finding evidence of wrongdoing.”<sup>113</sup>

Despite the invocation of the reasonable suspicion standard in *Knights*, most jurisdictions I studied have not explicitly incorporated a reasonable suspicion limitation into their standard search conditions. The three Pennsylvania counties studied are an exception: the standard condition in all three counties specifies that warrantless searches are permissible only with reasonable suspicion.<sup>114</sup> Other jurisdictions—such as Cuyahoga County, Ohio, and the state of New Jersey—indicate only that a probation officer can conduct a warrantless search of a probationer’s person, home, vehicle, and personal property.<sup>115</sup> The text of the condition does not provide the probationer (or the probation officer) with any information on what standard will be used in justifying the search (other than, implicitly, that probable cause will not be required). A commonly imposed condition in Los Angeles County, meanwhile, specifies that reasonable suspicion is not required; the condition authorizes searches of probationers and their property “at any time of the day or night, by any Probation Officer or other peace officer, with or without a warrant, probable cause or reasonable suspi-

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108. *Id.* at 870–71 (internal quotation marks omitted).

109. *Id.* at 873–74.

110. *Id.* at 874 (alterations in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

111. 534 U.S. 112, 121 (2001).

112. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

113. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 371 (2009).

114. Allegheny Cnty., Pa., *supra* note 29; Montgomery Cnty., Pa., *supra* note 29; Phila. Cnty., Pa., *supra* note 29.

115. N.J. Judiciary, *supra* note 78; Cuyahoga Cnty., Ohio, *supra* note 11.

cion.”<sup>116</sup> The standard search condition in Idaho also seems to allow for suspicionless searches, requiring probationers to forfeit all “Fourth Amendment rights concerning searches” as a condition of being on probation.<sup>117</sup>

The Supreme Court has not ruled on the legality of suspicionless search conditions for probationers. The United States Courts of Appeals for the Seventh and Ninth Circuits, however, have approved suspicionless searches under broadly worded probation conditions.<sup>118</sup>

These policing powers over probationers are greatly enhanced by the fact that probation officers can use them to enforce any of the myriad conditions of probation. Unlike in ordinary Fourth Amendment law, there is no requirement that the officer be investigating a crime. Probation officers are charged with enforcing all of the conditions of probation, and most conditions do not cover criminal conduct. Accordingly, a probation officer is empowered to use the authority granted by a search condition—or a visit condition—to ensure that a probationer is complying with any of probation’s broadly worded standards, such as not associating with disreputable persons or engaging in injurious or vicious habits.

Indeed, in many jurisdictions, armed officers conduct unannounced compliance sweeps to check whether probationers are abiding by the conditions of their probation. In a 2014 San Diego operation entitled “Tip The Scale,” for example, a joint team of sheriff deputies and probation officers looked for probationers on public transportation who did not have proper tickets; they then searched these probationers, checked them for warrants, and conducted drug tests.<sup>119</sup> In Idaho, teams of police officers and misdemeanor probation officers search through bars for the presence of probationers because probationers are banned from entering bars as a standard condition of their probation.<sup>120</sup> In Florida, Homeland Security officers have joined with probation officers and police officers in conducting surprise searches of probationers’ homes and property.<sup>121</sup>

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116. L.A. Cnty., Cal., *Felony*, *supra* note 30.

117. Idaho Dep’t of Corr., *supra* note 63.

118. *See* United States v. King, 736 F.3d 805, 806 n.3 (9th Cir. 2013) (holding that “[u]nder California law, Defendant’s agreement to the warrantless search condition as part of his state-court probation was an agreement to be subject to suspicionless searches”); United States v. Barnett, 415 F.3d 690, 692 (7th Cir. 2005) (upholding a suspicionless search of a probationer because a blanket waiver of Fourth Amendment rights was a condition of his intensive probation program).

119. *Operation Targets East County Probationers, Parolees*, SAN DIEGO CNTY. NEWS CTR. (Feb. 6, 2014, 12:12 PM), <http://www.countynewscenter.com/news/operation-targets-east-county-probationers-parolees>.

120. Laurie Welch, *Unabashedly Intrusive and Demanding, Misdemeanor Probation Officers Hold Offenders to Strict Standards*, MAGICVALLEY.COM (Oct. 17, 2011, 2:00 AM), [http://magicvalley.com/news/local/mini-cassia/unabashedly-intrusive-and-demanding-misdemeanor-probation-officers-hold-offenders-to/article\\_c4468fee-f7a6-11e0-90d0-001cc4c03286.html](http://magicvalley.com/news/local/mini-cassia/unabashedly-intrusive-and-demanding-misdemeanor-probation-officers-hold-offenders-to/article_c4468fee-f7a6-11e0-90d0-001cc4c03286.html).

121. *Probation Sweep*, WSVN (Aug. 7, 2013, 11:01 AM), <http://www.wsvn.com/story/23070432/probation-sweep>.

Importantly, evidence seized in a warrantless search of a probationer can be introduced both in a violation of probation proceeding and in support of a separate criminal prosecution. The search does not need to be carried out by someone actively charged with monitoring compliance with the conditions of probation. If there is a search condition, the search can be initiated for any law enforcement purpose, unconnected to any particular “probationary” purpose.<sup>122</sup>

#### B. THE COURT’S REVOCATION POWERS

Probationers can be arrested and put into revocation proceedings if they are alleged to have violated any of the conditions of their probation. In Georgia, for example, the following warning is included as part of the general conditions of probation: “The Defendant is subject to arrest for any violation of probation. If probation is revoked, the Court may order incarceration.”<sup>123</sup>

Significantly, a number of states allow for the possibility of revocation for conduct not explicitly covered by the conditions of probation. In California, judges can revoke probation “if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision” or “has become abandoned to improper associates or a vicious life.”<sup>124</sup> The Michigan statute provides that probation orders are revocable for either a violation, an attempted violation, or for “antisocial conduct or action on the probationer’s part for which the court determines that revocation is proper in the public interest.”<sup>125</sup> The Minnesota revocation statute allows the court to order revocation if it “appears that the defendant has violated any of the conditions of probation” or “otherwise been guilty of misconduct which warrants the imposing or execution of sentence.”<sup>126</sup> In Idaho, the court can order revocation if it finds that the probationer has violated any condition of probation or “for any other cause satisfactory to the court.”<sup>127</sup>

The Supreme Court has severely limited the constitutional protections that apply to revocation hearings by holding that such hearings are not criminal in nature.<sup>128</sup> Probationers are not entitled to the presumption of innocence or to a jury determination of guilt. They have no automatic constitutional right to appointed counsel or to cross-examine government witnesses. The exclusionary rule does not apply.

Only the most basic due process protections do apply in revocation hearings. Probationers have the right to written notice of the claimed violations, the right

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122. See *United States v. Knights*, 534 U.S. 112, 115–18 (2001).

123. Ga., SC-6.2, *supra* note 11; Ga., SC-6.3, *supra* note 11.

124. CAL. PENAL CODE § 1203.2(a) (West 2015); see also Prob. Dep’t, Orange Cnty., Cal., Instructions to Adult Probationer (quoting § 1203.2(a)).

125. MICH. COMP. LAWS ANN. § 771.4 (West 2015).

126. MINN. STAT. § 609.14(1)(a) (2014).

127. IDAHO CODE ANN. § 19-2602 (2015).

128. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).



to disclosure of the government's evidence, the right to be heard in person, and the right to present affirmative evidence. At the hearing, probationers can also confront adverse witnesses as long as the hearing officer does not find good cause for preventing them from doing so. They are entitled to a "neutral and detached" hearing body and to a written statement of the reasons for a decision to revoke their probation.<sup>129</sup>

Perhaps most significantly, the state is not required to prove a violation of probation beyond a reasonable doubt. The reasonable doubt standard is meant to effectuate the presumption of innocence in the criminal trial.<sup>130</sup> Courts have uniformly declined to extend this burden of proof to the revocation context.<sup>131</sup> They have emphasized that probation revocation is not part of the criminal process, and a probationer has already been convicted of a crime.<sup>132</sup>

Almost all of the jurisdictions in my study apply a preponderance of the evidence standard at revocation.<sup>133</sup> Only one state, Minnesota, has implemented a higher standard; its rules require that prosecutors provide clear and convincing evidence of a violation.<sup>134</sup>

The burden of proof at revocation applies equally to hearings dealing with claims of new criminal conduct (as a violation of the condition barring such conduct) and hearings dealing with alleged technical violations. Judges can imprison probationers for criminal conduct even if they do not believe the state can prove the crime beyond a reasonable doubt. Indeed, judges can revoke probation because of a new criminal charge, even if the person is acquitted of the same charge in a criminal trial. Because no distinction is made between substantive and technical violations, judges can also imprison probationers under the same standards for any of the broad array of noncriminal actions that are covered by the conditions of probation.

### C. THE PROBATION OFFICER'S SANCTIONING POWERS

The sanctioning authority of the probation officer is arguably more significant than the revocation power of the judge, and an understanding of probation in the

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129. *Id.* at 786; *see also* *Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972) (explaining that parole revocation hearings are not criminal in nature).

130. *In re Winship*, 397 U.S. 358, 363 (1970).

131. Note, *Winship on Rough Waters: The Erosion of the Reasonable Doubt Standard*, 106 HARV. L. REV. 1093, 1102 (1993).

132. *United States v. Hooker*, 993 F.2d 898, 900 (D.C. Cir. 1993).

133. *See* GA. CODE ANN. § 42-8-34.1(b) (West 2015); 730 ILL. COMP. STAT. ANN. 5/5-6-4(c) (West 2015); IND. CODE ANN. § 35-38-2-3(f) (West 2015); MICH. CT. RULES 6.445(E)(1) (2007); *People v. Stanphill*, 87 Cal. Rptr. 3d 643, 650 (Cal. Ct. App. 2009); *Mann v. State*, 768 A.2d 470 (Del. 2001) (unpublished table decision); *Odom v. State*, 15 So. 3d 672, 675 (Fla. Dist. Ct. App. 2009); *State v. Reyes*, 504 A.2d 43, 48 (N.J. Super. Ct. App. Div. 1986); *State v. Wagner*, 900 N.E.2d 1089, 1090 (Oh. Ct. App. 2008); *Commonwealth v. Castro*, 856 A.2d 178, 180 (Pa. Super. Ct. 2004); *Anderson v. State*, 621 S.W.2d 805, 808 (Tex. Crim. App. 1981). Idaho uses a "satisfactory proof" standard, *State v. Rose*, 171 P.3d 253, 256 (Idaho 2007), whereas Rhode Island uses a "reasonable satisfaction" standard, *State v. Hazard*, 68 A.3d 479, 499 (R.I. 2013).

134. MINN. R. CRIM. P. 27.04, subd. 2(1)(c)b (2015).

United States requires appreciation of that sanctioning authority. In most jurisdictions, probation officers have extensive powers to penalize probationers who violate the conditions of their probation. Asking a judge to revoke probation and send the person to prison is only the most dramatic of these options.<sup>135</sup>

Under the federal sentencing guidelines, for example, federal probation officers only need to report alleged felony violations to the court.<sup>136</sup> The probation officer has much more flexibility if the person is suspected of committing a misdemeanor or a technical violation of probation.<sup>137</sup>

The decision not to report this kind of conduct does not mean that the officer does not sanction the probationer. Indeed, the monograph for federal probation officers instructs them to respond to “*all* instances of noncompliance.”<sup>138</sup> The monograph warns of the perils of ignoring any conduct that violates a condition of supervision: “To do nothing in response to any violation, no matter how minor, only invites further noncompliance. Not responding, or responding with only covert detection activities, is not a viable option for effective supervision.”<sup>139</sup> This monograph applies equally to federally defined probation and federal supervised release.

The federal monograph provides a list of possible sanctions that probation officers might use to respond to low severity violations without informing the court. The monograph defines low severity violations as conduct like minor traffic infractions and nonrecurring technical violations. For such violations, the monograph provides a nonexhaustive list of controlling interventions that the probation officer might decide to impose. These include, for example, delivering a reprimand, increasing the reporting requirements, restricting travel, or increasing “overt surveillance.”<sup>140</sup>

The monograph provides a separate list of suggested sanctions for moderate severity violations. These violations are defined to include conduct like recurring technical violations, a positive drug test, or a new nonfelony arrest. The illustrative sanctions for such violations include measures like intensive supervision, a curfew, home detention, electronic monitoring, and placement in a residential reentry center (halfway house) for monitoring.<sup>141</sup> When sanctioning moderate severity violations, the probation officer does need to provide a report of the sanction to the court.<sup>142</sup>

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135. See, e.g., Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1039–40 (2013) (noting that probation officers generally have wide authority to decide how to respond to violations).

136. U.S. SENTENCING GUIDELINES MANUAL § 7B1.2(a) (2014).

137. See *id.* § 7B1.2(b).

138. 8E ADMIN. OFF. OF THE U.S. CTS., GUIDE TO JUDICIARY POLICY, PROBATION AND PRETRIAL SERVICES, SUPERVISION OF FEDERAL OFFENDERS § 620.10(b) (2011).

139. *Id.* § 620.10(a).

140. *Id.* § 620.40.10.

141. *Id.* § 620.40.20.

142. *Id.*

For high severity violations, the final category addressed in the federal monograph, probation officers normally seek revocation from the judge. The monograph defines high severity violations as chronic violations of low severity, refusal to comply with court-ordered drug testing, four or more positive drug tests, or “any felonious conduct (whether arrested or not) that can be established by preponderance of the evidence.”<sup>143</sup> The monograph notes that probation officers should request revocation in response to these kinds of violations “except where special circumstances warrant a less arduous response.”<sup>144</sup>

Over the last two decades, many states adopted similar graduated (or intermediate) sanctioning systems to supplement the penalty of revocation.<sup>145</sup> Just as in the federal system, state probation officers normally deal with lower severity violations whereas higher severity violations are left for formal revocation proceedings. In a 2001 handbook on responding to probation violations, for example, the National Institute of Corrections included a sample “Violation Response Chart” in its training materials for local probation departments.<sup>146</sup> Under the chart, a probation officer would respond to a low severity violation by choosing from a group of sanctions, such as a curfew (up to seven days), loss of travel privileges, or community service (up to eight hours).<sup>147</sup> A supervising officer would approve the chosen sanction for a moderate severity violation: these might include, for example, longer curfews (up to thirty days), more community service (up to forty hours), or electronic monitoring.<sup>148</sup> High severity violations, meanwhile, would result in a court hearing.<sup>149</sup>

In recent years, states concerned about their corrections budgets have promoted an expanded use of graduated sanctions to reduce their reliance on revocation.<sup>150</sup> Under a 2012 law, for example, the Georgia Department of Corrections (which runs the state’s felony probation system) can administer graduated sanctions for all technical violations as long as the probationer is required to submit to graduated sanctions as a condition of probation:

If graduated sanctions have been made a condition of probation by the court and if a probationer violates the conditions of his or her probation, other than for the commission of a new offense, [the department] may impose graduated sanctions as an alternative to judicial modification or revocation of probation,

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143. *Id.* § 620.40.30(a).

144. *Id.* § 620.40.30(6)(1).

145. *See, e.g.*, Faye S. Taxman & David Soule, *Graduated Sanctions: Stepping into Accountable Systems and Offenders*, 79 PRISON J. 182 (1999) (noting that many states had introduced graduated sanctions as “structured, incremental responses to non-compliant behavior”).

146. NAT’L INST. OF CORR., U.S. DEP’T OF JUSTICE, RESPONDING TO PAROLE AND PROBATION VIOLATIONS: A HANDBOOK TO GUIDE LOCAL POLICY DEVELOPMENT 75 (Madeline M. Carter ed., 2001).

147. *Id.*

148. *Id.*

149. *Id.*

150. LAVIGNE ET AL., *supra* note 11, at 21.

provided that such graduated sanctions are approved by a chief [probation] officer.<sup>151</sup>

Georgia's judgment form for both misdemeanor and felony probation does now incorporate a standard condition that the person "agree to the imposition of graduated sanctions."<sup>152</sup> Graduated sanctions authorized by statute include, for example, increased reporting, community service, work crews, treatment programs, increased drug testing, electronic monitoring, and an intensive supervision program.<sup>153</sup> The failure to comply with any graduated sanction is another violation of probation.<sup>154</sup>

The graduated sanctions matrix used by Georgia's Department of Corrections reveals just how much power individual probationer officers have to enforce the kinds of standard conditions explored in this Article.<sup>155</sup> The examples in Table 9 show the punishments probation officers can impose if they determine, for example, that someone on standard (as opposed to high risk) probation has failed to maintain employment, failed to support his or her family, or failed to avoid disreputable persons or places. The probation officer has the discretion to impose any Level 1 sanction—ranging from community service to bench duty—for any Level 1 violation.

Some states (inside and outside my study) have allowed probation officers to impose short jail or prison sentences as administrative sanctions without specific court approval.<sup>156</sup> In Delaware and Oregon, for example, the probation departments have the authority to impose short jail stays as administrative sanctions.<sup>157</sup> The use of these custodial sanctions by probation departments appears to be a growing trend. For example, the American Legislative Exchange Council has proposed a model "Swift and Certain Sanctions Act" that would allow a probation department to sanction a technical violation by imposing a punishment of up to five consecutive days in a state or local detention facility.<sup>158</sup>

At the same time, many probation departments mimic the federal system in training their officers to respond to each and every violation of a probation condition. A 2013 report by the American Probation and Parole Association and the National Center for States Courts insists that "[e]very violation must be met

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151. GA. CODE ANN. § 42-8-23(c) (2015).

152. Ga., SC-6.2, *supra* note 11; Ga., SC-6.3, *supra* note 11.

153. GA. CODE ANN. § 42-1-1(6) (2015).

154. GA. CODE ANN. § 42-8-23(d) (2015).

155. Ga. Dep't of Corr., Consistent Sanctions Response Matrix, SOP IIIB09-0001 (2011), *available at* [http://www.interstatecompact.org/Portals/0/library/statefiles/GA/GA\\_Sanctions\\_Matrix.pdf](http://www.interstatecompact.org/Portals/0/library/statefiles/GA/GA_Sanctions_Matrix.pdf).

156. LAVIGNE ET AL., *supra* note 11, at 21.

157. See ALISON LAWRENCE, NAT'L CONF. OF ST. LEGISLATURES, PROBATION AND PAROLE VIOLATIONS: STATE RESPONSES 2 (2008) (noting that short-term incarceration is used as an administrative sanction in Delaware); *Administrative Structured Sanctions*, OR. DEP'T OF CORR., [http://www.oregon.gov/doc/CC/pages/structured\\_sanctions.aspx](http://www.oregon.gov/doc/CC/pages/structured_sanctions.aspx) (last visited Sept. 15, 2015) (noting that jail sanctions can be imposed by probation officers).

158. AM. LEGIS. EXCH. COUNCIL, SWIFT AND CERTAIN SANCTIONS ACT: MODEL LEGISLATION, *available at* <http://www.alec.org/initiatives/prison-overcrowding/> (last visited Sept. 15, 2015).

**Table 9: Probation Sanctions in Georgia**

<b>Examples of Level 1 Violations in Georgia's DOC Probation Matrix</b>	<b>Examples of Sanctions Available to PO for Level 1 Violations</b>
Failure to avoid disreputable persons or places Failure to avoid bad influences Failure to obtain/maintain employment Failure to comply with employment/job search directives Failure to provide family support Failure to pay fines, fees, costs, or restitution Lying to a PO about a material fact Failing to follow directions/instructions of PO Failure to report for required contact	Impose curfews up to 7 days per sanction Impose up to 8 hours of community service per sanction Institute more frequent searches Increase reporting requirements Impose Bench Duty/All Day Reporting ("offender sits on bench at office every day for 8 hrs/day until ready to seek employment") Require a change in residence Require proof of a certain number of employment applications

with an anticipated sanction. This eliminates the perception by the probationer or parolee that some violations have been ignored or excused.”<sup>159</sup> The Michigan Policy Directive on the “Probation Violation Process” similarly emphasizes: “All violations require a response from the supervising field agent, but not all violations must result in a recommendation for revocation [from] probation.”<sup>160</sup>

The use of graduated sanctions is an invisible enforcement mechanism. Unlike revocation proceedings, there is no publicly accessible record of the alleged violation or the sanction used against a probationer.<sup>161</sup> There is no easy way to study how the sanctions are deployed in practice or how different sanctions are used against different categories of people, including minorities. It is impossible to know about (let alone review) instances in which probation officers exercise either favorable or unfavorable discretion. Despite the significant powers that probation officers have over probationers, those powers operate largely in the shadows.

#### IV. THREE TRADITIONAL JUSTIFICATIONS FOR PROBATION'S LEGAL STRUCTURE

In this Part, I examine how courts and probation departments have justified the two primary structural components of the probation system I mapped out in

159. AM. PROB. & PAROLE ASS'N & NAT'L CTR. FOR ST. CTS., *EFFECTIVE RESPONSES TO OFFENDER BEHAVIOR: LESSONS LEARNED FOR PROBATION AND PAROLE SUPERVISION* 4 (2013); *see also* VERA INST. OF JUST., *THE POTENTIAL OF COMMUNITY CORRECTIONS TO IMPROVE SAFETY AND REDUCE INCARCERATION* 18 (2013) (noting “a growing body of research showing the importance of responding to every infraction”).

160. MICH. DEP'T OF CORR., *POLICY DIRECTIVE: PROBATION VIOLATION PROCESS* 1 (2005).

161. *See, e.g.*, Interview with Chief Deputy Pub. Defender, Orange Cnty., Ca. (Oct. 6, 2014) (on file with author) (noting that probation does not notify the defendant's lawyer of administrative sanctions imposed on that defendant).

Parts II and III: the substance of the conditions imposed and the process by which those conditions are enforced. Having plotted out the contours of the modern-day system, it should now be possible to cross-check the prevailing theoretical justifications against the system as it actually exists.

I have located three central theories that have been put forward to support the legal structure of probation: the benevolent supervisor theory; the privilege theory; and the contract theory. Courts have drawn from each of these theories to rationalize and validate the powers of the state to control the lives of those on probation.

As I will show, these three theories are not necessarily consistent with one another. But courts tend to pluck from a theory as needed to vindicate the diminishment of the particular right at issue in a case. Despite some tension between the theories, each of the theories has become resonant in the cultural landscape of the law—a familiar and comfortable reference point in explaining why a probationer must submit to this or that power.

#### A. THE BENEVOLENT SUPERVISOR THEORY

The benevolent supervisor theory is a construct of the Progressive Era. It was during this era that adult probation systems first began to spread across the United States.<sup>162</sup>

David J. Rothman has described how Progressive reformers, in fashioning probation systems between 1900 and 1915, affirmatively “cast the probation officer in the role of ‘friend.’”<sup>163</sup> He explains how this understanding of a probation officer’s role grew out of the tradition of charitable “friendly visit[s]” to the poor by middle class women in the nineteenth century.<sup>164</sup> The premise behind such visits was that the “friend” would “raise the character and elevate the moral nature” of the poor through regular and personal influence.<sup>165</sup> Rothman quotes Josephine Shaw Lowell, the architect of the friendly visit program, in explaining its core rationale:

“[A] constant and continued intercourse must be kept up between those who have a high standard and those who have it not, and that the educated and happy and good are to give some of their time regularly and as a duty, year in and year out, to the ignorant, miserable, and the vicious.”<sup>166</sup>

This view of the probation officer as benevolently elevating his or her charge is evident in training materials from the 1920s. A 1925 pamphlet from the New

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162. 2 U.S. DEP’T OF JUST., THE ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES: PROBATION 26–27 (Wayne L. Morse et al. eds., 1939, rprt. 1960).

163. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 64 (rev. ed. 2002).

164. *Id.*

165. *Id.* (internal quotation marks omitted).

166. *Id.* (internal quotation marks omitted).

York Probation Commission explained: “Probation, by exerting a helpful influence over those placed under the care of the probation officer, by gradually changing their habits, associations and manner of life, and by securing the co-operation of their families and of other persons, reclaims offenders from evil ways and restores them to proper conduct.”<sup>167</sup> The pamphlet made clear that only people of the right “character, temperament, ability and interest” should be appointed as probation officers.<sup>168</sup> As the pamphlet explained, “[p]robation officers should understand human nature and be tactful, sympathetic, resourceful and industrious. The point of view of a probation officer should be that of a friend and helper.”<sup>169</sup>

Progressive reformers were comfortable delegating broad discretionary power to probation officers in the name of realizing this vision. As Rothman has emphasized: “[T]he probation officer as friend at once promoted and justified the need for unfettered discretion. One did not tell a friend under what circumstances to enter a home, or what questions to ask—so constitutional strictures about search or self-incrimination were irrelevant.”<sup>170</sup> The reformers trusted that probation officers would use their powers compassionately for the good of the probationer.<sup>171</sup>

Unsurprisingly, given this emphasis on discretion, some of the vaguest modern-day conditions of probation are legacies of the Progressive Era. California’s probation revocation statute, for example, contains the same grounds for revocation as it did in 1903. The statute allows the court to revoke supervision “if the interest of justice so requires, and if the court, in its judgment, shall have reason to believe from the report of the probation officer, or otherwise” that the person “has become abandoned to improper associates, or a vicious life.”<sup>172</sup> A New York probation statute from 1910, meanwhile, included the following familiar conditions: “That the probationer (a) shall indulge in no unlawful, disorderly, injurious or vicious habits; (b) shall avoid places or persons of disreputable or harmful character.”<sup>173</sup> New York still has these conditions in its probation statute,<sup>174</sup> as do a number of other states outside my study, including South Carolina, Alabama, and Kentucky.<sup>175</sup> And both Georgia and Texas, the two states with the largest probation populations, continue to impose both conditions.<sup>176</sup>

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167. N.Y. ST. PROB. COMM’N, ADVANTAGES OF PROBATION: A BRIEF DESCRIPTION AND SOME ILLUSTRATIONS 2 (1925).

168. *Id.* at 14.

169. *Id.*

170. ROTHMAN, *supra* note 163, at 66.

171. *Id.* at 70.

172. CAL. PENAL CODE § 1203 (1903); CAL. PENAL CODE § 1203.2(a) (West 2015).

173. N.Y. CODE CRIM. P. § 11-a(2)(4) (M. Bender & Co. 1914).

174. N.Y. PENAL LAW § 65.10(2)(a)–(b) (McKinney 2010).

175. ALA. R. CRIM. P. Sample Form 49, Order of Probation; KY. REV. STAT. ANN. § 533.030 (West 2015); S.C. CODE ANN. § 24-21-430 (2015).

176. *See* discussion *supra* section II.B.

Courts built up the infrastructure for the revocation of probation with similar reference to the benevolent purposes of probation. In *Riggs v. United States*, for example, the United States Court of Appeals for the Fourth Circuit considered a challenge to the district court's revocation powers shortly after the enactment of federal probation.<sup>177</sup> The district court had sentenced Riggs to four years probation in 1925 as a result of a conviction under the National Prohibition Act.<sup>178</sup> The court later revoked Riggs's probation and sentenced him to four years in prison because of a subsequent violation of the Prohibition Act.<sup>179</sup> In a subsequent appeal, Riggs argued that he was entitled to a trial on whether he had violated the conditions of his probation.<sup>180</sup> Although acknowledging the merits of Riggs's argument, the Fourth Circuit emphasized the good intentions behind the statute:

The question of procedure under the Probation Act is not free from difficulty, especially because of the great latitude conferred upon the District Judges in enforcing the same. Manifestly many things may be done that ought not to be, and the doing of which would tend to make questionable some of the provisions of the act, because of the far-reaching and unreasonable restraints and embarrassments that might be placed upon the rights of an accused. The act should not, however, be viewed in the light of the unreasonable things that may be done under it, but rather having regard to its general purposes, and the wise and humane things that should be done in its due administration, looking to the amelioration of the condition of the unfortunate in whose behalf it was enacted.<sup>181</sup>

The Court justified the lack of procedure because wise and humane things *should be* done with the authority the statute conveyed; “[t]he purpose of the act was to give to the federal District Courts a free ha[n]d in humanely dealing with criminal classes which come before them . . . .”<sup>182</sup>

Approximately fifty years later, the Supreme Court provided for some limited procedural protections during the revocation process. A 1972 case, *Morrissey v. Brewer*, applied these protections to the revocation of parole.<sup>183</sup> In 1973, in *Gagnon v. Scarpelli*, the Court applied these same protections to the revocation of probation.<sup>184</sup> Under these cases, probationers and parolees were entitled to notice of their alleged violations and an opportunity to appear and present evidence on their own behalf.<sup>185</sup> They also had a conditional right to confront

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177. 14 F.2d 5 (4th Cir. 1926).

178. *Id.* at 5.

179. *Id.* at 6.

180. *Id.* at 9.

181. *Id.*

182. *Id.*

183. 408 U.S. 471, 482 (1972).

184. 411 U.S. 778, 782 (1973).

185. *Id.* at 786.



adverse witnesses (unless the judge denied this right for good cause) and to a written report of the judge's decision on the violation.<sup>186</sup>

The Court in *Gagnon* found this limited mix of due process rights sufficient for probationers because of the purportedly caring and supportive character of the probation system.<sup>187</sup> In particular, the Court declined to provide indigent probationers with an automatic right to appointed counsel in revocation proceedings based on its vision of the probation officer's role. It emphasized: "While the parole or probation officer recognizes his double duty to the welfare of his clients and to the safety of the general community, by and large concern for the client dominates his professional attitude."<sup>188</sup> The Court stressed that the legal system had traditionally entrusted the probation officer with broad discretion precisely because the officer's "function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation."<sup>189</sup> Thus, the Court reasoned, the probation officer would approach a revocation decision with a rehabilitative, rather than punitive aim: treating revocation "as a failure of supervision."<sup>190</sup> Similarly, the Court suggested that the presence of counsel at revocation hearings might subvert the judge's own role as the ultimate benevolent supervisor. Formalizing the procedure by providing lawyers could make the hearing body "less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation."<sup>191</sup>

In 1987, in *Griffin v. Wisconsin*, the Supreme Court returned to the benevolent supervisor theory in upholding a regulation that permitted the warrantless search of a probationer's home.<sup>192</sup> In holding it appropriate to dispense with the warrant requirement, the Court stressed that it would be a probation officer—and not a police officer—who would carry out the search.<sup>193</sup> The Court underscored that the probation officer was "an employee of the State Department of Health and Social Services who, while assuredly charged with protecting the public interest, is also supposed to have in mind the welfare of the probationer (who in the regulations is called a 'client')."<sup>194</sup>

Justice Blackmun, in a dissent joined by Justices Marshall and Brennan, expressed puzzlement that the Court would invoke the supposed altruism of the probation officer to justify the warrantless search.<sup>195</sup> He faulted the majority for its "curious assumption that the probationer will benefit by dispensing with the

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186. *Id.*

187. *Id.* (noting that these due process measures "serve as substantial protection against ill-considered revocation").

188. *Id.* at 783 (quoting FRANK J. REMINGTON ET AL., CRIMINAL JUSTICE ADMINISTRATION: MATERIALS AND CASES 910–11 (1969)).

189. *Id.* at 784.

190. *Id.* at 785.

191. *Id.* at 788.

192. 483 U.S. 868, 872 (1987).

193. *Id.* at 876.

194. *Id.* (citation omitted).

195. *Id.* at 886 (Blackmun, J., dissenting).

warrant requirement.”<sup>196</sup> He emphasized:

[T]he benefit that a probationer is supposed to gain from probation is rehabilitation. I fail to see how the role of the probation agent in “foster[ing] growth and development of the client” is enhanced the slightest bit by the ability to conduct a search without the checks provided by prior neutral review. If anything, the power to decide to search will prove a barrier to establishing any degree of trust between agent and “client.”<sup>197</sup>

Each of these cases, in letting the rights of the probationer derive from the theory of the benevolent supervisor, is invoking a form of the *parens patriae* principle. This principle empowers the state to care for those who cannot care for themselves.<sup>198</sup> Because the state is focused on caring for the probationer (for example, bringing about his or her rehabilitation), the interests of the state and the probationer are not adverse.<sup>199</sup> The parenting role of the state obviates the need for due process protections to protect the probationer from the state.

Not surprisingly, those who seek to expand enforcement powers over probationers typically invoke the language of parenting. The majority in *Griffin*, for example, used explicit parenting language to explain why a warrant requirement would make it unnecessarily difficult to respond to evidence of a probationer’s misconduct. The Court rationalized its decision in the following terms: “By way of analogy, one might contemplate how parental custodial authority would be impaired by requiring judicial approval for search of a minor child’s room.”<sup>200</sup>

Advocates of swift and certain sanctions, the latest trend in the enforcement of probation conditions, also invoke a parenting model to justify the use of this power over probationers. In describing the impetus behind Hawaii’s Opportunity Probation with Enforcement (HOPE), for example, Judge Steven Alm explained: “I thought about how I was raised and how I raise my kids. Tell’em what the rules are and then if there’s misbehavior you give them a consequence immediately. That’s what good parenting is all about.”<sup>201</sup> The American Probation and Parole Association (APPA) has also used the language of parenting to push for the implementation of swift and certain sanctions for violations.<sup>202</sup> The APPA argues that a probationer who knows that a sanction will be imposed “may be likened to a child knowing about his parents’ rules, knowing the

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196. *Id.* (emphasis omitted).

197. *Id.* (citation omitted) (internal quotation marks omitted).

198. *E.g.*, *Parens Patriae*, BLACK’S LAW DICTIONARY (10th ed. 2014).

199. *See* *Hyser v. Reed*, 318 F.2d 225, 237 (D.C. Cir. 1963) (“In a real sense the Parole Board in revoking parole occupies the role [of] parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege.”)

200. *Griffin*, 483 U.S. at 876.

201. Sam Kornell, *Probation that Works*, SLATE (June 5, 2013, 6:45 AM), [http://www.slate.com/articles/health\\_and\\_science/science/2013/06/hawaii\\_hope\\_probation\\_program\\_reduces\\_crime\\_drug\\_use\\_and\\_time\\_in\\_prison.html](http://www.slate.com/articles/health_and_science/science/2013/06/hawaii_hope_probation_program_reduces_crime_drug_use_and_time_in_prison.html) (internal quotation marks omitted).

202. AM. PROB. & PAROLE ASS’N & NAT’L CTR. FOR ST. CTS., *supra* note 159, at 4.

consequences for breaking those rules prior to the occurrence of any infraction, and knowing that the consequences will for sure occur if the rules are broken.”<sup>203</sup>

The use of the parenting analogy is a subtle nod to the benevolent supervisor theory. If a parent wants to do it, it must be for your own good. It must be for your own good, even if it seems painful in the moment. A parent has your best interests at heart.

One problem with this analogy is the disconnect between the parental authority that is invoked and the enforcement powers that are sought. The HOPE model, for example, calls for the immediate imposition of a jail sanction (starting with a few days in jail) for a positive drug test or a missed appointment.<sup>204</sup> The length of the jail sanction increases with each subsequent violation.<sup>205</sup> This kind of sanction is not among the tools a typical parent would select.

Whether revocation (or a few days in jail) represents a failure or success of supervision depends on the goals of the probation system. If public safety is the predominant goal, then locking people up is a measure of success.<sup>206</sup> The probation officer is doing his or her job by routing out violations and keeping the community safe, assuming that these kinds of sanctions can be shown to increase compliance.<sup>207</sup>

Public safety is, indeed, now often claimed to be the dominant goal of probation. As David Garland has documented, there has been a profound shift in the ideology of probation departments in recent decades: a retreat from their early welfarist ambitions and a growing emphasis on control and risk monitoring functions.<sup>208</sup> The goal is still changing the behavior of the probationer. But the real focus is on enforcing discipline to protect the public, not on finding ways to improve the life of the offender.<sup>209</sup> And yet, the conditions of probation, and the legal justifications for the ways in which they are enforced, still reflect the benevolent supervisor theory, with its emphasis on the offender’s personal growth.

The websites of the departments of probation in my study signal just how far the tide has turned. “Enhancing Public Safety, Holding Felons Accountable” is the tagline, for example, of the Probation Supervision Division of the Georgia

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203. *Id.*

204. ANGELA HAWKEN & MARK KLEIMAN, *MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII’S HOPE 9* (2009).

205. *Id.*

206. *See, e.g.*, Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 *CRIME & JUST.* 99, 105 (1996) (noting that from a “the law must keep its promises” perspective, a higher probation failure rate is good).

207. *See* Stephanie A. Duriez et al., *Is Project HOPE Creating a False Sense of Hope? A Case Study in Correctional Popularity*, 78 *FED. PROB.* 57, 67 (2014) (emphasizing that “evaluations of HOPE and its adaptations are few in number and have produced mix results” and are also “methodologically limited”).

208. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 12 (2001).

209. *Id.*

Department of Corrections.<sup>210</sup> Within this framework, there is nothing painful (or even regrettable) about imposing a jail or prison sanction or, indeed, in imposing any of the intermediate sanctions that a probation officer has the authority to use. Mark Kleiman, one of the most forceful advocates of HOPE, has described probation officers' enthusiasm over the new jail sanctions: the officers in Hawaii "have become fervent fans as they've discovered the exhilaration of being able to exercise in practice the authority over their clients that they possess in theory."<sup>211</sup>

The imposition of swift and certain sanctions, moreover, has eliminated any space for the kind of individualized "concern for the client" relied on by the Supreme Court in *Gagnon*. Kleiman has warned supervisors (whether judges or probation officers) against exercising any favorable discretion for a probationer who has violated a condition covered by the program. He has emphasized: "The temptation on the part of probation officers and judges to cut an erring probationer some slack 'just this once' can be disastrous; when consistency is the name of the game, mercy is toxic."<sup>212</sup> Sanction hearings are to be quick and summary.<sup>213</sup>

The modern-day emphasis on sanctioning powers may be chalked up to changing times and democratic processes. It is important to note, however, that the legal structure of probation was built on the back of a distinctly different, Progressive worldview. The Supreme Court justified the lack of constitutional protections for probationers (and the breadth of the conditions imposed upon them) by relying on the Progressive vision of the probation officer as friend. That vision is now fading into a model of the probation officer as strict enforcer of the rules. Even if this model proves effective in achieving compliance with certain rules of probation,<sup>214</sup> it is in direct conflict with the model relied on by the Supreme Court in *Gagnon*.

#### B. THE PRIVILEGE THEORY

Courts have also long justified limiting the rights of probationers by emphasizing that probation is a privilege.<sup>215</sup> The central idea behind this theory is that

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210. *Probation Supervision*, GA. DEP'T OF CORR., <http://167.192.44.227/Divisions/Corrections/ProbationSupervision/ProbationSupervision.html> (last visited Sept. 15, 2015).

211. Mark A. R. Kleiman, *Jail Break: How Smarter Parole and Probation Can Cut the Nation's Incarceration Rate*, WASH. MONTHLY (July/Aug. 2009), <http://www.washingtonmonthly.com/features/2009/0907.kleiman.html>.

212. Mark A. R. Kleiman, *A New Role for Parole*, WASH. MONTHLY, Jan./Feb. 2013, available at [http://www.washingtonmonthly.com/magazine/january\\_february\\_2013/features/a\\_new\\_role\\_for\\_parole\\_042045.php?page=all](http://www.washingtonmonthly.com/magazine/january_february_2013/features/a_new_role_for_parole_042045.php?page=all).

213. Kleiman, *supra* note 211 (noting that the average HOPE sanction hearing lasts seven and a half minutes).

214. See, e.g., Duriez et al., *supra* note 207, at 57 (noting that the effectiveness of the swift and certain sanction model for handling probation violations needs to be evaluated more extensively).

215. Judah Best & Paul I. Birzon, *Conditions of Probation: An Analysis*, 51 GEO. L.J. 809, 811-12 (1963).

every probationer would be in prison but for the grace of the court. Probationers receive a discount from the normal and appropriate prison sentence for their crimes. Thus, the state's powers over a probationer are justified because they are the trade-off for keeping the probationer out of prison. This notion is so entrenched in the law that even if other people receive a lesser sentence for the same crime—such as a deferred prosecution or a dismissal—the grant of probation still remains legally synonymous with privilege.

In a 1932 case, *Burns v. United States*, the U.S. Supreme Court first set forth the privilege rationale in upholding a sentence for a person who had violated the terms of his probation.<sup>216</sup> The district court had sentenced Burns on multiple counts: one year in custody under one of the counts and five years in custody, execution suspended during five years of probation, under another count.<sup>217</sup> While simultaneously on probation and serving the one year custodial sentence, Burns was allowed to leave the jail periodically in order to visit the dentist. One day, a federal agent discovered him at home, when he was supposed to be at the dentist. The court revoked his probation, imposing the suspended five-year prison sentence.<sup>218</sup> Burns appealed the sentence, arguing that he should have received a violation hearing with more due process protections.<sup>219</sup> In rejecting his appeal, the Court emphasized that Burns could not look a gift horse in the mouth:

Probation is . . . conferred as a privilege, and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment, and cannot insist on terms or strike a bargain.<sup>220</sup>

In a 1935 case, *Escoe v. Zerbst*, the Supreme Court affirmed that constitutional protections did not apply to decisions to grant or revoke probation because probation was “an act of grace to one convicted of a crime.”<sup>221</sup> The Court held that the privilege of probation was based on statute and not on the Constitution. Thus, any procedural protections provided at revocation—such as notice or a hearing—also had to be creatures of statute. The Due Process Clause did not compel any such protections because being on probation was a privilege rather than a right.<sup>222</sup>

In *Morrissey and Gagnon*, the Supreme Court rejected this “right” versus “privilege” distinction and held that the Due Process Clause did extend to the

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216. 287 U.S. 216, 220 (1932).

217. *Id.* at 217.

218. *Id.* at 218–19.

219. *Id.* at 219.

220. *Id.* at 220.

221. 295 U.S. 490, 492–93 (1935).

222. *Id.* at 493.

revocation of parole and probation.<sup>223</sup> In *Morrissey*, the Court emphasized that the revocation of parole inflicted a “grievous loss” on a parolee.<sup>224</sup> As the Court explained, “[b]y whatever name, the liberty [of a parolee] is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.”<sup>225</sup> One year later, the Court in *Gagnon* extended this holding to the revocation of probation.<sup>226</sup> The Court emphasized: “It is clear at least after [*Morrissey*] . . . that a probationer can no longer be denied due process, in reliance on the dictum . . . that probation is an ‘act of grace.’”<sup>227</sup>

At the same time, to preserve flexibility at revocation, the *Morrissey* Court held that only a “few basic requirements”<sup>228</sup> were necessary. These were the package of due process protections outlined in my earlier discussion of *Morrissey* and *Gagnon*.<sup>229</sup>

Writing in 1972, the Justices in *Morrissey* noted that a grant of parole or probation could no longer meaningfully be characterized as an act of grace, given how routinely they were imposed. In the majority opinion, Chief Justice Burger observed that “[r]ather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals.”<sup>230</sup> Justice Douglas emphasized the point more strongly in a partial dissent, which pushed for more due process protections at revocation than the majority had provided.<sup>231</sup> He stressed how much the criminal justice system had “come to depend” on probation and parole:

A fundamental problem with [the right-privilege] theory is that probation is now the most frequent penal disposition just as release on parole is the most frequent form of release from an institution. They bear little resemblance to episodic acts of mercy by a forgiving sovereign. A more accurate view of supervised release is that it is now an integral part of the criminal justice process and shows every sign of increasing popularity.<sup>232</sup>

Justice Douglas was correct in predicting that the use of probation (and parole) would only continue to grow. If probation was a common sentence in 1972, its use has become ever more routine. As reflected in Table 10, 816,525 adults were on probation in the United States as of 1977, the first year that the

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223. See *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (explaining and then rejecting the “right” versus “privilege” distinction).

224. *Morrissey*, 408 U.S. at 482.

225. *Id.*

226. *Gagnon*, 411 U.S. at 782.

227. *Id.* at 782 n.4.

228. *Morrissey*, 408 U.S. at 490.

229. See discussion *supra* Part IV.A.

230. *Morrissey*, 408 U.S. at 477.

231. *Id.* at 499–500 (Douglas, J., dissenting).

232. *Id.* at 493 n.3 (alteration in original) (internal quotation marks omitted).

Bureau of Justice Statistics began keeping nationwide probation statistics.<sup>233</sup> By 2013, this number had ballooned to nearly four million adults—a nearly 400% increase.<sup>234</sup> Over the same period, the resident population of the United States grew by roughly 50%.<sup>235</sup> Although the number of adults in prison and on parole also increased dramatically during this timespan, the probation population continues to dwarf even these sizable populations.

**Table 10: Relative Increase in Probation<sup>236</sup>**

State and Federal Adult Prison Populations	State and Federal Adult Probation Populations	State and Federal Adult Parole Populations
1972: 196,092	1977: 816,525	1975: 143,164
2013: 1,574,741	2013: 3,910,647	2013: 853,215

Despite the number of people now serving probation sentences, many courts have declined to heed Justice Douglas’s warning and continue to use the same privilege rationale to justify the limited rights afforded people on probation. Georgia courts, for example, rely heavily on the privilege theory to rationalize the extensive powers the state exercises over probationers:

[A] person occupies a special status while on probation, during which time his private life and behavior may be regulated by the State to an extent that would be completely untenable under ordinary circumstances. The rationale for this power is basically, of course, that the person has been convicted of a crime and would be serving a sentence but for the grace of the court.<sup>237</sup>

Georgia courts continue to characterize (and defend) probation as a privilege without acknowledging that their own heavy use of probation undercuts the privilege rationale. At the end of 2013, Georgia had more than eight times as many people on probation (514,477)<sup>238</sup> as it had sentenced to prison or jail

233. *Adults on Probation, Federal and State-By-State, 1977–2012*, BUREAU OF JUST. STAT. (Dec. 19, 2013), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2026>.

234. *See id.*

235. *See United States Population by Year*, MULTPL, <http://www.multpl.com/united-states-population/table> (last visited Jan. 30, 2015).

236. For the 1972 prison population statistic, see BUREAU OF JUST. STAT., PRISONERS, 1925–85, at 2 tbl.1 (1986). The 1975 parole population statistic is from BUREAU OF JUST. STAT., ADULTS ON PAROLE IN THE UNITED STATES, 1975–2012 (2013). The probation statistics are from *Adults on Probation, Federal and State-By-State, 1977–2012*, BUREAU OF JUST. STAT. (Dec. 19, 2013), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2026>. For the remaining statistics, see GLAZE & KAEBLE, *supra* note 1.

237. *Staley v. State*, 505 S.E.2d 491, 494 (Ga. Ct. App. 1998).

238. HERBERMAN & BONCZAR, *supra* note 13, at app. tbl.2.

(61,620).<sup>239</sup>

These figures contradict any notion that probation represents a categorical discount in Georgia. Undoubtedly, Georgia courts do take a chance on some defendants, imposing probation when a prison term might be the going rate (the “correct” sentence) for the crime in question. But in many situations, probation is simply the normal, default sentence.<sup>240</sup> It is not a privilege (or a bargain) in any meaningful sense of that word.

Georgia could not afford to incarcerate all of the people currently on probation, making probation a “systematic imperative,” rather than a grant of discretionary leniency.<sup>241</sup> The state is already groaning under the costs of its corrections spending.<sup>242</sup> Its annual corrections budget has swelled to over one billion dollars, as the number of prison inmates has doubled over the last two decades.<sup>243</sup> In 2011, the state general assembly convened a special council on criminal justice reform to find ways to reduce the state’s costly reliance on incarceration.<sup>244</sup>

Like Georgia, nearly all of the jurisdictions in my study continue to characterize probation as a privilege, despite the size of their probation systems. Texas, the state with nearly as many people on probation as in Georgia, provides another telling example. Its courts emphasize that placement on community supervision “is a privilege, not a right” and that supervision “benefits” the probationer.<sup>245</sup> California, the state with the next highest probation population, routinely rejects challenges to probation conditions by emphasizing that “probation is ‘an act of clemency and grace,’ not a matter of right.”<sup>246</sup> In dismissing these challenges, the appellate courts in California sweep away concerns about how deeply some of the routine conditions impinge on defendants’ constitutional rights; after all, they assert, a defendant is free to reject the privilege of

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239. See BUREAU OF JUST. STAT., PRISONERS IN 2013, at 3 (2014) (54,004 prisoners); OFF. OF RES., GA. DEP’T OF CMTY. AFFAIRS, COUNTY JAIL INMATE POPULATION REPORT 1 (2013) (7,616 sentenced inmates in jails).

240. See, e.g., Andrew Horwitz, *The Costs of Abusing Probationary Sentences: Overincarceration and the Erosion of Due Process*, 75 BROOK. L. REV. 753, 754 (2010) (noting that probation is now “the default sentence imposed upon a majority of defendants with little to no regard for whether probation makes sense for that defendant”).

241. See SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 1006 (8th ed. 2007) (“Criminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in the typical case” meaning that “[l]eniency has therefore become not merely common but a systemic imperative.” (internal quotation marks omitted))

242. REPORT OF THE SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS 5 (2011).

243. *Id.* at 2.

244. *Id.* at 5.

245. *Speth v. State*, 6 S.W.3d 530, 533–34 (Tex. Crim. App. 1999) (noting that placement on community supervision “is a *privilege*, not a right”); *Ramos v. State*, No. 03-10-00705-CR, 2013 WL 1876577, at \*2 (Tex. Ct. App. 2013) (same).

246. *People v. Anderson*, 235 P.3d 11, 20 (Cal. 2010) (citations omitted) (quoting *People v. Rodriguez*, 51 Cal. 3d 437, 445 (Cal. 1990)); see also *People v. Fritchey*, 2 Cal. App. 4th 829, 835 (Cal. Ct. App. 1992) (“A grant of probation is not a matter of right, but an act of clemency designed to allow rehabilitation.”).



probation and to submit to incarceration instead.<sup>247</sup>

The notion that probation is a privilege in Texas and California is as questionable as it is in Georgia. As noted in Table 11, both Texas and California already have probation populations that far exceed the number of sentenced inmates in their prisons and jails.<sup>248</sup> Both states have notoriously overburdened and expensive prison systems. Texas incarcerates more people than any other state.<sup>249</sup> And in 2011, the U.S. Supreme Court held that California's prison system was so overcrowded that the state could not provide constitutionally adequate medical care to all of the people it was choosing to imprison.<sup>250</sup> The Court's decision forced California to reduce its prison population, which has resulted in the state pushing even more people to the supervision of county probation departments.<sup>251</sup>

**Table 11: Probation Compared to Jail and Prison**

Jurisdiction	Probation December 2013	Prison December 2013	Jail December 2013
Georgia sentenced adults	514,477	54,004	7,616
Texas sentenced adults	399,655	168,280	15,847
California sentenced adults	294,057	135,981	30,784

Rather than providing an escape from an otherwise certain term of incarceration, probation has increased the capacity of the criminal justice system to control more defendants for longer periods of time while expending fewer resources. The existence of probation has not displaced incarceration or lowered the number of people sentenced to prison in any significant way. The United States incarcerates a greater percentage of its people than any other nation, even though probation has been widely available in this country for over a hundred years. As judges sentence record numbers of people to prison, they are sentencing roughly twice as many people to probation at the same time. In a large sense, probation has simply widened the net. It has allowed prosecutors to

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247. *See, e.g.*, *People v. Olguin*, 198 P.3d 1, 4 (Cal. 2008) (“If a defendant believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence.”); Klingele, *supra* note 135 (noting that because probation is viewed as an act of grace, courts are free to impose almost any conceivable condition of release with little appellate review).

248. *See* BUREAU OF JUST. STAT., *supra* note 239, at 3 (reporting the prison population for Georgia, Texas, and California at the end of 2013); HERBERMAN & BONCZAR, *supra* note 13, at app. tbl.2 (reporting the adult probation population for Georgia, Texas, and California at the end of 2013); CAL. BD. OF ST. & CMTY. CORR., JAIL PROFILE SURVEY: FOURTH QUARTER CALENDAR YEAR 2013 SURVEY RESULTS 6 (reporting sentenced inmates in California jails); GA. DEP’T OF CMTY. AFFAIRS, *supra* note 239 (reporting sentenced inmates in Georgia jails); TEX. COMM’N ON JAIL STANDARDS, ABBREV. POP. REPORT FOR 1/1/2014 (2014) (reporting sentenced inmates in Texas jails).

249. BUREAU OF JUST. STAT., *supra* note 239, at 3.

250. *Brown v. Plata*, 131 S. Ct. 1910, 1917–21 (2011).

251. REBECCA SULLIVAN SILBERT, THINKING CRITICALLY ABOUT REALIGNMENT IN CALIFORNIA 5 (2012).

charge ever more cases because probation provides a cheaper method of imposing a sanction.

Observing the system at the beginning of the 1970s, David Rothman recognized the early signs that probation was not being used as an alternative to incarceration.<sup>252</sup> Instead, it simply increased the number of people being brought under the control of the criminal justice system. Rothman noted that the introduction of probation “allowed the state to exert legal authority over a group of people who would have otherwise been left to their own devices.”<sup>253</sup> This trend has only accelerated since the 1970s.

In a significant number of cases, moreover, probation is a comparatively harsh sentence. Many of the smallest criminal cases end in probation. As many as eighty percent of misdemeanor convictions result in probationary sentences.<sup>254</sup> Instead of dismissing one person’s case, a prosecutor might insist on a plea to a misdemeanor and a term of probation. In another case, the prosecutor might object to the defendant’s participation in a diversionary program and demand that the person accept probation to avoid the risk of going to jail. Incarceration may not be the normal outcome for most small cases, but incarceration being authorized even in the smallest cases gives prosecutors leverage to press for a term of probation whenever they choose. Some defendants who receive probation are simply unlucky. They receive probation when others under similar circumstances would not have been prosecuted at all—or if prosecuted, would have had their cases dismissed as a function of prosecutorial discretion. And if probation were not an available option, it is a practical and logistical certainty that the entire pool of probationers would not be incarcerated instead.

States have also been making probation sentences harsher (and even less of a privilege) by allowing for probation to be combined with jail or prison. All of the states in my study provide judges with easy mechanisms for imposing a sentence of incarceration with an additional sentence of probation.

Most states combine prison and probation by providing for split sentences. Judges might impose a specific term of incarceration followed by a specific term of probation. In Pennsylvania, for example, judges regularly sentence defendants to a term of incarceration followed by a “tail” of probation.<sup>255</sup> In the federal system, judges almost always impose a fixed period of supervised release (a form of probation) to be served after the conclusion of the prison term.<sup>256</sup>

Alternatively, judges in some jurisdictions impose a term of incarceration, suspend a portion of this incarceration term, and then follow it with a period of

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252. ROTHMAN, *supra* note 163, at 12.

253. *Id.* at 111.

254. Petersilia, *supra* note 15, at 173.

255. *See, e.g.*, Commonwealth v. Basinger, 982 A.2d 121, 127 (Pa. Super. Ct. 2009) (noting that probation “may be employed in conjunction with confinement as a ‘tail’”).

256. Doherty, *supra* note 7, at 1015.

probation. The person goes on probation after serving the portion of the custodial term that was not suspended; the balance of the custodial term then hangs over the probationer's head during the period of probation. The judgment forms for both felony and misdemeanor probation in Georgia, for example, provide the option of either straight probation or a combination of confinement and probation. To impose both incarceration and probation, the judge simply fills in the following slots on the state's official judgment form: "The Defendant is sentenced for a total of \_\_\_\_\_, with the first \_\_\_\_\_ to be served in confinement and the remainder to be served on probation . . . ." <sup>257</sup> By making it simple, the form invites this outcome.

Although seemingly counterintuitive, a significant number of jurisdictions also allow for a term of prison or jail as a special condition of probation. The County of Los Angeles, which administers the world's largest probation department, <sup>258</sup> provides for a variety of custodial options on its judgment forms. <sup>259</sup> In sentencing a defendant to probation for a misdemeanor, a Los Angeles judge might decide to check a box to require the defendant to serve a certain number of days in the Los Angeles County jail. <sup>260</sup> Alternatively, the judge might check a box to order confinement on consecutive weekends. <sup>261</sup> Other jurisdictions, including Texas, Michigan, Illinois, Indiana, and New Jersey, provide for similar powers in their probation systems. <sup>262</sup>

The widespread use of probation in conjunction with incarceration is hastening the demise of probation as an alternative to incarceration, making it ever more of a supplement, not an alternative, to incarceration. The original idea of probation, as explained by the Supreme Court in 1928, was the avoidance of prison. <sup>263</sup> Probation ameliorated the sentence by "delaying actual execution or providing a suspension, so that the stigma might be withheld, and an opportunity for reform and repentance granted before actual imprisonment should stain the life of the convict." <sup>264</sup> In drafting its influential 1955 model probation act, the National Probation and Parole Association (NPPA) sought to hold this line,

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257. Ga., SC-6.2, *supra* note 11; Ga., SC-6.3, *supra* note 11.

258. *Did You Know*, L.A. CNTY. PROB. DEP'T, [http://probation.lacounty.gov/wps/portal/probation!/ut/p/b0/04\\_Sj9CPyKssy0xPLMnMz0vMAfGjzOLdDAwM3P2dgo0snP0tDRzdVQ0MLYx9DQI9zfQLsh0VAShJ2Ow/](http://probation.lacounty.gov/wps/portal/probation!/ut/p/b0/04_Sj9CPyKssy0xPLMnMz0vMAfGjzOLdDAwM3P2dgo0snP0tDRzdVQ0MLYx9DQI9zfQLsh0VAShJ2Ow/) (last visited Oct. 15, 2015).

259. *See* L.A. Cnty., Cal., *Felony*, *supra* note 30; L.A. Cnty., Cal., *Misdemeanor*, *supra* note 30.

260. L.A. Cnty., Cal., *Misdemeanor*, *supra* note 30.

261. *Id.*

262. *See* 730 ILL. COMP. STAT. 5/5-6-3(b) (2015) (providing that courts can require probationers to serve a term of periodic imprisonment); IND. CODE § 35-38-2-2.3(c) (2015) (allowing judges to impose consecutive or intermittent intervals of imprisonment as a condition of probation); MICH. COMP. LAWS § 771.3(2)(a) (2015) (empowering judges to impose a condition of probation requiring confinement in county jail for up to twelve months in consecutive or nonconsecutive intervals); N.J. STAT. ANN. § 2C:43-2(b)(2) (West 2015) (authorizing judges to impose up to 364 days of confinement as a condition of probation); *Johnson v. State*, 286 S.W.3d 346, 351 (Tex. Crim. App. 2009) (noting that a judge can impose confinement in jail as a condition of community supervision at any time during the supervision period).

263. *Cook v. United States*, 275 U.S. 347, 357 (1928).

264. *Id.*

defining probation strictly as a mechanism to avoid the imposition of incarceration. Probation was a “procedure under which a defendant, found guilty of a crime upon verdict or plea, is released by the court, without imprisonment, subject to conditions imposed by the court and subject to the supervision of the probation service.”<sup>265</sup> The NPPA stressed its strong opposition to any system that combined probation with incarceration:

The probation definition is constructed to exclude the practice of some courts of combining a period of imprisonment with probation to follow. Such a disposition is a contradiction in terms and in concept and is condemned. The purpose of probation is to avoid, where it is feasible, the impact of institutional life.<sup>266</sup>

Despite the NPPA’s best efforts, the combined use of incarceration and probation is now a (largely unexamined) norm.

In a world where probation is becoming less of an alternative to prison, and is instead routinely applied either in addition to prison, or in situations where prison would not have been imposed, the privilege theory has significant structural weaknesses.

#### C. THE CONTRACT THEORY

In some instances, particularly in justifying expansive search conditions, courts have upheld conditions under a contract theory of probation. Courts in various states in my study—including California, Georgia, Idaho, Illinois, Michigan, and New Jersey<sup>267</sup>—have held that probationers can validly consent to conditions that waive their Fourth Amendment rights.

The contract theory of probation depends heavily on the validity of the privilege theory. The contract theory rests on the notion that the consideration provided to a probationer who agrees to be bound by a particular condition of probation is the privilege of being on probation. In *People v. Woods*, for example, the Supreme Court of California found that probationers “may validly consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term.”<sup>268</sup> In *United States v. Barnett*, the Seventh Circuit similarly held that probationers can contract to give up their Fourth Amendment rights for the privilege of avoiding prison:

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265. NAT’L PROB. & PAROLE ASS’N, STANDARD PROBATION & PAROLE ACT 2 (1955).

266. *Id.*

267. See *People v. Woods*, 981 P.2d 1019, 1023 (Cal. 1999); *Allen v. State*, 369 S.E.2d 909, 909 (Ga. 1988); *State v. Devore*, 2 P.3d 153, 156 (Idaho Ct. App. 2000); *People v. Absher*, 950 N.E.2d 659, 665 (Ill. 2011); *People v. Hellenthal*, 465 N.W.2d 329, 330 (Mich. Ct. App. 1991); *State v. Bollinger*, 405 A.2d 432, 437 (N.J. Super. Ct. App. Div. 1979).

268. *Woods*, 981 P.2d at 1023.

Nothing in the Fourth Amendment's language, background, or purpose would have justified forcing Barnett to serve a prison sentence rather than to experience the lesser restraint of probation. Nothing is more common than an individual's consenting to a search that would otherwise violate the Fourth Amendment, thinking that he will be better off than he would be standing on his rights.<sup>269</sup>

As noted in the previous section, this kind of reasoning assumes that search conditions are imposed only in cases in which probation is a true reprieve from prison. Probation is only a privilege, however, in a case in which a sentence of imprisonment would also be a proportionate and just sentence for that particular defendant. Although some probation cases clearly fall within this category, many do not. Thus, in the aggregate, probationers are forced to accept probation conditions without receiving any proper consideration. Because the system can always afford to put one more person in prison, however, no individual probationer has any real leverage to challenge the conditions imposed.

The Supreme Court has acknowledged the probationer's lack of bargaining power over which probation conditions are imposed. In *Burns*, the 1932 case that first announced the privilege theory, the Court held that probation was "a matter of favor, not of contract."<sup>270</sup> Because probation was a privilege, probationers had no right to haggle over the terms that would be imposed on them. They had to accept the system as it was without attempting to "insist on terms or strike a bargain."<sup>271</sup> This analysis would seem to vitiate reliance on a contract theory to justify waivers, but it has not stopped courts from doing so.

Although probationers typically cannot negotiate over the conditions of probation, courts and probation departments often try to create the appearance of a contract. They require probationers to sign documents formally agreeing to accept all of the conditions imposed. The instruction form for adult probationers in Orange County, California, provides a typical example. This form, prepared by the Orange County Department of Probation, lays out all of the standard conditions of probation.<sup>272</sup> The probationer must initial a box beside each of the conditions. The probationer then signs the form under the following acknowledgment: "I have personally initialed the above boxes and understand each and every one outlined above. I hereby acknowledge receipt of and agree to comply with the above instructions."<sup>273</sup> The structure of the form, which announces the predetermined rules of probation, creates the appearance of a contract.

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269. 415 F.3d 690, 692 (7th Cir. 2005).

270. *Burns v. United States*, 287 U.S. 216, 220 (1932).

271. *Id.*

272. Orange Cnty., Cal., *supra* note 124.

273. *Id.*

To the extent that these forms might be contracts, they are more like cell phone contracts and other contracts of adhesion than negotiated contracts.<sup>274</sup> But unlike a person who decides to purchase a cell phone, the probationer cannot opt out of the system. That is, a probationer cannot opt out of the system unless he or she decides to insist on a sentence of incarceration, even if no one else would be incarcerated under the same circumstances.

In addition, the contract rationale must be analyzed against the backdrop of the points made earlier in this Article concerning the substantive scope of the standard conditions of probation, the vagueness of many of their terms, and the ways they can be enforced. Against this backdrop, it is difficult to argue that probationers as a class have entered into a bargain or a meeting of the minds pursuant to which they have meaningfully waived their rights.

#### V. OVERCRIMINALIZATION, UNEQUAL POLICING, AND THE CONCENTRATION OF POWER

The legal framework of probation perpetuates several key problems that scholars have criticized elsewhere in the criminal justice system: overcriminalization, the shifting of power toward the system's law enforcers, and the unequal policing of the poor. Indeed, as I will argue, the impact of being on probation takes many of these criticisms to a whole new level, despite the fact that, ironically, probation is often presented as a solution to problems in other parts of the system.

The law of probation has been sidelined for three main reasons. First, probation continues to suffer from its outdated reputation as a progressive alternative to incarceration. The fact that probation is a community-based sanction has tilted scholars away from probation and towards a focus on the more serious condition of incarceration, even though probation and incarceration are now regularly intertwined: judges routinely mix sentences of probation and incarceration, and the revocation of probation has been a leading source of overcrowding in prisons and jails.<sup>275</sup> Moreover, the hope that probation might solve the problems of mass incarceration has led policymakers to glide over the problems created by probation itself.

Second, the conditions of probation are not easy to access. I found it surprisingly difficult to retrieve even standard conditions, the bedrock law of probation, across the multiple jurisdictions in this study. One of the major goals of this Article was to begin to map out the standard conditions because it has not been done and any examination of the system is impossible unless we know and understand what the basic contours of probation are.

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274. See Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 86 (2000) (noting that the "extraordinary inequality in bargaining power" has led virtually all scholars to reject the contract theory of probation).

275. AM. PROB. & PAROLE ASS'N & NAT'L CTR. FOR ST. CTS., *supra* note 159, at 1.

Third, the expectations set by many standard conditions fall differently on those who are poor and least able to make their experiences visible. In part, this extends to the availability of legal resources to provide a check on the people who hold discretionary power over probationers' lives. A person with a private lawyer, for example, can call on that lawyer to intercede with a probation officer and create a record (or some atmosphere of accountability) of how power is being exercised by that officer. In general, however, appointed lawyers do not stay on cases postsentencing unless and until a violation of probation is reported to the court.<sup>276</sup> A poor probationer is for the most part on his or her own, especially with respect to the extrajudicial sanctions and impositions of control effectuated by probation officers. Those interactions are more widely occurring and impact more people than judicial revocation hearings.

Legal research focused on the expanding reach of the criminal law is one example of an area of scholarship that has largely overlooked the role of probation. Scholars of overcriminalization have criticized legislatures for passing too many criminal statutes and for passing criminal statutes that are too vague and too broad.<sup>277</sup> They also condemn legislatures for "regularly add[ing] to criminal codes, but rarely subtract[ing] from them," carving out ever greater swaths of criminal liability.<sup>278</sup>

This study of the standard conditions of probation reveals that these conditions are extreme (but unacknowledged) examples of the overcriminalization trend. The fact that some jurisdictions make obeying every local ordinance a condition of probation is just one illustration of how broadly a probation system can reach. New Jersey, for example, has a standard condition requiring compliance with "all federal, state, and municipal laws and ordinances."<sup>279</sup> Local New Jersey ordinances, meanwhile, cover requirements as varied as not feeding pigeons or squirrels<sup>280</sup> and not flying a kite in a park.<sup>281</sup> Through the standard conditions of probation, all of these activities attain the force of criminal acts for probationers, who constitute a not-insignificant percentage of the population.

At the same time, courts continue to impose moralistic conditions that date from the Progressive Era. In many jurisdictions, the law makes probationers vulnerable to penal sanction if they fail to be good, for example, or fail to avoid vicious habits. These conditions may be remnants of a discredited philosophy, but judges continue to impose them just the same. Tellingly, the jurisdictions in

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276. See, e.g., Interview with Pub. Defender, DeKalb Cnty., Ga. (Sept. 30, 2014) (on file with author) (noting that a public defender is not assigned to a case postsentencing, once the person is on probation, unless there is an active warrant for a court-based revocation proceeding).

277. See, e.g., Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2136 (1998) ("Most legal academics, however, would probably also agree that there are too many criminal statutes on the books, and that those statutes are frequently too broad and too vague.").

278. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 507 (2001).

279. N.J. Judiciary, *supra* note 78.

280. See *NEWARK, N.J., MUN. CODE* § 20:20-1(n) (2015).

281. *NEWARK, N.J., MUN. CODE* § 20:2-12 (2015).

my study did not modify their standard conditions in the 1970s, at the height of the public assault on the Progressive philosophy elsewhere in the criminal justice system.<sup>282</sup> They continue to impose these same conditions decades later, even while embracing an increasingly deterrence-oriented philosophy of supervision—a philosophy that demands that probation officers respond to every violation of a condition to maintain respect for their credibility and authority. Meanwhile, the language and impact of the conditions, looser than even the loosest criminal statutes, continue to escape attention and analysis.

Noted legal scholars have described how broad criminal statutes transfer lawmaking authority to police and to prosecutors.<sup>283</sup> William J. Stuntz explained, for example, that because the “criminal law is broad, prosecutors cannot possibly enforce the law as written: there are too many violators.”<sup>284</sup> Because the language of the law captures too much conduct to determine who goes to prison, it necessarily empowers law enforcers to take over that function: the police by deciding whom to arrest and the prosecutors by deciding whom to prosecute. The system’s law enforcers, in Stuntz’s analysis, become the system’s “real lawmakers.”<sup>285</sup>

This dynamic is even more intense with respect to probation. The language of probation conditions propels the probation officer into lawmaker status. And the fact that standard conditions of probation are simultaneously so deep (obey all laws) and so broad (be good) transfers that much more lawmaking power to these officers. Even more than the prosecutor, the probation officer is a hidden and unaccountable lawmaker.

Some jurisdictions make the probation officer’s legislative function explicit. In Texas, for example, the standard conditions typically include a catchall requirement that the probationer abide by “the rules and regulations” of the supervision department.<sup>286</sup> One of the standard conditions in Delaware County, Pennsylvania, is that the probationer “abide by any written instructions” of the probation officer.<sup>287</sup> A standard condition in the state of Delaware requires that probationers comply with any “[s]pecial condition” imposed by the probation officer.<sup>288</sup> Each such condition transforms the probation officer into an unequivocal lawmaker with authority over probationers’ lives.

A related body of legal scholarship has focused on the increasingly adjudicative (or judge-like) role of law enforcement officers. In studying federal plea

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282. Doherty, *supra* note 7, at 991–95 (discussing the building criticism of indeterminate sentencing and coercive rehabilitation in the late 1960s and 1970s).

283. *See, e.g.*, Stuntz, *supra* note 278, at 509 (“As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors . . .”).

284. *Id.* at 519.

285. *Id.* at 506.

286. Dallas Cnty., Tex., *Community Supervision*, *supra* note 28; Harris Cnty., Tex., *supra* note 28; Tarrant Cnty., Texas, *Community Supervision*, *supra* note 28.

287. Adult Prob. & Parole Servs., Delaware Cnty., Pa., General Rules, Regulations and Conditions Governing Adult Probation/Parole.

288. Del. Dep’t of Corr., *supra* note 74, at 1.



bargaining, for example, Rachel E. Barkow has stressed that federal prosecutors are both the investigators and adjudicators in the ninety-five percent of federal cases that result in guilty pleas.<sup>289</sup> Barkow criticizes this consolidation of roles, arguing that “[p]rosecutors who investigate a case are poorly positioned to make a final assessment of guilt because they cannot view the facts impartially. After investing time and effort in pursuing a particular defendant, the prosecutor cannot view the facts as a neutral party.”<sup>290</sup> Barkow argues that this merging of enforcement and adjudicative powers creates enhanced opportunities for a single prosecutor’s “prejudices and biases to dictate outcomes.”<sup>291</sup>

This critique applies squarely to probation officers. Indeed, for violations of probation that do not lead to court-based revocation proceedings, probation officers arguably inhabit the roles of victim, witness, investigator, prosecutor, and judge, all in the same case. The probation officer is the *de facto* victim (the complainant) if a probationer fails to adhere to many of the standard conditions of probation—failing to report as required, for example, or refusing to submit to a search. The probation officer then becomes the investigator of the alleged violation, deciding whom to interview and how to document his or her own observations (as the primary witness to the violation). Next, the probation officer assumes the role of prosecutor, deciding what violations to charge. If the violations do not lead to a formal revocation petition, the probation officer will also decide whether the probationer is guilty of the violations and what the administrative sanction should be. And unlike plea bargaining outcomes, which are recorded in open court, administrative sanctions need not appear on the public record.

The multiple roles of the probation officer when alleged violations do lead to court-based revocation proceedings also deserve careful study. The probation officer typically serves as the instigator of the revocation proceedings and as a principal witness at the hearing. At the same time, the probation officer is considered an officer of the court, conferring a type of insider status within the court system.

The federal system provides an example of just how complicated (and structurally compromised) the probation officer’s role can become during formal revocation proceedings. Federal probation officers are employees of the court system.<sup>292</sup> In many federal districts, this status has led to probation officers having off-the-record conversations with judges about cases, even though the probation officer is the accuser and witness against the proba-

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289. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869, 869 (2009).

290. *Id.* at 883.

291. *Id.*

292. *Probation and Pretrial Officers and Officer Assistants*, U.S. Cts., <http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer> (last visited Sept. 15, 2015) (“U.S. probation . . . officers . . . are federal law enforcement officers and U.S. district court employees.”).

tioner.<sup>293</sup> The U.S. Attorney's Office, moreover, often represents the probation officer in revocation proceedings in an attorney–client form of relationship.<sup>294</sup> Thus, the probation officer has a privileged relationship with both branches of government at the hearing: the prosecutor, who decides how vigorously to prosecute the alleged violation in court, and the judge, who decides if the probationer is guilty and what the sentence should be.

These role dynamics are particularly important, because the violation need only be proven by a preponderance of the evidence. Although this standard is the general civil standard, it does not work in the same way for a probation revocation hearing as it does for an ordinary civil case. Unlike the typical defendant in a civil case, the probationer has already been convicted of a crime. This conviction means that the probationer's status and credibility have already been diminished in the eyes of the court. Meanwhile, the plaintiff in the hearing is the probation officer. The relative standing of these two participants becomes highly significant when the violation must be proven only by a preponderance of the evidence.

This combination of status and the probationer's reduced due process rights means that a probationer often has little leverage at revocation. The conditions of probation are broad. Evidence obtained in violation of the Fourth Amendment can be used against the probationer at the hearing.<sup>295</sup> Violations need only be established by a preponderance of the evidence. The probationer is already marked as a criminal. The chief witness against the probationer is an officer (or perhaps employee) of the court. Given this combination of factors, few probation violations are contested in a hearing.

Whether the weight of this system falls equally on the rich and the poor (and other disadvantaged social groups) is a question that must be considered in any examination of the law of probation. After all, it was an explicitly class-based project that first inspired many of the conditions identified in this study. Progressive reformers sought to help nudge poor Americans into the ranks of the middle class by encouraging hard work, sobriety, and stable employment.<sup>296</sup> The expectations set by the conditions, aided by the supposedly friendly interven-

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293. *See, e.g.*, *United States v. Maury*, 530 F. App'x 205, 210 (3d Cir. 2013) (holding that district court's *ex parte* conference with probation officer in revocation proceeding did not affect defendant's substantial rights); *United States v. Pittarelli*, 205 F. App'x 188, 189 (4th Cir. 2006) (denying challenge to claimed *ex parte* meeting between judge and probation officer prior to revocation hearing); *United States v. Davis*, 151 F.3d 1304, 1306 (10th Cir. 1998) ("Because of the 'close working relationship between the probation officer and the sentencing court,' the probation officer may communicate *ex parte* with the district court . . .").

294. This arrangement is standard practice, for example, in the Eastern District of New York and the District of Connecticut. *See* E-mail from Assistant Fed. Defender, Fed. Pub. Defender, D. Conn., to author (Sept. 29, 2015, 3:47 PM) (on file with author); E-mail from Assistant Fed. Defender, Fed. Pub. Defender, E.D.N.Y., to author (Sept. 29, 2015, 3:35 PM) (on file with author). It is also standard practice in the Southern District of New York, where I served as an Assistant Federal Defender between 2005 and 2010.

295. *See supra* section III.A.2

296. WILLARD GAYLIN ET AL., *DOING GOOD: THE LIMITS OF BENEVOLENCE* 75 (1978).

tions of a probation officer, were meant to elevate the poor—not to make them more vulnerable.

The critique of Progressive-inspired rehabilitation programs, however, was that they did make poor people vulnerable by granting the state huge amounts of discretionary power over their lives.<sup>297</sup> The Progressives justified these broad discretionary powers because of the humanitarian quality of their interventions. But critics showed how the language of benevolence was being used to mask the realities of penal control.<sup>298</sup> An influential 1971 report by the American Friends Service Committee charged that the discretion exercised in the name of rehabilitation was really a method of keeping the “powerless in line.”<sup>299</sup>

This history suggests that the class-based dimensions of modern probation systems deserve careful study. How should standard conditions be understood today outside the framework of benevolent optimism that was used to justify their early imposition? How do these conditions operate in the control-oriented and discipline-focused mindset of modern probation systems?

As discussed in Part II, a common condition of probation is that the probationer be productively occupied (in work or at school) and financially responsible (supporting dependents and paying all relevant fees and fines). The employment conditions in my study fall along a spectrum, ranging from the least directive (requiring probationers to work faithfully at suitable employment in so far as possible) to the most directive (requiring probationers to be employed full-time).<sup>300</sup> The support your dependents conditions follow a similar pattern.

These kinds of employment and support conditions function differently depending on a probationer’s social class. Poor people are arguably less likely to find stable employment than those who have more resources.<sup>301</sup> And people are poor because of long-standing factors like educational background, family circumstances, and lack of stable work history. Being on probation only makes

297. ROTHMAN, *supra* note 163, at 61.

298. See, e.g., FRANCIS ALLEN, *Legal Values and the Rehabilitative Ideal*, in *THE BORDERLAND OF CRIMINAL JUSTICE* 33–34 (1964) (emphasizing how “the vocabulary of therapy” had been “exploited”).

299. See AM. FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* 28 (1971).

300. See *supra* Table 5.

301. See Susan Lambert & Julia Henly, *Double Jeopardy: The Misfit Between Welfare-to-Work Requirements and Job Realities*, in *WORK AND THE WELFARE STATE: STREET-LEVEL ORGANIZATIONS AND WORKFARE POLITICS* 69, 81 (Evelyn Z. Brodtkin & Gregory Marston eds., 2013) (“[T]he changing nature of employment at the low end of the labor market suggests that . . . available jobs are increasingly ‘bad jobs,’ subject to the cost-containment practices . . . that expose low-income individuals to significant market risk.” (citation omitted)); Françoise Carré et al., *Retail Jobs in Comparative Perspective*, in *LOW-WAGE WORK IN THE WEALTHY WORLD* 211, 212 (Jérôme Gautié & John Schmitt eds., 2010) (finding a 50% annual labor turnover rate in U.S. retail jobs in 2002, with 42% of retail workers receiving wages in the bottom two-thirds of national wage rates). See generally GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (2011) (describing an emerging class defined by its inability to escape from insecurity in working conditions).

matters worse—due in part to employer skepticism of people with criminal histories.

Requiring poor and disadvantaged people to work as a condition of their probation leaves them exposed. Even the least directive example in my study lets the probation officer determine what efforts a person should take to find a job and what efforts are insufficient. The most directive conditions leave probationers vulnerable to sanction if they cannot secure an explicitly full-time job, whatever the status of the employment market.

Many of the policing conditions also acquire a more menacing resonance, depending on a probationer's resources. The requirement to report as directed, for example, can be disproportionately difficult for poor people, as can the requirement to attend fixed treatment appointments. People with low paying jobs are less likely to have flexibility in their work schedules. Missing work makes them at risk of losing their jobs. They lose money if they lose work hours. If they have children, they may struggle to pay for a babysitter. For the poorest probationers, of whom there are many, finding reliable and affordable transportation to the probation office or to a treatment program can be an insurmountable hurdle.

Focused on enforcement, the rules and regulations of probation departments often seem blind to these problems. The Travis County Probation Department in Texas, for example, includes the following notice on its website under the banner “frequently asked questions” concerning “conditions of probation:”

Can I bring children to my office visits?

No, children cannot come with you to an office visit. Some office visits may take up to 2 hours to complete, depending on the purpose of the visit. You need to try and find someone to watch your children prior to your office visit.<sup>302</sup>

The intersection of the policing conditions with the payment conditions also raises questions about the extent to which such fees serve as tripwires for the poor. Although the Supreme Court has held that probationers cannot be jailed solely for not being able to pay their fees,<sup>303</sup> the threat of rearrest is a common tactic in pressuring probationers to pay.<sup>304</sup> In Georgia, for example, private probation companies have been criticized for aggressively threatening probationers with jail if they fall behind in their payments.<sup>305</sup> But the risk of jail, or at least some administrative sanction, is implicit in the very fact that paying the fees is a condition of probation.

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302. *FAQ Probation Conditions*, TRAVIS CNTY., TEX., <https://www.traviscountytx.gov/adult-probation/faq-conditions> (last visited Sept. 15, 2015).

303. *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983).

304. *See supra* Part II.D.

305. HUMAN RIGHTS WATCH, *supra* note 92, at 49–53.

The fees for the Probation Reporting Center (PRC) in Ramsey County, Minnesota, provide an illustration of how these payment requirements are presented to probationers. The PRC is a form of (nonprivate) call-in supervision specifically intended for low- and moderate-risk probationers. Participation is mandatory for any probationers assigned to PRC, but it comes with a supplemental \$7-per-month program fee, which must be paid through a money order.<sup>306</sup> In presenting this monthly payment, Ramsey County Community Corrections (RCCC) notes that the call-in system saves a probationer time and money considering “the cost of driving, parking, time off of work or school and other expenses associated with the trip to see your probation officer.”<sup>307</sup> But the probation department also emphasizes the consequences of any refusal to pay the seven-dollar fee:

If you refuse to pay, then you are not complying with the terms of your probation. RCCC has determined this is how you will report, so you must comply with paying the costs associated with the program. If you do not comply, you will be in violation of the terms and conditions of your probation, as you will be locked out of the system. If you fail to make your call, a probation violation maybe submitted.<sup>308</sup>

Failing to pay such fees—or violating any other condition of probation—also has implications for a probationer’s eligibility for federal assistance programs. A probationer is not eligible to receive assistance under a host of federal programs if he or she is violating “a condition of probation or parole imposed under Federal or State law.”<sup>309</sup> Such programs include: Temporary Assistance to Needy Families (TANF), Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps), federal housing assistance programs (including public housing and Section 8), Social Security disability, and Old-Age, Survivor, and Disability Insurance (OASDI).<sup>310</sup> That probationers must proactively disclose whether they are violating a condition (however broad that condition might be) also means that they could be prosecuted for fraud if they do not provide fully accurate information.

One predictable (but insufficient) response is that probation officers do not have the resources to enforce most conditions anyway, lessening any disparate

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306. *Payment for PRC*, RAMSEY CNTY., [https://www.co.ramsey.mn.us/cc/payment\\_for\\_prc.htm](https://www.co.ramsey.mn.us/cc/payment_for_prc.htm) (last visited Sept. 15, 2015).

307. *Frequently Asked PRC Questions*, RAMSEY CNTY., [https://www.co.ramsey.mn.us/cc/frequently\\_asked\\_prc\\_questions.htm](https://www.co.ramsey.mn.us/cc/frequently_asked_prc_questions.htm) (last visited Sept. 15, 2015).

308. *Id.*

309. *See, e.g.*, 42 U.S.C. § 608(a)(9)(A)(ii) (2012) (prohibition in TANF statute mandating “denial of assistance” to “probation and parole violators”).

310. 7 U.S.C. § 2020(e)(8)(E) (2012) (SNAP bar for anyone “violating a condition of probation or parole imposed under Federal or State law”); 42 U.S.C. § 608(a)(9)(A)(ii) (2012); 42 U.S.C. § 1382(e)(4)(A)(ii) (2012) (same bar for SSI disability); 42 U.S.C. § 1437d(l)(9) (2012) (same bar for public housing); 42 U.S.C. § 1437f(d)(1)(B)(v) (2012) (same bar for project-based Section 8 and Section 8 vouchers); Pub. L. No. 108-203 §203, 118 Stat. 493 §203 (same bar for OASDI program).

impact on the poor. But a probationer cannot count on having a probation officer who takes a relaxed approach to enforcement in his or her case.<sup>311</sup> And poor probationers are the least likely to have the social capital to push back if they are targeted disproportionately, a dynamic that potentially makes them even more vulnerable to this kind of enforcement. In addition, even if lax enforcement is common (at least for low-risk probationers), this reality cannot justify the use of conditions that invite problematic and disparate administration. As I have explored elsewhere, complaints about the malicious or bad-tempered enforcement of supervision conditions stretch back into the nineteenth century.<sup>312</sup>

The current emphasis on using risk assessments to decide how closely to supervise various probationers, a methodology that is part of a growing trend called evidence-based sentencing, only increases the likelihood of the enhanced monitoring of the poor. A central idea behind this methodology, as it is applied to probation, is that probation departments should focus their supervision resources on probationers who have the highest risk of recidivism (that is, violating the conditions of their probation).<sup>313</sup> Although framed in the neutral language of evidence-based practices, risk assessment instruments rely on a variety of poverty-correlated variables in sorting individual probationers into the high-risk categories.

A number of scholars have begun to look at how risk assessment instruments are weighted against the poor.<sup>314</sup> A leading instrument called the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) provides a typical example. The COMPAS Probation Assessment Instrument gauges risk through factors that include a person's income level, employment history, job skills, stability of residence, whether they own or rent a home, the employment status of peers and associates, the availability of family resources, and the criminal history of family members, peers, and associates.<sup>315</sup> Under these measures, probationers are judged to have a higher risk of recidivism the fewer resources they have.

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311. See, e.g., ROTHMAN, *supra* note 163, at 112 (“That the [probation] system’s potential for coercion was never fully realized does not mean that all probationers escaped from the arbitrary exercise of power.”); Klingele, *supra* note 135, at 1039 (“Agent responses to low-level violations vary tremendously, even within the same office.”).

312. Doherty, *supra* note 7, at 969.

313. See, e.g., VERA INST. OF JUST., PERFORMANCE INCENTIVE FUNDING 13 (2012) (noting that evidence-based principles include providing “more intensive supervision” to “offenders identified as having a higher risk of reoffending”).

314. See, e.g., J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, app. (2011) (documenting use of variables in risk assessments such as education, employment, finances, family/marital accommodation, and failure to provide support for biological child.).

315. SHARON LANSING, DIV. OF CRIM. JUST. SERVS., NEW YORK STATE COMPAS-PROBATION RISK AND NEED ASSESSMENT STUDY: EXAMINING THE RECIDIVISM SCALE’S EFFECTIVENESS AND PREDICTIVE ACCURACY app. A, 29 (2012) (instrument used for COMPAS probation assessment).

Sonja Starr has criticized the use of these actuarial risk assessment instruments in criminal sentencing proceedings on both constitutional and empirical grounds.<sup>316</sup> Starr has focused on how judges are using these instruments at sentencing to determine “whether and for how long a defendant is incarcerated.”<sup>317</sup> She argues that the use of these instruments at sentencing violates the Equal Protection Clause, amounting to “overt discrimination based on demographics and socioeconomic status.”<sup>318</sup> In particular, she criticizes the instruments’ heavy reliance on factors relating to poverty.<sup>319</sup>

Starr also argues that the use of these instruments in individual cases is empirically flawed. She emphasizes that the instruments cannot provide “anything even approaching a precise prediction of an individual’s recidivism risk.”<sup>320</sup> Instead, the instruments predict only average recidivism rates for all offenders who share characteristics with a defendant that are included as factors in the model.<sup>321</sup> Thus, judges are using the instruments to make sentencing decisions for individual defendants, when there can be little confidence in the accuracy of the risk-based predictions for the individuals in question.

Starr does not focus on probation systems, but the concerns she raises also apply to how risk assessment instruments are used for probation. As a preliminary matter, a judge might use a risk assessment at sentencing to decide not only whether a defendant deserves to be incarcerated but also whether a defendant should be put on probation (and for how long). In other words, risk assessment results factor into decisions about whether probation is the appropriate sentence for a particular defendant, as opposed to a more lenient sentence like an unconditional discharge. In addition, the probation department then uses risk assessment results to decide how closely to supervise those on probation, thus using these metrics to decide how punitive the experience of being on probation will be. These dynamics suggest the cumulative possibilities: the poor can be disproportionately punished both by being placed under supervision at higher rates (as they present a higher risk of recidivism) and by being monitored more strictly once they are under supervision (for the same reason).

The employment conditions provide an example of how these circumstances could play out in an individual case.<sup>322</sup> A person with no family resources, unstable housing, low job skills, and no obvious employment prospects is placed on probation. The risk assessment instruments used by probation place the person in a high-risk category. The person is then closely supervised for compliance with conditions that include finding a stable job, paying monthly

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316. Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 806 (2014).

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 842.

321. *Id.* at 842, 847.

322. *See supra* Table 5.

supervision fees, and promptly reporting all changes in address. In such a scenario, being on probation is a sentence that may serve disproportionately to debilitate—rather than rehabilitate—the poor.

In a similar vein, the racial dynamics of probation enforcement must be investigated more deeply, particularly as race intersects with class.<sup>323</sup> How does race—including unconscious racism—affect how probation officers prioritize their enforcement resources? To what degree do the heavy policing and underperforming public schools of poor urban neighborhoods help sift minorities into high-risk categories? The little available research does suggest a significant correlation: being African American is the strongest predictor of a preference for prison over probation.<sup>324</sup>

#### CONCLUSION

Probation is, by far, the most commonly imposed criminal sentence in the United States, with nearly four million adults under supervision. And yet, the critical analysis that has been applied to incarceration has, for the most part, avoided the subject of probation entirely.

In this Article, I examine the standard conditions of probation in the sixteen U.S. jurisdictions that use probation most expansively. Analyzing the details of these conditions is important because the extent of the state's authority to control and punish probationers depends on the substance of the conditions imposed.

Based on the results of my analysis, I argue that the standard conditions of probation have constructed a sprawling and undertheorized definition of recidivism—one that leads to overcriminalization, the concentration of adjudicative and legislative power in the probation officer, and the unequal treatment of the socially disadvantaged. I also conclude that, although probation is often invoked as a solution to the problem of overincarceration, it should instead be analyzed as part of the continuum of excessive penal control. The phenomenon of hypersupervision outside of prisons deserves to be scrutinized in a manner commensurate with its dominant role in the U.S. criminal justice system.

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323. For an important analysis of the racial impact of risk assessments, see Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 *FED. SENT'G REP.* 237 (2015).

324. Ben M. Crouch, *Is Incarceration Really Worse? Analysis of Offenders' Preferences for Prison Over Probation*, 10 *JUST. Q.* 67, 85 (1993).