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 16 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 non-criminal conduct punishable with criminal sanctions, construct a definition of recidivism that contributes to over-criminalization. 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 over-incarceration, I argue that it instead should be analyzed as part of the continuum of excessive penal control.
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, 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. 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” condition of imprisonment. This state of affairs is exemplified by the accompanying graph, which is excerpted from a 2014 National Research

*Clinical Associate Professor of Law, Yale Law School. I am extremely grateful to Judith Resnik, Dennis Curtis, Scott Shapiro, Muneer Ahmad, Michael Wishnie, James Forman, Tracey Meares, Issa Kohler-Hausmann, Jean Koh Peters, Chris Klatell, and participants at a roundtable at the UCLA School of Law and a workshop at the University of California, Irvine School of Law.

1 BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 2 (Dec. 2014) (noting that 3,910,600 people were on probation at year-end 2013).

2 See, e.g., Michelle Phelps, The Paradox of Probation: Community Supervision in the Age of Mass Incarceration, 35 LAW & POL’Y. 51, 52 (2013) (noting “as mass incarceration boomed, scholars largely lost interest in probation,” “rarely engaging with it seriously as an important institution”).
Council (NRC) report on the growth of incarceration in the United States. The graph, titled “Rising Incarceration Rates” in the NRC report, actually reveals the extent to which increases in the U.S. probation population have dwarfed increases in the prison and parole populations. At year-end 2013, the most recent figures available, there were approximately 2.2 million inmates in U.S. prisons and jails. This figure, while breath-taking 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 hyper supervision 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 post-incarceration supervision that has become nearly universal in

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3 NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 41 (2014) (Figure 2-4).
4 Id.
5 BUREAU OF JUSTICE STATISTICS, supra note 1, at tbl. 1.
the federal system. 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 numbers of people already on probation, it is often invoked as an attractive solution for addressing the problem of mass incarceration. Groups as varied as Right on Crime and the ACLU have been pushing for more probation.

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. 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

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7 See, e.g., Phelps, supra note 2, at 51 (“One of the most popular reform suggestions is to expand probation supervision in lieu of incarceration.”)
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 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, and deserves to be analyzed in a manner commensurate with its scope and impact.

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). To avoid the threat of incarceration, a probationer must follow all of the conditions of his or her probation, and not just be deterred from committing a new criminal act.

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10 See, e.g., URBAN INST. & BUREAU OF JUSTICE ASSISTANCE, JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT 9 (2014) (noting definition of recidivism for probationers as “a new crime or a technical violation of supervision”).
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 and are disproportionately racial minorities?

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 non-public 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 traditionally used to justify the law of probation fits the system that has come to exist.

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 over-criminalization, 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 under-theorized 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 anti-recidivism 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

[In this section, I explain how I chose the jurisdictions studied. These include: (1) the ten states that have the greatest number of adults under probation supervision; (2) the ten states that have the highest percentage of their adult residents on probation; and (3) the federal system.]
Table 1
Ten States with the Most People on Probation
End of 2013 BJS Figures

<table>
<thead>
<tr>
<th>State</th>
<th>Numbers on Probation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Georgia</td>
<td>514,477</td>
</tr>
<tr>
<td>Texas</td>
<td>399,655</td>
</tr>
<tr>
<td>California</td>
<td>294,057</td>
</tr>
<tr>
<td>Ohio</td>
<td>250,630</td>
</tr>
<tr>
<td>Florida</td>
<td>233,128</td>
</tr>
<tr>
<td>Michigan</td>
<td>176,795</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>171,970</td>
</tr>
<tr>
<td>Illinois</td>
<td>123,862</td>
</tr>
<tr>
<td>Indiana</td>
<td>123,673</td>
</tr>
<tr>
<td>New Jersey</td>
<td>113,231</td>
</tr>
</tbody>
</table>

Table 2
Ten States with the Greatest Percentage of Adults on Probation
End of 2013 BJS Figures

<table>
<thead>
<tr>
<th>State</th>
<th>Number Per 100,000 Adults</th>
</tr>
</thead>
<tbody>
<tr>
<td>Georgia</td>
<td>6,829</td>
</tr>
<tr>
<td>Ohio</td>
<td>2,802</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>2,737</td>
</tr>
<tr>
<td>Idaho</td>
<td>2,634</td>
</tr>
<tr>
<td>Indiana</td>
<td>2,471</td>
</tr>
<tr>
<td>Minnesota</td>
<td>2,446</td>
</tr>
<tr>
<td>Michigan</td>
<td>2,305</td>
</tr>
<tr>
<td>Delaware</td>
<td>2,209</td>
</tr>
<tr>
<td>Texas</td>
<td>2,043</td>
</tr>
<tr>
<td>Hawaii</td>
<td>1,958</td>
</tr>
</tbody>
</table>
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 to 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 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.

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 3, several jurisdictions (including Georgia and Michigan) specifically instruct probationers not to violate a criminal law of any unit of
government. While 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.” This condition is pointedly phrased to make probationers vulnerable to revocation on the basis of a new prosecution, whether the prosecution proves successful or not.

Most jurisdictions quickly progress 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. Others (such as counties in Ohio and Pennsylvania) specify that a probationer violate no local, state, or federal law. A last group of jurisdictions (such as 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.

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

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11 Cites to conditions forms are omitted in this excerpted version of the paper.
of any jurisdiction, specifically defined to include traffic regulations. In this context, speeding or a bad parking job become acts of recidivism.

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. 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.

<table>
<thead>
<tr>
<th>Sample &quot;Obey the Law&quot; Conditions</th>
<th>Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violate no criminal law of any unit of government</td>
<td>Georgia; Michigan; Montgomery Co. (PA); Cook &amp; DuPage Cos. (IL); Monroe Co. (IN)</td>
</tr>
<tr>
<td>Do not be charged with a criminal offense based on probable cause</td>
<td>Marion Co. (IN)</td>
</tr>
<tr>
<td>Violate no federal, state, or local law</td>
<td>Cuyahoga and Franklin Cos. (OH); Allegheny Co. (PA); Ramsey Co. (MN); Idaho (felony form)</td>
</tr>
<tr>
<td>Violate no local, state, or federal law or ordinance</td>
<td>New Jersey; Hennepin Co. (MN)</td>
</tr>
<tr>
<td>Obey all laws</td>
<td>Hamilton Co. (OH); Florida; Rhode Island; Canyon Co. (ID - misd form); Dakota Co. (MN); LA and Orange Cos. (CA)</td>
</tr>
<tr>
<td>Do not violate any laws or ordinances of any jurisdiction including traffic regulations</td>
<td>Lake Co. (IL)</td>
</tr>
</tbody>
</table>
B. “Be Good” and Associate with “Good” People

Many jurisdictions also include what I call a “be good” condition amongst their standard conditions of probation. As shown in Table 4, 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.

<table>
<thead>
<tr>
<th>Conditions</th>
<th>Georgia</th>
<th>Texas</th>
<th>California</th>
<th>Ohio</th>
<th>Rhode Island</th>
</tr>
</thead>
<tbody>
<tr>
<td>Keep the Peace and Remain on Good Behavior</td>
<td></td>
<td></td>
<td>State-wide</td>
<td></td>
<td>State-wide</td>
</tr>
<tr>
<td>Be of General Good Behavior</td>
<td>State-wide</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Avoid Injurious and/or Vicious Habits</td>
<td>State-wide</td>
<td>Harris, Dallas and Tarrant Counties</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do Not Become Abandoned to a Vicious Life</td>
<td></td>
<td></td>
<td></td>
<td>State-wide</td>
<td></td>
</tr>
<tr>
<td>Conduct Oneself Properly</td>
<td></td>
<td></td>
<td></td>
<td>Hamilton County</td>
<td></td>
</tr>
</tbody>
</table>
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 “avoid injurious and vicious habits” as “general conditions of probation.” In California, a state statute allows for revocation if a probationer has “become abandoned” to a “vicious life.”\(^\text{12}\) In Rhode Island, the courts characterize “keeping the peace and remaining on good behavior” as the two key conditions of probation.\(^\text{13}\)

These kinds of “be good” conditions—present in all three top states in each of my categories—are so broad that they defy basic due process requirements. The Supreme Court has long held that an enactment “is void for vagueness if its prohibitions are not clearly defined.”\(^\text{14}\) A condition of probation must “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited.”\(^\text{15}\) 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.

Challenges to these kinds of conditions are surprisingly rare, however, and courts have tended to wave off arguments that do raise vagueness challenges without engaging in any extended analysis.\(^\text{16}\) In 1971, for example, the Court of Appeals of Georgia acknowledged concerns about a probation condition requiring “general good behavior.”\(^\text{17}\) 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.”\(^\text{18}\) In 1968, a Court of Appeal in California declared that it saw “no vagueness” in

\(^{12}\) CAL. PENAL CODE § 1203.2(a) (West 2014).
\(^{15}\) Id. at 108.
\(^{18}\) Id.
conditions requiring a probationer to “conduct himself in a law-abiding matter,” not to engage in “criminal practices”, and not to become “abandoned to improper associates or a vicious life.”\textsuperscript{19} Without further elaboration, the court simply declared that such terms were not unconstitutionally vague.\textsuperscript{20} 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;\textsuperscript{21} this reasoning is a version of the contract theory of probation discussed in Part IV.C.

The modern 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.\textsuperscript{22} I therefore compare its semantic presentation in the state’s three most populated counties. Table 5 provides examples of how the condition appears on the counties’ respective judgment forms and probation websites:

<table>
<thead>
<tr>
<th>Texas County</th>
<th>Standard Condition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harris County (includes Houston)</td>
<td>Avoid injurious or vicious habits. (The use of illegal drugs and alcohol.)</td>
</tr>
<tr>
<td>Dallas County</td>
<td>Avoid injurious or vicious habits.</td>
</tr>
<tr>
<td>Tarrant County (includes Fort Worth)</td>
<td>Avoid injurious or vicious habits and abstain from the illegal use of controlled substances or consumption of any alcoholic beverage.</td>
</tr>
</tbody>
</table>

\textsuperscript{20} Id.
\textsuperscript{21} See, e.g., Simmons v. State, 2008 WL 4587282 (Tex. App. 2008) (holding defendant had “waived any ambiguity argument” with respect to an “avoid injurious or vicious habits condition” in signing off on probation order imposing the condition).
\textsuperscript{22} TEX. CODE CRIM. PROC. art. 42.12(11)(2).
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. In Harris County, the parenthetical suggests that “avoiding injurious or vicious habits” means avoiding the “use of illegal drugs and alcohol.” But in Tarrant County, probationers must “avoid injurious or vicious habits” and “abstain from the illegal use of controlled substances or excessive consumption of alcoholic beverages.” 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.

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 “avoid injurious or vicious habits” as the second condition on a list of “general conditions of community supervision.” The third condition requires probationers to “avoid the use of all narcotics, habit forming drugs, alcoholic beverages, and controlled substances.” Thus, Travis County’s form not only provides no explanation for what it means to “avoid 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.”

In addition to the “be good” conditions, many jurisdictions require probationers to associate with only “good” people. As shown on Table 6 below, this kind of broad associational limitation appears in four of the five states that use probation most heavily. In Georgia, Texas, and California, the phrasing is particularly expansive. A probationer is to avoid all
“disreputable,” “harmful,” or “improper” persons. He or she 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 upheld the associational prohibitions in terms nearly as broad as the conditions themselves. In a 2002 case, for example, a Texas court found that a probationer had failed “to avoid persons or places of disreputable or harmful character” because he had been seen “at” a crack house. 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. 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 go to places that there is an illegal activity going on.” Based on this explanation of the condition’s meaning, the court revoked the man’s probation and sentenced him to four years in prison.

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 6 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).” 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>
<thead>
<tr>
<th>Conditions</th>
<th>Georgia</th>
<th>Texas</th>
<th>California</th>
<th>Ohio</th>
<th>Rhode Island</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avoid Persons or Places of Disreputable or Harmful Character</td>
<td>State-wide</td>
<td>Harris, Dallas, &amp; Tarrant Counties</td>
<td>State-wide</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Refrain from Becoming Abandoned to Improper Associates</td>
<td>State-wide</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do Not Associate with Persons Having Known Criminal Records</td>
<td></td>
<td>Cuyahoga County</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[Analysis of conditions requiring probationers to work, support their families, and pay probation fees is excerpted out.]
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, very 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. I will address each of these three areas in turn.

A. Standard Policing Conditions

1. Monitoring, Reporting, and Visiting Powers
In this section, I outline the policing structure of probation in its most basic form by examining the powers created by the standard conditions of probation.

Standard conditions 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.

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. This condition creates more leverage for probation officers in asking questions about compliance. Any failure to tell the truth can be its own subject of disciplinary enforcement.

Most jurisdictions in my study also allow for unannounced visits from a probation officer as a standard condition of probation. 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.

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. At the other end of the spectrum, as exemplified by a standard condition in Idaho, courts mandate that people give up all
of their Fourth Amendment rights as a condition of being on probation. Some representative examples of these conditions are included in Table 7.

<table>
<thead>
<tr>
<th>Sample Standard “Search” Conditions</th>
<th>Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>You are subject to a person search or property search, including vehicle, if there is a reasonable</td>
<td>Philadelphia Co. (PA); Ramsey Co.</td>
</tr>
<tr>
<td>suspicion that you have violated any condition of supervision</td>
<td>(MN)</td>
</tr>
<tr>
<td>You shall consent to search and seizure by any PO or law enforcement officer. Any search may be</td>
<td>Cuyahoga Co. (OH)</td>
</tr>
<tr>
<td>done without a warrant and include your person, property, place of residence, vehicle, or personal</td>
<td></td>
</tr>
<tr>
<td>effects.</td>
<td></td>
</tr>
<tr>
<td>You shall submit your person and property to search at any time of day or night, by any PO or</td>
<td>Check off: LA Co. (CA) (fel</td>
</tr>
<tr>
<td>other peace officer, without a warrant, probable cause, or reasonable suspicion.</td>
<td>probation)</td>
</tr>
<tr>
<td>You shall consent to the search of your person, vehicle, real property, and any other property</td>
<td>Canyon Co. (ID) (misd probation)</td>
</tr>
<tr>
<td>at any time and at any place by any law enforcement officer, peace officer, or po, and you waive</td>
<td></td>
</tr>
<tr>
<td>your constitutional right to be free of such searches.</td>
<td></td>
</tr>
</tbody>
</table>

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, for example, entitled “Tip The Scale,” 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 did drug tests. In Idaho, teams of police officers and misdemeanor probation officers search through bars for the presence of probationers, as probationers are banned from entering bars as a standard condition of their probation. In Florida, Homeland Security officers have joined with probation officers and police officers in conducting surprise searches of probationers’ homes and property.

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.

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27 San Diego County News Center, Operation Targets East County Probationers, Parolees (Feb. 6, 2014).
29 7 News, Miami/Fort Lauderdale, Probation Sweep, August 7, 2013).
30 Knights, 534 U.S. at 115-118.
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.”

Significantly, a number of states allow for the possibility of revocation for conduct not explicitly covered by the conditions of probation. The Michigan statute, for example, provides that probation orders are revocable for either a violation, an attempted violation, or for “anti-social conduct or action on the probationer’s part for which the court determines that revocation is proper in the public interest.” 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.” In Idaho, the court can order revocation if finds that the probationer has violated any condition of probation or “for any other cause satisfactory to the court.”

The Supreme Court has severely limited the constitutional protections that apply to revocation hearings by finding that such hearings are not criminal in nature. 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.

31 Georgia, SC-6.2 & SC-6.3.
32 MICH. COMP. LAWS ANN. § 771.4.
33 MINN. STAT. § 609.14(1)(a).
34 IDAHO CODE ANN. § 19-2602.
Perhaps most significantly, the state is not required to prove a violation of probation beyond a reasonable doubt. Almost all of the jurisdictions in my study apply a preponderance of the evidence standard at revocation.

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 on the basis 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 non-criminal actions that are covered by the conditions of probation.

C. The Probation Officer’s Sanctioning Powers

To understand probation’s enforcement powers, however, the sanctioning authority of the probation officer is arguably more significant than the revocation power of the judge. 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.36

Under the federal sentencing guidelines, for example, federal probation officers only need to report alleged felony violations to the court.37 The probation officer has much more

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36 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).
37 U.S.S.G. § 7B1.2(a).
flexibility if the person is suspected of committing a misdemeanor or a technical violation of probation.\textsuperscript{38}

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 “\textit{all instances of non-compliance}.”\textsuperscript{39} 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.”\textsuperscript{40}

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 non-recurring technical violations. For such violations, the monograph provides a non-exhaustive 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.”\textsuperscript{41}

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 non-felony 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. When sanctioning

\textsuperscript{38} U.S.S.G. § 7B1.2(b).
\textsuperscript{39} \textit{8E Guide to Judiciary Policy and Procedures, Supervision of Federal Offenders} § 620.10(b) (2010).
\textsuperscript{40} \textit{Id.} § 620.10(a).
\textsuperscript{41} \textit{Id.} § 620.40.10.
moderate severity violations, the probation officer does need to provide a report of the sanction to the court.42

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 a preponderance of the evidence.”43 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.”44

Over the last two decades, many states adopted similar graduated (or intermediate) sanctioning systems to supplement the penalty of revocation.45 Just as in the federal system, state probation officers generally deal with lower severity violations, while higher severity violations are left for formal revocation proceedings.

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.46 The examples in Table 8 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

42 Id. § 620.40.20.
43 Id. § 620.40.30.
44 Id.
46 GDC Consistent Sanctions Response Matrix, SOP IIIB09-0001, Attachment 2, 4/01/2011.
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.

Table 8

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

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. In Delaware and Oregon, for example, the probation departments have the authority to impose short jail stays as administrative sanctions. The use of these custodial sanctions by probation departments appears to be a growing trend: The American Legislative Exchange Council has

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48 Nat’l Conference of State Legislators, Probation and Parole Violations: State Responses 2 (Nov. 2008) (noting that short-term incarceration is used as an administrative sanction in Delaware); Oregon Dep’t of Corrections, Administrative Structured Sanctions (Jan. 25, 2015) (noting that jail sanctions can be imposed by probation officers).
proposed a model “Swift and Certain Sanctions Act,” for example, 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.49

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, for example, insists that “[e]very violation must be met with an anticipated sanction. This eliminates the perception by the probationer or parolee that some violations have been ignored or excused.”50 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.”51

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.52 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 very

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50 AM. PROBATION & PAROLE ASSOCIATION & NAT’L CTR. FOR STATES COURTS, EFFECTIVE RESPONSES TO OFFENDER BEHAVIOR: LESSONS LEARNED FOR PROBATION & PAROLE SUPERVISION 4 (2013); see also VERA, THE POTENTIAL OF CMTY CORRECTIONS TO IMPROVE SAFETY & REDUCE INCARCERATION 18 (July 2013) (noting “a growing body of research indicating the importance of responding to every violation”).
51 MICH. DEP’T OF CORRECTION, POLICY DIRECTIVE: PROBATION VIOLATION PROCESS 1 (February 1, 2005).
52 See, e.g., Interview with Chief Deputy Public Defender, Orange Cnty., Cal. (Oct. 6, 2014) (noting that probation does not notify the defendant’s lawyer of administrative sanctions imposed on that defendant).
significant powers that probation officers have over probationers, those powers operate largely in the shadows.

IV.

THREE TRADITIONAL JUSTIFICATIONS FOR PROBATION’S LEGAL STRUCTURE

[Discussion of benevolent supervisor theory, privilege theory, and contract theory has been excerpted out]

V.

OVER-CRIMINALIZATION, 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: over-criminalization; 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.\textsuperscript{53}) Moreover, the hope that probation might solve the problems of mass incarceration has led policy-makers 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. Although jurisdictions impose standard conditions on thousands (upon thousands) of probationers each year, the vast majority of probation departments do not make the relevant forms publicly available. Obtaining the conditions for this study required repeated requests to probation departments and sign off from department supervisors. One of the major goals of this Article was to begin to map out the standard conditions, because it has not been done, and because any examination of the system is impossible unless we know and understand what the basic contours of probation are.

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

\textsuperscript{53} \textit{EFFECTIVE RESPONSES, supra} note 50, at 1.
on cases post-sentencing unless and until a violation of probation is reported to the court.\(^{54}\) A poor probationer is for the most part on his or her own, especially with respect to the extra-judicial 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 over-criminalization have criticized legislatures for passing too many criminal statutes and for passing criminal statutes that are too vague and too broad.\(^{55}\) 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.\(^{56}\)

This study of the standard conditions of probation reveals that these conditions are extreme (but unacknowledged) examples of the over-criminalization 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.” New Jersey ordinances, meanwhile, cover requirements as varied as not feeding pigeons or squirrels, not flying a kite in a park, and keeping one’s dog on a leash.\(^{57}\) 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.

\(^{54}\) See, e.g., Interview with Public Defender, DeKalb Cnty., Ga. (Sept. 30, 2014) (noting that a public defender is not assigned to a case post-sentencing, once the person is on probation, unless there is an active warrant for a court-based revocation proceeding).

\(^{55}\) See, e.g., Gerard Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136 (“Many 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.”).


\(^{57}\) Newark Code, 20:20-1(n); 20:2-12; 6:1-4.
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 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. And they continue to impose these 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 law-making authority to police and to prosecutors. Bill Stuntz has explained, for example, that because the “criminal law is broad, prosecutors cannot possibly enforce the law as written: there are too many violators.” 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 law makers.”

This dynamic is even more intense with respect to probation. The language of probation conditions propels the probation officer into law-maker 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 law-making power to these officers. Even more than the prosecutor, the probation officer is a hidden and unaccountable law-maker.

Some jurisdictions make the probation officer’s legislative function explicit. In Texas, for example, the standard conditions typically include a catch-all requirement that the probationer abide by “all the rules and regulations” of the supervision department. One of the standard conditions in Delaware County, Pennsylvania, is that the probationer “abide by any written instructions” of the probation officer. A standard condition in the state of Delaware requires that probationers comply with any “special condition” imposed by the probation officer. Each such condition transforms the probation officer into an unequivocal law maker 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 bargaining, for example, Rachel Barkow has stressed that federal prosecutors are both the investigators and adjudicators in the 95 percent of federal cases that result in guilty pleas. 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.” Barkow argues that this merging of enforcement and adjudicative powers creates enhanced opportunities for a single prosecutor’s “prejudices and biases to dictate outcomes.”

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62 Id. at 883.
63 Id.
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 principle witness at the hearing. At the same time, the probation officer is generally 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. In many federal districts, this status has led to probation officers having off-the-record conversations with judges about cases,
The U.S. attorney’s office, moreover, often represents the probation officer in revocation proceedings in an attorney-client form of relationship. 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. The plaintiff in the hearing meanwhile, is the probation officer. The relative standing of these two participants becomes highly significant when the violation must be proven 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. 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

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64 See e.g., United States v. Maury, 530 Fed.Appx. 205, 209 (3rd 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 Fed.Appx. 188, 189 (4th Cir. 2006) (denying challenge to claimed ex parte meeting between judge and probation officer prior to revocation hearing).

65 This arrangement is standard practice, for example, in the Southern and Eastern Districts of New York and the District of Connecticut.
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.\textsuperscript{66} The expectations set by the conditions, aided by the supposedly friendly interventions 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.\textsuperscript{67} 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.\textsuperscript{68} 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.”\textsuperscript{69}

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

\textsuperscript{66} ROTHMAN, ET AL., DOING GOOD: THE LIMITS OF BENEVOLENCE 75 (1978).
\textsuperscript{67} DAVID ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 61 (2002).
\textsuperscript{69} AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 28 (1971).
conditions operate in the control-oriented and discipline-focused mindset of modern probation systems?

... 

One predictable (but insufficient) response is that probation officers do not have the resources to enforce most conditions anyway, lessening any disparate 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.70 And poor probationers are the least likely to have the social capital to push back if they are targeted disproportionately: a dynamic which 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 19th century.71

The current emphasis on using risk assessments to decide how closely to supervise various probationers only increases the likelihood of the enhanced monitoring of the poor. Using risk assessments to decide how intensely a particular probationer should be supervised is part of a growing trend called “evidence based sentencing.” 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 (i.e. violating the conditions of their

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70 See, e.g., ROTHMAN, supra note 67 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.”).

71 Doherty, supra note 6, at 969.
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. 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. Under these measures, probationers are judged to have a higher risk of recidivism the fewer resources they have.

Sonja Starr has criticized the use of these actuarial risk assessments instruments in criminal sentencing proceedings on both constitutional and empirical grounds. Starr has focused on how judges are using these instruments at sentencing to determine “whether and for how long a defendant is incarcerated.” She argues that the use of these instruments at sentencing violates the Equal Protection Clause, amounting to “overt discrimination based on

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72 See, e.g., VERA INSTITUTE OF JUSTICE, PERFORMANCE INCENTIVE FUNDING 13 (November 2012) (noting that evidence-based principles include providing “more intensive supervision” to “offenders identified as having a higher risk of re-offending.”)
73 See, e.g., J.C. Oleson, Risk in Sentencing: Constitutionally Suspect Variables and Evidence Based Sentencing, 64 S.M.U. L.REV. 1329, Appendix A (2011) (documenting use of variables in risk assessments such as education/employment, finances, family/marital accommodation, failure to provide support for biological child, and failing to graduate from high school).
74 COMPAS-Probation Assessment Instrument.
76 Id.
demographics and socioeconomic status.” In particular, she criticizes the instruments’ heavy reliance on factors relating to poverty.

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.” 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. Thus, judges are using the instruments to make sentencing decisions for individual defendants, when there can be very 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 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: i.e. 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).

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77 Id. at 803, 806.
78 Id. at 806.
79 Id. at 842.
80 Id. at 842, 847.
The employment conditions provide an example of how these circumstances could play out in an individual case. 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 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. How does race—including unconscious racism—affect how probation officers decide how to 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.81

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 16 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 under-theorized definition of recidivism: one that leads to over-
criminalization; 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 over-incarceration, it should instead be analyzed
as part of the continuum of excessive penal control. The phenomenon of hyper supervision
outside of prisons deserves to be scrutinized in a manner commensurate with its dominant role in
the U.S. criminal justice system.