

ON PROBATION

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Among the constellation of actors who appear in courtrooms every day, probation has been largely overlooked in conversations and debates about institutional reform in the criminal legal system. Prior scholarship has focused on probation's role in administering the sentence of probation. This Article calls for recognizing probation as a key institutional player across the entire ecosystem of criminal law, procedure, and punishment. Probation is not limited to administering the sentence of probation. In many jurisdictions, probation is now a part of administering pretrial release, diversionary programs, specialty courts, determining restitution, supervising parole, and expungement processes. In the juvenile arena, probation is involved in even more critical decision-making junctures. Of all actors, even defense counsel, probation has the most sustained, intimate, and constant contact with defendants. Probation's actions, like those of police, shape defendants' experiences and perceptions of the criminal legal system.

This Article argues that excavating probation's full reach as an institution reveals how probation destabilizes our ideas of how the criminal legal system operates and deformatizes criminal law and punishment. Its "boundary spanning"

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nature and characterization as a neutral actor have allowed probation to operate in a highly deregulated fashion, infiltrating and informalizing every aspect of criminal adjudication. Probation enhances law enforcement's investigative powers, lessens prosecutors' burden of proof, dilutes the right to counsel, and circumvents the judicial role. This Article concludes that until probation is recognized as the powerful, boundary spanning institution it is, efforts to reform the criminal legal system will remain incomplete.

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INTRODUCTION

The institution of probation hides in plain sight.¹ Much discourse and attention have been directed toward the most visible actors in the criminal legal system. But probation has largely escaped that holistic attention. Just like other institutional actors—police, prosecutors, courts, defense counsel, and correctional institutions—probation plays an integral role in administration of the criminal legal system beyond the administration of punishment. Just as these other actors have garnered institutional scrutiny, probation merits the same.

Studies of the institutional actors in the criminal legal system have revealed critical insights on how mass incarceration, racial biases, police misconduct, prosecutorial abuses, inadequate and under-resourced defense counsel, and the high proportion of pleas contribute to distrust in our institutions of criminal justice and, ultimately, the criminal legal system as a whole. Probation has also been subject to research and scholarly inquiry, especially in recent years as the number of people on probation has grown to over three million.² Although probation may have originally been conceived as an attractive alternative to incarceration, critics believe probation is now driving mass incarceration instead of reining it in.³ These important critiques, however, focus on probation's role in administering the sentence of probation—a period of court supervision imposed as a sentence to a criminal conviction—when probation today does much more.⁴

1. Nazish Dholakia, *Unreasonable Probation Requirements Are Sending People to Jail*, VERA (Apr. 30, 2025), <https://www.vera.org/news/unreasonable-probation-requirements-are-sending-people-to-jail> [<https://perma.cc/UQ48-S679>].

2. SHAUNN GANN & DANIELLE KAEBLE, BUREAU JUST. STAT., NCJ 310413, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2023 – STATISTICAL TABLES 2 (2025).

3. Michelle S. Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 PUNISHMENT & SOC'Y 53, 54 (2017); VINCENT SCHIRALDI, MASS SUPERVISION: PROBATION, PAROLE, AND THE ILLUSION OF SAFETY AND FREEDOM 27 (2023).

4. Professor Natapoff includes probation among the cast of institutional characters in the penal apparatus. See Alexandra Natapoff, *Institutional Structures of Penal Inequality*, 115 J. CRIM. L. & CRIMINOLOGY 821 (2026). Natapoff focuses on the punishment role of probation. This Article calls for a conception of probation to encompass the full range of its functions beyond punishment. Scholars' critiques have included observations that probation net-widens; that the status of probation, and the actions of probation officers, circumscribe individual rights, allowing the state to intrude into the home and the intimate details of people's lives; and that

This Article examines probation on the macro-level, as an institutional actor in the criminal legal system. With roots in the Progressive Era reforms starting in the late 1800s, probation is a ubiquitous actor throughout the criminal legal system, with extraordinary access to and authority over defendants and their lives. Of all actors, including defense counsel, probation has the most sustained, intimate, and constant contact with defendants. Probation's actions—like the actions of police, prosecutors, and courts—contribute to defendants' experiences and perceptions.⁵ Probation's scope and influence are broad. Every county and federal judicial district in the United States has a probation department. There are approximately 92,300 “probation officers and correctional treatment specialists” nationwide, including those in juvenile court.⁶ And the approximately 3.7 million people serving the sentence of probation should be seen as the minimum number of people who are affected by probation actions.⁷ Probation also affects the millions of people who come through the criminal courts every day, at multiple points throughout the

programming and treatment overseen by probation has actually caused harm to individuals. See Phelps, *supra* note 3; Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015 (2013); Jyoti Nanda, *Set Up to Fail: Youth Probation Conditions as a Driver of Incarceration*, 26 LEWIS & CLARK L. REV. 677 (2022); Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291 (2016); Chaz Arnett, *Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts*, 108 J. CRIM. L. & CRIMINOLOGY 199 (2018) [hereinafter Arnett, *Virtual Shackles*]; Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641 (2019) [hereinafter Arnett, *From Decarceration to E-Carceration*]; Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147 (2022); Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015 (2013); Michelle S. Phelps & Ebony L. Ruhland, *Governing Marginality: Coercion and Care in Probation*, 69 SOC. PROBS. 799, 800 (2021); Victoria Piehowski & Michelle S. Phelps, *Strong-Arm Sobriety: Addressing Precarity Through Probation*, 48 LAW & SOC. INQUIRY 489 (2023); Lahny Silva, *The Trap Chronicles Vol. 2: A Call to Reconsider “Risk” in Federal Supervised Release*, 82 MD. L. REV. 530 (2023). These observations are analogous to many of the criticisms lodged against the family regulation system.

5. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC. REV. 513, 516–20 (2003); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2058 (2017).

6. *Probation Officers and Correctional Treatment Specialists*, U.S. BUREAU OF LAB. STAT. (Aug. 28, 2025), <https://www.bls.gov/ooh/community-and-social-service/probation-officers-and-correctional-treatment-specialists.htm> [<https://perma.cc/S67L-QCU9>].

7. E. ANN CARSON & RICH KLUCKOW, BUREAU JUST. STAT., NCJ 305542, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2021 – STATISTICAL TABLES 4, tbl. 1 (2023).

criminal process.⁸ During the formal criminal process, these actions by probation may be part of release and bail determinations, specialty court participation, and sentencings.

Probation involvement may begin even before the formal commencement of a criminal case if it is involved in diversion programming. On the back end, probation is also tasked with determining what kind of restitution is owed by the defendant. Indeed, in some jurisdictions, probation may be tasked with reentry supervision once the defendant returns to the community. After a case is over, probation may still be involved in collecting fines and fees owed by the defendant and making recommendations on whether a defendant's case file should be sealed or expunged. Probation has the same and more responsibilities in juvenile court, as its responsibilities may include operating juvenile facilities and acting as quasi-social workers. All of these tasks are beyond what is most commonly understood of probation's functions, that of monitoring the progress of those sentenced to a term of probation.

This Article argues that excavating the full spectrum of probation's influence and role reveals how probation destabilizes our views on how the criminal legal system works and deformalizes criminal law and punishment. Viewing probation as an institutional actor allows us to see how formal categories of police, prosecution, courts, and defense counsel do less work than we think. Probation enhances law enforcement's investigative powers, lessens prosecutors' burden of proof, dilutes the right to assistance from counsel, and circumvents the judiciary's role. As factfinder and punisher in a decreased evidentiary environment, probation benefits from the guise of neutrality, credibility, and expertise based on probation's proximity to courts and its rehabilitation mandate.

The institutional lens also allows us to see how probation permeates not just formal hearings and determinations but also operates informally in the interstices of the criminal process. Probation does not fit neatly into any of the existing institutional categories of actors in the criminal legal system. It acts as factfinder, investigator, social worker, risk assessor, treatment provider, law enforcement, rehabilitation expert, and enforcer all in one. Its "boundary spanning" nature and perception as a neutral actor has allowed probation to operate in a highly

8. See *infra* Part I.

deregulated fashion in the pretrial and post-adjudication contexts, infiltrating and informalizing every aspect of criminal adjudication and extending beyond the criminal legal system to other systems like the family regulation system and probate courts.⁹ This diluted regulatory context for probation allows other actors to rely on probation in ways that make their own tasks easier.

Probation's purported role as the expression of grace, lenience, and rehabilitation in the legal system allows it to escape legal strictures, processes, and democratic accountability. Moreover, its actions are viewed as assistive and administrative in function, even as its continuous role throughout the criminal process grants it power to evaluate and define criminality and control who merits treatment and who does not. Probation becomes a part of the way in which the criminal legal system manages families, poverty, disorder, and societal ills, as much as it does crime. It is another "powerful socio-legal institution" that participates in case-processing and managing people in a system that operates in perceptions of need and risk as much as questions of guilt and innocence.¹⁰ Ultimately, probation's shape-shifting and deformalized role allows it to maintain institutional power through penological shifts of reform and retrenchment. Yes, probation net-widens and drives mass incarceration, but it does so in more ways and on a much larger scale than we have previously thought.

This Article builds upon the work of legal scholars, sociologists, and criminologists examining probation's community supervision role with critiques of the modern day criminal legal process.¹¹ These studies are brought into conversation with sociological and criminology literature on the relationship between

9. I borrow the term "boundary spanners" from Moana Hafoka et al., *What Legally Prescribed Functions Tell Us: Role Differences Between Adult and Juvenile Probation Officers*, 81 FED. PROB. 32, 35 (2017).

10. Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L. J. 1648, 1648 (2019) (reviewing ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018)).

11. *E.g.*, Phelps, *supra* note 3; Klingele, *supra* note 4; Nanda, *supra* note 4; Doherty, *supra* note 4; Kate Smith & José A. Cabranes, *Judging Under the Sentencing Guidelines*, 91 NW. L. REV. 1248 (1997); Renagh O'Leary, *Supervising Sentencing*, 57 U.C. DAVIS L. REV. 1931, 1947 (2024); Arnett, *Virtual Shackles: supra* note 4; Arnett, *From Decarceration to E-Carceration, supra* note 4; Weisburd, *supra* note 4; David J. Harding et al., *From Supervision to Opportunity: Reimagining Probation and Parole*, 701 ANN. AM. ACAD. POL. & SOC. SCI. 8, 8 (2022).

the penal and welfare states.¹² This Article extends my research surfacing the legal relationships and institutional dynamics at the crossroads where societal institutions providing care and the criminal legal system meet.¹³

To make its arguments, the Article draws from legal sources, sociological literature, probation trade journals, governmental reports, and state and local material on probation. It uses examples from across the country to demonstrate the range of probation practices and issues. The Article is also informed by my professional experience in juvenile justice policy and representing adults and young people, which gave me the opportunity to observe on-the-ground probation practices and public and private initiatives involving probation.

This Article makes two contributions. First, Part I maps the range of probation's functions. It first describes the organizational structure of probation. It then parses probation's responsibilities in criminal sentencing and supervision and maps out how modalities and mechanisms are replicated throughout the criminal legal process.

Second, Part II sets forth the core argument of the Article that probation has a destabilizing effect on the criminal legal system. The reality is that constitutional and evidentiary rules, norms, and formal court processes are loosely applied to probation. Because probation is in fact not neutral, this loose regulatory regime amplifies the power of the state and disadvantages individual defendants.

These issues with probation, as with other institutional actors, bring the question of institutional reform to the forefront.¹⁴

12. *E.g.*, ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); KOHLER-HAUSMANN, *supra* note 10); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637 (2020); DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 91 (1990); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 450 (1992); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2009).

13. My prior scholarship has examined institutions outside the penal system, specifically hospitals, for how they provide vital social services for the criminal legal system. See Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646 (2021); Ji Seon Song, *Cops in Scrubs*, 48 FLA. ST. L. REV. 861 (2021); Ji Seon Song, *Patient or Prisoner*, 98 GEO. WASH. L. REV. 1 (2024).

14. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007); David A. Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J.

Scholars and advocates have proposed various measures to curb the harms of probation's community supervision responsibilities, ranging from reform measures to the question of abolition.¹⁵ Should and can these proposals be extended to probation's actions in total? Is probation the right entity to perform certain functions? Do criminal legal reforms, and decarceral reforms, in fact, increase the footprint of this underregulated entity? Full engagement with these questions is beyond the scope of this Article. This Article concludes by urging scholars, advocates, and policymakers to pay attention to these critical questions.

I. MAPPING THE BREADTH OF PROBATION

Probation sprang from various Progressive Era reforms, beginning in the late nineteenth century, that envisioned a new mode of punishment in opposition to prison and prison labor.¹⁶ The Progressive Era was marked by widespread social activism and reform and the belief that government intervention could counter the negative effects of industrialization.¹⁷ Modern day probation traces its roots to John Augustus, a Bostonian shoemaker, abolitionist, and proponent of the temperance movement.¹⁸ In 1841, he saw a "drunkard" being arraigned in a courtroom one day and asked that the "man be allowed a short probation period and be placed in his care," thus beginning the

CRIM. L. & CRIMINOLOGY 473 (2016); Rachal A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870 (2015); Barry Friedman, *Disaggregating the Police Function*, 169 U. PA. L. REV. 925 (2021); ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* (2005); Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); Amna Akbar, *An Abolitionist Horizon for Police Reform*, 108 CALIF. L. REV. 1781, 1844 n.286 (2020); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021); Irene Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113 (2020); Alexis Hoag-Fordjour, *Community Responsive Public Defender*, 92 FORDHAM L. REV. 1309 (2024).

15. Doherty, *supra* note 4, at 294.

16. Elizabeth D. Katz, *Criminal Law in a Civil Guise*, 86 U. CHI. L. REV. 1241, 1263 (2019).

17. K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1345 (2016).

18. Justin Iverson & David S. Tanenhaus, *Cops or Coaches? The Statutory Role of Juvenile Probation Officers in a Transformative Age*, 2023 MICH. ST. L. REV. 613, 622–23.

first probation case.¹⁹ Augustus's intervention spawned a volunteer model of probation that became formally integrated into the Massachusetts courts through the establishment of the country's first probation agency, the Massachusetts Probation Service, in 1878.²⁰ Other states followed suit, establishing both volunteer and more formal models of probation.²¹ The federal probation system was established by the Probation Act of 1925.²² At that time, nine states had enacted some form of adult probation.²³ By 1967, every state had some form of adult probation.²⁴ These Progressive Era roots have now spawned a probation institution that has tentacles throughout the criminal court process.

19. JOHN AGUSTUS, A REPORT OF THE LABORS OF JOHN AGUSTUS (1852), *reprinted in* NATIONAL PROBATION ASSOCIATION, JOHN AGUSTUS: FIRST PROBATION OFFICER, vi (1939). Though probation in its modern form began in the United States in 1841, the idea of community supervision existed in early European history with the practice of "suretyship" which allowed a "a private citizen of good reputation" to guarantee the good behavior of the defendant. JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1900, at 17 (1993). Recognizance bonds allowed people to both bail out before trial and to be a form of final resolution of charges for less serious crimes. Simon describes two of these latter bonds—"peace bonds" and the bond for "good abearing" (or good behavior)—as bonds assured by private citizens that the accused would maintain good behavior. These practices rested the power of "penal exclusion" and perceptions of "good order" in the hands of private citizens. *Id.* at 17, 21.

20. Act of Apr. 26, 1878, ch. 198, 1878 Mass. Acts 146; *Massachusetts Probation Service's Famous Firsts*, MASS.GOV, <https://www.mass.gov/info-details/learn-about-the-massachusetts-probation-services-famous-firsts> [https://perma.cc/2QUF-KV9T]; George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 861 (2000) ("Massachusetts is the birthplace of probation . . .").

21. Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 175 (2003) ("New York enact[ed] the nation's first probation for adults in 1901. Soon thereafter adult probation laws appeared in Missouri, Vermont, Illinois, Minnesota, Rhode Island, and New Jersey.").

22. *Probation and Pretrial Services History*, U.S. CTS., <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history> [https://perma.cc/95N3-WJRJ]; Sanford Bates, *The Establishment and Early Years of the Federal Probation System*, 51 FED. PROB. 4 (1987). The federal courts experimented with implementing a type of probation with district judges spending or deferring sentencing upon condition of good behavior. J.M. Master, *Legislative Background of the Federal Probation Act*, FED. PROB. 9, 10 (1950). The Supreme Court stopped this practice with its decision in *Ex Parte United States*, 242 U.S. 27, 52 (1916). Probation officially took hold in the federal system with the 1925 Congressional act. The expansion of federal criminal statutes contributed to the establishment of federal probation. Bates, *supra*, at 5.

23. REID MONTGOMERY, JR. & STEVE N. DILLINGHAM, PROBATION & PAROLE IN PRACTICE 24 (1983).

24. *Id.*

This Part maps the breadth of probation's participation and influence. The Part begins with a general overview of the scope of probation, and the types of organizational structure and composition of probation entities. This overview is followed by a description of probation's functions and continues by examining how these functions and modalities have been replicated at other junctures of the criminal process beyond sentencing and supervision, and in ancillary systems as well.

A. *Organizational Structure and Composition*

Probation's institutional coherence is reflected in its organizational structure and composition, even as its features vary across jurisdictions. But even with these variances, probation entities share salient commonalities in their organizational structure, training requirements, and responsibilities.

Every criminal jurisdiction in the United States, whether it be federal or state, has a probation institutional entity.²⁵ There are approximately 92,300 people employed as probation officers and correctional treatment specialists.²⁶

Probation may be housed under the judiciary or its own state or local agency, depending on the jurisdiction. After years as a subsidiary of the Bureau of Prisons, the federal probation agency is now administered through the judiciary.²⁷ Some states

25. See *Probation and Pretrial Services – Mission*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/history/probation-and-pretrial-services-mission> [https://perma.cc/Y48A-WBAE] (“Across the United States, you’ll find community corrections professionals at all levels of government—federal, state, county, and municipal.”); see also R. M. Labrecque, *Probation in the United States: A Historical and Modern Perspective*, in HANDBOOK OF CORRECTIONS IN THE UNITED STATES 14 (O. H. Griffin III, & V. H. Woodward eds., 2017) (explaining that probation was available for adults and juveniles in every state by 1956).

26. The latest data from the Bureau of Labor Statistics lists 92,300 jobs for probation officers and correctional treatment specialists, which combines the number of probation officers, pretrial officers, parole officers, case managers, and correctional counselors, without individual differentiation. *Probation Officers and Correctional Treatment Specialists*, *supra* note 6. The Bureau of Labor Statistics data does not necessarily reflect the number of people employed. Other data sources, including DataUSA which aggregates publicly available data, approximates the number of people employed as probation and correctional specialists at 91,444. *Probation Officers & Correctional Treatment Specialists*, DATAUSA, <https://datausa.io/profile/soc/probation-officers-correctional-treatment-specialists> [https://perma.cc/H4FU-CW54].

27. *History of U.S. Probation*, U.S. PROB. OFF. S. DIST. OF CAL., <https://www.casp.uscourts.gov/history-us-probation> [https://perma.cc/N54L-3JH2]

and localities similarly house probation within their judiciary.²⁸ More commonly, states organize probation services through an agency, either at the state or local level, or a hybrid of both.²⁹

Typically, these entities oversee both adult and juvenile probation though this is not always the case.³⁰ Some jurisdictions divide responsibilities by the severity of cases, separating felony probation from misdemeanor. Several of these jurisdictions farm out misdemeanor probation to private probation companies.³¹

In many jurisdictions, probation is now responsible for probation and pretrial matters, and some version of parole. The federal government follows this model. The federal United States Probation & Pretrial Services includes pretrial services and post-incarceration supervised release in its mandate.³² Several states also employ a unitary model of pretrial and probation.³³

(“The responsibility of the United States Probation Service was first under the United States Department of Justice, under the supervising authority of the Federal Bureau of Prisons, however, in 1940 the Administrative Office of the U.S. Courts was established and assumed the responsibility.”)

28. NAT’L CTR. FOR STATE CTS., CCJ AND COSCA SURVEY OF EVIDENCE BASED PRACTICES IN SENTENCING & PROBATION 1 (2012).

29. See, e.g., KELLI D. MARTIN, CTY. OF BEXAR CMTY. SUPERVISION & CORR. DEPT., FY2024 ANNUAL REPORT (2024); *County Probation and Parole*, PA. DEPT OF CORR., <https://www.pa.gov/agencies/cor/parole/county-probation-and-parole> [<https://perma.cc/66R4-LLEG>]; see also NAT’L CTR. FOR STATE CTS, *supra* note 28. Texas is an example of a hybrid jurisdiction with two executive agencies at the state level for both juvenile and adult probation that are responsible for funding county probation and for policymaking with separate probation units at the county level that are organized under the judicial branch. *Community Justice Assistance Division*, TEX. DEPT OF CRIM. JUST., <https://www.tdcj.texas.gov/divisions/cjad/index.html> [<https://perma.cc/7NPN-ZVBR>]; *Probation Services*, TEX. JUV. JUST. DEPT., www.tjjd.texas.gov/index.php/probation-services [<https://perma.cc/6B5S-HXHE>].

30. *Learn About the Office of the Commissioner of Probation*, MASS.GOV, <https://www.mass.gov/info-details/learn-about-the-office-of-the-commissioner-of-probation> [<https://perma.cc/8453-JY8Q>] (last updated Apr. 4, 2022); see also TEX. OFF. OF THE ATT’Y GEN., 2020 JUVENILE JUSTICE HANDBOOK: A PRACTICAL REFERENCE GUIDE INCLUDING UPDATES FROM THE 86TH LEGISLATIVE SESSION 3–4 (2020).

31. HUMAN RIGHTS WATCH, SET UP TO FAIL: THE IMPACT OF OFFENDER-FUNDED PRIVATE PROBATION ON THE POOR 2 (2018).

32. See, e.g., *County Probation and Parole*, *supra* note 29; NAT’L CTR. FOR STATE CTS, *supra* note 28.

33. These states include Alaska, Arizona, Colorado, and Connecticut. ALASKA STAT. § 33.05.010 (2025); ALASKA STAT. § 33.07.010 (2025); ARIZ. REV. STAT. § 12-251 (2025); ARIZ. CODE JUD. ADMIN. § 5-201 (2025); COLO. REV. STAT. § 16-4-106 (2025); *Adult Probation Services*, STATE OF CONN. JUD. BRANCH, <https://www.jud.ct.gov/cssd/adultprob.htm> [<https://perma.cc/RQ9M-V5L5>]; *Pretrial Services*, STATE OF CONN. JUD. BRANCH, <https://www.jud.ct.gov/cssd/bail.htm> [<https://perma.cc/M5D5-LXUH>]. In some states such as California, Texas, and

Many of these states have the highest rates of incarceration or the highest total incarceration numbers in the country, or both.³⁴

Aside from these organizational differences, probation entities bear significant similarities in their organizational structures. First, the chief of the probation unit is appointed, not elected.³⁵ The entities share hierarchical structures where managers or supervisors of component units are under section chiefs, delineating the particular tasks of probation.³⁶ These component units are defined as various types of supervision.³⁷ Probation in larger localities may be subdivided into adult and juvenile probation, and within those subdepartments, into specific categories like sex offender supervision or intensive supervision, investigations, specialty courts, electronic monitoring, pretrial, and units that focus on specific issue areas like mental health, substance abuse, and reentry.³⁸ Recent trends have been to create specialized units that correspond to certain types of crimes, like gang offenses or sex assaults.³⁹

Pennsylvania, the practice varies by county and certain counties combine probation and pretrial together. *See, e.g., Adult Field Services*, ALAMEDA CNTY. PROB. DEP'T, <https://probation.acgov.org/adult-field-services.page> [<https://perma.cc/BV8G-9BFV>] (California); *Travis County Community Justice Services (TCCJS)*, TRAVIS CNTY., <https://www.traviscountytexas.gov/tccjs> [<https://perma.cc/8JXN-DD4X>] (Texas); *Probation, Parole & Pretrial Services*, CHESTER CNTY. PA., <https://www.chesco.org/129/Probation-Parole-Pretrial-Services> [<https://perma.cc/GG4K-QS45>] (Pennsylvania).

34. *State Profiles*, PRISON POLY INITIATIVE, <https://www.prisonpolicy.org/profiles> [<https://perma.cc/BN78-FVVZ>].

35. *E.g.*, ARIZ. REV. STAT. § 12-251 (2010) (Adult probation officers and support staff; appointments; qualifications); CAL. GOV'T CODE § 27770 (2017) (appointment).

36. *See* sources cited *supra* note 35.

37. *E.g., Probation Field Supervision Unit (PFSU)*, NINETEENTH JUD. CIR. CT., LAKE CNTY., ILL., <https://19thcircuitcourt.state.il.us/1164/Probation-Field-Supervision-Unit-PFSU> [<https://perma.cc/BZT4-5K3L>]; *Adult Probation/Court Alcohol & Drug Program*, IN.GOV: MONROE CNTY., <https://www.in.gov/counties/monroe/justice/probation/adult-division> [<https://perma.cc/EQ3S-AHSN>].

38. *E.g., Adult Probation Services*, JUD. BRANCH OF ARIZ., CNTY. OF MOHAVE, <https://www.mohavecourts.com/probation/adult-probation-services> [<https://perma.cc/LT8Y-975L>] (restitution, substance abuse, Project SAFE).

39. *E.g., Gang Supervision Unit*, CNTY. OF SAN MATEO, <https://www.smcgov.org/probation/gang-supervision-unit> [<https://perma.cc/BT2C-9ASY>]; U.S. DEP'T OF JUST. OFF. ON VIOLENCE AGAINST WOMEN, STOP PROGRAM 2012 REPORT 56, 90 (2012).

Probation officers are generally required to have a college degree or relevant work experience, or in some instances both.⁴⁰ Advanced degrees in law, social work, or criminology may provide applicants with a competitive edge, but there is no data on the prevalence of advanced degrees in the profession.⁴¹ In some states, probation officers need only have a high school diploma.⁴² Once employed, probation officers undergo training.⁴³ Typical training programs consist of learning about courtroom processes, report writing, risk assessments, and other tasks for the job.⁴⁴ Most offices require probation officers to complete continuing education at regular intervals.⁴⁵

Probation also bears other institutional hallmarks. Many probation officer positions are unionized.⁴⁶ Probation

40. See, e.g., U.S. S. DIST. OF N.Y. PROB. OFF., U.S. PROBATION OFFICER DUTIES AND QUALIFICATIONS 1–2 (2013), http://probation.nysd.uscourts.gov/PDFs/Human-Resources/Probation_Officer_Duties_and_Qualifications_2013.pdf [<https://perma.cc/QX4S-YM3C>].

41. See, e.g., *Job Opportunities: Probation and Parole Officer, Trainee*, ALA. STATE PERS. DEP'T, <https://personnel.alabama.gov/Jobs#60899000> [<https://perma.cc/PVS5-RKT2>] (requiring high school diploma or GED certificate); *Job Opportunities: Probation Officer*, SHERWOOD, ARK., <https://www.sherwoodar.gov/Jobs.aspx?UniqueId=98&From=All&CommunityJobs=False&JobID=PROBATION-OFFICER-87> [<https://perma.cc/LL48-4X7L>] (requiring high school diploma or GED certificate); *Deputy Probation Correctional Officer I*, OC PROB., <https://ocprobation.ocgov.com/join-oc-probation/dpco-i> [<https://perma.cc/8BGA-AWPL>] (requiring high school diploma or equivalent); *Probation Officer*, COLO. JUD. BRANCH, <https://www.coloradojudicial.gov/job-descriptions/probation-officer> [<https://perma.cc/RD9J-3LP8>] (requiring high school diploma or GED certificate combined with work experience).

42. See sources cited *supra* note 41.

43. *Federal Probation and Pretrial Academy*, U.S. CTS., <https://www.uscourts.gov/federal-probation-and-pretrial-academy> [<https://perma.cc/7B38-5MA3>].

44. See, e.g., *About the STC Core Training Program*, BSCC CAL., https://web.archive.org/web/20250126023356/https://www.bscc.ca.gov/s_stcaboutcoretrainingprogram [<https://perma.cc/WW83-TG9H>].

45. *Id.*

46. *Id.* (noting that Suffolk County, Massachusetts and Erie and Westchester Counties, New York have probation unions); see also *Collective Bargaining Agreements*, COOK CNTY. GOV'T, <https://www.cookcountyl.gov/service/collective-bargaining-agreements> [<https://perma.cc/7E3V-5Z6P>]; *Labor Contracts/Collective Bargaining*, DEKALB CNTY. ILL., <https://dekalbcounty.org/government/ordinances-resolutions-policies/labor-contracts> [<https://perma.cc/2SJA-2J26>]; Council 31 Staff, *Probation Employees Join AFSCME*, COUNCIL 31 AFSCME (Feb. 24, 2021), <https://afscme31.org/news/probation-employees-join-afscme> [<https://perma.cc/E3AK-4N4A>]; *Union Profile: American Federation of State County & Municipal Employees/AFSCME*, PUB. UNION FACTS, <https://publicunionfacts.com/union> [<https://perma.cc/K34W-VU6M>]; *About Judicial Professional Employees Union*, JUD. PRO. EMPS. UNION, <https://jpeunion.org/about> [<https://perma.cc/2E3Z-3P23>].

professionals have their own professional periodicals that disseminate and exchange information and ideas about developments, reforms, and changing laws.⁴⁷ The *Probation Journal* has been in publication since 1929 and *Federal Probation* has been in circulation for nearly as long.⁴⁸ These periodicals reflect the profession's own view that it is a distinctive institutional actor, publishing articles about topics ranging from case management strategies to supervision and management of personnel, effective ways to cope with high caseloads, secondary trauma, and probation's adaptation to trends.⁴⁹

This type of organization by profession mirrors that of other stakeholders in the criminal system like prosecutors, police, and defense attorneys.⁵⁰ Like these other stakeholders, probation's cohesiveness and self-identification as a separate institutional stakeholder can also be seen in the existence of long-established professional organizations at the national and state levels. The American Probation and Parole Association (APPA), a national organization, states its purpose as giving community corrections professionals a "collective voice."⁵¹ The APPA makes policy goals, participates in policy discussions, issues reports, and tracks bills relevant to criminal and juvenile justice policy and funding.⁵² State level associations like the APPA have proposed legislation and many are authorized to lobby legislatures.⁵³

47. *Perspectives*, AM. PROB. & PAROLE ASS'N, <https://www.appa-net.org/eweb/DynamicPage.aspx?webcode=Perspectives> [<https://perma.cc/9KGD-BPWA>]; *Federal Probation Journal*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/federal-probation-journal> [<https://perma.cc/ES83-99LG>].

48. *Probation Journal*, SAGE J., <https://journals.sagepub.com/home/prb> [<https://perma.cc/4UMT-QCVE>]; *Federal Probation*, HEINONLINE, <https://heinonline.org/HOL/Index?index=journals/fedpro&collection=journals> [<https://perma.cc/FE37-8ZEW>].

49. See sources cited *supra* note 48.

50. See generally Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712 (2017) (exploring police unions and their role in reform); Carissa Byrne Hessick et al., *The Prosecutor Lobby*, 80 WASH. & LEE L. REV. 143 (2023) (examining prosecutor's political influence); Nirej Sekhon, *Public Defenders and Collective Action*, 52 FLA. STATE L. REV. 275 (2025) (examining public defender's potential in reform agendas); LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CONTROL* (2008) (examining law enforcement advocacy).

51. *About APPA*, AM. PROB. & PAROLE ASS'N, <https://www.appa-net.org/eweb/DynamicPage.aspx?webcode=AboutAPPA-Introduction> [<https://perma.cc/2Z34-RMF4>].

52. *Id.*

53. Combined Law Enforcement Associations of Arizona, *2018 Legislative Update* (on file with author). Other state associations have been listed as lobbyists.

B. Sentencing-Related Functions

This Section outlines probation's functions related to the sentencing process. It begins with sentencing both because probation's role with respect to the sentence of probation is the most well-known aspect of probation and to underscore probation's involvement prior to the start of the probationary sentence. In fact, even for cases where the defendant may not ultimately receive the sentence of probation, probation plays an integral part of preparing the court and parties for sentencing.⁵⁴ Probation's actions range from fact-gathering and investigation of defendants and their circumstances, implementing risk assessments, and preparing and writing presentence reports that recommend probationary and incarceratory sentences.

1. Fact-Gathering and Investigation

Once a defendant enters a guilty plea or is convicted, probation officers typically conduct presentence investigations, culminating in a report to the court generally referred to as the probation report or presentence report.⁵⁵ Presentence investigations are the norm in federal courts, regardless of the level of offense.⁵⁶ In state courts, presentence investigations are typically only required in felony cases.⁵⁷

Lobbyist Public Search: Massachusetts Chief Probation Officers Association, Inc., SEC'Y OF THE COMMONWEALTH OF MASS., <https://www.sec.state.ma.us/LobbyistPublicSearch/Summary.aspx?sysvalue=RuGjYkIrBYNppc+aJ6Zi-jIBDyA7a2tf+gPBCjtHcFko=> [<https://perma.cc/V4A4-X262>]; *Lobbyists Currently Registered with the Louisiana Board of Ethics and the Companies They Represent*, LA. ETHICS ADMIN. PROGRAM, <https://ethics.la.gov/LobbyistListPDF.aspx> [<https://perma.cc/RAS9-SHZZ>]; *MN Assn of County Probation Officers*, MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., <https://cfb.mn.gov/reports-and-data/viewers/lobbying/lobbyists/945/2023.1> [<https://perma.cc/8CRE-YMY7>]; George Christie, *Keeping a Close Eye on Trenton for Probation Officers*, PROB. ASS'N OF N.J. (Aug. 2006), <https://www.panj.org/archives/presidential/pres-newsletter8-06.pdf> [<https://perma.cc/AYU3-SC82>].

54. O'Leary, *supra* note 11, at 1949–50 (discussing why probation may have been assigned supervisory and sentencing roles because probation traditionally had this role when Progressive Era reformers precipitated the practice of presentence investigations and also because both stages bear the veneer of allyship).

55. 18 U.S.C. § 3552; FED. R. CRIM. P. 32(c)(1); O'Leary, *supra* note 11, at 1947.

56. 18 U.S.C. § 3552.

57. See, e.g., *Frequently Asked Questions: What Is a Pre-Sentence Investigation (PSI)?*, JEFFERSON CNTY., IND., <https://jeffersoncounty.in.gov/FAQ.aspx?QID=205> [<https://perma.cc/8T5F-KLXT>].

These reports provide courts with information about the defendant and the criminal offense.⁵⁸ An important part of the fact-gathering process is getting an account of the offense from multiple sources, including the victim, witnesses, and law enforcement.⁵⁹ The questions put to defendants by probation officers include queries into the defendant's background, substance use, mental health, and family, education, employment, and past criminal history.⁶⁰ These inquiries can also be deeply personal, such as the nature of defendants' relationships with family members.⁶¹ In the case of defendants with sexual offense charges, including youth charged with sex-related offenses, the officer may ask questions about the person's sexual history.⁶²

The presentence investigation necessitates defendants to be interviewed by the probation officer, whether or not defense counsel is present.⁶³ These interviews can be tricky situations for defendants and defense counsel, putting them in a bind. Participation may lead to mischaracterizations about the defendant and information taken out of context. Nonparticipation, on the other hand, may lead the probation officer, the prosecutor, and the court to believe that the defendant is hiding something or being somehow obstreperous.⁶⁴

2. Risk Assessments

Risk assessments have been used by correctional staff since the early 1900s.⁶⁵ Probation would assess the suitability of a sentence after considering previous criminal history, age,

58. O'Leary, *supra* note 11, at 1957.

59. *Id.*

60. FED. R. CRIM. P. 32(d)(2); *see also* O'Leary, *supra* note 11, at 1957–60.

61. O'Leary, *supra* note 11, at 1958.

62. *Id.* at 1961. Cynthia Godsoe has provided significant accounts of the criminalization of sexual conduct by youth in the delinquency system. *See* Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091 (2014) (discussing the juvenile system's treatment of commercially sexually exploited children (CSEC)); Cynthia Godsoe, *Punishment as Protection*, 52 HOU. L. REV. 1313 (2015) (examining the prosecution and incarceration of girls for prostitution); Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173 (2017); Cynthia Godsoe, *#MeToo and the Myth of the Juvenile Sex Offender*, 17 OHIO ST. J. CRIM. L. 335 (2020).

63. *See* FED. R. CRIM. P. 32(c)(2).

64. *See infra* Section I.B.3.

65. *What Is Risk Assessment?: Public Safety Risk Assessment Clearinghouse*, BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/program/psrac/basics/history-risk-assessment> [<https://perma.cc/V7TE-UW4J>].

marital status, employment status, income level, education, substance abuse, property holdings, prior probation, and the types of conditions imposed.⁶⁶

Today's risk assessments continue to make similar determinations by incorporating new technology and using statistical modeling and algorithms to reflect the "new penology" that shifts away from emphasizing individual characteristics to measuring probability and risk of the criminal population.⁶⁷ Professor Jessica Eaglin, who has written extensively on risk assessment tools, has noted that these tools often instruct stakeholders on how they should administer these tools, such as collecting information via structured interviews to estimate a risk score.⁶⁸ Other methods of collecting offender information include gathering information from publicly accessible data or through defendants' own self-reports.⁶⁹

This use of risk assessments reflects the recent emphasis in the criminal system to imbue evidence-based practices, presenting at least the appearance of unbiased decision-making.⁷⁰ It is through this risk-assessing process that probation facilitates and operationalizes the risk model, where an individual that is subject to certain group characteristics is deemed to need or warrant certain interventions, whether it be incarceration, drug court, probation, or a jail or prison term. These algorithmic approaches can and do produce racially biased outcomes, compounded by the biases of probation officers who administer these risk assessments.⁷¹ By couching the use of risk assessments in technocratic and evidence-based terms, the use of risk

66. See *History of the United States Probation Office*, U.S. PROB. AND PRETRIAL SERV.: W. DIST. OF N.Y., <https://www.nywp.uscourts.gov/history-united-states-probation-office> [<https://perma.cc/JP7X-W9NU>].

67. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 450 (1992).

68. Jessica M. Eaglin, *Constructing Recidivism Risk*, 77 EMORY L. J. 59, 85 (2017).

69. *Id.*

70. See generally Jessica M. Eaglin, *Racializing Algorithms*, 111 CALIF. L. REV. 753 (2023). This "scientific" based neutrality is part of a general reorientation of courts from a "balancing" and adversarial model of neutrality (the scales of justice) to a scientific-administrative notion of neutrality in which impartiality is no longer about mediating between the participants in an adversarial system, but impartiality based on "the evidence." Of course, this is a misunderstanding of how scientific racism has historically worked to justify all sorts of bad stuff.

71. Eaglin, *supra* note 70, 755; Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2029 (2022).

assessments by probation, just as in other settings, strongly suggests that conclusions from such assessments are based on scientific evidence and devoid of implicit and explicit bias. Risk assessments are now ubiquitous in the criminal process.⁷² Several jurisdictions incorporate them as part of the sentencing process.⁷³ Probation may also administer risk assessments to determine the appropriate level of care for mental health treatment, substance abuse counseling, sex offender treatment, and other programming.⁷⁴

3. Presentence Report Writing

One of probation's core functions is writing reports for the court. In the sentencing process, these reports are the official record of what probation presents as the culmination of its fact-gathering and investigation.⁷⁵ With the purpose of helping the court in its determination of a sentence, the presentence report relays information about the offense and the individual defendant.⁷⁶ In addition to the offense, the report summarizes information about the defendant's criminal history including juvenile adjudications, criminal convictions, pending charges, and other arrests and criminal conduct.⁷⁷ Though this information may be available in other forms, the presentence report compiles all of this information together in one document along with non-offense related information, such as personal and family information; physical, mental, and emotional health; substance use; education and vocational skills; employment; and financial condition to make restitution or fine payments.⁷⁸

72. Jonathan Simon, *Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice*, 1 ANN. REV. L. & SOC. SCI. 397, 397 (2005).

73. *What Is Risk Assessment?*, *supra* note 65 (stating that probation and parole use risk assessments to set level of supervision); N.C. GEN. STAT. § 15A-1343.2(b) (2025); JORDAN M. HYATT & STEVEN L. CHANENSON, U.S. DEP'T OF JUST., THE USE OF RISK ASSESSMENT AT SENTENCING: IMPLICATIONS FOR RESEARCH AND POLICY 4 (2016) (spotlighting states including Virginia, Pennsylvania, Utah).

74. EDWARD LATESSA ET AL., CREATION AND VALIDATION OF THE OHIO RISK ASSESSMENT SYSTEM: FINAL REPORT 17 (2009); Doherty, *supra* note 4, at 352–53.

75. *Presentence Investigations*, U.S. CTS., <https://www.uscourts.gov/federal-probation-and-pretrial-services-system/presentence-investigations> [<https://perma.cc/3ZK4-QGHA>].

76. *Id.*

77. *Id.*

78. *Id.*

Probation reports are not merely a recitation of facts. One significant example of this is probation's computation of the applicable sentencing guideline of offense level based upon its conclusions in federal cases.⁷⁹ In calculating a recommended guideline, probation can decide that an enhancement of penalties is necessary if the officer finds defendants have obstructed justice, inadequately accepted responsibility for their behavior, or committed other misconduct not related to the instant conduct.⁸⁰ In state courts, probation's process of factfinding includes comparing law enforcement accounts of the offense to the defendant's version and incorporating law enforcement's accounts of crimes beyond what the defendant may have pled to.⁸¹ This process has been described by Professor Renagh O'Leary as probation agents engaging in "meaning-making" as they interpret and make meaning of facts gathered in "impressionistic and subjective ways," such as determination of defendants' attitudes and the officers' analysis of the defendant and the presence or lack of remorse.⁸²

These reports also contain recommendations. In the federal system, probation makes recommendations about sentencing guidelines.⁸³ In state courts, recommendations made by probation are not limited to probationary terms but include opinions about incarceration terms.⁸⁴

The presentence report has been deemed "the most important document in the federal criminal process" for decision-making at sentencing and after the imposition of sentence.⁸⁵ This statement can also be extended to the state criminal process based upon the report's lasting influence. These reports are given to the prosecution, defense, and court.⁸⁶ They

79. Judy Clarke, *Ruminations on Restrepo*, 2 FED. SENT'G REP. 135, 135 (1989).

80. *The Presentence Report*, U.S. PROB. OFF. W. DIST. OF TEX., <https://www.txwp.uscourts.gov/presentence-report/index.html> [<https://perma.cc/R7TQ-UK66>].

81. O'Leary, *supra* note 11, at 1965–66.

82. *Id.* at 1966; *see also* Susan A. Bandes, *Remorse and Judging*, in REMORSE IN CRIMINAL JUSTICE: MULTI-DISCIPLINARY PERSPECTIVES 19 (Steven Tudor et al. eds., 2021) (examining judicial evaluation of remorse).

83. Clarke, *supra* note 79, at 135.

84. ELIZABETH G. HILL, LEGIS. ANALYST'S OFF., THE STATE OF CALIFORNIA'S PROBATION SYSTEM (1994), https://lao.ca.gov/1994/reports/state_of_cal_probation_system_281_0394.pdf [<https://perma.cc/JQL3-NWTP>]; CAL. R. CT. 4.411.5

85. J.M. Schmolesky & T.K. Thorson, *Importance of the Presentence Investigation Report After Sentencing*, 18 CRIM. L. BULL. 406, 406 (1982).

86. CAL. PENAL CODE § 1203 (2025).

remain with the court and are forwarded to jails and prisons for classification and become incorporated into a person's prison file.⁸⁷ They reappear as part of a person's history when they are rearrested in subsequent prosecutions or petitions for post-conviction relief.⁸⁸ Probation reports are considered in family court decisions on custody and visitation.⁸⁹ These reports become, in essence, "life histories" of defendants.⁹⁰

To fulfill its mandate to provide information to the court, separate and apart from any information or argument from either the prosecution or defense, probation is thus given much latitude to gather information, investigate, and make recommendations in a permanent written record.

C. *Supervision of Probation*

Probation is most commonly associated, studied, and discussed through references to probation officers' supervision of the sentence of probation.⁹¹ As the previous Section recounts, the authority given to probation officers to supervise probation means that probation takes part in presentence processes even in cases where the defendants do not receive probation.⁹² This Section builds on the accounts of other scholars in mapping the mechanisms involved in probation's involvement in sentencing and supervision: the surveillance, monitoring and enforcement of probation conditions; the overseeing, distribution, and provision of treatment; the termination of probation; certain

87. *Id.*; FED. BUREAU OF PRISONS, PROGRAM STATEMENT 1351.05 (stating the restrictions on disclosures of presentence reports).

88. CAL. PENAL CODE § 1203.10 (2025) ("The record of the probation officer is a part of the records of the court, and shall at all times be open to the inspection of the court or of any person appointed by, or allowed access by order of, the court for that purpose, as well as of all magistrates, and the chief of police, or other heads of the police, and other probation agencies, unless otherwise ordered by the court.").

89. *James v. James*, 334 S.E.2d 551, 553 (Va. 1985) (noting that findings were reinforced by report of a "neutral probation officer" in denying custody pleas of natural parents); *Internoscia v. Internoscia*, No. A-1818-06T5, 2007 WL 2935363, at *5 (N.J. Super. Ct. App. Div. Oct. 10, 2007) (noting mother's refusal to allow father's premises to be inspected by neutral probation officers).

90. I borrow this term from Jonathan Simon's account of Lee Harvey Oswald, drawn from probation reports in Oswald's delinquency and family court cases. Jonathan Simon, *Ghosts of the Disciplinary Machine: Lee Harvey Oswald, Life-History, and the Truth of Crime*, 10 YALE J.L. & HUMANS. 75, 77 (1998).

91. See generally Doherty, *supra* note 4 (reporting on the conditions of probation in several jurisdictions).

92. See generally O'Leary, *supra* note 11 (describing how probation offices' reports and investigations influence sentencing).

ministerial matters like the handling of fines and fees; and the courts' decisions to seal or expunge records.

1. Surveillance, Monitoring, and Enforcement

Probation supervision entails monitoring defendants for their compliance with probation conditions imposed by the court.⁹³ Standard conditions of probation can vary and generally include requirements to obey all laws, retain employment, pay fees, and abide by conditions regulating who defendants can associate with.⁹⁴ Other types of conditions may include electronic monitoring, community service hours, restitution, stay-away orders, and other conditions related to the crime or the defendant.⁹⁵

Probation officers are given broad discretionary authority to oversee these conditions. They have discretion in how they monitor defendants, how often and in what manner defendants must report to probation, and when and where the officer can make unannounced visits.⁹⁶ Probation officers have expansive authorization to search defendants and their property and the authority to determine when a defendant has violated terms of probation.⁹⁷

Probation officers typically have personal contact with the probationer, either through meetings or other kinds of check-ins.⁹⁸ Probation officers are also required to stay informed on all aspects of defendants' lives, including their employment and their "lifestyle and associates."⁹⁹ The probation officer conducts drug tests, DNA collection, and enforces home confinement if home confinement or electronic monitoring is part of the sentence, which turns the home into its own kind of carceral

93. 18 U.S.C. § 3603(7) ("A probation officer shall . . . keep informed concerning the conduct, condition, and compliance with any condition of probation . . .").

94. Doherty, *supra* note 4, at 301.

95. *Id.*

96. *Id.* at 317.

97. *Id.* at 296.

98. PAUL GOLASZEWSKI & BRIAN BROWN, CAL. LEGIS. ANALYST'S OFF., *ACHIEVING BETTER OUTCOMES FOR ADULT PROBATION* (2009), https://lao.ca.gov/2009/crim/probation/probation_052909.aspx [<https://perma.cc/QXZ8-L7BK>].

99. *Job Details for United States Probation Officer: Position Description*, U.S. CTS., <https://www.uscourts.gov/careers/current-job-openings/135937> [<https://perma.cc/E8PC-UCVS>] (noting a job posting for the U.S. Probation Office for the District of Nevada).

setting.¹⁰⁰ Technology has further expanded probation's powers to gather even more intimate details about defendants through biotechnology and electronic surveillance.¹⁰¹

The monitoring and reporting to the court includes providing information to the court, prosecution, and defense counsel, not just at revocation hearings but at interim review dates.¹⁰² Part and parcel of probation's monitoring and surveillance functions is its enforcement authority. Professor Fiona Doherty has described probation as being given "supercharged enforcement powers," leading to "an almost unlimited amount of power for these officers."¹⁰³ In federal court, probation petitions the court, which has the sole authority to initiate probation revocation proceedings.¹⁰⁴ Outside of federal courts, however, the norm is that probation can initiate revocation based upon a violation of the court conditions.¹⁰⁵ Though probation would not be the ultimate arbiter of the probation violation, it has the authority to take a person into custody or have the person detained pending a court hearing.¹⁰⁶ Probation officers' reports and testimony typically form the bulk of the state's case against the defendant at a revocation hearing.¹⁰⁷

In certain jurisdictions, probation departments have implemented alternatives or graduated sanctions before formal revocation proceedings are initiated.¹⁰⁸ Probation's enforcement

100. Kate Weisburd, *The Carceral Home*, 103 B.U. L. REV. 1879, 1893–1900 (2023).

101. JAMES REDDEN ET AL., U.S. DEPT' OF JUST., NCJ 307604, MONITORING TECHNOLOGIES FOR COMMUNITY SUPERVISION (2023), <https://www.ojp.gov/library/publications/monitoring-technologies-community-supervision> [<https://perma.cc/C35P-DFWU>].

102. Chuck Goodwin, *Parole and Probation Officer*, EBSCO: RSCH. STARTERS (2023), <https://www.ebsco.com/research-starters/social-sciences-and-humanities/parole-and-probation-officer> [<https://perma.cc/49KL-EUBY>].

103. Doherty, *supra* note 4, at 301.

104. Jacob Schuman, *Prosecutors in Robes*, 77 STAN. L. REV. 629, 633 (2025).

105. CAL. PENAL CODE § 1203.2(a) (2025).

106. *Id.*; JUD. COUNCIL OF CAL., CALIFORNIA JUDGES BENCHGUIDE: PROBATION REVOCATION § 84.5 (2011), <https://cdn.cocodoc.com/cocodoc-form-pdf/pdf/129807573—PVH-Partner-Sites-State-of-California-www2-courtinfo-ca.pdf> [<https://perma.cc/XAD8-QRMG>].

107. *Anaya v. State*, 606 P.2d 156, 157 (Nev. 1980) (noting that the State's "principal witness" at revocation hearing was appellant's probation officer); *State v. Carey*, 636 A.2d 840, 845 (Conn. 1994) (noting that "principal evidence" at revocation hearing was probation officer's testimony).

108. Cecelia M. Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1048–49 (2013); *see also* TEX. CODE CRIM. PROC. ANN. art. 42A.752 (2025).

authority also grants officers the ability to have a say over the length of probation, and in some places, officers have the sole power of determining whether an individual's probation can be terminated.¹⁰⁹

In carrying out its enforcement of probation conditions, probation may work in tandem with police in conducting searches and seizures and other task force initiatives for law enforcement, including partnering with law enforcement in community policing efforts.¹¹⁰ In carrying out these Community Oriented Policing Services (COPS) programs, probation and police officers have conducted home visits together to demonstrate that the two agencies are a unified presence in the community.¹¹¹ As police officers have described, probation and police “share similar roles, responsibilities, and missions to the community.”¹¹² Whether through formal or informal collaborations, probation officers have informed police when their probationers are involved with crime, and likewise, police may inform probation when a probationer is involved in criminal conduct.¹¹³ Probation's cooperation has extended beyond collaboration with local law enforcement to federal immigration enforcement.¹¹⁴

Hence, in the supervision of conditions, probation officers are given great latitude in their authority and ability to monitor and enforce conditions, and partner with law enforcement to enhance their surveillance capabilities.

2. Treatment and Programming

Probation's supervisory authority is typically encapsulated in the standard condition that the defendant must comply

109. *Early Discharge/Earned Compliance Credit*, MO. DEPT OF CORRS., <https://doc.mo.gov/divisions/probation-parole/early-discharge>

[<https://perma.cc/27K4-ABAB>] (explaining that in Missouri, the Division of Probation and Parole has the authority (as well as the court) to initiate early discharge).

110. David Murphy & Faith Lutze, *Police-Probation Partnerships: Professional Identity and the Sharing of Coercive Power*, 37 J. CRIM. JUST. 65, 66 (2009); Adam K. Matz & Bitna Kim, *Working with the Police: A Positive Outlook from a National Sample of Probation and Parole Officers*, 35 J. POLICE & CRIM. PSYCH. 480, 481 (2020).

111. Murphy & Lutze, *supra* note 110; Matz & Kim, *supra* note 110, at 483–86.

112. LaToshia Butler & Ebonyque Taylor, *Probation and Line Officer—Partnerships to Protect the Public*, 14 CMTY. POLICING DISPATCH, Feb. 2021, at 1, 1.

113. *Id.*

114. *Ending ICE/Police Entanglement: From Street Encounter to Custody*, IMMIGRANT DEF. PROJECT, <https://www.immigrantdefenseproject.org/ending-ice-police-entanglement/#background> [<https://perma.cc/4QPA-6HRK>].

with probation directives about substance abuse evaluation, drug treatment, and counseling for issues ranging from substance abuse to domestic violence, anger management, mental health, and vocational training.¹¹⁵ In some places, these take the form of individualized treatment plans where probation can unilaterally add conditions.¹¹⁶ Probation's oversight of treatment and programming of a defendant stems from Progressive Era beliefs that the government should and could protect and provide for individual citizens—what David Garland termed “penal welfare.”¹¹⁷

Probation's roots in treatment provision were assisted by federal funding in the 1960s and 1970s through the Law Enforcement Administration Act (LEAA).¹¹⁸ Early LEAA reports highlighted the importance of probation as a funding priority, stating “it is not enough to turn prisoners loose in society and hope they will find a constructive way to earn a living if adequate resources are not given to parole and probation authorities to assist them in the difficult task of rehabilitation.”¹¹⁹ LEAA funding laid the groundwork for probation's treatment provision role.¹²⁰ These federal funds helped establish treatment programs and paid for training, technical assistance, staffing, and other probation-led community services that focused on counseling, job training, and coordination with community resources.¹²¹

115. GOLASZEWSKI & BROWN, *supra* note 98.

116. *For People Under Probation, Conditions Meant to Support Behavior Change Can Burden More than Benefit*, PEW, <https://www.pew.org/en/research-and-analysis/issue-briefs/2023/03/for-people-under-probation-conditions-meant-to-support-behavior-change-can-burden-more-than-benefit> [https://perma.cc/66QS-GK3Z] (last updated May 10, 2023); GOLASZEWSKI & BROWN, *supra* note 98.

117. GARLAND, *supra* note 12, at 161.

118. LEAA also facilitated the expansion of criminal justice bureaucracies generally. *See generally* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME (2016) (describing the growth of the carceral state since the 1960s with the LEAA).

119. U.S. DEP'T OF JUST., LEAA 1970: LEAA ACTIVITIES JULY 1, 1969 TO JUNE 30, 1970 2 (1970).

120. *Id.* at 7–8, 14, 18–19, 21, 26–28, 99, 104, 126 (describing training, technical assistance, and staffing efforts more generally and across various states, such as Indiana, Georgia, Pennsylvania, Arizona, Massachusetts, South Carolina, Michigan, Washington, Virginia, California, Louisiana, and Texas).

121. *Id.* at 6 (Indiana: alcohol treatment for adult correction); *id.* at 9–10 (Georgia: support for community-based corrections program and develop outpatient clinics); *id.* at 16 (Arizona: establish probation treatment programs for youth); *id.* at 26 (South Carolina: after-care program for juveniles); *id.* at 28 (Kentucky: community services conducted by probation and parole, and funds for youth placement and facilities); *id.* at 35 (Utah: neighborhood probation teams); *id.* at 19 (community programming).

LEAA funding also facilitated contracts between probation and social service agencies where the latter provided service to probationers through probation.¹²² LEAA funding ceased in the early 1980s and was supplanted by state, local, and private funding.¹²³ Some federal grants continue to support probation programming.¹²⁴

Probation's mandate of overseeing the "rehabilitative process" gives it extraordinary discretion to ensure people receive—or don't receive—services. Many jurisdictions have conditions that give discretion to probation officers to mandate treatment plans and programs that they believe are necessary and appropriate.¹²⁵ What makes probation's distributing role particularly worth examining is the breadth of its authority: from the responsibility and discretion in gathering facts about a person's needs to determining eligibility for certain kinds of treatment and enforcing any noncompliance with treatment programs.¹²⁶

Probation also runs its own programs, and hence participates directly in the administering of treatment services to defendants.¹²⁷ One early example of this were the probation

122. See generally GENE KASSEBAUM ET AL., U.S. DEP'T OF JUST., CONTRACTING FOR CORRECTIONAL SERVICES IN THE COMMUNITY (1978) (reporting on an empirical study of private contractors that provided correctional services across several jurisdictions).

123. WILLIAM F. POWERS, THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION: AN ADMINISTRATIVE HISTORY 3 (1982); GOLASZEWSKI & BROWN, *supra* note 98; see, e.g., MODELS FOR CHANGE, <https://www.modelsforchange.net> [<https://perma.cc/KAV2-QPGN>]; *Probation Transformation*, ANNIE E. CASEY FOUND., <https://aecf.org/work/juvenile-justice/probation-transformation> [<https://perma.cc/SVZ6-NTVA>].

124. See, e.g., PAUL GOLASZEWSKI & BRIAN BROWN, CAL. LEGIS. ANALYST'S OFF., ACHIEVING BETTER OUTCOMES FOR ADULT PROBATION (2009), https://lao.ca.gov/2009/crim/probation/probation_052909.aspx [<https://perma.cc/QXZ8-L7BK>].

125. See generally Nanda, *supra* note 4 (examining the flaws of the youth probation system and advocating for reform); Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*, 58 HARV. C.R.-C.L. L. REV. 1 (2023) (comparatively analyzing probation and parole rules across many jurisdictions).

126. See U.S. PROB. & PRETRIAL SERVS., PROBATION OFFICERS (2007), https://www.nvp.uscourts.gov/downloads/about-us/role_of_probation_officers.pdf [<https://perma.cc/KUB4-MZ2W>]; *Probation Division*, ST. JOSEPH CNTY., MICH., <https://www.stjosephcountymi.org/government/courts-law-enforcement/3b-district-court-probation-division> [<https://perma.cc/BAR3-D9J5>].

127. See *Community Justice Support Centers*, MASS.GOV, <https://www.mass.gov/info-details/community-justice-support-centers> [<https://perma.cc/KF48-KSUU>]; UTAH DEP'T OF CORR., FRIENDS AND FAMILY ORIENTATION GUIDE (2024), <https://corrections.utah.gov/wp->

methadone clinics created in 1970s in Manhattan, established in partnership with local hospitals and the city's Health Service Administration.¹²⁸ These clinics were located either in satellite clinics of the hospital, as was the case for the Manhattan clinic, or in the probation offices themselves.¹²⁹ Probation officers not only referred probationers to these clinics, but they also acted as methadone counselors, helping with referrals to jobs, housing, and education, as well as other issues.¹³⁰

Today, probation programs continue, enmeshing probation's oversight role with that of treatment provision. In Massachusetts, the Probation Service operates the Office of Community Corrections (OCC), responsible for running Community Justice Support Centers where defendants participate in classes as determined by OCC, such as cognitive behavioral therapy, GED preparation, and employment classes.¹³¹ OCC also operates a Community Service Program, where probation closely monitors community service performed by defendants.¹³² In Michigan, probation officers supervise work programs and sobriety treatment programs.¹³³ Arizona probation officers administer mental health programming.¹³⁴ New York's community supervision department operates a treatment program for those convicted of

content/uploads/2024/10/Copy-of-nuccc_friends_and_family_orientation.7.2024.pdf [https://perma.cc/CD3U-D94V].

128. Herman Joseph, *A Probation Department Treats Heroin Addicts*, 37 FED. PROB. 35, 35–36 (1973).

129. *Id.*

130. *Id.* at 35.

131. *Office of Community Corrections (OCC)*, MASS.GOV, <https://www.mass.gov/orgs/office-of-community-corrections> [https://perma.cc/Q52V-ZKE5]; see *Community Justice Support Centers*, *supra* note 127.

132. *Learn About the Trial Court Community Service Program*, MASS.GOV, <https://www.mass.gov/info-details/learn-about-the-trial-court-community-service-program> [https://perma.cc/R3GW-GGTA] (last updated June 30, 2020).

133. See, e.g., *Work Program*, 36TH DIST. CT., <https://www.36thdistrictcourtmi.gov/divisions-departments/probation/work-program> [https://perma.cc/Y53D-DZQA]; *On-Site Drug Testing*, 36TH DIST. CT., <https://www.36thdistrictcourtmi.gov/divisions-departments/probation/on-site-drug-testing> [https://perma.cc/7EDL-85EF].

134. ANDREA MILLER ET AL., NATIONAL JUDICIAL TASK FORCE TO EXAMINE STATE COURTS' RESPONSE TO MENTAL ILLNESS: MENTAL AND BEHAVIORAL HEALTH INITIATIVES IN THE ARIZONA COURTS (2021), https://web.archive.org/web/20230530005346/https://www.ncsc.org/_data/assets/pdf_file/0019/71155/Mental-and-Behavioral-Health-Initiatives-in-the-Arizona-Courts.pdf [https://perma.cc/CT4W-XD4Y].

sex offenses.¹³⁵ These examples reveal probation as itself the treatment-providing agent.

Moreover, that these resources are available through probation means probation may also withhold resources. Youth justice advocates have recounted instances where probation interfered with counseling programs ordered by the court by not authorizing payment.¹³⁶ Probation's control of the money spigot means that it can exert its authority and influence in ways that affect a person's progress while on supervision.

3. Termination, Fines, Fees, and Expungement

Part of probation's supervisory responsibilities extend to the ability to recommend the termination of probation.¹³⁷ In some jurisdictions, termination can be characterized as a successful or unsuccessful discharge from probation.¹³⁸ This characterization is discretionary. Though an unsuccessful discharge may end a defendant's term of supervision, any prior unsuccessful terminations of probation can negatively affect defendants later, such as being viewed as evidence of a defendant's resistance to rehabilitation in subsequent criminal cases, or impeding defendants' later applications to seal or expunge their records.¹³⁹

In addition to determining how a probationer's term of supervision is characterized, probation officers' duties also include opining on whether defendants' criminal records should be sealed or convictions expunged. Courts in some jurisdictions rely on probation to provide background information and an

135. See N.Y. STATE DEPT. OF CORR. AND CMTY. SUPERVISION, SEX OFFENDER COUNSELING AND TREATMENT PROGRAM (2024), <https://doccs.ny.gov/system/files/documents/2024/08/soctp-guidelines-07.2024.pdf> [<https://perma.cc/YTE5-KQV3>].

136. Interview of E.M. dated Nov. 3, 2022 (on file with author).

137. See Jacob Schuman, *Terminating Supervision Early*, 62 AM. CRIM. L. REV. 261, 299 (2025).

138. *In re Thomas D.*, 290 P.3d 223, 223 (Ariz. Ct. App. 2012) (considering whether juvenile court abused discretion in terminating probation as unsuccessful); *People v. Hopper*, No. A098503, 2003 WL 21054688, at *3 (Cal. Ct. App. 2003) (holding that once the trial court lost jurisdiction, it could no longer make "a finding on the merits of [defendant's] performance on probation").

139. See CAL. PENAL CODE § 1203.4 (2025) (providing the conditions under which an expungement application may be approved by the court); "Unsat" Is an Option to End Probation, NEAL DAVIS L. FIRM (Nov. 20, 2020), <https://www.neal-davislaw.com/blog/criminal-defense/unsatisfactory-termination-probation-texas> [<https://perma.cc/UFH7-DG4H>].

assessment of the appropriateness of the expungement and sealing request.¹⁴⁰

Probation also plays an important role in money collection. Probation keeps track of fines and fees owed to the court, fines and fees imposed for treatment programs, and the cost of supervision itself.¹⁴¹ Probation is often involved in the determination of restitution and the monitoring and reporting of restitution payments (or failure to pay) by defendants.¹⁴² The nonpayment of fines and fees can prolong probation.¹⁴³ Or, in some jurisdictions, nonpayment can result in credit liens, unsuccessful termination of supervision, or incarceration.¹⁴⁴

D. Beyond the Sentence of Probation

Thus far, our description of probation's functions has delved into actions traditionally thought to be the responsibility of probation—the supervision and monitoring of the sentence of probation—as well as related processes, such as sentencing and the implementation of probation conditions related to treatment. In the following Section, we turn to probation's responsibilities and influence at other points of the criminal process, including pretrial release, diversion, specialty courts, post-incarceration supervision, juvenile courts, and ancillary court systems.

140. See *Clear and Expunge Records – Adults*, CNTY. OF SANTA CLARA, <https://pro.santaclaracounty.gov/adult-services/clear-and-expunge-records-adults> [<https://perma.cc/4K8K-FQ7D>].

141. E.g., *Special Program Supervision*, CNTY. OF L.A. PROB., <https://probation.lacounty.gov/special-program-supervision> [<https://perma.cc/XAS7-WKXF>]; CAL. LEGIS. ANALYST'S OFF., OVERVIEW OF STATE CRIMINAL FINES AND FEES AND PROBATION FEES (2019). See also Amy F. Kimpel, *Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY 439, 452–69 (2022) (examining the many ways that defendants must pay to have records expunged or sealed via fines and fees).

142. E.g., NEB. REV. STAT. § 29-2284 (2021); S.D. CODIFIED LAWS § 23A-28-8 (2025); Harding et al., *supra* note 11, at 14.

143. Harding et al., *supra* note 11, at 14.

144. See SHARON BRETT ET AL., CRIM. JUST. POL'Y PROGRAM, PAYING ON PROBATION: HOW FINANCIAL SANCTIONS INTERSECT WITH PROBATION TO TARGET, TRAP, AND PUNISH PEOPLE WHO CANNOT PAY (2020), https://static.prisonpolicy.org/scans/cjpp/Paying_on_Probation_report_FINAL.pdf [<https://perma.cc/W4XT-TZTB>]; Ebony Ruhland, *The Impact of Fees and Fines for Individuals on Probation and Parole*, ROBINA INST. OF CRIM. L. & CRIM. JUST. (May 23, 2016), <https://robinainstitute.umn.edu/articles/impact-fees-and-fines-individuals-probation-and-parole> [<https://perma.cc/U2GX-QYR8>].

1. Pretrial Release

A 2009 survey by the Pretrial Justice Institute found that half of all pretrial service programs that started after 1990 were part of probation departments.¹⁴⁵ Since 2010, as more jurisdictions establish pretrial programs, the trend has been for new pretrial service programs to be housed within probation departments.¹⁴⁶

Bail statutes permit probation to conduct bail studies and develop recommendations concerning the appropriateness of release.¹⁴⁷ These assessments often include pretrial risk assessments.¹⁴⁸ Similar to probation supervision, pretrial condition statutes authorize probation to supervise defendants with surveillance tools such as electronic monitoring, drug testing, and completion of treatment programs.¹⁴⁹ At this pretrial stage, probation officers provide updates to the court on defendants' compliance with pretrial conditions. Such reports give probation officers similar access to information about defendants as the presentence investigation process.

Pretrial supervision occurs before any adjudication of guilt is made. These pretrial interviews or assessments focus on information relating to the defendant's suitability for pretrial release, including their ties to the community and risk of flight.¹⁵⁰ Hence the emphasis is on information relating to the suitability of pretrial release, such as verifying information about employment, family ties, criminal history, employment history, and

145. PRETRIAL JUST. INST., 2009 SURVEY OF PRETRIAL SERVICES PROGRAMS 7 (2009).

146. PRETRIAL JUST. INST. & AM. PROB. & PAROLE ASS'N, PROMISING PRACTICES IN PROVIDING PRETRIAL SERVICES FUNCTIONS WITHIN PROBATION AGENCIES: A USER'S GUIDE 9 (2010). In addition to being housed within probation departments, pretrial services can also be a standalone agency, such as the San Francisco Pretrial Diversion Project. See S.F. PRETRIAL DIVERSION PROJECT, <https://sfpretrial.org/> [<https://perma.cc/F2VU-CUE6>].

147. See STATE CT. ADMIN. OFF., MANUAL FOR DISTRICT COURT PROBATION OFFICERS 25–26 (2021) (discussing the rules for bail investigations in Michigan).

148. Eaglin, *supra* note 68, at 61.

149. Karla Dhungana Sainju et al., *Electronic Monitoring for Pretrial Release: Assessing the Impact*, 82 FED. PROB. 3, 4 (2018); Thomas S. Kapinos, *Pretrial Drug Testing*, ALTS. INCARCERATION, Spring 2000, at 19, 19.

150. See CHIEF PROB. OFFICERS OF CAL. & THE PRETRIAL JUST. INST., EFFECTIVE PRETRIAL IMPLEMENTATION TOOLKIT (2019) (spotlighting practices of two counties practices' of probation assessing and interview detainees in jail for pretrial release); *Pretrial Investigators Unit*, TRAVIS CNTY.: CMTY. JUST. SERVS., <https://www.traviscountytx.gov/tccjs/pretrial/investigations-unit> [<https://perma.cc/2XKG-9DVC>] (describing elements of pretrial investigation)

health issues.¹⁵¹ Though the offense is not the primary target, these assessments will include a summary of the offense as the nature of the charge is an element of the court's pretrial release or detention determination.¹⁵²

2. Diversion and Specialty Courts

Though pretrial diversion programs are typically thought to be directed by police, prosecutors, or courts, in some places probation also supervises diversion programs. These programs give criminal defendants the opportunity to “divert” from the formal criminal process by successfully completing supervisory programs.¹⁵³ Generally, diversion programs require defendants to comply with a set of conditions, which may include drug testing, community service, and treatment program completion, in exchange for dismissal of the charges.¹⁵⁴ Diversion can occur either before or after a guilty plea.¹⁵⁵ Even when probation does not initiate or administer the actual program, probation is often tasked with monitoring, supervising, and reporting to the court on defendants' progress on diversion as well as whether defendants have successfully completed the program.¹⁵⁶ When diversion programs are offered by probation, probation officers are not only involved in monitoring and reporting progress but also in overseeing how the diversion program is structured and who is able to qualify for diversion.¹⁵⁷

Probation plays an integral role in another type of diversion from the normal court process—the specialty court. Specialty

151. *Pretrial Services*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/pretrial-services> [https://perma.cc/9828-CMA7].

152. *Pretrial Release: Detention*, NAT. CONF. OF STATE LEGS., <https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-detention> [https://perma.cc/HNC6-YT3A] (last updated June 20, 2022).

153. See U.S. DEPT OF JUST., JUSTICE MANUAL § 9-22.000 (2023), <https://www.justice.gov/jm/jm-9-22000-pretrial-diversion-program> [https://perma.cc/QP9W-J6N8] (describing the pretrial diversion program).

154. *Diversion Programs, Explained*, VERA (Apr. 28, 2020), <https://www.vera.org/diversion-programs-explained> [https://perma.cc/P3BC-MSNG]; U.S. DEPT OF JUST., *supra* note 153.

155. STANDARDS FOR CRIMINAL JUSTICE: DIVERSION § 7.1 (A.B.A. 2022).

156. See *id.* § 1.4.

157. See TEX. GOV'T CODE ANN. § 76.011(1) (Operation of Certain Services and Programs); Amber Petkus & Ebony Ruhland, *The Outcomes of a Pretrial Diversion Program in Texas*, 86 FED. PROB. 50, 51 (2022); *El Paso County CSCD*, EL PASO CNTY., <https://www.epcounty.com/epcs> [https://perma.cc/26MF-HDCL].

courts include drug court, mental health court, domestic violence court, veterans court, girls court, and other issue-specific courts.¹⁵⁸ Probation officers, like defense counsel and courts, have the authority to refer defendants to these courts and often participate in the decision-making process on who may be accepted into these programs.¹⁵⁹ Participation in these specialty courts requires compliance with various conditions, often monitored by probation.¹⁶⁰

Professor Eric Miller has posited that specialty courts colocalize the probation services by taking over their structural position in the criminal process.¹⁶¹ Indeed, specialty courts are yet another instance where the supervision and reporting mechanism of probation, as well as their relationships vis-à-vis agencies and treatment providers, are replicated in yet another part of the criminal process. Probation officers staff these courts and perform reporting and monitoring duties, as well as liaising with treatment programs and other agencies like mental health or housing.¹⁶² To further underscore the relationship between specialty courts and probation, in relaying its historical role in the development of juvenile courts, one state's court system has pointed to the early juvenile courts as the model for today's specialty courts.¹⁶³

Not only are probation's mechanisms replicated, but probation's involvement in specialty courts grants it even more authority in the criminal process and in an environment where informality is a key component. Judges address defendants

158. *E.g.*, *Specialty Courts Department*, MASS.GOV, <https://www.mass.gov/orgs/specialty-courts-department> [https://perma.cc/VYJ8-RW3K].

159. Shanda K. Sibley, *The Unchosen: Procedural Fairness in Criminal Specialty Court Selection*, 43 CARDOZO L. REV. 2261, 2272 (2022).

160. *Specialty Courts*, SAINT LOUIS CNTY., MO., <https://stlouiscountymo.gov/st-louis-county-government/municipal-court/specialty-courts> [https://perma.cc/5LS3-YAE3]; *Specialty Courts Program*, SECOND JUD. DIST. CT. OF WASHOE CNTY., NEV., <https://www.washoecourts.com/SpecialtyCourts> [https://perma.cc/6SZ9-TNC3].

161. See Eric J. Miller, *Foreword* to JANE DONOGHUE, *TRANSFORMING CRIMINAL JUSTICE? PROBLEM-SOLVING AND COURT SPECIALISATION*, at xiii, xx (2014).

162. See *Collaborative Courts*, SUPER. CT. OF CAL.: CNTY. OF ORANGE, <https://www.occourts.org/divisions/collaborative-courts> [https://perma.cc/UVB9-Y4TW].

163. See *Illinois Supreme Court History: Juvenile Courts*, ILL. CTS. (June 23, 2020), <https://www.illinoiscourts.gov/News/388/Illinois-Supreme-Court-History-Juvenile-Courts/news-detail> [https://perma.cc/WWG7-JBVI] (stating that specialty courts' "existence and success can trace their roots to the ground-breaking, Progressive-era idea of creating Juvenile Courts in Illinois in 1899").

directly, and certain procedural protections are eschewed when sanctions are imposed, prompting due process concerns.¹⁶⁴ Probation's traditional treatment function is valuable in specialty courts because these courts explicitly integrate nontraditional stakeholders like social service agencies, mental health providers, or community actors, drawing criticisms of net-widening and dispensing treatment in carceral and coercive environments.¹⁶⁵

Whether or not one views specialty courts as successful reforms, as some have, the fact remains that their existence expands probation's influence.¹⁶⁶ In Utah, a probation officer started a Tribal community reentry court, potentially demonstrating how probation could participate in a positive reform for underserved communities.¹⁶⁷ The probation officer had connections with the community and worked to incorporate Indigenous concepts of harmony and balance into the reentry process.¹⁶⁸ Like other alternative-to-incarceration reforms, this perceived success can draw attention and energy from other reform efforts outside of the criminal arena.¹⁶⁹

164. See KERWIN KAYE, *ENFORCING FREEDOM: DRUG COURTS, THERAPEUTIC COMMUNITIES, AND THE INTIMACIES OF THE STATE* (2019).

165. See *Collaborative Courts*, *supra* note 162; DRUG POL'Y ALL., *DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE* 2, 8 (2011), https://drugpolicy.org/wp-content/uploads/2023/09/Drug-Courts-Are-Not-the-Answer_Final2.pdf [<https://perma.cc/MWU5-KMKX>]. Proponents of specialty courts state that the courts' dynamics counterbalance the coercive environment in which they take place. See Kelly Lynne Frailing, *The Achievements of Specialty Courts in the United States*, SCHOLARS STRATEGY NETWORK (Apr. 11, 2016), <https://scholars.org/contribution/achievements-specialty-courts-united-states> [<https://perma.cc/FR7G-W8P8>].

166. Drug courts in particular have been viewed as policy successes, with comparatively lower recidivism rates than defendants who are not diverted. See Sonia Chopra, *'We Can't Incarcerate Our Way out of the Problem': Why Some Judges Favor Drug Courts' Treatment-Based Approach*, JUV. JUST. INFO. EXCH. (Mar. 23, 2023), <https://jjie.org/2023/03/23/grads-laud-benefits-of-drug-court-which-has-supporters-and-critics> [<https://perma.cc/G8KQ-ELTP>].

167. Tilda Wilson, *Utah's Tribal Reentry Court Is a Success that Arizona and Wyoming Want to Model*, KUER (May 28, 2024, at 2:00 AM), <https://www.kuer.org/race-religion-social-justice/2024-05-28/utahs-tribal-reentry-court-is-a-success-that-arizona-and-wyoming-want-to-model> [<https://perma.cc/W62L-Z8EY>].

168. E-mail from HT, to Ji Seon Song (Jan. 29, 2024, at 1:00 PM) (on file with author).

169. Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1621–23 (2021) (describing how the perceived success of drug courts in California have created active resistance to drug sentencing reform).

3. Reentry Post-Incarceration

Historically, probation's supervision has not extended to circumstances when defendants are sentenced to jail or prison terms. That has changed in recent decades.¹⁷⁰ In the federal system, probation has taken over supervision of people released from federal detention facilities since the elimination of federal parole.¹⁷¹ Probation also has taken over some parole functions in California following the passage of a law that permits prison sentences to be served in county jails and for post-sentence supervision to occur at the county level.¹⁷²

In these situations, probation is in charge of supervising release conditions and facilitating defendants' reentry from a carceral institution back to the community. Probation's reach thus broadens even more with its involvement, monitoring, surveillance, and reporting on those persons who were never placed on probation. Probation entities in the federal system and in certain states are responsible for conducting reentry planning, transition planning, and linking up to services such as medical care, housing, social service benefits, and employment.¹⁷³ Though the level of probation officers' discretion in reentry planning is similar to their discretion in supervision probation terms, the consequences are very different. Revocation of supervised release or parole potentially means additional incarceration.

4. Juvenile Court

In the juvenile legal system, probation's role is even more expansive. Though modern probation's origins may have been in adult court, it is through juvenile courts that we see the origins of probation's expansive and multifaceted role. Today, probation's role in juvenile court is perhaps even more significant as

170. *Postrelease Community Supervision (PRCS)*, CAL. DEPT OF CORR. & REHAB., <https://www.cdcr.ca.gov/law-enforcement-resources/home/prcs> [<https://perma.cc/45NQ-6GW8>].

171. CHARLES DOYLE, CONG. RSCH. CTR., RS21364, SUPERVISED RELEASE (PAROLE): AN ABBREVIATED OUTLINE OF FEDERAL LAW (2021).

172. A.B. 109, 2011 Gen. Assemb., Reg. Sess. (Ca. 2011).

173. Richard M. Berman, *Federal Court Involvement in Supervised Release*, THE REG. REV. (Jun. 28, 2021), <https://www.theregreview.org/2021/06/28/berman-federal-court-involvement-supervised-release> [<https://perma.cc/6F4A-HJ8M>]; *Chapter 14: Reentry Programs and Initiatives*, DEPT. OF JUST., <https://www.justice.gov/file/1115291/dl?inline> [<https://perma.cc/44VN-WA3F>] (explaining the Pennsylvania Department of Corrections reentry programs).

punitive laws that blur the line between juvenile and adult court, such as direct file and transfer laws which allow youth to be prosecuted in adult court and the lessening of confidentiality protections of juvenile court adjudications, create even greater room for probation's expansive influence.¹⁷⁴

Like probation, juvenile courts were also a product of Progressive Era reforms.¹⁷⁵ The legal doctrine of *parens patriae*—the state as parent—formed the central tenet of these early juvenile courts, where the state actors consisted of the court and probation officers.¹⁷⁶ Juvenile probation was established in every state by 1920, years before the broad adoption of adult probation.¹⁷⁷

The probation officer's authority in early juvenile cases was extensive.¹⁷⁸ Children had no right to counsel and hence had no advocate other than family members.¹⁷⁹ Probation conducted intake and screened complaints to determine what action to take to purportedly protect the child and the community.¹⁸⁰ It prepared predispositional studies of the child and family and recommendations to the court in advance of the disposition (sentencing) hearing.¹⁸¹ Probation presented its findings to the court at the disposition hearing and provided “casework, groupwork, or other therapeutic services” to youth on probation.¹⁸²

174. *E.g.*, COLO. REV. STAT. § 19-2-517 (2018).

175. Illinois Juvenile Court Act, 1899 Ill. Laws 131 (to be codified at 705 ILL. COMP. STAT. 405/1-2 (2025)). As Professor Jyoti Nanda has observed, the creation of juvenile courts “accelerated the evolution and expansion of probation.” Nanda, *supra* note 4, at 694.

176. William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1085–87, 1093–95 (1994); *see also* Esther K. Hong, *A Reexamination of the Parens Patriae Power*, 88 TENN. L. REV. 277 (2021) (reexamining theory of *parens patriae* and arguing that it continues to play a role in the juvenile legal system); Eduardo R. Ferrer, *Razing & Building Delinquency Courts: Demolishing the Flawed Philosophical Foundation of Parens Patriae*, 54 LOY. U. CHI. L.J. 885 (2023) (arguing that the foundational concept of *parens patriae* has contributed to the failures of the state systems' care for children).

177. REID MONTGOMERY, JR. & STEVE N. DILLINGHAM, PROBATION & PAROLE IN PRACTICE 24 (1983).

178. ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969) (providing an account of social reform movements of the late nineteenth century and early twentieth century as movements to control the lives of poor youth).

179. William H. Sheridan, *The Gault Decision and Probation Services*, 43 IND. L.J. 655, 656 (1968).

180. *Id.*

181. *Id.*

182. *Id.*

These probation practices continue today. Juvenile probation officers run early diversion programs before cases are even charged.¹⁸³ They attend and participate in court, investigate, and present recommendations to courts.¹⁸⁴ Probation officers often run anger management courses, drug counseling, and employment courses, and they also administer programming through youth centers and in juvenile halls.¹⁸⁵ In such jurisdictions, probation thus acts as a corrections-type agency.¹⁸⁶ The management of these facilities has drawn the same kind of criticism and legal scrutiny as adult facilities. Lawsuits have alleged sexual abuse, abuse of solitary confinement, violation of disability rights, and the improper collection of fees.¹⁸⁷

The authority of probation in juvenile courts extends to schools, giving probation officers broad access to otherwise private educational materials.¹⁸⁸ A standard condition of probation is that youth must “attend a school program approved by a probation officer,” thus giving probation say-so over what kind of education a youth receives.¹⁸⁹ For probation-run juvenile halls, probation contracts with school districts to provide education for

183. *Diversion in the Juvenile Justice System*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/civil-and-criminal-justice/diversion-in-the-juvenile-justice-system> [<https://perma.cc/N6Q5-8B45>] (last updated May 23, 2022).

184. *Participants in Juvenile Justice Cases*, SUPERIOR CT. OF CAL.: CNTY. OF SANTA CLARA, <https://santaclara.courts.ca.gov/self-help/self-help-topics/self-help-childrenjuveniles/self-help-juvenile-justice/participants> [<https://perma.cc/9UBU-3VSB>].

185. Sheridan, *supra* note 179.

186. *E.g.*, *Role of Counties: Probation Department*, CAL. STATE ASS'N OF CNTYS., <https://www.counties.org/counties/role-of-counties> [<https://perma.cc/D2CZ-JZ2J>]; *Juvenile Detention Center*, BEXAR CNTY. TEX., <https://www.bexar.org/2398/Juvenile-Detention-Center> [<https://perma.cc/7JLC-2RHM>]; Joseph Hayes & Sonya Tafoa, *Juvenile Justice in California*, PUB. POL'Y INST. OF CAL. (May 2014), <https://www.ppic.org/publication/juvenile-justice-in-california> [<https://perma.cc/84AS-Q5XB>].

187. Joaquin Palomino, *Lawsuits Allege Decades of Sexual Abuse in San Mateo County Juvenile Hall*, S.F. CHRON., <https://www.sfchronicle.com/bayarea/article/san-mateo-sexual-abuse-lawsuit-probation-juvenile-17804041.php> [<https://perma.cc/QX8Q-4NW3>] (last updated Feb. 24, 2023, at 4:35 PM); *Riverside County Settles Lawsuit About the Assessment and Collection of Juvenile Detention Fees*, RIVCO NOW (June 16, 2023), <https://rivco.org/news/riverside-county-reaches-final-settlement-lawsuit-about-assessment-and-collection-juvenile> [<https://perma.cc/3U5R-DUTU>].

188. CATHERINE FEELEY & JESSICA FEIERMAN, JUV. L. CTR., UNDERSTANDING FERPA: SHARING EDUCATION RECORDS OF CHILDREN IN THE JUVENILE JUSTICE SYSTEM 7 (2015), https://jlc.org/sites/default/files/publication_pdfs/Understanding-FERPA-2-2015-FINAL.pdf [<https://perma.cc/ATE2-KAZQ>].

189. *E.g.*, CAL. EDUC. CODE § 48267 (2025).

youth.¹⁹⁰ Probation involvement in schools extends beyond delinquency-involved youth. Probation officers also staff schools.¹⁹¹ Initially instituted so that probation officers could supervise court-involved youth more closely, school-based probation allows probation officers to interface with “at-risk” youth *not* on probation and report on attendance to truancy or other status courts.¹⁹² In at least one jurisdiction, concerns about how these programs expand state surveillance led to the school ending the program.¹⁹³

Probation’s authority is especially pronounced when youth in the delinquency system are also ordered into foster care placement. In many jurisdictions, juvenile delinquency courts use the foster care placement system as additional placement options. In such instances, probation officers become like social workers in the child dependency system.¹⁹⁴ Even without a dependency court finding that a parent has been abusive or neglectful, a young person can be taken from their family.¹⁹⁵ Probation becomes social worker, probation officer, and guardian all in one.¹⁹⁶ The delinquency court becomes another site where parental rights can be circumscribed and sometimes even terminated.¹⁹⁷ Probation officers are tasked with completing periodic placement reports and assessing the suitability of return to the

190. *Id.* § 48647 (2025).

191. Jyoti Nanda, *Web of Incarceration: School-Based Probation*, 21 NEV. L.J. 1117, 1131 (2021); *School-Based & Special Programs*, CNTY. OF L.A. PROB. DEP’T, <https://probation.lacounty.gov/school-based-and-special-programs> [<https://perma.cc/TJT6-M7UC>]; *Cattaraugus County Probation School-Based Unit*, CATTARAUGUS CNTY.: JUV. FAM. CT., <https://www.cattco.gov/probation/juvenile-family-court> [<https://perma.cc/P7EC-SHGJ>].

192. See sources cited *supra* note 191.

193. Nanda, *supra* note 191, at 1148; Joseph Hong, *Coachella Valley Unified School District Cuts Ties With Controversial Probation Program*, DESERT SUN, <https://www.desertsun.com/story/news/education/2018/10/05/coachella-valley-school-board-cuts-ties-riverside-probation-program/1531473002> [<https://perma.cc/C2FN-YHGW>] (last updated Oct. 5, 2018, at 6:29 PM).

194. *Placement Services/Title IV-E*, TEX. JUV. JUST. DEP’T, <https://web.archive.org/web/20220209084433/https://www.tjjd.texas.gov/index.php/placement-title-iv-e> [<https://perma.cc/QNX2-JEQF>]; CAL. WELF. & INST. CODE § 727 (2025).

195. *Taking Children Into Temporary Custody*, L.A. CNTY. DCFS POLY INST. WEBSITE, <https://policy.dafs.lacounty.gov/Policy?id=5946> [<https://perma.cc/CT3S-784L>] (last revised June 5, 2024).

196. CAL. WELF. & INST. CODE § 241.1 (2025).

197. CAL. R. CT. 5.650; *Grounds for Involuntary Termination of Parental Rights - California*, CHILD WELFARE INFO. GATEWAY (Aug. 2025), <https://www.childwelfare.gov/resources/grounds-involuntary-termination-parental-rights-california> [<https://perma.cc/YYD9-K6C8>].

family.¹⁹⁸ During this period, much of the decision-making for the child, including education and extracurricular activities, the ability to work, and sometimes even health care, can be determined by probation.¹⁹⁹

5. Ancillary Systems & Beyond Courts

Probation's obligations extend to other types of court systems as well. Truancy court is one example. In California, the probation officer has coterminous power with the district attorney to notify parents that they may be prosecuted for failure to compel their child's attendance at school.²⁰⁰ Probation shares the ability with the school attendance review board to determine whether a truant pupil can make use of community services, or to notify the prosecution if the pupil fails to respond to directives.²⁰¹ Probation also is given the authority to arrest truants.²⁰²

In some jurisdictions, the probation agency oversees probate and family court.²⁰³ Probation also plays a key role in jurisdictions that hold court proceedings for persons, families, or children in need of services, and other status offenses that do not rise to a level of conduct that would merit delinquency or dependency involvement.²⁰⁴

Probation takes part in local governmental and community initiatives. On the federal level, the Probation Officers Advisory Group, established by the U.S. Sentencing Commission, represents federal probation officers.²⁰⁵ The Group reports back to the Commission, proposing amendments, reporting observations on the operation of the guidelines, and providing feedback.²⁰⁶ On the local level, probation is often part of initiatives related to the

198. CAL. R. CT. 5.810; CAL. WELF. & INST. CODE § 706.5 (2025).

199. *E.g.*, CAL. EDUC. CODE § 49130 (2025).

200. *Id.* § 48263.5(b) (2025). Probation or the prosecution may request the parents to come to a meeting at either the district attorney's office or the probation department to discuss the legal consequences of the child's truancy. *Id.*

201. *Id.* § 48263(b)(1)–(2) (2025).

202. *Id.* § 48264 (2025).

203. *E.g.*, *Learn About the Office of the Commissioner of Probation*, *supra* note 30.

204. N.Y. FAM. CT. ACT § 735 (2025); MASS. GEN. LAWS, ch. 119, § 39E (2025).

205. *Probation Officers Advisory Group*, U.S. SENT'G COMM'N, <https://www.uscc.gov/new/probation-officers-advisory-group> [<https://perma.cc/7YLC-T9RQ>].

206. *Id.*

criminal legal system, such as reentry councils to help people released from jail and prison to reenter the community.²⁰⁷ In California, probation is part of Community Corrections Partnerships that bring together criminal court stakeholders alongside health and human services to discuss implementing reforms, programs, and rehabilitation and recidivism generally.²⁰⁸ Probation is part of Texas's local community justice councils, which are mandated to provide "continuing policy guidance and direction for criminal justice planning, programs, and initiatives."²⁰⁹ Probation's participation in these local efforts are not limited to criminal justice reform, as evidenced by its participation in school attendance boards.²¹⁰

These examples reveal probation's reach beyond managing and administering probation as a sentence. Probation's interventions start early in the criminal process and extend beyond the end of defendants' sentences and into other legal systems.

II. PROBATION'S DESTABILIZING EFFECT

Probation's broad reach and involvement throughout the criminal legal process have a discernible and significant effect on the criminal legal system. This Part presents the core claim of the Article: by inhabiting roles on every side of the adversarial divide, probation operates in a highly deregulated fashion that systematically empowers the state and disadvantages individual defendants.

207. See *Local Reentry Council*, ORANGE CNTY., N.C., <https://www.orangecountync.gov/1977/Local-Reentry-Council> [<https://perma.cc/JY37-S6WZ>]; *About the Reentry Council*, SF.GOV, <https://sf.gov/departments/reentry-council-city-and-county-san-francisco/about> [<https://perma.cc/Z5HM-PQAW>]; *County Re-Entry Task Force Initiative*, N.Y. STATE: DIV. OF CRIM. JUST. SERVS., https://www.criminaljustice.ny.gov/crimnet/ojsa/initiatives/offender_reentry.htm [<https://perma.cc/7VUK-GSAV>].

208. *Community Corrections Partnership*, NEV. CNTY., CAL., <https://nevadacountyca.gov/653/Community-Corrections-Partnership> [<https://perma.cc/4NAN-ACWT>].

209. TEX. GOV'T CODE, tit. 2, sub. F, ch. 76, § 76.003(a) (2025). Specifically, these representatives include the Texas Department of Human Services, a police chief, a school superintendent, a representative from state mental health, a state representative from human services, a substance abuse professional, a victims' right advocate, a defendants' rights organization, a community service organization, a court administrator, a criminal lawyer, a representative from the Department of Assisive and Rehabilitative Services, a representative from the Texas Workforce, and a representative from Texas parole. *Id.* § 76.003(b).

210. See, e.g., CAL. EDUC. CODE § 48321 (2025).

A fundamental premise of the criminal legal system in the United States is its adversarial nature.²¹¹ The choice of an adversarial legal system as opposed to an inquisitorial one reflects the stated commitment of the United States that justice and democratic values are best served by the contestation of facts between two sides—the defense and prosecution—with a neutral judge or jury as arbiter of the disputes.²¹² This is in contrast to much of the world’s legal systems that employ an inquisitorial model where impartial state officials carry out criminal investigations in order “to determine the truth.”²¹³ Though this view of a true equal battle between two parties is much criticized as an idealized one, it remains a foundational principle of the U.S. legal system.²¹⁴

Various rules define this adversarial fight. They include the foundational principle of the presumption of innocence, constitutional provisions, evidentiary rules, and rules of court process.²¹⁵ These rules set forth the parameters of case adjudication by defining the rights of individuals charged with crimes vis-à-vis the power of the state and its law enforcement actors and courts, imposing obligations and limits on those actors, and structuring the relationship between parties.

This Part demonstrates how probation, excused from following many of the formal rules, norms, and processes of the adversarial system, destabilizes our ideal of an adversarial system. Probation heightens the power imbalance between the state and the defendant. Its position as adviser to the court, its mutable

211. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383–84 (1978).

212. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV INT’L L.J. 1, 4 (2004).

213. *Id.*

214. Scholars’ critiques have highlighted, among other problems, the vast disparity in resources between prosecution and defense, the ubiquity of pleas, problems with indigent defense, and doctrines that permit expansive law enforcement and prosecutorial discretion in both criminal and juvenile courts. See Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 911, 912 (2011/12) (“The current American system is marked by an adversary process so compromised by imbalance between the parties . . . that true adversary testing is virtually impossible.”); Barry C. Feld, *Criminalizing the American Juvenile Court*, 17 CRIME & JUST. 197 (1993).

215. These include the right to due process, right to counsel, the privilege against self-incrimination, the right to confront adverse witnesses, and the right to a fair trial. U.S. CONST. amends. IV, V, VI, XIV; See, e.g., FED. R. EVID.; FED. R. CRIM. P.

character, and its mandate of rehabilitation grant it a veneer of neutrality legitimizing a deformalization of rules, norms, and practices imposed on the other stakeholders in the system. Probation, thus, operates under a diluted regulatory environment, with its agents and officers given freer rein than other actors, as evidenced by legal doctrine evaluating constitutional criminal procedure rules, evidentiary rules, and rules of criminal court. This neutrality veneer is exactly that—a guise even as probation ends up enhancing the investigative and punishment arms of the criminal legal system.

This Part proceeds in five sections, each identifying a distinct way probation destabilizes the criminal legal system: through the neutrality myth that insulates it from formal rules; its enhancement of law enforcement; its dilution of the right to counsel; its weakening of evidentiary safeguards; and its circumvention of the judicial role.

A. *Neutrality Myth*

In an adversarial system where prosecution and defense are on opposite sides, probation occupies a space in between. Even as probation investigates defendants, enforces court orders, and initiates revocation of diversion, pretrial release, or probationary sentences, probation actors are often characterized as neutral actors by probation themselves, other stakeholders, and by courts.²¹⁶ What becomes clear, however, is that this idea of neutrality or impartial in-betweenness is belied by probation's actual involvement in the criminal legal system.

This characterization of neutrality²¹⁷ appears to derive from two sets of beliefs—that probation is acting as an advisor of the court and that probation officers are independent participants in the otherwise adversarial process.²¹⁸ Probation departments perceive their job as neutral and objective providers of

216. O'Leary, *supra* note 11, at 1939 (stating that the "neutral" framing of community supervision presents them as serving a "banal, even clerical" role where they are "merely serving as a conduit for information").

217. *Id.*

218. Scott MacDonald & Cynthia Baroody Hart, *Communications Between Probation Officers and Judges: An Innovative Model*, 63 FED. PROB. 42, 45 (1999); Catherine M. Goodwin, *The Role of the Probation Officer in Applying Koon v. United States*, 9 FED. SENT'G REP. 34, 34 (1996).

information to courts.²¹⁹ Judges similarly adopt this characterization.²²⁰ In a study of the communications between judges and probation officers in Santa Cruz County, California, the interviewed judges spoke of the independence and neutrality of probation.²²¹ One judge spoke of how the probation officer's recommendations to the court come "from a position of neutrality, unlike those of the district attorney and defense counsel."²²²

Caselaw also emphasizes this neutrality guise.²²³ Neutrality is cited as a reason for not applying formal rules to certain actions by probation. For instance, a court held that defense counsel's failure to appear at a presentence interview did not violate the defendant's Sixth Amendment right to counsel because of the probation officer's "neutral role" and the court's independent sentencing discretion.²²⁴ In a civil action against a county probation department for imposing a condition to attend Alcohol Anonymous (AA) meetings, the Second Circuit upheld the lower court's finding that probation was liable for nominal damages of one dollar for violating the defendant's constitutional rights under the First Amendment's Establishment Clause.²²⁵ Even as it found probation liable for not giving the defendant an alternative to AA meetings, the appellate court continued to characterize probation's role as a "neutral adviser to the court," and "not a partisan advocate aligned with either the prosecution or the defendant."²²⁶ Given this neutral role, the court determined it

219. SONOMA CNTY. PROB. DEPT., DEPARTMENT POLICY & PROCEDURES MANUAL § 2.13, ROLES AND RESPONSIBILITIES OF THE DEPUTY PROBATION OFFICER 2 (rev. 2019) (1994) ("Probation serves as the neutral arm of the Court and is tasked with providing the Court with objective, comprehensive reports that in aid in determining appropriate case dispositions.").

220. *See id.*

221. MacDonald & Hart, *supra* note 218, at 46.

222. *Id.*; *see also* Goodwin, *supra* note 218, at 34.

223. These private entities who are put in charge of misdemeanor probation in jurisdictions where such contracts exist have been questioned for their neutrality. *See, e.g.*, Carter v. Montgomery, No. 15-CV-00555, 2018 WL 3521397, at *1 (M.D. Ala. July 20, 2018) (describing allegations made by plaintiff against local jurisdiction for conspiring with a private actor to play the role of a "neutral probation officer").

224. Dixon v. United States, 151 F. Supp. 3d 582, 592 (E.D. Pa. 2015).

225. Warner v. Orange Cnty. Dep't. of Prob., 115 F.3d 1068, 1072–73 (2d Cir. 1996), *remanded to*, 968 F. Supp. 917 (S.D.N.Y. 1997), *aff'd*, 173 F.3d 120 (2d Cir. 1999).

226. *Id.* (citing Schiff v. Dorsey, 877 F.Supp. 73, 77 & n.1 (D. Conn. 1994)); *accord* Sharon Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 105 YALE L.J. 933, 945 (1995); *see also* James v. James, 334 S.E.2d 551, 553 (Va. 1985) (discussing the report of a "neutral

was a “natural consequence” that the court would adopt the probation department’s recommendation without conducting an independent investigation.²²⁷

This characterization of neutrality, however, fails to fully account for probation’s boundary spanning characteristic.²²⁸ The term “boundary spanners” has been used to describe probation officers’ inhabitation of social work and law enforcement roles. As the previous Part shows, probation’s boundary spanning covers far more territory.²²⁹ Probation’s occupation of multiple roles has been accepted as a given and necessary condition, even as these multiple roles give rise to conflicts and tensions as individual officers must deal with competing obligations.²³⁰ Probation officers’ perceptions of their role have changed as officers have taken on more law enforcement characteristics, perhaps most starkly epitomized by their ability to carry arms.²³¹

probation officer”); *United States v. Rainiere*, No. 18-CR-204, 2021 WL 4522298, at *4 n.4 (E.D.N.Y. Oct. 4, 2021) (citations omitted) (“Motions to compel disclosure of presentence reports . . . are viewed differently from parties’ sentencing submissions” because of “the distinct function performed by the probation department as ‘neutral information gatherers for the sentencing judge.’”); *United States v. Travaglini*, No. 90-00100, 1992 WL 220997 (E.D. Pa. Aug. 31, 1992); *Internoscia v. Internoscia*, No. A-1818-06T5, 2007 WL 2935363 (N.J. Super. Ct. App. Div. Oct. 10, 2007); *United States v. Washington*, 146 F.3d 219 (4th Cir. 1998); *United States v. Quinn*, 472 F. Supp. 2d 104, 108 n.6 (D. Mass. 2007) (“[A] court should be cautious about disregarding what appears to be the unanimous view not only of the adversaries but also of the neutral probation officer.”); *Jeffries v. United States*, 721 F.3d 1008, 1015 (8th Cir. 2013) (characterizing evaluation of probation office as “neutral”).

227. *Warner*, 115 F.3d at 1073.

228. Hafoka et al., *supra* note 9, at 35.

229. *Id.*

230. Julian Abele Cook, Jr., *The Changing Role of the Probation Officer in the Federal Court*, 4 FED. SENT’G REP. 112, 112–13 (1991) (describing the difficulties on probation with the Sentencing Act’s requirement that probation “continue the traditional dual role of investigator and sentencing supervisor, as well as to assume additional duties as a mediator, negotiator and an interpreter of guideline issues in the courtroom” and changing the probation’s role from a “friend” or confidant of defendant and neutral to that of being an adversary in the sentencing process); Ming-Li Hsieh et al., *Probation Officer Roles: A Statutory Analysis*, 79 FED. PROB. 20, 23–24 (2015); Hafoka et al., *supra* note 9, at 36.

231. Paul W. Brown, *Guns and Probation Officers: The Unspoken Reality*, 54 FED. PROB. 21, 21–23 (1990); Shawn E. Small & Sam Torres, *Arming Probation Officers: Enhancing Public Confidence and Officer Safety*, 65 FED. PROB. 24 (2001). In addition to policification of probation in the criminal and juvenile systems, this argument has also been made about the family regulation system. *See generally* DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2024) (describing the law enforcement characteristics of caseworkers in the family regulation system).

Internal role conflict may also arise. As one probation periodical noted, probation officers hired during a time when rehabilitation was a more pronounced goal may still adhere to that model, while newer probation officers hired during the “tough on crime” era are more likely to be oriented toward police.²³²

Though not made explicit in court doctrine, the neutrality guise also seems to stem from the entrenched view that probation is the main expression of rehabilitation in our justice system.²³³ This concept of neutrality based upon rehabilitation, however, does not quite fit with our adversarial system. Perhaps one way of thinking through probation’s in-between position is by drawing from Professor John Griffiths’s Family Model of criminal procedure.²³⁴ Writing in response to Professor Herbert Packer, Griffiths characterized the two models of criminal procedure posited by Packer—the Crime Control and Due Process Models—as essentially one model: the Battle Model.²³⁵ Packer’s ideology affirms the adversarial nature of the criminal system. Both models are based upon the criminal process as a struggle, “a stylized war” between the individual and the state.²³⁶ As a heuristic, Griffiths used the Family Model to pose an alternative way of viewing criminal procedure. This Family Model is grounded in paternalism rather than adversarialism, in which the state treats offenders as dependents to be corrected for their own good, thereby legitimating extensive coercive intervention while displacing procedural safeguards.²³⁷

Griffiths did not identify probation by name, but it is easy to see how probation fits within his conception of treatment and coercive intervention. The closest Family Model in the legal system at the time of Griffiths’s writing in 1970 was the juvenile

232. See Small & Torres, *supra* note 231, at 25.

233. *United States v. Reese*, 775 F. 2d 1066, 1077 (describing the presentence report prepared by the probation service as providing a “neutral, third party analysis of the defendant’s background and his prospects for rehabilitation”).

234. John Griffiths, *The Ideology in Criminal Procedure*, 79 *YALE L.J.* 359, 367–68 (1970).

235. *Id.* at 368. The crime control model holds as its most important function the repression of crime that relies on the prosecution and investigators to “elicit and reconstruct” an account of the criminal event. Herbert L. Packer, *Two Models of the Criminal Process*, 113 *U. PA. L. REV.* 1, 14 (1964). The due process model emphasizes the individual’s rights vis-à-vis the power of the state and prioritizes controls and safeguards to protect individuals against maximal state power and efficiency. *Id.* at 16–17.

236. Griffiths, *supra* note 234, at 367.

237. *Id.* at 371–76.

court.²³⁸ But in Griffiths's eyes, the juvenile court was a failure because it was an "idea imposed artificially on an unchanged Battle Model," and one consequence was that due process safeguards were eliminated.²³⁹

Probation's trajectory and current state can be seen as analogous to what Griffiths concluded about the juvenile court. In our current adversarial system, the adaptation of probation's purported treatment or rehabilitative stance ultimately becomes one that sides with the "crime control" actors—namely law enforcement and prosecutors.

The perception of probation as a neutral arbiter coincides with the proliferation of evidence-based probation practices.²⁴⁰ These evidence-based practices include the use of risk assessments by probation in making treatment determinations, assessments of appropriate punishments and other key decision-making points, behavioral management rubrics or matrices to implement graduated sanctions, targeted case management, and evidence-based treatment like cognitive-based therapies.²⁴¹ Each of these rationales incorporate a view of probation as an expert in rehabilitation, assessing risk and determining treatment. Later in this Part, we discuss probation's perceived expertise in these areas.²⁴² In the context of technological expertise, Professor Ari Waldman has noted how experts are traditionally viewed as "impartial, neutral, and apolitical."²⁴³ The same kind of view is accorded to probation because of this expertise perception.

This neutrality guise coexists uneasily with probation's surveillance and monitoring role, its prosecutorial stance in alleging

238. *Id.* at 400.

239. *Id.* at 400–01.

240. Christopher T. Lowenkamp et al., *Changing Probation Officer Attitudes: Training Experience, Motivation, and Knowledge*, 77 *FED. PROB.* 54 (2013).

241. *Evidence-Based Practices*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/evidence-based-practices> [<https://perma.cc/69DE-WMV2>] (discussing federal probation and pretrial services use of evidence-based practices); THE COUNCIL OF STATE GOV'TS JUST. CTR., *IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESSES* 13, 14 (2009); ORANGE CNT'Y PROB. DEP'T, *CONTINUUM OF GRADUATED SANCTIONS AND INTERVENTIONS FOR VIOLATIONS OF ADULT GENERAL, MANDATORY AND PCS SUPERVISION* 2–3 (2021).

242. *Cf. In re S.S.*, 306 Cal. Rptr. 3d 650, 658–59 (Ct. App. 2023) (challenging expertise of probation officers).

243. Ari Ezra Waldman, *Challenging Technological Expertise* 36 (U.C. Irvine Sch. Of L. Rsch. Paper No. 2025-04, 2025) (citing Aziza Ahmed, *Abortion Experts*, 2022 U. CHI. LEGAL F. 1, 13).

violations, and its recommendations that involve punitive sanctions. All of these belie the guise of neutrality and instead underscore a decided punitive ideology.²⁴⁴ And what this neutrality myth permits is this: Even though probation's ability to move fluidly between roles—from law enforcement to social worker, counselor, and adjudicator—is seen as necessary for probation officers to do their job, this ability enables them to increase the state's punitive and law enforcement power against defendants, while diluting measures designed to protect them.

B. Enhancing Law Enforcement

Perhaps one of the clearest ways in which probation is not neutral is in the way that probation enhances the ability of law enforcement actors to investigate, charge, and prosecute.

We first examine probation's actions at the presentence stage. Probation is given wide discretion in carrying out presentence investigations. Probation's questioning and fact-gathering may seem different from police interrogations where the sole purpose is to determine a person's involvement in criminal conduct. But probation questioning can lead to further penalties. In one federal case, the court dismissed a defendant's ineffective assistance of counsel claim for not being advised properly prior to the presentence interview when he made non-*Mirandized* statements which increased his baseline offense under the sentencing guidelines.²⁴⁵ In another case, the court continued to characterize probation as neutral even as it found that a probation officer—who separately questioned the lab report findings of a drug analysis, contacted the forensic scientist who had prepared the report, and determined that the amount of drugs was higher, thus recommending a higher sentence than what was agreed to in the plea agreement—acted within his proper role as a probation officer.²⁴⁶ That court dismissed the defendant's separation-of-powers argument that the probation officer acted like a prosecutor advocate.²⁴⁷

244. See O'Leary, *supra* note 11, at 1972.

245. *United States v. Travaglini*, No. 90-00100, 1992 WL 220997, at *2, *7 (E.D. Pa. Aug. 31, 1992).

246. *United States v. Washington*, 146 F.3d 219, 223 (4th Cir. 1998).

247. *Id.* In support of its decision, the court pointed to a case where the probation officer had acted in a similar fashion and the court had in fact used the probation officer's actions as evidence of his "independence" from the prosecution. *Id.*

Probation reports may also provide more evidence that could lead to further punishment based on the officer's characterization of the defendant and the offense. An officer's opinion or conclusion that the defendant appears to be malingering or minimizing their conduct could result in a higher sentencing recommendation if the defendant is deemed to not have sufficiently accepted responsibility.²⁴⁸ Even when the questioning is not about criminal misconduct but about matters like a person's drug use or aptitude for violent outbursts, and even if no further formal punishment may ensue, such admissions can result in an increase in monitoring and surveillance.

Post-sentencing, for those serving sentences of probation or parole in jurisdictions where probation supervises parole, probation continues to enhance the law enforcement aspect of the criminal legal system. Probation's questioning may take the form of lie detector tests, more assessments, and questioning during routine required meetings with probation.²⁴⁹ In any of these interactions, probation's questions could result in statements that are viewed as incriminatory or other information that may expose probationers to further penalties.²⁵⁰

In certain instances, probation may not question defendants themselves but can still facilitate interrogations by police. A necessary prerequisite under the *Miranda* doctrine is that a person be in a "custodial setting" in order for *Miranda* protections to apply.²⁵¹ Police officers, however, can circumvent that requirement by questioning probationers in probation offices. In one such situation, a police officer had previously arrested a man and questioned him at the scene of the alleged crime about a

248. See U.S. SENT'G COMM'N, GUIDELINES MANUAL § 3E1.1 (2025).

249. James M. Shaw, *Sex, Lies, and Polygraph Machines: The Portrait of Mr. Cassamassima*, 57 U. MIA. L. REV. 429, 430 (2003); *Evidence-Based Practices, supra* note 241; *Chapter 2: Answering Truthfully Probation Officer's Questions (Probation and Supervised Release Questions)*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/post-conviction-supervision/overview-probation-and-supervised-release-conditions/chapter-2-answering-truthfully-probation-officers-questions> [https://perma.cc/5NWC-EAW2].

250. *Graddy v. State*, 517 So. 772, 773 (Fla. Dist.Ct. App. 1988) (finding that probation revocation was valid based on probationer's admission that he brought alcohol to the probation and restitution center in violation of conditions requiring him to be truthful to probation officer and comply with all probation instructions).

251. *Miranda v. Arizona*, 384 U.S. 436, 498 (1966) (holding that law enforcement must notify defendants of right to counsel when they are interrogated while in custody).

backpack containing drug paraphernalia.²⁵² The man denied ownership of the backpack.²⁵³ Sometime later, the officer heard from the suspect's probation officer that he would be coming to the probation office for a meeting. The police officer asked to speak with the suspect at the probation office, explaining that it was "neutral ground."²⁵⁴ The probation officer told the man that the officer wanted to ask him a few questions. After saying he did not need *Miranda* warnings, the man at first denied ownership of the backpack and then later admitted it was his.²⁵⁵ A court later found that the statements made to the officer were not made in response to a "custodial interrogation" for the purpose of *Miranda*, including in its reasoning that the defendant was questioned at the probation office, a place "familiar" to the defendant.²⁵⁶ Other courts have reached similar conclusions.²⁵⁷

Separate from statements obtained from defendants through questioning, information can be obtained from probation searches and seizures. A particularly important and potent power of probation is the ability to search the person, property, and home of people on probation.²⁵⁸ Different from searches by police, probation searches are seen as part and parcel of the rehabilitative process, even though searches could lead to new charges or increased penalties.²⁵⁹

This enhanced law enforcement capability stems from probation conditions' exceptionalism in Fourth Amendment doctrine. As Professor Fiona Doherty found in her study of standard conditions of probation imposed on defendants, these conditions diminish and, in fact, "eviscerate [defendants'] Fourth

252. *United States v. Webb*, No. CR. 06-5E, 2006 WL 3254534, at *1 (W.D. Pa. Nov. 9, 2006).

253. *Id.*

254. *Id.*

255. *Id.* at *4.

256. *Id.* at *5.

257. *See, e.g., State v. Brandon*, 287 A.3d 71, 93–98 (Conn. 2022).

258. *Probation Department Policy/Procedure Manual: Search Policy*, CNTY. OF SAN LUIS OBISPO, <https://www.slocounty.ca.gov/departments/probation/forms-documents/education-and-training-materials-documents/policies/sec-vi-general-operations/search-policy> [<https://perma.cc/UHT6-T6K4>] (last updated Mar. 4, 2021, at 12:00 AM); *Chapter 3: Search and Seizure (Probation and Supervised Release Conditions)*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/post-conviction-supervision/overview-probation-and-supervised-release-conditions/chapter-3-search-and-seizure-probation-and-supervised-release> [<https://perma.cc/3HL3-8MF9>].

259. *Chapter 3: Search and Seizure (Probation and Supervised Release Conditions)*, *supra* note 258.

Amendment rights.”²⁶⁰ Being on probation typically means that a person’s expectation of privacy is reduced. Probation’s power to search people is subject to the Fourth Amendment but only to an extent.²⁶¹ Probationers relinquish many of their rights for the “benefit” of not being incarcerated and instead being able to remain out of custody and on probation. In *Griffin v. Wisconsin*, the Supreme Court upheld a warrantless search of a probationer’s home based on state regulations authorizing the search based on “reasonable grounds.”²⁶² The Court deemed the search as falling within the special government needs doctrine allowing suspicionless searches—the special government need being probation’s twin societal purposes of rehabilitation and public safety.

Other doctrinal justifications for probation searches include consent searches and the dominance of reasonableness as the measurement of Fourth Amendment constitutionality.²⁶³ An explicit condition of waiver makes probation searches generally exempt from constitutional purview when there is not an explicit search and seizure condition.²⁶⁴ Consent as a justification for diminished Fourth Amendment protections has been criticized by scholars. When probationers are faced with the “choice” between prison or probation with expansive search clauses attached to their probation terms, scholars have argued that such coerced consent cannot be deemed sufficient.²⁶⁵ These rules apply to law enforcement as well. But probation officers’ more frequent and routine contact with defendants turn probation agents into potent helpers of law enforcement.²⁶⁶

The state’s surveillance capabilities are also furthered by probation’s ability to oversee defendants on electronic

260. Doherty, *supra* note 4, at 318.

261. Patricia Soung, *Is Probation Obsolete? Reexamining and Reimagining Youth Probation Law, Policy, and Practice*, 112 J. CRIM. L. & CRIMINOLOGY 549, 574 (2022).

262. *Griffin v. Wisconsin*, 483 U.S. 868, 872–80 (1987).

263. Kate Weisburd, *Sentenced to Surveillance*, 98 N.C. L. REV. 717, 736 (2020).

264. *See United States v. Knights*, 534 U.S. 112, 118, 121–22 (2001).

265. Kate Weisburd, *Consent in Criminal Procedure*, 113 CALIF. L. REV. 697 (2025). Courts have upheld probationary search terms despite these coerced “choices” between probation and prison. *See Knights*, 534 U.S. at 113.

266. This is in many ways the inverse of therapeutic policing where principles or logics of care and rehabilitation are incorporated into policing. *See* Michael L. Perlin & Alison Lynch, “*Had to Be Held Down by Big Police*”: A Therapeutic Jurisprudence Perspective on Interactions Between Police and Persons with Mental Disabilities, 43 FORDHAM URB. L.J. 685 (2012).

monitoring, including GPS monitoring and electronic bracelets, now broadly adopted as part of court conditions.²⁶⁷ Though electronic monitoring of defendants may obviate the need for face-to-face contact, electronic surveillance reveals all manner of a person's life to probation, including every step they take within and outside of a house.²⁶⁸ This information may be shared with law enforcement, without law enforcement having to obtain a warrant.²⁶⁹

At the probation revocation stage, probation's law enforcement characterization is particularly significant, as these hearings operate with less due process.²⁷⁰ As Doherty has stated, "[o]nly the most basic due process protections" are applicable, namely those of notice, disclosure of government's evidence, the ability to be heard in person, the right to adjudication by a neutral factfinder, and to have a written statement of decision.²⁷¹ The standard of proof is only by preponderance or clear and convincing evidence, and the evidentiary rules are relaxed.²⁷²

Probation also has significant authority over the revocation process. Probation investigates and writes reports on probation violations.²⁷³ Probation is authorized to arrest a probationer.²⁷⁴ Because a common probation condition is that a person shall not commit a new crime, a violation based on this ground can assist law enforcement and prosecutors on the new criminal conduct.²⁷⁵ Any violation based on new criminal conduct can potentially subsume a new criminal charge. Because there is a much lower threshold of factual showing required at the violation

267. Weisburd, *supra* note 263, at 726–27.

268. YAZMINE NICHOLS ET AL., ACLU, RETHINKING ELECTRONIC MONITORING: A HARM REDUCTION GUIDE 7 (2022), https://www.aclu.org/sites/default/files/field_document/2022-09-22-electronicmonitoring.pdf [<https://perma.cc/65NW-GCL2>].

269. John R. Ellement, *Police Can Look Into GPS Tracking Records of Probationers, Court Says*, BOSTON GLOBE (Mar. 26, 2026), <https://www.bostonglobe.com/metro/2019/03/26/court-police-can-look-into-gps-tracking-records-probationers/ZDFWsY1qGiz2id2r6iQlgM/story.html> [<https://perma.cc/6LTM-H4P4>].

270. Patrick M. Reilly, *The Doctrine of Collateral Estoppel in Parole Revocation*, 4 FORDHAM URB. L.J. 609, 609 (1976).

271. Doherty, *supra* note 4, at 322.

272. *Id.* at 322–23.

273. 2A RICHARD B. MCNAMARA, NEW HAMPSHIRE PRACTICE SERIES: CRIMINAL PRACTICE & PROCEDURE § 33.39 (7th ed. 2025).

274. 18 U.S.C. § 3606.

275. *United States v. Jackson*, 214 A.3d 464, 467–68 (D.C. 2019); Cecelia Klingele, *The Role of Sentencing Commissions in the Imposition and Enforcement of Release Conditions*, 26 FED. SENT'G REP. 191, 192–93 (2014).

stage, a person could be punished for new criminal conduct through the probation violation even if the prosecutor could not prove the matter beyond a reasonable doubt. The very fact of the arrest could then be a probation violation without having to prove the validity of the alleged criminal conduct.

If the probation violation proceeds to a revocation hearing, probation also has the advantage of being an “insider” as an “officer of the court.”²⁷⁶ Probation may be the witness to testify about the wrongdoing, just as police officers may be witnesses in criminal cases. Probation is also the “client” of prosecution in probation revocation hearings where the prosecution is prosecuting the probation violation asserted by probation.²⁷⁷

Hence, just as federal judges have been characterized as “prosecutors in robes” when they initiate probation violations, probation officers at the state and local level act much in the same way.²⁷⁸ This appropriation of prosecutorial functions in the probation role destabilizes our adversarial system in a way similar to the hybridity of prosecutorial functions in plea bargaining as described by Professor Máximo Langer.²⁷⁹ Langer asserts that where prosecutors exert control over charging decisions, plea bargaining, and sentencing differentials, these coercive prosecutorial actions fail the due process ideal of the adversarial system.²⁸⁰ The same can be said of probation’s hybridity here. The deformalization of rules that results serves to undercut and destabilize our institutional structure.

Probation’s law enforcement enhancing role can be seen in other parts of the legal process, such as when probation is in charge of pretrial diversion programs or contributes to admission decisions of specialty courts and progress reports.²⁸¹ For instance, the same waivers for searches exist in these pretrial and

276. Doherty, *supra* note 4, at 347; see also Cynthia Godsoe, *Disrupting Carceral Logic in Family Policing*, 121 MICH. L. REV. 939, 949 (2023) (making a similar argument about lawyers as insiders of carceral state systems).

277. Doherty, *supra* note 4, at 348.

278. Schuman, *supra* note 104.

279. Professor Máximo Langer described this in his examination of the prosecutor’s role in plea bargaining. Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. CRIM. L. REV. 223, 251–52 (2006).

280. *Id.* at 225.

281. See *supra* Section I.D.

diversion or specialty court provisions.²⁸² Participation in specialty courts is also often contingent upon an agreement to a search waiver where the participant consents to a physical or property search at any time, without particular cause, drug testing, and other kinds of monitoring that may not be related to the underlying charges.²⁸³

The mechanisms of probation revocation and probation's role are also replicated in other parts of the criminal process. For instance, if probation is conducting pretrial monitoring, probation can file a motion to revoke a defendant's release or impose other sanctions.²⁸⁴ Similarly, if a defendant has been granted a pretrial diversion, probation's monitoring responsibilities also gives officers the ability to report on violations of those diversionary terms and recommend termination.²⁸⁵ In the pretrial context when a defendant has not yet entered a plea or been found guilty, having an extra law enforcement-like actor is particularly consequential for the defendant. Short of additional charges, any perceived and reported conduct may affect plea offers by courts and release conditions.

Probation, ultimately, has extensive police and prosecutor-like influence through their agents' authority to recommend and oversee conditions of release, sentencing, diversion, and to monitor, surveil, arrest, and punish defendants for violating those conditions. In these ways, probation has the authority to expand its own power through the probation conditions they recommend to the court in ways that can further punish and criminalize defendants. By enhancing both the police and prosecutorial arm, probation serves to deformalize those same functions.

282. See Chris Slobogin & Kate Weisburd, *Illegitimate Choices: A Minimalist(?) Approach to Consent and Waiver in Criminal Cases*, 101 WASH. U. L. REV. 1913 (2025).

283. NAT'L DRUG CT. INST., THE DRUG COURT JUDICIAL BENCHBOOK § 8.3, at 164 (Douglas B. Marlowe & Judge William G. Meyer eds., 2017) (Fourth Amendment and related issues). This "consent" raises concerns under the unconstitutional conditions framework as articulated by Kay Levine, Jonathan Nash, and Robert Shapiro. Kay I. Levine et al., *The Unconstitutional Conditions Vacuum in Criminal Procedure*, 133 YALE L.J. 1401 (2024).

284. See, e.g., *Pretrial Services*, CNTY. OF SONOMA: JUST. SERVS., <https://sonoma-county.ca.gov/justice-services/probation/adult-division/pretrial-services> [https://perma.cc/TZ2L-G25S].

285. E.g., *Commonwealth v. Preston P.*, 136 N.E.3d 1179, 1189 (Mass. 2020).

C. *Diluting Right to Counsel*

Probation not only enhances the law enforcement apparatus, but it also dilutes the protections afforded to individuals. One key protection is that of counsel. The role of defense counsel in the criminal legal system is to provide a helping hand to a defendant, to even the playing field, and to ensure assistance to a defendant when they are confronted by “prosecutorial forces.”²⁸⁶ In articulating the right to counsel, the Supreme Court has stated, “[T]he adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate.”²⁸⁷ The right to counsel derived from the Fifth Amendment privilege against self-incrimination also stems from the same premise.²⁸⁸

Probation is unique in that it is the only stakeholder (other than defense counsel) to have open-ended and direct access to defendants with few legal constraints.²⁸⁹ Judges and prosecutors are either prohibited or strongly discouraged from having conversations with defendants without their counsel present.²⁹⁰ Law enforcement agents must comply with the Fifth and Sixth Amendments before they can communicate with represented defendants.

From diversion assessments to pretrial release interviews, communications pretrial, presentence interviews, and post-sentence communications, probation is legally required to talk to defendants, and defendants are required—or it is in their interest—to cooperate.²⁹¹ Most of the contact between probation officer and defendant does not mandate or contemplate the presence of counsel, though these practices have been challenged in some jurisdictions.²⁹²

286. *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (quoting *Maine v. Moulton*, 474 U.S. 159, 170 (1985)); see Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133 (2013).

287. *United States v. Cronin*, 466 U.S. 648, 656 (1984) (internal quotation marks omitted).

288. *Miranda v. Arizona*, 384 U.S. 436 (1966).

289. FED. R. CRIM. P. 32.

290. MODEL RULE OF JUD. CONDUCT r. 2.9 (A.B.A. 2026); MODEL RULE OF PRO. CONDUCT r. 4.2 (A.B.A. 2026).

291. *Presentence Investigation*, U.S. PROB. S. DIST. OF CAL., <https://www.casp.uscourts.gov/presentence-investigation> [<https://perma.cc/F4F9-QSPE>]; 18 U.S.C. § 3563(b).

292. See, e.g., C.R. DIV., U.S. DEPT OF JUST., MEMORANDUM OF AGREEMENT REGARDING THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY (2012),

Like defense counsel, probation also has access to otherwise privileged information from other social service agencies, schools, or health care providers.²⁹³ But probation agents, unlike defense counsel, are not obligated to keep information confidential and are mandated reporters.²⁹⁴ Hence, this broad ability to access and gather information can lead to social and criminal consequences not just for the individual speaking to probation but also for their broader family network.²⁹⁵ These potential consequences can put the defendant's employers, friends, and family members in a similar quandary as defendants—nonparticipation may be harmful to the defendant's case and participation could be harmful to the defendant and themselves.

Even with these potential harms, the guardrails surrounding conversations with probation are minimal. At the presentence interview stage, federal courts have generally recognized that defendants have a Fifth Amendment privilege from being made to disclose information that would increase criminal penalties.²⁹⁶ In some jurisdictions, probation officers must *Mirandize* defendants in recognition of the fact that statements made to probation by individuals could be used against them at a subsequent court proceeding.²⁹⁷ That a person can assert their constitutional privilege, however, can have little meaning in probation interviews. It is not necessarily to the benefit of the defendant to assert their privilege if their silence may be perceived as a lack of remorse or lack of cooperation by the court.²⁹⁸

<https://www.shelbycountyn.tn.gov/DocumentCenter/View/5759/DOJ-MOA-12-17>
[<https://perma.cc/VS4E-HEKH>].

293. O'Leary, *supra* note 11, at 1962; STATE CT. ADMIN. OFF., *supra* note 147, at 55. In some instances, the access is based upon probation's partnerships with providers. Probation may also gather this information with broad waivers for private information such as health information.

294. *See, e.g.*, CAL. WELF. & INST. CODE § 15610.45 (2025).

295. *See* Joel M. Geiderman & Chaterine A. Marco, *Mandatory and Permissive Reporting Laws: Obligations, Challenges, Moral Dilemmas, and Opportunities*, 2020 J. AM. COLL. EMERG. PHYSICIANS OPEN 38 (2020).

296. *E.g.*, *Hoffman v. Arave*, 236 F. 3d 523, 538 (9th Cir. 2001).

297. *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984).

298. Pamela Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel*, 97 NW. L. REV. 1635, 1678 (2003); Megan E. Burns, Note, *The Presentence Interview and the Right to Counsel: A Critical Stage Under the Federal Sentencing Structure*, 34 WM. & MARY L. REV. 527, 538 (1993) (noting the interaction just between the presentence report (PSR) and right to counsel); *see also* Elizabeth Phillips, *United States v. Washington: Why Counsel's Advise and Presence at Presentence Interviews Is Necessary to Prevent Sentencing Suicide*, 89 DENV. L. REV. 477, 477–78 (2012).

But recognizing that the privilege exists is different from the formal right to counsel. There is no absolute right to counsel at meetings between defendants and probation officers.²⁹⁹ Federal courts have not definitively recognized defendants' right to have counsel present at presentence interviews across the board, though circuits have varied in their approach and rationales.³⁰⁰ Individual courts often have local court rules or norms that *allow* counsel to be present. This permission or allowance, however, is very different than the right. Practically speaking, the burden falls upon defense counsel or defendants to affirmatively request that counsel be present and notified when probation conducts the interview.³⁰¹ The benefits of having a lawyer present include helping and guiding the defendant in answering questions, witnessing exchanges between the probation officer and client, and ensuring that information is properly relayed. But without any kind of mandate, defendants may very well end up vulnerable and facing probation questioning alone.

299. *Fields v. State*, 840 So. 2d 184, 189–90 (Ala. Crim. App. 2002). Several jurisdictions have followed the Supreme Court's statements in *Minnesota v. Murphy* and have held that a probation officer is not required to give *Miranda* warnings to a probationer during routine interviews and that admissions by probationers to probation officers in the absence of *Miranda* warnings are admissible against the probationers in probation-revocation proceedings. *Murphy*, 465 U.S. at 420 (1984); *see also* *United States v. Nieblas*, 115 F.3d 703, 705 (9th Cir. 1997) (holding that a probationer's statement to her probation officer was admissible against the probationer in a probation-revocation proceeding because "a probationer generally has no Fifth Amendment privilege regarding questions relevant to the status of her probation"); *United States v. Rea*, 678 F.2d 382, 390 (2d Cir. 1982) (holding that a probationer's statement to his probation officer was admissible against the probationer in a probation-revocation proceeding despite the fact that the probationer requested an attorney during the interview because a probationer has "no right to have a lawyer present during an interview with his probation officer"); *United States v. MacKenzie*, 601 F.2d 221, 222 (5th Cir. 1979) (*per curiam*) (holding that a probationer is not entitled to *Miranda* warnings before being interrogated by his probation officer regarding violations of the terms and conditions of his probation); *see also* *Simpson v. State*, 555 S.E.2d 247 (Ga. Ct. App. 2001); *State v. Cossin*, 673 N.E.2d 649 (Ohio Ct. App. 1996); *State v. Aldape*, 794 P.2d 672 (Kan. Ct. App. 1990); *Cleveland v. State*, 557 So. 2d 959 (Fla. Dist. Ct. App. 1990); *Hughes v. Gwinn*, 290 S.E.2d 5 (W. Va. 1981); *Alspach v. State*, 440 N.E.2d 502 (Ind. Ct. App. 1982); *State v. Joao*, 606 P.2d 1332 (Haw. 1980); *Childers v. Commonwealth*, 593 S.W.2d 80 (Ky. Ct. App. 1979); *State v. Generoso*, 384 A.2d 189 (N.J. Super. Ct. App. Div. 1978); *State v. Lassai*, 366 So. 2d 1389 (La. 1978); *State v. Rivera*, 569 P.2d 1347 (Ariz. 1977); *People v. Hardenbrook*, 243 N.W.2d 705 (Mich. Ct. App. 1976); and *State v. Johnson*, 514 P.2d 1073 (Wash. Ct. App. 1973).

300. Metzger, *supra* note 298, at 1680.

301. Some advocacy groups have pushed for this burden to fall on probation. *See* THE GAULT CENTER, NATIONAL YOUTH DEFENSE SYSTEM STANDARDS USER GUIDE 20 (2005).

Probation questioning in the post-sentencing and supervision stage is also subject to constitutional limits under the Fifth Amendment. In *Minnesota v. Murphy*, the Court held that a probationer could not be compelled to relinquish their Fifth Amendment privilege against self-incrimination.³⁰² But even though a probationer does not lose their constitutional privilege, probationers are still expected to be truthful to their supervising officers. Moreover, if there is a valid privilege, the probationer must assert that privilege. The probation officer does not have to give *Miranda* warnings when asking questions unless, either expressly or impliedly, the officer threatens to revoke probation or some other similar “substantial penalty.”³⁰³ The implicit idea is that probationers should speak freely to probation because probation is trying to help them. The issue of self-incrimination arises most in the context of conditions requiring sex-offender treatment programs and mandated polygraph tests, with many courts permitting such polygraphs.³⁰⁴

Part of the rationale for this relaxation in the post-sentencing phase is to allow probation officers the ability to glean information that helps them with their tasks of supervision. And even though statements from probation officers can lead to new charges or at the very least probation violations, there is a sense, at least from the courts’ rationales, that allowing probation access is the price of probation.³⁰⁵

That rationale does not apply to the pretrial, or more precisely the preplea or preadjudication context, yet the same kind of relaxation of rules apply. In the federal system, the right to counsel does not extend to pretrial interviews where pretrial officers, who are part of the federal probation department, are tasked with obtaining a broad swath of information for the goal

302. *Murphy*, 465 U.S. at 435–37.

303. *Id.* at 434.

304. *Chapter 3: Polygraph for Sex Offender Management (Probation and Supervised Release Conditions)*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/post-conviction-supervision/overview-probation-and-supervised-release-conditions/chapter-3-polygraph-sex-offender-management-probation-and> [<https://perma.cc/GU64-4BHD>].

305. This is similar to the kinds of privacy infringements that poor people must bear, as Khiara Bridges states in her discussion of motherhood and poverty. KHIARA BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017); see also Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297 (2013) (describing various “degradation ceremonies” such as excessive penalties and extrajudicial public shaming of women convicted of welfare fraud).

of assessing whether a person should be released or detained pretrial.³⁰⁶ Federal courts have found that similar to the sentencing hearing, the pretrial interview stage is not a “critical stage” of a criminal case where a constitutional right to counsel attaches and *Miranda* warnings are required. As one federal court stated, “[A] pretrial services officer, [as] part of the Probation Office, is an arm of the Court and does not work on behalf of the prosecution or a law enforcement agency.”³⁰⁷ In another case, the court denied the petitioner’s constitutional claim for statements he made to the pretrial service officer without counsel based upon the notice the defendant had received that he must be truthful in the interview.³⁰⁸ Other courts have found that bail interviews are akin to routine booking questions, and hence are not “interrogations” where *Miranda* rights would apply.³⁰⁹

Certainly, counsel may be present when probation questions defendants because of a norm within the jurisdiction or court. But even in the few places where defendants are appointed counsel early or where the public defender’s office covers arraignments, practical constraints limit counsel’s presence. Counsel may be able to advise their clients about the pretrial interview, but scheduling and even obtaining knowledge of when the pretrial interview will take place make it nearly impossible to ensure that a lawyer is present for every interview.³¹⁰

The kind of probation access to information that occurs in specialty courts or pretrial release mirrors the supervision phase. In jurisdictions where probation supervises an individual’s progress in specialty courts, the types of interactions between probation and defendant are also similar to other kinds of

306. Cole Press, *A New “Critical Stage”? Federal Pretrial Services Interviews Meet the Sixth Amendment*, 25 BERKELEY J. CRIM. L. 219 (2020) (arguing that pretrial interviews constitute a “critical stage” in criminal proceedings and that the right to counsel should be provided); Bunzel, *supra* note 226 (describing the transformation of the PSR and the origins of the PSR).

307. *Sarr v. United States*, No. 09CR119, 2013 WL 12342171, at *5 (E.D. Va. Aug. 30, 2013).

308. *Id.* at *1.

309. *Commonwealth v. Daniels*, 644 A.2d 1175, 1181 (Pa. 1994) (“[I]nformation obtained via routine questions designed to secure biographical data necessary to complete booking or pretrial services is exempt from *Miranda*’s coverage.”).

310. See, e.g., MASS. R. CRIM. PRO. ch. 7 (2025); BARRY MAHONEY ET AL., NAT’L. INST. JUST., *PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL 1* (2001) (recommending that pretrial interviews with defendants occur as soon as possible after arrest).

probation monitoring.³¹¹ Probation has the ability to report non-compliance and other conduct that becomes the basis for termination or revocation from the program, further criminal liability, or even evidence of less potential for rehabilitation.³¹² In specialty courts, counsel may be present for the in-court portion of the specialty court though this is not always the case.³¹³ Further, even if counsel may be present in court, that does not mean that defendants have access to counsel for interactions with probation that occur outside of the courtroom.³¹⁴ In some courts, defendants may have to waive their right to counsel in order to gain admission to specialty courts.³¹⁵ One court's justification for the lack of the right to counsel in drug courts is the fact drug court "is not a 'court' in the jurisprudence sense; it is a drug treatment program administered by the court system."³¹⁶ Further, admission to a specialty court is framed as a privilege for the defendant because they get the benefit of dismissal or some result short of a criminal conviction if they comply with the conditions.

Though probation is given the authority and mandate to meet one-on-one with defendants and gather intimate details, probation officers are certainly not defense counsel. Most significantly, defendants' interactions with probation officers are not protected in the same way their interactions are vis-à-vis their

311. Jennifer Skeem & John Petrila, *Problem-Solving Supervision: Specialty Probation for Individuals with Mental Illnesses*, CT. REV.: J. AM. JUDGES ASS'N, Winter 2004, at 8, 9; Courtney A. Wachal et al., *Kansas City Municipal Court's Domestic Violence Court Programming*, 92 UMKC L. REV. 649, 653 (2024).

312. ALEX ROTH ET AL., VERA INST. OF JUST., THE PERILS OF PROBATION: HOW SUPERVISION CONTRIBUTES TO JAIL POPULATIONS 4 (2021).

313. Shanda K. Sibley, *The Unchosen: Procedural Fairness in Criminal Specialty Court Selection*, 43 CARDOZO L. REV. 2261, 2263 (2022).

314. Whether there is counsel is based upon structural reasons, such as a lack of resources or willingness by defense counsel or the public defenders' office. In some instances, if the specialty court has occurred post-plea, offices have taken the position that their representation has formally ended. CTR. FOR JUST. INNOVATION & ALL RISE, A PRACTITIONER'S GUIDE TO CONSTITUTIONAL AND LEGAL ISSUES IN ADULT DRUG COURTS 38–39 (2023), <https://www.innovatingjustice.org/wp-content/uploads/2023/08/Constitutional-and-Legal-Issues.pdf> [<https://perma.cc/7TMR-YCMD>].

315. NAT'L DRUG CT. INST., *supra* note 283, § 8.9, at 173. A jurisdiction in Arkansas requires that defendants who participate in the drug court program sign a waiver of right to counsel stating that the participant will not be entitled to legal representation until the point of termination of drug court participation. *Cross v. State*, 357 S.W.3d 895, 897 (Ark. 2009).

316. *Dunson v. Commonwealth*, 57 S.W.3d 847, 850 (Ky. Ct. App. 2001).

lawyers by the attorney-client privilege.³¹⁷ Throughout the criminal court process, probation gathers personal and intimate information that is then later disseminated to the parties.³¹⁸ The reports contain the results of assessments administered by probation that measure, for instance, risk or the need for substance abuse treatment.³¹⁹ Their accounts include statements of wrongdoing by defendants, whether the acts are criminal charges, other uncharged misconduct, or the behavior underlying a violation of probation, pretrial release, or conditions of specialty courts.³²⁰

Probation's narratives also display key differences from accounts of defendants which might be presented by defense counsel. Probation's reporting highlights certain types of information required by law to focus on points related to the question before the court (i.e., release, bail, or sentencing).³²¹ Because probation's information is defined in terms of risks, needs, dangerousness, and liability, the resulting report memorializes facts that align with these priorities: Does an individual have an anger management problem? Are they a gang affiliate? How many people do they know who have been arrested or incarcerated? Probation reporting also includes family relationships and dynamics, detailing possible abuse or neglect, and reflects probation's own choices in selecting what categories to highlight in presentence reports.³²² This kind of topic selection, as termed by O'Leary, applies to probation's curation of information throughout. The reports are not designed to capture the whole person or provide a fulsome picture of the defendant. Now, it is true that the problems with adequate counsel may mean that this is not any better than what a defense attorney may do.³²³ But defense

317. See MODEL RULE OF PRO. CONDUCT r. 1.6 (A.B.A. 2026).

318. FED. R. CRIM. P. 32; 18 U.S.C. § 3603; 18 U.S.C. § 3664; COLO. DUI BENCHMARK § 10.9, at 588 (2025); MONT. ADMIN. R. 23.13.102(14) (2026); ARIZ. R. JUV. CT. P. 226.

319. *Chapter 3: Substance Abuse Treatment, Testing, and Abstinence (Probation and Supervised Release Conditions)*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/post-conviction-supervision/overview-probation-and-supervised-release-conditions/chapter-3-substance-abuse-treatment-testing-and-abstinence> [<https://perma.cc/MTY3-NWYR>].

320. *Fare v. Michael C.*, 442 U.S. 707, 720 n.5 (1979); U.S. SENT'G COMM'N, GUIDELINES MANUAL § 7B1.2 (2025).

321. *Presentence Investigations*, *supra* note 75.

322. O'Leary, *supra* note 11, at 1957.

323. O'Leary, *supra* note 11, at 1994. In pointing out the ways in which probation adopts a punitive perspective in its preparation and writing of reports, O'Leary

counsel are bound by ethical duties as well as constitutional requirements to provide adequate counsel—none of which apply to probation officers.³²⁴

Probation officers' ability to access intimate information and present that information to courts is particularly problematic because of the real potential that officers may be importing their own biases and positions on defendants and consequently, their recommendations to courts. A study by sociologists George Bridges and Sara Steen in the early 1990s of probation report narratives prepared for sentencing in juvenile courts revealed such bias.³²⁵ Their analysis revealed important distinctions between Black youth and White youth on how probation attributed causes of their criminal behavior. For Black youth, probation reports were more likely to attribute criminal behavior to internal attributes rather than external ones.³²⁶ In two similar narratives of first-time offenders charged with robbery, one Black youth and one White youth, the Black youth was described as having an "adult quality," being unremorseful, exhibiting no desire to change his lifestyle, and seeming like "there was no moral content to his comment." In contrast, the White youth was described as "a victim of a broken home," "easily misled," "a tall emaciated little boy . . . terrified of his predicament," and in need of drug and alcohol evaluation and treatment.³²⁷

Though this study is a few decades old, it reveals how probation narratives are not merely recitations of facts. They include observations, impressions, and perceptions by the

suggests that such narratives be completely excised from the sentencing process, even those that may come from defense counsel.

324. *Performance Guidelines for Criminal Defense Representation (Black Letter)*, NAT'L. LEGAL AID & DEF. ASS'N, <https://www.nlada.org/defender-standards/performance-guidelines/black-letter> [<https://perma.cc/DN6T-EN7X>]; *Defense Function*, A.B.A. (2017), https://www.americanbar.org/groups/criminal_justice/resources/standards/defense-function [<https://perma.cc/YEA6-GV5X>]; *Strickland v. Washington*, 466 U.S. 668 (1984).

325. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanism*, 63 AM. SOC. REV. 554 (1998). They focused on the reports' discussions on attributions of causes of the crime, threat of future crime, and the sentencing recommendations contained in the report. *Id.* at 558–60.

326. *Id.* at 563. The narratives of two first-time offenders, seventeen-year-old boys charged with robbery, were given as examples of the different ways these attributions surfaced in the reports. *Id.* at 564.

327. *Id.*

writer.³²⁸ And one can see how these biases and assumptions could have consequences beyond narratives. A probation officer's perception that someone is malingering, exaggerating certain facts, or lacking remorse will surely lead to different recommendations than an officer who might perceive the opposite of a defendant.

Finally, there are structural ways in which probation dilutes the right to counsel. In rural jurisdictions that span large geographical areas, probation may be the sole in-person contact because defense counsel is located miles away.³²⁹ And because most places do not require or contemplate counsel representing defendants beyond sentencing, probation ends up being the supposed "helping hand" that stays with defendants for the duration of their case. This is despite probation's mandates and authority often causing the parties' interests to be misaligned. In contrast, defense counsel has the near-absolute duty of loyalty to clients.

Probation's responsibilities risk standing in place of what a defense attorney should do. When considering how probation also carries law enforcement functions, its intrusion on counsel-like activities upsets the power balance.

D. Decreasing Evidentiary Safeguards

Rules of evidence ensure that the information presented in court has sufficient indicia of reliability, authenticity, and relevance.³³⁰ Two aspects of probation's role vis-à-vis evidence are discussed here: how probation is viewed as an expert in many ways and how information provided by probation officers skirt evidentiary rules and constitutional safeguards on the presentation of information.

Experts are commonly relied upon in criminal cases. Their testimony can come in various forms, such as written declarations or formal testimony that generally must comply with evidentiary rules on qualification and foundation.³³¹ Probation's

328. Philip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, J. PERS. & SOC. PSYCH. 526, 529–30 (2014).

329. This is based upon my conversations with attorneys in rural jurisdictions. See also Weisner et al., *Criminal Justice System Utilization in Rural Areas*, ILL. CRIM. JUST. INFO. AUTH. (Mar. 18, 2020), <https://icjia.illinois.gov/researchhub/articles/criminal-justice-system-utilization-in-rural-areas> [https://perma.cc/7GKK-52Z3].

330. FED. R. EVID. 401, 901.

331. See, e.g., FED. R. EVID. 702.

boundary spanning capability has essentially converted its officers into experts of various subjects without requiring qualifications in criminology, recidivism, social services, corrections, or even law enforcement. Probation officers' expertise has been recognized explicitly by courts in certain instances, based upon their practical experience.³³² But what makes probation's grant of expertise peculiar and potentially problematic is that the training, qualifications, and experience that would be required of criminologists, social workers, or treatment providers are not required of probation officers.³³³

One prominent example of the recognition of probation expertise is as gang experts.³³⁴ The fact that probation officers are not formally law enforcement agents has not disqualified them as gang experts. As one state court found, state law permitted a wide range of jobs and experiences as the basis for expertise.³³⁵ The probation officer in question had spent four and a half years as a probation officer, including time in "community probation" with a police department, and received training and certification in street gangs.³³⁶ The court also cited the officer's "wealth of experience" including coming into contact "hundreds of times"

332. GIL EYAL, *THE CRISIS OF EXPERTISE* 26–27 (2019); HARRY COLLINS & ROBERT EVANS, *RETHINKING EXPERTISE* 24 (2007). *See also* Benjamin Levin, *Criminal Justice Expertise*, 90 *FORDHAM L. REV.* 2777 (2022) (categorizing criminal justice expertise as that based on vocational expertise and educational expertise and offering up insights on the limitations of these expertise categories).

333. *Probation Careers*, S.D. CNTY. PROB. DEPT', https://www.sandiegocounty.gov/content/sdc/probation/career_opportunities.html [<https://perma.cc/2NJZ-BJ6P>]; *How to Become a Criminologist*, ARIZ. ST. UNIV. ONLINE (May 23, 2023), <https://asuonline.asu.edu/newsroom/online-learning-tips/what-could-my-career-criminologist-look> [<https://perma.cc/88XA-6QEB>]; *Licensed Clinical Social Worker*, CAL. BD. OF BEHAV. SCIS., <https://www.bbs.ca.gov/applicants/lcsw.html> [<https://perma.cc/AAY2-GWGS>]; CAL. SEX OFFENDER MGMT. BD., *TREATMENT PROVIDER CERTIFICATION REQUIREMENTS* (2022).

334. *In re Tony N.*, No. A100230, 2004 WL 792091, at *2 (Cal. Ct. App. Apr. 13, 2004); *In re Rodrigo N.*, No. F048007, 2005 WL 3163620, at *2 (Cal. Ct. App. Nov. 29, 2005); *People v. Her*, No. F048301, 2006 WL 2535527, at *2 (Cal. Ct. App. Sep. 5, 2006) (noting that a probation officer along with police expert testified in support of gang enhancement), *cert. granted, judgment vacated on other grounds*, 560 U.S. 901 (2007); *United States v. Robinson*, 922 F.2d 845 (9th Cir. 1991); *People v. Robertson*, No. B270696, 2017 WL 2628150 (Cal. Ct. App. June 19, 2017); *People v. Sanchez*, No. F075385, 2019 WL 4438220 (Cal. Ct. App. Sep. 17, 2019); *People v. Mata*, No. F061132, 2012 WL 4223581 (Cal. Ct. App. Sep. 21, 2012); *People v. Noriega*, No. F079577, 2020 WL 2386381 (Cal. Ct. App. May 11, 2020).

335. *In re Tony N.*, 2004 WL 792091, at *10.

336. *Id.*

with gang members, in addition to his caseload.³³⁷ The probation officer had spoken with gang members, talked to police officers, reviewed police reports on gang activity, participated in gang-related probation research, attended gang task force meetings, and testified previously as an expert in gangs.³³⁸

In other cases, probation's expertise is not explicitly litigated and decided but assumed. In some jurisdictions, probation not only gives recommendations to the court on whether probation as a sentence is appropriate, but they also recommend the length of the incarceratory sentence.³³⁹ It is not clear what kind of expertise probation has to determine whether someone should be sentenced to two years of prison or eight, but that practice is not questioned. California is one of the jurisdictions where probation expertise has been challenged specifically in juvenile court, with the court stating, "The renewed focus on rehabilitation also means courts must take care not to place too much weight on the probation officer's report on the behavioral patterns and social history of the minor."³⁴⁰

Another instance of probation expertise can be seen in cases involving the transfer of youth to adult court. All jurisdictions have laws that permit youth to be charged in adult court when they are accused of committing certain serious crimes.³⁴¹ These laws are experiencing resurgence in the current turn back toward punitive juvenile justice policies.³⁴² In what may be one of the most consequential decision-making points, probation takes on criminologist-type identities, opining on whether a youth's background and offense would make them amenable to rehabilitation or better suited to be prosecuted in adult court.³⁴³ That defense attorneys often combat these probation reports with

337. *Id.*

338. *Id.*

339. In California, probation officers include in their presentence reports whether the defendant should get the low-, mid-, or high-term as prescribed in the corresponding penal statutes. CAL. R. CT. 4.411.5 (listing what a probation officer's presentence investigative report must include).

340. *In re S.S.*, 306 Cal. Rptr. 3d 650, 658 (Ct. App. 2023).

341. Olivia Naugle, *Automatically Charging Youth as Adults*, SENT'G PROJECT (Dec. 11, 2025), <https://www.sentencingproject.org/policy-brief/automatically-charging-youth-as-adults> [<https://perma.cc/36HR-E2ML>].

342. Nell Bernstein, *Reversing a National Trend, DAs and State Lawmakers Push to Treat Youth Who've Committed Crimes as Adults*, IMPRINT (June 30, 2025, at 2:00 AM), <https://imprintnews.org/top-stories/reversing-a-national-trend-das-and-state-lawmakers-push-to-treat-youth-whove-committed-crimes-as-adults> [<https://perma.cc/M39E-KMCU>].

343. *E.g.*, CAL. WELF. & INST. CODE § 707(a)(3) (2024).

social histories conducted by psychologists specializing in adolescence speaks to the complexities of the issues involved.³⁴⁴

The treatment of probation as an expert stands in stark contrast to the treatment of another kind of expert: Community members who are uniquely situated to present relevant and significant information to the court. Participatory defense is a relatively recent innovation that empowers families and friends of the accused to be a part of the defense of their loved ones.³⁴⁵ As a power-shifting mode, participatory defense does not accept that courtrooms are “only for lawyers” but brings community organizing principles to the courtroom.³⁴⁶ Through multimedia presentations that bring to life and humanize charged defendants, and by keeping family and other loved ones apprised of the case, participatory defense makes the courtroom a forum for people who have previously been excluded from the criminal court process.³⁴⁷ Professor Cynthia Godsoe has highlighted how because participatory defense shifts expertise from courtroom stakeholders away from traditional stakeholders, it expands the category of experts to include community members.³⁴⁸ In her discussion, Godsoe interrogates this expansion against attorney expertise.³⁴⁹ Yet, as attorneys and participatory defense actors have noted, the kind of relaxed evidentiary safeguards allowed to probation are not similarly accorded to them, with defense attorneys sometimes having to lay foundational bases for the information they present to the court on behalf of participatory defense actors.³⁵⁰

Moving from the designation of probation as experts, the decreased evidentiary safeguards are reflected in how probation information is treated by the courts. Written reports generated

344. See *What We Do*, S.F. PUB. DEF., <https://sfpublicdefender.org/about-us/about-us> [<https://perma.cc/N3R7-VXED>] (describing how public defender social workers prepare social histories); ANDREA MATEI ET AL., JUST. POL’Y CTR., ASSESSING A SOCIAL WORKER MODEL OF PUBLIC DEFENSE 6 (2021), https://www.urban.org/sites/default/files/publication/103811/assessing-a-social-work-model-of-public-defense_1.pdf [<https://perma.cc/465N-A6RK>] (describing how social workers develop sentencing plans).

345. Raj Jayadev, *People-Powered Defense*, INQUEST (Aug. 1, 2024), <https://inquest.org/people-powered-defense> [<https://perma.cc/UZ99-3RB9>].

346. Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 717 (2018).

347. *Id.* at 719–20.

348. Godsoe, *supra* note 346, at 717, 719.

349. *Id.* at 722.

350. Interview with Attorney and Advocate (names withheld) (Sep. 13, 2025) (on file with author).

by probation, such as presentence reports, are also not subject to the same evidentiary and constitutional strictures as other kinds of information.³⁵¹ The lack of legal guardrails matters because probation reports do not only contain statements by the defendant or opinions of the officer—they also necessarily contain statements by others. Probation officers have broad access to information about the defendant beyond what they obtain from the defendant, either through questioning or searches. Officers are authorized to speak to family, employers, and other individuals to confirm information provided to probation about the defendant.³⁵² They communicate with victims and witnesses when gathering information about the offense for sentencing and restitution.³⁵³ When assessing the defendant's progress or status, probation may speak to people who can confirm the defendant's employment, housing situation, and education, and even visit workplaces unannounced.³⁵⁴ As information is relayed from a third party through probation, this information is properly considered hearsay.³⁵⁵

Because relaxed evidentiary and constitutional standards are the norm in sentencing hearings, the rules of evidence and prohibitions against hearsay statements do not apply to reports even though this information will be contained in the formal court record and relied on by the court.³⁵⁶

Another arena where fewer legal guardrails extend to probation concerns is the Sixth Amendment's Confrontation Clause. Defendants have raised Confrontation Clause issues regarding information contained in presentence reports. In one Texas case, a defendant charged with possession of child pornography objected to the inclusion of facts relating to a pending

351. Generally, probation officers benefit from absolute quasi-judicial immunity in the preparation of presentence reports. *Spaulding v. Nielsen*, 559 F.2d 728, 729 (5th Cir. 1979); *Hughes v. Chesser*, 731 F.2d 1489, 1490 (11th Cir. 1984) (extending immunity to state probation officers). This is because a PSR is "an integral part of the sentencing process, and in preparing the report the probation officer acts at the direction of the court." *Spaulding*, 559 F.2d at 730.

352. *Post-Conviction Supervision*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/post-conviction-supervision> [<https://perma.cc/TVM2-DN6L>].

353. David N. Adair, Jr., *Looking at the Law: Restitution*, FED. PROB., June 1987, at 69, 69.

354. Doherty, *supra* note 4, at 317.

355. FED. R. EVID. 801(a)(3).

356. Gregory W. Carman & Tamar Harutunian, *Fairness at the Time of Sentencing: The Accuracy of the Presentence Report*, 78 ST. JOHN'S L. REV. 1, 5–6 (2022).

unadjudicated offense in the report on Confrontation Clause grounds.³⁵⁷ Those facts included witness statements that they had seen pornographic images on the defendant's computer as well as statements from the examiner of the computer, who noted the number of images and victims found on the computer hard drive.³⁵⁸ The court rejected the constitutional claim, emphasizing the purpose of the presentence report as providing the court with "a wide range of information . . . without an adversarial hearing" and noting as well that the governing statute did not limit the report to final convictions.³⁵⁹ In the federal context, courts have routinely held that the Confrontation Clause is not implicated "[w]hen a probation officer imparts information to a sentencing court as its neutral agent."³⁶⁰ This includes the interviews that probation conducts to prepare the presentence report.³⁶¹

These reports can also contain misstatements or impressions. The remedy for misstatements varies. In Alaska, though the court is authorized to strike factual allegations that are not verified, the governing rule does not call upon the judge to strike the presentence officer's evaluations or recommendations.³⁶² In Michigan, reports can be amended if a challenge by the defendant is successful, and the subsequent copy to the Department of Corrections must be amended.³⁶³ There is greater difficulty in challenging the impressions or "tenor" of a presentence report.³⁶⁴ There may also be costs to contesting the presentence reports.³⁶⁵ In certain jurisdictions, challenges to the report make them available to the public.³⁶⁶

357. *Stringer v. State*, 309 S.W.3d 42, 43 (Tex. Crim. App. 2010).

358. *Id.* at 45.

359. *Id.* at 48.

360. *United States v. Johnson*, 935 F.2d 47, 49–50 (4th Cir. 1991).

361. *Id.* at 49–50.

362. *McCoy v. State*, 80 P.3d 751, 752 (Alaska Ct. App. 2002).

363. *People v. Hall*, 478 Mich. 914, 914 (2007).

364. A defendant contested the probation officer's "belief" or characterization of events meant that the defendant "knew exactly what she was doing" in stealing cigarettes. The defense attorney argued that even though probation reported facts about chain of events, it left the impression that defendant did not keep in touch with probation. *E.g.*, *Davison v. State*, No. A-5738, 1996 WL 33686476, at *6–7 (Alaska Ct. App. Mar. 6, 1996).

365. *See Pre-Sentence Investigation Report (PSR)*, U.S. CT. OF APPEALS FOR THE SECOND CIR. (Dec. 22, 2009), https://www.ca2.uscourts.gov/clerk/case_filing/appealing_a_case/criminal_case/psr.html [<https://perma.cc/78ST-KQYT>] (last updated Dec. 22, 2009).

366. *E.g.*, *J.S. v. State*, 928 N.E. 2d 576, 579 n.4 (Ind. 2010).

Probation may also offer testimony at sentencing hearings. The testimony may include hearsay statements because rules of evidence do not apply to sentencing.³⁶⁷ Courts have also been known to access and rely upon information in the probation file that can contain information beyond the reports prepared by the probation officer, such as probation notes, police reports, and other information.³⁶⁸

Revocation is another stage where issues regarding probation's presentation of information have been litigated. In revocation proceedings, most courts have found that probation officers are entitled to qualified immunity.³⁶⁹ In revocation hearings, as scholars have noted, there is a lack of evidentiary protections, including the admission of hearsay evidence. Hearsay evidence is permitted if there are sufficient "indicia of reliability" to overcome due process concerns.³⁷⁰ Similar to the presentence report, federal courts have held that there is no right of confrontation in supervised release proceedings, and instead defendants are given a limited statutory right subject to the court's discretion.³⁷¹

Beyond these formal settings, probation officers can present information directly and *ex parte* to the court.³⁷² In some jurisdictions, courts are routinely staffed with probation court officers, raising the concern of further *ex parte* communications.³⁷³ Defense counsel and prosecutors are generally not given this access without particular justification and allowance.³⁷⁴ But probation is treated differently. This kind of communication is allowed because courts have deemed probation officers the "eyes and ears" of the court, and thus under a continuing obligation to keep the court informed of the activities of persons under its

367. *United States v. Hamad*, 496 F.3d 241, 246 (6th Cir. 2007).

368. *Pleasant v. State*, No. 01-14-00586-CR, 2015 WL 2393393, at *3 (Tex. Crim. App. May 19, 2015) (citing *Garza v. State*, 996 S.W.2d 276, 280 (Tex. Crim. App. 1999)) ("[W]e conclude that error in taking judicial notice of the contents of Pleasant's probation file, if any would not warrant reversal."); *Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999).

369. *E.g.*, *Park Cnty v. Cooney*, 845 P.2d 346, 351 (Wyo. 1992) (citing *Galvan v. Garmon*, 710 F.2d 214 (5th Cir. 1983), *cert. denied* 466 U.S. 949 (1984)).

370. *In re X.T.*, No. A127627, 2010 WL 3349225, at *4 (Cal. Ct. App. Aug. 26, 2010).

371. *United States v. Hall*, 419 F.3d 980, 985–86 (9th Cir. 2005); *United States v. Martin*, 382 F.3d 840, 844 n.4 (8th Cir. 2004).

372. *E.g.*, CAL. WELF. & INST. CODE §§ 280–81 (2025).

373. Saige Miller, *Ex Parte Communications Between Sentencing Judges and Probation Officers: A Need for Full Disclosure*, 44 U. HAW. L. REV. 290, 301 (2022).

374. *See id.*

supervision.³⁷⁵ A federal court pointed to the rule as “recogniz[ing] several circumstances under which a probation officer may communicate ex parte with the sentencing court through the presentence report without disclosure of the substance of these communications.”³⁷⁶ In a rare case granting relief to a defendant for a court’s reliance on ex parte information from probation, the issue was that the court relied on this information without disclosing it to the parties.³⁷⁷

That probation’s information is characterized as expert information and subject to less evidentiary safeguards is especially concerning when we think about how these reports become *carceral knowledge sources*. Professor Ngozi Okidegbe has identified police, pretrial services, and courts as such knowledge resources for pretrial risk assessment algorithms used in the criminal court process.³⁷⁸ Probation is another key carceral knowledge source that contributes to carceral archives.³⁷⁹ The narratives produced in these reports do not just affect information presented to a court. They create historical artifacts that have future effects on individuals, families, and communities, as well as future defendants as we move further toward data-driven practices.³⁸⁰

Individually, reports can pathologize a person’s experiences into categories of trauma or mental health diagnoses. Information from probation creates a “life cycle of information,” as termed by Professor Fanna Gamal when describing the whole of education records created, collected, and documented by school

375. *Schiff v. Dorsey*, 877 F. Supp. 73, 78 (D. Conn. 1994); 18 U.S.C. § 3603 (delineating officers’ obligations to keep court informed).

376. *United States v. Johnson*, 935 F.2d 47, 51 (4th Cir. 1991) (citing what is now known as FED. R. CRIM. P. 32(e)(3)) (rejecting the defendant’s claim that the district court should have required the probation officer to disclose from his report the confidential, diagnostic, or other information that was instead communicated to the court ex parte for recommendation on the sentence).

377. *United States v. Christman*, 509 F. 3d 299, 301 (6th Cir. 2007). In a federal child pornography prosecution, the judge relied upon “subjective impressions of the court officers that defendant had acted on his pedophilia and in fact molested children”—these feelings and impressions not being based on anything concrete but just “feelings.” *Id.* at 310. The court only disclosed the influence of the probation officer’s “gut feelings” to the parties three months *after* the sentencing. *Id.* at 301. The appellate court thus remanded for the court to resentence with a direction to not rely on this information. *Id.* at 312.

378. Okidegbe, *supra* note 71, at 2011–12.

379. Tonia Sutherland, *The Carceral Archive: Documentary Records, Narrative Constructions, and Predictive Risk Assessment*, J. CULTURAL ANALYTICS 1, 6 (2019).

380. Okidegbe, *supra* note 71, at 2011–12.

authorities.³⁸¹ The school authorities' production of records has the "power to create truth about young people—facts that follow them throughout their educational and adult lives."³⁸² Probation reports and records have a similar kind of potency, following people throughout criminal processes. Probation reports recount and confirm narratives of criminality. Even when the reports reflect rehabilitation or success, they are framed in terms of success as defined by probation, confirming and justifying the ability of the criminal system and, in particular, probation to rehabilitate and correct deviant behavior.³⁸³

Hence through their reports and records, probation becomes more than just an administrator but a producer of knowledge about criminality, risk, and need. Its reports, assessments, and investigative files create lasting records that construct a defendant's identity across multiple institutional contexts. These archives follow defendants to prison classification units, inform later sentencing decisions, and migrate into adjacent systems such as family courts, immigration, and child welfare proceedings. In contributing to the carceral archive, probation is a site where subjective impressions, actuarial predictions, and state interests merge into durable life histories that shadow individuals long after the underlying case is resolved. Through the information probation officers produce, accumulate, and retain, probation plays a role in defining defendants—shaping the categories of risk, need, and criminality that legitimate further state intervention.

On a broader level, probation reports can create a narrative about families, potential gang units, neighborhoods, and entire communities. Given the disproportionately high number of poor and minority people in the legal system, these narratives, or carceral archives, perpetuate narratives of poverty, Black criminality, family dysfunction, and mental health and medical needs.³⁸⁴

381. Fanna Gamal, *The Private Life of Education*, 75 STAN. L. REV. 1315, 1318–19 (2023). Gamal describes these records as "assum[ing] an aura of truth, becoming the near-uncontestable facts of the matter." *Id.* at 1318.

382. *Id.*

383. O'Leary, *supra* note 11, at 1932 (revealing how supervision agents engage in the project of bolstering the idea of "the criminal legal system as just, criminal punishment as socially beneficial, and criminal defendants as moral failures").

384. Deborah Johnson, *Connections Among Poverty, Incarceration, and Inequality*, INST. FOR RSCH. ON POVERTY, UNIV. OF WISCONSIN-MADISON (May 2020), <https://www.irp.wisc.edu/resource/connections-among-poverty-incarceration-and-inequality> [https://perma.cc/GT2V-4Y5Q].

E. Circumventing the Judicial Role

Lastly, we turn to how probation circumvents the judicial role. Probation from its inception has the purpose of aiding the court. How then can an actor whose purpose is to aid the court in decision-making and to oversee any rehabilitative sentence circumvent that judicial role? Probation circumvents the judicial role in several respects, some visible and some that are less obvious.

For one, like prosecution diversion programs, early-stage probation diversion raises concerns of usurping the judicial role of overseeing probable cause determinations. By giving probation the ability to decide whether certain cases should go before the formal criminal process or when would-be-defendants can informally resolve their cases by completing certain requirements, probation becomes the de facto adjudicator.³⁸⁵

Probation's functions also usurp the judicial role in the enforcement of probation conditions. A reform effort to standardize probation supervision practices has led jurisdictions to implement graduated sanctions policies where probation can mete out intermediate sanctions short of a formal violation.³⁸⁶ As part of its intermediate sanctions, probation may also impose short terms of incarceration, known as flash incarceration.³⁸⁷ In Wisconsin, probation officers can impose lengthy holds—up to twenty-one business days—without any judicial approval.³⁸⁸ In one jurisdiction, a court-imposed probation condition even authorized the probation officer to arrest a defendant if he failed to successfully complete a program, though that condition was

385. William Helmer, *Judicial Control of Prosecutorial Discretion in Pretrial Diversion Programs*, 31 BUFF. L. REV. 909, 912 (1982).

386. PEW CHARITABLE TRS., ISSUE BRIEF: FIVE EVIDENCE-BASED POLICIES CAN IMPROVE COMMUNITY SUPERVISION 7 (2022).

387. CAL. PENAL CODE § 1203.35 (2025); Emily Widra, *One Size Fits None: How 'Standard Conditions' of Probation Set People Up to Fail*, PRISON POL'Y INITIATIVE (Oct. 2024), https://www.prisonpolicy.org/reports/probation_conditions.html [https://perma.cc/8TYU-NER5].

388. JARRED WILLIAMS ET AL., COLUM. UNIV. JUST. LAB, THE WISCONSIN COMMUNITY CORRECTIONS STORY 12 (2019) (“Without revoking someone’s supervision, and sometimes without any intent to revoke, Division of Community Corrections agents can incarcerate someone on a hold. These holds do not require judicial review or approval, and can extend for up to 21 business days (not including weekends or holidays) without initiating a revocation process. This period can be extended with the approval of an administrator.”).

later deemed unconstitutional because it improperly delegated judicial authority.³⁸⁹

This ability to incarcerate expands probation's authority to impose actual punishment, including more conditions, without court oversight. Even if a probation entity has not adopted graduated sanctions as a formal policy, probation officers can try to incentivize future compliance with conditions when meeting with defendants.³⁹⁰ Similar discretion is allowed in other procedural points, such as pretrial release or in a diversion program.

Doherty has described probation as a "hidden and unaccountable lawmaker."³⁹¹ Probation's informal handling of non-compliance with court orders perhaps may be preferable because officers can administer less severe punishments and leave less of a paper trail. Still, probation is permitted to act as hidden and unaccountable judges.

Probation also destabilizes or deformalizes the judicial role in less obvious ways. Probation reports, ranging from bail, pretrial, specialty court, presentence, and revocation reports, often recount the offense verbatim or include the police report's account of the offense.³⁹² Police reports are typically not allowed to be wholesale admitted into evidence because they contain hearsay statements, opinions, and other conclusions that are prohibited under evidentiary rules.³⁹³ In addition, the facts in the police report need not be what the parties stipulated to as part of a plea agreement, or the facts as revealed at trial.³⁹⁴ By inserting a narrative of facts in a report advising the court, probation engages in a type of factfinding. Even if these facts do not ultimately have direct sentencing consequences for the

389. *People v. Emrick*, No. A172010, 2026 WL 114225, at *1, *4 (Cal. Ct. App. Apr. 24, 2026).

390. See Sydney N. Ingel et al., *Juvenile Probation Officers' Perceptions of Sanctions and Incentives as Compliance Strategies*, J. APPLIED JUV. JUST. SERVS., Oct. 2022, at 27, 28 (discussing tactics used to increase juvenile compliance with probation conditions); *Chapter 2: Answering Truthfully Probation Officer's Questions (Probation and Supervised Release Questions)*, *supra* note 249.

391. Doherty, *supra* note 4, at 346.

392. *Timothy v. State*, No. 90379 (Tenn. Crim. App. Mar. 14, 2019); *Johnson v. State*, 994 A.2d 744 (Del. 2010) (unpublished table decision); *Forthoffer v. State*, No. A-13483, 2022 WL 2339864, at *2 (Alaska Ct. App. June 29, 2022); *State v. Collins*, No. 2021-L-109, 2022 WL 16737702, at *7 (Ohio Ct. App. Nov. 7, 2022).

393. See, e.g., *Pickett v. State*, 179 S.E.2d 303 (Ga. Ct. App. 1970); FED. R. EVID. 803(8)(B), (C).

394. CAL. R. CT. 4.415 (stating that presentence report must include sources for facts and circumstances of crime and can include collateral information including defense and prosecution statements subsequent to police reports).

defendant, they become historical facts of criminal wrongdoing that follow the defendant to prison and in any future cases, and become the bases for judicial decision-making.

In creating these reports, probation also sets the terms of engagement between the prosecution and defense. Probation officers do not merely present information to the court through these reports; they opine not only on the type of punishment (probation or incarceration) but the length of that probationary or incarceratory sentence.³⁹⁵ Whether or not the court ultimately adopts these recommendations, probation's recommendations become the position the parties argue against or for. The same concern extends to other decisions made by the courts in matters ranging from pretrial release, adult court prosecution suitability for juveniles, and probation revocation.

Finally, probation's influential role in the criminal legal process blurs and broadens the line between guilt and innocence.³⁹⁶ Today, the vast majority of criminal cases resolve in pleas or through "off-ramps" like diversion or specialty court.³⁹⁷ These options place people under surveillance and monitoring even as their cases resolve short of the full adjudication of guilt contemplated by their original charges.³⁹⁸ This reality makes the presumption of innocence cede into the background as defendant's risk, dangerousness, and needs are foregrounded.

Probation, as the bridge between punishment and rehabilitation in the criminal legal system, is the paradigmatic expression of penal governance. As sociologist Loïc Wacquant observed, the precipitous downsizing of the welfare state and the corresponding growth of the penal state in the period between 1975 and 1990 pointed to a new age of the penalization of poverty.³⁹⁹

395. U.S. PROB. & PRETRIAL SERVS., *supra* note 126; Curtis Campbell et al., *The Influence of Probation Recommendations on Sentencing Decisions and Their Predictive Accuracy*, 54 FED. PROB. J. 13, 14 (1990).

396. *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

397. Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Report Finds*, NPR (Feb. 22, 2023, at 5:00 AM), <https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice> [<https://perma.cc/3EDV-FZK3>]; *Diversion in the Juvenile Justice System*, *supra* note 183.

398. THEA JOHNSON, CRIM. JUST. SECTION, A.B.A., PLEA BARGAIN TASK FORCE REPORT 6 (2023); Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 48 (2017).

399. WACQUANT, *supra* note 12, at 14, 52, 79.

Because the welfare and penal systems are two “modalities of state policy toward the poor, . . . they must imperatively be analysed—and reformed—together.”⁴⁰⁰ Probation and other forms of community supervision have certainly been identified as inhabiting both modalities.⁴⁰¹ Probation “represents the largest form of penal control and a critical intersection between criminal justice and welfare.”⁴⁰² Though this observation has been made with respect to probation’s community supervision role, it applies to probation’s responsibilities system-wide.

Probation is the actor within the system that is tasked with assessing risk, suitability for release or detention, appropriateness for prosecution or diversion, and amenability to rehabilitation. An unhoused person with untreated mental illness charged with petty theft or disorderly conduct may be seen as better served by being detained pretrial, sent to mental health court, or sentenced to a short stint in jail. Probation’s perceived expertise in these areas and its responsibility to connect defendants with social services may confirm decisions by other stakeholders that criminal court involvement is preferable, from arrest decisions by police, charging decisions by prosecutors, strategic decisions and client counseling by defense counsel, and determinations by judges.

This is particularly true when the criminal legal system is one of the main points where the state intervenes to help people. The paucity of services and the difficulties of accessing health care, housing, mental health or substance abuse counseling *outside* the criminal legal system has meant that the criminal legal system is seen as an easier pathway to address any number of individual problems and systemic societal ills. The criminal system becomes a place for accessing services. And where the institution of probation is one of the main repositories for accessing those services and identifying individuals’ needs and risks, the institution itself becomes the preferred mode of social control.

400. Loïc Wacquant, *The Punitive Regulation of Poverty in the Neoliberal Age*, CTR. FOR CRIME & JUST. STUD. (Aug. 1, 2016), <https://www.crimeandjustice.org.uk/publications/cjm/article/punitive-regulation-poverty-neoliberal-age> [<https://perma.cc/822V-PZD4>].

401. GARLAND, *supra* note 12; Edwin M. Lemert, *Visions of Social Control: Probation Considered*, 39 CRIME & DELINQ. 447, 449 (1993); Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL’Y 51, 53 (2013); *see also* SIMON, *supra* note 19; Doherty, *supra* note 4; Weisburd, *supra* note 4; Phelps & Ruhland, *supra* note 4, at 800.

402. Phelps & Ruhland, *supra* note 4, at 800.

The circumvention of the judicial role is not just about usurping the adjudication of guilt or innocence, or some degree of wrongdoing. The judicial role is conceptualized here as the gatekeeper to further criminal involvement. Implementing court orders for treatment, drug programs, and other services seen as part of a rehabilitative regime, probation is positioned as a means to provide services to people who are living in poverty, unhoused, using substances, or have mental disabilities.

Take health care as an example. Access is a major problem in the United States. A person living in poverty with inadequate or no health care who is *not* in the criminal or delinquency systems will likely face an uphill battle in getting mental health and drug treatment approved by insurance or finding a program that is affordable.⁴⁰³ In addition to addressing the financial component of treatment, a person with mental health or substance abuse addiction must want treatment and know where to find that treatment. Appropriate treatment programs must also exist. With our social safety net in disarray, the criminal legal system has come to be an inadequate stand-in. Probation as an institutional actor—either through actual probation, pretrial release, diversion, specialty court, or juvenile placement—then presents the criminal legal system with an alternative pathway that bypasses these systemic difficulties, from finding treatment, payment, and in theory, ensuring compliance with treatment.

Thus, the institution of probation plays a major role in case processing and managing people in a system that operates on perceptions of need and risk as much as questions of guilt and innocence.⁴⁰⁴ Alexandra Natapoff has called the misdemeanor process a massive system that punishes innocent people.⁴⁰⁵ Though probation is not the ultimate arbiter of punishment decisions, probation's actions across the criminal process enable the slippery slope of criminalizing people based upon need rather than for their criminal actions.

Probation as an institution, thus, has a reach that is both broad and deep and not rule-bound in the same way as police, prosecutors, courts, and defense counsel. Its multirole character

403. Ramin Mojtabai, *U.S. Health Care Reform and Enduring Barriers to Mental Health Care Among Low-Income Adults With Psychological Distress*, 72 PSYCHIATRIC SERVS. 338, 338–39 (2021).

404. Natapoff, *supra* note 10.

405. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1319 (2012).

also allows it to operate fluidly in terms of information gathering, investigation, charging, and even sanctioning.⁴⁰⁶ Its less regulated manner of gathering, compiling, and presenting information allows other actors to rely on probation's functions and circumvent the rules they themselves have to follow.⁴⁰⁷ The person affected by this destabilization and deformalization is the person charged, convicted, and sentenced—the defendant.

CONCLUSION

Probation's destabilizing effect on the criminal legal system is just one critique of the institution of probation. An obvious next question arising from the critiques presented so far is—so what? Does this mean that we get rid of probation? And if so, will that mean that a vital tool of decreasing our reliance on incarceration will be taken away? Does the continued existence of probation as a sentence require the continued existence of probation as an institution? Though further exploration is beyond the task of this Article, this conclusion sketches out potential responses and future lines of scholarly and advocacy inquiries.

One future avenue of exploration is the matter of probation's many roles. That probation as an institution is responsible for various functions, and that the individual probation officer has many roles is understood and accepted as inevitable. In his study of Progressive Era reforms, historian David Rothman noted that reformers viewed probation's multiple tasks as investigator and supervisor uncritically and saw no need to protect defendants from the well-intended probation officer.⁴⁰⁸ Today, probation has taken on even more tasks, and its portfolio of responsibilities has expanded.

This acceptance of probation's many roles is all the more striking when we consider the attention paid to the many roles of police and ensuing debates.⁴⁰⁹ We expect too much of police, and police are not well equipped or trained to fulfill these various

406. *Presentence Investigations*, *supra* note 75; Campbell et al., *supra* note 395, at 14; ROTH ET AL., *supra* note 312, at 4.

407. Carman & Harutunian, *supra* note 356, at 5–6.

408. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (2nd ed. 2002).

409. Friedman, *supra* note 14, at 931.

roles.⁴¹⁰ Probation has not attracted the same kind of criticism or scrutiny for the same even though arguably probation agents do even more than police. This Article calls for us to engage in this scrutiny and ask: Are we asking too much of probation? Have we been layering on duties on an anachronistic institution with duties that are more properly allocated to existing actors?

A possible disaggregation of probation in terms of roles may result in a list such as this: information-gathering and generating, surveillance and monitoring, law enforcement, social worker, treatment provider, jailer, criminologist, and confidant, among others. Once disaggregated, the next set of questions include: Is probation well-suited for that role? Could measures be taken to make probation better suited to carry out that function? Would those measures actually change probation's function so much that it would not make any more sense for probation to retain that responsibility? Should that role actually be taken on by another actor, or is it already redundant of another role? Should that role or function in fact exist?

The same kind of questions could apply to one of probation's primary functions: collecting information for the court, whether it be through a presentence report for sentencing; writing status reports in specialty courts or to aid the court in determining probation violations; overseeing pretrial release; transferring juveniles to adult court; managing restitution; or handling other substantive decisions by the court. But do we need probation to write reports? Could those report-writing obligations be shifted to the public defender's office, particularly for information gathered from the defendant, families, employers, and privileged or sensitive information like health documents, immigration records, and education history?

Probation is also tasked with being a central hub of sorts. As Schiraldi recognizes, probation provides a critical coordinating function. Programs like wraparound services or multisystemic family therapy are clinical innovations that work because a central figure helps families and young people navigate the complicated social service system, including health insurance, government agencies, and legal systems. Probation's central position between criminal system stakeholders, service agencies, the defendant, and community organizations gives it the ability

410. Nicholas Turner, *Society's Problems Call For More Than Police*, VERA (May 18, 2023), <https://www.vera.org/news/societys-problems-call-for-more-than-police> [<https://perma.cc/Q6E2-WNTH>].

to coordinate between parties and act as a central communication hub. Probation has evolved to become the fulcrum or the mediator between the courts and community-based programs and services. Would it be possible to have a non-court entity provide that central function? The answer may lie in having a non-state entity contract with the court and to put in place protocols to ensure both appropriate separation when needed and authority to communicate with all parties.

Such an examination could query whether having probation act as a hub makes sense and whether that role should actually be taken by the advocate that represents defendants: defense counsel. Indeed, in many ways, public defenders do what probation is also tasked to do. Defense counsel regularly presents information about their clients, and a growing number of public defender offices have social workers embedded in their offices doing work that may be seen as a mirror image of probation functions but with the protections of the attorney-client relationship.⁴¹¹ Of course there are structural problems of indigent defense.⁴¹² These misgivings, however, are not unsolvable. Excising probation's role could result in a corresponding transfer of state and local resources to public defender offices. Defense counsel's positionality as an advocate should also not be a deterrent. Defense counsel are officers of the court bound by ethical obligations, including candor to the court.⁴¹³ And where the prosecution's responsibility is to the public and to any complaining witnesses or victims, the defense counsel's job is to properly represent the defendant, including presenting their story. They are also in the best position to humanize defendants in a decidedly dehumanizing system.⁴¹⁴

411. U.S. DEP'T OF JUST., *supra* note 119, at 85. *See also, e.g.*, ANDREEA MATEI ET AL., URB. INST., ASSESSING A SOCIAL WORKER MODEL OF PUBLIC DEFENSE: FINDINGS AND LESSONS LEARNED FROM GENESEE COUNTY, MICHIGAN (2021). One of the key benefits of having the defender's office fulfill this role is that they are a built-in buffer between the client and the law enforcement arm, protecting client privacy and ensuring against the over-emphasis on monitoring and compliance when the process of getting back on one's feet is going to have setbacks.

412. O'Leary, *supra* note 11, at 1988. The problems with indigent defense are also not just about resources but an ideological mindset of certain counsel who may have different views on what is considered sufficient assistance of counsel. Second, defense lawyers are not "neutral" since they represent the defendant.

413. MODEL RULES OF PRO. CONDUCT r. 3.3 (A.B.A. 2026).

414. S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1109 (2022). In her study of the family regulation system, Washington describes domestic violence narratives as "[t]he hegemony of victim hood narratives [that] continues to shape the criminal and legal

The question of institutional oversight is another key question to consider. As the previous explanations reveal, probation operates with a great deal of discretion. Many of probation's discretionary acts are outside the bounds of current legal constraints. What would be the best pathways toward regulating probation? Is it possible to satisfactorily oversee an entity that operates in the interstices and informally? Would fully realizing legal regulatory measures such as the right to counsel, search and seizure protections, and imposing evidentiary requirements fundamentally change probation's job and role?

One potential solution may be to institute greater oversight.⁴¹⁵ But this is again an important reason why an institutional lens is important. Any limit or constraint by the courts on probation based upon its adoption or rejection of probation recommendations may influence individual probation officers' behavior. But it does not, and is not, intended to affect the operations of the institution of probation.

Imposing practice standards on probation may be yet another form of regulation, and one that is directed at the institution as a whole. What would those standards look like? Who would impose them and enforce them?⁴¹⁶ Probation standards as they stand now, from organizations like the American Probation and Parole Association, however, differ substantially from professions like mental health providers or social workers.⁴¹⁷

and family regulation responses to domestic violence, often to the detriment of survivor knowledge.”

415. One might argue that probation is already subject to judicial oversight because its actions are only spurred by court order. Nanda, *supra* note 4, at 701. For instance, recommendations must be adopted by the court to become a binding order. Courts do not have to follow reports and recommendations submitted by probation. Parties can—and do—contest probation's recitation of facts and their recommendations. The court may follow the recommendation of the prosecution or defense.

416. Probation officers could be required to adhere to professional standards and ethics that encompass all the jobs that they are authorized to take on. Those kinds of standards do not currently exist for probation. Some federal probation agency websites have a section titled *What Professional Standards Apply to Us* which states that “officers and officer assistants do a job that presents unique demands and challenges” and lists three standards: background investigations, workplace drug testing, and medical standards. *Probation & Pretrial Info*, U.S. PROB. AND PRETRIAL SERV.: N. DIST. OF OKLA., <https://oknp.uscourts.gov/probation-pretrial-info> [<https://perma.cc/A883-LV9J>].

417. Take social work, the one profession routinely associated with probation work. The National Association of Social Work promulgates numerous guidelines and standards specific to practice and issue areas, like cultural competence, child welfare, substance abuse disorders, and health care settings. *See, e.g., NASW Standards for Social Work Practice in Child Welfare*, NAT'L ASS'N OF SOC.

Implementing institutional oversight can also turn scrutiny toward probation rather than the defendant.⁴¹⁸ A different way would be to build in accountability measures of probation, and not just for the defendant. Currently, the model of diversion, pre-trial release, specialty court, or probation is set up so that the person who bears the responsibility for the failure of the defendant is the defendant. What would a program or probation entity look like if legal mechanisms allowed courts to assess probation and ask whether it is meeting its purported objectives? For instance, courts could ask: Did probation follow through with referrals in a timely manner? Did officers adapt programming specific to an individual's needs, such as in the case of an unhouseed defendant or a defendant requiring disability accommodations? Holding probation accountable for the actions it is supposed to undertake for the purpose of rehabilitation would make the success or failure of a person's program not just about the person but also about measuring the work of the probation agent.

Examining how probation could be better regulated leads to considerations of whether probation in its current form can remain. If probation's actions are brought under the formal legal rules and process, does probation as an institution disappear? Or does it morph into something else? And if probation was to shrink, shift, or be eliminated, would that only further entrench incarceratory alternatives? Does the sentence of probation require the kind of probation institution we have now? Do we need probation as an institution?

Lastly, critically assessing probation as an institution must also include the political economy of probation, meaning the governance, power, distributional effect, and ideology of the institution. How do criminal justice reforms reallocate power to probation? Decarceration efforts offer an example of how reform

WORKERS, <https://www.socialworkers.org/Practice/NASW-Practice-Standards-Guidelines/NASW-Standards-for-Social-Work-Practice-in-Child-Welfare> [https://perma.cc/T9VX-3R2K]. Probation professional organizations and states have adopted codes of ethics that state principles such as being professional and competent, upholding the law, being objective, maintaining decorum in their personal lives, and maintaining separation between their personal and professional lives. Other types of standards similarly pertain to probation's obligation and duty to carry out the functions of probation work. *See, e.g., Code of Conduct for the Field of Community Corrections*, AM. PROB. & PAROLE ASS'N, <https://www.appanet.org/eweb/docs/APPA/Code-of-Ethics.pdf> [https://perma.cc/4QGE-8XL5]; TEX. STATE PROB. COMM'N, STANDARDS FOR ADULT PROBATION SERVS. IN TEX. (1983); CHIEF PROB. OFFICERS OF CAL., PROBATION STANDARDS (1980).

418. *See supra* Section I.C.1.

efforts actually increase probation's influence and power as an institution.⁴¹⁹ In California, the policy of realignment devolved incarceration responsibilities to the counties, arguably to bring imprisoned people closer to their families and as cost-saving move for the state. The reallocation of funds from the state corrections agency to counties, however, went directly to probation budgets as probation became the local authority responsible for implementation of that policy. Further, examining probation from a political economy perspective should also scrutinize reform efforts of probation itself, including conditions of probation that have been criticized as net-widening. How does reforming or limiting probation's authority to supervise probation affect probation as an institution? Pennsylvania's recent probation reform is a good example of this complexity.⁴²⁰ In response to excessively long probation terms, the new law sets term limits on probation.⁴²¹ But these changes also create more intervention points for probation and expand the portfolio of probation's

419. Lawsuits against California's adult and juvenile prisons for poor conditions led to what is known in California as realignment—shifting prison populations down to the local county level. See *Brown v. Plata*, 563 U.S. 493 (2011); Complaint for Injunctive and Declaratory Relief, *Farrell v. Harper*, No. RG 03079344 (Cal. Super. Ct. Alameda Cnty. Jan. 16, 2003). As state funding for these facilities became available to counties, chief probation officers of each county formed a non-profit organization to draw down state funds. Concerns of transparency of the group led to a lawsuit which prompted the disbanding of the group—but only after the group declared that it had met its (unknown) objectives. See Greg Moran, *Secretive Nonprofit Group of County Probation Leaders Decides to Disband*, S.D. UNION-TRIB. (Jul. 3, 2023), <https://www.sandiegouniontribune.com/news/courts/story/2023-07-03/nonprofit-group-county-probation-leaders-disband-youth-justice> [https://perma.cc/V74K-FBC7].

420. Pennsylvania recently drew nationwide attention for its probation practices because of rapper Meek Mills's decade-long ordeal with probation, revocation, and imprisonment. Advocacy by Mills and others culminated in the signing of a probation reform bill by Pennsylvania's governor in December 2023. The bill had wide bipartisan support, including from probation officials. Liz Tung, *After 5-Year Battle, New Pa. Probation Reforms Pushed by Meek Mill Go Into Effect*, WHYY (June 21, 2024, at 1:32 PM), <https://whyy.org/articles/pennsylvania-probation-reforms-act-44-go-into-effect-meek-mill> [https://perma.cc/EV3S-DY8J]; Eric Nixon, *Meek Mill Joins Gov. Shapiro for Signing of Pennsylvania Probation Reform and Clean Slate Legislation*, WHYY (Dec. 15, 2023), <https://whyy.org/articles/meek-mill-governor-josh-shapiro-pennsylvania-probation-reform-bill-signing> [https://perma.cc/2PSG-ZQPH].

421. See 42 PA. CONS. STAT. § 9774. The new law mandates probation reviews and reports in advance of termination. *Id.* These changes limit the ability of probation agents in the sense that they set firm end dates on probationary terms and provide oversight by parties and the court. These court hearings give defendants (and defense counsel) the chance to raise any issues with probation and to request termination when appropriate.

responsibilities by requiring interim and final reviews.⁴²² The narrative of cost-savings, however, camouflages the transfer of influence to probation.⁴²³

Moreover, as increasing scrutiny has been brought to bear on how the criminal legal system profits and partners with private industry, the same kind of scrutiny needs to be extended to probation as an institution.⁴²⁴ How much do private corporations profit from their probation contracts? How does privatization of probation contribute to increasing surveillance and decreasing privacy? Is the convenience offered by these private companies through technological advancements an appropriate trade-off?⁴²⁵ And given the purported purpose of probation to rehabilitate, do these public-private partnerships actually improve upon the quality of services?⁴²⁶

422. See S. APPROPRIATIONS COMM., FISCAL NOTE, S.B. 838, Reg. Sess. 2023–2024 (Pa. 2023), <https://www.legis.state.pa.us/WU01/LI/BI/SFN/2023/0/SB0838P0973.pdf> [https://perma.cc/CN42-T9FT]; H. APPROPRIATIONS COMM., FISCAL NOTE, S.B. 838, Reg. Sess. 2023–2024 (Pa. 2023), <https://www.legis.state.pa.us/WU01/LI/BI/FN/2023/0/SB0838P1113.pdf> [https://perma.cc/D7T2-FDPN].

423. See 42 PA. CONS. STAT. § 9774.1(d). In the new law, probation determines when hearings can be brought, such as the accelerated initial probation review, which must be approved by the supervising probation officer. See *id.* § 9774.1(c)(3).

424. See A.B.A., PRIVATIZATION OF SERVICES IN THE CRIMINAL JUSTICE SYSTEM (2020); HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf [https://perma.cc/3HAB-ZPBH].

425. See, e.g., *Community Supervision/Probation*, CORR. SOFTWARE SOLUTIONS, <https://correctionssoftware.com/community-supervision> [https://perma.cc/UNA6-UT5Y]; PRONTO CASELOAD SOLUTIONS, <https://prontocmssoftware.com> [https://perma.cc/X2GJ-KNZH]; *The Premier Web-Based Probation Manager At No Cost to You!*, JUD. INNOVATIONS, <https://www.judicialinnovation.com/probation-management-software> [https://perma.cc/5N8P-47AL]. The companies offer other features to help probation keep in touch with defendants through text messages and appointment modules and to prepare for court reports with document modules for progress reports and case reviews. As with private probation companies, some of these software companies advertise that they are no-cost to the jurisdiction that uses them, suggesting that their profits come from fees billed to the individual probationer or defendant. Ali Rogin, *Why Children and Teens in Residential Treatment Centers Are Vulnerable to Abuse*, PBS NEWS (Jul. 13, 2024, at 5:30 PM), <https://www.pbs.org/newshour/show/why-children-and-teens-in-residential-treatment-centers-are-vulnerable-to-abuse> [https://perma.cc/A6R3-F7VZ].

426. One potential concern with these public-private partnerships is the quality of services. Probation has used the private sector for treatment and rehabilitation services, and problems with these private companies have come to light, particularly for long-term residential placements where reports of abuse have surfaced in the media. Rogin, *supra* note 425.

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Probation touches defendants at every stage of the criminal process, giving it substantial opportunity to affect the decisions of courts, prosecutors, defense attorneys, and ultimately, the outcomes of criminal cases and the lives of criminal defendants. Even as each input by probation increases its power and influence, far fewer constraints are placed on probation than any other criminal justice actor.

This Article calls for the scholarly community, policymakers, and advocates to pay attention to probation's institutional power. The costs of inadequate attention have led to probation's growth and adaptation to penal trends, contributing to the growth of the penal apparatus, the erosion of the rule of law, and the increasing imbalance of power between the state and individual citizens. Until probation is recognized as the powerful, boundary spanning institution it is, efforts to reform the criminal legal system will remain incomplete.