

Handbook on Punishment Decisions Locations of Disparity

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HANDBOOK ON PUNISHMENT DECISIONS

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MASS PROBATION AND INEQUALITY

Race, Class, and Gender Disparities in Supervision and Revocation

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Introduction

In recent years, there has been growing concern with the tremendously high imprisonment rate in the U.S. and disparities by class, race, and gender in who gets locked up. As Western (2006) documents, the effects of the prison boom were concentrated among young black men without a high school diploma, for whom imprisonment became a routine experience by the 2000s (27). Yet at the same time as imprisonment rates expanded, probation—or supervision in the community in lieu of imprisonment—remained the predominant mode of criminal justice supervision. As I argue elsewhere, this expansion of *mass probation* is a critical and deeply understudied dimension of the penal state (Phelps, 2017). At its peak in 2007, there were nearly 4.3 million Americans under probation supervision, compared to the 1.6 million in state and federal prisons (Kaeble et al., 2015). Yet we know little about how this expansion varied across demographic groups. This chapter evaluates race, class, and gender differences in the experience of probation supervision to build a more complete picture of disparities in the criminal justice system.

Probation is a contested institution. Originally designed and promoted as an “alternative” to imprisonment that would spare promising individuals from the ravages of institutionalization, it has often instead served as a “net-widener” that expands formal supervision for low-level cases (Aebi, Delgrande, and Marguet, 2015; Blomberg, 2003; Morris and Tonry, 1990; Phelps, 2013; Rothman, 2002). In addition, though frequently dismissed as a “slap on the wrist,” probation can entail fairly onerous supervision requirements, including frequent reporting and drug testing, expensive fines and fees, and tedious rules and regulations. Probationers frequently fail to meet the multitude of conditions, which can lead to revocation to jail or prison. For these individuals, probation represents a *delayed* path to prison rather than a true diversion or alternative (Klinge, 2013). Phelps (2013) tests these two competing visions of

probation (alternative or net-widener) at the state level and finds that probation plays both roles to varying degrees, depending in part on the state's sentencing and supervision practices.

In this chapter, I develop an account of probation as both penal alternative and net-widener at the individual level of analysis, structured by the relative social advantage of probationers. We know from sentencing research that markers of social privilege correlate with more lenient sentences in general, including diversion to probation (see e.g. Kim et al., 2015; Kutateladze et al., 2014; Wooldredge et al., 2015). In addition, researchers have found that adults with more privilege have an easier time completing supervision requirements like reporting at appointments on time, interacting deferentially with their probation officer, and paying fines and fees (Albonetti and Hepburn, 1997; Jannetta et al., 2014; Doherty, 2016). This suggests that probation may more effectively serve as a prison alternative for relatively advantaged probationers, who are more likely to be diverted and complete successfully, whereas for the less advantaged adults it functions more commonly as a net-widener and stepping-stone to further criminal justice control.

To bolster this perspective on probation, I provide the first national demographic portrait of probationers—both in the community and failed probationers incarcerated in the nation's jails and prisons during the peak of the carceral build-up (mid-2000s). As described below, the lack of such basic information about probationers (e.g. prevalence rates by gender, race, and age) is due in large part to scholarly neglect of probation and the limitations of the national data collection efforts on probation (Phelps, 2015). To maneuver around these limitations, I estimate probationer demographics using a national household survey—the Substance Abuse and Mental Health Services Administration's National Survey on Drug Use and Health. I then compare these characteristics to those of inmates in jail or prison who were on probation at the time of arrest using the Bureau of Justice Statistics' Survey of Inmates in Local Jails and Survey of Inmates in State and Federal Correctional Facilities. I also analyze the reasons for probationers' incarceration, evaluating in particular whether they are incarcerated for new crimes or violations of the terms of supervision ("technical" violations).

The results show that while probationers are skewed relative to the U.S. resident adult population along the expected lines of privilege/disadvantage (more likely to be male, non-white, and non-college educated), these disparities are substantially less pronounced than those for prisoners. Thus, compared to prisoners, probationers are more similar to the general population and, accordingly, are more likely to come from higher socioeconomic backgrounds. Yet failed probationers, incarcerated in jail and prison, are nearly indistinguishable from other prisoners. Further, roughly one quarter of these adults are incarcerated for probation violations that do not involve a new arrest (e.g. failure to report, drug use, and non-payment of fines/fees). This pattern of results suggests that probation plays a crucial role in stratifying outcomes in the criminal justice system, providing an off-ramp for some and a conveyor belt toward prison for others. In the conclusion, I sketch out a vision for the sociology of mass probation and highlight the importance of considering privilege alongside disadvantage in explaining criminal justice outcomes.

Literature Review

Mass Incarceration and Inequality

Western's *Punishment and Inequality in America* (2006) stands as the central account of how imprisonment shapes U.S. social stratification patterns. While the overall individual risk of imprisonment for adults remains relatively low (less than 1% in the early 2000s), he argues that the criminal justice system plays a key role in shaping inequality because it is heavily concentrated among the most disadvantaged. In particular, the (direct) effects of the prison boom were largely concentrated among young (aged 20–40 years) black men without a high school diploma, over 30% of whom were in jail or prison on any given day in 2000 (17). By age 34, nearly 60% of black high school dropouts who came of age during the prison boom (born 1965 to 1969) had experienced incarceration, compared to 5% of black men who had attended college and 11% of white high school dropouts (27). Further, the experience of incarceration exacerbates existing social inequalities for these adults post-release (Western, 2006), including deteriorated labor market outcomes, health, family stability, and educational attainment (for a review, see Wakefield and Uggen, 2010).

More recent work has begun to explore the “edge of stigma,” exploring how more common low-level contacts with the criminal justice system influence inequality (Uggen et al., 2014). Many more than the estimated 13% of U.S. adult males that have been convicted of a felony (Shannon et al., f.c.) have been stopped by police and, in some cases, convicted of misdemeanor and other low-level offenses (Kohler-Hausmann, 2013; Natapoff, 2011). Criminal justice involvement for these individuals can stretch on for years, often prolonged by the burdens of excessive fines and fees imposed by the court (Harris, 2016). These processes have transformed life in economically marginalized inner-city communities, with residents becoming “cop-wise” (Stuart, 2016; see also Goffman, 2014) “custodial citizens” whose relationship with the state is dominated by criminal justice interactions (Lerman and Weaver, 2014). While probation is often lurking in the background of these studies (serving as the most common form of supervision), research on the direct effects of probation has been sparse, as described below.

The Rise of Mass Probation

Probation in the U.S. initially expanded during the Progressive Era, becoming the “exemplary penal form” of the penal-welfarist model that became dominant in the 1950s and 1960s (Simon, 2013). The core idea was that “promising” cases could be diverted from institutionalization and guided by a mentor (first a member of the community and later a trained professional) within the community (Rothman, 2002). With the decline of the rehabilitative ideal and the shift toward more punitive criminal justice practices (with the prison as the exemplary penal form), many expected probation rolls to empty (Robinson, McNeill, and Maruna, 2013).

Instead, *mass probation* developed right alongside mass imprisonment (Phelps, 2017). The timing and state-level variation in the expansion of these two forms of supervision

suggests that rather than diverting cases from prison, probation often “widened the net” of social control (Phelps, 2013). The state and federal probation population soared from 1 million in 1980 to a peak of nearly 4.3 million in 2007. In more recent years, probation populations have (modestly) downsized, dropping to just under 3.9 million by 2014. Probation continues to be the predominant form of formal supervision, comprising 56% of those under correctional control (which includes probation, parole, prison, and jail counts) in 2014 (Kaeble et al., 2015). In addition, the U.S. probation rate remains more than five times the average across European countries (Alper et al., 2016).

Feeley and Simon (1992) argue that the expansion of community supervision was part of a broader shift toward the “new penology” model, which framed probation and parole as “cost-effective” risk-management solutions. As a result, community supervision grew increasingly managerial and punitive, with rising revocation rates (or returns to jail and prison) as the primary indicator of this new “toughness” (Simon, 1993; Caplow and Simon, 1999; Petersilia, 2002). Former Probation Commissioner Ronald Corbett (2015) describes this as “the burdens of leniency,” noting that the average probationer now faces between 10 and 20 conditions of supervision, including regular reporting, paying fines and fees, abstaining from drugs and alcohol, avoiding criminal “associates,” finding and maintaining employment, and more. This laundry list of conditions requires probationers to “obey all laws and be good,” a standard vague enough that probation officers have tremendous discretion over charging supervision violations (Doherty, 2016). In addition, most probationers receive little in the way of treatment, services, or assistance programs that would help them address their (often many) challenges, including addiction, spotty work histories, histories of trauma and abuse, and unstable family and living arrangements (Taxman, 2012).

As a result, many probationers fail to meet the demands of supervision, ending up in jail or prison as a result (Klinge, 2013). Critics thus charge that not only does probation contribute to “front-end net-widening” through the failures of diversion, but it also produces “back-end net-widening” by incarcerating probation violators (Tonry and Lynch, 1996). Probationers are penalized in three ways: they are subject to revocation for behaviors that would not be criminal were they not on supervision (i.e. breaking curfew or drinking alcohol), they face increased risk of incarceration for new crimes (due to greater surveillance and the relative ease of incarceration through the probation revocation process as compared to prosecuting new convictions), and they can be hit with more severe sentences if charged with a new crime because their probation status increases their criminal history score and/or serves as an aggravating factor (Doherty, 2016; Petersilia, 2002; Kingsnorth et al., 2002; Klinge, 2013). As a result of these various pathways, the lines between incarceration for new crimes and technical violations can be very blurry.

In addition to the burdens of supervision, probationers are “marked” with a conviction record and thus face many of the same negative consequences ascribed to imprisonment, including barriers to employment, democratic participation, housing, and public assistance, that likely hinder integration and success (Chiricos et al., 2007; Jacobs, 2015; Pager, 2007). In 2014, 56% of probationers bore the stigma of felony-level

offense. We are also learning how misdemeanor offenses—for which 42% of probationers were under supervision in 2014 (Kaeble, Maruschak, and Bonczar, 2015)²—negatively impact individuals’ life trajectories through disruption, explicit bans on employment and assistance opportunities, and discrimination by employers and others (Kohler-Hausmann, 2013; Natapoff, 2011).

Not surprisingly, research on supervisees suggests that probation is often viewed as a punitive intervention, even in European contexts where social supports are more robust (Fitzgibbon, Graebisch, and McNeill, 2016). Durnescu (2011) outlines the “pains of probation,” including deprivation of autonomy, private or family life, and time; financial costs; stigmatization effects; forced rumination over one’s crime; and the looming threat of revocation. As a result, surveys of criminal justice populations find that U.S. adults often prefer a shorter prison term over a longer period of probation (Crouch, 1993; May, Wood, and Eades, 2008).³ In a surprising moment of transparency, a local probation director in Texas recently told reporters that if he were faced with the choice between probation and prison, he would pick prison (Lieber, 2016).

In recent years, states have tried to rein in probation revocations to reduce prison populations, through changing revocation policies and improving supervision according to “evidence-based practices” (Phelps, 2013). These reforms include tailored supervision plans based on risk-needs assessments, concentrating resources on “high-risk” cases (and reducing burdens for “low-risk” cases), alleviating the barriers to employment, implementing graduated sanctions for violations, and shifting the fiscal and administrative burden of revocations to local counties (instead of the state) to incentivize counties to reduce revocations (Taxman, 2012; Klingele, 2013; Vera Institute of Justice, 2013). At the same time, success rates have slowly crept up, with the percentage of exiting probationers successfully completing probation hovering around 65% (and sometimes slightly higher) between 2008 and 2014 (Kaeble, Maruschak, and Bonczar, 2015), compared to a low of just under 60% from 2003 to 2006 (Glaze and Bonczar, 2006, 2009).

Mass Probation and Inequality

As suggested by the term *mass probation*, probation supervision is socially concentrated among economically disadvantaged men of color. At its peak in 2007, an estimated 1 in every 21 black adults (and 1 in 12 black men) was under probation supervision nationally, compared to 1 in 53 adults, 1 in 65 white adults, and 1 in 41 white men (Phelps, 2017). Using data from a household survey, Lerman and Weaver (2014) find that fully 46% of young (24 to 32 years old) black men without a high school degree report having been on probation at some point in the past.

It is less clear, however, if and how probation affects individuals and, more broadly, patterns of inequality. This ambiguity is driven both by neglect in the literature and by the complex role of probation as a penal sanction or *alternative*. In other words, what is the comparison case for probationers? If supervision is simply a treatment-oriented intervention whereby all eligible adults are diverted from prison and connected to social services, then we might expect it to have inequality-ameliorating consequences

(as compared to these cases going to prison). In contrast, to the extent that probation widens the “net” of control (diverting low-level cases *up* from no supervision to formal control) and makes success more difficult, we would expect probation to exacerbate patterns of inequality. In addition, in the absence of record sealing and expungement programs, probation automatically comes with a stigmatizing criminal record that can thwart life goals regardless of the quality or orientation of supervision.

High-quality research evaluating these competing visions of probation is limited. The studies that do exist often focus on the effect of imprisonment, using probation as a counter-factual. These studies allow us to compare probation to imprisonment, but not to consider probation versus no formal supervision. The first wave of this research used regression model techniques to compare adults sentenced to prison versus probation and other alternative sanctions, often finding that incarceration had a negative impact on individuals’ trajectories (for reviews, see Bushway et al., 2007; Nagin, Cullen, and Jonson, 2009; Loeffler, 2013). However, this research was critiqued as insufficiently controlling for selection into prison, pushing scholars toward quasi-experimental approaches (Apel and Sweeten, 2010).

In perhaps the most exacting published study to date, Loeffler (2013) uses variation in judicial severity to estimate the effect of imprisonment (compared to probation) on later re-arrest⁴ and employment rates among felons in Cook County (Chicago). The point estimates suggest that prisoners face somewhat worse outcomes on some dimensions, but these differences are not statistically significant (arguably due to insufficient statistical power).⁵ Loeffler attributes the null findings to selection (and the changing social context of increased criminal justice contact), arguing that many of the negative consequences ascribed to imprisonment are simply due to the pre-existing challenges faced by those who are imprisoned.

We might also interpret this evidence to support the hypothesis that conviction with probation is (nearly) as damaging to individuals as imprisonment.⁶ Or perhaps the mixed results are a product of the heterogeneity in the experience of supervision for both probationers and prisoners. While some programs may do a better job at assisting probationers in building successful lives, others may be more focused on punitive surveillance and catching violations. As Bushway (2011) argues, “the nature of the treatment (type of program, length of program, etc.) seems fundamentally more important than the program venue (community or prison)” (331).⁷ It is also likely that the effects of supervision are heterogeneous across the population of probationers, as calls to tailor supervision practices to individuals’ needs and social context highlight (Taxman, 2012).

Stratified Outcomes: Mass Probation Across Privilege/Disadvantage

I hypothesize that probation serves multiple roles in the criminal justice system, stratified by the relative social privilege of probationers. Although the majority of adults involved in the courts and under penal control have lower income and education levels than the average American (Brennan Center for Justice, 2010), there is still relative socioeconomic gradation as well as variation across gender, age, location, and other

axes of inequality. For relatively advantaged adults, probation may be more likely to function as a true diversion whereby individuals are shunted away from prison and able to complete probation successfully. For relatively disadvantaged probationers, supervision may more often serve as a “piling on” of sanctions that ultimately ends with imprisonment. Thus, just as research has shown that the role of probation as a diversion or net-widener varies by state policy choices (Phelps, 2013), so too may the interpretation (and likely effects) of probation supervision vary across individuals.

Existing research findings on both sentencing and revocation patterns support this hypothesis. First, a massive (and growing) literature on sentencing disparities outlines the direct and indirect effects of “extralegal” individual characteristics (particularly race, age, gender, and socioeconomic status) as well as their interaction with the “legal” characteristics (including prior record) that affect sentencing severity (for a handful of recent exemplars, see Kim et al., 2015; Kutateladze et al., 2014; Wooldredge et al., 2015; for a qualitative analysis of these dynamics, see Van Cleve, 2016). These studies examine various sites in the sentencing process, from the setting of bail and pre-trial detention, to a guilty plea versus a trial finding guilt, to whether to incarcerate or not, and the sentence length (Baumer, 2013). As Spohn (2015) notes in a recent review essay, research on sentencing disparities has moved away from a simple descriptive account of disparities and, later, regression models that tried to estimate the direct causal effect of status characteristics in sentencing decisions, toward more complex accounts of how the direct and indirect effects of race (and other factors) compound through each stage of the criminal justice system, creating a cumulative disadvantage cascade that is particularly disastrous for young black men.

In addition, research shows that probation revocation is more likely for relatively disadvantaged probationers. Studies of jurisdictions across the country have found that probation revocation is associated with the same characteristics correlated with sentencing outcomes (Albonetti and Hepburn, 1997; Cuniff and Shilton, 1991; Gray et al., 2001; Rodriguez and Webb, 2007; Stevens–Martin et al., 2014). Consistent with disparities in other places in the criminal justice system, women, older adults, those with stable employment, and (in some findings) white adults are the most likely to complete probation successfully. The Urban Institute (Jannetta et al., 2014) recently found that black and Hispanic probationers faced substantially higher revocation rates in the four jurisdictions studied, which were only partially explained by factors like risk assessment scores and probation violation charges. As Albonetti and Hepburn (1997) argue, these characteristics often are mutually constitutive: “social disadvantage may condition the effects of other offender characteristics (such as age, race, and gender), incident offense characteristics, and treatment conditions on probation failure” (126).

Doherty (2016) and Corbett (2015) illustrate several possible mechanisms for the relationship between privilege/disadvantage and revocation, the most obvious of which is that poor people face unique challenges in meeting the requirements of supervision, which include maintaining employment, meeting regularly with the probation officer, and paying fines and fees. Failure to meet these obligations—including financial penalties—can lead to imprisonment, creating a loophole for legal prohibitions against “debtor’s

prisons” (Harris, 2016). Relatively poorer probationers and racial minorities are also more likely to be rated as “high risk” on actuarial risk assessment instruments and therefore may face greater supervision burdens. Lastly, relatively more disadvantaged probationers may lack the social capital to negotiate with their probation officer and face implicit to explicit discrimination in the officer’s supervision style and use of discretion.

A final mechanism through which disadvantage affects revocation is through the likelihood of committing new crimes. Just as differences in criminal offending rates are *partially* responsible for the disparities in incarceration rates (Tonry and Melewski, 2008), so too do crime patterns shape probation admission and revocation. Rather than seeing this as a confounding variable, however, I construe criminal offenses as part of the constellation of behaviors that reflect and shape individuals’ social context (Simons et al., 2014), in part because neighborhood conditions play a crucial role in raising or lowering overall crime prevalence and the risk of arrest. Thus, we should be wary of framing incarceration for new convictions (or revocations based on a new arrest) as a “justifiable” result of probationer’s misbehavior that is entirely distinct from other kinds of violations.

Data and Methods

The core data collection on probation is the Bureau of Justice Statistics’ (hereafter BJS) Annual Probation Survey, which sends questionnaires to local and state agencies identified by the BJS as adult probation agencies. In addition to asking for probationer totals, the survey contains questions about the basic demographic characteristics of agencies’ probationer populations (including gender and race/ethnicity, but not socioeconomic markers or age).⁸ Due to reporting challenges, even these minimal descriptive characteristics of probationers are unavailable for many jurisdictions (Phelps, 2015). In addition, the BJS surveys miss a non-trivial number of supervising agencies (Tubman-Carbone and Glaze, 2013), particularly local programs for misdemeanor supervision, which provide the majority of probation services for misdemeanants in a small number of states (Phelps, 2017).⁹ These data omissions skew both overall rate and demographic composition estimates.

Due to these limitations, I use the Substance Abuse and Mental Health Services Administration’s National Survey on Drug Use and Health (hereafter NSDUH), an annual household survey sent to a nationally representative stratified sample of non-institutionalized U.S. residents.¹⁰ In the most recent iteration (2014), the sample size was 67,000 respondents with a weighted interview response rate of 71%. The NSDUH includes a single question about probation, asking respondents to report if they were on probation at any time in the past 12 months. The NSDUH also has a wealth of demographic questions, including race/ethnicity, gender, age, and level of education.

Relying on the NSDUH, I estimate the demographic composition of adults in the community who report having been on probation in the past year during the mid- to late-2000s. I include the following characteristics: race/ethnicity (percent non-Hispanic black, percent Hispanic, percent non-Hispanic white), percent male, age (percent aged

18–29 years), and educational composition (percent high school graduate, percent with some college, percent with college degree) as a proxy measure for socioeconomic status. All NSDUH respondents under 18 years of age are excluded to limit the analyses to U.S. adults. In addition to demographic composition estimates, I provide probation prevalence rates for key demographic groups, comparing these to the estimates of imprisonment rates produced by Western (2006).

Next, I estimate the demographic characteristics of adults behind bars in jail and prison who were on probation at the time of arrest (i.e. failed probationers). For these calculations, I rely on the BJS Survey of Inmates in Local Jails (hereafter SILJ) and Survey of Inmates in State and Federal Correctional Facilities (SISFCF).¹¹ These surveys include nationally representative stratified random samples of inmates in jails and prisons, respectively. The sample size for the 2002 SILJ was 6,982 inmates, with a response rate of 84%. For the 2004 SISFCF, the statistics are 14,499 and 89% for state inmates and 3,686 and 85% for federal inmates. The SILJ and SISFCF include questions about all of the key demographic characteristics listed above. Inmates are also asked whether they were on probation (and/or parole and other forms of supervision) at the time they were arrested for the charges that led to their current spell of incarceration. In addition, inmates are asked about whether they were charged with and convicted of a new offense and/or had their probation revoked for supervision violations, which are used to categorize the reasons for incarceration. I distinguish between new arrests, convictions, and revocations for new crime; revocations for all other supervision violations (e.g. failure to report, drug use, and unpaid fines and fees); and other reasons for incarceration.

The spatial and temporal scope of study is constrained by the combined limitations of the datasets. None of the series are designed to provide state-level estimates, limiting these analyses to the national level.¹² Due to changes in the survey design, NSDUH data from before 2002 are not comparable to the later years.¹³ To produce stable estimates for the key demographic characteristics of adult probationers in the community, it was necessary to aggregate across years.¹⁴ I combine data from the 2002, 2003, 2004, 2005, and 2006 NSDUH surveys to roughly correspond with the most recent iterations of the BJS surveys (2002 for the SILJ and 2004 for the SISFCF). For the prevalence rates, I generate estimates for 2002–2006 and 2010–2014 NSDUH surveys to evaluate whether trends have changed significantly in recent years. For all of these estimates, I use take into account the stratified sampling designs and final sample weights.¹⁵ Cases with missing data on the relevant outcomes are dropped in analyses.¹⁶ Due to the survey differences (described below), I only calculate statistical significance tests within (not across) datasets, using Wald mean tests to compare group means.

There are several additional limitations. First, the three surveys measure individuals' self-reported criminal justice status, requiring that community members and inmates be able to report accurately that they were on probation supervision.¹⁷ Second, the probation questions are not identical. The NSDUH asks respondents to report whether they were under probation supervision in the past year, while the BJS collections ask inmates whether they were on probation at the time of the arrest that led to their

current incarceration. On average, probation terms currently last 22 months (Kaeble, Maruschak, and Bonczar, 2015), which suggests that there should be substantial overlap between the population on probation at any given point in time and those who were on probation in the past year.

Third, because the NSDUH is a household survey, it does not include individuals who are homeless, in housing transitions or insecurely housed, or in institutional settings. In addition, since the survey only records the probation status of the primary respondent, it may under-report probation rates among those living in housing arrangements that deviate from the single-family norm (e.g. multiple younger adults in one household). In addition, results may be affected by non-response rates, which are somewhat higher for the NSDUH than for the SILJ and SISFCF. These concerns produce a bias toward under-reporting the most disadvantaged criminal justice-involved populations, most of whom lack stable traditional single-family housing (Western et al., 2016). As a result, some of the estimates for the demographic groups most likely to be insecurely housed may be overly conservative. I return to this concern in the conclusion.

One check on the reliability of the NSDUH data is to compare the estimates of the total probationer population generated from the NSDUH results to the total population reported by agencies to the BJS. As shown in Appendix A, these populations show a rough consistency, although the NSDUH estimates are generally higher than the BJS totals (which is perhaps reflective of the missing misdemeanant probationers in the BJS counts and/or the more expansive question wording of the NSDUH series). Both series also show a decline in the population since 2010, although time trends before this period (2002–2010) are not as consistent. The other comparison we can make is between the race and gender breakdowns reported by agencies to BJS (in 2012) to the NSDUH demographics (for 2010–2014). These estimates show a correspondence for percent non-Hispanic white (54% in BJS and 58% in NSDUH), although the percent identified as non-Hispanic black is much higher in the BJS data (30% vs. 18%) and the percent Hispanic is much lower (13% vs. 19%), perhaps reflecting a hesitation on behalf of probation authorities to categorize supervisees as Hispanic (instead of black or white) and/or an under-reporting of race/ethnicity data in jurisdictions with larger Hispanic populations. The percent female is also lower in the BJS data (24% vs. 30%), which might reflect that the NSDUH data better captures probationers under supervision for lower-level offenses and/or serving shorter terms of supervision. Since both datasets have significant limitations, it is unclear what conclusions to draw from these comparisons. However, the rough correspondence of the two datasets on most dimensions suggests that there is substantial overlap between the administratively reported probation data and the NSDUH survey.

Results

Household Respondents

Among the household resident adult population in the U.S. during the mid-2000s, approximately 2% report having been on probation in the prior year. There are very

large differences between all respondents and those reporting probation experience. As summarized in Table 2.1, compared to the total household population, probationers are significantly more likely to be racial/ethnic minorities (57% vs. 70% non-Hispanic white), male (74% vs. 48%), and young (63% vs. 31% aged 18–34 years). In addition, probationers are educationally disadvantaged, with 68% reporting a high school diploma (compared to 83% in the general population) and only 7% (compared to 26%) reporting a college degree. Thus, like the prison population, the probation population is significantly skewed toward young men of color with low levels of formal education.

Another way to visualize these trends is through prevalence rates, which reflect the percent of respondents in particular demographic groups who report having been on probation in the past year. Figure 2.1 displays prevalence rates among non-institutionalized younger adults (aged 20–34),¹⁸ sorted according to race, gender, and educational attainment (with error bars reflecting the 95% confidence interval). I estimate these rates during two periods: the early to mid-2000s (2002–2006) and the period of recent reforms (2010–2014). The results show that, compared to the differential for incarceration rates, probation experience is more evenly distributed, with surprisingly high rates among relatively privileged groups.

As expected, the rate of probation supervision rate is highest among young black men without a high school diploma, standing at an estimated 19% in the early 2000s and 16% in more recent years. This means that nearly one fifth of non-institutionalized black men aged 20 to 34 without a high school diploma were on probation in an average year during the height of the penal boom. Yet young white men without high school diplomas face a prevalence rate of 12% in both periods. This is a statistically and substantively significant difference from the 16%–19% of similarly situated black men

Table 2.1 Demographic Characteristics of U.S. Adults by Penal Status

	<i>All Household Respondents (2002–2006)</i>	<i>Household Respondents on Probation in Past Year (2002–2006)</i>	<i>All Jail Inmates (2002)</i>	<i>Jail Inmates on Probation at Time of Arrest (2002)</i>	<i>All Prison Inmates (2004)</i>	<i>Prison Inmates on Probation at Time of Arrest (2004)</i>
On probation	2%		33%		23%	
<i>Race/Ethnicity</i>						
NH black	11%	17%	41%	40%	42%	40%
Hispanic	12%	20%	18%	17%	19%	18%
NH white	70%	57%	37%	41%	36%	39%
Male	48%	74%	88%	87%	93%	90%
18–34 years	31%	63%	61%	67%	50%	64%
<i>Education Level</i>						
HS graduate	83%	68%	40%	39%	35%	32%
Some college	51%	30%	15%	15%	15%	13%
College graduate	26%	7%	3%	2%	3%	2%

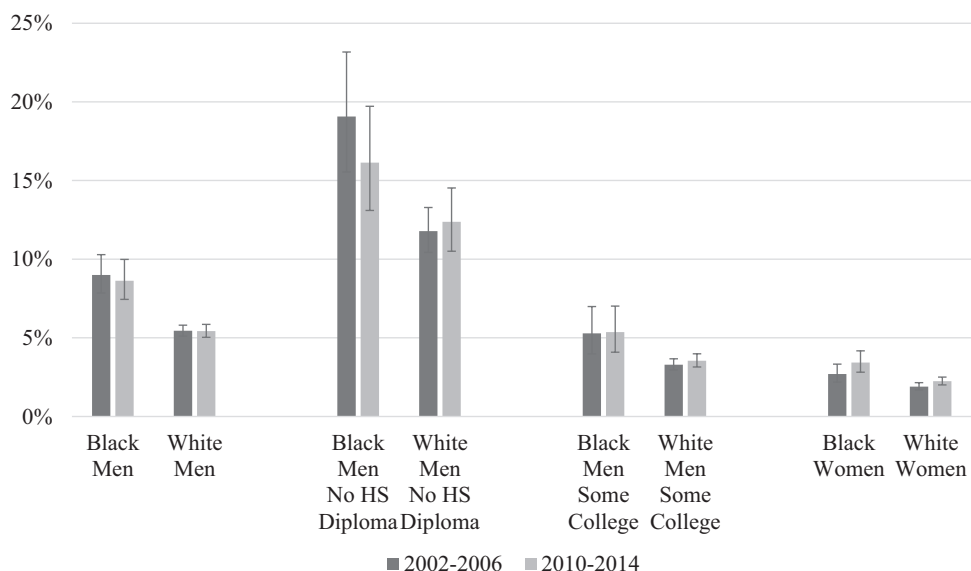


Figure 2.1 NSDUH Prevalence Rates for Probation in Prior Year Among Adults Aged 20–34 Years, 2002–2006 and 2010–2014

under probation supervision, but the disparity (at worst 1.6:1) is far less severe than the 4.8:1 ratio Western (2006: 19) finds for imprisonment rates. Similarly, black young men with some college experience had a prevalence rate of 5% in the two periods, compared to 3%–4% for white college men (a race difference that is statistically significant at $p < .05$ but substantively small). Prevalence rates among women were generally lower, and again we see a small, but statistically significant, difference (3% for black women; 2% for white women).

As documented in Appendix A, both the BJS and NSDUH estimates for the total number of probationers declined between the peak of the probation population in 2007 and 2014. However, this decline is not reflected in the estimates for the demographic group prevalence rates displayed in Figure 2.1 (with the exception of the noticeable, but not statistically significant, decline in rates for young black men without a high school diploma). This is likely due to the relatively small scale of decline (especially in the context of pooled data) and the large standard errors. Thus, these data do not permit us to draw conclusions about changes across the time periods for demographic groups.

Jail and Prison Inmates

Among inmates in jail and prison, many were on probation at the time of their arrest (33% of jail inmates and 23% of prisoners). Returning to Table 2.1, the estimates reveal that prisoners who were on probation at the time of arrest are demographically very similar to other prisoners. For example, the percent identified as non-Hispanic white is estimated as 39% of prisoners who were on probation at the time of arrest, compared

to 36% of all prisoners (or 41% vs. 37% for jail inmates). The percent identified as male is also substantially skewed for all incarcerated adults, reaching 87% among failed probationers in jail (compared to 88% of all jail inmates) and 90% of failed probationers in prison (compared to 93% of all prisoners). The percentage aged 18 to 34 years was much higher among institutionalized populations, reaching a high of 67% of jail inmates on probation at arrest (compared to 61% for all jail inmates, 64% of prison inmates on probation at arrest, and 50% for all prison inmates). We can also see this trend across high school dropout rates, which reach 61% among failed probationers in jail and 68% for failed probationers in prison, compared to 60% and 65% of all jail and prison inmates, respectively.

While some of these differences reach statistical significance, they are generally substantively small (with the exception of age, where failed probationers skew much younger than other prisoners). Thus, except for age profiles, failed probationers in jail and prison demographically overlap with all incarcerated adults. This lack of difference is particularly stark when compared to the sizable differences between the demographics of probationers in the community and the broader household population.

Finally, we turn to the reasons probationers are behind bars. Table 2.2 summarizes the most serious legal status of jail and prison inmates who were on probation at the time of arrest. Collapsing across survey questions on arrests, convictions, and revocation reveals that 25% of failed probationers in jail and 70% of failed probationers in jail have been convicted of a new crime, while an additional 32% of jail inmates and 6% of prison inmates' most serious legal status was being charged with a new crime and/or revoked (or facing revocation) for new arrest(s). This means that 55% of jail inmates (and over 75% of prison inmates) are incarcerated for new arrests and convictions. However, one fifth to more than one quarter (27% of jail inmates and 21% of prisoners) of inmates who entered incarceration while on probation are incarcerated for other kinds of supervision violations (including failure to report, drug use,

Table 2.2 Most Serious Legal Status of Jail and Prison Inmates Who Were on Probation at Time of Arrest

<i>Jail Inmates (2002)</i>	
Convicted of New Crime	25%
Charged with New Crime and/or Revocation for New Arrest	32%
Revoked (or Awaiting Hearing) for Other Supervision Violations	27%
Incarcerated for Other Reasons	16%
<i>State and Federal Prisoners (2004)</i>	
Convicted of New Crime	70%
Revoked for New Arrest	6%
Revoked for Other Supervision Violations	21%
Incarcerated for Other Reasons	3%

Note: Categories sum to 100% because only most serious legal status is represented. Many inmates fit multiple categories (e.g. both a new conviction and revocation). Cases with missing data on all legal status variables (and inmates held for supervision violations without revocation or new offense charges filed) are included in the residual category (Incarcerated for Other Reasons).

and non-payment of fines and fees).¹⁹ The remaining 16% of jail inmates and 3% of prisoners are incarcerated without a new arrest/conviction or revocation (or did not report those data).

For comparison purposes, Appendix B replicates these results for parole, the other predominant form of community supervision. Overall, fewer jail and prison inmates were on parole (as compared to probation) at the time of arrest (12% of jail inmates and 18% of prisoners), reflecting the much smaller scale of parole supervision.²⁰ In terms of the most serious legal status, the results for parole echo those for probation: 64% of failed parolees in jail and 79% of failed parolees in prison were incarcerated for reasons related to a new arrest (including a new criminal charge, conviction, and/or revocation for new arrest). Roughly one fifth of inmates who were on parole at the time of arrest were incarcerated for other kinds of supervision violations (24% of jail and 18% of prison inmates). Another 12% of jail inmates and 3% of prisoners were incarcerated without a new arrest/conviction or revocation (or did not report those data).

Conclusions: Toward a Sociology of Mass Probation

This chapter had a modest goal: to produce descriptive estimates of the probation population in the community and failed probationers behind bars. The results show that disparities in probation supervision rates across race, gender, age, and educational attainment are substantially less pronounced than those for imprisonment rates. Yet when we examine probationers behind bars, they are once again the “usual suspects”—disproportionately young, non-white men with low levels of formal schooling. This supports the hypothesis that probation provides a bifurcated pathway, diverting relatively more privileged defendants toward community supervision (which they can more easily complete) while their less advantaged counterparts are funneled deeper into the criminal justice system.

This bifurcated perspective provides a complex picture of how probation shapes broader inequalities in the criminal justice system. The results suggest that probation supervision contributes to racial disparities in imprisonment, both by diverting more white defendants to probation initially and by revoking black probationers at greater rates. Yet, more broadly, including probation as a measure of punishment reduces racial disparities—revealing that the population under formal supervision is more demographically representative of the U.S. as a whole (as compared to statistics that focus solely on imprisonment). Rather than conceiving of whites in the criminal justice system as simply “collateral damage” (Forman, 2012), the results direct us to ask how and why these multiple forms of control expanded differentially (and to different effects) across demographic groups (for a similar argument at the state level, see Phelps, 2017).

However, one important caveat to these results is that the NSDUH data may systematically under-report the most vulnerable or marginalized populations due to its sampling of the *household* population, as noted above. This means that the demographic portrait of probationers in the community from Table 2.1 may be unduly conservative (i.e. the gap between household residents and probationers should be larger) and

that the prevalence rates in Figure 2.1 may be too low for some groups. However, the rough correspondence between the NSDUH estimates of the probation totals and the BJS figures (Appendix A) and the massive demographic differences between those who were on probation in the past year and all household respondents suggests that this likely under-reporting was not large enough to invalidate the pattern of results. In addition, the bias from under-reporting would have to be quite large to alter the conclusion that the demographics of failed probationers are much more skewed than those for probationers in the community, given the substantial differences observed in the results. Finally, such under-reporting would not affect the conclusion that there are surprisingly high rates of probation supervision among those with more educational privilege (as compared to the likelihood of imprisonment), or the conclusions drawn from the SISFCF and SILJ that a substantial percent of jail and prison inmates are incarcerated simply for technical violations that did not involve new arrests.

Looking forward, these results suggest two different avenues of research. First, the overwhelming focus on the ways in which *disadvantage* shapes the criminal justice system has led to a neglect the effect of social advantage or *privilege*. What would it mean to think about the effect of privilege instead of disadvantage in the criminal justice system? For one, it would point our attention to the social contexts in which sentences err on the side of leniency. These examples may provide a model for what a more humane system of justice might look like in the U.S. Second, it provides a new perspective on supervision regimes, prompting us to ask not just why people fail—but how and why they succeed. Again, such a focus may help us to shift policies in a way that acknowledges the challenges of supervision and reduces the burdens of supervision for less privileged probationers (e.g. by decreasing the number and onerousness of conditions or providing alternative ways of satisfying financial obligations).

Third, the results prompt a series of questions about the individual-level effects of probation. We still have very little reliable evidence on the effects of probation supervision on individuals' employment histories, criminal activity, relationship patterns, and overall health and wellbeing—especially compared to those who receive no post-conviction supervision. Critical to this line of research will be defining the counterfactual: what is probation an *alternative* to (and for which individuals)? In what ways does probation help or harm supervisees—and how much of this effect is due simply to pre-existing inequalities and the effects of a criminal record? These questions will require the kind of focused attention and methodological rigor and diversity that has been applied to the question of the effects of imprisonment.

More broadly, what are the consequences of mass probation for families, neighborhoods, and inequality more broadly? We would expect probation to influence families and communities in ways quite different than imprisonment since probationers are usually supervised while living at home. Rather than “missing men” pulled away from (and cycled back into) the community through mass imprisonment (Pettit, 2012), probation instead draws the formal criminal justice system into the community (Cohen, 1985). Several recent analyses provide hints of what we might find. Rios (2011), for example, shows how juvenile probation officers in Oakland, CA, have become ingrained in schools and community centers, fueling a “youth control complex” that

criminalizes and stigmatizes young men of color. How does this process work for adults and communities more broadly?

In addition, given the broader spread of the demographics of adults under probation supervision, we would expect probation to be an influence in a more diverse array of neighborhoods. How does probation supervision influence family and neighborhood dynamics across these different contexts? In particular, how does probation operate in relatively more advantaged communities with less of a law enforcement presence? These questions suggest that there is much more to learn about community control. A spotlight on the development of mass probation and its effects on individuals, families, and neighborhoods will help us to develop a fuller picture of U.S. exceptionalism in harsh penal policies and their role in shaping social inequality.

Notes

- 1 Thanks to Fergus McNeill, Chris Uggen, Matthew DeMichele, Gil Rothschild, and Robert Stewart for helpful comments on this project. Jennifer Chudoba, Michael Eastman, and Veronica Horowitz provided research assistance. Lauren Glaze at the Bureau of Justice Statistics initially directed my attention to the NSDUH data on probation. This work also benefited from the resources of the Minnesota Population Center (NICHD 5R24HD041023). Finally, thanks go to the audience members at the Minnesota Population Center Seminar Series and the 2016 American Society of Criminology meetings who provided helpful comments.
- 2 There is also substantial variations in terms of probationers' offense categories. In 2014, the breakdown was 19% violent, 28% property, 25% drug, 16% public order (mostly DWI/DUI), and 11% other (Kaeble, Maruschak, and Bonczar, 2015).
- 3 May, Wood, and Eades (2008) estimate an "exchange rate" that measures the number of months that adults (in Kentucky) would be willing to serve on probation in lieu of twelve months in a medium security prison. By group, the average exchange rate was: 24 months among current probationers and parolees, 27 months among members of the public, 40 among judges, and 44 months among probation and parole officers.
- 4 One important difference between probationers and prisoners is that probationers are subject to local law enforcement throughout their supervision, whereas prisoners are only "at risk" of re-arrest after release (since most offenses behind prison walls do not lead to a new arrest record). To (partially) respond to this challenge, Loeffler (2013) compares re-arrest rates in the 5 years after indictment.
- 5 Green and Winik (2010) use a similar design and find no significant effect of imprisonment on recidivism among drug offenders in the District of Columbia. Recent work in the U.K. has used propensity score matching to compare the effects of probation versus imprisonment, finding that incarceration has a small but significant positive effect on reoffending and reincarceration (see e.g. Jolliffe and Hedderman, 2012). Research in progress suggests that, if we compare split sentences of probation and jail to jail without probation, those with probation experience better employment outcomes in the initial post-release period (Nguyen et al., 2016).
- 6 One mechanism by which probation may have negative effects on individuals' trajectories is that probationers (and parolees) can be subject to short-term custodial stays for smaller supervision violations. New research suggests that even short periods of incarceration can cause enough disruption to destabilize family relationships and employment (Comfort, 2016; Apel, 2016; Harding et al., f.c.).
- 7 See also Welsh and Rocque (2014) on the complexities of evaluating criminal justice interventions.
- 8 Although see Cuniff and Shilton (1991).
- 9 The BJS is now working to address some of these limitations in the latest wave of data collection, including a broader sample of supervising agencies.

- 10 Results are generated from the public-use version of the NSDUH data for the years 2002–2014. The public-use file is a subsample and provides less detailed information for certain variables. Applications for access to the restricted full sample were put on hold indefinitely as of May 2015. The National Survey on Drug Use and Health public data files are available at the Substance Abuse and Mental Health Data Archive and the Inter-university Consortium for Political and Social Research, which are sponsored by the Office of Applied Studies, Substance Abuse and Mental Health Services Administration. Retrieved from www.icpsr.umich.edu/icpsrweb/ICPSR/series/64.
- 11 I rely on the restricted access versions of these datasets in order to estimate error terms that account for the stratified sampling design. The data are collected by the United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, and are available through a data access request to the Inter-university Consortium for Political and Social Research. The Survey of Inmates in Local Jails, 2002 (ICPSR 4359) is available at www.icpsr.umich.edu/icpsrweb/ICPSR/studies/4359. The Survey of Inmates in State and Federal Correctional Facilities, 2004 (ICPSR 4572) is available at www.icpsr.umich.edu/icpsrweb/ICPSR/studies/4572.
- 12 In some cases, it is possible to generate state-level estimates for the largest states (if they represent a unique sampling stratum). It is also possible to use small area estimation techniques to create state-level estimates with the NSDUH, but due to the rarity of probation and its wide variance across states, these are unlikely to be reliable.
- 13 See Appendix C at <http://media.samhsa.gov/data/nhsda/2k2nsduh/results/appC.htm>.
- 14 The NSDUH is a large survey, but since probation is a rare experience (2% of the sample), pooling across annual waves is necessary to get reliable estimates.
- 15 I calculate the results in STATA using the survey proportion and test commands. I use $p < .05$ as the significance level cut-off.
- 16 The one exception to this rule is the most serious legal status of jail and prison inmates. Here, I utilize all relevant data, even if some of the variables had missing information. Cases with no information on legal status were included in the “other” category. However, the estimates were consistent within 1–2 percentage points even if all cases with any missing data were dropped.
- 17 It might be particularly challenging for some respondents to distinguish between various types of community supervision. For example, in some locales, the differences between probation and parole are murky, and individuals can be on both forms of supervision simultaneously. In other cases, individuals might be on “paper-only” supervision that requires no reporting and is very similar to a suspended sentence. The NSDUH survey distinguishes between “probation” and “parole, supervised release, or other conditional release from prison.” Of those reporting supervision on probation in the years 2002 through 2006, 23% also reported being on parole in the past year.
- 18 The public-use NSDUH data do not provide age in years but instead generate a categorical variable for years. Since ages 35 to 49 were bundled together in one age bin, I was not able to estimate probation rates for the age category Western (2006) adopts (20–40 years). Instead, I estimated rates for adults aged 20–34 years.
- 19 These estimates are lower than many other studies of probation violations and revocations (e.g., Clear et al., 1992; Gray et al., 2001; Rodriguez and Webb, 2007; Cunliffe and Shilton, 1991), likely in large part because stock (rather than flow) measures of the prison population emphasize more serious offenses (because these individuals remain in jail or prison longer).
- 20 Jail inmates were allowed to report simultaneous parole and probation supervision at the time of arrest. Prison inmates were forced to choose one category of pre-arrest supervision.

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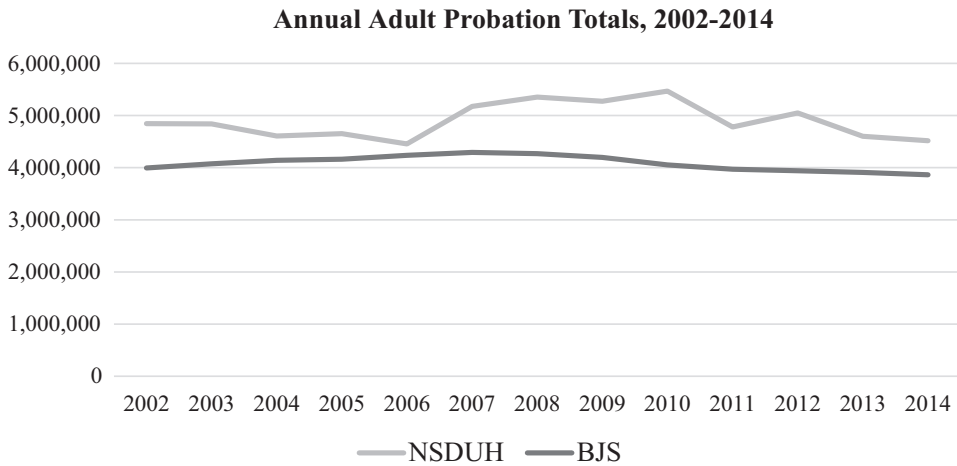
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Appendix A

COMPARING BJS AND NSDUH PROBATION ESTIMATES



<i>Annual Adult Probation Totals, 2002–2014</i>	<i>NSDUH (Weighted Average 2010–2014)</i>	<i>BJS (2012)</i>
Black	18%	30%
Hispanic	19%	13%
Non-Hispanic White	58%	54%
Male	70%	76%

Note: The BJS probation population reflects an estimated year-end count for all reporting jurisdictions (as available online through the Corrections Statistical Analysis Tool for Probation, generated June 9, 2017). The NSDUH totals reflect the estimated number of household respondents nationally who report having been on probation during the prior year. Race and gender percentages are only reported by some jurisdictions to the BJS (Maruschak and Bonczar, 2013).

Appendix B

JAIL AND PRISON INMATES ON PAROLE AT TIME OF ARREST

Percent on Parole at Time of Arrest

Jail Inmates (2002)	12%
State and Federal Prisoners (2004)	18%

Most Serious Legal Status

Jail Inmates (2002)

Convicted of New Crime	24%
Charged With New Crime and/or Revocation for New Arrest	40%
Revoked (or Awaiting Hearing) for Other Supervision Violations	24%
Incarcerated for Other Reasons	12%

State and Federal Prisoners (2004)

Convicted of New Crime	75%
Revoked for New Arrest	4%
Revoked for Other Supervision Violations	18%
Incarcerated for Other Reasons	3%

Note: Categories sum to 100% because only most serious legal status is represented. Many inmates fit multiple categories (e.g. both a new conviction and revocation). Cases with missing data on all legal status variables (and inmates held for supervision violations without revocation or new offense charges filed) are included in the residual category (Incarcerated for Other Reasons).