



# THE PROBATION QUAGMIRE

WHAT WAS ORIGINALLY INTENDED AS AN ALTERNATIVE TO INCARCERATION HAS BECOME A SYSTEM FOR MASS STATE CONTROL.

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*illustrations by Federico Gastaldi*

**S**HORTLY AFTER BECOMING a mother in summer 2013, Jennifer Schroeder was arrested for a drug charge. Schroeder, who lives outside of Minneapolis, Minnesota, pleaded guilty and was sentenced to serve 365 days in Wright County Jail.

And 40 years on probation.

Probation terms vary by state. They can include curfews, restrictions on travel, submitting to warrantless searches, paying court fees, holding down a job, and abstaining from alcohol and drugs, to the point of being prohibited from even *entering* a bar. For Schroeder it means a near-lifetime ban on voting or owning a gun, and the looming threat of eight years behind bars if she ever violates her terms. For the privilege of being subjected to all this, there are also fees owed to the state—all to live on the edge of a life-destroying prison sentence.

“The fear that you live with, it diminishes as time goes by a little bit, but it’s always there—that I could be in the wrong place at the wrong time and, and have somebody else do something that I could go to prison for,” Schroeder says. “My sentence would be 98 months if I ever violate my probation, no matter what. It’s always a scary thing.”

In most other states, Schroeder’s possible probationary term would have been capped at around five years. But until 2020, Minnesota’s probation terms could be as long as the maximum prison sentence you could receive for the crime. Minnesota has since changed its sentencing guidelines to cap the amount of time someone can be sentenced to probation for a felony offense to five years, thanks in large part to Schroeder’s story and her advocacy. But that change did not apply to sentences issued prior to the legislative change. As it stands,

Schroeder won't be off probation until she's 71 years old, in October 2053.

"I don't think I've ever met anybody," Schroeder says, "even people who have murdered other people or assault or arson, or any big crimes I can think of, that has a sentence that long."

Schroeder's sentence is extreme, but the statutory framework that allows for such lengthy supervision terms is just one of the problems with America's sprawling probation systems.

While many gauge the criminal justice system by the population of jails and prisons, probation affects more lives. And while it is clearly less punitive than being locked in a prison cell, it is still a form of onerous correctional control. Probation is supposed to help people get their lives back on track while staying accountable and keeping the public safe, but in many states offenders are set up to fail in systems that can't or won't give them the opportunity to succeed.

It's a scattershot array of state-run systems that, over nearly 200 years, has evolved away from its original purpose of providing public accountability and rehabilitation without punishment, quietly transforming into a secondary criminal justice system hiding in plain sight. As it has evolved, it has lost much of its original purpose, leaving even many of the system's enforcers uncertain about a fundamental question: What is probation supposed to be for?

## SIGN OVER THE RIGHTS TO YOUR CHILD

PROBATION WAS ORIGINALLY established as a way for community members to keep an eye on those who committed petty offenses or misdeeds—to hold someone accountable without punishment.

John Augustus, a Massachusetts teetotaler who believed in reforming alcoholics, became the U.S.'s first probation officer in 1841, when he bailed out a drunkard and returned the man to court three weeks later, sober and cleaned up. He would go on to post bail for nearly 2,000 people over the next 18 years, and he kept detailed notes on his efforts to steer them back to virtuous living, establishing some of the major principles of probation. According to his notes, only 10 of his probationers absconded.

"That just sort of became the birth of probation," says Kelly Mitchell, the executive director of the Robina Institute of Criminal Law and Criminal Justice, a nonpartisan research institute at the University of Minnesota Law School. "It was intended originally to be an alternative to a prison sentence. And I'd say that as it has evolved over time, it's become a sort of punishment in and of itself."

The use of probation accelerated alongside the huge rise in prison populations in the 1980s and 1990s. "If you go all the way back to 1990, there were a little over 1 million people on probation," says Mitchell. "By 2007, it was 4.3 million people. It

expanded dramatically at the same time that prison populations expanded, and it's been going down since then."

At the end of 2020, an estimated 5,500,600 people were under adult correctional control in the U.S., according to the Bureau of Justice Statistics. This includes people incarcerated in a jail or prison and those on probation or parole, which are commonly lumped together under the term community supervision.

Of that 5.5 million, more than half—3,053,700 people—were on probation. That's about one in 84 American adults. Probation numbers have been steadily declining over the last decade, but that's still a staggering amount.

Schroeder joined their ranks in 2013, when police caught her with methamphetamine in her car. Prior to her arrest, Schroeder's newborn daughter was taken away from her at the hospital due to a positive methamphetamine drug screen.

"I was an addict, obviously," Schroeder says. "I quit using, but I was still selling drugs because that's all I knew how to do to make money."

Schroeder pleaded guilty to first degree sale of drugs, kept working on staying sober and complying with her case plan, and threw herself at the mercy of the judge.

"I'm not a monster or horrible person, you know?" she says. "I've had a lot of things happen. Drug use was a normal thing in my family. I used with my parents, and it was just kind of what we did."

In an unlucky twist for Schroeder, the judge in her criminal case was the same as the one in the family court case regarding the welfare of her newborn daughter. She says the judge gave her a choice: voluntarily relinquish her parental rights or have them terminated.

"She said, 'I'm gonna terminate your rights. I'm gonna give you an opportunity right now to sign your rights over, or you'll never see your daughter again,'" Schroeder recalls. "That was it. She gave me 15 minutes to decide if I wanted to sign over my parental rights to the lady who had been her foster family for this entire time."

So Schroeder says she signed over parental rights to her daughter. Back in criminal court, she received another shock. The judge sentenced her to a year in jail, which she'd already served at that point, and 40 years on probation. At the time of Schroeder's sentencing, Minnesota allowed probation sentences to be up to the maximum sentence you could get in prison for the same crime.

Only a small number of states allow probation terms to be as long as the maximum sentence for the underlying offense, which could be decades or even life. These states include Arkansas, Colorado, Georgia, Idaho, Indiana, Massachusetts, Oklahoma, Pennsylvania, Virginia, and Wisconsin.

Most states cap the length of misdemeanor probation sentences to two years and felony probation sentences to around

five years. Many states have a “soft cap” on probationary term lengths, allowing felony probation to be extended for either an additional set amount of time, or indefinitely, for a number of reasons. Some states allow it to be extended for failure to pay restitution or fines and fees; others only allow that for violations, or if it’s “in the best interest of justice.” Only a fraction of those states require that felony probation be terminated after five years and do not have a pathway for courts or prosecutors to extend the probationary sentence for any reason.

Schroeder, like many people sentenced to probation, stood at an inflection point in her life. She had just lost custody of her daughter, and she was looking at 40 years on the straight and narrow, under the watchful eye of the state of Minnesota, or eight years in prison if she returned to her old ways.

“It’s hard to even go back to what I felt in the moment, because it was a really hard thing to get through, especially brand-new sober, but I channeled my energy into college,” she says. “I just went to college and said, ‘I’m just gonna try to make sure this is not possible to happen again to anybody else.’”

## TERMS AND CONDITIONS MAY APPLY

WHEN A PERSON is sentenced to probation, there are numerous terms and conditions that he or she must adhere to or face potential consequences. Sometimes these conditions are set by statute, but more often they are assigned by the judge, a state or county probation department, or an individual probation officer. According to a joint report issued by the American Civil Liberties Union (ACLU) and Human Rights Watch in 2020, people under supervision across the country “must comply with an average of 10 to 20 conditions a day.”

In Wisconsin, a person on probation has to obtain written approval from their probation agent to purchase, trade, or sell a car. New York, Kansas, Georgia, Texas, and South Carolina require that probationers avoid “injurious and vicious habits,” while New York, Kansas, Georgia, and South Carolina also require they avoid “persons or places of disreputable or harmful character.”

It’s common to be prohibited from consuming alcohol, even if the crime was unrelated to drinking. Those on probation are also prohibited from missing any court-ordered treatment or rehabilitation meetings.

Beyond that, probationers sometimes have curfews imposed, are unable to cross state or county lines without first getting permission, and expect unannounced drop-ins from officers. Any slip-up of these conditions can be counted as a technical violation. If regulations and state statutes don’t prohibit or restrict revocations for technical violations, and a person has a particularly strict probation officer, one of these violations can land someone in prison.

Schroeder’s terms include notifying an officer of changes in employment or residence within 24 hours, as well as of any plans to leave the state. The officer has the right to refuse travel requests.

In addition, those on probation are stripped of otherwise constitutionally protected rights. “I live in a really bad neighborhood, and I can’t carry any kind of protection,” Schroeder says. “I can’t have a gun in my home, which is a barrier for me. My boyfriend’s whole family hunts, and my son isn’t going to be able to learn gun safety and all that stuff, unless it’s outside of our home, away from me.”

Minnesota also doesn’t allow offenders to vote until they complete the terms of their criminal sentence, so Schroeder isn’t supposed to cast a ballot until 2053.

According to an October report by The Sentencing Project, an estimated 995,717 people in the U.S. were disenfranchised in 2022 while on felony probation.

“What is the point where you have paid back your debt to society and you get to have your say in what happens in your political world?” she wonders. “In fact, if I voted, I would be charged with another felony.”

## FINES AND FEES

IN ADDITION TO probation conditions, there are also often recurring fees. The overwhelming majority of states allow for probation supervision fees—fees that people pay simply because they’re being supervised. These supervision fees vary wildly by state. According to the Fines and Fees Justice Center, they range from \$10 to more than \$208 per month, or a flat \$60–\$300 per year.

On top of the monthly or annual probation fee, it’s common for a person on probation to pay additional fees for probation conditions, such as treatment, programming, classes, electronic monitoring, or other interventions. In Oklahoma, probationers are required to pay \$40 per month during the first two years of probation to “compensate the district attorney for the costs incurred during the prosecution of the offender and for the additional work of verifying the compliance of the offender with the rules and conditions of his or her probation,” in addition to several other fees.

In many states, probation terms can be continued—sometimes indefinitely—until restitution, fines and fees, or both are paid. Georgia even has a special form of probation specifically for paying fees. Called “pay-only probation,” it offers no actual supervision. The statute describes it as when “a defendant has been placed under probation supervision solely because such defendant is unable to pay the court imposed fines and statutory surcharges when such defendant’s sentence is imposed.”

If you don't pay, it can be counted as a technical violation and can potentially lead to incarceration. If you don't have a job to pay your fees, that could be a violation too. It is common for people on probation to be required to maintain employment. Our Constitution is supposed to prevent the government from jailing people just for being too poor to pay their fines and fees. So states are first supposed to find that a person "willfully" did not pay her fees before incarcerating her for this. But in practice it's murkier.

Some states have recognized the burden these costs put on people and are reducing or eliminating the fees. In October, Democratic Delaware Gov. John Carney signed a bill into law abolishing fines and fees from many facets of the state's criminal justice system, including fees for being under probation supervision. In 2020, California and Oregon passed legislation that removed statutory language permitting supervision fees as well.

### 'TRAIL 'EM, NAIL 'EM, AND JAIL 'EM'

**SCHROEDER WAS LUCKY.** She got a good probation officer, which can make or break someone's chances of staying on track and out of prison.

"My probation officer has been a big pillar in my recovery, actually," Schroeder says. "She was completely supportive of me, and she was one of my biggest fans cheering me on, so I got fortunate in that."

Being a probation officer is a hard, often thankless job. The expectations for such officers have expanded as probation has become more prevalent and as the types of people on probation have changed.

"Older probation officers will tell you that it used to be their job to just look for people to do something wrong and then send them back," says Julia Laskorunsky, a research scholar at the Robina Institute. Those older officers, Laskorunsky says, summed it up this way: "Trail 'em, nail 'em, and jail 'em."

In some places that's still standard operating procedure. In Delaware, the Wilmington Police Department's "Operation Safe Streets" (OSS), a partnership with the Delaware Department of Correction, allows police and probation officers to jointly police those on probation.

While the program is, on paper, supposed to do things like curfew checks and other routine compliance tasks, the ACLU of Delaware released a report in October contending that OSS teams perform violent, frequently unconstitutional home searches and traffic stops, then coerce probationers into becoming confidential informants with the threat of going to prison. They then use tips from those informants to generate collateral arrests of nonprobationers. ACLU researchers found 13 cases where judges tossed evidence or prosecutors dismissed charges because of unlawful searches by OSS teams.

The report includes the account of Sharee Congo, who says

that on the night of October 29, 2020, an OSS team tasered and beat her 22-year-old son, who was on probation, and then ransacked her house. She says officers also pulled her cellphone out of her hand as she tried to record the incident, handcuffed her, and then pushed her down the stairs.

The OSS team had received a tip from one of their sources that Congo's son had a gun. They did indeed recover a handgun, but it was Congo's. She had recently purchased it for self-protection. She says she tried to show officers the receipt, but they ignored her. Her son tried to fight the case, but after sitting in jail for two years while failing to convince prosecutors to drop the charges, he took a plea deal to serve five years in prison.

More typically, people become cogs in a bureaucratic machine and get tripped up for minor violations that can sometimes spin out of control.

Take Samuel Goggins. *The Philadelphia Inquirer* profiled Goggins in a 2019 investigative series on the city's probation system. Goggins was sentenced to five years of probation for a robbery (for which he maintained his innocence). Goggins missed one of his required appointments because he was hospitalized. He called his probation officer the next day, but the officer put out a detainer on him anyway. He eventually turned himself in, spent 20 days in jail, and was sentenced to 18 more months on probation. "Probation, it's like a setup," he told the *Inquirer*. "Any little thing you do, they send you to jail."

Not all probation officers take such a punitive approach. "In the last decade, it's swapped from being viewed more in the community as like a police officer to more of a social worker or clinician or somebody like a case manager," says Dan Pustinger, parole supervisor in Mercer County, Pennsylvania. Pustinger says the push to reduce jail populations has left officers dealing with many people who have repeatedly violated the terms of their probation. "It's not uncommon for us to have the same person released six or eight times in a year, just doing the same thing over and over," he says.

Mercer County probation officer Robert Sheridan talks about the frustration of trying to take someone in the midst of a mental health crisis to a hospital, only to be turned away. "And then overnight, they're on the streets, and then they commit a new crime or somebody gets hurt," he says.

"It's tough because you try and put yourself out there to help these people," Sheridan says. "You really want to see them do well. And it really sucks when you're doing everything you can, and then you just hit a barrier." Probation was a system set up to help mend lives, but even some probation officers seem to agree it's not working.

### NOT ALL PROBATION IS CREATED EQUAL

NOT ONLY DO probation sentences' lengths and conditions vary



widely, but so do the types of supervision.

For example, “probation tails” are fairly common in Arizona. In these situations, a person facing multiple charges accepts a plea agreement that requires a prison sentence for one charge, and probation to be served after incarceration for another. Since the practice began in 2009, the Administrative Office of the Courts estimates that 36 percent of inmates will eventually be released to serve a probation tail. This radically changes the population that Arizona probation officers supervise. Instead of supervising someone who is diverted from prison, they are supervising someone who has served a prison term. Arizona prisons don’t have the reputation for being the most rehabilitative of places. A federal judge recently held the state prison system in contempt for failing to fix unconstitutional medical and mental health care, which included indefinite solitary confinement of people with mental illness.

In addition to regular probation, Florida has a unique system called “community control,” which is essentially house arrest. A person on community control is prohibited from leaving home even to get basic necessities without first seeking permission from a probation officer. Typically this population is assessed as high-risk, but it is not limited to specific offenses. According to a recent study by the Crime and Justice Institute, it has an extremely high failure rate, with 85 percent of those having their probation revoked.

Several states allow for split sentences, with a portion of the sentence to be served in prison and another portion on probation.

Idaho has “rider,” a sentence where the court retains jurisdiction over an individual for 365 days. After that year, courts will determine whether to place the person on probation or incarcerate them.

“In the United States we have 50 different judicial systems,” says Laskorunsky. “And within those systems we have probation agencies that are more conservative, more progressive. And then there’s variation from officer to officer.”

There’s also variation from court to court after a person is accused of violating probation conditions. Some judges might be willing to give you a second chance. Others will sentence a first-time violator to lengthy additional probation terms or stints in prison, depending on what state statutes allow. “The unknown and an uncertainty of what they’re going to be facing, that’s the part that I think people are really afraid of,” Keir Bradford-Grey, Philadelphia’s former chief public defender, told *The Philadelphia Inquirer* in 2019.

## REVOKED

SCHROEDER HAS BEEN on probation for nine years now without incident, but she still worries about being sent to prison for messing up. It’s not an irrational fear.

Over the last four years, 42–45 percent of prison admissions were for probation or parole supervision violations. Roughly a quarter of all admissions to prison are for technical violations of probation or parole, such as missing an appointment.

Some states and localities have introduced graduated sanctions for technical violations and more discretion to probation officers, so offenders don’t have probation revoked for their first minor screw-up. But in some states, people on probation are often set up to fail. Instead of being an alternative to prison, it simply ends up delaying incarceration.

For example, Idaho has a staggeringly high rate of prison admissions for probation and parole violations. According to a report this year from the Idaho Department of Correction, 80 percent of 2021’s admissions had either violated probation, violated parole, or failed a rider. “In our interviews of high-ranking criminal justice officials in Idaho, we heard consensus that Idaho is ill-equipped to meet the behavioral and substance use disorder treatment needs of Idahoans under community supervision,” a 2020 report by the Idaho Center for Fiscal Policy said.

The overwhelming majority of admissions to prison in Wisconsin are also for supervision violations. More than 63 percent admitted to prison in 2021 were there for such a violation, and 40 percent were admitted for a technical violation of supervision.

Kansas also has a high admission to prison rate for probation violations—44 percent of admissions to prison in fiscal year 2021 were for a violation of probation.

The use of probation in Florida has been slowly and steadily declining over the past decade, mirroring the national trend, but the rate of revocations has remained stubbornly persistent. According to the Crime and Justice Institute, an average of 48 percent of those on community supervision in Florida have their terms revoked every year; around 54 percent of these revocations were for technical violations.

People arrested for probation violations have fewer constitutional rights—in many states they have no right to bail, for instance—and they then can face deplorable and unconstitutional conditions behind bars while they wait for a judge to review the violation. In September, a woman filed a federal lawsuit after she was forced to give birth alone on the concrete floor of a Maryland jail cell while nurses and guards allegedly ignored her pleas for help. She had been put in jail for an alleged probation violation the day before she went into labor.

## SETTING PEOPLE UP TO FAIL

A NUMBER OF tweaks have been proposed to improve probation systems. Some states have begun reducing or capping the maximum probation sentences. Others have expanded earned credit opportunities to reduce the time served on probation, giving offenders a stronger incentive for good behavior.

ior. Other states have reduced or eliminated probation-related fines and fees.

Another idea is to start cases with no probation conditions and add them based on individual supervision needs, instead of assuming that everyone needs a long list of rules. Advocates say that when probationers are overburdened

with check-ins and other conditions, it can make it harder to follow more important conditions, such as staying employed.

“When we talk about people not being set up to succeed, it’s much harder to hold down a job, pick up your kid from day care, go to medical appointments, etc., if you need to travel to check in with your probation officer,” says Katherine Williams, the policy manager for the Florida Rights Restoration Coalition, which works toward ending discrimination against formerly incarcerated people.

Advocates also say that, especially in drug cases, it’s unreasonable to demand perfect compliance from probationers.

“If a person has a substance abuse problem, we should expect that we’re gonna see a dirty [urinalysis]. We’re gonna see a positive drug test at some point during that person’s probation, because you can’t stop that behavior overnight,” argues Mitchell. “If the probation officer is responding to that as a signal that the person needs more help, then that’s the right response. If they’re responding to that like this person should be revoked and put in prison, that’s the wrong response.”

Schroeder, who became a drug and alcohol counselor after graduating from college, can speak to that point from both personal and professional experience.

“You cannot expect for somebody who has been an addict their whole life to come out and be perfect,” Schroeder says. “It’s just not gonna happen. And to send people to prison for those kinds of violations is just absolutely ridiculous.”

Things as simple as text message reminders can significantly improve probation outcomes. A recent report published by Reason Foundation, which publishes this magazine, found that text message reminders could reduce canceled and



missed appointments by as much as 21 percent and 29 percent, respectively.

More fundamentally, many researchers, advocates, and even probation officers struggle to understand what the real purpose of probation should be. Does it serve any public safety goal to keep Schroeder on probation for another three

decades? Can offenders in Mercer County be rehabilitated when they’re being turned away from hospitals? What exactly is the system trying to accomplish?

## THE LINGERING FEAR

**SCHROEDER SAYS SHE** has been clean for nine years now. She stays in touch with her daughter, and she has become an advocate for probation reforms. In 2019, Schroeder testified before the Minnesota Legislature in support of capping sentence lengths. The Minnesota Sentencing Guidelines Commission passed that reform, but because it was not retroactive it will have no effect on Schroeder’s sentence.

“It’s frustrating that it’s not retroactive, and at the same time it’s rewarding that I was able to be a part of it,” she says. “If anything good comes out of me being on probation, at least there are some changes made that are going to affect a lot of people that would normally probably end up in prison.”

Barring any other changes to Minnesota’s laws, Schroeder will live most of the rest of her life with a nagging worry in the back of her head, that no matter how long she stays clean and how successful she is, a minor slip-up could destroy everything she’s accomplished.

“It’s a fear that never leaves you,” she says. “You could be plucked from society at any moment for being in the wrong place at the wrong time.” 📍

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