Supervising Sentencing

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Community supervision agencies and officers do not just supervise people on probation and parole. They also play a unique and privileged role at sentencing. In nearly every state, community supervision officers investigate and write the presentence report, which is often the judge's primary source of information about the defendant and the crime of conviction. With minimal guidance from legislatures or courts, community supervision agencies set the policies that govern the presentence investigation and report process.

This Article offers a descriptive and theoretical account of community supervision's sentencing role in state courts. My account is based on an analysis of statutes, court rules, and a collection of almost 200 internal community supervision agency policy documents obtained through open records requests to community supervision agencies in every state. I find that community supervision agencies and officers do not simply implement sentencing policy; in key respects, they make it.

In their sentencing role, community supervision agencies and officers take positions on highly contested first-order questions about the sentencing process itself: what goals, values, and assumptions should guide sentencing decisions?

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What types of facts should sentencing judges consider? How should those facts be found, and what meaning do they support? I argue that community supervision's answers to these questions both reflect and reinforce what I describe as a punitive perspective on the sentencing process: one that sees the criminal legal system as just, criminal punishment as socially beneficial, and criminal defendants as moral failures. Community supervision's sentencing role elevates the punitive perspective on the pretense of neutrality and, by doing so, helps to insulate it from challenge and critique.

TABLE OF CONTENTS

INTRODUCTION 1933
I. COMMUNITY SUPERVISION'S DUAL ROLE 1943
A. *Supervisory Role* 1943
B. *Sentencing Role* 1947
II. FACETS OF COMMUNITY SUPERVISION'S SENTENCING ROLE 1954
A. *Topic Selection* 1956
B. *Fact-Finding* 1960
C. *Meaning-Making* 1966
III. COMMUNITY SUPERVISION'S PUNITIVE PERSPECTIVE 1972
A. *Open Questions About the Sentencing Process* 1973
1. The Scope of the Sentencing Inquiry 1976
2. The Meaning of Individualization 1981
B. *Punitiveness as Neutrality* 1986
IV. RE-THINKING COMMUNITY SUPERVISION'S SENTENCING ROLE 1988
A. *Reforming the Presentence Process* 1988
B. *Eliminating the Presentence Process* 1994
CONCLUSION 2001
APPENDIX A: WHEN PRESENTENCE REPORTS ARE REQUIRED AND WHO PREPARES THEM 2003
APPENDIX B: OPEN RECORDS RESPONSES BY JURISDICTION 2017
APPENDIX C: MOST COMMON STATUTORY REQUIREMENTS FOR THE CONTENTS OF PRESENTENCE INVESTIGATIONS 2020

INTRODUCTION

Community supervision agencies and officers play a dual role in the criminal legal system. In their primary, supervisory role, they administer the punishments of probation and parole.[1] Scholars and advocates have mapped and critiqued the enormous power that community supervision agencies and officers wield over the 3.8 million adults currently on community supervision in the United States.[2] A wide range of commentators have criticized this contemporary system of "mass supervision" for widening the net of criminal legal control, perpetuating racial inequality, and trapping people in a vicious cycle of supervision, revocation, and re-incarceration.[3] Yet a core aspect of the power community supervision agencies and officers wield over people involved in the criminal legal system has received far less attention: their role at sentencing in state courts.

In nearly every state, community supervision agencies and officers are responsible for conducting presentence investigations and writing the

[1] "Community supervision" is an umbrella term that encompasses both probation and parole. Usually, someone on parole has already served a prison term and is under parole supervision after release. Probation, in contrast, is typically imposed as a stand-alone, noncustodial sentence. *See* Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1021 (2013) ("The term 'community supervision' describes the practice of allowing a convicted criminal defendant to serve his sentence in the community, either as an alternative to incarceration or as part of a transition from prison back into ordinary life. A community sentence that is imposed in lieu of imprisonment is called probation; a community supervision term that follows a period of imprisonment is most commonly referred to as parole or supervised release.").

[2] *See* DANIELLE KAEBLE, U.S. DEP'T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2021, at 1 (2023), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus21.pdf [https://perma.cc/PWH2-ZYAB].

[3] *See, e.g.*, Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, (2016); Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641 (2019); Alexis Karteron, *Family Separation Conditions*, 122 COLUM. L. REV. 649 (2022); Klingele, *supra* note 1; Evangeline Lopoo, Vincent Schiraldi & Timothy Ittner, *How Little Supervision Can We Have?* 6 ANN. REV. CRIMINOLOGY 23 (2023); Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW POL'Y 51 (2013); Jacob Schuman, *Revocation and Retribution*, 96 WASH. L. REV. 881 (2021); Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717 (2020).

presentence report.[4] The presentence report is often the sentencing judge's "primary source of information about the defendant and the offense."[5] Where a presentence report is prepared,[6] its contents help determine the judge's sentencing decision: whether to sentence the defendant to community supervision or incarceration, for how long, and with what conditions.[7] The report also stays with the defendant long after sentencing, influencing how they are classified and treated in prison or on community supervision, whether they are granted parole, and sometimes, how they are sentenced in future cases.[8]

Sentencing scholars have examined community supervision's sentencing role in the federal system,[9] where federal probation officers play a distinctive role as the "guardian[s] of the [federal sentencing] Guidelines."[10] But the sentencing literature lacks rich accounts of the

[4] Community supervision officers investigate and write presentence reports; community supervision agencies set the policies that govern how they do so. *See infra* APPENDIX A.

[5] 6 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 26.5(b) (4th ed. 2021); *accord* MODEL PENAL CODE: SENTENCING § 7.07 (AM. L. INST., Proposed Final Draft 2017) (describing the presentence report as "one of the most important documents in any felony case").

[6] States vary in when they require or permit presentence reports, but every state provides for presentence reports in at least some cases. *See infra* APPENDIX A.

[7] *See* LAFAVE ET AL., *supra* note 5, § 26.5(b).

[8] *See id.*

[9] *See, e.g.*, KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 85-92 (1998); Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV 1 (2010) ; Sharon M. Bunzel, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933 (1995); Leslie A. Cory, *Looking at the Federal Sentencing Process One Judge at a Time, One Probation Officer at a Time*, 51 EMORY L.J. 379 (2002); Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615 (1980); Keith A. Findley & Meredith Ross, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under* Julian *and the Sentencing Guidelines*, 1989 WIS. L. REV. 837 (1989); John E. Gillick Jr. & Robert E. Scott Jr., *The Presentence Report: An Empirical Study of Its Use in the Federal Criminal Process,* 58 GEO. L.J. 451, 451 (1970); Nancy Glass, *The Social Workers of Sentencing? Probation Officers, Discretion, and the Accuracy of Presentence Reports Under the Federal Sentencing Guidelines*, CRIM. L. BULL., Jan.–Feb. 2010.

[10] STITH & CABRANES, *supra* note 9, at 89 & 223 n.47 (noting that the origins of the term "guardian of the Guidelines" is "obscure, but it has been widely adopted by many commentators, including defense attorneys . . . and probation officers themselves").

role community supervision officers play in *state* court sentencing proceedings.[11] In some ways, this is unsurprising. Like much of criminal law scholarship generally, sentencing scholarship has long focused disproportionately — perhaps even "obsessive[ly]"[12] — on the highly unrepresentative federal system.[13] But this federal focus doesn't align

Federal probation officers are responsible for performing an initial calculation of the applicable sentencing range under the (now advisory) federal sentencing guidelines, based on information gathered during the presentence investigation. *See* FED. R. CRIM. P. 32(d)(1).

[11] Nor do accounts of community supervision officers' role as the "guardians of the guidelines" in federal sentencing proceedings generalize to their role in state courts. Notably, most states do not even have sentencing guidelines. *See* Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1600 n.1 (2012) (identifying 19 states that have sentencing guidelines). Where they do exist, state sentencing guidelines "look nothing" like the federal sentencing guidelines, which are "truly an outlier." JOHN F. PFAFF, SENTENCING LAW AND POLICY 275 (2016). As John Pfaff has observed, "For all the differences among state sentencing guidelines, any one state guideline system is more similar to that of any other state than any state guideline system is to that in the federal system." *Id.*; *see also* David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 271 (2005) ("The Federal Sentencing Guidelines are dramatically different than all state systems. The U.S. Sentencing Commission adopted a model that incorporates far more real-offense elements than any other structured-sentencing system ever has."). The leading treatment of community supervision's sentencing role in state courts is a series of articles from the 1980s by John Rosecrance, who drew on his own experiences working as a probation officer for 15 years as well as interviews with probation officers who write presentence reports. *See generally* John Rosecrance, *Maintaining the Myth of Individualized Justice*, 5 JUST. Q. 235 (1988) (arguing that community supervision's sentencing role helps maintain the "myth of individualized justice"); John Rosecrance, *A Typology of Presentence Probation Investigators*, 31 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 163 (1987) (proposing a typology of five types of presentence investigators); John Rosecrance, *Extralegal Factors and Probation Presentence Reports*, 3 J. CONTEMP. CRIM. JUST. 38 (1987) (arguing that presentence investigators primarily focus on the crime of conviction and the defendant's prior criminal record when formulating a sentencing recommendation); John Rosecrance, *The Probation Officers' Search for Credibility: Ball Park Recommendations*, 31 CRIME & DELINQUENCY 539 (1985) (describing how presentence investigators' sentencing recommendations respond to cues from judges, prosecutors, and probation supervisors) [hereinafter *The Probation Officers' Search for Credibility*].

[12] Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 117 (2002) (criticizing criminal law scholarship's "obsessive focus on federal law").

[13] *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1305, 1320 n.21 (2018) (describing state rather than federal law as one of "criminal

with the realities of sentencing on the ground, where the overwhelming majority of defendants are prosecuted and sentenced in state, not federal, court.[14] Mass incarceration and mass supervision are driven by state, not federal, sentencing practices: eighty-seven percent of people in prison, and ninety-seven percent of people on community supervision, are there because of sentences imposed in state court proceedings.[15] As this Article reveals, community supervision agencies and officers often play a significant role in shaping those sentencing outcomes.

In this Article, I map the multi-faceted role that community supervision agencies and officers play in state court sentencing proceedings. My descriptive account is based on (1) a fifty-state survey of statutes and court rules governing the presentence process and (2) analysis of nearly 200 internal community supervision agency policy documents that I obtained through open records requests to community

justice scholarship's most familiar blind spots" and noting "the distorting gravitational pull that federal law routinely exerts on criminal justice scholarship"); Thomas Ward Frampton & Brandon Charles Osowski, *The End of* Batson*? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1, 17 (2024) ("[C]riminal procedure scholars have become accustomed to . . . ignoring state courts generally."); Gerard E. Lynch, *Sentencing: Learning From, and Worrying About, the States*, 105 COLUM. L. REV. 933, 934 (2005) ("[B]oth journalistic and legal academic writing have focused heavily on Congress and its Sentencing Reform Act of 1984, which created a system of guideline sentencing in the federal courts, despite the fact that the federal system accounts for only around six percent of felonies charged annually in the United States."); Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1351-52 (2005) ("The federal sentencing system . . . has dominated scholarly discussions of sentencing reform."). To be sure, there are many important exceptions to this broad trend. Recent examples of sentencing scholarship examining state laws, policies, and practices include Jessica M. Eaglin, *Population-Based Sentencing*, 106 CORNELL L. REV. 353 (2021) (analyzing developments in both state and federal courts' sentencing jurisprudence in response to the institutionalization of risk assessment instruments at sentencing) and Nancy J. King, *Handling Aggravating Facts After Blakely: Findings from Five Presumptive-guidelines States*, 99 N.C. L. REV. 1241 (2021) (describing the implementation of *Blakely v. Washington* in Kansas, Minnesota, North Carolina, Oregon, and Washington).

[14] Miller, *supra* note 13, at 1353 ("[T]he federal system . . . accounts for merely six percent of all felony convictions each year in the United States.").

[15] *See* E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2021 — STATISTICAL TABLES 6 tbl.1 (2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf [https://perma.cc/CFD9-DGZS]; KAEBLE, *supra* note 2, at 19 tbl.5.

supervision agencies in every state.[16] I identify three consistent facets of community supervision's sentencing role across jurisdictions: topic selection, fact-finding, and meaning-making.

Through defendant questionnaires, presentence report templates, and agency policies, community supervision agencies standardize the topics that presentence investigations and reports address. The legal framework for presentence reports gives agencies considerable discretion over topic selection. The statutes and court rules governing the contents of presentence reports are typically broad and vague. For example, statutes commonly require that the presentence report include information about capacious categories such as the defendant's "social history," "family background," "present condition," or "characteristics."[17] Seventeen states allow community supervision officers to include in their reports any information that they deem relevant to sentencing.[18]

To find facts about the selected topics, community supervision agency policies typically instruct community supervision officers to interview the defendant using a standardized questionnaire, review law enforcement records, and seek the release of the defendant's protected information (such as medical and educational records).[19] Agencies ask officers to gather information that is deeply personal and highly sensitive. For example, some presentence questionnaires ask the defendant to disclose whether they have attempted suicide (and if so, when and how);[20] if they have experienced physical or sexual abuse;[21]

[16] *See infra* APPENDIX B.

[17] *See infra* Part II.A, APPENDIX C.

[18] *See infra* Part II.A, APPENDIX C, note 325.

[19] *See infra* Part II.B.

[20] *See, e.g.*, S.C. DEP'T OF PROB., PAROLE & PARDON SERVS., POLICY & PROCEDURE NO. 501: PRE-SENTENCE INVESTIGATIONS 3-4 (2018) ("The special needs section will primarily reflect information gathered from the social history interview and will include: . . . Detailed facts on any suicide attempts by the defendant and information on any subsequent counseling received.").

[21] Ala. Prob. & Parole, Bessemer Off., Personal History and Interview Form 6-12 (n.d.) (asking defendants to report, for each family member, whether they were "[a]bused [b]y [t]his [p]erson" and if so, to circle one of three categories: "Physical/Mental/Sexual") (on file with author); Maricopa Cnty. (Ariz.) Adult Prob.,

why they got divorced or ended their last relationship;[22] and how satisfied they are with their current job[23] or current romantic partner.[24]

Community supervision agency policies also instruct officers to interpret and make meaning from the facts they find, and to do so in highly impressionistic and subjective ways. Agencies ask officers to opine in the presentence report on questions such as: what is the defendant's "attitude" toward their crime of conviction?[25] Why did they commit it?[26] Does the defendant have a "positive support system"?[27] Both explicitly and implicitly, agency policies ask community

Your Presentence Interview 7 (1999) ("Were you ever sexually abused by anyone as a child? Yes/No; If yes, how often?") (on file with author).

[22] *See, e.g.*, FIRST JUD. CIR. S.D. CT. SERVS. DEP'T, ADULT PRE-SENTENCE INVESTIGATION INTERVIEW GUIDE 9 (2021) ("Reason for Divorce/Separation"); Franklin Cnty. (Ohio) Adult Prob. Dep't, Presentence Investigation Questionnaire 8 (2017) ("Reason Marriage/Relationship Ended") (on file with author); State of Alaska Dep't of Corr., Presentence Worksheet 8 ("if Divorce, Annulment or Separation, give reason why") (on file with author).

[23] *See, e.g.*, FIRST JUD. CIR. S.D. CT. SERVS. DEP'T, *supra* note 22, at 14 ("On a scale of 1 to 10, please rate your satisfaction with your job? Your pay? Your coworkers? Your working conditions? Your hours?").

[24] *See, e.g.*, Fla. Dep't of Corr., Pre-sentence Investigation Questionnaire 4 (2017) ("Current Marital Relationship: Good / Fair / Poor") (on file with author); Ky. Dep't of Corr., Presentence Investigation Questionnaire 17 (2021) ("Are you satisfied with your current marital situation? (If single, how satisfied are you with being single?)") (on file with author); Ind. Off. of Ct. Servs., Standard Presentence Investigation Worksheet 4 (2011) [hereinafter Indiana Standard Presentence Investigation Worksheet] ("Whether involved or single, how satisfied are you with your current situation?") (on file with author).

[25] *See, e.g.*, Ind. Off. of Ct. Servs., Standard Presentence Investigation Report Instructions (2011) [hereinafter INDIANA STANDARD PRESENTENCE INVESTIGATION REPORT INSTRUCTIONS] ("Another purpose of this section [Defendant's Version] is to gain understanding of the defendant's attitude toward his or her offense and victim."); STATE OF LA. DEP'T OF PUB. SAFETY & CORR., DIV. OF PROB. & PAROLE POLICIES, CHAPTER 4: INVESTIGATIONS 7 (2019) ("Data that should ordinarily be covered with respect to the offense include . . . [the] defendant's attitude toward offense."); MINN. DEP'T OF CORR., PSI AGENT HANDBOOK 2 (2020) ("This section [Defendant's Version] must also include the [defendant's] attitude toward the offense.").

[26] *See, e.g.*, OKLA. DEP'T OF CORR., OP-160301: REPORTS AND INVESTIGATIONS 14 (2021) (instructing community supervision officers to assess in their report "whether or not the offense appears to be situational or indicative to a pattern of behavior").

[27] STATE OF UTAH DEP'T OF CORR., PRESENTENCE INVESTIGATION 23 (2022).

supervision officers to assess what kind of a person the defendant is — their character, blameworthiness, dangerousness, and potential.[28]

Community supervision agencies and officers play a unique and privileged role in sentencing hearings. Courts describe community supervision officers as a neutral third party who provides the sentencing court with reliable, unbiased information about the defendant and the crime.[29] This framing presents community supervision's sentencing role as banal, even clerical — merely serving as a conduit for information. But my account reveals that community supervision agencies and officers do not simply implement sentencing policy; to a large degree, they make it.

In their sentencing role, community supervision agencies and officers take positions on first-order questions about the sentencing process itself: what goals, values, and assumptions should guide sentencing decisions? What types of facts should sentencing judges consider? How should those facts be found, and what meaning do particular facts support? The choices community supervision agencies and officers make about how to approach each facet of their sentencing role are not straightforward, obvious, or inevitable. Rather, these choices have an inescapable ideological dimension. They reflect underlying normative commitments and value-laden assumptions about how the criminal legal system works and should work.

Based on my descriptive findings, I develop a theoretical framework for conceptualizing community supervision's sentencing role. I argue that community supervision agencies' approach to the presentence process is rooted in what I call the "punitive perspective" on the sentencing process. [30] The punitive perspective has deep faith in the value of criminal punishment. It sees the criminal legal system as doing socially beneficial work responding to the harms defendants have

[28] *See infra* Part II.C.

[29] *See, e.g.*, State v. Garreau, 864 N.W.2d 771, 778 (S.D. 2015) ("[T]he [community supervision officer at sentencing] has no adversarial role in the sentencing proceedings . . . and acts as a neutral information gatherer for the judge." (internal quotations omitted)); State v. Howland, 663 N.W.2d 340, 349 (Wis. Ct. App. 2003) (describing the community supervision officer as a "neutral and independent participant" in the sentencing process).

[30] *See infra* Part III.B.

caused. From the punitive perspective, the focus of the sentencing inquiry should be narrowly limited to the defendant's culpability and dangerousness.

While the punitive perspective has long been dominant in practice, it is increasingly contested by scholars, advocates, and practitioners who advance what I describe as the "decarceral perspective" on the sentencing process.[31] Proponents of the decarceral perspective have argued that sentencing hearings should consider nontraditional but legally permissible factors such as the far-reaching harms caused by criminal punishment,[32] the realities of incarceration,[33] and the profound racial disparities in who is subjected to criminal punishment.[34] They have pioneered new fact-finding methods, such as intensive, "capital-style" life history investigations[35] and social biography videos that elevate the perspectives of the defendant's family and friends on who

[31] *See infra* Part III.B.

[32] *See* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1280 (2004) ("Empirical evidence of community-level harm presents a compelling moral indictment of mass imprisonment, regardless of the moral deserts of individual offenders."); *see also* Sheldon A. Evans, *Punishment Externalities and the Prison Tax*, 111 CALIF. L. REV. 683, 683-93 (2023) (discussing the social costs of criminal punishment); Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 STAN. L. & POL'Y REV. 1, 14-16 (2022) (reviewing the literature on the social harms of incarceration); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 464-65 (2013) (discussing the family-level and community-level harms of incarceration).

[33] *See, e.g.*, M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1242-44 (2020) [hereinafter *Invisible Prisons*] (critiquing the lack of attention, at sentencing, to incarcerated people's experience of prison).

[34] *See, e.g.*, Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1040-42 (2013) (arguing that at sentencing defense attorneys should present, and judges should consider, evidence of racial disparities in sentencing practices).

[35] *See* Betsy Wilson & Amanda Myers, *Accepting* Miller*'s Invitation: Conducting a Capital-Style Mitigation Investigation in Juvenile-Life-Without-Parole Cases*, 2015 THE CHAMPION 42; *see also* Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41 (2013) [hereinafter *Grace Notes*] (arguing that best practices for mitigation in capital cases should apply to noncapital sentencing).

the defendant is as a person.[36] They have criticized the dominance at sentencing of individualistic and moralistic explanations for people's involvement with the criminal legal system,[37] and highlighted instead the significance of situational and structural factors — especially the ways in which race mediates individual vulnerability to arrest and conviction.[38]

Considering the decarceral perspective's alternative approaches to topic selection, fact-finding, and meaning-making helps bring into focus the ideological commitments underlying community supervision's approach to their sentencing role. I argue that community supervision's approach to their sentencing role elevates the punitive perspective on the pretense of neutrality, whitewashing the punitive perspective as obvious, objective, and inevitable. In this way, community supervision's sentencing role helps to entrench the punitive perspective on the sentencing process and insulate it from challenge and critique.

While this Article's primary contribution is to the sentencing literature, it contributes to two broader bodies of literature as well. First, it contributes to the growing body of criminal procedure scholarship that looks beyond constitutional criminal procedure and the federal system to describe and theorize the day-to-day practices of criminal adjudication in state courts.[39] Second, the Article contributes

[36] *See* Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1286-87 (2014) (discussing the use of social biography videos at sentencing).

[37] *See, e.g.*, Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 286 (2011) ("The discourse of personal choice and individual agency that dominates public and political thinking about crime and punishment justifies and thereby sustains the project of perpetual marginalization and exclusion.").

[38] *See, e.g.*, Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1485-1512 (2016) (analyzing how the convergence of multiple factors "render[s] African-Americans vulnerable to repeated police interaction"); Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162 (2021) (describing the role of race-based policing in the creation of criminal records).

[39] *See, e.g.*, ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018) (analyzing misdemeanor adjudication in New York City courts); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018) (critiquing the informality and punitiveness of

to the rich literature describing and critiquing the ideology of criminal procedure.[40] This scholarship has illuminated how ways of thinking about aspects of the criminal process shape practices and outcomes.[41] The ideology of criminal procedure is reflected in — and sustained by — not just readily visible aspects of the criminal legal system, such as caselaw and statutes, but also by policies, norms, and practices that typically elude scholarly scrutiny.[42] In this Article, I zero in on one such collection of policies and, by doing so, reveal community supervision agencies and officers as important ideological actors at sentencing.

The Article proceeds in four parts. In Part I, I describe community supervision's sentencing and supervisory roles. In Part II, I identify

misdemeanor case adjudication in state courts); Crespo, *supra* note 13 (analyzing the subconstitutional legal framework for plea bargaining in state courts); Fiona Doherty, *Testing Periods and Outcome Determination in Criminal Cases*, 103 MINN. L. REV. 1699 (2019) (describing the use of "testing periods" in state court criminal proceedings). As Alexandra Natapoff's pathbreaking work has illustrated, city-controlled municipal courts are also an important component of the criminal legal system and are distinct from state-level courts. *See, eg.*, Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964 (2021) (describing the criminal law functions of municipal courts).

[40] The meaning of ideology is contested across and within disciplines. I follow John Griffiths in defining ideology, in this context, to refer to "that set of beliefs, assumptions, categories of understanding, and the like, which affect and determine the structure of perception." John Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 359 n.1 (1970).

[41] *See generall*y HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968) (identifying two competing models of criminal procedure's purpose and values, one focused on crime control and one on due process); Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019) (critiquing the traditional people/defendant dichotomy in criminal cases); Dolovich, *supra* note 37 (arguing that logic of exclusion and control legitimizes current penal practices); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992) (identifying the emergence of a new penology focused the identification, classification, and sorting of groups by dangerousness); Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189 (2013) (describing and critiquing the emergence of a new model of punishment, neorehabilitation, centered on evidence-based programming and predictive tools).

[42] *See* Simonson, *supra* note 41, at 258-59 ("A central insight of the literature on ideology and criminal procedure is that the principles we use to frame our procedures in turn shape the cultures of our precincts, courthouses, prisons, and other sites of interaction between criminal justice actors and the public. Although these principles are not always explicit, nor are they uniform, they constitute a set of ideas and assumptions that run beneath the operation of the criminal process and legitimize the status quo.").

three facets of community supervision's sentencing role: topic selection, fact-finding, and meaning-making. In Part III, I surface the ideological dimension of community supervision's sentencing role and argue that community supervision's approach is rooted in the punitive perspective. In Part IV, I consider the implications of my descriptive and theoretical account for the future of community supervision's sentencing role.

I. COMMUNITY SUPERVISION'S DUAL ROLE

Community supervision agencies and officers play a dual role in the criminal legal system. In their primary, supervisory role, they administer the punishments of probation, parole, and other forms of community supervision. But they also play an important role at sentencing. In this Part, I provide a brief overview of both roles.[43]

A. Supervisory Role

Community supervision is an umbrella term that encompasses both probation and parole.[44] Today, 3.8 million adults in the United States are on community supervision — nearly double the number of adults in prison or jail.[45] While the legal structures of probation and parole vary from state to state, parole is typically a period of supervision that

[43] Throughout the Article, but especially in this Part, I use "community supervision" in two different senses. First, I use "community supervision" to describe a particular type of punishment (e.g., "people on community supervision"). I also use "community supervision" as a shorthand for referring to community supervision agencies and officers (e.g., "community supervision's sentencing role"). I hope my intended meaning in each case is clear from the context.

[44] Karteron, *supra* note 3, at 657 ("The term 'community supervision' embraces a range of community-based correctional institutions and programs. Among them, the most prominent are probation and parole. Probation is a form of supervision typically imposed as a sentence in lieu of incarceration. In state criminal systems, parole is usually the community supervision system that applies to people immediately after they are released from incarceration.").

[45] E. ANN CARSON & RICH KLUCKOW, U.S. DEP'T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2021 — STATISTICAL TABLES 4 tbl.1 (2023), https://bjs.ojp.gov/document/cpus21st.pdf [https://perma.cc/ED2R-A4QH].

follows release from prison.[46] Probation, in contrast, is typically imposed as a stand-alone, noncustodial sentence.[47]

As a form of criminal punishment, community supervision enjoyed a reputation as a rehabilitative alternative to incarceration well into the 21st century.[48] In the last decade, however, a wave of scholarship has challenged this account. This recent scholarship has argued that rather than serving as a true alternative to incarceration, community supervision often creates new and different pathways to incarceration through revocations.[49] And even where supervision does not lead to revocation, it "extends punitive control and surveillance beyond the walls of carceral facilities and into the community."[50] To be sure, community supervision sometimes facilitates access to services and programs, such as drug treatment or job training.[51] Such access, however, is folded within "a web of punitive regulation," such as where

[46] I use the term "parole" generically, to refer to all types of post-prison supervision. *See* Karteron, *supra* note 3, at 657.

[47] Sometimes probation is imposed as part of a "split" sentence: a period of initial incarceration, followed by period of probation. This is distinct from parole because the period of initial incarceration is served in jail rather than prison and is briefer. *See* Klingele, *supra* note 1, at 1022 n.22 ("In some jurisdictions, a short term of imprisonment may be imposed as a 'condition' of probation or as part of a 'split sentence.'").

[48] Doherty, *supra* note 3, at 344.

[49] Klingele, *supra* note 1, at 1015 ("[I]n many cases, community supervision is not an alternative to imprisonment but only a delayed form of it."); Lopoo et al., *supra* note 3, at 23 ("Originally intended as an alternative to incarceration and a means of rehabilitation for those who have committed crimes, supervision often functions as a trip wire for further criminal legal system contact.").

[50] Lopoo et al., *supra* note 3, at 26.

[51] Michelle S. Phelps & Ebony L. Ruhland, *Governing Marginality: Coercion and Care in Probation*, 69 SOC. PROBS. 799, 800 (2022) ("[P]robation does, at times, provide meaningful assistance to marginalized adults, including support from POs [probation officers], access (often mandated) to drug treatment and other programs, and (in some cases) relief from a jail or prison term. Yet this care comes with the stigma of a criminal record, potentially degrading experiences with a PO, onerous financial and time constraints, and the threat of revocation. Together, this suggests that mass probation does more harm than good in adding fiscal, time, and emotional burdens to already legally and socially precarious lives.").

participation in drug treatment is a mandatory supervision condition, and lapses are punishable with incarceration.[52]

The heart of community supervision's supervisory role is to enforce compliance with the standard conditions of community supervision,[53] which are "prolific and suffocating."[54] Supervision conditions regulate the relationships, movement, activities, finances, and personal habits of people on community supervision, allowing community supervision officers to "wield an almost farcical level of control over people's lives."[55] Standard conditions commonly include the "prohibition of alcohol use (even if your case did not involve substance abuse), zero contact with others with criminal records (even if they are friends and family), and enforcement of a strict curfew (even if you work night shifts)."[56] Other common conditions are "vague and moralistic" — such as a requirement that people on community supervision "be good" and only associate with "good" people, or that they make "every effort" to find employment.[57] The vagueness and breadth of standard supervision

[52] Kevin R. Reitz & Edward E. Rhine, *Parole Release and Supervision: Critical Drivers of American Prison Policy*, 3 ANN. REV. CRIMINOLOGY 281, 290 (2020) ("Rehabilitation efforts are maintained within a web of punitive regulation."); *see also* Robert Werth, *The Construction and Stewardship of Responsible Yet Precarious Subjects: Punitive Ideology, Rehabilitation, and "Tough Love" Among Parole Personnel*, 15 PUNISHMENT & SOC'Y 219, 220-21 (2013) ("Programs ostensibly designed for offender assistance are frequently used as a means to enhance supervision, normative regulation and control . . . facilitating rehabilitation and community reintegration, as goals, are not jettisoned or delegitimized, but are folded within a punitive envelope geared toward 'aiding' parolees by enmeshing them in a net of regulatory surveillance.").

[53] *See* Schuman, *supra* note 3, at 885 ("In total, the United States sends approximately 350,000 people to jail or prison each year for violating conditions of their supervision, accounting for more than a third of all prisoners in thirteen states, and more than half in Arkansas, Idaho, Missouri, and Wisconsin.").

[54] Lopoo et al., *supra* note 3, at 27 (noting that standard conditions of supervision "include prohibition of alcohol use (even if your case did not involve substance abuse), zero contact with others with criminal records (even if they are friends and family), and enforcement of a strict curfew (even if you work night shifts)"); *see also* Doherty, *supra* note 3, at 296 (noting the prevalence of "vague and moralistic" conditions).

[55] Doherty, *supra* note 3, at 294.

[56] Lopoo et al., *supra* note 3, at 27.

[57] Doherty, *supra* note 3, at 296-310.

conditions means community supervision officers have broad discretion to decide what constitutes a violation.[58]

Where a community supervision officer believes that someone has violated their supervision conditions, they can initiate revocation proceedings.[59] The legal standard for revocation is low, and revocation often leads to incarceration — including for technical violations, where the person on supervision violated a supervision condition but did not commit any new crime.[60] The combination of far-reaching conditions, community supervision officers' expansive investigatory powers, and the low standards for revocation mean that people on community supervision can become trapped in a vicious cycle of revocation and re-incarceration.[61] The punitiveness of community supervision is felt most intensely by Black people on supervision, who are revoked more often than their white and Latino counterparts.[62]

Amidst the rise of mass incarceration, scholars largely lost interest in studying community supervision as a sanction.[63] This lack of attention partly explains why community supervision's reputation as a kind and gentle alternative to incarceration endured for so long. Recent scholarship that closely examines the policies and practices of

[58] *Id.* at 308.

[59] Klingele, *supra* note 3, at 1039-40.

[60] *See* MICHAEL P. JACOBSON, VINCENT SCHIRALDI, REAGAN DALY & EMILY HOTEZ, LESS IS MORE: HOW REDUCING PROBATION POPULATIONS CAN IMPROVE OUTCOMES 4 (2017) https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less_is_more_final.pdf [https://perma.cc/28YC-RHVY]; Doherty, *supra* note 3, at 295.

[61] Approximately half of all revocations are for technical violations (violations of supervision conditions that are not standalone criminal offenses). Jacob Schuman, *Criminal Violations,* 108 VA. L. REV. 1817, 1820-21 (2022).

[62] *See, e.g.*, JESSE JANNETTA, JUSTIN BREAUX, HELEN HO & JEREMY PORTER, URB. INST., EXAMINING RACIAL AND ETHNIC DISPARITIES IN PROBATION REVOCATION 1 (2014), www.urban.org/sites/default/files/publication/22746/413174-Examining-Racial-and-Ethnic-Disparities-in-Probation-Revocation.PDF [https://perma.cc/FB78-FQHV] (finding that Black people on probation are revoked more often than white and Latino people on probation, controlling for probationer characteristics); Sara Steen & Tara Opsal, *Punishment on the Installment Plan: Individual Level Predictors of Parole Revocation in Four States*, 87 PRISON J. 344 (2007) (finding that Black people on parole were more likely than white people to be revoked for a new offense or technical violation, controlling for parolee characteristics).

[63] Phelps, *supra* note 3, at 52 ("As mass incarceration boomed, scholars largely lost interest in probation . . . rarely engaging with it seriously as an important institution.").

community supervision, however, has demonstrated that community supervision is part of, rather than an alternative to, "the continuum of excessive penal control."[64]

B. Sentencing Role

In their primary, supervisory role, community supervision agencies and officers administer the punishment of community supervision for people whose sentences include a term of probation or parole. But community supervision agencies and officers also play a role in shaping what sentences people receive in the first place.

Today, all fifty states and D.C. provide for presentence reports in some or all felony cases.[65] In every state except Delaware, community supervision officers are the ones responsible for conducting presentence investigations and writing presentence reports.[66] Community supervision agencies, in turn, develop the policies that govern those investigations and reports.

When a presentence report is prepared, judges (and the parties) receive the report after conviction but before sentencing.[67] The

[64] Doherty, *supra* note 3, at 354.

[65] *See infra* APPENDIX A. States vary widely in when presentence reports are required versus permitted. How often presentence reports are used when they are permitted, but not required, varies even within states. *See* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 378 (2016) (discussing local variation in practice in California, Oregon, Maryland, Florida, and Missouri).

[66] *See infra* APPENDIX A. Note that in some states, the relevant statutes or court rules do not require that community supervision officers be the ones to conduct presentence investigations. Some states don't specify who should conduct presentence investigations; others delegate the task to a larger agency, such as the Department of Corrections. *Id.* In practice, however, community supervision officers are the ones who conduct presentence investigations and write presentence reports in 49 states (all except Delaware) and D.C. *Id.*

[67] The nature and extent of the parties' access to the report varies from state to state. Some states permit judges to withhold specific portions of the report from the parties. *See, e.g.*, OR. REV. STAT. § 137.079(2) (2023) ("The court may except from disclosure parts of the presentence report . . . which are not relevant to a proper sentence, diagnostic opinions which might seriously disrupt a program of rehabilitation if known by the defendant, or sources of information which were obtainable with an expectation of confidentiality."); S.D. CODIFIED L. § 23A-27-7 (1997) (allowing the court

presentence report provides the judge with information about both the crime of conviction and the defendant as an individual.[68] The more sentencing discretion the judge has in a particular case, the more significant the presentence report becomes.[69]

not to disclose to the parties "any recommendation as to sentence, and other material that, in the opinion of the court, contains a diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons").

[68] *See infra* Part II.

[69] On the whole, judges today have far less sentencing discretion than they did in the first seven decades of the 20th century. *See, e.g.*, Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 392 (2005) (describing sentencing in this period as a "Wild West of unregulated discretion"). Nonetheless, judges still retain some degree of sentencing discretion in many cases. Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 251 (2018) (noting that even in the most structured sentencing systems, "it is rare that conviction inexorably leads to a single lawful penalty"); Maneka Sinha, *Junk Science at Sentencing*, 89 GEO. WASH. L. REV. 52, 67 (2021) ("Even in jurisdictions that utilize some form of sentencing guidelines, judges typically retain significant discretion in sentencing decision making."); Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 136 (2018) ("Judges can often choose whether to send a person to prison or not, and, if the court chooses to order a sentence to incarceration, they can determine, albeit often within a statutorily-proscribed range of years, how long that sentence should be."). For example, even where the conviction carries a mandatory minimum penalty, the judge must still exercise discretion in deciding how long the sentence should be, within the statutorily authorized range. *See* Erik Luna, *Mandatory Minimums*, *in* 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 117, 119 (Erik Luna ed., 2017).

To be clear, in some cases the judge does not have *any* degree of sentencing discretion, as where the plea agreement structured to be binding on the judge. The judge has broad discretion to reject such a plea agreement upfront, but if the judge accepts the plea agreement, then they must impose the agreed-upon sentence. *See* Jeffrey Bellin & Jenia I. Turner, *Sentencing in an Era of Plea Bargains*¸ 102 N.C. L. REV. 179, 197-203 (2023). Additionally, some states permit only a life-without-parole sentence for certain convictions. Even mandatory life (rather than life-without-parole) sentences, however, sometimes carry a degree of discretion, where the judge can decide whether and when to make someone eligible for release on parole. *See* ASHLEY NELLIS, THE SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 29-30 (2017), https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf [https://perma.cc/M3UR-8K3P].

Community supervision's sentencing role originated in the Progressive Era.[70] The role is rooted in the rehabilitative ideal, which was the dominant model of sentencing in the early and mid-twentieth century.[71] The rehabilitative ideal embraced a medical model of punishment in which defendants were morally "sick" and the purpose of punishment was to provide the "treatment" that would cure them of their "deviancy."[72] To impose an appropriately rehabilitative punishment, sentencing judges needed an accurate understanding — a diagnosis — of the underlying causes of an individual defendant's criminal behavior.[73] The purpose of presentence reports, at least in theory, was to provide such a diagnosis.[74]

The rehabilitative ideal also provided the foundation for the Supreme Court's decision in the 1949 case of *Williams v. New York*,[75] which

[70] DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 61 (2d ed. 2002). The Progressive Era is roughly the late 1890s through the 1920s.

[71] *See* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 5-7 (1981) (discussing the rehabilitative ideal's "dominance in the United States for most of the twentieth century").

[72] Douglas A. Berman, *Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 654 (2005) ("The rehabilitative ideal was often conceived and discussed in medical terms — with offenders described as 'sick' and punishments aspiring to 'cure the patient' — and sentencing judges and parole officials were thought to have unique insights and expertise in deciding what sorts and lengths of punishments were necessary to best serve each criminal offender's rehabilitative potential.").

[73] ROTHMAN, *supra* note 70, at 50. ("The most critical component of the Progressive attempt to understand the causes of crime was not an agreed-upon answer but an agreed-upon method. . . . The point was to understand the facts of each offender's life history. . . . Indeed, the method held the key to rehabilitation. In the diagnosis would be the prescription. To understand the particulars of the case was to solve it.").

[74] *Id.* at 61-62. Despite these grand ambitions, in practice presentence reports were frequently "dossiers of gossip," consisting of "a few facts and much speculation." THOMAS G. BLOMBERG & CAROL LUCKEN, AMERICAN PENOLOGY: A HISTORY OF CONTROL 79 (2000).

[75] 337 U.S. 241 (1949). Samuel Tito Williams, an 18-year-old Black man, was convicted — wrongly — of murdering a young white girl. In accordance with New York law, after conviction a community supervision officer wrote a presentence report discussing his "past life, health, habits, conduct, and mental and moral propensities." *Id.* at 245. The jury recommended a sentence of life imprisonment, but the judge — relying heavily on the presentence report — overrode the jury's recommendation and instead

remains the leading case on community supervision's sentencing role. In holding that defendants had no right to cross-examine the witnesses who provided information that the community supervision officer included in the presentence report, the *Williams* Court emphasized that "reformation and rehabilitation" had displaced retribution as "the dominant objective of the criminal law."[76] In the new rehabilitative era, judges needed "the best available information" to impose an appropriately rehabilitative sentence.[77] Defendants, the Court insisted, had nothing to fear from opening their lives to scrutiny by the community supervision officer. To the contrary, doing so would benefit defendants: "by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship."[78]

But why entrust the task of investigating and writing presentence reports to community supervision officers, in particular? Community supervision's sentencing role emerged at the same time probation was becoming a common punishment in criminal cases, which meant community supervision officers were already working within the criminal courts.[79] Additionally, community supervision's new sentencing role was consistent with the Progressive understanding of community supervision officers' supervisory role: that community supervision officers were defendants' allies in a joint quest for rehabilitation.[80]

sentenced Mr. Williams to death. For excellent overviews of the facts underlying Mr. Williams' wrongful conviction, see Shaakirrah R. Sanders, *Making the Right Call for Confrontation at Felony Sentencing*, 47 U. MICH. J. L. REFORM 791,795-800 (2014) and Shaakirrah R. Sanders, *The Value of Confrontation as a Felony Sentencing Right*, 25 WIDENER L.J. 103, 111-16 (2016).

[76] *Williams*, 337 U.S. at 248.

[77] *Id.* at 249.

[78] *Id.*

[79] ROTHMAN, *supra* note 70, at 44 ("[N]ot until the Progressive period did probation become a popular courtroom disposition. In 1900, only six states provided for probation. In 1915 alone, thirty-three states created or expanded the procedure; and by 1920, every state permitted juvenile probation and thirty-three states, adult probation.").

[80] An early and influential Progressive vision of the community supervision officer's role was as the defendant's "friend." The community supervision officer's "intimate personal relationship" with the defendant allowed the officer to provide "friendly advice," "helpful oversight," and "encouragement." During the 1920s and 30s, the

The rehabilitative ideal has always been illusory. Even during the rehabilitative ideal's heyday, sentencing and punishment practices diverged sharply from any rehabilitative aspirations[81] — especially for Black defendants, who were seen by white criminal legal system actors as incapable of rehabilitation.[82] By the 1980s, however, the rehabilitative ideal had been largely abandoned even as a theory, discarded in favor of a more explicit punitiveness.[83] The decline of the rehabilitative ideal transformed many aspects of the sentencing process, as states re-evaluated sentencing structures (e.g., indeterminate sentencing and

dominant understanding of the community supervision officer's role shifted from friend to social worker — though "distinctions between friend and social worker had never been iron-clad." *Id.* at 64-66.

[81] *See* FRANCIS A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 35 (1964) ("[I]n practice, there is a strong tendency for the rehabilitative ideal to serve purposes that are essentially incapacitative rather than therapeutic in character."); Anthony Grasso, *Broken Beyond Repair: Rehabilitative Penology and American Political Development*, 70 POL. RSCH. Q. 394, 394 (2017) (noting that the rehabilitative ideal "has always relied on distinguishing curable offenders from incorrigible ones who cannot be reformed and warrant harsher punishment"); Loic Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 124 n.21 (2001) ("[E]ven in the heyday of rehabilitation . . . the prison did not much rehabilitate.").

[82] *See* Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1364-68 (2013) (describing how the view that Black children were "degenerate from birth" shaped sentencing outcomes for Black children in juvenile court during the Progressive Era); Khalil Gibran Muhammad, *Where Did All the White Criminals Go?: Reconfiguring Race and Crime on the Road to Mass Incarceration*, 13 SOULS 72, 88 (2011) (describing rehabilitation in the northern United States in the early 20th century as a "racial privilege" available to white but not Black defendants).

[83] CHRISTOPHER SEEDS, DEATH BY PRISON: THE EMERGENCE OF LIFE WITHOUT PAROLE AND PERPETUAL CONFINEMENT 91 (2022) ("One can appreciate the variation with which states adopted rehabilitation, in rhetoric and in practice, while simultaneously acknowledging the rehabilitative model's standing as an official ideology that was identity defining for US punishment [until] the dismantling of that official ideology in the 1970s and 1980s."); Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 162 (2016) ("The rehabilitative model of sentencing was largely abandoned in the late twentieth century."); Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33, 36 (2011) ("Scholars concur that one of the most important changes in the penal field in the last 30 years was the decline of the rehabilitative ideal and the shift toward a more punitive criminal justice system.").

parole release) that were based on the rehabilitative ideal.[84] Improbably, community supervision's sentencing role survived these sea changes intact.[85]

In the wake of the rehabilitative ideal's decline, courts have offered subtly different justifications for community supervision's sentencing role. While continuing to cite *Williams* approvingly, the handful of contemporary state court decisions discussing the role's purpose downplay any connection to rehabilitation. Rather, they emphasize that community supervision's sentencing role promotes the value of individualized sentencing: sentences that "fit the [defendant] as well as the crime."[86] For the *Williams* court, the purpose of gathering individualized information about the defendant was to understand the defendant's unique rehabilitative needs.[87] Contemporary caselaw, in contrast, treats an abundance of information about the individual defendant as an end in itself.[88]

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[84] Between 1976 and 2000, 16 states and the federal system eliminated parole release for all or most cases and implemented determinate sentencing ("truth-in-sentencing") regimes instead. JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER RE-ENTRY 66-69 (2003) (listing each of the 16 states that eliminated or curtailed parole); Reitz & Rhine, *supra* note 52, at 283.

[85] *See infra* APPENDIX A.

[86] *See, e.g.*, State v. Patterson, 674 A.2d 416, 422-23 (Conn. 1996) ("The sole purpose [of a presentence investigation] is to enable the court, within limits fixed by statute, to impose an appropriate penalty, fitting the offender as well as the crime."); Dillard v. State, 827 N.E.2d 570, 576 (Ind. Ct. App. 2005) ("There is only one purpose for filing a presentence investigation report, viz., to provide information to the court for use at individualized sentencing."); Germain v. State, 769 A.2d 931, 937 (Md. 2001) ("Generally, a PSI [presentence investigation] is a tool offered to the sentencing court to assist it in reaching its goal of individualizing the sentence 'to fit "the offender and not merely the crime."'") (quoting Williams v. New York, 337 U.S. 241, 247 (1949)); People v. Miles, 559 N.W.2d 299, 303 (Mich. 1997) (the presentence investigation report is "intended to insure that the punishment is tailored not only to the offense, but also to the offender."); People v. Lee, 218 N.W.2d 655, 665 (Mich. 1974) ("The presentence report . . . shifts the emphasis of the sentencing proceedings from the specific nature of the crime committed to the individual convicted of the crime."); State v. Tufts, 618 A.2d 818, 820 (N.H. 1992) ("critical information").

[87] *Williams*, 337 U.S. at 249.

[88] *See, e.g.*, *Tufts*, 618 A.2d at 820 ("Every person with the passage of time leaves behind an ever-deepening reservoir of things done and things left undone, of associations cultivated and associations abandoned, of good works performed and

Additionally, courts continue to emphasize that community supervision officers have a non-adversarial relationship with defendants, but they no longer describe community supervision officers as defendants' allies (as the *Williams* court did[89]). Rather, state court decisions from the last thirty years have generally described the community supervision officer as a neutral third party at sentencing, one who is unaligned with either the defense or the prosecution.[90]

Community supervision's sentencing role in state courts has attracted far less attention from scholars than community supervision's supervisory role.[91] In part, this may reflect obstacles to studying the sentencing role. Community supervision's sentencing role is shrouded in secrecy, at two levels. First, presentence reports prepared for individual cases are typically confidential.[92] Second, the agency policies

actions taken that reflect the darker side of humanity. In preparing a presentence evaluation and report, a probation officer is entitled, and should be encouraged, to dredge up from this reservoir those areas of significance that will supply critical information upon which the trial judge may base his or her judgment in passing sentence."); State v. Frey, 817 N.W.2d 436, 445 (Wis. 2012) ("[A] sentencing court needs the fullest amount of relevant information concerning a defendant's life and characteristics.").

[89] *Williams*, 337 U.S. at 249 (noting the community supervision officers "have not been trained to prosecute but to aid" defendants).

[90] *See, e.g.*, *Patterson*, 674 A.2d at 426 (Berdon, J., concurring) ("It is important, not only from the perspective of the defendant whose liberty is at stake, but also from the vantage point of the state, which represents the public's interest, that the sentencing judge have before him or her all the information regarding the defendant that is necessary to make an informed decision. Additionally, it is important that this information be gathered and evaluated by a professionally trained probation officer who is detached from the advocacy of both the defendant and the state."); Howe v. Detroit Free Press, Inc., 487 N.W.2d 374, 378 (Mich. 1992) ("The probation officer is a nonadversarial adviser to the court whose function it is to collect and evaluate information concerning the life and character of the subject and to make recommendations."); State v. Garreau, 864 N.W.2d 771, 778 (S.D. 2015) (stating that the community supervision officer "'is not an agent of the prosecution, . . . has no adversarial role in the sentencing proceedings . . . and acts as a neutral information gatherer for the judge . . .'" (internal quotations omitted)); State v. Howland, 663 N.W.2d 340 (Wis. Ct. App. 2003) (describing the community supervision officer as a "neutral and independent participant" in the sentencing process).

[91] *See supra* notes 11–15 and accompanying text.

[92] Most states require presentence reports to be filed under seal. *See, e.g.*, ALA. CODE 1975 § 15-22-53 (annotated 2021) (presentence reports "shall be privileged and shall not

that govern the presentence process are usually not readily available to the public. But community supervision's sentencing role, too, deserves a critical re-examination. This Article begins that project.

II. FACETS OF COMMUNITY SUPERVISION'S SENTENCING ROLE

The first step in a critical re-examination of community supervision's sentencing role is to understand the contours of that role. We know that community supervision agencies and officers are responsible for conducting presentence investigations and writing presentence reports — but what does that role entail? Put slightly differently, when states empower community supervision agencies and officers to conduct the presentence process, what, exactly, are they empowering them to do?

To answer these questions, I conducted a fifty-state survey of statutes and court rules related to presentence investigations and reports and analyzed nearly 200 community supervision agency policy documents related to presentence investigations and reports, which I obtained through open records requests.[93] Because the structure of community supervision agencies varies from state to state, I submitted open records requests in each state to any state-level community supervision agency

be available for public inspection except upon order of the court"); *see also* MODEL PENAL CODE: SENTENCING § 7.07C (2017) (collecting citations). *But see* ARIZ. R. CRIM. P. 26.6(e) (2023) ("A [presentence] report . . . is a public record unless the court orders otherwise or it is confidential by law."); Kan. Stat. Ann. § 21-6813(c) (2019) ("The presentence investigation report will become part of the court record and shall be accessible to the public, except that the official version, defendant's version and the victim's statement, any psychological reports, risk and needs assessments and drug and alcohol reports and assessments shall be accessible only to: The parties; the sentencing judge; the department of corrections; community correctional services; any entity required to receive the information under the interstate compact for adult offender supervision; and, if requested, the Kansas sentencing commission.").

[93] To be clear, the statutes, court rules, and policy documents capture policy, not practice. They cannot tell us how individual community supervision officers, as quintessential "street-level bureaucrats," approach their sentencing role in actual cases. *See* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES, at xii (1980) ("[T]he decisions of street-level bureaucrats, the routines they establish, and the devices they invent to cope with uncertainties and work pressures, effectively *become* the public policies they carry out."). While this is an important question, it is difficult to answer because presentence reports in individual cases are typically confidential.

and the relevant county-level agency in the state's largest county.[94] In my open records requests, I requested a wide range of policy documents related to the presentence process.[95]

In all, I received responses from forty-eight community supervision agencies (at both the state and county levels), across thirty-eight states (and D.C.).[96] The responding jurisdictions varied in which documents they provided. The three major categories of documents provided were standardized questionnaires for use in the defendant interview, templates for presentence reports, and general agency policies related to presentence investigations and reports.[97] As a shorthand, I call all three categories of policy documents "presentence protocols."

Through analysis of statutes, court rules, and the presentence protocols, I identified three consistent facets of community supervision's sentencing role across jurisdictions: topic selection, fact-

[94] Community supervision may be administered at the state or county level, and through one agency or multiple agencies. *See* Doherty, *supra* note 3, at 298 ("[M]any probationers are supervised through county-based probation departments, rather than state-based probation departments."); Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 153 (1997) ("Probation receives little public scrutiny, not by intent but because the probation system is so complex and the data are scattered among hundreds of loosely connected agencies, each operating with a wide variety of rules and structures."); Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 159 n.61 (2022) ("In some states, the same agencies oversee the various forms of community supervision, while in other states, separate agencies oversee pretrial release, probation, and parole.").

[95] I requested: "Any policy, instructions, or guidance related to presentence investigation reports, including but not limited to the contents, preparation, use, dissemination, and/or maintenance of presentence investigation reports; any training materials related to presentence investigation reports, including but not limited to any sample presentence investigation reports used as examples in trainings; any questionnaire or worksheet that defendants are asked to complete as part of the presentence investigation process; any templates, worksheets, forms, or other documents used in the preparation of presentence investigation reports; any document describing the suggested or required contents of a presentence investigation report; any document describing suggested questions or topics to investigate as part of the presentence investigation process; and any policy, instructions, or guidance on risk assessment as part of the presentence investigation report."

[96] *See infra* APPENDIX B.

[97] *See infra* APPENDIX B.

finding, and meaning-making.[98] This Part describes each facet of community supervision's sentencing role.

A. Topic Selection

The first facet of community supervision's sentencing role is topic selection. Through the creation and dissemination of presentence protocols, community supervision agencies standardize the topics that community supervision officers are supposed to investigate and report. In most states, statutes and court rules establish requirements for topics that officers must include in their presentence reports.[99] But community supervision agencies have significant discretion in selecting standard topics for investigation and reporting, for two reasons. First, many of the statutorily required topics are vague, as I discuss below. Second, the legal standard for relevance at sentencing is remarkably broad, such that courts can consider "almost anything" when imposing a sentence.[100] This means that the law of sentencing imposes few limits on the topics community supervision agencies can select for investigation.

States vary widely in how much detail the statutes and rules provide about the required contents of presentence reports.[101] The specific topic

[98] In some jurisdictions, community supervision officers are also responsible for administering a risk assessment instrument and generating a risk assessment score, which is included in the presentence report. *See, e.g.*, KY. REV. STAT. ANN. §§ 532.050, 532.007 (West 2020) ("The [presentence investigation] report shall be prepared and presented by a probation officer and shall include . . . the results of the defendant's risk and needs assessment."). Because conducting a risk assessment is not a consistent facet of their sentencing role across jurisdictions, however, I do not address it here.

[99] *See infra* APPENDIX C.

[100] Chin, *supra* note 69, at 251; *see also* Roberts v. United States, 445 U.S. 552, 556 (1980) (noting that it is a "fundamental sentencing principle" that "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come").

[101] Three states, for example, require only that the report include "any prior criminal record of the defendant and such information about the defendant's characteristics, the defendant's financial condition, and the circumstances affecting the defendant's behavior as may be helpful in imposing or deferring sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court." R.I. SUPER. R. CRIM. P. 32(c)(2); S.D. CODIFIED LAWS § 23A-27-6

requirements fall into two broad categories: topics related to the crime of conviction and topics related to the defendant as an individual.

The most common required topics related to the crime of conviction are "the circumstances of the offense" (twenty-eight states) and the impact of the crime on the victim (thirty-two states and D.C.).[102] The statutory requirements related to the defendant as an individual are far broader and more varied. By far the most common requirement (in thirty-nine states and D.C.) is to report on the defendant's "criminal record" or "history of delinquency and criminality."[103] The next most common requirement (in thirty states and D.C.) is to report on the defendant's "financial condition," "economic status," or something similar.[104] Twenty-three states and D.C. have a sweeping requirement that the officer report on the defendant's "present condition," "characteristics," or the "circumstances affecting the defendant's behavior."[105] The other most common requirements are to report on the defendant's occupation or employment history (twenty states); "social history" (nineteen states); educational background (nineteen states); and family "situation" or "background" (nineteen states).[106]

Notably, many of the topics required by statute or court rule are remarkably capacious. For example, the requirements to investigate the defendant's "characteristics, " "present condition," or "personal habits" could justify investigating almost any dimension of the defendant's life: housing, work, family and romantic relationships, friendships, interests, ambitions, substance use, physical and mental health, finances, civic involvement — and the list goes on.[107] Even requirements that may

(2021); VT. R. CRIM. P. 32(c)(2). At the other end of the spectrum, Florida requires that presentence reports address more than 15 specific topics. FLA. STAT. § 921.231 (2020).

[102] *See infra* APPENDIX C.

[103] *See infra* APPENDIX C.

[104] *See infra* APPENDIX C.

[105] *See infra* APPENDIX C.

[106] *See infra* APPENDIX C.

[107] Ten states require that presentence reports include information about the defendant's "personal habits." ARK. CODE ANN. § 5-4-102 (2019); HAW. REV. STAT. § 706-602 (2020); 730 ILL. COMP. STAT. 5/5-3-2 (2020); IND. CODE. § 35-38-1-9 (2021); LA. CODE CRIM. PROC. ANN. art. 875 (2021); NEB. REV. STAT. § 29-2261 (2021); N.J. STAT. ANN. § 2C:44-6 (2022); N.Y. CRIM. PROC. LAW § 390.30 (2020); 42 PA. CONS. STAT § 9732 (2023); TENN. CODE ANN. § 40-35-207 (2019).

appear narrower or more straightforward still require agencies to engage in topic selection. For example, the category of the defendant's "criminal record" surely includes adult criminal convictions, but it could also include (or not) arrests that did not lead to convictions, sealed or expunged records, and juvenile adjudications or arrests.[108]

Five states do not specify any requirements for the contents of presentence reports.[109] Additionally, seventeen states' statutes or rules have a catchall provision that explicitly permits the officer to include in the presentence report any information that they deem "relevant."[110] While community supervision agencies' discretion in topic selection is wide in all states, it is nearly unlimited in these twenty-two states.

To illustrate community supervision agencies' discretion in selecting topics, consider the variety of approaches to investigating the defendant's family "situation" or "background."[111] In some jurisdictions, agencies instruct officers to ask only for demographic information about the defendant's family members, such as their occupation, marital status, or date of death if deceased.[112] Some agencies focus on whether the defendant experienced particular forms of childhood adversity or trauma, such as physical or sexual abuse, involvement with state child

[108] *See, e.g.*, FLA. DEP'T. CORR., OFF. OF CMTY. CORR., INVESTIGATIONS IN COMMUNITY CORRECTIONS 20 (2021) ("[I]nclude sealed prior record information in the criminal history, with a notation that the particular offense information is from a sealed record.").

[109] *See infra* APPENDIX C (Arizona, Georgia, Kentucky, New Mexico and South Carolina).

[110] *See infra* APPENDIX C.

[111] Though investigation of the defendant's family "background" or "situation" is only required in 19 states, *see infra* APPENDIX C, every responding jurisdiction's protocols involved some investigation into the defendant's family background. See generally APPENDIX B for list of responding jurisdictions. The variation I describe here in agencies' selection of topics related to the defendant's family background extends to nearly all of the common topics of investigation. The area with the least variation, unsurprisingly, is the defendant's "criminal record" or "history of delinquency and criminality." Nonetheless, jurisdictions varied in their approach to this topic. *Compare* VT. DEP'T. OF CORR., PRESENTENCE INVESTIGATION (PSI) REPORTS 4-5 (2021) (convictions only), *with* FLA. DEP'T. CORR., *supra* note 108, at 20 (all prior arrests, regardless of disposition, including sealed or expunged records).

[112] *See, e.g.*, State of Alaska Dep't of Corr., Presentence Worksheet 1-4 (2021) (on file with author).

welfare agencies, or domestic violence in their home.[113] Other agencies instruct officers to ask the defendant to assess the quality of their relationships with their parents, siblings, spouse, or children using a numerical scale[114] or binary categories (e.g., is a particular family member a "positive support" or not,[115] does the defendant have a "good relationship" with them or not).[116] All of these different approaches arguably help fulfill the mandate to investigate the defendant's family "situation" or "background," but none of them is explicitly required by statute.

Some community supervision agencies interpret the requirement to investigate the defendant's family "background" or "situation" as justification for building mini-dossiers of sensitive information about the defendant's family members — with or without their knowledge. Notably, two thirds of the questionnaires I received ask if the defendant's family members have criminal records,[117] have been

[113] The most common areas of inquiry related to the defendant's childhood family experiences are whether the defendant experienced physical or sexual abuse by family members and whether state child welfare agencies were involved in their family. *See, e.g.*, Ala. Prob. & Parole, *supra* note 21, at 6-12 (asking defendants to report, for each family member, whether they were "abused by this person" and if so, to circle one of three categories: "Physical/Mental/Sexual") (on file with author).

[114] Colo. 18th Jud. Dist., Prob. Dep't, Background Information: Personal Data 7 (2022) ("On a scale from 1 (not very good) to 10 (very good), please rate yourself as a parent [and] [p]lease explain your scoring.") (on file with author).

[115] Idaho Dep't of Corr., Presentence Investigation Personal History Questionnaire 8-9 (2021) ("Do you consider [your dad/your mom] a positive support now? [circle yes or no] If not, why? If yes, what type of (emotional/financial, etc.) support? How often do you speak now?") (on file with author).

[116] Colo. 18th Jud. Dist. Prob. Dep't, *supra* note 114, at 5 ("Do you have a good relationship with your siblings?").

[117] *See, e.g.*, Maricopa Cnty. (Ariz.) Adult Prob., *supra* note 21, at 7 ("Does anyone in your family (parents, siblings) have a criminal record?"); Idaho Dep't of Corr., *supra* note 115, at 10 ("Any members of your family, including spouse, who have a criminal record - note their name/relationship and crimes."); Ind. Off. of Ct. Servs., *supra* note 24, at 4 ("Does anyone in your family have a criminal record? Who? What was it for?"); Minn. Dep't of Corr., PSI Questionnaire 6 (2015) ("Have any family members been convicted of a crime? If yes, explain.") (on file with author); Kanawha Cnty. (W. Va.) Adult Prob. Dep't, Presentence Investigation Questionnaire 5 (2020) ("Who in your family has/had a criminal record?") (on file with author).

incarcerated or on supervision,[118] or have been "in trouble with the law."[119] Some questionnaires also ask about family members' mental health or substance use issues, histories of physical or sexual abuse, and citizenship or immigration status.[120] Again, none of these questions is explicitly required by statute.

B. Fact-Finding

As is true for topic selection, community supervision agencies also have broad discretion in identifying preferred methods and sources for officers to use in their fact-finding. The statutes governing presentence reports give little, if any, instruction about *how* community supervision officers should conduct their investigations. And the law of sentencing is highly permissive regarding what evidence, from what sources, is admissible at sentencing hearings.[121] The protocols instruct officers to

[118] *See, e.g.*, Nev. Dep't of Pub. Safety, Div. of Parole & Prob., Presentence Investigation Questionnaire 3 (Sept. 10, 2019), http://npp.dps.nv.gov/uploadedFiles/nppdpsnvgov/content/Forms/PSIQ.pdf [https://perma.cc/T6PK-KZWL] ("Have any members of your immediate family ever been in prison or on probation? No / Yes; If you answered yes above, please complete the following: Name; Relationship; Crime; When; Where.") (on file with author); State of Utah Adult Prob. & Parole, Presentence Report Questionnaire 11 (2019) ("Did a household member go to prison?") (on file with author).

[119] Colo. 18th Jud. Dist. Prob. Dep't, *supra* note 114, at 5 ("Has anyone in your family EVER been in trouble with the law? If so, who and why? Please be specific."); First Cir. Ct. of Haw., Adult Client Servs. Branch, AP-P-183 Prison w/ Questionnaire 14 (YEAR/n.d. if not dated) ("Have any members of your family been in trouble with the law? If so, who and for what matters?") (on file with author); Multnomah Cnty. (Or.) Dep't of Comm. Just., PSI Interview Form 2 (2008) ("Children: (Name/ages/who they live with)/Adult children on supervision?") (on file with author).

[120] Colo. 18th Jud. Dist. Prob. Dep't, *supra* note 114, at 5 (2022) ("Please check those that apply to your family and indicate which family members were involved: Alcohol Abuse / Drug Abuse / History of Mental Health / Social Service Involvement / Domestic Violence / Physical Abuse / Sexual Assault / Incest / Neglect / Trauma"); Kanawha Cnty. (W. Va.) Adult Prob. Dep't, *supra* note 117, at 5 (2020) ("Did other family members suffer from physical or sexual abuse during your youth?"); *see* STATE OF LA. DEP'T OF PUB. SAFETY & CORR., *supra* note 25, at 13 ("Factual information on the defendant's family is also important, including his wife (or husband), children, parents, brothers, and sisters. Their names should be secured, their relationship to the offender, ages, birthplace (city and state), present addresses, occupation, employer, economic status, education, citizenship, religion, health, arrests).").

[121] *See infra* notes 169–175 and accompanying text.

rely on two primary sources of information in their fact-finding: an interview with the defendant and law enforcement records.[122]

The protocols typically require an interview with the defendant,[123] which is often structured by a standardized questionnaire.[124] The questionnaire covers both basic biographical information (e.g., where the defendant lives and works) and what Khiara Bridges has described in a different context as "intensely personal, painfully intimate" topics.[125] For example, some questionnaires ask about the defendant's mental health, trauma history, and romantic and family relationships.[126] People facing sentencing for a sex offense — a broad category[127] — may be asked to disclose how old they were when they had their first orgasm and how many sexual partners they have had in their lifetime.[128] The protocols also instruct officers to ask the defendant to provide their

[122] In cases where there is a victim, officers also obtain a victim impact statement from the victim (or the victim's family, in the case of a homicide). In 32 states, statutes or court rules require that presentence reports include a victim impact statement, where applicable. *See infra* APPENDIX C. Some protocols also instruct officers to verify information self-reported by the defendant with third parties (e.g., the defendant's employer, family members, roommates, etc.).

[123] Interviews for people who are not incarcerated typically take place at the local community supervision office; interviews for incarcerated defendants take place in the jail or by phone. *See, e.g.*, IDAHO DEP'T OF CORR., STANDARD OPERATING PROCEDURE: PRESENTENCE INVESTIGATION 5 (2017) ("In-person presentence interviews must take place in a safe and controlled setting, such as a jail, correctional facility, or IDOC office. Interviews may be conducted via telephone or video.").

[124] *See, e.g.*, MINN. DEP'T OF CORR., PSI AGENT HANDBOOK 1 (2020) ("Agents will conduct a thorough interview with the client using an appropriate questionnaire as determined by the District Supervisor.").

[125] Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 116 (2011) (describing questioning about "intensely personal, painfully intimate" topics as part of the screening process for people to receive subsidized prenatal care in New York).

[126] *See supra* notes 20–24 and accompanying text.

[127] *See, e.g.*, Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1557 (2014).

[128] N.D. Dep't. of Corr. & Rehab., Sex Offense Pre-Sentence Investigation Questionnaire Form 15 (2022) ("At what age, did you first experience a sexual orgasm? ([D]escribe the circumstances and your reaction).") (on file with author); First Cir. Ct. of Haw., Adult Client Servs. Branch, AP-P-563 Sex Unit w/o ASUS 26 ("Presentence Questionnaire") (2016) ("How many people have you had sex with in your life?") (on file with author).

version of the incident underlying the defendant's conviction — to describe "what happened" in their own words.[129]

As a routine part of the interview, some protocols instruct community supervision officers to ask defendants to sign releases so that the community supervision officer can obtain the defendant's protected information (i.e., information the community supervision officer could not access without the defendant's written authorization).[130] For example, the protocols commonly instruct officers to request releases authorizing the community supervision officer to obtain the defendant's medical and mental health records (protected by HIPAA[131]) and the defendant's educational records, including special education designation and school disciplinary records (protected by FERPA[132]).The defendant's willingness to sign these releases itself becomes a subject of investigation: some protocols explicitly instruct the community supervision officer to note in their presentence report if

[129] Sometimes presentence protocols include a board invitation to describe what happened; sometimes they instruct community supervision officers to ask about specific aspects of the offense, such as the defendant's motivation or the role of drugs and alcohol. Indiana Standard Presentence Investigation Worksheet, *supra* note 24 ("Tell me about what happened the day you were arrested. Why did you decide to commit the offense? What part did others play in the offense? What part did drugs or alcohol play? Did you threaten or hurt anyone?") (on file with author).

[130] *See, e.g.*, GA. DEP'T OF COMM. SUPERVISION, POLICY AND PROCEDURE STATEMENT NO. 4.113: SUPERVISEE INVESTIGATIONS 4 ("Note: An original signed release of information form must be obtained for each medical or psychological provider before any information can be obtained."); HAW. JUDICIARY, ADULT PROBATION POLICIES AND PROCEDURES MANUAL: DIAGNOSTIC REPORTS 6 (2016) ("The assigned officer shall have the offender sign the necessary consent forms . . . so that information provided by the offender can be verified."); N.Y. STATE DIV. OF PROB. & CORR. ALTS., NEW YORK STATE PROBATION PRACTITIONER HANDBOOK FOR THE MANAGEMENT OF THE DWI OFFENDER 14-15 (2015) ("Offenders should sign a release of information form, as required in order for the probation officer to access records. Relevant contacts may include but are not limited to the following: Household Members, Family Members, Treatment Providers, Employers, Friends, Spouses or Significant Others, Schools, Clergy, Support Groups (such as AA/NA or a Secular Equivalent).").

[131] Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936 (1996).

[132] The Family Educational Rights and Privacy Act ("FERPA") is codified at 20 U.S.C. § 1232g.

the defendant declines to sign a release authorizing the community supervision officer to access their protected information.[133]

Under the Fifth Amendment, defendants can decline to answer questions in the presentence interview or to sign releases authorizing the officer to collect their legally protected records.[134] But several legal and practical aspects of the presentence investigation process strongly encourage compliance and disclosure. First, courts have generally found that the Sixth Amendment does not require the presence of counsel at presentence investigation interviews.[135] The absence of counsel from the presentence interview means that there is no third party allied with the defendant to counterbalance the community supervision officer's authority or advise the defendant about whether to answer particular questions and what information to share. Second, defendants are not informed of their Fifth Amendment rights in the presentence process. Indeed, the standard instructions to defendants about the interview sometimes create the opposite impression: that full compliance and

[133] FLA. DEP'T. CORR., OFF. OF CMTY. CORR., PROCEDURE NO. 302.105: INVESTIGATIONS IN COMMUNITY CORRECTIONS 16 (2021) ("If the defendant refuses to sign the [release of information], the officer will include the refusal in the defendant's statement section of the [presentence report]."); KY. DEP'T. OF CORR., POLICY NO. 28-01-03: PRESENTENCE, POSTSENTENCE, AND OTHER INVESTIGATION REPORTS 3 (2018) ("If the offender refuses to be interviewed by the officer, the offender's lack of cooperation shall be addressed within the cover letter attached to the presentence report.").

[134] *See* Estelle v. Smith, 451 U.S. 454, 462 (1981) ("[T]he availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites."); Cassie Deskus, *Fifth Amendment Limitations on Criminal Algorithmic Decision-Making*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 237, 253-64 (2018) (discussing relevant Fifth Amendment caselaw).

[135] *See* MODEL PENAL CODE: SENTENCING § 7.07 (AM. L. INST., Proposed Final Draft 2017) (collecting cases and noting that "a majority of courts" do not require the presence of counsel at the presentence interview). In some jurisdictions, defense counsel is permitted to attend the interview. *See, e.g.*, VT. DEP'T. OF CORR., *supra* note 111, at 3 ("If the defendant requests counsel, investigating staff shall allow counsel to attend the interview."). But as Pamela Metzger has argued, so long as defense counsel's attendance is "a rule-based courtesy, conditioned on counsel's 'timely request,' some defense counsel will make untimely requests and others will choose not to attend." Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1681 (2002).

disclosure is mandatory.[136] Finally, the sentencing court can legally draw negative inferences about the defendant's character from the defendant's silence or failure to "cooperate."[137] For example, courts may legally infer that silence in the presentence interview demonstrates that the defendant lacks remorse or fails to accept responsibility.[138]

In addition to the interview with the defendant, the other primary source of information for community supervision officers' fact-finding is law enforcement records. Law enforcement records include police reports about the charged offense, charging documents drafted by the prosecutor's office, and criminal record information maintained by state or national law enforcement agencies.[139] The protocols instruct officers to use law enforcement records to determine the defendant's

[136] South Dakota's questionnaire, for example, includes these instructions at the top: "IT IS IMPORTANT THAT THESE QUESTIONS ARE ANSWERED THOROUGHLY AND HONESTLY SO THE JUDGE MAY HAVE AN ACCURATE DESCRIPTION OF YOU. . . . Please take the necessary time to appropriately complete these questions. Please do not skip questions or sections." FIRST JUD. CIR. OF S.D. CT. SERVS. DEP'T, *supra* note 22, at 1.

[137] In *Mitchell v. United States*, 526 U.S. 314 (1999), the Supreme Court held that the sentencing court may not draw an adverse factual inference about the underlying facts of the offense from the defendant's choice to remain silent on that issue at sentencing. But this protection is a narrow one. The Court explicitly declined to rule on "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility." *Mitchell*, 526 U.S. at 330. Lower courts have generally agreed that the sentencing court may permissibly consider a defendant's silence or failure to cooperate with the presentence interview as indicating a lack of remorse, a failure to accept responsibility, or an increased risk of future dangerousness. *See, e.g.*, State v. Muscari, 807 A.2d 407, 416 (Vt. 2002) (holding that the sentencing court appropriately "considered defendant's silence at the PSI as one factor in determining whether defendant had accepted responsibility and expressed remorse for his violent criminal behavior"); Lee v. State, 36 P.3d 1133, 1141 (Wyo. 2001) (holding that non-cooperation with the presentence investigation was a "valid factor" for the sentencing court to consider). For an excellent overview of the caselaw in this area, see Paul Peterson, *A Decade Redrawn: Presentence Boundaries of the Privilege Against Compelled Self-Incrimination Since* Mitchell v. U.S., 25 FED. SENT'G REP. 81, 81-84 (2012).

[138] *See Muscari*, 807 A.2d at 416.

[139] *See, e.g.*, NEV. DEP'T OF PUB. SAFETY, PRESENTENCE INVESTIGATION ("PSI") MANUAL 6 (2017) ("'Rap sheets' . . . includes information obtained from NCIC, NCJIS, Interstate Identification Index (III), FBI, SCOPE, etc.").

criminal record[140] and as the basis for their fact-finding about the incident underlying the defendant's conviction.[141]

Presentence report templates typically require two accounts of the crime of conviction: the "official version" (i.e., the state's version) of the crime and the defendant's version.[142] The protocols do not ask officers to independently investigate the crime of conviction (e.g., by speaking to witnesses or reviewing surveillance footage). Rather, the protocols' approach to "fact-finding" about the crime of conviction involves summarizing police reports and charging documents,[143] and comparing them to the defendant's account of the crime.[144]

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[140] *Id.* at 18 ("Investigators are to thoroughly investigate the defendant's criminal history and independently verify the information as much as possible. All efforts should be made to investigate and verify the criminal history prior to interviewing the defendant. At the time of interview, the criminal history should be reviewed with the defendant to allow them to confirm or dispute their criminal history so that the most accurate history is reflected in the PSI. If the defendant disputes any portion of their criminal history, they should be directed to contact their attorney who can pursue a correction on behalf of the defendant through the appropriate Criminal History Repository.").

[141] *See, e.g.*, N.D. DEP'T OF CORR. & REHAB., REHABILITATION, POLICY AND PROCEDURE NO. 7A-7: PRE-SENTENCE INVESTIGATION 6 (2020) ("Description of Offense (Official Version): Include a detailed summary of the offense based on law enforcement investigation reports and other official documents, including the complaint, any supporting affidavit, and the criminal information.").

[142] *Id.* (requiring that presentence reports include the "official version" and the "defendant's version" of the crime of conviction).

[143] *See, e.g.*, IDAHO DEP'T OF CORR., *supra* note 123, at 7 ("Official Version: Includes a description of the situation surrounding the present criminal offense. The description should provide a clear and concise synopsis of what occurred. Sources of information most likely come from police reports, prosecutor's information, or reports of violation."); IND. OFF. OF CT. SERVS., STANDARD PRESENTENCE INVESTIGATION REPORT INSTRUCTIONS, *supra* note 25 ("Official Version [of the present offense]: The purpose of this section is to paraphrase the instant offense as described in the Probable Cause Affidavit or the police report.").

[144] STATE OF CONN. JUD. BRANCH CT. SUPPORT SERVS. DIV., POLICY NO. 4.31: ADULT SERVICES PRESENTENCE INVESTIGATION AND REPORT 14 (2016) ("Report any discrepancies between the statement and the police affidavit and/or report(s)."); INDIANA STANDARD PRESENTENCE INVESTIGATION REPORT INSTRUCTIONS, *supra* note 25, at 3 ("If there is sufficient difference between the defendant's version and the official version [of the offense], this should be noted."); MD. DEP'T OF PUB. SAFETY & CORR., DIVISION OF PAROLE AND PROBATION MANUAL CHAPTER 8: INVESTIGATIONS 35 (2017) ("An agent shall include . . . significant differences between the subject's version and the State's version of the

Nor is fact-finding about the crime limited to facts related to the specific crime(s) of conviction.[145] Rather, the protocols instruct community supervision officers to summarize the sum total of law enforcement's allegations about "what happened" in the underlying incident, regardless of what specific crimes the defendant was convicted of.[146] For example, if a defendant was charged with assault in the first degree and robbery, and pleaded guilty only to the robbery charge, the protocols require that the officer nonetheless include the alleged assault as part of the "official version" of the offense because it was discussed in the arrest report.

C. Meaning-Making

The third facet of community supervision's sentencing role is meaning-making. Community supervision officers do not just find and report facts; they interpret and make meaning from those facts, in highly impressionistic and subjective ways. The protocols ask them to opine on questions such as: what is the defendant's "attitude" toward their crime

crime."); MO. DEP'T OF CORR., DIV. OF PROB. & PAROLE, POLICY AND PROCEDURE MANUAL PROCEDURE NO. P2-3.1: SENTENCING ASSESSMENT REPORT 6 (2021) ("This section [Offender's Version] shall include any differences between the client's version and the official version of the offense.").

[145] This reflects, in part, community supervision agencies' interpretations of statutory language. For example, 14 states require community supervision officers to investigate and report on "the circumstances of the offense." *See infra* APPENDIX C. This statutory language arguably supports a "real offense" approach in which community supervision officers report all factual allegations contained in police reports or charging documents. *See, e.g.*, Yellen, *supra* note 11, at 267 (discussing "real offense" sentencing).

[146] *See, e.g.*, S.C. DEP'T OF PROB., PAROLE & PARDON SERVS., *supra* note 20, at 2 ("The official version will be based, whenever possible, on the Incident Report prepared by the arresting agency."); State of Utah Adult Probation & Parole, Presentence/Postsentence Report 3 (2019) ("Summary of offense: this section is derived from police and investigative reports in the case and may contain information not included as part of the determination of guilt.").

of conviction?[147] Why did they commit it?[148] Does the defendant have a "positive support system"?[149] Are their "social activities" "constructive" or "non-constructive"?[150] What is the defendant's "personality" or their "potential for positive change"?[151] Are they a good candidate for probation, or should they be incarcerated?[152]

[147] *See, e.g.*, INDIANA STANDARD PRESENTENCE INVESTIGATION REPORT INSTRUCTIONS, *supra* note 25, at 4 ("Another purpose of this section [Defendant's Version] is to gain understanding of the defendant's attitude toward his or her offense and victim."); STATE OF LA. DEP'T OF PUB. SAFETY & CORR., *supra* note 25, at 7 ("Data that should ordinarily be covered with respect to the offense include . . . [the] defendant's attitude toward offense"); MINN. DEP'T OF CORR., PSI AGENT HANDBOOK 2 (2020) ("This section [Defendant's Version] must also include the [defendant's] attitude toward the offense.").

[148] OKLA. DEP'T OF CORR., *supra* note 26, at 14 (instructing community supervision officers to assess in their report "whether or not the offense appears to be situational or indicative to a pattern of behavior").

[149] STATE OF UTAH DEP'T OF CORR., *supra* note 27, at 23.

[150] VA. DEP'T OF CORR., PRESENTENCE INVESTIGATION MANUAL: OPERATING PROCEDURE 930.1 ATTACHMENT 1, at 8 (2020) ("Social Activities: A probation officer must make a subjective assessment of the offender in this section. Mark the appropriate category [none specified/constructive/non-constructive] based on the following guidelines. None Specified: offender did not mention any leisure activities, offender is not a member of any social groups, and or offender only watches television, or goes to the occasional movie in his/her spare time. Constructive- offender is a member of a social group that does not conflict with societal order and/or offender is active as a church member. Non-constructive: offender's main social activities generally conflict with the social order of the community and/or his/her activity is (for the majority) illegal.")

[151] GA. DEP'T OF COMM. SUPERVISION, *supra* note 130, at 6 (instructing officers to include their evaluation of the defendant's "personality and potential for positive change" in the report section titled "Evaluation, Summary, and Recommendation"); *see also* S.C. DEP'T OF PROB., PAROLE & PARDON SERVS., PRESENTENCE INVESTIGATION REPORT — WORKSHEET 5 (2016) (instructing community supervision officers to "evaluat[e]" the defendant's "Personality, Problem and Needs, Potential for Growth, and Future Plans") (on file with author).

[152] STATE OF CONN. JUD. BRANCH CT. SUPPORT SERVS. DIV., *supra* note 144, at 22 (2016) (instructing officers to provide "a sentencing recommendation based on the information in the report" but noting that the recommendation should not include "a specific length of sentence"); STATE OF UTAH DEP'T OF CORR., *supra* note 27, at 23 (instructing officers to discuss in the presentence report "what level of supervision would be necessary to control the offender"); VA. DEP'T OF CORR., OPERATING PROCEDURE 930.1: COMMUNITY CASE OPENING, SUPERVISION, AND TRANSFER 6 (2020) ("Based on a professional analysis of the verified information, Presentence Reports should include recommendations or information about sentencing options or sanctions other than

None of these questions is straightforward or narrowly factual. Rather, these questions ask community supervision officers to make impressionistic, highly subjective judgments about what kind of a person the defendant is — their character, blameworthiness, dangerousness, and potential — and what punishment they deserve. To illustrate the meaning-making facet of community supervision's sentencing role, I focus on two common examples of meaning-making required by the protocols: the officer's descriptions of the defendant's "attitude" toward the crime of conviction and the officer's overall "evaluation" or "analysis" of the defendant.

One of the most common ways in which the protocols requires community supervision officers to make meaning is through descriptions of the defendant's "attitude" toward the crime: whether and to what extent the defendant expresses remorse and accepts responsibility for the crime.[153] Indeed, a primary purpose of asking the

incarceration for which the offender is eligible and special conditions of supervision."). In some jurisdictions, community supervision officers are required by statute make a sentence recommendation in their report. *See, e.g.*, FLA. STAT. § 921.231 (2020) ("A recommendation as to disposition by the court. It shall be the duty of the department to make a written determination as to the reasons for its recommendation."); GA. CODE ANN. § 42-8-29 (2022) ("It shall be the duty of each officer to investigate all cases referred to him or her by the court and to make findings and report thereon in writing to the court with a recommendation."); LA. STAT. ANN. § 1132 (2021) ("[R]ecommendations to the court as to the rehabilitation potential of the defendant, the stages required to make the defendant useful and productive, and as to whether the defendant should be placed on probation and the terms thereof or whether the defendant should be committed to a community rehabilitation center or prison, or to the Department of Corrections for assignment to an appropriate penal or correctional facility."); OKLA. STAT. ANN. Tit. 22, § 982 (2022) ("[A] recommendation detailing the punishment which is deemed appropriate for both the offense and the offender, and specifically a recommendation for or against probation or suspended sentence.")

[153] IND. OFF. OF CT. SERVS., STANDARD PRESENTENCE INVESTIGATION INSTRUCTIONS, *supra* note 25 ("Another purpose of [the defendant's version] section is to gain understanding of the defendant's attitude toward his or her offense and victim. Be observant for what the potential is for improved behavior based primarily upon his or her statement. (Example: Is the defendant remorseful? Does he or she exhibit regret and understanding into his or her charges and the resulting consequences?)."); N.Y. OFF. OF PROB. & CORR. ALTS., FUNDAMENTALS OF PROBATION PRACTICE: MODULE 13 — INVESTIGATION AND REPORT PREPARATION 16 (2021) ("RESPONDENT/DEFENDANT VERSION: Provides a summary of the Respondents/defendants version of what occurred. Information should address the following: Accept responsibility?; Attitude

defendant to describe "what happened" in the incident underlying their conviction is to enable the officer to assess the defendant's attitude.[154] Because remorse and acceptance of responsibility are internal emotional states that are inherently unknowable to anyone other than the defendant, assessing them is an inescapably imprecise and subjective exercise.[155] In evaluating acceptance of responsibility and remorse, community supervision officers may look beyond the defendant's verbal statements to consider the defendant's body language and tone as indicia of their true attitude toward the crime.[156]

Another common site of meaning-making in presentence reports is the officer's overall "analysis" or "evaluation" of the defendant.[157] For example, presentence reports in Utah include a section called "Evaluative Assessment and Criminogenic Needs." Utah instructs

toward victim; Pattern of behavior; Substance abuse?; Attitude toward plea and proposed disposition."); VT. DEP'T. OF CORR., *supra* note 111, at 3-4 ("The statement shall include: the attitude of the individual facing sentencing; whether the offense was premeditated; any statements of remorse or acceptance of responsibility, including acknowledgment of: specific allegations and harm to the victim or community.").

[154] STATE OF CONN. JUD. BRANCH CT. SUPPORT SERVS. DIV., *supra* note 144, at 14 ("Report any expression of remorse or the lack of such expression.").

[155] *See generally* M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301 (2018) (discussing the complexity and subjectivity of remorse assessments); Kathryne M. Young & Hannah Chimowitz, *How Parole Boards Judge Remorse: Relational Legal Consciousness and the Reproduction of Carceral Logic*, 56 L. & SOC'Y REV. 237 (2022) (discussing remorse assessments in parole decision making).

[156] *See, e.g.*, MINN. DEP'T OF CORR., ADULT DOMESTIC PRESENTENCE INVESTIGATION 5 (2015) ("Defendants attitude: Look for minimizing, denying and blaming behaviors. What is the person's attitudes and beliefs?"); WIS. DEP'T OF CORR., AGENT IMPRESSION EXAMPLE #1 ("This apology did not sound sincere and it felt to this writer that he said he was sorry, because he felt like he had to or there was nothing else to say in this situation."); *see also* Colleen M. Berryessa, *Modeling "Remorse Bias" in Probation Narratives: Examining Social Cognition and Judgments of Implicit Violence During Sentencing*, 78 J. SOC. ISSUES 452, 474 (2022) (reporting results from a survey of community supervision officers about their approach to remorse assessment).

[157] *See, e.g.*, STATE OF IDAHO JUD. BRANCH, CRIMINAL RULE 32(b)(11) ("analysis of the defendant's condition"); N.H. DEP'T OF CORR., POLICY AND PROCEDURE DIRECTIVE NO. 5.38: ADULT PRESENTENCE INVESTIGATIONS (2017) ("Evaluation and Analysis" section of the report); N.Y. CRIM. PROC. LAW § 390.30 (2019) ("an analysis of as much of the information gathered in the investigation as the agency that conducted the investigation deems relevant to the question of sentence.").

community supervision officers to address the following questions when writing that section of the report:

> Was the offense situational or does it indicate an entrenched pattern of behavior that is likely to occur again? . . . What are the characteristics of the offender as they relate to relationships, behavior patterns, maturity, thinking and perception disorders, ability to relate to authority and society, and substance abuse? . . . Is there a positive support system available for the offender? Was the offender cooperative during the presentence process?[158]

Like assessments of remorse, "evaluation" or "analysis" of the defendant is a value-laden and highly subjective exercise. In the "evaluation" or "analysis" sections of sample presentence reports provided by community supervision agencies, officers discuss their overall impressions of the defendant (e.g. "The defendant presented as personable").[159] They speculate about why the defendant committed the crime of conviction (e.g., "[The defendant's crime] could have been avoided if [he] had not been influenced by his co-defendant, had remained sober after successfully completing a substance abuse treatment program and/or was actively participating in a mental health treatment program"[160]). They also assess the defendant's cooperation with the presentence investigation process (e.g., "The defendant appeared to be guarded during his interviews with [this officer]. He only spoke when asked questions and gave short brief answers. . . . On the day

[158] STATE OF UTAH DEP'T OF CORR., *supra* note 27, at 22. In their policy, the Utah DOC describes writing this section as "the most demanding task of the presentence investigation process." *Id.*; *see also* GA. DEP'T OF COMM. SUPERVISION, POLICY AND PROCEDURE STATEMENT: SUPERVISEE INVESTIGATIONS, 6 (2017) ("Provide an evaluation of the supervisee's personality and potential for positive change. Identify the individual's needs, specify a plan of action, and make recommendations."); S.C. Dep't of Prob., Parole & Pardon Servs., *supra* note 151, at 5 (instructing community supervision officers to identify and highlight "Factors Contributing to Present Offense and Prior Convictions" and to "evaluat[e]" the defendant's "Personality, Problems and Needs, Potential for Growth, and Future Plans").

[159] N.Y. DIV. OF CRIM. JUST. SERVS. & OFF. OF PROB. & CORR. ALTS., *supra* note 130, at 66.

[160] Conn. Jud. Dep't, Off. of Adult Prob., Sample Presentence Investigation Report Long Form — Example #1 11 (2014).

the defendant signed releases, he provided minimal information about his life on the Probation Social Investigation form."[161]).

It is highly likely that the defendant's race affects officers' meaning-making in their presentence reports. Because "remorse functions as a 'proxy for overall character,' it is easy for the remorse assessment to degrade into a mutually reinforcing circle of cognitive errors based on the well-established unconscious bias associating African Americans with criminality."[162] Long-standing racist stereotypes about the moral deficiencies of Black families and the moral rectitude of white families[163] may influence officers' assessments of the "values" or "stability" of the defendant's family.[164]

Similarly, attributions of criminal conduct to situational (external) rather than dispositional (internal) factors are heavily influenced by the defendant's race.[165] Research on juvenile probation officers, for example, found that they were more likely to attribute white children's behavior to external or situational factors (e.g., "the influence of the [child's]

[161] WIS. DEP'T OF CORR., *supra* note 156, at 1 (2021).

[162] M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 309 (2018) (quoting Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133, 164 (2015)).

[163] *See, e.g.*, DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES — AND HOW ABOLITION CAN BUILD A SAFER WORLD 85-124 (2022) (tracing the history and impact of racist stereotypes about Black mothers and families); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 6 (1993) ("In America, the image of the Black mother has always diverged from, and often contradicted, the image of the white mother."); S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1566 (2023) ("White mothers have been stereotyped as nurturing, naturally selfless, and subordinate for decades.").

[164] N.D. DEP'T OF CORR. & REHAB. REHABILITATION, POLICY AND PROCEDURE NO. 7A-8: PRE-SENTENCE INVESTIGATION (NON-SEX OFFENDER) 1 (2020) (instructing officers that the Family Background section of the presentence report should include "information about stability and values; family attitude; and marital/alternative family relationships"); WIS. DEP'T OF CORR., PRE-SENTENCE INVESTIGATION 10 (2020) (template for presentence reports including a section titled "family stability, attitudes, and values").

[165] *See* George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOCIO. REV. 554, 555 (1998) (finding that juvenile probation officers preparing presentence investigations tend to attribute Black children's behavior to internal characteristics rather than external circumstances, while the opposite is true in their evaluations of white children).

social environment") and Black children's behavior to internal or dispositional factors (e.g., "negative attitudinal and personality traits").[166] Black defendants are also more likely than white defendants to be read as disrespectful and uncooperative for the same behavior.[167] Black defendants who exercise their Fifth Amendment rights and decline to answer some questions or provide requested information in the presentence interview, or who provide what the officer interprets as inappropriately brief answers, run an especially high risk that the community supervision officer will form a negative impression of the defendant as uncooperative, non-compliant, or disrespectful of the community supervision officer's authority.[168]

III. COMMUNITY SUPERVISION'S PUNITIVE PERSPECTIVE

In Part II, I identified three facets of community supervision's role: topic selection, fact-finding, and meaning-making. In each facet of their role, community supervision agencies and officers are taking positions on foundational and contested questions about the sentencing process itself. What information is important for sentencing judges to consider? How should facts be found, and for what purpose? What meaning do particular facts support?

The law of sentencing leaves these questions largely open. To conceptualize the range of potential answers, I propose a theoretical framework of the "punitive" versus "decarceral" perspectives on the sentencing process. I argue that the protocols' approach to two highly

[166] *Id.* at 567.

[167] *See* M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 534 (2021) ("In particular, a judge may view similar actions and words as disorderly when coming from a Black defendant but neutral when coming from a white defendant."); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1658 (describing "deeply rooted norms that serve to link racial minorities or negatively racialized groups to criminality also inform social expectations for behavior, including what behaviors are perceived as disorderly.").

[168] *See* Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1677 (2002) ("[I]f a defendant cooperates in the interview, the probation officer may form a more favorable impression of the defendant. Frank admissions about past misconduct, criminal history, drug use, and participation in the crime may tip the scale in the defendant's favor when the probation officer has to make judgment calls about guidelines calculations and sentencing recommendations.").

significant and contested questions about the sentencing process — what topics are relevant, and what individualized sentencing means — aligns with the punitive perspective. Finally, I describe why community supervision's embrace of the punitive perspective is significant within the broader context of sentencing hearings.

A. Open Questions About the Sentencing Process

Sentencing hearings in the states are remarkably loose and flexible proceedings.[169] As John Douglass has observed, sentencing is "an informal, free-flowing world with few hard rules."[170] In general, any relevant evidence is admissible at sentencing, and relevant evidence is defined broadly.[171] Sentencing caselaw embraces what Carissa Byrne Hessick and F. Andrew Hessick have described as an "information maximization" view of sentencing: that courts should be able to consider a broad range of information, from a wide variety of sources, because doing so will improve the court's ability to impose a fair sentence.[172] Judges can consider "almost everything" in exercising their sentencing discretion.[173] There are many fewer evidentiary and

[169] *See* Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L. J. 423, 449 (2013) (describing sentencing hearings as "more flexible and less formal" than trial or suppression hearings).

[170] John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1968 (2005); *see also* Kimberly A. Thomas, *Sentencing: Where Case Theory and the Client Meet*, 15 CLINICAL L. REV. 187, 205 (2008) (observing that sentencing proceedings in state court "often seem like free-for-alls").

[171] *See, e.g.*, Roberts v. United States, 445 U.S. 552, 556 (1980) (identifying as "fundamental sentencing principle" that "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come").

[172] *See* Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 83-85 (2011).

[173] Chin, *supra* note 69, at 251. There are some limited exceptions. For example, courts cannot (explicitly) consider the defendant's race or gender in imposing sentence. *See* Hessick & Hessick, *supra* note 172, at 55.

procedural rules than at suppression hearings or trial.[174] And judges are often unrestricted in the meaning they can assign to particular facts.[175]

The law governing sentencing hearings does not answer questions about what topics matter at sentencing, how facts should be found, and how meaning should be made. As I have discussed, the statutes and court rules governing the presentence process *also* leave these questions largely open.[176] Amidst this legal flexibility, the choices that community supervision agencies and officers make about topic selection, fact-finding, and meaning-making will reflect a deeper set of assumptions and beliefs about how sentencing works and should work.

To make sense of how community supervision agencies and officers answer these questions, I propose a framework of what I call the "punitive" and "decarceral" perspectives on the sentencing process.[177] In the simplest terms, the punitive perspective sees defendants in a negative light and state actors within the criminal legal system (e.g.,

[174] *See* Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1773 (2003); Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 134 (2018) ("The rules of evidence do not apply at sentencing, and thus courts may rely on hearsay and other information that would otherwise be constrained or prohibited by evidentiary considerations.").

[175] *See* Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 175-77 (2016) (describing uncertainty around whether a defendant's diminished capacity, young age, reduced cognitive ability, or intoxication at the time of the crime should be treated as an aggravating or mitigating factor at sentencing). The rare exceptions to judges' general meaning-making discretion are where statutes identify specific factors as aggravating. For example, "prior convictions are widely recognized as aggravating sentencing factors." Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1114 (2008).

[176] Topic selection is the facet of the role most constrained by statutes and court rules. But as I have described, even in this area, community supervision agencies have broad discretion. Many of the content requirements are broad and vague. Additionally, statutes and court rules often include a catchall provision that allows officers to include anything they deem relevant. *See supra* Part II.A.

[177] This brief account of the punitive versus decarceral perspectives is a maximally stylized and simplistic version of a complex debate. But I offer this typology to help make legible the ideological dimension of community supervision's sentencing role, and to illustrate that their choices about topic selection, fact-finding, and meaning-making are not inevitable or obvious.

police, prosecutors, and prison administrators) in a positive light.[178] The punitive perspective assumes that defendants are facing sentencing because they have transgressed morally, and it attributes those moral transgressions primarily to defendants' individual deficiencies and failures: "the 'bad choices' they've made, their mistaken thinking, their lack of personal responsibility."[179] In contrast to this view of defendants as morally deficient, the punitive perspective sees state actors within the criminal legal system, and the system as a whole, as doing morally righteous work responding to harms caused by defendants.

The punitive perspective on the sentencing process, while long dominant in practice, is increasingly challenged by scholars, advocates, and practitioners who advance what I describe as the "decarceral perspective" on the sentencing process. [180] The decarceral perspective sees sentencing hearings (like other criminal legal proceedings) as sites

[178] An alternative label for the "punitive" perspective might be "pro-carceral." *See* Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1652 (2020) (defining pro-carceral aspects of the law school criminal curriculum as those that "make it more likely that lawyers and policymakers will pursue, not avoid, the use of criminal law").

[179] Elliot Currie, *Consciousness, Solidarity and Hope as Prevention and Rehabilitation*, 2 INT'L J. CRIME, JUST. & SOC. DEMOCRACY 3, 7 (2013); *see also* MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 15 (2016) ("Individual explanations that stress personal responsibility have continued to trump structural ones in discussions of crime, punishment, and penal reform, thus reinforcing the neoliberal slant in penal policy."); Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 286 (2011) ("The discourse of personal choice and individual agency that dominates public and political thinking about crime and punishment justifies and thereby sustains the project of perpetual marginalization and exclusion.").

[180] Decarceration is the "long-term project of meaningfully reducing prison populations." Seema Tahir Saifee, *Decarceration's Inside Partners*, 91 FORDHAM L. REV. 53, 53 (2022); *see also* Ben Grunwald, *Data-Driven Decarceration*, INQUEST (Jan. 12, 2023), https://inquest.org/data-driven-decarceration/ [https://perma.cc/95K9-AQ2Z] (defining decarceration as the "by-the-numbers work of reducing the prison population"). The goal of decarceration is endorsed both by those who see decarceration as an end in itself and those who see it as a step toward abolition. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161, 1167, 1239 (2015) (describing abolition as "an aspirational ethic" that entails a "framework of gradual decarceration"). While the decarceral perspective is a big and fractious tent, I treat it here as one coherent category (rather than foregrounding its significant internal debates) because doing so brings the punitive perspective into sharper focus.

of institutional violence, racial subordination, and endemic injustice.[181] The decarceral perspective resists moral condemnation of defendants facing sentencing, instead foregrounding their identity beyond the criminal conviction, the contingency of their status as defendants, and the broader social forces that contribute to criminal(ized) behavior.[182] While the ostensible purpose of sentencing is to respond to the harm caused by the defendant, the decarceral perspective emphasizes that criminal sentences enact new and often more severe harms, at both the systemic and individual levels.[183]

Using this framework, I analyze how community agencies resolve two contested questions about the sentencing process. First, what is the appropriate scope of the sentencing inquiry? Second, what is the meaning and purpose of individualized sentencing?

1. The Scope of the Sentencing Inquiry

In the topic selection facet of their sentencing role, community supervision agencies take positions in the live debate over what information is important for judges to know at sentencing. Due to the capacious legal definitions of relevance at sentencing, the potential scope of the sentencing inquiry is remarkably broad. I focus here on debates over the relevance of two categories of information: (1) information about the social context for the defendant's life and

[181] Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 170 (2021) (describing "white supremacy's enduring hold on our legal institutions . . . from policing through the court process to sentencing and reentry").

[182] *See, e.g.*, Michael J. Coyle & Judah Schept, *Penal Abolition Praxis*, 26 CRITICAL CRIMINOLOGY 319, 320 (2018) ("[L]aw breaking is a ubiquitous human behavior that elicits selective responses contingent on historical forces and social order regimes."); Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212, 215 (2000) ("[A]n abolitionist approach requires an analysis of 'crime' that links it with social structures, as opposed to individual pathology, as well as 'anticrime' strategies that focus on the provision of social resources."); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J.F. 848, 854-56 (2019) ("Choices about what is a crime and what is not are made by politicians and within the economic, social, and racial systems in which politicians exist.").

[183] *See* Evans, *supra* note 32, at 687-91 (2023); Robert Weisberg, *Barrock Lecture: Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1218-21 (2012).

crime of conviction and (2) information about the realities of punishment.

A hallmark of the punitive perspective on the sentencing process is that it embraces a "radically individualist" frame for understanding the defendant's crime of conviction.[184] Scholars, advocates, and practitioners who embrace the decarceral perspective, in contrast, have called for greater attention at sentencing to the social context in which the defendant's life and crime of conviction unfolded.[185] Considering social context provides a fuller, more contextual set of alternative causal explanations for the crime of conviction, beyond just the defendant's poor decisions or character defects.[186] These alternative explanations include choices by criminal legal system actors about what types of criminal behavior to prioritize for enforcement, and which people engaging in that behavior should be arrested and prosecuted.[187] They also include situational and structural, rather than dispositional, factors.[188] Considering social context tempers the tendency to explain

[184] *See* Dolovich, *supra* note 37, at 265; *see also* GOTTSCHALK, *supra* note 179, at 15 ("Individual explanations that stress personal responsibility have continued to trump structural ones in discussions of crime, punishment, and penal reform, thus reinforcing the neoliberal slant in penal policy.").

[185] Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1580 (2004).

[186] *See* Miriam Gohara, *Narrating Context and Rehabilitating Rehabilitation: Federal Sentencing Work in Yale Law School's Challenging Mass Incarceration Clinic*, 27 CLINICAL L. REV. 39, 45 (2020) [hereinafter *Narrating Context*].

[187] The decarceral perspective also holds out the possibility that in a large number of cases, criminal conviction is unmoored from factual guilt. Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2540 (2020) ("[E]ven where factual guilt does exist, its overlap with legal guilt may be a lot smaller than typically assumed . . . as a result, the number of defendants who are convicted, punished, and subjected to myriad other consequences of conviction in the absence of factual guilt is potentially much larger than typically assumed. . . . [T]he number of people who are not convicted but who have committed crimes is potentially huge.").

[188] Such explanations are particularly powerful where the underlying crime of conviction involves violence. *See, e.g.*, Mariame Kaba, *To Live and Die in "Chiraq,"* *in* THE END OF CHIRAQ: A LITERARY MIXTAPE 9, 10 (Javon Johnson & Kevin Coval eds., 2018) ("The violence experienced by young people of color in [Chicago] is multidimensional — both interpersonal and structural. So many of the young have to swallow their rage as they are surveilled in stores and on the streets, as they are targeted by cops for endless stops and frisks, as they are denied jobs, as their schools are closed, and as they are

crime as the product of the defendant's moral failings, by highlighting the ways in which broader social pathologies contribute to individual instances of criminal(ized) behavior.[189]

The statutes governing presentence reports would seem to require community supervision officers to pay attention to social context, which would align with the decarceral perspective. Nineteen states require that the presentence report address the defendant's "social history."[190] The protocols, however, adopt an insistently narrow and hyper-individualistic approach to topic selection. Even where investigation of social history is explicitly required by statute or court rule, the protocols pay little, if any, attention to the social structures and dynamics that shaped the defendant's individual life.[191] Perhaps this is because a requirement to consider social context would ask community supervision officers to do work they are not qualified or trained to do. But notably, the protocols make no use of even readily available contextualizing information from other government entities. For example, the presentence protocols instruct community supervision officers to investigate how far the defendant went in school, but not the graduation rates or other performance indicators for the schools the defendant attended.[192] The protocols instruct officers to investigate the

locked in cages by the thousands. For some, the violations and the deprivation turn outward. The instrumental use of violence by some young people becomes a rational adaptive strategy in response to racial and economic oppression."); Craig Haney, *Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 558 (1995) [hereinafter *Social Context*] (describing social histories of capital defendants as "connect[ing] individual violent behavior to the violence of social conditions").

[189] *See, e.g.*, Allegra McLeod, *An Abolitionist Critique of Violence*, 89 U. CHI. L. REV. 525, 526 (2022) ("[P]opular conceptions of violence are too narrow in that they do not recognize the larger context that precipitates and sustains violence concentrated on particular racialized bodies in places subjected to economic disinvestment, extraction, and militarized intervention.").

[190] *Infra* APPENDIX C.

[191] The "social" aspect of the social history investigation most commonly includes collecting demographic and criminal record information about the defendant's family members. *See supra* Part II.A.

[192] *Cf.* United States v. Bannister, 786 F. Supp. 2d 617, 670-71 (E.D.N.Y. 2011) (noting that the high school several defendants attended "has been identified by the New York

defendant's age at first arrest, but not the extent to which the defendant's race and neighborhood put them at heightened risk for police surveillance and arrest — even when other government entities have reported this information.[193]

In addition to calling for greater consideration of social context, proponents of the decarceral perspective have argued that sentencing judges can and should consider the brutal realities of how the state administers incarceration as a criminal punishment. [194] Doing so, they argue, is both legally permissible and normatively desirable. In the absence of a thick understanding of what punishment is like, judges cannot make informed sentencing decisions.[195]

Reckoning with the realities of criminal punishment includes considering both general characteristics of how the state administers punishment and how they interact with the defendant's individual characteristics. For example, how overcrowded or understaffed are the state prisons where the defendant would serve a prison sentence?[196] How great is the risk of suffering or witnessing a physical assault, sexual

City Department of Education as poorly performing" and citing the Department's "Progress Report Measures" for the school).

[193] For example, the Maryland protocols do not reference the Department of Justice's investigation of the Baltimore Police Department, which found that the Baltimore PD engaged in a pattern or practice of unconstitutional and racially targeted policing. U.S. DEP'T OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 163 (Aug. 10, 2016), https://www.justice.gov/crt/file/883296/download [https://perma.cc/H7FS-PPA9]. Similarly, the New York City protocols do not reference Judge Shira A. Scheindlin's *Floyd* decision finding that the New York City Police Department's stop-and-frisk practices were unconstitutional. Floyd v. City of New York, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013).

[194] *See generally* Hanan, *Invisible Prisons*, *supra* note 33 (arguing that incarcerated people's experience of incarceration is relevant to sentencing policy and practice).

[195] *See id.* at 1185.

[196] *See, e.g.*, Dan Harrie, *Worker Shortage Puts Utah's Prison in "Crisis,"* SALT LAKE TRIB. (last updated Dec. 9, 2022, 11:34 AM), https://www.sltrib.com/news/2022/12/05/worker-shortage-puts-utahs/ [https://perma.cc/FX9G-SC93] (reporting a 61% vacancy rate at Utah's Salt Lake Prison and describing as the prison as "being run with a bare-bones staff in crisis mode"); Mario Koran, *Inside a "Nightmare" Lockdown at a Wisconsin Prison*, N.Y. TIMES, https://www.nytimes.com/2023/08/19/us/wisconsin-prison-lockdown.html (last updated Aug. 21, 2023) [https://perma.cc/E9V8-GE9Z] (describing a months-long lockdown at Wisconsin's Waupun Correctional Institution and the "dire staffing shortages" at the prison).

assault, or a homicide while incarcerated?[197] How long are the waitlists for the prison programming that the community supervision officer believes the defendant needs — and is that programming available at all?[198] How might the defendant's particular characteristics — their race, gender identity, sexual orientation, disability status, mental health status, medical needs, etc. — impact their experience of incarceration?[199]

None of the presentence protocols I reviewed requires community supervision officers to investigate any of these aspects of incarceration, or even acknowledge the possibility that such information could be relevant. This is the case even in states where statute or policy clearly permits community supervision officers to consider and report on some realities of incarceration, such as where community supervision officers may report on "any relevant information," where they make a sentencing recommendation, or where community supervision agencies have complete discretion in determining the contents of presentence reports.[200]

It is not the case that community supervision officers don't need to report this information because judges already know it. In fact, judges typically know very little about prisons.[201] Nor is it the case that community supervision agencies and officers are ill-equipped to provide such information. In fact, the opposite is true. Community supervision officers are perhaps uniquely well-situated to provide some basic

[197] *See* Meghan A. Novisky & Robert L. Peralta, *Gladiator School: Returning Citizens' Experiences with Secondary Violence Exposure in Prison*, 15 VICTIMS & OFFENDERS 594, 594-95 (2020).

[198] *See* Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33, 33 (2011).

[199] *See, e.g.*, Valerie Jenness, Lori Sexton & Jennifer Sumner, *Sexual Victimization against Transgender Women in Prison: Consent and Coercion in Context*, 57 CRIMINOLOGY 603, 604 (2019) ("[I]t is beyond dispute that transgender women incarcerated in men's prisons are at heightened risk for sexual assault and other forms of sexual victimization."); E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 160 (2013) ("[I]ndividuals with major mental illnesses, as a class, face a substantial likelihood of incurring serious harm in prison, and are substantially more likely to suffer serious harms than non-ill prisoners.").

[200] *See supra* Part I.B.

[201] Hanan, *Invisible Prisons*, *supra* note 33 at 1191.

education — however partial, slanted, and incomplete[202] — to judges about some realities of punishment. In at least twenty-nine states, community supervision agencies are part of the state's Department of Corrections ("DOC"), which is responsible for operating state prisons.[203] Some state DOCs already collect and report information about total prison population, overcrowding, staffing levels, deaths among incarcerated people, and the violent victimization of incarcerated people.[204] This information, however, does not make it into presentence reports.

2. The Meaning of Individualization

The dominant contemporary justification for community supervision's sentencing role is that it promotes individualized sentencing.[205] While the Supreme Court has not recognized a constitutional right to individualized sentencing outside a narrow subset of cases,[206] the principle of individualized sentencing is "one of

[202] As Eve Hanan argues, any reliable account of the realities of punishment must include the voices of incarcerated people. *Id.* at 1223-24.

[203] *See* JOAN PETERSILIA, REFORMING PROBATION AND PAROLE IN THE 21ST CENTURY 36-37 (2003) (reporting that, of the 42 states where probation was administered at the state level, in 29 states probation was part of the state Department of Corrections and in eight it was part of the state judiciary). This is a significant difference from the federal system, where the probation officers who prepare presentence reports are part of the judicial branch — a fact federal courts have highlighted to emphasize community supervision officers' ostensible neutrality at sentencing. *See* Bascuas, *supra* note 9 at 58, nn.336–338.

[204] *See, e.g.*, EMILY D. BUEHLER, U.S. DEP'T OF JUST., SUBSTANTIATED INCIDENTS OF SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2016-2018 (2023), https://bjs.ojp.gov/document/sisvraca1618.pdf [https://perma.cc/TX7A-T8HY] (reporting substantiated incidents of sexual victimization experienced by incarcerated people between 2016 and 2018); E. ANN CARSON & MARY P. COWHIG, U.S. DEP'T OF JUST., MORTALITY IN STATE AND FEDERAL PRISONS, 2001–2016 — STATISTICAL TABLES (2020), https://bjs.ojp.gov/content/pub/pdf/msfp0116st.pdf [https://perma.cc/45S8-M29U] (reporting, for each state, the number of incarcerated people who died in prison and their cause of death, between 2001 and 2016); CARSON, *supra* note 15, at 37 tbl.21 (reporting prison facility capacity, the number of adults in prison, and percent of capacity, by state).

[205] *See supra* notes 86–88 and accompanying text.

[206] The Supreme Court has recognized a constitutional right to individualized sentencing only where the defendant is facing the death penalty or a life without parole sentence for a crime that occurred while they were a juvenile. *See* William W. Berry, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13, 15-16 (2019).

the primary tenets of modern sentencing policy."[207] The goal of promoting individualized sentencing has also been endorsed by a wide range of advocacy organizations critical of harsh sentencing practices.[208] But the principle of "individualizing" sentencing is so widely appealing precisely because the concept of individualization at sentencing is malleable and underspecified.

The punitive and decarceral perspectives produce very different understandings of what individualized sentencing means. From the punitive perspective, individualization means providing the judge with specific facts about the defendant's life and background, such as how far they got in school, where they live and work, and whether they're married or have children. I call this narrow understanding of individualized sentencing "individualization as information." The purpose of individualization as information is to facilitate the imposition of punishment, by giving judges information they can use to craft sentences that "fit" the defendant as well as the crime of conviction.[209]

In contrast, proponents of the decarceral perspective have advanced a more expansive understanding of individualized sentencing that I call "individualization as humanization." Individualization as humanization aims to counterbalance the routine dehumanization of defendants in sentencing hearings. In the typical sentencing proceeding in state court, the facts of the crime of conviction come to stand in "for the reality of

[207] Hessick & Hessick, *supra* note 172, at 83; *accord* Meghan J. Ryan, *Framing Individualized Sentencing for Politics and the Constitution*, 58 AM. CRIM. L. REV. 1747, 1749 (2021) (describing individualized sentencing as a "well-accepted value in criminal cases").

[208] *See, e.g.*, Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 115-16 (2019) (describing efforts to "repeal harsh mandatory minimums, even for violent crimes" as among "the nonreformist reforms in which prison abolitionists and other activists are already engaged"); FAMILIES AGAINST MANDATORY MINIMUMS, https://www.famm.org/ (last visited Sept. 15, 2023) [https://perma.cc/WPT2-37YR] ("We advocate individualized sentences. All sentences should be tailored to the unique facts and circumstances of each offense and individual.").

[209] *See, e.g.*, State v. Patterson, 674 A.2d 416 (1996) ("The 'sole purpose [of a presentence investigation] is to enable the court, within limits fixed by statute, to impose an appropriate penalty, fitting the offender as well as the crime.'" (quoting State v. Gullette, 209 A.2d 529, 538 (Conn. Cir. Ct. 1964)).

[the defendant's] personhood";[210] the defendant is "a two dimensional figure, without real depth,"[211] who is talked about but doesn't speak.[212] This dehumanizing dynamic at sentencing is especially pronounced for Black defendants and other defendants of color.[213]

To counteract this dynamic, advocates of the decarceral perspective developed new and creative fact-finding methods. For example, the participatory defense movement, which was created by grassroots organizers in San Jose, California, trains and supports the friends and family members of defendants in making "social biography" videos for use at sentencing.[214] These videos elevate the perspectives of "the people who know defendants best, and care about them most" — yet who are "often the most marginalized voices in the [sentencing] process."[215] Similarly, defense teams across a wide range of case types have conducted intensive life history investigations,[216] using methods first

[210] Haney, *Social Context*, *supra* note 188, at 547.

[211] Andrew Guthrie Ferguson, *Courts Without Court*, 75 VAND. L. REV. 1461, 1519 n.252 (2022).

[212] Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1500 (2005) ("Prosecutors and judges rarely contend with the human voice of the person they punish, learn his story, or hear his perspective.").

[213] NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST COURT 52-54 (2016) (describing sentencing hearings as "racial degradation ceremonies").

[214] Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1283, 1285-87 (2015).

[215] David Bornstein, *Guiding Families to a Fair Day in Court*, N.Y. TIMES (May 29, 2015, 7:00 AM), https://archive.nytimes.com/opinionator.blogs.nytimes.com/2015/05/29/guiding-poor-families-to-a-fair-day-in-court/ [https://perma.cc/H4YS-E2CL].

[216] Intensive mitigation investigation has become the foundation of sentencing advocacy for juveniles facing a possible life sentence. *See, e.g.*, HEATHER RENWICK, THE CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, TRIAL DEFENSE GUIDELINES: REPRESENTING A CHILD CLIENT FACING A POSSIBLE LIFE SENTENCE (2015), https://www.fairsentencingofyouth.org/wp-content/uploads/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf [https://perma.cc/NE5J-UB6T] (describing the centrality of mitigation investigations to the defense of juveniles facing a possible life sentence); Wilson & Meyers, *supra* note 35 (arguing that defense teams in juvenile life-without-parole cases should conduct an intensive, "capital-style" mitigation investigation). Across a range of case types, intensive mitigation investigations have been effective tools for achieving lesser sentences. *See, e.g.*, Gohara, *Narrating Context*, *supra* note 186, at 64-68 (describing sentencing outcomes achieved using intensive

developed in the death penalty context. Such mitigation investigations aim both to develop detailed accounts of the defendant's individual experiences, and to situate the defendant's individual story in "widening circles of influence: individual, family, neighborhood, city, economic, historical, and geographical."[217] These novel fact-finding methods aim to produce a rich, textured, and nuanced account of the defendant as a unique and complex person, and to provide the sentencing judge with a "basis for empathy."[218]

The protocols adopt a superficial and slanted approach to investigating a defendant's life history that aligns with the punitive perspective's narrower understanding of individualization as information.[219] I describe the protocols' investigative approach as "superficial" because the protocols encourage community supervision officers to focus on answering narrow, formulaic questions, and to fit the defendant's answers into predetermined categories (e.g., describing the defendant's health or marriage as good, fair, or poor).[220] The protocols advise a highly structured — and sometimes literally box-checking — approach to the interview. Even where the protocols require community supervision officers to investigate highly sensitive, intimate

mitigation investigation); Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 238 (2008) (providing examples of high-profile capital cases where mitigation evidence has led to life rather than death sentences).

[217] Gohara, *Narrating Context*, *supra* note 186, at 45.

[218] *Id.* at 52; *see also* Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 720-21 (2018); Gohara, *Grace Notes*, *supra* note 35, at 41; Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1558 (2004); Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 835-37 (2008); Haney, *Social Context*, *supra* note 188, at 605.

[219] I use life history investigations to mean accounts of the defendant's life that include both their history and present circumstances.

[220] *See, e.g.*, Fla. Dep't of Corr., *supra* note 24, at 4 ("Current marital relationship: Good / Fair / Poor"); Franklin Cnty. (Ohio) Adult Prob. Dep't, Presentence Investigation Questionnaire 14 (2017) ("How would you rate your health? EXCELLENT GOOD FAIR POOR") (on file with author); Kanawha Cnty. (W. Va.) Adult Prob. Dep't, *supra* note 117, at 1 ("Health: good / fair / poor"); Mont. Dep't of Corr. Adult Prob. & Parole, Presentence Investigation Questionnaire 5 (2017) ("How would you rate your health? Good / fair / poor") (on file with author).

topics, they are encouraged to do so in a cursory way. On some written questionnaires defendants are asked to complete before their presentence interview, the design of the forms themselves underscores the shallowness of the investigation. A West Virginia questionnaire asks, "What was your childhood like?" and provides half a line for the answer.[221] The Colorado questionnaire asks, "Did you suffer any physical, sexual or emotional abuse [as a child]?" The defendant can check the box for "yes" or "no." If yes, there is less than one full line allotted for the defendant to answer the follow up question: "What kind of abuse, when did it start and who abused you?"[222] This approach produces "bare lists" of facts, leaving little room for nuance, narrative, and the defendant's subjective experience.[223]

I describe the protocols' approach as "slanted" because the protocols typically devote little — if any — attention to the defendant's strengths, good character, and other positive attributes. To be sure, community supervision officers' presentence investigations may reveal evidence that the community supervision officer interprets as demonstrating good character, as where the investigation into work history reveals a history of steady employment. But even where statutes explicitly require community supervision officers to investigate and report on the defendant's "character," the protocols typically do not instruct community supervision officers to conduct any investigation aimed specifically at uncovering the defendant's *positive* character traits.[224] For example, the protocols typically do not instruct community supervision officers to ask the defendant about their proudest accomplishments at

[221] Kanawha Cnty. (W. Va.) Adult Prob. Dep't, supra note 117, at 5.

[222] Colorado 18th Jud. Dist. Prob. Dep't, *supra* note 114, at 5.

[223] Gohara, *Narrating Context*, *supra* note 186, at 52.

[224] There are exceptions. In South Dakota and Colorado, presentence protocols instruct community supervision officers to ask the defendant about their strengths. FIRST JUD. CIR. OF S.D. CT. SERVS. DEP'T, *supra* note 22, at 23 ("Describe yourself as person, what kind of a person are you? Explain what you feel are your personal strengths and weaknesses" and providing one line for an answer); Colorado 18th Jud. Dist. Prob. Dep't, *supra* note 114, at 3 ("What are your strengths?"). Military service is a standard topic in presentence investigations and, at least where the defendant was honorably discharged, is likely to be considered evidence of good character. *See* Hessick, *Bad Acts*, *supra* note 175, at 1113 (describing honorable military service as a type of good character evidence commonly considered at sentencing).

work, in school, or in their personal life; the people they currently help or support; if they have ever saved a life or intervened in a crisis; or the greatest challenges they have overcome.[225] To the extent that presentence investigations paint a picture of the defendant, the protocols' approach is more likely to produce a mug shot than a portrait.

B. Punitiveness as Neutrality

Community supervision's sentencing role empowers community supervision agencies and officers to take positions on significant, contested, and fundamentally ideological questions about the sentencing process. In the absence of clear legal guidance, their answers to these questions reflect a contested set of assumptions and beliefs about how sentencing works and should work.

Community supervision's privileged sentencing role emerged at a time of relatively robust consensus about the values, goals, and assumptions that should animate sentencing decisions.[226] The rehabilitative ideal, while never realized in practice, nonetheless provided a widely agreed upon framework for sentencing. But today, as Michael Tonry has observed, "there are no widely shared understandings about what sentencing can or should accomplish or about conceptions of justice it should incorporate or reflect."[227] The lack of consensus that Tonry observed, writing in 2006, is now only more pronounced, as increasingly muscular and total critiques of the criminal legal system have gained academic, popular, and political traction.[228]

This lack of consensus, combined with the legal flexibility of sentencing hearings, makes sentencing hearings in individual cases fertile ground for contestation over questions of what information judges should consider, how facts should be found, and how meaning should be made. Within this context, community supervision's embrace of the punitive perspective is significant for two reasons.

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[225] *See* Hessick, *Bad Acts*, *supra* note 175, at 1155 (discussing categories of good character evidence).

[226] *See supra* Part I.B.

[227] Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 1 (2006).

[228] *See, e.g.*, Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW J. CRIM. L. 27 (2020) (describing a trend toward "criminal law skepticism").

First, presentence reports are a crucial source of standardization in the sentencing process. The information provided by the parties at the sentencing hearing will vary widely from case to case. But presentence reports are highly standardized across cases. Community supervision agencies develop defendant questionnaires, report templates, and agency policies that govern what topics community supervision officers should investigate, through which means, and how they should report their findings to the court. Community supervision agencies' embrace of the punitive perspective shapes what information judges routinely consider at sentencing.

Second, community supervision agencies and officers play a unique and privileged role in sentencing hearings. When a prosecutor or defense attorney makes a sentencing argument, their perspective and motivations are transparent. They make their argument from a particular institutional role and in service of a particular sentencing goal. Community supervision officers, in contrast, are an ostensibly neutral third party whose job is to provide the sentencing court with reliable, unbiased information about the defendant and the crime.[229] In theory, they are above the fray, unaligned with either side, and unmotivated by the skin-in-the-game concerns that shape the prosecutor's and defense lawyer's choices at sentencing.[230]

Community supervision's privileged role at sentencing does not simply elevate the punitive perspective on contested questions about the sentencing process. It elevates the punitive perspective on the pretense of neutrality.[231] In other words, community supervision's ostensible neutrality obscures the fact that their choice to embrace the punitive perspective is a choice at all.

But of course, the punitive perspective is *not* the only possible one. The ideological underpinnings of community supervision's approach to their sentencing role are made clearest by considering alternative approaches rooted in the decarceral perspective on the sentencing process. Community supervision's sentencing role, however,

[229] *See supra* note 130 and accompanying text.

[230] *See supra* note 130 and accompanying text.

[231] *Cf.* Jocelyn Simonson, *The Place of the People in Criminal Procedure*, 119 COLUM. L. REV. 249, 254 (2019) ("To be 'neutral' is to side with the prosecution, not the defendant.").

whitewashes the punitive perspective as obvious, objective, and inevitable and, by doing so, helps to entrench their dominance at sentencing.

IV. RE-THINKING COMMUNITY SUPERVISION'S SENTENCING ROLE

I turn now to the implications of my descriptive and theoretical account for the future of community supervision's sentencing role and the presentence process. Who should conduct presentence investigations and write presentence reports — community supervision agencies and officers, or a different third party? What should the presentence process involve? And should the presentence process — regardless of who conducts it — be part of sentencing at all?

In this Part, I sketch out two possible paths forward. The first path is reforming the presentence process (and the role of community supervision agencies and officers within it). The second path is eliminating the presentence process altogether.

A. Reforming the Presentence Process

The presentence process has been part of sentencing for over a century.[232] Assuming that it continues to be part of sentencing in at least some cases, states should change both who is responsible for the presentence process, and what it involves.[233]

States should replace community supervision agencies and officers with a different third party. Since the Progressive Era, community supervision officers have been the ones to conduct presentence investigations and write presentence reports.[234] But they should not be. The leading contemporary justification for why community supervision agencies and officers should play a privileged role at sentencing is that they are neutral actors, unaligned with either the state or defense.[235]

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[232] *See supra* Part I.B (discussing the role's Progressive Era origins).

[233] This Section does not discuss all worthy reforms to the presentence process. For example, I do not discuss recognizing a Sixth Amendment right to counsel in the presentence interview. Pamela Metzger has already made a persuasive case for why this is important. *See* Metzger, *supra* note 135 at 1680.

[234] *See supra* Part I.B.

[235] *See supra* notes 129–175 and accompanying text.

This claim is plausible only if we look at their sentencing role in isolation. Zooming out to consider their primary, supervisory role reveals that community supervision agencies and officers are aligned with the "State" in the "State v. Defendant" caption used in many criminal cases.

In their supervisory role, community supervision agencies and officers are in a structurally antagonistic position toward defendants.[236] They administer the punishment of community supervision, which involves surveilling compliance with invasive and burdensome supervision conditions, investigating suspected violations, initiating revocation proceedings, and seeking the incarceration of people they believe have violated their supervision conditions.[237] In keeping with this antagonistic dynamic, ethnographic research has described the dominance within some community supervision agencies of negative views about defendants, who are seen "dispositionally flawed," "deviant," and "dangerous."[238]

[236] *Cf.* Brenner Fissell, *Police-Made Law*, MINN. L. REV. 1, 42 (forthcoming 2024) (describing police as "structurally partisan" because "they are enforcers representing one 'side' in an adversarial system"). To be sure, the nature of individual relationships between community supervision officers and people on supervision varies widely. In focus groups with people on probation, Michelle Phelps & Ebony Ruhland observed "tremendous variation" in experiences of supervision and found that "for some people at some times, probation was perceived as a 'lifeline,' providing caring and transformative resources that they had been unable to access before conviction." Phelps & Ruhland, *supra* note 51, at 806, 811; *see also* Megan Welsh, *How Formerly Incarcerated Women Confront the Limits of Caring and the Burdens of Control Amid California's Carceral Realignment*, 14 FEMINIST CRIMINOLOGY 89, 99-106 (2017) (describing variation in formerly incarcerated women's views of their probation and parole officers). But even where individual community supervision officers provide "care," in the form of emotional support or connection to desired services, such care is provided within a punitive relationship, in which the officer has the power to surveil and sanction. Indeed, some supervision officers see the threat of sanctions, including incarceration, as a tool for "helping" people on supervision, by providing accountability and motivation for positive change. Phelps & Ruhland, *supra* note 51, at 805.

[237] *See supra* notes 53–62 and accompanying text.

[238] Mona Lynch, *Waste Managers? The New Penology, Crime Fighting, and Parole Agent Identity*, 32 LAW & SOC'Y REV. 839, 844-45 (1998); *see also* Robert Werth, *The Construction and Stewardship of Responsible Yet Precarious Subjects: Punitive Ideology, Rehabilitation, and 'Tough Love' Among Parole Personnel*, 15 PUNISHMENT & SOC'Y 219, 227 (2013) ("Agents read the criminalized, always already dangerous identity into parolees' attitudes and

In contrast, community supervision agencies and officers are often in a cooperative, collaborative posture with police and prosecutors. Community supervision agencies in the states are most commonly part of the executive branch.[239] Within agencies, there is also a sense of a shared public safety mission with prosecutors and police.[240] Community supervision officers frequently cooperate with the police to conduct searches, investigations, and "compliance checks" of people on supervision.[241] As the Supreme Court has recognized in discussing community supervision officers' supervisory role, a community supervision officer "is the employee of the State which seeks to prosecute the alleged offender. He is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers."[242]

In addition to their structural alignment with the state, community supervision agencies and officers also have an interest in sentencing

practices, typically viewing them as unlikely to, or even incapable of, change."). Colleen Berryessa's research on remorse assessment by community supervision officers during the presentence process suggests that the negative, skeptical view of defendants Lynch and Werth observed in their research may extend to the presentence process. Berryessa found that community supervision officers writing presentence reports were often skeptical of defendants' expressions of remorse. Furthermore, they adopted an adversarial, quasi-prosecutorial posture toward the defendant when they discussed remorse in their presentence reports. Officers "prioritized 'exposing' disingenuous remorse displays" in their presentence reports. To effectively convey their skepticism to judges, officers included descriptions of both defendants' words and body language indicating (in the officer's eyes) their lack of sincere remorse. Berryessa, *supra* note 156, at 474.

[239] PETERSILIA, *supra* note 203, at 69.

[240] Rosecrance, *The Probation Officers' Search for Credibility*, *supra* note 11, at 545 ("Probation officers identify with prosecutors because ideally both groups have a common goal — the protection of the community. This 'common purpose' can be contrasted with the assumed goal of defense attorneys — to get their clients off 'scot-free.'").

[241] *See, e.g.*, LAUREN GILL, OPERATION "SAFE" STREETS: HOW DELAWARE'S MOST SECRETIVE POLICE FORCE PLAYS FAST & LOOSE WITH OUR COMMUNITIES 4 (2022), https://www.aclu-de.org/sites/default/files/aclu-de_operation_safe_streets_story_final.pdf [https://perma.cc/MM7E-2LV5] (describing a partnership between police and community supervision officers in Delaware to perform traffic stops and home searches of people on probation); Welsh, supra note 236, at 94 (describing how probation officers in some California counties outsource to local law enforcement "compliance checks" to verify supervisees' whereabouts).

[242] Fare v. Michael C., 442 U.S. 707, 720 (1979).

outcomes: their workloads are determined by judges' decisions about whether to sentence defendants to community supervision, and if so, for how long.[243] In other words, in their sentencing role, community supervision agencies and officers help to decide the punishment that then, in their supervisory role, they administer.

If the presentence process is preserved, states should replace community supervision agencies and officers with a different third party — one who is not part of the state's law enforcement and punishment apparatus and who has a more credible claim to neutrality at sentencing. The difficulty comes in identifying who such an alternative third party might be. Jurisdictions could contract with a nonprofit organization to fill the role — a model already used to provide other services within the criminal legal system.[244] The impact of this reform would depend, in large part, on the culture, staffing, and mission of the alternative third party organization.[245]

[243] This interest could cut either way. Community supervision officers may have incentives to say people *are* good candidates for community supervision, in an effort to ensure their agencies' relevance. Or, if supervision workloads are perceived as already too high, they may have incentives to say defendants are not good candidates for community supervision. Either way, they are not disinterested parties. Additional research on this point would be illuminating.

[244] Ursula Castellano, *Beyond the Courtroom Workgroup: Caseworkers as the New Satellite of Social Control*, 31 LAW & POL'Y 429, 430 (2009) [hereinafter *Beyond the Courtroom Workgroup*] (describing the role of pretrial release caseworkers who "are contracted through nonprofit agencies to supervise defendants released into the community pending adjudication of their criminal cases"); Ursula Castellano, *Courting Compliance: Case Managers as "Double Agents" in the Mental Health Court*, 36 LAW & SOC. INQUIRY 484, 491-93 (2011) (describing the role of case managers in mental health courts, who are contracted to provide community-based services to defendants mandated to participated in treatment); Farhang Heydari, *The Private Role in Public Safety*, 90 GEO. WASH. L. REV. 696, 717-18 (2022) (describing the varied roles of nonprofits within the criminal legal system).

[245] Importantly, all of these factors are malleable, and entering into a contractual relationship with the state can itself impact an organization's mission and culture. *See* Castellano, *Beyond the Courtroom Workgroup*, *supra* note 244, at 433-34 (describing variation in how caseworkers employed by different nonprofit organizations under contract with the court to provide pretrial services approach their role); Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2029 nn.116–17 (2022) ("[P]retrial services agencies, were originally developed for a decarceration purpose. They have their origins in the Manhattan Bail Project, launched by the Vera Foundation (now Vera Institute of Justice) and New York University in 1961, which was designed to provide

This reform should be paired with an overhaul of the presentence process itself. Currently, community supervision agencies and officers have broad discretion in deciding what topics presentence reports should cover, how facts should be found, and how meaning should be made. One of this Article's central claims is that these are in fact foundational, contested, and value-laden questions, whose answers will reflect a deeper set of assumptions and beliefs about sentencing and the criminal legal system. Recognizing the significance of these questions suggests two potential paths to reforming the presentence process: the first focused on changing the answers to these questions, and the second focused on changing the process for answering these questions. The two paths are potentially — but not necessarily — complementary.[246]

The first approach is to reform the substance of the protocols (and/or the statutes and court rules governing them), with the aim of tempering the punitive perspective. The presentence protocols or relevant laws could restrict officers' meaning-making by explicitly barring presentence investigators from opining on the sincerity of the defendant's remorse, assessing their attitude toward the crime of conviction, or providing their overall "evaluation" or "analysis" of the defendant.[247] Similarly, the protocols or laws could also require new

courts with information about a defendant's ties in a community in an effort to secure pretrial release without bond for defendants with strong community ties. . . . However, modern pretrial services agencies tend to operate as an arm of the carceral state.").

[246] These two paths implicate a broader debate in the criminal law literature about how to prioritize reform to the *processes* of criminal law policymaking versus reform to the *substance* of criminal law policy. *See* Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 YALE L.J.F. 798, 798 (2021) ("A given model of crime-policymaking process may ultimately serve the goal of policy reform, or it may not. Given this latter possibility, reformers must uncouple the normative pursuit of equity in the process of crime policymaking from the normative pursuit of substantive crime-policy reform. They should likewise prioritize the transformation of substantive crime policy over the transformation of the process of crime policymaking."); Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2828 (2022) ("[D]emocratic values and 'equitable process' might be an important goal, and so too might prioritizing decarceration and 'equitable crime policy.' But it's not inevitable that these goals always will be congruent. Whether, where, and to what extent the goals might conflict or overlap remain empirical questions.").

[247] *See supra* Part II.C (discussing the meaning-making facet of community supervision's sentencing role).

elements aimed at elevating the decarceral perspective, such as what Andrew Crespo has described as "systemic facts": "facts about the criminal justice system itself, and about the institutional behavior of its key actors."[248] For example, presentence reports could include specific facts about incarceration — such as staffing and overcrowding levels in state prisons — in any case where the defendant faces a potential prison sentence.[249]

The second approach is to reform the *process* through which the protocols are designed, to create opportunities for public input. Currently, community supervision agencies and officers resolve significant and contested questions about topic selection, fact-finding, and meaning-making with little transparency and little opportunity for public input.[250] Certainly, legislative overhaul of the statutory framework for presentence reports could constrain agencies' discretion here, and such legislative overhaul would itself create some opportunities for public input on questions about the presentence process. But reforms could also promote transparency and public engagement in the process of developing the protocols.[251] For example, legislatures or courts could empower a commission — ideally with

[248] Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2052 (2016).

[249] *See supra* Part III.B.

[250] Most jurisdictions do not make protocol documents available to the public, though there are some exceptions. *See, e.g.*, Nev. Dep't of Pub. Safety, Div. of Parole & Prob., *supra* note 118 (publishing presentence questionnaire). I am not aware of any agency that solicits public comment or feedback on the development of their presentence protocols, though this question was not my focus in researching this Article.

[251] Many policing scholars have considered means of promoting public engagement in formulating policing policy. *See, e.g.*, Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1887 (2015) (noting that "notice-and-comment rulemaking is hardly the only model for seeking input from the public on the rules and practices that govern police and practices that govern police" and describing alternative models); Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 522-23, 546 (2015) (discussing mechanisms for community feedback on policing policy); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 135 (2016) (proposing the use of notice-and-comment rulemaking in policing).

strong representation from people directly impacted by the criminal legal system — to design the protocols.[252]

Even without legislative action, community supervision agencies (or their replacement) could create opportunities for public engagement in the protocols' design. Such opportunities need not be limited to the usual suspects of public comment periods and community meetings — which, as other scholars have observed, tend to "re-inscrib[e] ... existing power imbalances" that already dampen the voices of people from the low income Black and brown communities most affected by the criminal legal system.[253] Rather, in seeking public input, community supervision agencies (or their replacement) could also affirmatively seek out input from people who have gone through the presentence process as defendants and have relevant "situated knowledge" of the presentence process.[254]

B. Eliminating the Presentence Process

The presentence process involves (1) a state actor (whether a community supervision officer or a different third party) (2) investigating (at least) the defendant's life, background, and crime of conviction[255] and (3) presenting their findings to the sentencing judge. By "eliminating" the presentence process, I mean that community supervision agencies and officers would no longer conduct presentence investigations and write presentence reports — but no one else would

[252] *See* Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 CONN. L. REV. 739, 739, 774-75 (2022) (arguing that the power to design pretrial risk algorithms should lie with community commissions composed, in whole or in part, of people from low-income communities of color who are directly impacted by the criminal legal system).

[253] Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1610 (2017); *see also* Okidegbe, *supra* note 252, at 771.

[254] There are interesting examples of such efforts from the administrative law context of agency rulemaking. *See generally* Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793 (2021) (providing an overview of agency efforts to secure meaningful public engagement in agenda setting and rule development by seeking input from people with "situated knowledge" of the topic).

[255] The potential scope of presentence investigations and reports is much broader. *See supra* Part III.A.1 (discussing debates over the appropriate scope of the sentencing inquiry).

either. Rather, the presentence process would no longer be part of sentencing. There are compelling reasons to consider eliminating the presentence process altogether, though doing so as a standalone change to the sentencing process may have perverse consequences.

The leading contemporary justification for the presentence process is that it facilitates the goal of individualized sentencing.[256] Individualized sentencing requires the sentencing judge to have information about both the crime of conviction and the defendant as an individual; through the presentence process, a third party provides the sentencing judge with both. As I have argued, the goal of "individualized sentencing" is vague and malleable. It encompasses both broad and narrow understandings of individualization, which I have described as "individualization as humanization" and "individualization as information."[257] But neither understanding of individualized sentencing provides a compelling justification for preserving the presentence process.

Even a thoroughly reformed presentence process is unlikely to realize the potential benefits of individualization as humanization. Individualization as humanization is "disruptive," in that it challenges the pronounced tendency at sentencing to define defendants by their crime of conviction. [258] Whereas individualization as information seeks to *facilitate* the imposition of punishment, individualization as humanization aims to make imposing punishment harder. The purpose of individualization as humanization is to "make the judge suffer," to make them feel the excruciating weight of how their sentencing decision will affect the defendant, their family, and their community.[259] In this way, individualization as humanization is incompatible with a defining aspect of the presentence process: that the investigator's primary

[256] *See supra* notes 73–86 and accompanying text.

[257] *See supra* Part III.A.2 (defining "individualization as information" versus "individualization as humanization").

[258] Godsoe, *supra* note 218, at 723.

[259] Lance Oppenheim, NO JAIL TIME: THE MOVIE, (New York Times short film Dec. 5, 2017) (quoting Doug Passon, one of the pioneers in video sentencing advocacy by the defense).

loyalty is to the sentencing court and the criminal legal system, rather than to the defendant as an individual.[260]

Nor does the narrower understanding of individualized sentencing (what I have described as "individualization as information") justify preserving the presentence process. While the presentence process is one means of providing the judge with information about the defendant and the crime, it is not necessary to realize the goal of individualized sentencing even in this narrower sense. If the presentence process were eliminated, the parties could provide the sentencing court with information about the crime of conviction and the defendant as an individual. In other words, the alternative to the presentence process is not a total informational void and the collapse of individualized sentencing; it is a sentencing process in which the parties solely control the presentation of evidence at sentencing, as they do at suppression hearings or trial.[261]

The individualization rationale for the presentence process rests on the specious assumption that defendants should disclose a wide range of information about their lives and backgrounds to the state actor conducting the presentence investigation.[262] As I described in Part I, the

[260] Methods of promoting individualization as humanization are rooted in loyalty to the individual defendant. *See* Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 742 (2008) (describing a relationship between defendant and investigator "that reflects warmth, genuine concern, and mutual trust" as a necessary precondition for effective life history mitigation investigations).

[261] William T. Pizzi, *Sentencing in the US: An Inquisitorial Soul in an Adversarial Body?*, *in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT 65 (John Jackson, Maximo Langer & Peter Tillers eds., 2008) ("[T]he probation officer has a stature at sentencing analogous to the neutral experts appointed by the judges in Continental trial systems."); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1436-40 (2008); Bascuas, *supra* note 9. The question of defining adversarial versus inquisitorial systems and practices is a complex one. Here, I use them in their stylized form, consistent with their use in much of U.S. criminal procedure law and scholarship. *See* David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1638 (2009) (observing and critiquing the use of a stylized, simplistic understanding of inquisitorial systems as a contrast model with U.S. criminal procedure law and scholarship).

[262] Without the assumption of defendants' cooperation, the individualization rationale for the presentence process makes little sense. If defendants did not disclose the requested information, the presentence investigation would not be able to provide

presentence process emerged in the Progressive Era as part of a broader effort to align sentencing with the rehabilitative ideal. When rehabilitation was (in theory) the principal purpose of sentencing, defendants (in theory) benefitted from disclosing information about their lives as part of the presentence investigation: more information about defendants' lives enabled judges to impose lesser sentences aimed at rehabilitation. The Supreme Court endorsed this view in *Williams*, which remains the leading case on the presentence process. By 1949, the Court noted, "reformation and rehabilitation" had displaced retribution as "the dominant objective of the criminal law."[263] In the new rehabilitative era, judges needed "the best available information" to impose an appropriately rehabilitative sentence.[264] Defendants, the Court insisted, had nothing to fear from opening their lives to scrutiny by the presentence investigator. Indeed, "by careful study of the lives and personalities of convicted offenders, many could be less severely punished and restored sooner to complete freedom and useful citizenship."[265]

Contrary to the *Williams* Court's contention, many defendants have little to gain, and much to lose, from disclosing information about their lives and background at sentencing.[266] Even information that may at first glance seem clearly mitigating — such as information about the defendant's childhood trauma history — can and often does lead to

the judge with much information about the defendant's life and background beyond their criminal history. *See* ROTHMAN, *supra* note 70, at 62-63 (noting that Progressive Era reformers who championed the presentence process "did not so much as conceive of the possibility of a mischievous result, the possibility that the state should not be allowed, or had no right, to investigate every detail of the offender's life and of his family").

[263] Williams v. New York, 337 U.S. 241, 248 (1949).

[264] *Id.* at 249.

[265] *Id.*

[266] Samuel Tito Williams, the wrongly convicted defendant in *Williams v. New York*, received a death sentence based largely on information contained in the presentence report. *Williams*, 337 U.S. at 242 ("The jury recommended life imprisonment, but the trial judge imposed sentence of death. In giving his reasons for imposing the death sentence the judge discussed in open court the evidence upon which the jury had convicted stating that this evidence had been considered in the light of additional information obtained through the court's 'Probation Department, and through other sources.'"); Shaakirrah R. Sanders, *The Value of Confrontation as a Felony Sentencing Right*, 25 WIDENER L.J. 103, 111-16 (2016).

harsher punishment.[267] So, too, can information in the presentence report harm the defendant beyond sentencing. For example, a defendant's statement to the presentence investigator about where they were born may be used as evidence against them in a subsequent deportation proceeding.[268]

In this high-stakes and harshly punitive context, one of the most valuable and protective functions served by defense counsel at sentencing is to strategically filter the information about the defendant's life and background that they affirmatively present to the court.[269] The presentence process undermines this protective function. The role of the third-party state actor is to report standardized categories of information across cases, regardless of the consequences for the individual defendant. While defendants can legally withhold such information from the investigator, the legal framework for the presentence process endows the presentence investigator with significant leverage to obtain the defendant's "cooperation."[270]

The presentence process is rooted in denial of the adversarial and punitive nature of sentencing proceedings.[271] As other commentators have observed, the presentence investigator fills a classically

[267] *See* Godsoe, *supra* note 218, at 727 ("I have previously cautioned [defense attorneys] against an unquestioning presentation of a client's traumatic history. Probation interviews with family members were one of the most difficult challenges I faced in practice, as a client's parent or sibling might unwittingly provide information about a young person's family history or substance abuse that would lead probation and other professionals to find them in need of more restrictive measures pending trial or after an adjudication. Judges may find people in need of further incarceration for services, such as attending school or job training, mental health, or even for their own safety."); Hessick & Berman, *supra* note 83, at 175-77 (describing uncertainty around whether a defendant's diminished capacity, young age, reduced cognitive ability, or intoxication at the time of the crime should be treated as an aggravating or mitigating factor at sentencing).

[268] *See, e.g.*, B.R. v. Garland, 26 F.4th 827, 843-44 (9th Cir. 2022).

[269] *See* Godsoe, *supra* note 218, at 725.

[270] *See supra* Part II.B.

[271] Bascuas, *supra* note 9, at 5 ("[T]he probation officer's presentence investigation report and participation in the sentencing process is incompatible with the adversarial system.").

inquisitorial role within an ostensibly adversarial system.[272] In a system where defendants consistently received zealous representation at sentencing, the alternative party control model would be preferable to the presentence process. But for the eighty percent of defendants represented by court-appointed counsel,[273] minimally competent, resourced, and zealous defense attorneys are the exception, not the rule.[274] Given the permanent crisis of public defense, it would be implausible to expect some court-appointed defense attorneys to conduct even a cursory investigation into the defendant's life and background.[275] In these circumstances, eliminating the presentence

[272] This was not always a viable alternative. The presentence process predates *Gideon v. Wainwright* and the establishment of indigent defense delivery systems. The first public defender office was established in Los Angeles in 1914. The model was not widely adopted until after the *Gideon* decision in 1963. *See* SARA MAYEUX, FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA 2 (2020) ("In most of the United States, there were no public defenders in the 1950s. . . . By 1973, nearly two-thirds of Americans lived in an area served by a public defender. That same year, a federal commission recommended that every local jurisdiction maintain 'a full-time public defender organization. By the end of the twentieth century, eight out of ten felony defendants in urban counties were represented by a publicly funded lawyer.").

[273] *See* Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* 3 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 121, 121 (Erik Luna ed., 2017).

[274] *See, e.g.*, Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 391 (2016) ("[P]ublic defenders are constantly tasked with representing more individuals than their limited resources support. . . . Insufficient resourcing . . . has created a public defender system that is commonly described as unfair, struggling, and even broken."); Primus, *supra* note 273, at 127 (describing public defenders as "persistently underfunded and overwhelmed"). *But see* Alexandra Natapoff, *The Penal Pyramid*, *in* THE NEW CRIMINAL JUSTICE THINKING 71, 75 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (observing that "in some jurisdictions an elite public defense bar provides stellar representation" for indigent defendants).

[275] *See* Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 BOS. COLL. L. REV. 1069, 1077-79 (2009) (discussing cases where defense counsel failed to conduct a meaningful sentencing investigation); Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1635-36 (2020) (discussing obstacles to defense counsel investigations into the alleged crime). Public defender resource constraints likely affect Black defendants more adversely than white defendants, both in general and at sentencing, in particular. *See* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2638-41 (2013) (arguing that social science research on implicit racial biases "raise[s] concerns that defenders may be more accepting of higher

process would leave the judge with little information about the defendant's life and background beyond their criminal history.[276]

I do not want to overstate the individualizing function accomplished by the presentence process in its current form. As I have described, the protocols' approach to fact-finding about the defendant's life and background is superficial and slanted.[277] But even the limited and superficial information about defendants' lives that the presentence process provides may be preferable to the realistic alternative, in some jurisdictions.[278]

The abysmal quality of public defense in many jurisdictions is a reason to be cautious about eliminating the presentence process. It also suggests that efforts to either reform or eliminate community supervision's sentencing role should be paired with efforts to support defense-side sentencing advocacy grounded in a vision of individualization as humanization — not as a panacea, but as a harm reduction strategy for individual defendants within a profoundly dehumanizing system.[279] Such support could include developing

sentencing recommendations for black versus white clients and, thus, less likely to negotiate aggressively for lower sentences or to conduct mitigation investigations").

[276] The state can obtain the defendant's criminal history without the defendant's cooperation. In some jurisdictions, the judge has independent access to a version of the defendant's criminal history, contained in the court file. *See, e.g.*, People v. Woods, 31 N.Y.S.3d 830, 834-35 (noting that the court file in New York City criminal courts contains the defendant's criminal history report, or "rap sheet"). Individual criminal history records are shaped by racially targeted surveillance and enforcement practices, such that criminal history functions as a "proxy for race." *See* Bernard E. Harcourt, *Risk as a Proxy for Race*: *The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 237 (2015); Ion Meyn, *Race-Based Remedies in Criminal Law*, 63 WM. & MARY L. REV. 219, 231-33 (2021) (discussing how racially targeted policing practices shape individual criminal histories).

[277] *See supra* Part III.A.1.

[278] *But see* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 378 (2016) (noting that "defense attorneys presented employment, health, and other information about their clients" at settlement conferences in the absence of presentence reports).

[279] On the role of harm reduction strategies in efforts for transformational change, see Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1214-15 (2022) (discussing harm reduction strategies within abolitionist praxis); Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1652

resources for defense attorneys to use in conducting life history investigations, such as standardized life history questionnaires for defendants to complete independently.[280] Nor are defense attorneys the only ones who can provide individualizing information about defendants at sentencing. Support for defense-side sentencing advocacy should also include support for participatory defense.[281]

More broadly, recognizing the inability or unwillingness of many defense counsel to conduct basic life history investigations for sentencing is yet another argument — as if one were needed — for remedying the permanent crisis of indigent defense delivery and for taking seriously calls for more transformational change.[282]

CONCLUSION

In this Article, I have demonstrated that community supervision agencies and officers are important institutional actors in state court sentencing proceedings. Their sentencing role is multifaceted, encompassing topic selection, fact-finding, and meaning-making. Each facet of their sentencing role has an inescapably ideological dimension. Community supervision agencies and officers take positions on open — and contested — questions about the sentencing process. Their approach to resolving contested questions about the appropriate scope

(2019) ("I believe that the prison system is like a social cancer: we should fight to eradicate it but never stop treating those affected by it.").

[280] The "Defense Map" program is one example of such a resource. DEFENSE MAP PROJECT, www.defensemap.com (last visited Sept. 22, 2023) [https://perma.cc/8N7T-VMDK].

[281] Indeed, the participatory defense movement was sparked, in part, by recognition of the permanent public defense crisis. Importantly, however, its goal is not to enable public defense systems to "shift the central tasks of high-quality representation — communication, investigation, and advocacy — onto low-income communities that need good lawyering." Raj Jayadev & Janet Moore, *Participatory Defense as an Abolitionist Strategy*, *in* TRANSFORMING CRIMINAL JUSTICE: AN EVIDENCE-BASED AGENDA FOR REFORM 71, 93 (Jon B. Gould & Pamela Metzger, eds., 2022).

[282] *See* Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2179 (2013) ("Even full enforcement of *Gideon* would not significantly improve the wretchedness of American criminal justice."); Premal Dharia, Gideon *Turns Sixty*, INQUEST (Mar. 8, 2023), https://inquest.org/gideon-turns-sixty/ [https://perma.cc/FQ2Z-HNMU] ("Does justice really look like a public defense system that relentlessly metastasizes to match the scale of the system's harms?").

of the sentencing inquiry and the meaning of individualization elevates the punitive perspective on the pretense of neutrality. Like community supervision's supervisory role, their sentencing role deserves sustained scholarly attention.

APPENDIX A: WHEN PRESENTENCE REPORTS ARE REQUIRED AND WHO PREPARES THEM

State	**Relevant statute or court rule**	**When presentence report is prepared**	**Who prepares presentence report**[283]
Alabama	ALA. CODE § § 13A-5-5 (2018)	All felony convictions	Probation and parole officer
Alaska	ALASKA R. CRIM. P. 32.1	Unclassified or Class A felony convictions, with exceptions[284]; upon request of either party; at judge's discretion	Probation officer
Arizona	ARIZ. R. CRIM. P. 26.4	Where the judge has sentencing discretion, with exceptions[285]	Unspecified in statute/ rule[286]

[283] This column of the table describes who prepares presentence reports according to the relevant statute or court rule. In many states, agency policies or other sources provide more specific information about who is responsible for preparing presentence reports (as where the statute empowers the Department of Corrections, but agency policy specifically empowers probation officers within the Department of Corrections). Where this is the case, I have provided the additional information in a footnote.

[284] ALASKA R. CRIM. P. 32.1(a)(2) ("[U]nless the court has accepted the parties' negotiated sentencing agreement and has decided to proceed without a presentence report.").

[285] ARIZ. R. CRIM. P. 26.4 ("[A] presentence report is optional if: (1) the defendant may only be sentenced to imprisonment for less than one year; (2) the court granted a request under Rule 26.3(a)(1)(B); or (3) a presentence report concerning the defendant is already available.").

[286] *But see* MARICOPA CNTY. ADULT PROB. DEP'T, POLICY NO. 5-101: PRESENTENCE INVESTIGATION REPORT 1, 3-4 (2018) (describing probation officers as responsible for conducting presentence investigations).

Arkansas	ARK. CODE ANN. §5-4-102 (2019)	At judge's discretion	Presentence officer[287]
California	CAL. RULES OF COURT 4.411	If defendant is eligible for probation or a jail sentence, with exceptions[288]; at judge's discretion	Probation officer
Colorado	COLO. REV. STAT. §16-11-102 (2020)	All felony convictions except Class 1 felonies	Probation officer
Connecticut	CONN. PRACTICE BOOK SEC. 43-3(A) (2021)	All felony convictions except capital felonies; at judge's discretion	Probation officer
Delaware	DEL. CODE ANN TIT. 11 §4331 (2021)	At judge's discretion; for sex offenses upon request of either party	Investigative services officer[289]

[287] ARK. DEP'T OF CMTY. CORR., POLICY MANUAL CHAPTER 5: PAROLE/PROBATION SERVICES 11 (2011), https://www.arkleg.state.ar.us/Calendars/Attachment?committee=520&agenda=I12062&file=Exhibit+8+-+Probation+and+Parole+Services+manual.pdf [https://perma.cc/4M3C-439R] ("The pre-sentence investigation should be conducted by a parole/probation officer or other person designated by the Parole/Probation Area Manager.").

[288] CAL. R. CT. 4.411(b) ("The parties may stipulate to the waiver of the probation officer's investigation and report in writing or in open court and entered in the minutes, and with the consent of the court. In deciding whether to consent to the waiver, the court should consider whether the information in the report would assist in the resolution of any current or future sentencing issues, or would assist in the effective supervision of the person.").

[289] DEL. CODE ANN. tit. 11, § 4335(2) (2021) ("Investigative Services Officer — The Superior Court and the Court of Common Pleas may . . . appoint an appropriate number of Investigative Services Officers in each county who shall have powers and responsibilities to conduct presentence investigations, as well as other types of investigations and investigative tasks, as directed by the Court and under the supervision of the Chief Investigative Services Officer.").

D.C.	D.C. SUPER. CT. R. CRIM. P. 32(B)(1)(A)	All felony convictions, with exceptions;[290] if restitution is permitted; at judge's discretion	Court Services and Offender Supervision Agency
Florida	FLA. R. CRIM. P. 3.710	At judge's discretion; for capital defendants who refuse to present mitigation evidence	Department of Corrections[291]
Georgia	GA. CODE ANN. § 42-8-29 (2020)	At judge's discretion	Probation officer

[290] D.C. SUPER. CT. R. CRIM. P. 32(b)(1)(A)(i) ("[U]nless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.").

[291] FLA. DEP'T OF CORR., OFF. OF CMTY. CORR., *supra* note 133, at 16-19 (identifying probation officers as responsible for completing presentence investigations).

Hawaii	HAW. REV. STAT. §706-601 (2020)	All felony convictions, with exceptions[292]; where defendant is less than 22 years old; at judge's discretion	Personnel assigned to the court or other agency designated by the court[293]
Idaho	IDAHO CRIM. R. 32	At judge's discretion	Unspecified in statute/rule[294]
Illinois	ILL. COMP. STAT. §5/5-3-2 (2020)	All felony convictions	Unspecified in statute/rule[295]

[292] HAW. REV. STAT. § 706-601(3)-(4) (2020). ("With the consent of the court, the requirement of a pre-sentence diagnosis may be waived by agreement of both the defendant and the prosecuting attorney; provided that in felony cases, the prosecuting attorney shall inform, or make reasonable efforts to inform, the victim or the victim's surviving immediate family members of their rights to be present at the sentencing hearing and to provide information relating to the impact of the crime, including any requested restitution. The court on its own motion may waive a pre-sentence correctional diagnosis where: (a) A prior pre-sentence diagnosis was completed within one year preceding the sentencing in the instant case; (b) The defendant is being sentenced for murder or attempted murder in any degree; or (c) The sentence was agreed to by the parties and approved by the court under rule 11 of the Hawaii rules of penal procedure.").

[293] HAW. JUD., *supra* note 130, at 3 ("Upon receipt of the referral to Adult Client Services for [presentence] investigation, the case shall be assigned to a probation officer.").

[294] *But see* IDAHO DEP'T OF CORR., *supra* note 123, at 3 ("Presentence investigations may be conducted and presentence reports prepared by investigators, probation and parole officers, and other staff who have received training in conducting presentence investigations and who are designated by the district manager or section supervisor.").

[295] *But see Adult Probation Department: Presentence Investigations*, STATE OF ILL., CIR. CT. OF COOK CNTY.,https://www.cookcountycourt.org/ABOUT-THE-COURT/Office-of-the-Chief-Judge/Probation-Departments/Probation-for-Adults/Adult-Probation-Department/Pre-Sentence-Investigations (last visited Sept. 22, 2023) [https://perma.cc/VK9P-PRUC] ("Presentence investigations are written to assist the court in making sentencing decisions. Probation officers conduct interviews and use collateral sources to gather and verify background information regarding a defendant's criminal record, drug and

Indiana	IND. CODE. §35-38-1-8 (2021)	All felony convictions (but at judge's discretion for Level 6 felonies)	Probation officer
Iowa	IOWA CODE §901.2 (2021)	Class B, C, or D felonies; at judge's discretion (but not permitted for Class A felonies)	Judicial district department of correctional services[296]
Kansas	KAN. STAT. ANN. §21-6813 (2020)	All felony convictions	Court services officer[297]
Kentucky	KY. REV. STAT. ANN. § 532.050 (2020)	All felony convictions except capital offenses	Probation officer
Louisiana	LA. CODE CRIM. PROC. ANN. ART. 875 (2021)	At judge's discretion	Probation officer

alcohol use, employment history, financial stability, education level, family situation, mental health history and peer associations.").

[296] *See* MAUREEN E. HANSEN, THIRD JUD. DIST. DEP'T OF CORR. SERVS., ANNUAL REPORT: FISCAL YEAR 2022, at 35-45 (2022), https://publications.iowa.gov/42155/1/AnnualReportFY22-Compressed.pdf [https://perma.cc/KU2Y-8VBE] (describing judicial district department of correctional services as responsible for supervising people on probation, parole, and pre-trial release).

[297] *Court Services*, DOUGLAS CNTY., KAN., https://www.douglascountyks.org/depts/court-services (last visited Sept. 22, 2023) [https://perma.cc/RGB4-WL2D] ("Court Services Officers are responsible for adult and juvenile supervision in misdemeanor and felony probation cases. They regularly perform drug screens, meet with individuals under supervision in the office and community and make sure all conditions imposed by the court are being followed. Court Services Officers also research and write presentence investigation reports which aid the court in determining the sentence a defendant receives.").

Maine	ME. R. CRIM. Pro. 32	At judge's discretion	Parole and probation agent
Maryland	MD. CODE ANN., CORR. SERVS. § 6-112 (2021); MD. CODE ANN., CRIM. PROC. § 11-727 (2021)	Where the state seeks a sentence of life without the possibility of parole; convictions for sexual abuse of a minor; at judge's discretion	Probation officer
Massachusetts	MASS. R. CRIM. P. 28	All felony convictions	Probation officer
Michigan	MICH. COMP. LAWS ANN. §771.14 (2021)	All felony convictions; if defendant has public health license; at judge's discretion	Probation officer
Minnesota	MINN. STAT. ANN. §609.115 (2020)	All felony convictions; at judge's discretion	Probation officer
Mississippi	MISS. R. CRIM. P. 26.3	At judge's discretion	Probation officer
Missouri	MO. ANN. STAT. § 557.026 (2020)	All felony convictions, with exceptions[298]; at judge's discretion for Class A misdemeanor convictions	Probation officer

[298] MO. ANN. STAT. § 557.026 (2020) ("[U]nless waived by the defendant.").

Montana	MONT. CODE ANN. §46-18-111 (2019)	Violent offenses; where restitution is at issue[299]; at judge's discretion	Probation and parole officer
Nebraska	NEB. REV. STAT. ANN. §29-2261 (2021)	All felony convictions other than first-degree murder, with exceptions[300]; first-degree murder convictions where aggravating circumstances are at issue[301]; at judge's discretion[302]	Probation officer
Nevada	NEV. REV. STAT. ANN. §176.135 (2020)	All felony convictions	Probation officer

[299] MONT. CODE ANN. § 46-18-111(d) (2023) ("[I]f the defendant is convicted of a crime for which a victim or entity may be entitled to restitution, and the amount of restitution is not contained in a plea agreement, the court shall order a presentence investigation.").

[300] NEB. REV. STAT. ANN. § 29-2261(1) (2023) ("Unless it is impractical to do so").

[301] *Id.* ("When an offender has been convicted of murder in the first degree and (a) a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520 or (b)(i) the information contains a notice of aggravation as provided in section 29-1603 and (ii) the offender waives his or her right to a jury determination of the alleged aggravating circumstances, the court shall not commence the sentencing determination proceeding as provided in section 29-2521 without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation.").

[302] NEB. REV. STAT. ANN. § 29-2261(2) (2023) ("A court may order a presentence investigation in any case, except in cases in which an offender has been convicted of a Class IIIA misdemeanor, a Class IV misdemeanor, a Class V misdemeanor, a traffic infraction, or any corresponding city or village ordinance.")

New Hampshire	N.H. REV. STAT. ANN. § 651:4 (2020)	At judge's discretion; at the prosecutor's recommendation for repeat violent offenses	Probation officer
New Jersey	N.J. CT. R. 3:21-2	All felony convictions	Court support staff[303]
New Mexico	N.M. STAT. ANN. § 31-21-9 (2020)	At judge's discretion	Department of Corrections field services officers[304]

[303] *Criminal Practice Division*, N.J. CTS., https://www.njcourts.gov/courts/criminal#toc-the-criminal-justice-process (last visited Sept. 22, 2023) [https://perma.cc/9VDE-E7CA] ("Criminal division probation officers prepare presentence investigation reports (PSIs) for criminal judges who render sentences [on all] convicted defendants.").

[304] N.M. CORR. DEP'T, PPD PRE-SENTENCE/PRE-RELEASE REPORTS 1-2 (2018), https://www.cd.nm.gov/wp-content/uploads/2019/06/CD-051700.pdf [https://perma.cc/5VDS-VGUY] (describing probation and parole division staff members as responsible for preparing presentence reports).

New York	N.Y. CRIM. PROC. LAW §390.20 (McKinney 2020)	All felony convictions, with exceptions[305]; at judge's discretion[306]; in order to impose a specified sentence for a misdemeanor conviction[307]	Probation agencies
North Carolina	N.C. GEN. STAT. ANN. §15A-1332 (2020)	At judge's discretion	Probation officer
North Dakota	N.D. R. CRIM. P. 32	At judge's discretion	Department of Corrections[308]

[305] N.Y. CRIM. PROC. LAW § 390.20(4)(A) (2020) ("a pre-sentence investigation of the defendant and a written report thereon may be waived by the mutual consent of the parties and with consent of the judge, stated on the record or in writing, whenever: (i) A sentence of imprisonment has been agreed upon by the parties and will be satisfied by the time served, or (ii) A sentence of probation or conditional discharge has been agreed upon by the parties and will be imposed, or (iii) A report has been prepared in the preceding twelve months, or (iv) A sentence of probation is revoked"); N.Y. CRIM. PROC. LAW § 390.20(5) (2020) ("In any city having a population of one million or ...a pre-sentence investigation and written report thereon shall not be required where a negotiated sentence of imprisonment for a term of three hundred sixty-five days or less has been mutually agreed upon by the parties with consent of the judge, as a result of a conviction or revocation of a sentence of probation").

[306] N.Y. CRIM. PROC. LAW § 390.20(3) (2020) ("the court may, in its discretion, order a pre-sentence investigation and report in any case").).

[307] N.Y. CRIM. PROC. LAW § 390.20(2) (2020) ("Where a person is convicted of a misdemeanor a pre-sentence report is not required, but the court may not pronounce any of the following sentences unless it has ordered a pre-sentence investigation of the defendant and has received a written report thereof: (a) A sentence of probation except where the provisions of subparagraph (ii) of paragraph (a) of subdivision four of this section apply; (b) A sentence of imprisonment for a term in excess of one hundred eighty days; (c) Consecutive sentences of imprisonment with terms aggregating more than ninety days")

[308] *Parole and Probation: Overview,* N.D. DEP'T CORR. & REHAB., https://www.docr.nd.gov/parole-and-probation (last visited Sept. 22, 2023) [https://perma.cc/V9RB-BCEX] ("Parole and Probation Services is responsible to

Ohio	OHIO REV. CODE ANN. §2951.03 (2021)	In order to impose a sentence of probation for a felony conviction, with exceptions[309]; at judge's discretion	Probation officer
Oklahoma	OKLA. STAT. ANN. TIT. 22 §982 (2020)	At judge's discretion, in limited circumstances[310]	Department of Corrections[311]
Oregon	OR. REV. STAT. ANN. § 144.791 (2019)	At judge's discretion; for felony sexual offenses, with exceptions[312]	Parole and probation officers

provide supervision for all offenders on parole or supervised probation in the community. . . . Parole and Probation Services is also responsible to complete Pre-Sentence Investigations as ordered by the state district courts.").

[309] OHIO REV. CODE ANN. § 2951.03 (2021) ("Unless the defendant and the prosecutor who is handling the case against the defendant agree to waive the presentence investigation report, no person who has been convicted of or pleaded guilty to a felony shall be placed under a community control sanction until a written presentence investigation report has been considered by the court. The court may order a presentence investigation report notwithstanding the agreement to waive the report.").

[310] OKLA. STAT. ANN. tit. 22, § 982 (2022) (stating the judge is only permitted to order a presentence investigation "[w]henever a person is convicted of a violent felony offense whether the conviction is for a single offense or part of any combination of offenses, except when the death sentence is available as punishment for the offense"; "Whenever a person has a prior felony conviction and enters a plea of guilty or nolo contendere to a felony offense other than a violent felony offense, without an agreement by the district attorney regarding the sentence to be imposed"; or "Whenever a person has entered a plea of not guilty to a nonviolent felony offense and is found guilty by a court following a non-jury trial").

[311] OKLA. DEP'T OF CORR., PROBATION AND PAROLE: REPORTS AND INVESTIGATIONS 7 (2021) (describing the Probation and Parole Services division of the DOC as responsible for completing presentence investigations).

[312] OR. REV. STAT. ANN. § 144.791(2) (2019) ("The sentencing court shall order a presentence report if the defendant is convicted of a felony sexual offense unless:

Pennsylvania	42 PA. STAT. ANN. §9732 (2019)	In order to impose a term of incarceration one year or longer, with exceptions[313]	Department of Probation and Parole
Rhode Island	R.I. SUPER. R. CRIM. P. 32	All felony convictions (except those carrying a mandatory sentence of life without parole); at judge's discretion	Probation officers
South Carolina	S.C. CODE ANN. § 24-23-120 (2020)	If the judge believes the defendant "suffers from a mental disorder, retardation, or substantial handicap"	Unspecified in statute/ rule[314]
South Dakota	S.D. CODIFIED LAWS §23A-27-5 (2021)	At judge's discretion	Court services officer[315]

(a) The defendant, as part of the same prosecution, is convicted of aggravated murder; (b) The felony sexual offense requires the imposition of a mandatory minimum prison sentence and no departure is sought by the court, district attorney or defendant; or (c) The felony sexual offense requires imposition of a presumptive prison sentence and no departure is sought by the court, district attorney or defendant." (emphasis omitted)).

[313] "[U]nless the sentence is death or a mandatory sentence to life imprisonment, or unless the court specifically orders to the contrary." 42 PA. STAT. AND CONS. STAT. ANN. § 9731 (2019).

[314] *But see* S.C. DEP'T OF PROBATION, PAROLE, AND PARDON SERVS., *supra* note 20, at 2 (describing probation and parole agents as responsible for completing presentence investigations).

[315] *See* S.D. UNIFIED JUD. SYS., FISCAL YEAR 2021 ANNUAL REPORT: COURT SERVICES (PROBATION) 23-25 (2021), https://ujs.sd.gov/uploads/annual/fy2021/CourtServices.pdf

Tennessee	TENN. CODE ANN. § 40-35-205 (2019)	All felony convictions, with exceptions[316]; at judge's discretion	Presentence service officer[317]
Texas	TEX. CODE CRIM. PROC. ANN. ART. 42A.252 (2019)	All felony convictions, with exceptions[318]; at judge's discretion	Supervision officer
Utah	UTAH CODE ANN. §77-18-103 (2021)	At judge's discretion[319]	Employee of the Department of Corrections[320]

[https://perma.cc/B5RH-WB75] (demonstrating through the costs of court services that the officers' responsibilities include both presentence investigations and supervising people on probation).

[316] TENN. CODE ANN. § 40-35-205(d) (2019) ("If the district attorney general and defendant agree on a specific sentence as to the offense classification, length or manner of service of sentence, and the court accepts the sentence agreement as the appropriate disposition in the case, no presentence report or hearing shall be required unless so ordered by the court.").

[317] TENN. GEN. ASSEMB. FISCAL REV. COMM., FISCAL NOTE: HB 1029 – SB 1385 (2015), https://www.capitol.tn.gov/Bills/109/Fiscal/HB1029.pdf [https://perma.cc/4NC6-TDP8] ("Presentence reports are prepared by presentence service officers, also known as probation officers.").

[318] TEX. CODE CRIM. PROC. ANN. art. 42A.252(c) (2017) ("The judge is not required to direct a supervision officer to prepare a presentence report in a felony case if: (1) punishment is to be assessed by a jury; (2) the defendant is convicted of or enters a plea of guilty or nolo contendere to capital murder; (3) the only available punishment is imprisonment; or (4) the judge is informed that a plea bargain agreement exists, under which the defendant agrees to a punishment of imprisonment, and the judge intends to follow that agreement." (emphasis omitted)).

[319] UTAH CODE ANN. § 77-18-103(1)(b) (2021) (only for a "felony or a class A misdemeanor").

[320] UTAH DEP'T OF CORR., DIV. OF ADULT PROB. & PAROLE, PRESENTENCE INVESTIGATION (PSI) TECHNICAL MANUAL 3 (2017) (describing the Division of Adult Probation and Parole within the DOC as responsible for conducting presentence investigations).

Vermont	VT. R. CRIM. P. 32	All felony convictions, with exceptions[321]; at judge's discretion	Probation officer
Virginia	VA. CODE ANN. § 19.2-299 (2021)	Specified felony convictions; at judge's discretion	Probation officer
Washington	WASH. CR. R 7.1	At judge's discretion	Community corrections officer
West Virginia	W. VA. R. CRIM. P. 32	All felony convictions, with exceptions[322]	Probation officer
Wisconsin	WIS. STAT. ANN. § 972.15 (2020)	At judge's discretion for felony convictions	Employee of the Department of Corrections[323]

[321] VT. R. CRIM. P. 32(c)(1) ("[T]he court, in its discretion, may dispense with the report . . . (B) if the defendant has two or more felony convictions; (C) if the defendant refuses to be interviewed by a probation officer or requests that disposition be made without a presentence report; [or] (D) if it is impractical to verify the background of the defendant." (emphasis omitted)).

[322] W. VA. R. CRIM. P. 32(b)(1) ("[T]he probation officer shall make a presentence investigation and submit a report to the court before the sentence is imposed, unless: (A) the defendant waives a presentence investigation and report; (B) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority; and (C) the court explains on the record its finding that the information in the record enables it to meaningfully exercise its sentencing authority." (emphasis omitted)).

[323] *See generally* WIS. DEP'T OF CORR., DIV. OF CMTY. CORR., PRE-SENTENCE INVESTIGATION (describing probation and parole agents, within the DOC's Division of Community Corrections, as responsible for completing pre-sentence investigations).

Wyoming	WYO. R. CRIM. P. 32	All felony convictions, with exceptions[324]; at judge's discretion	Department of Probation and Parole

[324] WYO. R. CRIM. P. 32(a)(1) ("In felony cases the investigation and report may not be waived but, with the parties' consent, the court may permit the report to be filed after sentencing.").

APPENDIX B: OPEN RECORDS RESPONSES BY JURISDICTION

Jurisdictions are listed in alphabetical order by the state of the jurisdiction. Non-responding jurisdictions are not listed.

Jurisdiction	**Number of policy documents provided**	**Number of questionnaires provided**	**Number of templates provided**
Jefferson County, Alabama	1	1	0
Alaska	1	1	1
Maricopa County, Arizona	3	1	0
Los Angeles County, California	0	0	1
Colorado	7	5	1
Connecticut	2	1	1
D.C.	2	0	1
Florida	1	1	0
Miami-Dade County, Florida	0	1	0
Georgia	1	0	1
Hawaii	1	2	0
Idaho	1	4	3
Indiana	3	1	0
Kansas	1	0	0
Johnson County, Kansas	1	0	0
Kentucky	1	4	1
Louisiana	2	1	1
Maine	0	3	1

Cumberland County, Maine	0	3	1
Maryland	1	0	0
Montgomery County, Maryland	0	1	0
Michigan	1	5	2
Minnesota	1	1	4
Hennepin County, Minnesota	2	1	5
Missouri	1	1	1
Montana	1	1	2
Nebraska	2	0	0
Nevada	2	1	1
New Hampshire	1	0	1
New York	5	1	1
New York County, New York	1	0	1
North Dakota	1	1	2
Franklin County, Ohio	0	1	0
Oklahoma	2	1	1
Multnomah County, Oregon	2	1	2
South Carolina	1	1	1
Greenville County, South Carolina	2	1	0
South Dakota	0	1	1
Utah	2	1	2
Vermont	1	0	0

Chittenden County, Vermont	1	0	0
Virginia	1	0	1
Washington	2	1	5
West Virginia	3	1	3
Kanawha County, West Virginia	0	1	0
Wisconsin	0	0	1
Milwaukee County, Wisconsin	0	1	0
Wyoming	1	1	5

APPENDIX C: MOST COMMON STATUTORY REQUIREMENTS FOR THE CONTENTS OF PRESENTENCE INVESTIGATIONS

State	Statute(s)	Circumstances of the Offense	Victim Impact	Criminal Record	Financial Status	Characteristics or Present Condition	Social History	Education	Employment	Family Background	Circumstances Affecting the Defendant's Behavior	Catchall Provision[325]
Alabama	ALA. CODE § 15-22-51 (2018)					X						
	ALA. R. CRIM. P. 26.3	X	X	X	X		X	X	X	X		
Alaska	ALASKA R. CRIM. P. 32.1		X	X	X						X	
Arizona	N/A											
Arkansas	ARK. CODE ANN. §5-4-102 (2019)	X		X	X		X	X	X	X		X
California	CAL. PENAL CODE §1203.1b (2021)				X							
Colorado	COLO. REV. STAT. §16-11-102 (2020)		X	X	X			X	X			

[325] A "catchall provision" permits the community supervision officer to include in the presentence report any information they deem relevant. *See supra* note 176 and accompanying text.

Connecticut	CONN. GEN. STAT. §54-91a (2021)	X	X	X		X						
D.C.	D.C. SUPER. CT. R. CRIM. P. 32(B)(1)(A)		X	X	X	X						X
Delaware	DEL. CODE ANN TIT. 11 §4331 (2021)	X	X	X		X						X
	DEL. R. CT. 32				X						X	
Florida	FLA. STAT. §921.231 (2020)	X		X	X		X	X	X	X		
Georgia	N/A											
Hawaii	HAW. REV. STAT. §706-602 (2020)	X	X	X	X			X	X	X		X
Idaho	IDAHO R. CT. 32	X		X	X		X	X	X	X		
	IDAHO CODE §19-5306 (2021)		X									
Illinois	ILL. COMP. STAT. §5/5-3-2(2020)		X	X	X			X	X	X		X

Indiana	IND. CODE. §35-38-1-9 (2021)	X	X	X	X		X	X	X	X		X
Iowa	IOWA CODE §901.3 (2021)	X	X	X	X	X	X			X		
Kansas	KAN. STAT. ANN. §21-6813 (2020)	X	X	X		X	X					X
Kentucky	N/A											
Louisiana	LA. CODE CRIM. PROC. ANN. ART. 875 (2021)	X	X	X	X			X	X	X		X
Maine	ME. R. CT. 32			X	X	X					X	
Maryland	MD. CODE ANN., CORR. SERVS. §6-112 (2021)		X									
Massachusetts	MASS. R. CRIM. P. 28			X								X
Michigan	MICH. R. CT. 6.425	X		X	X							X
	MICH. COMP. LAWS ANN. §771.14 (2021)		X				X	X	X			

Minnesota	MINN. STAT. ANN. §609.115 (2020)	X		X		X	X					
	MINN. STAT. ANN. §611A.037 (2020)		X									
Mississippi	MISS. R. CRIM. P. 26.3	X			X		X			X		
	MISS. CODE. §47-7-9 (2019)		X	X				X	X			
Missouri	MO. ANN. STAT. §217.70 (2020)		X			X	X					X
	MO. SUP. CT. R. 29.07			X	X						X	
Montana	MONT. CODE ANN. §46-18-112 (2019)	X	X	X	X	X	X	X	X			
Nebraska	NEB. REV. STAT. ANN. §29-2261 (2021)	X	X	X	X			X	X	X	X	X
Nevada	NEV. REV. STAT. ANN. §176.145 (2020)	X	X	X	X	X					X	

New Hampshire[326]	N.H. Rev. Stat. Ann. §651:4 (2020)											
New Jersey	N.J. STAT. ANN. §2C:44-6 (2020)	X	X	X	X				X	X		X
New Mexico	N/A											
New York	N.Y. CRIM. PROC. LAW §390.30 (McKinney 2020)	X	X	X	X		X	X	X	X		X
North Carolina	N.C. GEN. STAT. ANN. §15A-1332 (2020)											X
North Dakota	N.D. R. CRIM. P. 32	X	X	X	X		X	X	X	X	X	
Ohio	OHIO REV. CODE ANN. §2951.03 (2021)	X	X	X		X	X					

[326] The sole content requirement in the New Hampshire statute is that the report "shall include a recommendation as to disposition, together with reference to such material disclosed by the investigation as supports such recommendation." N.H. REV. STAT. ANN. §651:4 (2020).

Oklahoma	OKLA. STAT. ANN. TIT. 22 §982 (2020)	X	X	X	X	X	X	X	X	X		
Oregon	OR. REV. STAT. ANN. §137.50 (2019)	X	X	X		X	X					
Pennsylvania	PA. R. CRIM. P. 702	X								X		X
	42 PA. STAT. ANN. §9732 (2019)			X	X			X	X			
Rhode Island	R.I. SUPER. R. CRIM. P. 32			X	X	X					X	
South Carolina	N/A											
South Dakota	S.D. CODIFIED LAWS §23A-27-6 (2021)			X	X							
Tennessee	TENN. CODE ANN. § 40-35-207 (2019)	X	X	X	X			X	X	X		
Texas	TEX. CODE CRIM. PROC. ANN. ART. 42A.253 (2019)	X		X			X					

Utah	UTAH CODE ANN. §77-18-103 (2021)		X									
Vermont	VT. STAT. ANN. TIT. 28, § 204 (2020)	X		X								
	VT. R. CRIM. P. 32				X	X					X	
Virginia	VA. CODE ANN. § 19.2-299.1 (2021)		X	X								X
Wash-ington	WASH. CR. R. 7.1		X	X	X	X					X	
West Virginia	W. VA. R. CRIM. P. 32		X	X		X		X	X	X	X	X
Wiscon-sin[327]	WIS. STAT. §972.15 (2018)											
Wyom-ing	WYO. STAT. ANN. §7-13-303 (2021)	X	X	X		X	X					

[327] The Wisconsin statute includes some requirements for the contents of presentence reports in particular types of cases but does not universally require any of the categories of information listed here. WIS. STAT. §972.15 (2018).