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Is Juvenile Probation Obsolete? Reexamining and Reimagining Youth Probation Law, Policy, and Practice

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IS JUVENILE PROBATION OBSOLETE? REEXAMINING AND REIMAGINING YOUTH PROBATION LAW, POLICY, AND PRACTICE

PATRICIA SOUNG*

The dramatic growth of prison populations in the United States during the latter half of the twentieth century, as well as the problems of over-policing and police misconduct, have been well documented and decried.¹ But the related expansion and problems of community supervision receive far less attention. Across the nation, reform efforts have increasingly included a focus on probation, especially juvenile probation, as an actor that both jails and polices youth in the community while also trying to rehabilitate them and promote their well-being. This Article studies the juvenile probation system, with a focus on California as one important system aiming to both surveil and care for individuals. It draws together two frameworks: 1) law and policy which describe the juvenile probation system as intended, and 2) juvenile probation practices and attitudes which reveal the day-to-day translation of the system's formal intentions. Ultimately, where a system's approach to rehabilitation and accountability become synonymous with or too reflexively able to adopt surveillance, containment, and punishment orientations, its ability to deliver meaningful help and support through that same system is improbable. Thus, this Article discusses the need in the United States to reform, dismantle, or replace probation with youth development-focused systems and uses Los Angeles as an example of a government already doing this important work.

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¹ Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1018 (2013).

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INTRODUCTION

In August 2019, the Los Angeles County Board of Supervisors voted unanimously to explore the dismantling and replacement of juvenile probation—a division that employs over 3,400 staff and incarcerates and supervises more than 5,400 youth.² In an act of lost confidence in probation after years of scrutiny over the department’s performance, the Board tasked a “Youth Justice Workgroup” comprised of over 100 stakeholders to redesign the nation’s largest youth delinquency system.³ The Workgroup set out to reimagine the entire youth justice process, from better preventing youth’s involvement with police and the court system, to meaningfully supporting

² W. HAYWOOD BURNS INST., LOS ANGELES COUNTY: YOUTH JUSTICE REIMAGINED 11, 70 (2020), https://burnsinstitute.org/wp-content/uploads/2020/12/YJC_report_11.pdf [<https://perma.cc/9KRT-52YR>].

³ Youth within the juvenile delinquency court system are between the ages of twelve and eighteen at the time of their accused offenses under California Welfare and Institutions Code section 602. CAL. WELF. & INST. CODE § 602 (West, Westlaw through Ch. 6 of 2022 Reg. Sess.).

their development while under court monitoring, to developing therapeutic alternatives to the county's juvenile secure institutions.

The dramatic growth of prison populations in the United States during the latter half of the twentieth century along with issues of over-policing and police misconduct have been well documented and decried.⁴ But the related expansion and problems of community supervision during the same period as part and parcel of the incarceration and policing systems have captured far less attention.⁵ Across California and the United States, persistent efforts have won critical reform of youth and criminal legal systems.⁶ Overall, juvenile systems, especially, are relying less on arrest and incarceration of youth to address poverty, drug addiction, health problems, and other root causes of delinquency. For example, some have expanded pre-arrest diversion and detention alternatives, reduced punitive fines and fees, improved reentry supports, curbed adult prosecution and extreme sentencing, and eliminated prosecution altogether for the youngest children and most minor offenses.⁷ Proposals once regarded as too radical and impracticable have become logical, needed courses of action to reduce the costs and harms of the juvenile legal system, whose founding premise is to rehabilitate youth and also promote public safety.⁸

Across California and elsewhere, reform efforts have increasingly focused on probation, especially juvenile probation, as an actor that both jails and polices youth in the community.⁹ In just five years, Los Angeles County

⁴ See Klingele, *supra* note 1, at 1018.

⁵ *Id.*

⁶ See, e.g., NICOLE D. PORTER, SENT'G PROJECT, TOP TRENDS IN STATE CRIMINAL JUSTICE REFORM, 2020, at 1 (2021); Byrhonda Lyons, *Criminal Justice Reform Panel Scores Legislative Wins*, CALMATTERS (Oct. 1, 2021), <https://calmatters.org/justice/2021/10/california-criminal-justice-reform> [<https://perma.cc/FS2M-2QVY>]; Dana Shoenberg, *How State Reform Efforts Are Transforming Juvenile Justice*, PEW CHARITABLE TRS. (Nov. 26, 2019), <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/11/26/how-state-reform-efforts-are-transforming-juvenile-justice> [<https://perma.cc/LT8M-HLHA>].

⁷ See, e.g., Daniel Nichanian, *Criminal Justice Reform in the States: Spotlight on Legislatures*, APPEAL (June 2021), <https://theappeal.org/political-report/legislative-round-up> [<https://perma.cc/F4GY-Z3FS>].

⁸ See, e.g., CAL. WELF. & INST. CODE § 202 (West, Westlaw through Ch. 6 of 2022 Reg. Sess.); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 695 (1991).

⁹ See, e.g., SAMANTHA HARVELL, HANNA LOVE, ELIZABETH PELLETIER, CHLOE WARNBERG, TERESA DERRICK-MILLS, MARGUS GADDY, CONSTANCE HULL, AVIKA LIBERMAN, MEGAN RUSSO, JANEEN BUCK WILLISON & MARY K. WINKLER, URB. PEACE INST., BRIDGING RESEARCH AND PRACTICE IN JUVENILE PROBATION 2 (2018); ANNIE E. CASEY FOUND., TRANSFORMING JUVENILE PROBATION: A VISION FOR GETTING IT RIGHT 3 (2018) [hereinafter TRANSFORMING JUVENILE PROBATION].

alone has created a dizzying number of temporary bodies in response to the failures of its probation system: the Los Angeles County Probation Workgroup, the Probation Governance Study and Advisory Group, the Probation Oversight Workgroup, the Probation Reform and Oversight Team which lead to the creation of the Probation Oversight Commission to replace the old Probation Commission, and the Juvenile Justice Coordinating Council's various taskforces.¹⁰ The county created the Youth Justice Workgroup in 2020 to pursue among its most transformational projects related to probation and design a new system to replace juvenile probation altogether.¹¹

Over the last two years, many events have heightened the significance of police misconduct, incarceration, and racial inequity. First, the COVID-19 pandemic hit, which in the youth justice context lead to urgent calls to release and reduce the number of mostly youth of color in detention across the country.¹² Months later, the murder of George Floyd erased any doubt that a Black man's innocence and compliance would protect his life, much less his safety, in the hands of police officers. Civil unrest and conversations erupted about policing, the broader failures of the criminal legal system, and structural racism generally—each recognized as a public health crisis unto itself.¹³ As the economy suffered during these simultaneous crises, California Governor Gavin Newsom announced a plan to close the state's youth prison system and devolve all custody of youth to the responsibility of local county

¹⁰ See generally DENISE C. HERZ & KRISTINE CHAN, CALSTATE L.A., THE LOS ANGELES COUNTY PROBATION WORKGROUP REPORT (2017); RES. DEV. ASSOCS., INC. & L.A. CNTY. EXEC.'S OFF., LA PROBATION GOVERNANCE STUDY: FINAL REPORT (2018); L.A. CNTY. PROB. OVERSIGHT WORKING GRP., WORKING DOCUMENT OF RECOMMENDATIONS, VERSION 6-24-16 (2016), <https://lacounty.gov/wp-content/uploads/2017/02/Recs-for-Probation-Oversight-working-document-6-24-16.pdf> [<https://perma.cc/JVU7-NCVE>]; W. HAYWOOD BURNS INST., *supra* note 2, at 18–19.

¹¹ W. HAYWOOD BURNS INST., *supra* note 2, at 11.

¹² Erica L. Green, 'Pacing and Praying': Jailed Youths Seek Release as Virus Spreads, N.Y. TIMES (April 14, 2020), <https://www.nytimes.com/2020/04/14/us/politics/coronavirus-juvenile-detention.html> [<https://perma.cc/J2C5-4LP2>].

¹³ See, e.g., *The Case of George Floyd: An Expression of Structural Racism*, INT'L INST. ON RACE, EQUAL. & HUM. RIGHTS, <https://raceandequality.org/english/george-floyd-structural-racism> [<https://perma.cc/R2H3-AW5J>]; Toluse Olorunnipa & Griff Witte, *How Systemic Racism Shaped George Floyd's Life and Hobbled His Ambition*, WASH. POST (Oct. 8, 2020, 7:47 AM), <https://www.washingtonpost.com/graphics/2020/national/george-floyd-america/systemic-racism/> [<https://perma.cc/US4H-SRWW>]; *We Need to Address Structural Racism as a Public Health Crisis*, NETWORK FOR PUB. HEALTH L., <https://www.networkforphl.org/news-insights/we-need-to-address-structural-racism-as-a-public-health-crisis> [<https://perma.cc/MX64-A3J6>].

probation departments.¹⁴ The tie between these events—the pandemic, Mr. Floyd’s death, the state juvenile prison closure, and the potential expansion of probation—are manifold. Each in some way reveals gaps, fissures, and inequities in public and legal systems. Each calls into question the efficacy of those systems in protecting the health and safety of communities. Each is an opportunity to fundamentally reevaluate our definition of and investment in health and equity.

This Article examines the juvenile probation system as another public legal system that is meant to focus on health and safety. It draws together two frameworks: 1) law and policy which describe the juvenile probation system as intended, and 2) juvenile probation practices and attitudes which reveal the day-to-day translation of the system’s formal intentions. Part I underscores the importance of juvenile probation systems as part of broader criminal legal and public health reform agendas. Part II studies the system of probation as it emerged and evolved through sets of laws and policies including statutory, policy, and Fourth Amendment constitutional definitions. Part III analyzes juvenile probation orientations and practices, which often prove at odds with their design and intent. In the end, juvenile probation operates as prison guard, police, and even prosecutor at the same time it tries to be healer, such that the system and its individual officers do not follow a consistent, coherent practice. On balance, probation officers resort to their law enforcement functions as they exercise their myriad duties and powers too often without the requisite background or more complete training of either police or social workers. Legal rights afforded to individuals outside of the probation context and relaxed therein thus rest on an ideal of probation, not its actuality.

Part V discusses the need in the United States to reform, dismantle, or replace probation with youth development-focused systems and provides an example in Los Angeles of a jurisdiction already pursuing such changes. Ultimately, where a system’s approach to rehabilitation and accountability becomes synonymous with or too reflexively able to adopt surveillance, containment, and punishment orientations, its ability to deliver meaningful help and support through that same system is improbable. In recent years, communities and public leaders have called into question the very existence of juvenile probation and have sought proposals for better alternatives.¹⁵ Present efforts, like those in Los Angeles, to take youth out of the probation

¹⁴ *CJ CJ Celebrates Closure of California’s Youth Correctional System*, CTR. ON JUV. & CRIM. JUST. (Sept. 30, 2020), <http://www.cjcj.org/news/12994> [<https://perma.cc/DA8U-MG3D>].

¹⁵ See W. HAYWOOD BURNS INST., *supra* note 2, at 18–19.

system and put them into a fundamentally different system are a testament to traditional probation's broken design and the need for transformational approaches to youth well-being and public safety.¹⁶

I. IMPORTANCE AND REACH OF JUVENILE PROBATION

Juvenile probation has a profound reach over youths in the delinquency system, yet has had insignificant to poor and inequitable results for youth.¹⁷ Probation's multiple roles, reach, inequitable contacts, and costs should all be cause for concern.

A. EXPANSIVE ROLES AND REACH

Since probation's inception, researchers have documented the many hats probation officers wear. Traditionally, probation has served two separate functions—social work and law enforcement. But probation's functions evolved over time to “focus[] on the management of cases and the merging of rehabilitation and law enforcement tasks together.”¹⁸ The social work function focuses on skills development, needs fulfillment, and harm reduction while the law enforcement function focuses on surveillance, control, and compliance.¹⁹ Thus, researchers have called probation officers “synthetic officers” or “boundary spanners” as they are situated “somewhere between social workers and peace officers in managing diverse cases.”²⁰ Under this model, probation officers “focus[] on risk to the community and future recidivism by actively addressing an offender's criminogenic need areas in order to bring about significant behavior change, while ensuring community safety.”²¹ Some researchers have described this blending of treatment and surveillance as a “balanced approach”²² or “hybrid” that combines risk management, control, and rehabilitation.²³ Generally, the day-to-day activities of juvenile probation officers fall into three categories:

¹⁶ *See id.*

¹⁷ TRANSFORMING JUVENILE PROBATION, *supra* note 9, at 6.

¹⁸ Moana Hafoka, Youngki Woo, Ming-Li Hsieh, Jacqueline van Wormer, Mary K. Stohr & Craig Hemmens, *What Legally Prescribed Functions Tell Us: Role Differences Between Adult and Juvenile Probation Officers*, 81 FED. PROB. 32, 35 (2017).

¹⁹ *Id.* at 33.

²⁰ *Id.* at 34.

²¹ *Id.* at 32.

²² *Id.*

²³ Jill Viglione, Danielle Rudes, Vienna Nightingale, Carolyn Watson & Faye Taxman, *The Many Hats of Juvenile Probation Officers: A Latent Class Analysis of Work-Related Activities*, 43 CRIM. JUST. REV. 252, 254 (2018).

intake screening and assessment, pre-sentence investigations, and supervision.²⁴ To complete all of their duties, “a juvenile probation officer takes on several roles, including police officer, counselor, family therapist and mentor.”²⁵ Other literature concedes though that “[w]hether the motive is community protection or treatment, the primary goal of probation is the prevention of recidivism,” and that “social control . . . is the guiding principle of probation conditions, although its expression may be disguised in more humanistic phraseology.”²⁶

Today’s modern probation system is expansive. “Between 1977 and 2010, the number of individuals on probation more than quadrupled . . . from just over 800,000 to more than 4,000,000,” and the number of individuals serving terms of parole supervision after incarceration “grew from more than 173,000 to nearly 841,000.”²⁷

In the juvenile delinquency system, similar expansion has occurred. The number of delinquency cases processed in juvenile courts across the United States nearly doubled from about 400,000 in 1960 to 744,500 in 2018.²⁸ In 1997, the number of delinquency cases peaked around 1.8 million cases.²⁹ Thereafter, reliance on the juvenile justice system declined, most dramatically in recent years: from 2005 to 2018, the number of adjudicated juvenile delinquency cases that resulted in probation declined 59% from about 342,800 cases to 139,000.³⁰ Even so, probation has steadily remained the most likely juvenile court sanction, imposed in about 63% of adjudicated cases.³¹

In California, 59,371 youth were referred to county probation departments for potential prosecution in 2019 alone.³² Of those referrals, 16,512 resulted in pre-adjudication detention in secure facilities run by probation and 5,355 resulted in post-adjudication detention in secure

²⁴ Benjamin Steiner, Elizabeth Roberts & Craig Hemmens, *Where Is Juvenile Probation Today? The Legally Prescribed Functions of Juvenile Probation Officers*, 16 CRIM. JUST. STUDS. 267, 270 (2003).

²⁵ *Id.* (citation omitted).

²⁶ James C. Weissman, *Constitutional Primer on Modern Probation Conditions*, 8 NEW ENG. J. PRISON L. 367, 373–74 (1982).

²⁷ Klingele, *supra* note 1, at 1018.

²⁸ SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT’L CTR. FOR JUV. JUST., JUVENILE COURT STATISTICS 2018, at 6 (2020), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/juvenile-court-statistics-2018.pdf> [<https://perma.cc/E239-T94L>].

²⁹ *Id.*

³⁰ *Id.* at 49.

³¹ *Id.* at 50.

³² CAL. DEP’T OF JUST., JUVENILE JUSTICE IN CALIFORNIA: 2019, at iv, 24 (2020).

probation facilities.³³ Prosecutors or probation filed a petition in about 53% (31,717) of referrals to probation departments.³⁴ Of those petitions, about 61% (19,216) resulted in formal “wardship” probation.³⁵

Probation or parole officer community supervision has become the most popular alternative to incarceration.³⁶ Although supervision may be a win compared to imprisonment, probation and parole can be a small victory in the long-term because these forms of supervision still serve to surveil and contain individuals, and have driven prison growth when minor violations and revocations result in detention.³⁷

Probation departments are crucial criminal justice actors because of their long reach and wide-ranging powers and roles, especially over youth. In California, probation officers are statutorily defined as peace officers and, as such, may carry firearms as their respective agencies permit.³⁸ They can detain and interrogate youth³⁹ and divert or file petitions to allege charges in court.⁴⁰ Throughout the justice process, probation officers issue myriad recommendations to juvenile courts that may result in incarceration in a local juvenile hall, camp or ranch, commitment to the state’s Division of Juvenile Justice custodial confinement in a non-secure setting,⁴¹ or transfer to adult jail and criminal court.⁴² Upon adjudication, probation officers can monitor youth through scheduled or unannounced visits and searches.⁴³ Probation operates locked facilities for youth pre- and post-adjudication,⁴⁴ runs prevention and diversion programs in some localities,⁴⁵ and in some jurisdictions, directly places officers on school campuses.⁴⁶ Additionally, probation departments in California administer various streams of state and

³³ *Id.* at v, 22.

³⁴ *Id.* at 24. Filing a petition is the equivalent of filing charges in juvenile court.

³⁵ *Id.* at v, 40. “Wardship” refers to the status of a youth in juvenile court when the court takes over primary responsibility for the control and treatment of the youth. *Id.* at 108.

³⁶ Klingele, *supra* note 1, at 1018.

³⁷ *Id.* at 1020.

³⁸ CAL. PENAL CODE § 830.5(a) (West, Westlaw through Ch. 770 of 2021 Reg. Sess.).

³⁹ CAL. WELF. & INST. CODE §§ 625, 627.5, 628 (West, Westlaw through Ch. 770 of 2021 Reg. Sess.).

⁴⁰ *Id.* §§ 653.5, 654.

⁴¹ *Id.* §§ 706, 726, 727, 730, 731.

⁴² *Id.* § 707(a)(1).

⁴³ *See id.* §§ 727, 730; *In re Ricardo P.*, 446 P.3d 747, 755 (Cal. 2019).

⁴⁴ CAL. GOV. CODE § 27771 (West, Westlaw through Ch. 14 of 2022 Reg. Sess.).

⁴⁵ CAL. WELF. & INST. CODE § 236 (West, Westlaw through Ch. 6 of 2022 Reg. Sess.).

⁴⁶ *See, e.g., School-based and Special Programs*, L.A. CNTY. PROB. DEP’T, <https://probation.lacounty.gov/school-based-and-special-programs> [<https://perma.cc/X36V-2JHD>].

federal funding for services inside juvenile facilities and in the community for both youth and adults.⁴⁷ As California closes its state prisons for youth, probation agencies may inherit total responsibility for the custody of all court-involved youth for the first time in the state's history.⁴⁸

B. RACIAL EQUITY

Like other parts of the criminal justice system, the juvenile probation system is rife with racial inequities. At every stage, Black, Latinx and Native American youth have overwhelmingly borne the brunt of harsher justice system decision-making, often at the recommendation of probation officers; youth of color are more likely to be arrested, charged, detained, sentenced severely, and tried as adults.⁴⁹ Even as the numbers of youth contacting or entering the delinquency system have declined and continue to decline, racial disparities persist and have sometimes steepened—for example, between 2003 and 2013, thirty-three states and the District of Columbia had higher disparities between White and Black youth's incarceration than 10 years prior, despite rates of commitment to juvenile facilities declining by forty-seven percent.⁵⁰ More recently in 2018 in California, Black youth were still 4.8 times more likely than White youth to be referred to probation, 6.5 times more likely to have probation or a district attorney file a petition in juvenile court, 7.9 times more likely to become a “ward” of the court, and 8.6 times more likely to be placed in an institution or on electronic monitoring post-adjudication.⁵¹ Latinx youth were 1.5 times as likely to be referred to probation, 1.9 times more likely to have a petition filed in juvenile court, 2.3 times more likely to become a “ward” of the court, and 2.6 times more likely to be placed in an institution or on electronic monitoring post-adjudication.⁵²

Studies show that while probation officers may not render the final decisions about prosecution, arrest, and disposition, their characterizations of

⁴⁷ See, e.g., CAL. GOV'T CODE § 30061; CAL. WELF. & INST. CODE § 1951; 2021-22 County JJCPA-YOYG Plans, CAL. BD. OF STATE & CMTY. CORR., https://www.bscc.ca.gov/s_cpgp2022countyjjcpayobgplans [<https://perma.cc/2VDL-KTNX>].

⁴⁸ See S.B. 823, 2019–20 Leg., Reg. Sess., Ch. 337 (Cal. 2020).

⁴⁹ Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 681–82 (2002).

⁵⁰ JOSHUA ROVNER, SENTENCING PROJ., RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS 1, 5 (2016).

⁵¹ *State of Disparities: California*, W. HAYWOOD BURNS INST., <https://californiadata.burnsinstitute.org/explore/counts#y=2018&c=1-58&o=1-60&d=1,7,15,17&a=5-24&g=f,m&e=a,b,l,n,w&m=dg> [<https://perma.cc/2VDL-KTNX>].

⁵² *Id.*

youth to the court (on which the court may rely) vary along racial lines.⁵³ For example, research reveals that probation officers are more likely to attribute the offenses of Black youth to internal character flaws, while consistently explaining the offenses of White youth in terms of external, environmental factors; as a result, Black youth are more likely to receive severe sanctions whereas White youth are more likely to receive rehabilitative sanctions.⁵⁴

C. FINANCIAL COSTS

Finally, the significant cost of youth probation raises concern. In Los Angeles, for instance, the Probation Department had a \$976.5 million budget for fiscal year 2020–2021, and the portion for juvenile institution services (which include pre- and post-adjudication locked facilities, intake and detention control, transportation, and community detention services via ankle monitors) comprises the largest percentage of the total budget at \$398.6 million (41%).⁵⁵ Between 2016 to 2020, the average daily youth population in locked institutions fell by approximately 33% (from 1,199 to 800).⁵⁶ The populations declined an additional 43% during the 2020 COVID-19 pandemic (from 875 in March to 497 in June).⁵⁷ Despite these significant population decreases, overall juvenile probation institution expenditures increased primarily due to inflation,⁵⁸ as staff levels remained nearly level to resist layoffs and preserve positions into the future.⁵⁹

In sum, the juvenile probation system has significant human and financial impacts, especially on communities of color. Oversight and accountability are thus critical but also complex given probation's identification as a community-based support that is akin to case managers, social workers, counselors, and mentors on one hand, and as agents of policing, juvenile courts, and juvenile lockups on the other.

⁵³ See, e.g., George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOCIO. REV. 554, 561–62 (1998).

⁵⁴ *Id.* at 563–64.

⁵⁵ L.A. CNTY. DEP'T AUDITOR-CONTROLLER, PROBATION DEPARTMENT – JUVENILE INSTITUTION COST SAVINGS REVIEW 1 (2020).

⁵⁶ *Id.* at 3.

⁵⁷ *Id.*

⁵⁸ *Id.* at 2.

⁵⁹ *Id.* at 5.

II. LAW AND POLICY FRAMEWORKS FOR JUVENILE PROBATION IN CALIFORNIA

Part II traces the emergence and formalization of probation and, in particular, juvenile probation in California. What began as an initial practice to keep individuals out of the formal justice system through community-based supports quickly became a full-fledged institution to which the justice system bestowed increasing responsibilities, including eventually the sole responsibility over youth in local detention in a swiftly growing juvenile court system. It is instructive to consider community supports, supervision, juvenile courts, and youth detention together, as each of these components of the youth justice system tried to advance and marry the goals of rehabilitation, accountability, and public safety and each leaned on probation's expansion. Today, the continued reform efforts to achieve these concurrent goals can take lessons of hope and failure from juvenile probation's historical foundation and evolution.

With high ideals and deep investment, California expanded its probation system's functions and infrastructure, including detention facilities and processes. The probation system's history reveals divergence and struggle from its inception, and ultimately it failed to ever fulfill its promise. Repeated attempts at innovation in the youth justice and probation systems, including through a statewide commission on juvenile justice that existed from 1957 to 1960, have long flowed from an acknowledgement that the practices of these systems fail routinely to serve youth or public safety well.⁶⁰ Still, despite evidence of the probation system's inconsistencies, contradictions, and other challenges, the legislature and courts have often regarded it in its ideal and their workarounds and analysis reflect an attachment to that ideal. The result has been to ignore the well-documented realities of a flawed design and legitimate an ineffective system that has enormous reach over youth and their communities.

A. CO-EVOLUTION OF PROBATION AND JUVENILE COURT

The concept of probation as community supervision and diversion, in lieu of detention or a formal sentence, is one that predates the juvenile court

⁶⁰ See GOVERNOR'S SPECIAL STUDY COMM'N ON JUV. JUST., FIRST INTERIM REPORT 8-9 (1959) [hereinafter GOVERNOR'S SPECIAL STUDY COMM'N, FIRST INTERIM REPORT]; GOVERNOR'S SPECIAL STUDY COMM'N ON JUV. JUST., PART I: RECOMMENDATIONS FOR CHANGES IN CALIFORNIA'S JUVENILE COURT LAW 9 (1960) [hereinafter GOVERNOR'S SPECIAL STUDY COMM'N, RECOMMENDATIONS].

system which was established in 1899.⁶¹ Historians have documented modern probation as an American innovation⁶² and typically attributed its origin to a bootmaker named John Augustus who convinced a Boston court in 1841 to release and defer the sentencing of a “common drunkard” into his custody, promising the man’s appearance at his next hearing.⁶³ Augustus successfully advocated for some 1,100 people to be released from jails.⁶⁴ His work subsequently inspired jurisdictions across the country to spread and develop probation to assist individuals in the community in lieu of detention.⁶⁵ In 1878, Massachusetts became the first state in the country to pass legislation that enabled probation,⁶⁶ including juvenile probation.⁶⁷ California similarly adopted a law in 1883 to allow police and the courts to put youth on supervised probation.⁶⁸ As other states codified probation as a core agent within the criminal legal system, California too recognized probation by amending Penal Code 1203 in 1903 to include supervision as a method of sentencing,⁶⁹ at the same time that it became the seventh state to create a juvenile court.⁷⁰

By 1910, thirty-four states had adopted probation laws,⁷¹ and, in 1925, the federal government followed suit.⁷² Over the years, administrative structures also grew in jurisdictions around the country to employ probation officers as civil servants under independent probation commissions, boards of charity, or other independent state agencies.⁷³ The turn-of-the-century

⁶¹ Diane Nunn & Christine Cleary, *From the Mexican California Frontier to Arnold-Kennick: Highlights in the Evolution of the California Juvenile Court, 1850-1961*, 5 J. CTR. FOR FAMILIES, CHILD. & CTS. 3, 10–11 (2004).

⁶² Klingele, *supra* note 1, at 1022.

⁶³ JAMES BELL, W. HAYWOOD BURNS INST. FOR YOUTH JUST. FAIRNESS & EQUITY, REPAIRING THE BREACH: A BRIEF HISTORY OF YOUTH OF COLOR IN THE JUVENILE JUSTICE SYSTEM 6 (2016).

⁶⁴ *Id.*

⁶⁵ Hafoka, Woo, Hsieh, van Wormer, Stohr & Hemmens, *supra* note 18, at 32.

⁶⁶ Charles L. Chute, *The Progress of Probation and Social Treatment in the Courts*, 24 AM. INST. CRIM. L. & CRIMINOLOGY 60, 63 (1933).

⁶⁷ Steiner, Roberts & Hemmens, *supra* note 24, at 267–68 (2003).

⁶⁸ Nunn & Cleary, *supra* note 61, at 5.

⁶⁹ David H. Melnick, *Probation in California: Penal Code Section 1203*, 50 CAL. L. REV. 651, 651 (1962); CAL. PENAL CODE § 1203 (West 1903).

⁷⁰ GOVERNOR’S SPECIAL STUDY COMM’N ON JUV. JUST., PART II: A STUDY OF THE ADMINISTRATION OF JUVENILE JUSTICE 1 (1960) [hereinafter GOVERNOR’S SPECIAL STUDY COMM’N, STUDY].

⁷¹ Klingele, *supra* note 1, at 1023.

⁷² *Id.*

⁷³ *Id.* at 1025.

innovation to create a separate court system for children accelerated the evolution and expansion of probation; juvenile courts and juvenile probation were both intended to be benign alternatives to criminal prosecution and incarceration.⁷⁴ The first published directory of probation officers in the United States showed that these employees worked mainly in the juvenile courts in 1907. By 1925, probation was available for youth in every state, and soon proliferated for adults as well.⁷⁵

A mission to rehabilitate guided both probation and juvenile courts across the country, which operated with flexibility and wide discretion to make individualized determinations about criminal as well as non-criminal behavior, such as smoking, sex, and truancy.⁷⁶ In contrast to criminal courts, juvenile courts generally adopted informal processes, excluded lawyers and juries, and conducted confidential hearings in the name of protecting and caring for young delinquents.⁷⁷ In this manner, youth-focused courts joined other state-sanctioned institutions, including the child welfare system and public schools, to carry out their mission to “rescue” and “reform” youth. That juvenile court’s creation was linked to that of probation made sense as the two systems developed concurrently:

Juvenile probation, much like the juvenile court, was largely undergirded by English common law and the doctrine of *parens patriae*. Consequently, when the first juvenile court began operation in 1899, the role of the juvenile probation officer was to act in the best interest of the child, as the court was specifically designed to see to the care, welfare, and treatment of the juvenile offenders who came to its attention.⁷⁸

Probation officers thus sat at the core of the juvenile delinquency system and became “the chief means through which the juvenile court served delinquent youths.”⁷⁹

In California, both probation and juvenile courts grew in formal recognition and infrastructure in the decades after their founding. In 1904, California’s Board of Charities and Corrections recommended that juvenile

⁷⁴ See MARCUS NIETO, CAL. RSCH. BUREAU, THE CHANGING ROLE OF PROBATION IN CALIFORNIA’S CRIMINAL JUSTICE SYSTEM 4 (1996); GOVERNOR’S SPECIAL STUDY COMM’N, STUDY, *supra* note 70, at 3.

⁷⁵ NIETO, *supra* note 74, at 4.

⁷⁶ Steven Mintz, *Placing Children’s Rights in Historical Perspective*, 44 CRIM. L. BULL. 2, 7, 10 (2008).

⁷⁷ *Id.* at 7.

⁷⁸ Steiner, Roberts & Hemmens, *supra* note 24, at 268.

⁷⁹ Craig S. Schwalbe & Tina Maschi, *Investigating Probation Strategies with Juvenile Offenders: The Influence of Officers’ Attitudes and Youth Characteristics*, 33 L. & HUM. BEHAV. 357, 357 (2009).

courts be expanded to all counties.⁸⁰ Amendments in 1905 more fully developed the county probation system and created salaried positions in some counties.⁸¹ Additional laws in 1909 expanded the juvenile court's jurisdictional bases and increased salaried probation positions.⁸² The laws also created county detention settings and assigned their operations to local citizen oversight bodies called Probation Committees.⁸³ In 1915, California juvenile court laws changed further to proscribe greater responsibilities to county probation officers and probation committees to supervise children, administer detention homes, submit annual reports, and assist courts.⁸⁴ Considered an overhaul by some,⁸⁵ others viewed the laws as leaving "many areas 'open for differences of interpretation and the growth of divergent practices.'"⁸⁶ More than a decade later, in 1929, the California legislature created the Probation Office, the first statewide infrastructure focused on supervision, under the California State Department of Social Welfare.⁸⁷

Despite initial optimism about these new laws, discontent and disagreement grew about solutions to delinquency, abuse, and neglect.⁸⁸ Between 1915 and 1960, piecemeal fixes to the juvenile state code created "an unwieldy checkerboard of inconsistencies, duplications, and archaic practices unresponsive to the needs of a more modern, more populated California."⁸⁹ Over this period, probation departments' responsibilities continued to grow. For example, Los Angeles County pioneered the state's first juvenile camp in 1932 to confine youth,⁹⁰ and, in 1941, the legislature gave each county Probation Committee the discretion to relinquish their administration over juvenile halls to the county probation officer and step

⁸⁰ Nunn & Cleary, *supra* note 61, at 14.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 1909 Cal. Stat. 213–27 §§ 6, 9, 25 (mandating that counties create and maintain a county detention home and vesting the probation committee with the control and management of the internal affairs of the detention homes, including the duty to nominate its superintendent or matron).

⁸⁴ Nunn & Cleary, *supra* note 61, at 17.

⁸⁵ See GOVERNOR'S SPECIAL STUDY COMM'N, STUDY, *supra* note 70, at 4.

⁸⁶ Nunn & Cleary, *supra* note 61, at 16 (citation omitted).

⁸⁷ *The History of the Division of Juvenile Justice*, CAL. DEP'T CORR. & REHAB., <https://www.cdcr.ca.gov/juvenile-justice/history> [<https://perma.cc/DZ9M-PGFV>].

⁸⁸ Nunn & Cleary, *supra* note 61, at 16.

⁸⁹ *Id.* at 21.

⁹⁰ GOVERNOR'S SPECIAL STUDY COMM'N, STUDY, *supra* note 70, at 22.

back into advisory roles.⁹¹ Later, in 1945, the state created subsidies for counties to establish and operate local juvenile facilities as an alternative to the state juvenile prison system called the California Youth Authority.⁹² In 1949, the legislature restructured the administration of juvenile detention and required that all probation officers, except in Los Angeles County, manage and control their internal affairs instead of probation committees.⁹³ In 1957, the legislature transferred responsibility for the operation of juvenile halls from the Los Angeles County Probation Committee to the Los Angeles County Probation Office as well.⁹⁴ In short, the first half-century of probation's creation and growth—especially that of juvenile probation—reflected lawmakers' high hopes for the system, evident in its ever-expanding role, management, facilities, and infrastructure.

B. PROBATION AND JUVENILE COURTS – GROWING CRITIQUES IN 1950S

Critiques of the juvenile court and probation system mounted over the years and reached a crescendo in the 1950s when reform proponents pointed out that the code had not been revised in over forty years, the “size and seriousness of [the] delinquency problem” had grown, and the performance of juvenile courts, detention, and “delinquency control agencies” needed to be reevaluated.⁹⁵ At the same time, increasing administrative experience and advances in behavioral and social sciences contributed to greater rethinking in the field of juvenile justice.⁹⁶ In this context, the California State Board of Corrections passed a resolution on March 28, 1957 that established a Special Study Commission on Juvenile Justice whose charge was to propose sweeping changes to the juvenile justice system in keeping with newer wisdom and research.⁹⁷ The Commission submitted its first interim report in 1959⁹⁸ and its ultimate findings and recommendations in 1960.⁹⁹ Despite the “humanitarian principles” upon which the juvenile court system was

⁹¹ ACLU FOUND. S. CAL., ROBUST INDEPENDENT OVERSIGHT OF THE LOS ANGELES COUNTY PROBATION DEPARTMENT: A HISTORICAL LEGACY 9 n.34 (2018).

⁹² GOVERNOR'S SPECIAL STUDY COMM'N, STUDY, *supra* note 70, at 22.

⁹³ ACLU FOUND. S. CAL., *supra* note 91, at 9 n.34.

⁹⁴ *Id.* at 9.

⁹⁵ GOVERNOR'S SPECIAL STUDY COMM'N, RECOMMENDATIONS, *supra* note 60, at 9.

⁹⁶ GOVERNOR'S SPECIAL STUDY COMM'N, FIRST INTERIM REPORT, *supra* note 60, at 8.

⁹⁷ *Id.* at 7.

⁹⁸ *Id.* at 12.

⁹⁹ *See generally* GOVERNOR'S SPECIAL STUDY COMM'N, RECOMMENDATIONS, *supra* note 62; GOVERNOR'S SPECIAL STUDY COMM'N, STUDY, *supra* note 70.

founded, its promise had not been fulfilled according to the Commission's final reports; key among the problems were excessive probation caseloads, a "lack of definitions, contradictions and ambiguities in California's Juvenile Court law," a lack of protection of basic legal rights, a lack of well-defined, data driven standards and norms, and inconsistencies across the agencies in the juvenile justice processes.¹⁰⁰

However, the Commission's report described probation optimistically as a "method of community treatment"¹⁰¹ and "essentially a task of reorientation, reconditioning, and reeducating the child" with the goal "to effect changes or modifications in attitudes so that the child can be brought into closer harmony with society's requirements."¹⁰² At the time, state law mandated each county provide probation officers.¹⁰³ In nearly every county, probation officers were closely tied to the juvenile court system, such that juvenile court judges appointed probation officers.¹⁰⁴ Indeed, the broad and multi-faceted roles assigned to probation departments made clear the centrality of the probation system in virtually all aspects of the juvenile justice system. Probation departments vetted the vast majority of referrals for petitions filed against youth, conducted investigation and informal supervision of a youth in lieu of filing, prepared social histories and issued recommendations to courts on detention and disposition, and supervised wards at the court's direction.¹⁰⁵ Probation officers supervised dependency youth as well.¹⁰⁶ Additionally, county probation officers directly supervised the administration of camp facilities in most counties.¹⁰⁷ Finally, the legislature tasked probation officers to represent the interests of youth in court and furnish the court with information and assistance, including subpoena of witnesses to prove allegations in a petition.¹⁰⁸

Accordingly, the juvenile probation system had grown immense in its reach over youth, infrastructure, and procedure since its creation at the turn of the century. In 1957, over 113,000 cases were referred to probation in

¹⁰⁰ GOVERNOR'S SPECIAL STUDY COMM'N, FIRST INTERIM REPORT, *supra* note 60, at 7–8.

¹⁰¹ GOVERNOR'S SPECIAL STUDY COMM'N, STUDY, *supra* note 70, at 33.

¹⁰² *Id.* at 41.

¹⁰³ GOVERNOR'S SPECIAL STUDY COMM'N, FIRST INTERIM REPORT, *supra* note 60, at 11.

¹⁰⁴ *Id.*

¹⁰⁵ *See id.* at 10–11.

¹⁰⁶ GOVERNOR'S SPECIAL STUDY COMM'N, RECOMMENDATIONS, *supra* note 60, at 42.

¹⁰⁷ GOVERNOR'S SPECIAL STUDY COMM'N, STUDY, *supra* note 70, at 22.

¹⁰⁸ Joel Goldfarb & Paul M. Little, *1961 California Juvenile Court Law: Effective Uniform Standards for Juvenile Court Procedure?*, 51 CALIF. L. REV. 421, 436 (1963); CAL. WELF. & INST. CODE §§ 581, 701, 702 (West 1961).

California (43% for traffic offenses, 40% for delinquency, 12% for dependency, and 5% for other reasons).¹⁰⁹ Probation agencies supervised about 32,000 delinquency and 19,000 dependency cases.¹¹⁰ In 1959, an April snapshot of the over 18,000 dependent and neglected children in the forty-three counties surveyed showed that almost 60% were assigned to probation departments for supervision.¹¹¹ Since Los Angeles County established the first camp nearly thirty years prior, juvenile camps expanded to sixteen of fifty-eight counties (thirteen of the twenty most populated).¹¹² About half of the probation officers across the state had established formal intake screening procedures prior to placing youth in detention.¹¹³

Despite the potential benefits of probation, the Commission found in its 1960 final report that the system suffered structurally from variability across counties, chronic understaffing, and high caseloads.¹¹⁴ Average caseloads exceeded 160, three times the standard that the National Probation and Parole Association suggested at the time.¹¹⁵

The Commission also affirmed California's growing notoriety among national probation and child welfare organizations for excessive juvenile detention practice: in 1958, more than three-fourths of the 68,000 youth referred for delinquency were detained; county juvenile halls detained more than 50,000 youth and local police jails and other lock-ups held several thousand more.¹¹⁶ In some communities, the ratio was even higher, with virtually every youth that law enforcement officers referred to probation being detained.¹¹⁷ According to data from the Bureau of Criminal Statistics, approximately 12,600 youth were detained in 1958 for curfew violations, truancy, running away from home, and traffic violations (like jay-walking).¹¹⁸

In addition to finding an alarmingly excessive use of custody, the Commission deemed probation's supervision to perform subpar:

¹⁰⁹ GOVERNOR'S SPECIAL STUDY COMM'N, FIRST INTERIM REPORT, *supra* note 60, at 23.

¹¹⁰ *Id.*

¹¹¹ GOVERNOR'S SPECIAL STUDY COMM'N, STUDY, *supra* note 70, at 63.

¹¹² GOVERNOR'S SPECIAL STUDY COMM'N, FIRST INTERIM REPORT, *supra* note 60, at 22–23.

¹¹³ *Id.* at 25.

¹¹⁴ GOVERNOR'S SPECIAL STUDY COMM'N, RECOMMENDATIONS, *supra* note 60, at 35.

¹¹⁵ GOVERNOR'S SPECIAL STUDY COMM'N, FIRST INTERIM REPORT, *supra* note 60, at 23.

¹¹⁶ GOVERNOR'S SPECIAL STUDY COMM'N, RECOMMENDATIONS, *supra* note 60, at 41.

¹¹⁷ *Id.*

¹¹⁸ GOVERNOR'S SPECIAL STUDY COMM'N, STUDY, *supra* note 70, at 74.

Probation personnel serving the juvenile courts of this State are supplying very little supervision and even less treatment. Only an insignificant proportion of probation cases receive intensive rehabilitative services. By and large, the services offered to juvenile probationers are minimal, superficial, and of dubious effectiveness. Several factors are responsible for this unsatisfactory situation. The level of skills necessary to render effective treatment is not universally available among all probation officers; the small proportion who are trained and skilled are frequently thwarted by excessive caseloads and thereby are unable to render meaningful treatment services; and available treatment resources and placement facilities are in too short supply to provide the services required.¹¹⁹

Moreover, probation widely conducted “informal” supervision, which raised broad concern about its lack of formal hearings, lack of uniformity in determinations of which youth should receive informal versus formal versus no supervision, and its extensive use to assist or supervise youth where help might be better sought elsewhere.¹²⁰ Indeed, in 1960, the United States Children’s Bureau had taken a vocal stance against informal probation since it was too readily subject to abuse and overuse, and recommended that youth who do require court supervision be referred to appropriate social service agencies instead.¹²¹ On top of concerns about custody and supervision practices, the Commission identified problems with probation’s role as investigator and prosecutor in filing petitions, including a lack of concern among three-quarters of county probation agencies about the sufficiency of evidence to substantiate allegations.¹²²

C. JUVENILE PROBATION OVERHAUL IN 1960S

Still, the Special Commission advocated in its 1960 report that the juvenile court “should work to increase the status of the probation departments and to take advantage of the clinical knowledge and skills of treatment specialists.”¹²³ It also observed the “shocking” number of youth detained and recommended that probation reduce its reliance on incarceration.¹²⁴ The Special Commission’s extensive recommendations thus reflected a desire to both expand and narrow probation. While the Commission proposed dedicating more money from the state for county

¹¹⁹ *Id.* at 42.

¹²⁰ *Id.* at 45–46; GOVERNOR’S SPECIAL STUDY COMM’N, FIRST INTERIM REPORT, *supra* note 60, at 19.

¹²¹ GOVERNOR’S SPECIAL STUDY COMM’N, STUDY, *supra* note 70, at 46.

¹²² *Id.* at 37.

¹²³ Nunn & Cleary, *supra* note 61, at 25; *see also* GOVERNOR’S SPECIAL STUDY COMM’N, RECOMMENDATIONS, *supra* note 60.

¹²⁴ GOVERNOR’S SPECIAL STUDY COMM’N, RECOMMENDATIONS, *supra* note 60, at 41–42.

probation agencies, and developing more comprehensive practice standards on intake, detention, and wardship decisions, it also recommended reducing probation's scope of work to screen court referrals, render diagnosis for disposition, and conduct supervision.¹²⁵ To place further parameters and limits on probation, the Commission suggested that probation limit the use of informal probation to six months and restructure probation departments to be independent administrative units of county government rather than arms of juvenile courts.¹²⁶

The California legislature enacted many of the Commission's recommendations in 1961.¹²⁷ Despite legislators initially feeling "ambivalent at best and . . . generally skeptical about the proposed changes," the bill moved quickly out of the Senate Judiciary Committee; apparently a Shasta County judge's testimony about his heavy-handed, improper practice of detaining youth until they were ready to admit to the charges against them spurred the decisiveness.¹²⁸ Called "the earthquake of 1961" by one judge, the legislation "dramatically changed the structure of the juvenile courts, probation departments, and even police and sheriff's departments and public defender's offices" and "[s]uddenly the juvenile court was run like a court rather than like a counseling service or an administrative agency."¹²⁹

With the 1961 revisions, probation departments' status and workload in California grew substantially. Probation now bore the sole responsibility to decide whether to detain apprehended youth pending disposition of their cases, whereas previously it shared that role with law enforcement agencies.¹³⁰ The statutory overhaul also centralized in probation officers the investigative and decision-making functions in filing petitions—which prior to 1961 could also be made by police officers subject to probation approval.¹³¹ Furthermore, despite the Commission's concern with over-detention of youth, the new law also expanded the basis of detention from the single criterion of "necessary for the protection of the welfare of the child" to include protection of other persons and property, flight risk, and violation of court orders.¹³² The revisions left intact probation's ability to informally supervise youth in lieu of filing a petition, but limited both the

¹²⁵ *Id.* at 35–41.

¹²⁶ *Id.*

¹²⁷ *See* Goldfarb & Little, *supra* note 108, at 421.

¹²⁸ Nunn & Cleary, *supra* note 61, at 25.

¹²⁹ *Id.*

¹³⁰ Goldfarb & Little, *supra* note 108, at 429.

¹³¹ *Id.* at 430 n.56.

¹³² *Id.* at 429 n.50.

duration of the supervision to six months and the possibility of a youth being subject to prosecution after having served the six-month period.¹³³

The revisions further validated the value of probation in how the legislature specified qualifications for “referees” who served as lower court judges. Whereas none existed prior to 1961, the new requirements treated legal and probation experience equally so that all referees subsequently appointed were required to have five years of law practice, five years of probation supervision experience, or a combination thereof.¹³⁴ The new law failed to resolve probation’s proper role in adjudicatory hearings—continuing to assert an officer’s duty to represent the interests of a youth,¹³⁵ while also providing youth with the right to counsel at most juvenile proceedings (except in detention hearings).¹³⁶

In the aftermath of the Commission’s work, one critic recognized that comingling so many functions into a single agency and individual officer could blur the lines of responsibility and accountability.¹³⁷ For instance, probation officers who served as court-referees “may be inadequately prepared to cope with the extensive procedural innovations of the revised law” and may struggle to “act impartially in a case in which he or one of his subordinates prepared the social study.”¹³⁸ They were also concerned that the probation officer was expected to represent the interests of a youth in court and also supply courts with witness testimony and other evidence to substantiate allegations in a petition.¹³⁹ The emergence of a right to counsel under the new law created confusion about “whether [the probation officer was] to remain neutral or take the position of an advocate” and concern about the real “temptation for the probation officer to assume a more prosecutorial function in support of his social study.”¹⁴⁰ In fact, the 1961 legislation was silent as to the role of any prosecutor and whether someone other than the probation officer would act in a prosecutor-like function to secure witnesses and prove the petition.¹⁴¹ It was only after the United States Supreme Court’s 1967 opinion *In re Gault*, which established that youth must be afforded due process rights in juvenile court proceedings (including the right to counsel),

¹³³ *See id.* at 431.

¹³⁴ *Id.* at 435.

¹³⁵ *Id.* at 436.

¹³⁶ *Id.* at 437.

¹³⁷ *See id.* at 435.

¹³⁸ *Id.*

¹³⁹ *Id.* at 436.

¹⁴⁰ *Id.*

¹⁴¹ *See id.* at 436 n.91.

that the presence of prosecutors in juvenile court emerged alongside the newfound presence of defense attorneys,¹⁴² and effectively curbed probation's role as either prosecutor or advocate.

After nearly sixty years of experimentation upon probation's creation in the state, California thus acknowledged through creating a special commission and adopting many of its recommendation that the probation and juvenile court systems were inadequate in many aspects.¹⁴³ Importantly, the discourse grappled with the over-detention and over-supervision of youth for minor, illegitimate, and paternalistic reasons and reaffirmed the protective and rehabilitative philosophy of juvenile court law.¹⁴⁴ Apparent in the reform debate and proposals were tensions and negotiations about the varied role and practices of the probation system and the juvenile court system.¹⁴⁵ Still, judges, legislatures and others regarded each of these systems as revolutionary in the aims to achieve rehabilitation and community safety, such that the state and counties continued to heavily invest in their expansion, formalization, and standardization.¹⁴⁶ In the end, the 1961 statutory overhaul essentially legitimated and added expectation to probation.¹⁴⁷ As such, probation continued to don the hats of social worker, police officer, legal advocate, prosecutor, and judge with greater investment and support.

D. POST-1961 AND RECENT STATUTORY CHANGES

In the ensuing decades in the 1970s and 1980s, societal dissatisfaction with the criminal justice system as a whole endured,¹⁴⁸ and juvenile justice systems in California and across the nation underwent a "tough on crime" period through the 1990s in the face of a rise in youth crime.¹⁴⁹ Thus, "the retributive goals of probation rapidly gained popularity in corrections."¹⁵⁰ Jurisdictions developed intensive, more restrictive probation supervision

¹⁴² Riane Miller Bolin, *Adultification in Juvenile Corrections: A Comparison of Juvenile and Adult Officers* 42 (Aug. 9, 2014) (Ph.D. dissertation, University of South Carolina) (citing H. Ted Rubin, *The Emerging Prosecutor Dominance of the Juvenile Court Intake Process*, 26 CRIME & DELINQ. 299, 318 (1980)).

¹⁴³ GOVERNOR'S SPECIAL STUDY COMM'N, FIRST INTERIM REPORT, *supra* note 60, at 7.

¹⁴⁴ GOVERNOR'S SPECIAL STUDY COMM'N, RECOMMENDATIONS, *supra* note 60, at 12.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 14–16.

¹⁴⁷ *Id.* at 35–41.

¹⁴⁸ Steiner, Roberts & Hemmens, *supra* note 24, at 276–78.

¹⁴⁹ Ming-Li Hsieh, Youngki Woo, Moana Hafoka, Jacqueline van Wormer, Mary K. Stohr & Craig Hemmens, *Assessing the Current State of Juvenile Probation Practice: A Statutory Analysis*, 55 J. OFFENDER REHAB. 329, 332 (2016).

¹⁵⁰ *Id.*

programs, which led to increased rates of revocation (whereby probation and courts find a person on probation in violation of their probation terms, revoke their probation status, and detain that person).¹⁵¹

At the same time that juvenile probation continued to juggle its functions, policymakers continued to attempt to professionalize the juvenile system.¹⁵² Among the more formal attempts to do so was the *Desktop Guide to Good Juvenile Probation Practice*, created by The National Council of Juvenile and Family Court Judges in 1991 and updated in 2002 in response to the lack of clarity that still existed about the proper role of a juvenile probation officer.¹⁵³ The guide described the necessary knowledge, skills, techniques, and resources probation officers needed to perform the job of juvenile probation so they could ultimately serve “as catalyst[s] for developing safe communities and healthy youth and families.”¹⁵⁴

Despite probation’s multiple aims, the result of these “tough on crime” decades tilted probation’s balancing act toward punishment. In 2002, scholars conducted a statutory analysis of juvenile probation across all fifty states and concluded that probation’s legally prescribed functions tended to follow a punishment model.¹⁵⁵ Instead of balancing support and punishment of youth, states “placed an overwhelming emphasis on community protection” through case investigation, performance of court duties, law enforcement, supervision, monitoring, and custody over tasks that focus on promoting meaningful accountability or developing critical competencies of youth.”¹⁵⁶ The field had “shifted away from their welfare foundation and towards the law enforcement end of the pendulum.”¹⁵⁷

In recent years, the focus of probation functions under the law has shifted to a degree in the other direction back toward rehabilitation. A 2017 statutory analysis of all fifty states and the District of Columbia showed an overall increase over ten years in probation’s rehabilitation-oriented and case manager-oriented tasks.¹⁵⁸ Going beyond conventional rehabilitation approaches, 24% of states codified restorative justice principles in their

¹⁵¹ Klingele, *supra* note 1, at 1023–24.

¹⁵² Hsieh, Woo, Hafoka, van Wormer, Stohr & Hemmens, *supra* note 149, at 330.

¹⁵³ Hafoka, Woo, Hsieh, van Wormer, Stohr & Hemmens, *supra* note 18, at 34; Steiner, Roberts & Hemmens, *supra* note 24, at 269.

¹⁵⁴ Steiner, Roberts & Hemmens, *supra* note 24, at 269.

¹⁵⁵ See Hsieh, Woo, Hafoka, van Wormer, Stohr & Hemmens, *supra* note 149, at 329.

¹⁵⁶ Steiner, Roberts & Hemmens, *supra* note 24, at 279–80.

¹⁵⁷ *Id.*

¹⁵⁸ Hafoka, Woo, Hsieh, van Wormer, Stohr & Hemmens, *supra* note 18, at 36.

statutes.¹⁵⁹ The researchers considered the shift fitting: “This is a system that is inherently rehabilitation-focused, given the age of those supervised and the understanding that as a group they are more malleable.”¹⁶⁰ In fact, some states even modified their statutory definition of “probation officer” to “probation counselor.”¹⁶¹ Still, their research found that law enforcement-oriented functions outweighed other tasks for both adult and juvenile probation officers.¹⁶²

In California, the wide-ranging roles of probation came under examination in a 2006 Probation Services Survey conducted by the Judicial Council of California of the Administrative Office of the Courts. Overall, the survey concluded that no consistent, detailed, statewide information existed about the role of probation officers or the range of services those departments provided.¹⁶³ The Council found probation services were heavily weighted toward juvenile probation, especially juvenile custody; across all counties, an average of 77% of probation officer time was allocated to juvenile services.¹⁶⁴ Other key findings were that a high proportion of officer time was spent writing reports and performing other court-related activities, provision of balanced and restorative justice programs and other alternatives to traditional probation services was infrequent, and in small counties, probation departments struggled to fund and provide a range of services.¹⁶⁵

Meanwhile, legal reform in California continued to expand the size—and consequently the budgets—of probation departments. In the early 2000s, after a decade of criticism and lawsuits over abusive conditions within the state’s California Youth Authority (CYA) prisons, then-Governor Arnold Schwarzenegger and state lawmakers made the decision to shrink or close many CYA facilities.¹⁶⁶ In 2007, state legislators passed a law to limit state detention to youth, which shifted supervision of most youth offenders to county probation departments and granted them additional funding for local facilities and programs.¹⁶⁷ In subsequent years, the state youth prison

¹⁵⁹ *Id.* at 37.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 36.

¹⁶³ ADMIN. OFF. OF THE CTS. & CTR. FOR FAMILIES, CHILD. & THE CTS., CALIFORNIA PROBATION SERVICES SURVEY 8 (2006).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See BARRY KRISBERG, LINH VUONG, CHRISTOPHER HARTNEY & SUSAN MARCHIONNA, A NEW ERA IN CALIFORNIA JUVENILE JUSTICE 1, 3 (2010).

¹⁶⁷ *Id.* at 11.

population dropped from a peak of over 10,000 youth in 1996 to about 1,500 by 2009 after CYA closed nine of their facilities.¹⁶⁸ The state expanded local probation responsibility in 2010 by putting probation agencies in charge of the supervision of all young people released from state detention.¹⁶⁹

Today in California, local juvenile probation agencies and roles are the largest, most wide-ranging they have been since their creation, even with dramatic declines in the rates and number of youth arrest, prosecution, and detention in California.¹⁷⁰ For instance, there was a 71% decline in overall juvenile arrests between 2010 and 2016.¹⁷¹ In 2019, probation detained 16,512 youth pre-adjudication in secure county facilities, 5,355 post-adjudication in local secure facilities, and around 23,700 youth under some form of county-level community supervision.¹⁷² In 2020, in the face of the COVID-19 pandemic, youth populations in California detention facilities dropped further by as much as 35% in just five months from February to July.¹⁷³

Probation-run facilities for youth are now nearly three-quarters empty across California, yet the departments retain the same budgets, have little demonstrated efficacy, and stand to inherit greater responsibility and more money as jurisdiction of incarcerated youth shifts completely from the Division of Juvenile Justice (DJJ, formerly CYA) to counties.¹⁷⁴ In May 2020, Governor Newsom announced that he would shut down DJJ to accomplish two goals: 1) to close an historic budget deficit that the COVID-19 pandemic created, and 2) to “enable youth to remain in their communities and stay close to their families to support rehabilitation.”¹⁷⁵ The legislation, signed into law on September 30, 2020, set in motion the timetable to close

¹⁶⁸ *Id.* at 1, 5.

¹⁶⁹ 2010 Cal. Stat. 5070–98.

¹⁷⁰ See, e.g., Mike Males, *California Youth Continue to Bring Steep Declines in Juvenile Arrests*, CTR. JUV. & CRIM. JUST. (Dec. 19, 2017), <http://www.cjci.org/news/11883> [<https://perma.cc/5DFR-XY28>].

¹⁷¹ *Id.*

¹⁷² See CAL. DEP’T OF JUST., *JUVENILE JUSTICE IN CALIFORNIA: 2019*, at iv, 22, 40 (2020).

¹⁷³ Dan Morain, *California Counties Empty Juvenile Halls to Combat COVID-19*, IMPRINT (Aug. 2, 2020, 8:52 PM), <https://imprintnews.org/news-2/california-counties-empty-juvenile-halls-combat-covid-19/46065> [<https://perma.cc/LX2E-EB2Z>].

¹⁷⁴ James Rainey, *California Plans to Close Troubled Youth Prisons After 80 Years. But What Comes Next?*, L.A. TIMES (Feb. 15, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-02-15/california-youth-prisons-closing-criminal-justice-reform> [<https://perma.cc/DX2F-UCA6>]; S.B. 823, 2019–20 Leg., Reg. Sess. (Cal. 2020).

¹⁷⁵ See CAL. DEP’T OF FIN., *MAY REVISION TO THE GOVERNOR’S BUDGET: PUBLIC SAFETY 87–88* (2020), <http://www.ebudget.ca.gov/2020-21/pdf/Revised/BudgetSummary/PublicSafety.pdf> [<https://perma.cc/WVE2-HBK2>].

DJJ and provided additional funding for counties to shoulder responsibility for youth who would have otherwise been subject to state custody.¹⁷⁶

Thus, in California, the landscape of juvenile probation includes, on the one hand, expansive, sometimes recently renovated secure facilities and ballooning budgets that resulted from growing responsibilities over time, and on the other, steep reductions in youth incarceration and justice system involvement generally. Probation's recurring problems over its more than 100 years of existence are all the more resonant today as California decides who can best serve youth in their local communities and whether it can justify continued investments in juvenile probation.

III. FOURTH AMENDMENT JURISPRUDENCE AND PROBATION

So far, this Article has discussed the legislative and policy history and evolution of probation. Courts too have discussed the dual roles of probation and reinforced its law enforcement functions to the detriment of the rights owed to those individuals who interact with law enforcement. As such, this Part studies the intersection of Fourth Amendment jurisprudence and probation—specifically, the courts' analysis of probation's purpose and the concomitant rights of individuals on probation under search and seizure caselaw to elucidate the aspirational and normative lens through which lawmakers continue to understand probation. As in legislative and policy development, it is the balanced ideal of probation—rather than its actual practices—that has shaped courts' arrangement of formal rights and protections for persons it places on probation.

The right of persons against “unreasonable searches and seizures” via the Fourth Amendment is fundamental.¹⁷⁷ For Fourth Amendment protection to apply, a person must have a “reasonable expectation of privacy” and society must accept that expectation as “objectively reasonable.”¹⁷⁸ If both prongs are met, police must then have both probable cause and a search warrant issued by a neutral magistrate to conduct a constitutionally valid search.¹⁷⁹ Some have argued that the Supreme Court applies a sliding scale to the probable cause analysis,¹⁸⁰ since “[l]ess intrusive searches require less

¹⁷⁶ 2010 Cal. Stat. 3789.

¹⁷⁷ U.S. CONST. amend. IV.

¹⁷⁸ See *California v. Greenwood*, 486 U.S. 35, 39 (1988) (“The warrantless search and seizure . . . would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy . . . that society accepts as objectively reasonable.”).

¹⁷⁹ See *Jones v. United States*, 357 U.S. 493, 498–99 (1988).

¹⁸⁰ Sunny A. M. Koshy, *The Right of [All] the People to be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 449,

justification.”¹⁸¹ The Supreme Court “views the reasonableness and warrant provisions of the amendment as intertwined and interdependent” such that a search without a warrant is per se unreasonable.¹⁸² But the shield against warrantless searches is far from absolute; a warrantless search can survive constitutional muster under a few “specifically established and well-delineated exceptions.”¹⁸³

Individuals on some form of community supervision, whether probation or parole, are generally required to waive many of their rights, including the right to be free of warrantless searches and searches without probable cause.¹⁸⁴ For many years, the Court’s clarification of these rights in the probation context did not exist.¹⁸⁵ In 1982, scholar J. Weismann asked, “Is the probation officer, part-therapist, part-surveillance agent, bound by the same rules applicable to law enforcement personnel? The short answer is that appellate courts disagree and the Supreme Court has yet to announce its position.”¹⁸⁶ Soon after, in 1987, the United States issued its first ruling on the proper scope of probationers’ Fourth Amendment rights in *Griffin v. Wisconsin*. In that opinion, the Court upheld a search of a probationer’s home conducted with neither probable cause nor a search warrant because a state regulation authorized probation searches on the basis of “reasonable grounds.”¹⁸⁷ In 2001 in *United States v. Knights*, the Court reaffirmed that the warrantless search of a probationer’s home is permissible under the Fourth Amendment if there is reasonable suspicion and an authorized probationary condition.¹⁸⁸ In both *Griffin* and *Knights*, the fact that either a statute or probation condition explicitly allowed police to conduct a warrantless search of the probationer’s home, and the probationers’ knowledge of the parameter, was enough for the Supreme Court to conclude

456 (1988); see also Taylor S. Rothman, *Fourth Amendment Rights of Probationers: The Lack of Explicit Probation Conditions and Warrantless Searches*, 2016 U. CHI. LEGAL F. 839, 844 (2016).

¹⁸¹ Koshy, *supra* note 180, at 456.

¹⁸² John M. Pelletier, *Searches and Seizures: To Warrant or Not to Warrant in Parole and Probation Officer Searches*, 17 SUFFOLK U. L. REV. 687, 704 (1983).

¹⁸³ Koshy, *supra* note 180, at 453.

¹⁸⁴ John R. Turner, Craig Hemmens & Adam K. Matz, *Is It Reasonable? A Legal Review of Warrantless Searches of Probationers and Parolees*, 27 CRIM. JUST. POL’Y REV. 684, 684 (2016).

¹⁸⁵ See James C. Weissman, *Constitutional Primer on Modern Probation Conditions*, 8 NEW ENG. J. ON PRISON L. 367, 374 (1982).

¹⁸⁶ *Id.*

¹⁸⁷ See *Griffin v. Wisconsin*, 483 U.S. 868, 872–80 (1987).

¹⁸⁸ 534 U.S. 112, 121–22 (2001).

that probationers have diminished expectations of privacy.¹⁸⁹ Thus, the Supreme Court has upheld probation and parole officers' at-will searches where a statute or probation condition explicitly permits warrantless searches. No known cases have rendered warrantless searches unconstitutional where a statute or probation condition authorizes them.

Where probation terms do not explicitly authorize warrantless searches of a probationer's home, courts are split in their Fourth Amendment conclusions.¹⁹⁰ The Fifth, Ninth, and Eleventh Circuits have upheld such warrantless searches,¹⁹¹ reasoning similarly to the decisions in *Griffin* and *Knights* that probationers have a reduced expectation of privacy and also that the government's interest in keeping society safe from potential crime is sufficient justification.¹⁹²

In contrast, the Fourth Circuit held in 2015 that warrantless searches absent an express condition permitting them violates the Fourth Amendment.¹⁹³ In *United States v. Hill*, the Fourth Circuit was unpersuaded that the probationer had consented to periodic and unannounced probation officer visits where the challenged search was conducted without a search warrant or authorizing probation condition.¹⁹⁴ The *Hill* court acknowledged the governmental interest in supervision and diminished privacy expectation of probationers but maintained that a probation officer must comply with the Fourth Amendment's warrant requirement. The Second and Sixth Circuits have also ruled similarly that warrantless probation officer searches are presumptively unreasonable when there is no probation term or state law authorizing them.¹⁹⁵

The rationale underlying much of federal court jurisprudence focuses on the "unique relationship between a probationer and probation officer,"¹⁹⁶ and relies on probation's twin goals of assistance and law enforcement to

¹⁸⁹ See Rothman, *supra* note 180, at 841–42.

¹⁹⁰ *Id.* at 841.

¹⁹¹ See *United States v. Keith*, 375 F.3d 346, 350 (5th Cir. 2004); *United States v. Carter*, 566 F.3d 970, 974–76 (11th Cir. 2009); *United States v. King*, 672 F.3d 1133, 1139 (9th Cir. 2012); *Smith v. City of Santa Clara*, 876 F.3d 987, 995 (9th Cir. 2017).

¹⁹² *Keith*, 375 F.3d at 350; *Carter*, 566 F.3d at 974–76; *King*, 672 F.3d at 1139; *Smith*, 876 F.3d at 995; see also Rothman, *supra* note 180, at 859.

¹⁹³ *United States v. Hill*, 776 F.3d 243, 249–50 (4th Cir. 2015); see also *United States v. Bradley*, 571 F.2d 787, 789 (4th Cir. 1978) (holding a warrant was needed before search of parolee's home).

¹⁹⁴ *Hill*, 776 F.3d at 248–50.

¹⁹⁵ *United States v. Rea*, 678 F.2d 382, 387–88 (2d Cir. 1982); *United States v. Carnes*, 309 F.3d 950, 961 (6th Cir. 2002).

¹⁹⁶ See Rothman, *supra* note 180, at 851.

both permit persons on probation to have fewer privacy rights and grant the government greater right to intrusion for the sake of public safety. As early as the 1930s, the Supreme Court described probation in terms of its duality—as “an authorized mode of mild and ambulatory punishment . . . as a reforming discipline.”¹⁹⁷ Like parole, probation was “intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency.”¹⁹⁸ Federal courts considered probation an “opportunity” for “a young or unhardened offender . . . to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity.”¹⁹⁹

In more recent caselaw, the Supreme Court is clear about the difference between police and probation:

Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen. He is an employee of the State Department of Health and Social Services who, while assuredly charged with protecting the public interest, is also supposed to have in mind the welfare of the probationer.²⁰⁰

With a probation officer then, “there is an ongoing supervisory relationship—and one that is not, or at least not entirely, adversarial—between the object of the search and decisionmaker.”²⁰¹ Likewise, the Supreme Court has clearly distinguished probationers from the general public: “the very assumption of . . . probation” is that the probationer “is more likely than the ordinary citizen to violate the law.”²⁰² Under a balancing test then, these distinctions support the application of a lower standard of reasonable suspicion to determine whether a search violates the Fourth Amendment in the absence of an authorizing statute or probation condition.²⁰³

Taylor Rothman argues that it is the “dual role” of probation that “complicates the determination of whether a probation officer impinges on a

¹⁹⁷ *Korematsu v. United States*, 319 U.S. 432, 435 (1943) (quoting *Cooper v. United States*, 91 F.2d 195, 199 (5th Cir. 1937)).

¹⁹⁸ *Korematsu*, 319 U.S. at 435 (citing *Zerbst v. Kidwell*, 304 U.S. 359, 363 (1938)).

¹⁹⁹ *Roberts v. United States*, 320 U.S. 264, 272 (1943).

²⁰⁰ *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987).

²⁰¹ *Id.* at 879.

²⁰² *Id.* at 880.

²⁰³ *United States v. Knights*, 534 U.S. 112, 113 (2001).

probationer's constitutional rights."²⁰⁴ Probing practices, like routine home visits, interviews, and drug tests, inform a probation officer's approach to supervision and construction of effective programming for persons on probation. Yet the gathering of information is always double-edged; it can be used to help or punish youth. The threat and use of warrantless searches may also feel inherently harassing and impair trust with "the very person who is entrusted with the responsibility of overseeing and guiding his hoped-for rehabilitation."²⁰⁵ Thus, Rothman argues that "impermissible and intrusive searches may injure, rather than promote, the state's interests."²⁰⁶

Not only do probation's dual responsibilities potentially breed tension and mistrust between a probationer and probation officer, but they can also create dual approaches and outcomes such that each probation officer in exercising discretion can pick and choose how to proceed with their authority and the information they discover. "The dual rehabilitative and crime prevention responsibilities of parole and probation officers may at times create a seemingly irreconcilable conflict for the officer, who must determine in any given situation whether his primary rehabilitative function should be sacrificed for the public safety."²⁰⁷ Rothman contends that probation officers can abuse this broad authority and discretion to bypass constitutionally required procedures and protections in a criminal investigation:

As a probation officer moves further from the guidance approach and closer to the enforcer approach, the broad discretion that allows the probation officer to intrude upon the privacy of the probationer can become less justified. This broad discretion becomes even more dangerous when probation officers and police work together, such as when police rely on probation officers for investigational support.²⁰⁸

The worried scenario is more than conjecture. Evidence shows that in states that permit warrantless searches of persons on probation or parole, police officers have collaborated with probation and parole officers to conduct such searches.²⁰⁹ In eleven states, law enforcement officers are permitted to conduct searches of probationers without a search warrant and without the probation officer's presence.²¹⁰ Indeed, the availability of less

²⁰⁴ Rothman, *supra* note 180, at 852.

²⁰⁵ Koshy, *supra* note 180, at 478; see also Rothman, *supra* note 180, at 869.

²⁰⁶ Rothman, *supra* note 180, at 869.

²⁰⁷ Pelletier, *supra* note 182, at 692.

²⁰⁸ Rothman, *supra* note 180, at 852–53.

²⁰⁹ Turner, Hemmens & Matz, *supra* note 186, at 699 (citing A.K. Matz & B. Kim, *Policy Implications of Police-Probation/Parole Partnerships: A Review of the Empirical Literature*, 77 *FED. PROB.* 9 (2010)).

²¹⁰ *Id.*

restrictive means (like visitation and reporting) to achieve rehabilitation and public safety weakens the justification for such searches.²¹¹ As a result, critics have argued that courts and probation officers “should not treat probationers like prisoners.”²¹² Ultimately, warrantless searches, even when the law or a probation condition authorizes them, are counterproductive to the state’s interests.

The crux of Fourth Amendment analysis of warrantless probationer searches stands firm only if probation officers—as part social worker and part police officer—meaningfully actualize and balance their intended practice and impact. Indeed, other areas of law and procedure also reflect this conception of probation as different from and more benign than other criminal and juvenile justice actors; the standard of proof for a probation violation ordinarily requires no more than a preponderance of the evidence and courts relax other evidentiary standards, such as admitting hearsay.²¹³ Certainly, the technical line courts draw between the statuses of persons on probation and suspects whom prosecutors have yet to prove guilty is one of presumed innocence afforded to the latter and not the former. But the reality is that criminal and youth justice systems pull in many individuals whose youth, actual innocence, the minor and technical nature of both their underlying offenses and probation violations, as well as other factors might mitigate their guilt. Regardless, probation officers can act more like police officers than social workers in many instances. Such cases undermine the justification that youth on probation are guilty individuals who deserve less constitutional protection and blurs the apparent difference between probation and police officers.

In the end, all the relaxed constitutional and other legal standards courts apply to probation, and juvenile probation in particular, reflect an abiding faith in probation’s dual purposes. But that faith is unwarranted (pun intended) if probation fails to serve and balance those dual purposes effectively or equitably. If such is the case, policy development and the courts’ constitutional analysis of probation rely on an ideal that is ultimately a fiction. If the notion that probation assists individuals towards rehabilitation and greater community safety is a fiction, then foregoing or relaxing probationers’ constitutional and other legal rights is legally unsound.

²¹¹ See Koshy, *supra* note 180, at 452.

²¹² Rothman, *supra* note 180, at 869.

²¹³ Klingele, *supra* note 1, at 1041.

IV. JUVENILE PROBATION IN PRACTICE

In Parts II and III, this Article explored the emergence and evolution of the juvenile probation system, with a focus on California laws and policies, and constitutional caselaw that interprets the rights of persons on probation in the Fourth Amendment context based on the intent of juvenile probation law and policy. Part IV examines juvenile probation officer orientations and attitudes and argues that their practice diverges too often from the purported goal of balancing youth rehabilitation, well-being, and community safety.

The available research shows that juvenile probation officers apply discretion in ways that are often at odds with their stated overarching organizational objectives. Some juvenile probation officers favor rehabilitation, others favor punitive measures, and most fall into gray areas across youth and within individual cases. It is perhaps unremarkable that such evident variation would flow from the wide scope of work and authorities that legislatures and courts have assigned to probation agencies and officers. The divergences and over-reliance on law enforcement approaches among juvenile probation officers are important in light of the ample attempts to reform probation law and policy, add responsibility and funding to probation agencies, and ensure racial equity, youth justice, and public safety.

A. RESEARCH ON ORIENTATIONS AND PRACTICE

As the delinquency and probation systems have grown and experimented, scholarship has tracked corresponding probation approaches and attitudes on the ground.²¹⁴ Differences among probation officers' practices have profound implications for the people they supervise, and the interaction between organizational-level and individual-level strategies of juvenile probation officers is complex.²¹⁵ Of course, discretion is an inescapable, important ingredient for any justice system decision-maker, especially in the context of the juvenile justice system and its emphasis on individualized approaches. That same discretion, however, can open the door to inconsistency, biases, and inequities across probation officers and agencies.²¹⁶ Indeed, research has long disavowed the assumption that probation officers implement organizational policies and practices as their

²¹⁴ See James R. Andretta, Terri Odom, Fannie Barksdale, Michael E. Barnes, Aaron M. Ramirez & Malcolm H. Woodland, *An Examination of Management Strategies and Attitudes Among Probation Officers*, 4 J. FORENSIC SOC. WORK 150, 151 (2014) (citing shifts in social pressure and policy directives to juvenile probation officers sparking scholarly interest in probation attitudes and outcomes).

²¹⁵ See Viglione, Rudes, Nightingale, Watson & Taxman, *supra* note 23, at 254.

²¹⁶ See *id.* at 255.

departments direct.²¹⁷ The need to understand individual-level juvenile probation officers' views and approaches to carrying out their roles is thus critical to promote and meaningfully improve the well-being of justice-involved youth and community safety.

Among the earliest research about the orientations of juvenile probation officers was a 1968 study that surveyed practitioners in a midwestern state and documented considerable disagreement and ambiguity about what responsibilities and tasks probation officers should prioritize in their jobs.²¹⁸ Across nearly all categories, juvenile probation officers were split in their assessments about whether a task was appropriate or a priority.²¹⁹ For instance, 51% of the officers surveyed thought investigating facts to substantiate an allegation should be mainly their responsibility, 48% believed filing the adjudication petition was an appropriate task while 52% did not, 54% indicated that informing youth of their rights at the time of custody should be their function and 46% did not, 44% considered discussing charges with the victim as their responsibility and 56% did not, and 40% considered initial questioning of a youth regarding an allegation to be appropriate and 60% did not.²²⁰ Probation officers expressed especial conflict about their actual and ideal roles when it came to the presentation of information about the alleged offense; “[n]early two-thirds of the subjects were actually taking the main responsibility for this activity, but only about one-fourth believed it to be their proper function.”²²¹ Notably, there was “relative harmony” between “what probation officers did and what they thought they should be doing” during the post-adjudication phase because it “contained activities of a rehabilitative and therapeutic nature”²²² This early study also noted differences in perceived role and responsibilities based on academic training; compared to those without a masters degree of social work (MSW), probation officers with such a degree highly valued therapeutic tasks like the coordination of services and treatment, while non-MSW probation officers did not.²²³ Probation officers with MSW degrees possessed a much clearer idea of their appropriate roles and rejected most activities that they perceived

²¹⁷ *See id.*

²¹⁸ William C. Brennan & Shanti K. Khinduka, *Role Discrepancies and Professional Socialization: The Case of the Juvenile Probation Officer*, 15 SOC. WORK 87, 89 (1970).

²¹⁹ *See id.*

²²⁰ *Id.*

²²¹ *Id.* at 89–90.

²²² *Id.* at 90.

²²³ *Id.* at 92.

as legal in nature.²²⁴ In sum, “[i]dentification with the professional subculture defines for professionals what is their main task, what is only peripherally their responsibility, and what is plainly outside their jurisdiction.”²²⁵

Subsequent research between the 1980s and 2000s arrived at varied conclusions about juvenile probation officers’ orientations and actual practice. In 1983, a scholar observed that overall “studies indicate that most parole and probation officers consider law enforcement their first responsibility, despite commentators’ emphasis on rehabilitation.”²²⁶ In 1995, Professor Joseph B. Tulman deconstructed the role of probation officers across the juvenile justice system process in the District of Columbia, and argues that “intake probation officers do not properly understand and execute their role before, during, and after initial hearings in delinquency cases.”²²⁷ At the point of intake, for instance, Tulman argued that officers in the juvenile intake unit “routinely perform the wrong job” in presenting evidence and argument for pretrial detention (a prosecutor’s job), in ascertaining an assessment of dangerousness (a psychiatrist’s job), and in processing cases (a courtroom clerk’s job), while being insufficiently focused on screening cases to keep children out of detention and out of the delinquency system.²²⁸ In Tulman’s analysis, “[t]he intake probation officer could and should be the child’s confidant and champion.”²²⁹ Yet intake officers fail to fulfill that role, as they instead present facts and allegations even though they are less equipped to do so compared to the prosecutor who has access to prior case records and legal training to accurately represent prior facts and dispositions.²³⁰ Subsequent to intake, probation departments assign a second “diagnostic probation officer” and a third post-disposition supervision probation officer which creates a “trifurcated arrangement of probation [that] minimizes the chance that a child will develop a trusting relationship with any of the three adults the system provides to interact with the child” or the chances the child will receive or accept assistance.²³¹ In the end, this structure, alongside large caseloads and the everyday stresses of the job, undermine individual probation officers’ ability to help children

²²⁴ *Id.* at 91–92.

²²⁵ *Id.* at 92.

²²⁶ Pelletier, *supra* note 182, at 706.

²²⁷ See Joseph B. Tulman, *The Role of Probation the Officer in Intake: Stories from Before, During, and After the Delinquency Initial Hearing*, 3 UDC L. REV. 235, 235 (1995).

²²⁸ *Id.* at 235–36, 259.

²²⁹ *Id.* at 277.

²³⁰ *Id.* at 258–59.

²³¹ *Id.* at 266–67.

succeed.²³² The 1995 study found that officers ultimately stress surveillance functions over bonding and helping functions through a model of “primarily punishment and incapacitation, rather than care and empowerment.”²³³

In a subsequent 2004 study, researchers found that “juvenile probation officers were twice as likely to exercise law enforcement-oriented tasks as rehabilitation-oriented tasks.”²³⁴ Although some probation departments have adopted thoughtful reforms since, research from 2013 to 2015 has concluded generally that “[i]n most jurisdictions, probation is a punitive system that attempts to elicit compliance from individuals primarily through the imposition of conditions, fines, and fees that in many cases cannot be met.”²³⁵ More recently, a 2017 statutory analysis of probation functions across the country demonstrated many juvenile probation officers in practice “have been resistant to [more rehabilitation-oriented] role changes,” even though statutes had changed to include greater rehabilitation-oriented tasks.²³⁶ Across these years, researchers found that juvenile probation officers inconsistently carry out the duties they are instructed to perform and are “called upon to perform other tasks which are not found in the state codes or even their job descriptions.”²³⁷

Overall then, broader trends toward more punishment and tough-on-crime approaches were concomitant with “responsibilities of probation officers shift[ing] towards law-enforcement oriented functions.”²³⁸ At the same time, a 1993 study found that juvenile probation officers identified their primary orientation as therapeutic and supported case-management more than law enforcement work.²³⁹ Research in 2009 and 2014 also showed that, with the development of standardized risk and needs screening tools in the

²³² See *id.* at 266–67, 279.

²³³ *Id.* at 273, 279.

²³⁴ Hsieh, Woo, Hafoka, van Wormer, Stohr & Hemmens, *supra* note 149, at 332 (citation omitted).

²³⁵ MICHAEL P. JACOBSON, VINCENT SCHIRALDI, REAGAN DALY & EMILY HOTEZ, LESS IS MORE: HOW REDUCING PROBATION POPULATIONS CAN IMPROVE OUTCOMES 1 (2017), <https://thecrimereport.org/wp-content/uploads/2017/08/LessIsMore-FINAL.pdf> [<https://perma.cc/Z4SA-P83Q>] (citations omitted).

²³⁶ See Hafoka, Woo, Hsieh, van Wormer, Stohr & Hemmens, *supra* note 18, at 33–34.

²³⁷ Steiner, Roberts & Hemmens, *supra* note 24, at 278.

²³⁸ See Hsieh, Woo, Hafoka, van Wormer, Stohr & Hemmens, *supra* note 149, at 332.

²³⁹ Hafoka, Woo, Hsieh, van Wormer, Stohr & Hemmens, *supra* note 18, at 34 (citing Richard D. Sluder & Frances P. Reddington, *An Empirical Examination of the Work Ideologies of Juvenile and Adult Probation Officers*, 20 J. OFFENDER REHAB. 115 (1993)).

late 1990s, juvenile probation officers had shifted toward case management styles to reduce the likelihood of reoffending.²⁴⁰

Are such studies at odds with one another? The seeming dissonance across research findings might be understood in light of the complexity of treatment and punishment orientations; such orientations do not exist as firm binaries but instead interact as probation officers flexibly employ them on a case-by-case basis.²⁴¹ In 2009, research established “clear evidence that [probation officers] implement a balanced approach with delinquent youths” that blended both accountability-based and rehabilitation-based approaches.²⁴² In case management, officers equally adopted deterrence and treatment approaches, though they were “less inclined toward restorative justice.”²⁴³ Researchers found that meanwhile, officers “use[d] confrontation, counseling, and behavioral tactics at about equal levels” to garner probationer compliance.²⁴⁴ The attitudes of probation officers unsurprisingly matched their tactics. Those officers who emphasized accountability in their interventions favored punishment and made fewer contacts with youth.²⁴⁵ Officers who focused on rehabilitative tasks strongly endorsed treatment and devoted more time to cases.²⁴⁶ In short, probation officer attitudes heavily informed probation officer practices.²⁴⁷ In a more nuanced examination, Ward and Kupchik proposed that there is “no consensus among probation officers about the appropriate goals of juvenile social control” and that a perceived balance of treatment and punishment objectives in modern juvenile justice systems “may be gradually shifting in a less visible way toward a singularly punitive agenda,” especially as younger probation officers advocate for punishment.²⁴⁸

Another 2018 study further illustrates that the paradigms of treatment and punishment are complexly interwoven: researchers examined self-reported work-related activities across fifteen juvenile probation offices within a single state and concluded that workers’ profiles impacted “both

²⁴⁰ See Hsieh, Woo, Hafoka, van Wormer, Stohr & Hemmens, *supra* note 149, at 331 (citations omitted).

²⁴¹ Geoff Ward & Aaron Kupchik, *What Drives Juvenile Probation Officers? Relating Organizational Contexts, Status Characteristics, and Personal Convictions to Treatment and Punishment Orientations*, 56 *CRIME & DELINQ.* 35, 57 (2010).

²⁴² Schwalbe & Maschi, *supra* note 79, at 364.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Ward & Kupchik, *supra* note 241, at 59, 63.

their job performance and perceptions of the organization.”²⁴⁹ While juvenile probation officers’ activities did not fit neatly within traditional role definitions of punishment and rehabilitation,²⁵⁰ the researchers developed “three distinct classes of juvenile probation officers based on their practices, strategies, and related organizational variables”: bare minimum, active and communicative, active and inclusive.²⁵¹ Researchers classified about 40% of the sample as bare-minimum since the juvenile probation officers demonstrated non-participation in either “traditional social work or compliance activities,” low levels of engagement in the “informal aspects of their job,” and the lowest participation in the “formal aspects of their job” when compared to the juvenile probation officers in the other classes.²⁵² Officers in the active and communicative class reported a “higher probability of participation in a range of social work and compliance activities.”²⁵³ Juvenile probation officers in the third class reported a high probability of participation in formal case management, emphasized inclusion of youth and family members in the probation process as their highest priority, and were less likely to focus on monitoring, compliance, or referral practices.²⁵⁴ In their discussion, the researchers expressed concern about the prevalence of the bare-minimum class given that “best practices require [juvenile probation officers] to go beyond merely supervising based on probation conditions and require use of an individualized approach with each juvenile they supervise.”²⁵⁵ Based on relevant literature, the researchers suggested such officers’ inactivity may be due to “boredom, role conflict, role ambiguity, and lack of participation in organizational decisions” which then “create heightened levels of job stress that may eventually result in strain, exhaustion, and ultimately, burnout.”²⁵⁶ Ultimately, the study demonstrates that “[juvenile probation officers] with the same job title have different perceptions of their jobs and pursue their jobs in different ways that may align or misalign with reform efforts.”²⁵⁷

²⁴⁹ Viglione, Rudes, Nightingale, Watson & Taxman, *supra* note 23, at 255–56.

²⁵⁰ *Id.* at 262–63.

²⁵¹ *Id.* at 260–61.

²⁵² *Id.* at 261–63.

²⁵³ *Id.* at 263.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* (citations omitted).

²⁵⁷ *Id.* at 265.

B. FACTORS AFFECTING ORIENTATIONS

A range of factors can affect the ultimate orientations and practices of juvenile probation officers. Prior to 2002, “there appeared to be a consensus that advanced and specified education prevented overly punitive orientations from developing among correctional personnel.”²⁵⁸ In 2002, a graduate degree was found more likely to reduce an officer’s punitiveness, regardless of their particular focus of study.²⁵⁹ Ward and Kupchik found that African American probation officers are more treatment-oriented than are their colleagues with different racial-ethnic backgrounds, but that they and their White counterparts supported punishment equally.²⁶⁰

Juvenile probation officers’ personal attitudes about treatment effectiveness and objectives were the best predictors of their practice orientations—even more important than organizational contexts (e.g., court context and location) and officer’s demographics (e.g., race, age, job experience) in explaining their preference for rehabilitative over punitive measures in their work with youth. Thus, “[h]ow respondents feel about the importance of considering moral character, offense severity, and the rights of victims in the course of delinquency case processing tells us a great deal about their attitudes regarding treatment and punishment.”²⁶¹ Researchers in 2014 echoed the findings in their examination of three management approaches: compliance (high frequency of deterrence and confrontation strategies and less frequent use of behavioral, counseling, and restorative strategies characterize this approach), therapeutic (fewer deterrence and confrontation strategies and above-average use of behavioral and counseling tactics, and, to a lesser degree, restorative approaches characterize this approach), and intensive (frequent use of all types of probation approaches characterize this approach).²⁶² Compliance-oriented probation officers reported favorable attitudes toward punitive measures in juvenile justice, pessimistic attitudes toward the utility of mental health interventions, and the most negative evaluations of youths.²⁶³ Probation officers with a therapeutic profile disagreed with punitive measures in juvenile justice, held higher levels of optimism about the utility of mental health rehabilitation, and reported the most favorable scores for their youths’ development, including

²⁵⁸ Andretta, Odom, Barksdale, Barnes, Ramirez & Woodland, *supra* note 214, at 152.

²⁵⁹ *Id.*

²⁶⁰ Ward & Kupchik, *supra* note 241, at 57.

²⁶¹ *Id.*

²⁶² *See* Andretta, Odom, Barksdale, Barnes, Ramirez & Woodland, *supra* note 214, at 161–62.

²⁶³ *See id.* at 161.

their sense of accountability and competency. Therapeutic officers were also the “least likely to see youth as a continued threat” to public safety.²⁶⁴ Intensive probation officers scored average in their attitudes toward punitive approaches and favored mental health treatment but were the most negative in their evaluations of youths’ responses to probation.²⁶⁵

Viglione also found that race was a significant variable, although to a smaller degree than Ward and Kupchik found; specifically, White juvenile probation officers were “more likely to be members of the bare-minimum class” and officers of color were “more likely to be members of the active and communicative class.”²⁶⁶ Researchers also found that female juvenile probation officers are more likely than their male counterparts to recommend treatment and counseling,²⁶⁷ and younger juvenile probation officers are less likely to do so than their older and more experienced colleagues.²⁶⁸ Ward and Kupchik found younger probation officers strongly support punishment and officers over forty years old were markedly less punitive than their younger counterparts, but officers of all ages were similar in their support for treatment.²⁶⁹ Other researchers formed a similar conclusion that job tenure predicts probation approaches. In that study, tenure above fifteen years correlated with a greater likelihood of therapeutic and intensive approaches compared to the approaches of colleagues with fewer years of service.²⁷⁰ Studies have also correlated the race and gender of youth on probation with the perception and treatment philosophies of officers. In two studies, probation officers favored White youths over youths of color and males over female.²⁷¹

Type of work is also tied to a juvenile probation officer’s orientation towards rehabilitation. According to some research, those who worked in diversion, for instance, were more rehabilitation oriented than those who worked within a non-diversion capacity.²⁷² Studies have also linked a probation officer’s perceptions of a youth’s social supports to the officer’s rehabilitation orientations. In other words, the negative or positive beliefs of

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 161–62.

²⁶⁶ Viglione, Rudes, Nightingale, Watson & Taxman, *supra* note 23, at 263–64.

²⁶⁷ *Id.* at 254.

²⁶⁸ *Id.*

²⁶⁹ Ward & Kupchik, *supra* note 241, at 59.

²⁷⁰ Andretta, Odom, Barksdale, Barnes, Ramirez & Woodland, *supra* note 214, at 162.

²⁷¹ Schwalbe & Maschi, *supra* note 79, at 359.

²⁷² Vera Lopez & Margaret Russell, *Examining the Predictors of Juvenile Probation Officers’ Rehabilitation Orientation*, 36 J. CRIM. JUST. 381, 387 (2008).

an officer about youths' social supports result in either less or more application of rehabilitative approaches.²⁷³

At the organizational level, research suggests caseload size can influence supervision strategy such that probation officers who work in larger agencies with larger caseloads are more likely to emphasize punitive supervision strategies that focus on control rather than rehabilitative strategies.²⁷⁴ Studies have found that positive perceptions of supervisory leadership, greater organizational integration with community-based service providers, and lower levels of staff cynicism about organizational change are significantly related to whether staff reported the use of service-oriented practices.²⁷⁵ In a 2018 study, researchers found a significant correlation between juvenile probation officers' perceptions of their immediate supervisors, management, and the overall agency and its values with how they approached their jobs. Those who held more favorable views on their work environment were more engaged in the social services aspects of supervision.²⁷⁶

V. MOVING FROM PROBATION TO YOUTH DEVELOPMENT

Almost since its creation, probation has struggled to fulfill its mission. As reflected in laws, policies, and practice, the inherent tug-of-war within juvenile probation roles creates an identity crisis for the system and its workers. One scholar noted that over time, “juvenile probation officers resemble[d] something far different from their early predecessors as their duties have changed,” and they are torn between probation’s historical foundation and society’s demand for punishment.²⁷⁷ Indeed, “[d]espite millions of dollars invested in juvenile justice reform . . . and application of an adolescent development model in the field, juvenile justice still appears to reflect a disjunction between the ‘ideology’ of the probation functions prescribed by statutes and regulations and the ‘reality’ of probation practice.”²⁷⁸ Because probation officers employ attitudes and practices as wide-ranging as their official roles permit, the “balanced” approach to juvenile probation remains elusive. On balance, the evidence shows that the very definition, design, and scale of juvenile probation work is, and has always been, fundamentally unwieldy, unrealistic, and inequitable. The choices in practice too easily gravitate toward punishment approaches.

²⁷³ *Id.*

²⁷⁴ Viglione, Rudes, Nightingale, Watson & Taxman, *supra* note 23, at 254.

²⁷⁵ *Id.* at 255.

²⁷⁶ *Id.* at 264.

²⁷⁷ Steiner, Roberts & Hemmens, *supra* note 24, at 267.

²⁷⁸ Hsieh, Woo, Hafoka, van Wormer, Stohr & Hemmens, *supra* note 149, at 330.

Moreover, when societal biases and impulses already tend to consider Black and Brown youth through a lens of suspicion, low expectation, and criminality, it should be no surprise that the probation system is also guilty of over-reliance on its law enforcement roles and perpetuates structural racism.

Many government, non-profit, academic, and community reformers have worked to confront probation's failures and its need for change. How the range and divergences among juvenile probation roles affect outcomes for youth or staff though is not widely studied. Little research shows that probation in general is effective in its goal to rehabilitate, and some evidence suggests just the opposite.²⁷⁹ Some research has found that conflict between probation officer roles and philosophies "negatively affect[s] service delivery to probationers."²⁸⁰ Literature that examines probation practice suggests that despite regular innovation, probation departments have achieved little improvement in programming and service delivery to date.²⁸¹ There is also research that suggests probation staff do not fare well within the system either; their role conflicts between law enforcement and social casework are a "contributor . . . to burnout,"²⁸² and the lack of adequate background and training compromises probation officers' ability to wear their multiple hats effectively.²⁸³

As history shows, the repeated challenges of juvenile probation are not new; they existed almost as soon as probation existed. The efforts to evolve and reform the probation system also date back to probation's founding. In recent times, the various probation-focused reform efforts across California have often proposed: 1) more policies to ensure less reliance on incarceration and the justice system, including probation, 2) more humane, youth-appropriate treatment within the probation system; and 3) more evaluation and accountability measures to achieve more equity and positive outcomes.²⁸⁴

The work that Los Angeles is spearheading takes reform a step further as the county seeks to eliminate the flawed design of probation for youth and replace it with a newly designed "rehabilitative, health-focused, care-first

²⁷⁹ See, e.g., JACOBSON, SCHIRALDI, DALY & HOTEZ, *supra* note 235, at 4.

²⁸⁰ Hafoka, Woo, Hsieh, van Wormer, Stohr & Hemmens, *supra* note 18, at 34.

²⁸¹ See Schwalbe & Maschi, *supra* note 79, at 357.

²⁸² Hafoka, Woo, Hsieh, van Wormer, Stohr & Hemmens, *supra* note 18, at 34.

²⁸³ See Frances P. Reddington & Betsy Wright Kreisel, *Basic Fundamental Skills Training for Juvenile Probation Officers—Results of a Nationwide Survey of Curriculum Content*, 67 FED. PROB. 41, 41 (2003); NIETO, *supra* note 74, at 37.

²⁸⁴ See, e.g., TRANSFORMING JUVENILE PROBATION, *supra* note 9, at 20–21 (2018).

youth justice system.”²⁸⁵ The Board of Supervisor’s 2019 vote to explore phasing out juvenile probation, and its eventual decision in 2020 to move forward recommendations to do so reflect the willingness to go beyond incremental reforms that probation departments have tried for decades.²⁸⁶ Going forward, the county will implement “Youth Justice Reimagined,” a redesign of the youth justice system based on youth development principles including a central Department of Youth Development to vastly expand, resource, and strengthen community-based services and diversion pathways.²⁸⁷ This model seeks to establish small, secure, healing-focused, home-like alternatives to traditional incarceration, a robust youth development workforce, and collaborative decision-making that centers youth and their community at every point of justice decision-making, from arrest to reentry.²⁸⁸ The model reflects a combination of old and new—long repeated recommendations that require more political will and accountability to make happen and innovation adapted from elsewhere that the county is now ready to try and take to scale.²⁸⁹ These components of the Youth Justice Reimagined proposal rest on a body of evidence of what works to achieve youth well-being and public safety—including quantitative data and the lived experiences of youth, families, advocates, service providers, and government leaders who know the youth legal system intimately.²⁹⁰

Underlying the components of the Youth Justice Reimagined model is a set of core values.²⁹¹ Some core values describe how the justice system itself should work with other stakeholders, such as “centering community,” “power-sharing, coordination and collaboration,” and system “transparency and accountability.”²⁹² Other core values focus on the approach to working with youth: embracing “positive, strengths-based” youth development, focusing on youth and family well-being and the social determinants of health, repairing harm through transformative and restorative justice approaches, and using data and evidence to inform design.²⁹³ These core

²⁸⁵ L.A. CNTY. BD. OF SUPERVISORS, MOTION ON “YOUTH JUSTICE REIMAGINED: A NEW MODEL FOR YOUTH JUSTICE IN LOS ANGELES COUNTY” 4 (2020).

²⁸⁶ See W. HAYWOOD BURNS INST., *supra* note 2, at 5, 11; Robert Garrova, *LA County Supes: Let’s Overhaul the Youth Justice System*, LAIST (Nov. 24, 2020, 3:11 PM), https://laist.com/latest/post/20201124/la_supervisors_overhaul_youth_justice_system_juvenile [<https://perma.cc/DW7G-YVYV>].

²⁸⁷ See W. HAYWOOD BURNS INST., *supra* note 2, at 12–13.

²⁸⁸ See *id.*

²⁸⁹ See *id.* at 18–19.

²⁹⁰ See *id.* at 11.

²⁹¹ See *id.* at 36–38.

²⁹² *Id.*

²⁹³ *Id.*

values become the foundation for all other components of the model as well as the measuring stick by which to assess all implementation and outcomes.

But calling for a new system entirely raises new questions. Is the Youth Justice Reimagined proposal a radical one to abolish probation everywhere? Is it meant to return probation to its original intent to be a community-based diversion from the court system and whittle down or entirely strip away its law enforcement functions? Does it seek to better serve both social-worker and police functions, or separate the two? What roles are best served by a county agency relative to community-based, non-profit providers?

Whatever one might call this system—probation or something else—the goals and values at its core and the design components that flow from it are what matter. Labels can be misleading. A system called a health and social services system can be punitive and deficit-based just as a probation system could be holistic, strength-based, and youth development focused. Indeed, probation means vastly differently approaches in vastly different contexts. In South Africa, for instance, all probation officers are defined as and must be social workers to qualify to serve in the capacity.²⁹⁴ There, the probation system may very well be a strength-based youth and family-centered service delivery system.

In the United States too, probation, in theory, could return to what it was once intended to be—a community-based support that serves as an alternative to system processing and incarceration. But here, semantics matter because the course of history has so evolved, disfigured, and tainted the concept of probation in the United States that reformers are now trying to abolish much of community supervision, policing, and incarceration, and, in the meantime, limit and improve them. Probation is no longer synonymous with community-based supports, and perhaps it never was or was only briefly so. Now, the system must both transform and call itself something else. Inherent role conflicts and accumulated distrust among communities and government leaders alike challenge the notion that the probation system we know could deliver the youth development, diversion, and community-based services that communities want and need. To improve and transform the set of functions courts and legislatures have assigned to probation requires more than a new name for the same body of workers and entrenched thinking. The functions that probation aims to serve should be called something else in the United States, and it should embody the values that models like Youth Justice Reimagined articulate.

²⁹⁴ ANN SKELTON & BOYANE TSHEHLA, CHILD JUSTICE IN SOUTH AFRICA 35, 38 (2008), <https://www.files.ethz.ch/isn/103622/MONO150FULL.pdf> [<https://perma.cc/P7BD-ND4H>].

CONCLUSION

Questions about the approach and efficacy of the probation and juvenile justice systems are not new. In their ideal, both systems are rooted in the primary penological goals of rehabilitation and public safety. There has always been tension about their many functions. The nearly 120 years' worth of experimentation in creating and improving probation systems in California are instructive in considering more transformational models to achieve safety, accountability, and healing and support of youth, their families, and communities. History advises probation reform leaders to abandon the approaches that have routinely failed. The design of juvenile probation that embeds wide-ranging treatment and law enforcement aims and roles in a single agency, indeed sometimes a single individual, has long created role conflicts among juvenile probation officers who are further influenced by a number of individual, organizational, and contextual variables. Any redesign of a government agency to achieve youth development, community safety, and equity should seek to end over-criminalization of youth of color, shrink punishment systems, and reinvest those resources into community growth and development instead of containment and control.²⁹⁵

This Article focuses on youth justice and probation in California, but the lessons learned from these interacting systems apply to criminal justice at large. At its most conceptual level, the exploration of probation and juvenile justice is about systems designed to dually help and hold accountable wrongdoers. Whether the call is to dismantle probation, shrink the police force, or engage law enforcement in diversion of individuals to services instead of jail, reform must carefully balance, redefine, and reassign its rehabilitative and punitive authorities in order to effectively promote well-being, equity, accountability, and safety.

Conceived as an alternative to jail in the United States, probation inspired great hope that it would be a kinder, more rehabilitative path to individual betterment and crime reduction. Instead, it too often replicated the tools and orientations of policing and prisons. So long as policymakers, courts, and communities continue to believe and invest in actors and systems tied to criminal justice frameworks to support individual rehabilitation or healing—the ultimate key to community safety—such systems may be ineffective at best and reconstitute themselves into other forms of state surveillance, detention, and harm at their worst.

²⁹⁵ See W. HAYWOOD BURNS INST., *supra* note 2, at 36.