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## **Web of Incarceration: School-Based Probation**

Jyoti Nanda

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# WEB OF INCARCERATION: SCHOOL-BASED PROBATION

Jyoti Nanda\*

*Close to three quarters of a million cases flow through the United States' juvenile justice system annually. Juvenile probation is the most commonly utilized form of sentencing, yet juvenile probation has not been the focus of sustained research or analysis. This Article focuses on School-Based Probation, a type of juvenile probation program that was created to enroll youth before a criminal charge has been filed. Described by its proponents as a "voluntarily probation" program, pre-delinquent, or "at-risk," youth are identified by on-site school probation officers and enrolled in a supervised program. Deemed to be problematic by many jurisdictions, this Article critiques the School-Based Probation's flaws in structure, design, and execution, suggesting such programs fail to serve their ostensible purpose of promoting youth safety and balancing risk. By examining how this kind of program operates, this Article provides a glimpse into the larger scheme of juvenile probation practices. Moreover, the Article reveals just how wide the carceral web has been woven. Beyond mere policing of youth in school spaces, this School-Based Probation ensnarls innocent children into a web of incarceration. Although juvenile probation is frequently invoked as positive alternative to juvenile incarceration, the Author argues that juvenile probation should instead be analyzed as part of the continuum of excessive penal control in America.*

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## INTRODUCTION

As our country undergoes a fundamental rethinking of the efficacy of our criminal legal system, a critical examination of the carceral mechanisms attached to the youth criminal system must be examined. A central part of this is probation or the phenomenon scholar Michelle Phelps has aptly labeled “mass probation.”<sup>1</sup> Within the juvenile justice system, probation is the most widely used mechanism to divert juvenile offenders away from incarceration.<sup>2</sup> Thus, juvenile probation must be part of realizing any meaningful reform of the juve-

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<sup>1</sup> Michelle S. Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 PUNISHMENT & SOC’Y 53 (2017) (article develops the concept of mass probation and theorizes both the scale and type of punishment states deploy).

<sup>2</sup> In 2018 (latest statistics available), courts in the United States handled 744,500 delinquency cases. Of those, over half formally had charges filed against them and nearly half of those youth (49.96 percent) were ultimately put on probation. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT’L CTR. FOR JUV. JUST., JUVENILE COURT STATISTICS 2018, at 49, 52 (2020), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/juvenile-court-statistics-2018.pdf> [<https://perma.cc/E3UP-YU4Y>]; Adam D. Fine et al., *Juveniles’ Beliefs About and Perceptions of Probation Predict Technical Violations and Delinquency*, 25 PSYCH., PUB. POL’Y, & L., 116, 116 (2019) (“Supervised probation in the community is the most common service provided in the juvenile justice system.”). Despite overall juvenile incarceration numbers decreasing in the United States over the last 20 years, the numbers of youth on probation remains steady. ROBERT G. SCHWARTZ, YOUTH ON PROBATION: BRINGING A 20TH CENTURY SERVICE INTO A DEVELOPMENTALLY FRIENDLY 21ST CENTURY WORLD (2017), <https://stoneleighfoundation.org/wp-content/uploads/2018/02/Youth-on-Probation-Report.pdf> [<https://perma.cc/T5AE-FWWQ>] (“Even before the decline in incarceration, most youth in the juvenile justice system were on some form of probation. In 2013, an estimated 383,600 delinquency cases resulted in a term of probation—5% above the number of cases placed on probation in 1985.”).

nile justice system.<sup>3</sup> This Article highlights one often overlooked type of juvenile probation, school-based probation, where probation officers are housed in schools and oversee children and youth.<sup>4</sup> School-based probation is particularly worthy of examination since it functions as a net-wider by ensnaring youth into the juvenile justice system who may never otherwise enter the system.<sup>5</sup> Whereas most types of juvenile probation which were conceived as alternatives to juvenile prison, school-based probation ensnarls children who have not been charged with any crime by mischaracterizing it as “voluntary.” This form of probation exemplifies the state-sanctioned and far-reaching nature of the surveillance of our poorest youth—what scholars have dubbed, the “web” of incarceration.<sup>6</sup> A web analogy describes the myriad of formal and informal forms of state surveillance of Black and Latinx children and their families at schools and beyond, given they are more likely to be watched, have their actions documented, and be categorized as deviant.<sup>7</sup> And while punishment has been de-

<sup>3</sup> It is worth noting that the word “Probation” derives from the Latin verb “probare” which means to prove, to test. John Augustus coined the term in 1852. See *Probation and Parole: History, Goals, and Decision Making*, <https://law.jrank.org/pages/1817/Probation-Parole-History-Goals-Decision-Making-Origins-probation-parole.html> [<https://perma.cc/7BZN-JKCW>]. For a thoughtful analysis of the limits of the Juvenile Justice System, see NELL BERNSTEIN, *BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON* 7, 8, 17 (2014) (argues that state-run detention centers should be abolished completely given their failure to truly rehabilitate); BARRY C. FELD, *THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS AND THE CRIMINALIZING OF JUVENILE JUSTICE* 2–3 (2017) (suggesting that juvenile courts are necessary to protect children who commit crimes but they must be reformed into a developmentally appropriate justice system in light of neuroscience and developmental psychology research bolstering youths’ reduced culpability).

<sup>4</sup> When discussing children, rhetoric matters and the use of “child” and “youth” is deliberate. See Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 *UCLA L. REV.* 1502, 1505 n.3 (2012) (“The ways in which we refer to ‘children,’ ‘youth,’ ‘juvenile,’ ‘girl,’ or ‘boy’ [or they] affects our framework and understanding of the juvenile justice system. This Article uses the terms ‘girls’ and ‘youth’ to refer to children under the age of eighteen who interact with the juvenile justice system.”); see also Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 *HOFSTRA L. REV.* 547, 549 (2000) (“Since the establishment of the juvenile court in 1899, young offenders have been transformed in legal rhetoric from innocent children to hardened adult criminals.”).

<sup>5</sup> Here I apply the same concept discussed by Professor Fiona Doherty who examines adult probation and aptly argues that probation should not be viewed as a solution to overincarceration but rather as “part of the continuum of excessive penal control.” Fiona Doherty, *Obey All Laws and Be Good: Probation and Meaning of Recidivism*, 104 *GEO. L. J.* 291, 354 (2016).

<sup>6</sup> Nanda, *supra* note 4, at 292–99.

<sup>7</sup> Following the example of the Network for Justice and to “reject the gender binary that is inherent linguistically in both ‘Latino/as’ and its newest form Latin@s,” I use the term “Latinx” in this Article. Luz E. Herrera & Pilar Margarita Hernández Escontrías, *The Network for Justice: Pursuing a Latinx Civil Rights Agenda*, 21 *HARV. LATINX L. REV.* 165, 165 n.1 (2018). In doing so, however, I recognize the fraught history of the limits of the terms Latino/Latina, Latinx, and Hispanic. For a fuller account of this history, see LAURA E. GÓMEZ, *INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM* (2020) (providing historical and contemporary insight into the complexity of the Latinx identity and how race oper-

scribed to be a shared commitment of schools and youth prisons, this Article expands the responsibility of widening the criminal net to juvenile probation.<sup>8</sup>

A primary purpose of the juvenile court is to divert children away from being processed through the (adult) criminal legal system.<sup>9</sup> One unique feature of the juvenile court is often under-scrutinized—the duty and ability of probation officers to divert youth away from being processed by the juvenile delinquency system at the youth’s first touch with the system or at intake.<sup>10</sup> Dubbed the “workhorse of the juvenile justice system,” nearly all of the children in juvenile courts had contact with a probation officer.<sup>11</sup> Probation may be used on the

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ates in the United States today); see also HOW THE UNITED STATES RACIALIZES LATINOS: WHITE HEGEMONY AND ITS CONSEQUENCES 9 (José A. Cobas et al., eds., 2009) (“Racialization often entails minimizing historical, cultural, and linguistic differences among peoples from the same region—including, for example, those in various Latin American countries. Such labels as ‘Hispanic’ typically collapse diverse peoples into a single overarching group . . .”).

<sup>8</sup> See BETH E. RITCHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* 3, 4, 21, 22 (2012) (providing a theoretical framework for understanding the social and political context of the human stories caught in the web of incarceration); LIZBET SIMMONS, *THE PRISON SCHOOL: EDUCATIONAL INEQUALITY AND SCHOOL DISCIPLINE IN THE AGE OF MASS INCARCERATION* 3 (2007) (examining the link between school failure and mass imprisonment and the grave impact of this intertwining in urban schools and African American male students, in particular); SUBINI ANCY ANNAMMA, *THE PEDAGOGY OF PATHOLOGIZATION: DIS/ABLED GIRLS OF COLOR IN THE SCHOOL-PRISON NEXUS* 12–13 (2018) (identifying the systemic processes that impact young, dis/abled girls or color in juvenile detention centers; this includes the “pedagogy of pathologizing” namely hyper-surveillance, hyper-labeling and hyper-punishment).

<sup>9</sup> See Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CALIF. L. REV. 2477, 2479 (2000) (“This promotion of juvenile court as a diversion from criminal justice is distinct from more ambitious programs of ‘child saving’ intervention because avoiding harm can be achieved even if no effective crime prevention treatments are available.”).

<sup>10</sup> Joseph Tulman has argued that at this intake stage, the vast majority of youth, especially those identified with unique learning needs, should be diverted and makes a thoughtful case. See Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y. L. SCH. L. REV. 875, 877–78, 898, 902, 907 (2009–10); see also Charles Lindner, *Probation Intake: Gatekeeper to the Family Court*, 72 FED. PROBATION 48 (2008). Judge Julien W. Mack stated that:

It is the last thing to do with the wayward child to bring him into any court. The wise probation officer will save him from the court . . . Of course in the end some will have to be brought into court. That court is successful in its work that has the least number of cases.

*Id.* at 49 (internal citation omitted). Judge W. Waalkes wrote that:

Intake is a permissive tool of potentially great value to the juvenile court. It is unique because it permits the court to screen its own cases . . . It can cull out cases which should not be dignified with further court process. It can save the court from subsequent time consuming procedures to dismiss a case . . . It provides machinery for referral of cases to other agencies when appropriate and beneficial to the child.

*Id.* (internal citation omitted).

<sup>11</sup> Patricia McFall Torbet, *Juvenile Probation: The Workhorse of the Juvenile Justice System*, OJJDP JUV. JUST. BULL. (U.S. Dep’t of Just.), Mar. 1996, <https://www.ncjrs.gov/pdffile/s/workhors.pdf> [https://perma.cc/2WSD-EH4E].

“front end” for first time or for low-risk offenders or at the back-end as an alternative to out-of-home confinement for youth who the court has deemed to have committed serious offenses.<sup>12</sup>

Juvenile probation is the most commonly used disposition (or sentence) in juvenile court.<sup>13</sup> As in the adult criminal justice system, juvenile probation is used as an alternative to incarceration.<sup>14</sup> Rather than sending the youth to juvenile custodial setting, such as a juvenile detention center, youths on probation must comply with a set of terms and conditions imposed by the court.<sup>15</sup> Juvenile probation, like adult probation, was originally designed for rehabilitative purposes. Its origin attributed 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.<sup>16</sup> While adult probation began in the mid 1800s, the origins of juvenile

<sup>12</sup> It is worth noting that the risk assessment utilized by probation are also ripe for criticism as racialized and discriminatory due to ableist norms for students of color and/or students with disabilities. See Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. (forthcoming 2021) (manuscript at 32) (“Ableist norms are another type of discriminator norm enforced through policing disorderly conduct); see also OFF. OF JUV. JUST. & DELINQ., PREVENTION, LITERATURE REVIEW: FORMAL, POST-ADJUDICATION JUVENILE PROBATION SERVICES (2017), [https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/probation\\_services.pdf](https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/probation_services.pdf) [<https://perma.cc/VH9C-J42T>].

<sup>13</sup> Of the 422,100 petitioned juvenile court cases in 2018, 63 percent of the adjudicated (trial) cases ended up on probation, 36 percent of non-adjudicated, and 15 percent of the cases never formally filed. Probation remains the singular category of cases where most juveniles who enter the juvenile court system end up. HOCKENBERRY & PUZZANCHERA, *supra* note 2, at 52. Also, “36 [percent] of delinquency cases adjudicated and ordered to probation involve [B]lack youth, but youth who are [B]lack male make up only 15 [percent] of the youth population” illustrating the disproportionate number of youths of color on probation and in the juvenile justice system. *Vision*, GOOD JUV. PROB. PRAC., <https://www.goodjuvenileprobationpractice.org/vision> [<https://perma.cc/8TNB-YEP3>].

<sup>14</sup> Doherty, *supra* note 5, at 354 (examining the standard conditions of probation in the sixteen jurisdictions that use probation most expansively). At the origins of juvenile court, it was made clear that both court and probation was to be separate for juveniles. See Laura S. Abrams, *Guardians of Virtue: The Social Reformers and the “Girl Problem,” 1890-1920*, 74 SOC. SERV. REV. 436, 440 (2000) (“Social reformers, in tandem with the child savers, regarded the juvenile court as an important and benevolent institution for vulnerable youth, and they played an active role in promoting separate court and probation systems for delinquents.”); see also Laura S. Abrams, *Juvenile Justice at a Crossroads: Science, Evidence, and Twenty-First Century Reform*, 87 SOC. SERV. REV. 725, 727 (2013).

<sup>15</sup> Megan Kurlychek et al., *Focus on Accountability: Best Practices for Juvenile Court and Probation*, JAIBG BULL. (U.S. Dep’t of Just.), Aug. 1999, at 7–8, <https://www.ojp.gov/pdffiles1/177611.pdf> [<https://perma.cc/66JA-JLN7>].

<sup>16</sup> Charles L. Chute, *John Augustus—Pioneer of Probation*, 5 FED. PROB. 36, 36 (1941). The origin of adult probation is credited to a shoemaker-turned philanthropist in Boston named John Augustus who began the practice of bailing out hundreds of offenders from court and assuming responsibility for them in the community between 1841–1859. *Id.* at 37. As a result, Augustus bailed out prisoner, helped them obtain jobs and aided their family in other ways, they agreed to his terms. *Id.* at 38. He published his work in 1852 and shortly after, in 1878, Massachusetts legislature passed a bill to hire a probation officer. *Id.* Between 1897

probation can be traced to the birth of the Juvenile Court in Chicago in 1891 and was deemed to be an essential part of juvenile court, more so than in adult proceedings.

The single most important component of the juvenile court program was probation. Indeed, it assumed a significance to these proceedings that was still greater than in adult criminal justice. . . . In the more elaborate phrases of Judge Tuthill, it was “the cord upon which all the pearls of the juvenile court are strung . . . . Without it, the juvenile court could not exist.”<sup>17</sup>

The two tasks for probation were to first, provide the juvenile court with the relevant information to understand the child’s personality and conditions; and two, to supervise the young person in the community—in lieu of detention.<sup>18</sup> And while it is perceived to be the more humane option than detention—which has been proved to be dangerous and damaging to the development of youth—it has its share of contradictions worth highlighting briefly.<sup>19</sup>

Juvenile probation is now widely perceived to have multiple tensions in its purpose and effect.<sup>20</sup> First, juvenile probation is inherently at odds in its purpose to both “help,” and “to surveille.”<sup>21</sup> This combined purpose is perhaps at

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and 1920, 26 states and the District of Columbia passed adult probation statutes. *Probation and Parole: History, Goals, and Decision Making*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/law/legal-and-political-magazines/probation-and-parole-history-goals-and-decision-making> [<https://perma.cc/F92Y-JA4M>]. By 1927, all states except Wyoming had adopted some type of probation for juveniles. *Id.* Augustus was clear in his desire to help rehabilitate but also made it clear to help those who were first time offenders: “It became pretty generally known that my labors were upon the ground of reform, that I confined my efforts mainly to those who were indicted for their first offense, and whose hearts were not wholly depraved, but gave promise of better things . . . .” *Id.* See generally Clark M. Peters, *Social Work and Juvenile Probation: Historical Tensions and Contemporary Convergences*, 56 SOC. WORK 355 (2011) (outlining the steps in professional education and workforce development that would move the profession toward reintegrating social work into the corrections field).

<sup>17</sup> DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 218 (Routledge Press rev. ed. 2017).

<sup>18</sup> *Id.* at 218–19.

<sup>19</sup> See BARRY HOLMAN & JASON ZIEDENBERG, JUST. POL’Y INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2–3 (2006), [http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf) [<https://perma.cc/T4ZH-PSX9>]; see also BERNSTEIN, *supra* note 3, at 12 (arguing that state-run detention centers should be abolished completely given their failure to truly rehabilitate).

<sup>20</sup> See Jill Viglione et al., *The Many Hats of Juvenile Probation Officers: A Latent Class Analysis of Work-Related Activities*, 43 CRIM. JUST. REV. 252–53 (2018) (examines role of juvenile probation officers as “a balancing act between ‘child saving’ and community safety activities.”).

<sup>21</sup> See *How Can Juvenile Probation Help At-Risk Youth?*, MST SERV. (Sept. 18, 2018), <https://info.mstservices.com/blog/juvenile-probation-at-risk-youth> [<https://perma.cc/44KR-FVC3>]. The federal government regulatory body of juvenile justice defines the two primary purposes of juvenile probation to be that first, it holds youths who have offended accountable in order to protect public safety; and two, and it supports their rehabilitation through ser-

the core of its dysfunction: how does a probation officer both nurture and service the unmet needs of a young person while also serving to reprimand them?<sup>22</sup> It has been reported that “[i]n order to complete all the duties, a juvenile probation officer takes on several roles, including police officer, counselor, family therapist and mentor.”<sup>23</sup> This critique is also not much different than the critiques levied against juvenile courts as they attempt in their role to serve as a “parent” of a delinquent youth while also serving as an arbitrator and part of a broader conversation.<sup>24</sup> Second, the effect of juvenile probation has often been counterproductive.<sup>25</sup> Instead of its stated purpose to serve as an alternative to incarceration, it functions as a “net widener,”<sup>26</sup> particularly for Black, Indigenous and People of Color (BIPOC)<sup>27</sup> youth, bringing them into the criminal jus-

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vice delivery and with an alternative to incarceration. OFF. OF JUV. JUST. & DELINQ., *supra* note 12, at 1; *see also* LAURA S. ABRAMS & DIANE J. TERRY, *EVERYDAY DESISTANCE: THE TRANSITION TO ADULTHOOD AMONG FORMERLY INCARCERATED YOUTH* 1 (2017); Torbet, *supra* note 11, at 5; *Juveniles on Probation: Overview*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <https://www.ojdp.gov/ojstatbb/probation/overview.html> [<https://perma.cc/JX86-X989>]; MARK W. LIPSEY ET AL., *CTR. FOR JUV. JUST. REFORM, IMPROVING THE EFFECTIVENESS OF JUVENILE JUSTICE PROGRAMS: A NEW PERSPECTIVE ON EVIDENCE-BASED PRACTICE* 11, 24 (2010), <https://cjjr.georgetown.edu/wp-content/uploads/2014/12/ebppaper.pdf> [<https://perma.cc/2LQV-XCFH>].

<sup>22</sup> The author explores this issue more fully in a forthcoming article surveying probation in multiple states.

<sup>23</sup> Benjamin Steiner et al., *Where Is Juvenile Probation Today? The Legally Prescribed Functions of Juvenile Probation Officers*, 16 *CRIM. JUST. STUD.* 267, 270 (2003).

<sup>24</sup> Parents whose children are involved with the courts must cede some of their authority and direct control of their children to the state in order for the juvenile justice system to act as the functional equivalent of the parent under the *parens patriae* doctrine. The term *parens patriae* established the state’s responsibility for dependent children and affirmed its ability to take children away from their natural parents if the circumstances demanded it. Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820-1935*, in *A CENTURY OF JUVENILE JUSTICE* 3, 8 (Margaret K. Rosenheim et al. eds., 2002); *see also* Laurie Schaffner, *Families on Probation: Court-Ordered Parenting Skills Classes for Parents of Juvenile Offenders*, 43 *CRIME & DELINQ.* 412, 420 (1997).

<sup>25</sup> A growing body of evidence finds that juvenile probation in its current form is not always productive, without interventions that promote personal growth, positive behavior change, and long-term success. *See* ANNIE E. CASEY FOUND., *TRANSFORMING JUVENILE PROBATION: A VISION FOR GETTING IT RIGHT* 6, 9 (2018), <https://www.aecf.org/resources/transforming-juvenile-probation/> [<https://perma.cc/XAM9-EPN8>].

<sup>26</sup> VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* 45 (2011) (stating the cumulative effect of aggressive policing in communities coupled with sanctions results in young people in certain poor communities ending up in the system in disproportionate percentages); *see also* KIMBERLÉ WILLIAMS CRENSHAW ET AL., *BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED, AND UNDERPROTECTED* 7 (2015) (describing how various women and girls are “channeled onto pathways that lead to underachievement and criminalization”; finding that girls of color are disproportionately impacted by school discipline policies and excluded from efforts to address the “school-to-prison pipeline”).

<sup>27</sup> The author seeks to use this term to acknowledge that not all people of color face the same level of injustice. For an interesting discussion of this, *see* Sandra E. Garcia, *Where Did BIPOC Come From?*, *N.Y. TIMES* (June 17, 2020), <https://www.nytimes.com/article/wh>



tice system where they may remain indefinitely. School-based probation<sup>28</sup> is one form of juvenile probation that was created to reduce truancy,<sup>29</sup> but has morphed into punishment and a form of family regulation that governs and expands the number of youths who intersect with the juvenile justice system.<sup>30</sup> In this context, “family regulation” refers to the regulation and punishment of children and their families when they are put on juvenile probation. The term is borrowed from scholar Dorothy Roberts’s use of the phrase to characterize the over-regulatory scheme of our child welfare system and the need to be critical of alternatives to policing that still regulate the family.<sup>31</sup>

Through an intersectional lens, this Article remains narrowly focused on school-based probation.<sup>32</sup> By engaging with the facts of a litigated case, it is re-

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at-is-bipoc.html [https://perma.cc/W65D-55AF].

<sup>28</sup> SAFE AND RESPONSIVE SCHOOLS PROJECT, SCHOOL-BASED PROBATION OFFICERS (2003), <https://k12engagement.unl.edu/School-based%20Probation%20Officers%20Word%2011-24-03.pdf> [https://perma.cc/LL2V-N553].

<sup>29</sup> Leanne F. Alarid et al., *School-Based Juvenile Probation and Police Partnerships for Truancy Reduction*, 5 J. KNOWLEDGE & BEST PRACS. JUV. JUST. & PSYCH. 13, 14 (2011), <http://www.pvamu.edu/cojpp/wp-content/uploads/sites/31/jjj-2011-1.pdf#page=15> [https://perma.cc/2FTQ-W228]. The truancy reduction program of study did not actively pursue the root causes or broader school environment issues related to truancy. *Id.* at 13, 15. There were judicial concerns about the potential stigma that too much intervention during the school day might have for juveniles, by “drawing unnecessary attention to their probationary status.” *Id.* at 16–17. Probation officers in this study also had a more narrowly defined role that was limited to interacting solely with youth on probation. *Id.* at 17. This is quite different than other programs where the school-based probation officer had significantly more authority to file formal charges on any youth who committed an offense on school grounds, admit youths to detention, and mandate community service and drug testing that may result in adjusted charges. Ronald J. Seyko, *Balanced Approach and Restorative Justice Efforts in Allegheny County, Pennsylvania*, 81 PRISON J. 187, 197 (2001). The trend nationwide has been to expand the juvenile probation officer’s role to allow each local jurisdiction to choose whether to have the probation officer to have peacekeeping responsibilities and to be involved in charging decisions. This expanded role has the potential for juvenile probation officers to lose their historic caseworker function and be viewed by youth as just another police officer, so experts recommend a more limited role for school-based probation officers. *Id.*

<sup>30</sup> Due to the limited scope of this Article, it will not directly excavate the origins of the WIC code that sanctioned school-based probation. Much of that work has already been done and reveals our legislators’ misunderstanding that there are some youth that are “predisposed” to be part of the juvenile justice system. See Patricia Soung et al., *WIC 236: “Pre-Probation” Supervision of Youth of Color With No Prior Court or Probation Involvement* (2017), <https://witnessla.com/wp-content/uploads/2017/05/wic-236.pdf> [https://perma.cc/2WY4-P42L].

<sup>31</sup> See Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [https://perma.cc/ZZL8-VCDF].

<sup>32</sup> This Article is grounded in an intersectionality lens, a concept describing the social, economic and political ways in which identity-based systems of oppressions connect, overlap and influence each other. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243–44 (1991) (“[T]he experiences of women of color are frequency the product of intersecting pat-

vealed how this form of probation operates in schools with poor, BIPOC, and other marginalized students. The end result is a system that further widens the net of juvenile incarceration, under the guise of rehabilitation, and reveals two truths: (1) the failure of school based probation as a true alternative to incarceration, and (2) discretionary gaps in the application of juvenile laws and policies and the deployment of these programs in schools with underinvestment and high numbers of students of color, will likely result in disproportionate numbers of youth of color on school based probation.<sup>33</sup>

Three critical points require us to pay attention to juvenile probation as punishment. First, juvenile probation was created prior to our contemporary understanding of adolescent brain development<sup>34</sup> and, thus, probation's core terms often lack a developmentally appropriate framework for effective compliance.<sup>35</sup> In fact, a significant number of juvenile probation violations are technical.<sup>36</sup> In turn, young people and their families view probation as punish-

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terms of racism and sexism, and . . . tend not to be represented within the discourses of either feminism or antiracism.” (footnote omitted)). The author takes on the larger questions of the efficacy of juvenile probation as a means of rehabilitation in a forthcoming project titled *Defend Juvenile Probation*.

<sup>33</sup> There is no available national data for school-based probation enrollment, but we do know from what we can find that the programs are utilized in schools that are deemed majority/minority. See also JEFF ARMOUR & SARAH HAMMOND, NAT'L CONF. OF STATE LEGISLATURES, MINORITY YOUTH IN THE JUVENILE JUSTICE SYSTEM: DISPROPORTIONATE MINORITY CONTACT (2009), <https://www.ncsl.org/print/cj/minoritiesinjj.pdf> [<https://perma.cc/VPT6-7KL5>].

<sup>34</sup> See Naomi E.S. Goldstein et al., “You’re on the Right Track!”: Using Graduated Response Systems to Address Immaturity of Judgment and Enhance Youths’ Capacities to Successfully Complete Probation, 88 TEMP. L. REV. 803 (2016).

<sup>35</sup> See THE PEW CHARITABLE TRUSTS, POLICY REFORMS CAN STRENGTHEN COMMUNITY SUPERVISION: A FRAMEWORK TO IMPROVE PROBATION AND PAROLE 4–5, 18 (2020), <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/04/policy-reforms-can-strengthen-community-supervision> [<https://perma.cc/R26Y-LZU3>].

<sup>36</sup> “[A] recent study of youth on probation in Philadelphia, PA found that just over 50% of all youth failed to comply with the terms of their probation; 48% of the youth who technically violated subsequently had their probation revoked and were committed or detained to a facility.” Erika N. Fountain & Dillon Mahmoudi, *Mapping Juvenile Justice: Identifying Existing Structural Barriers to Accessing Probation Services*, 67 AM. J. CMTY. PSYCH. 116–17 (2020). National census data reveals that from 2013–2017, between 19–24 percent of detained youth were detained because of technical violations. *Easy Access to the Census of Juveniles in Residential Placement* (2019), <https://www.ojjdp.gov/ojstatbb/ezacjrp/> [<https://perma.cc/F29D-FRW7>]. Its critical to note that this may be the youth’s first experience in confinement. In Baltimore, Maryland, 20 percent of all first-time commitments resulted from technical violations. DATA RESOURCE GUIDE: FISCAL YEAR 2018, MD. DEP’T JUV. SERV. (2018), <https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/024500/024504/20200297e.pdf> [<https://perma.cc/N5RJ-ZEYS>]. Technical violations are akin to non-crimes that this author suggests seems to have replaced the Black Codes of slavery. For more on this history, see Bryan Stevenson, *Why American Prisons Owe Their Cruelty to Slavery*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html> [<https://perma.cc/5PV4-9QJP>]; see also JAMES BELL, W. HAYWOOD BURNS INST. FOR YOUTH JUST. FAIRNESS & EQUITY, REPAIRING THE

ment.<sup>37</sup> Second, probation officers do not sufficiently empower families because, despite rhetoric, probation officers do not trust the families with which they engage and see those, most often poor, families as part of the problem—a form of racial shaming and subjugation that feels like punishment.<sup>38</sup> And, third, studies have shown that what influences probation officers' decision making is their own personal convictions to treatment and punishment orientations; revealing that wide personal discretion of juvenile probation officers built into the system will likely have a negative impact on marginalized communities without detailed guidance or reframing.<sup>39</sup>

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BREACH: A BRIEF HISTORY OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 6 (2015), [https://burnsinstitute.org/wp-content/uploads/2020/09/Repairing-the-Breach-BI\\_compressed.pdf](https://burnsinstitute.org/wp-content/uploads/2020/09/Repairing-the-Breach-BI_compressed.pdf) [<https://perma.cc/E4L6-WX86>].

<sup>37</sup> See RIVERSIDE COUNTY PROBATION DEPARTMENT, YOUTH ACCOUNTABILITY TEAM – INFORMAL PROBATION CONTRACT (2020); see also Fine, *supra* note 2 (Study suggests that youths' perceptions of probation matter in the probation process; when they felt the role probation should play aligned with their actual experiences, they committed fewer technical violations and less delinquency); Joseph Hong, *Black and Latino youths more likely to end up in county crime-prevention program. Experts say it works*, DESERT SUN (May 24, 2019), <https://www.desertsun.com/story/news/education/2019/05/24/black-latino-youths-more-likely-end-up-county-crime-prevention-program/1205605001/> [<https://perma.cc/39FD-JPBW>].

<sup>38</sup> See C.J. Ciaramella, *Florida's Schools Have Become a High-Stakes Experiment in Classroom Policing*, REASON (June 8, 2020), <https://reason.com/2020/06/08/floridas-school-resource-officers-police-reform-protests/> [<https://perma.cc/L97F-RT45>]; MEGAN FRENCH-MARCELIN & SARAH HINGER, AM. CIV. LIBERTIES UNION, BULLIES IN BLUE: THE ORIGINS AND CONSEQUENCES OF SCHOOL POLICING 20, 22 (2017), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_bullies\\_in\\_blue\\_4\\_11\\_17\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_bullies_in_blue_4_11_17_final.pdf) [<https://perma.cc/E7RP-GVCX>]; NAT'L RSCH. COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 228–60 (2001).

<sup>39</sup> 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, 35–36, 45 (2010) (stating data from surveys of juvenile probation officers in four states revealed that the most influential predictor of whether probation officers adhered to a treatment versus punishment model of probation was their own personal convictions on crime and treatment). It is worth noting that, while risk assessment tools are the primary tool used by probation officers to set probation guidelines that arguably serve to further regulate the family, this Article is not an examination of the validity of risk assessment tools, nor does it call for a full-scale rejection of a “probation” function, given a real world where juvenile court judges facing a child who has committed what the state deemed a serious or violent crime. In these scenarios, probation can be a valuable alternative to a detention cell or locked facility. What this Article does is critique the probation system—not individual actors in the system—and looks to what is possible. *Id.* at 56, 62–63; see also Jodi L. Viljoen et al., *Impact of Risk Assessment Instruments on Rates of Pretrial Detention, Postconviction Placements, and Release: A Systematic Review and Meta-Analysis*, 43 L. & HUM. BEHAV. 397, 397–99 (2019); ANNIE E. CASEY FOUND., JUVENILE DETENTION ALTERNATIVES INITIATIVE: INSIGHTS FROM THE ANNUAL RESULTS REPORTS 6 (2017); James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 FED. SENT'G REP. 194, 194 (2004); LAURA S. GUY ET AL., ADVANCING USE OF RISK ASSESSMENT IN JUVENILE PROBATION 20, 101 (2011); Martin Hildebrand et al., *Predicting Probation Supervision Violations*, 19 PSYCH., PUB. POL'Y, & L. 114, 114 (2013); Contra Rachael T. Perrault et al., *Are Risk Assessments Racially Biased?: Field Study of the SAVRY and YLS/CMI in Probation*, 29 PSYCH. ASSESSMENT 664, 670 (2017); Darrell Steffensmeier

This Article proceeds in three parts. First, it maps out the legal terrain of school policy via the documented facts of a California school-based probation program and examines how it fits into the larger probation system for juveniles. It also discusses a high-profile recent case during the COVID-19 pandemic that reveals the flaws of juvenile probation writ-large. It then reveals how school-based probation blurs the lines between punishment and rehabilitation given the criminalization and hyper-surveillance that occurs in poor schools and communities, resulting in students of color more negatively impacted. The Article concludes with a call for a rethinking of school-based probation and juvenile probation writ-large by describing a recent bill signed by the California Governor to decriminalize truancy and end the practice of school-based probation. It then briefly looks ahead to what is possible for true probation reform.

This Article is part of a larger research agenda to question the utility of the ways in which American society punishes poor and BIPOC youth at various sites of punishment (e.g., schools and courts). The central argument being that these punishment sites lack the nuance and individualization demanded to truly rehabilitate because they fail to address the intersectional identities of the youth they target. This Article is also part of an inquiry into the viability of expanding the punishment site to include probation. An earlier piece critiqued the unfettered discretion afforded to juvenile court judges that allows for racial and gendered bias to impact their decisions regarding system-impacted girls.<sup>40</sup> And a more recent work dove deeper into the web of criminalization that occurs at the school site. That piece examines how, for BIPOC students, given the imprecise and fraught legal categories, disability can be weaponized as a mechanism through which they are criminalized.<sup>41</sup> Here, the project's lens shifts to an examination of a specific aspect of juvenile punishment—juvenile probation—and how it serves as a net-widener and punishment for youth, rather than meeting its intended goal of rehabilitation.<sup>42</sup> A forthcoming article examines juvenile probation writ large.

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et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 *CRIMINOLOGY* 763, 775 (1998); Gina M. Vincent et al., *Risk Assessment Matters, But Only When Implemented Well: A Multisite Study in Juvenile Probation*, 40 *LAW & HUM. BEHAV.* 683, 684, 692, 694 (2016).

<sup>40</sup> See Nanda, *supra* note 4, at 1518–21. For the reaction of bias that occurs in the school sites that may lead to criminal involvement, see CRENSHAW ET AL., *supra* note 26, at 1 (2015).

<sup>41</sup> See Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 *COLUM. J. RACE & L.* 265, 270–71 (2019).

<sup>42</sup> See *supra* note 32. As mentioned, a forthcoming article by the author will document the discretion afforded to probation officers that allows for a lopsided use of probation to punish youth and not rehabilitate them.

I. THE LEGAL TERRAIN OF SCHOOL POLICY: SCHOOL BASED PROBATION AS A WINDOW INTO PROBATION'S PUNITIVE-HEAVY MANDATE PERPETUATING PATERNALISM AND RACIAL DISPARITIES

A unique and powerful feature of the juvenile court is the duty and ability of intake probation officers to use their discretion to divert youth away from being processed by the juvenile court system.<sup>43</sup> The majority of youth who participate in probation enter the system via two points: (1) probation at intake or when they are first referred to the justice system,<sup>44</sup> and (2) formal probation following adjudication or after the court determines the youth has committed a status offense or delinquent behavior.<sup>45</sup> School probation, however, fits into neither of these categories; instead, it has a separate role—one guised as preventative.

School-based probation is a supervision model where juvenile probation officers work on-site, at a school, rather than within a traditional courthouse.<sup>46</sup> The concept of probation officers, as self-designated “eyes and ears”<sup>47</sup> for the court, housed within the school setting, brings together multiple strains of law—criminal, juvenile, and education. The original intention of school-based probation programs is documented from 1995 in Pennsylvania and was “to assist the school district[s] in handling increasing incidents of acting-out behavior exhibited by juvenile probation clients returned to the public schools.”<sup>48</sup>

However, being embedded in schools affords school-based probation officers near unlimited and unchecked purview over children while also being shielded behind a stated intention of encouraging positive behavior. And while debates about the utility of school-based police flourish, less attention is paid to

<sup>43</sup> Tulman & Weck, *supra* note 10, at 897.

<sup>44</sup> Generally, at the “intake” stage, an intake department within or outside the court will screen juvenile court case referrals. If the case is not formally petitioned for a hearing, it could be (1) dismissed or (2) resolved informally with informal probation—which means youth reports to the court directly and not a probation officer. OFF. OF JUV. JUST. & DELINQ. PREVENTION, *supra* note 12, at 1 (citing OJJDP Statistical Briefing Book 2015).

<sup>45</sup> After a juvenile is adjudicated as having committed a status offense or delinquent behavior, the disposition outcome may include (1) formal probation; (2) out-of-home placement (for example, a group home or a foster home); or (3) a referral to a mental health program, imposition of a fine, community service, or restitution. This disposition of probation at this point may also be information and voluntary or formally and court-ordered. *Id.*

<sup>46</sup> *Exemplary Programs*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/jaibgbulletin/exemp.html#5> [<https://perma.cc/7WCM-TDA8>].

<sup>47</sup> Jennifer Gastelum, *9 Myths About Probation Officers*, CORR. ONE (July 9, 2020), <https://www.correctionsone.com/probation-and-parole/articles/9-myths-about-probation-officers-tGJZ17Iib80xzsJe/> [<https://perma.cc/3AS2-NR8P>].

<sup>48</sup> Megan Clouser, *School-Based Juvenile Probation*, 2 PA. PROGRESS 1, 1 (1995), [http://ncjj.org/pdf/PA\\_Progress/1995/paprogress\\_march1995\\_schbprob.pdf](http://ncjj.org/pdf/PA_Progress/1995/paprogress_march1995_schbprob.pdf) [<https://perma.cc/B4NX-TK59>].

the usefulness of school probation officers who play a similar function.<sup>49</sup> School probation officers are housed within schools to provide more direct and immediate supervision of students.<sup>50</sup> Usually, a school-based probation officer (SBPO) is a sworn law enforcement officer assigned to work within school to ensure students on probation meet all probation goals.<sup>51</sup> The probation officer has frequent contact with the youth with hope to develop a positive relationship. Preliminary studies from 1995 and 1999 showed that school-based probation had “a favorable impact on school attendance and day-to-day school conduct of probationers” impacting drop-out rates, absenteeism, detentions, and suspension.<sup>52</sup> In Pennsylvania, in 1997, a study had similar results: “[School Based Probation] is a cost effective strategy for the supervision of juvenile probation cases.”<sup>53</sup>

Nearly twenty-five years later, there is no national count of how many current school-based probation programs exist.<sup>54</sup> In California, one such program

<sup>49</sup> See generally Phillip Matthew Stinson, Sr. & Adam M. Watkins, *The Nature of Crime by School Resource Officers: Implications for SRO Programs*, 1 SAGE OPEN 1 (2014); Kerrin C. Wolf, *Assessing Students’ Civil Rights Claims Against School Resource Officers*, 38 PACE L. REV. 215 (2018); Valerie H. Hunt et al., *An Examination of the Characteristics and Perceptions of School Resource Officers in Rural and Urban Oklahoma Schools*, 34 J. RURAL SOC. SCI. 1, 2–4 (2019); Denisa R. Superville, *The Police in Schools Debate Needs More Nuance, Ed Groups Say*, EDUC. WK. (Aug. 17, 2020), <https://www.edweek.org/education/the-police-in-schools-debate-needs-more-nuance-ed-groups-say/2020/08> [<https://perma.cc/XKM2-Q463>]; Dana Goldstein, *Do Police Officers Make Schools Safer or More Dangerous?*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/us/schools-police-resource-officers.html> [<https://perma.cc/5B6W-TWR9>]; PETER FINN ET AL., CASE STUDIES OF 19 SCHOOL RESOURCE OFFICER (SRO) PROGRAMS (2005), <https://www.ojp.gov/pdffiles1/nij/grants/209271.pdf> [<https://perma.cc/RAN7-EZRK>]; BENJAMIN THOMAS ET AL., SCHOOL RESOURCE OFFICERS: STEPS TO EFFECTIVE SCHOOL-BASED LAW ENFORCEMENT (2013), [http://www.dhs.state.il.us/OneNetLibrary/27896/documents/By\\_Division/MentalHealth/Child%20and%20Adolescents/SchoolBasedMH/ResourceOfficer/SRO-Brief.pdf](http://www.dhs.state.il.us/OneNetLibrary/27896/documents/By_Division/MentalHealth/Child%20and%20Adolescents/SchoolBasedMH/ResourceOfficer/SRO-Brief.pdf) [<https://perma.cc/M4U9-RSDM>]. See also Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 919–20 (2016) (empirical analysis revealing police officers’ regular presence at school is predictive of greater odds that students will be referred to law enforcement for low-level, non-criminal offenses, resulting in harmful short-term and long-term consequences for students of color).

<sup>50</sup> Reece L. Peterson, *School-Based Probation Officers*, SAFE AND RESPONSIVE SCHOOLS PROJECT (Jan. 2002), <https://k12engagement.unl.edu/School-based%20Probation%20Officers%20Word%2011-24-03.pdf> [<https://perma.cc/K5UT-X48R>].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (citing M. Clouser, *School-Based Juvenile Probation*, 2 PA PROGRESS (1995); Patrick Griffin, *Juvenile Probation in the Schools*, NCJJ IN-FOCUS, Winter 1999, at 1–11 (1999)).

<sup>53</sup> DAVID S. METZGER & DANIELLE TOBIN-FIORE, CTR. FOR STUD. OF ADDICTION, SCHOOL-BASED PROBATION IN PENNSYLVANIA 2 (1997), <https://www.ncjrs.gov/pdffiles1/Photocopy/214570NCJRS.pdf> [<https://perma.cc/E7KM-97GK>].

<sup>54</sup> Per the National Center for Juvenile Justice (NCJJ), there is no one source to determine how many are using school-based probation programs as it’s a state-by-state decision (per a conversation with the NCJJ, notes on file with author). The only available data is that in Pennsylvania, there are 17 such programs. *Id.*

reveals the far reach of when, under the guise of “juvenile probation,” punishment overrides treatment. For nearly eleven years, in Riverside County, just west of Los Angeles, the Riverside County Probation Department partnered with more than 20 local districts to refer students into a school-based probation program for a six-month, strict program because of their “family conflict, mental health, school adjustment, or gang involvement.”<sup>55</sup> Emboldened by a California statute,<sup>56</sup> this policy allowed probation officers to enroll students, mostly ages 12–17, in a probation program which required them to sign a contract waiving their procedural rights and allowing their every move to be monitored, despite the fact that they had committed no criminal offense.<sup>57</sup>

Until 2018, enforcement of this policy was determined by the Riverside County Youth Accountability Teams (YAT) program. Children were placed in the YAT probation program by law enforcement, or school staff, for “behavior issues.”<sup>58</sup> And placements were “justified,” because students were “easily persuaded by peers,” had “poor grades,”<sup>59</sup> or “caused daily disruptions.”<sup>60</sup> Children

<sup>55</sup> Sarah D. Sparks, *California Lawsuit Offers Cautionary Tale on School-Based Probation Programs*, EDUC. WEEK (July 25, 2019), [https://blogs.edweek.org/edweek/District\\_Dossier/2019/07/california\\_lawsuit\\_probation\\_in\\_schools.html](https://blogs.edweek.org/edweek/District_Dossier/2019/07/california_lawsuit_probation_in_schools.html) [<https://perma.cc/2XAR-AHX4>].

<sup>56</sup> CAL. WELF. & INST. CODE § 654(a) (Deering, through 2020 Sess.):

In any case in which a probation officer, after investigation of an application for a petition or any other investigation he or she is authorized to make, concludes that a minor is within the jurisdiction of the juvenile court *or will probably soon be within that jurisdiction*, the probation officer may, in lieu of filing a petition to declare a minor a dependent child of the court or a minor or a ward of the court under Section 601 or requesting that a petition be filed by the prosecuting attorney to declare a minor a ward of the court under subdivision (e) of Section 601.3 or Section 602 and with consent of the minor and the minor’s parent or guardian, delineate specific programs of supervision for the minor, for not to exceed six months, and attempt thereby to adjust the situation that brings the minor within the jurisdiction of the court or creates the probability that the minor will soon be within that jurisdiction.

(emphasis added).

<sup>57</sup> See Keith W. Kohn, *County, ACLU Settle Class-Action Lawsuit Over Controversial Youth Accountability Teams*, DESERT SUN (Jul. 26, 2019), <https://www.desertsun.com/story/news/education/2019/07/25/riverside-county-aclu-settle-suit-over-youth-accountability-teams-yat/1832456001/> [<https://perma.cc/YV7W-RT5D>]; *Exhibit A*, Youth Accountability Team (YAT)—Contract Voluntary Non-Court Ordered Program of Supervision; Settlement Agreement, Sigma Beta Xi, Inc., et al. v. Cnty. of Riverside, (C.D. Cal. 2018) (No. 5:18-cv-01399) <https://www.lawinsider.com/contracts/9rF4s5S98aP> [<https://perma.cc/DMM2-23RQ>]; Sparks, *supra* note 55.

<sup>58</sup> From 2001 to 2014, in Riverside County, the YATs had more than one referral for a youth. “These youths were at risk areas of property offenses (22.1%), violent offenses (20.2%), defiance/incorrigibility (18.5%), truancy (14.7%), and drugs/alcohol (12.7%).” MARON ASHLEY ET AL., CAL. STATE UNIV., SAN BERNARDINO, EVALUATION REPORT FOR THE RIVERSIDE COUNTY PROBATION DEPARTMENT JUVENILE CRIME PREVENTION ACT PROGRAM 5 (2015), [https://probation.co.riverside.ca.us/pdf/jjcc/JJCPA\\_Technical\\_Report\\_2015.pdf](https://probation.co.riverside.ca.us/pdf/jjcc/JJCPA_Technical_Report_2015.pdf) [<https://perma.cc/8PZR-7Y8H>].

<sup>59</sup> P.R. Lockhart, *How One California County is Criminalizing Bad Grades*, VOX (July 17, 2018), <https://www.vox.com/identities/2018/7/17/17569660/aclu-lawsuit-riverside-california>

were put on probation, even though, for many, their behaviors were because they were processing “deep grief or trauma,” “displaying signs of disability,” or “simply having an off day.”<sup>61</sup> Nearly 3,200 children were enrolled in YAT from 2005–16.<sup>62</sup> This program changed only after a 2018 settlement mandated it change.<sup>63</sup> Today, students can no longer be referred to YAT for non-criminal behavior.<sup>64</sup>

Riverside County is not alone. While there is no official federal count of programs of its kind, they exist in many states.<sup>65</sup> Understanding how the program worked reveals the danger of the ill-defined mandate of probation to rehabilitate youth while also punishing them for delinquent behavior.

The YAT program is emblematic of the far reach of probation and the blurring of lines between policing and rehabilitation. The program reveals three flaws within all current configuration of probation programs worth highlighting: (a) laws with dual purposes lead to net widening of children for non-criminal behavior, given probation’s punitive mindset and stereotyping of youth; (b) due to definitions of “at-risk youth” and subjective determinations, plus school resources lacking special education identifications, outcomes have been and will continue to be more negative for BIPOC youth; and (c) expansion of noncriminal uses of probation leads to increased budgets for probation, at the cost of alternative uses and monies are appropriated at the state level which means state’s sanctioning the criminalization of non-criminal behavior.

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-youth-accountability-team-probation [https://perma.cc/X4CA-Y4CD] (describing petitioner claims that by introducing students to the criminal justice system for basically no reason, the program is extending the “school-to-prison-pipeline,” a systemic bias that civil rights advocates say pushes children and young adults of color out of the classroom and behind bars, and, because the program’s contracts, usually signed without a lawyer present, ask families to consent to invasive searches and monitoring, the ACLU also alleges that the program is violating students’ Fourth Amendment rights).

<sup>60</sup> See Complaint at 22, *Sigma Beta Xi, Inc. v. Cnty. of Riverside*, No. 5:18-cv-01399 (C.D. Cal. July 1, 2018).

<sup>61</sup> *Id.* at 21.

<sup>62</sup> Sparks, *supra* note 55 (“The nearly 13,000 students in Riverside County’s Youth Accountability Team program from 2005 to 2016 signed a contract allowing campus-based parole officers to conduct random drug tests or search them or their home at any time—including during tests and classes. The students could only interact with other students approved by the program and were given 8 p.m. curfews.”).

<sup>63</sup> Class Action Settlement at 2, *Sigma Beta XI, Inc. v. Cnty. of Riverside*, No. 5:18-cv-01399-JGB-JEM (C.D. Cal).

<sup>64</sup> Kohn, *supra* note 57 (describing the settlement and how the county’s probation department agreed to stop referring minors to YAT for non-criminal offenses and committed \$8 million over five years to community-based organizations targeting underlying social issues).

<sup>65</sup> YAT is school based probation, and it unclear how many similar programs exists in the country. Sarah Hinger & Sylvia Torres-Guillen, *Innocent Students Are Getting Criminalizing Probation in One California County*, ACLU (July 2, 2018), <https://www.aclu.org/blog/racial-justice/race-and-inequality-education/innocent-students-are-getting-criminalizing> [perma.cc/EQ7Z-A6ZM].



- A. *Laws with discretion left up to a Juvenile Probation officer led to net-widening of youth due to a punitive mindset and stereotyping of certain youth; the lack of accountability leads to possibility of abuse of power.*

Probationary conditions in juvenile courts are largely determined by the courts in consultation with the Probation Department and subject to conditional limitation.<sup>66</sup> The role of the probation officer in this web of criminalization, however, can be quite broad. For example, in California, probation officers are statutorily defined as peace officers—and may carry firearms as permitted by their agency.<sup>67</sup> At the front end, they have discretion and the ability to detain and interrogate youth,<sup>68</sup> and divert or file petitions alleging charges in court.<sup>69</sup> This discretion coupled with a punitive mindset can lead to unnecessary surveillance and criminalization of our most marginalized children. As one scholar has aptly noted, the gatekeeping function of police and school resource officers is powerful:

Programs with police and school resource officers as gatekeepers divert black and Latino low-risk youth who, in police officers' own worlds, they would have warned and released in the absence of these programs. Thus, while probation officers disproportionately fail to divert high-risk youth of color away from court, the police, including school resource officers, disproportionately formally divert low-risk youth of color who are unruly into programs with requirements and services.<sup>70</sup>

<sup>66</sup> In California, guidelines are governed by Welfare & Institutions Code. CAL. WELF. & INST. CODE § 730(b) (West, current through 2021 Reg. Sess.). In California, the court has wide discretion in setting probation conditions, under its authority to make “any and all reasonable orders” for the youth’s conduct. *Id.* Note that the court’s discretion in setting probation conditions is limited by the constitutional requirements that such conditions not be vague or overbroad. *See In re Sheena K.*, 40 Cal. 4th 875, 889 (2007). Under the law, there are three specific probation conditions that the court must impose: (1) Require the child to attend a school program approved by Probation without absence; (2) Require the parent to participate with the child in a counseling or education program; and (3) Require the child to be at the child’s residence between 10:00 p.m. and 6:00 a.m. unless accompanied by a parent, legal guardian, or other adult having legal care or custody of the youth. CAL. WELF. & INST. CODE § 729.2 (West, current through 2021 Reg. Sess.). For a more comprehensive look, see Amanda NeMoyer et al., *Predictors of Juveniles’ Noncompliance with Probation Requirements*, 38 LAW & HUM. BEHAV. 580, 580–591 (2014). Each State and County sets both adult and probation guidelines with no uniformity. This allows then for variation among the states and counties and a variation in enforcement, numbers of conditions, and consequences. Fiona Doherty, *Obey All Laws and Be Good: Probation and Meaning of Recidivism*, 104 GEO. L. J. 291, 295 (2016) (“[Adult] probation systems have broad and at times surprising expectations for those under their control.”).

<sup>67</sup> CAL. PENAL CODE § 830.5(a) (2020). And where conditions do exist, they are boilerplate and may not be developmentally sound, or not related to a young person’s risks or needs. *See SCHWARTZ*, supra note 2, at 42–43.

<sup>68</sup> CAL. WELF. & INST. CODE §§ 625 (1976), 627.5 (1967), 628 (2018).

<sup>69</sup> CAL. WELF. & INST. CODE §§ 653.5, 654 (2021).

<sup>70</sup> Traci Schlesinger, *Decriminalizing Racialized Youth through Juvenile Diversion*, 28 THE FUTURE CHILD. 59, 71 (2018).

Two case studies illustrate the danger of discretion: First, an example of abuse of probation discretion occurred due to a statutory code that was the heart of the litigation in the YAT case.<sup>71</sup> Here, state code in California codified the ability of probation officers to allow for discretion in net-widening by allowing them to put students into their probation programs without a referral or arrest. Second, a case that caught widespread media attention revealed the unreasonable probation conditions that, once violated, could land an innocent fifteen-year-old child back in a juvenile facility—even for failing to do her homework, in the middle of a pandemic.<sup>72</sup>

First, in the YAT case, probation relied on California Welfare & Institutions Code (WIC) Section 236, which gives broad discretion to county probation departments to determine which youth should be targeted for juvenile justice programs. WIC 236 provides that:

... probation departments may engage in activities designed to prevent juvenile delinquency. These activities include rendering direct and indirect services to persons in the community. Probation departments shall not be limited to providing services only to those persons on probation being supervised under Section 330 or 654, but may provide services to any juveniles in the community.<sup>73</sup>

The term “any juvenile” under the Los Angeles Probation Authority determined that their mandate would include youth they defined to be “at-risk-youth”<sup>74</sup> or “youth who have not entered the probation system but who live or attend school in areas of high crime or who have ‘other factors’ that potentially predispose them to participating in criminal activities.”<sup>75</sup>

There are multiple areas for concern and the potential for probation to abuse its discretionary judgement in ways harmful to youth with this definition. First, the term “at-risk” is problematic for many reasons, the least of which is that it is deeply stigmatizing and racialized.<sup>76</sup> The first use of the term “at-risk”

<sup>71</sup> For a more complete and thoughtful analysis of how youth were caught up in the YAT Case under WIC 236, see generally Soung et al., *supra* note 30, at 3–19.

<sup>72</sup> Jodi S. Cohen, *A Teenager Didn't Do Her Online Schoolwork. So a Judge Sent Her to Juvenile Detention.*, PROPUBLICA (July 14, 2020), <https://www.propublica.org/article/a-teenager-didnt-do-her-online-schoolwork-so-a-judge-sent-her-to-juvenile-detention> [perma.cc/9ULQ-FRLV].

<sup>73</sup> CAL. WELF. & INST. CODE § 236 (West, current through 2021 Reg. Sess.). “WIC 236 was originally chaptered as WIC 536.5 and renumbered in 1976.” Soung et al., *supra* note 30, at 4 n.4.

<sup>74</sup> Lindsay McKenzie, *No More ‘At-Risk’ Students in California*, INSIDE HIGHER EDUC. (Nov. 5, 2019), <https://www.insidehighered.com/news/2019/11/05/changing-conversation-about-%E2%80%9C-risk%E2%80%9D-students-california> [perma.cc/3WJU-9TB7].

<sup>75</sup> Terry Fain et al., *Los Angeles County Juvenile Justice Crime Prevention Act: Fiscal Year 2014–2015 Report*, LOS ANGELES CNTY. PROB. DEP’T (2016), [https://www.rand.org/pubs/research\\_reports/RR1458.html](https://www.rand.org/pubs/research_reports/RR1458.html) [perma.cc/ZM7N-EYW3].

<sup>76</sup> Bernard E. Harcourt, *Risk as a Proxy for Race 2* (Working Paper No., 535, 2010) (“The fact is, risk today has collapsed into prior criminal history, and prior criminal history has become a proxy for race.”); see also Jamelia Morgan, *Rethinking Disorderly Conduct*, 109

can be traced back to 1983 publication of the policy report, *A Nation at Risk*, which cautioned that a “rising tide of mediocrity” within the school system was threatening America’s way of life.<sup>77</sup> A generous interpretation of the description “at-risk” implies a focus on prevention and intervention (e.g., social services), in contrast with the word “delinquent” which suggests a state of being or criminality. Others have suggested that “at-risk” was useful for policy construction since it was vague enough to be defined broadly or narrowly, depending on the purpose.<sup>78</sup> Scholars have argued for decades that the term “at-risk” is problematic because the label is implicitly, if not explicitly, racist, classist, and problematic as children and their parents are very much aware they are seen as being at risk for failure.<sup>79</sup> The term marginalizes students and one educator suggested eliminating its use, instead describing “at-risk student” to simply “students.”<sup>80</sup> In 2019, a California Bill was passed to remove “at-risk youth” and replace with “at-promise youth” in California’s Education Code and Penal Code.<sup>81</sup> For the YAT Program, “at-risk” served as one of two critical threshold categories for students voluntarily enrolled in what came to be a controversial school-based probation program.

Second, if a youth was not found to be “at-risk” she/he/they could still qualify for the YAT Program if they had “other factors” that predisposed them to being at risk. These factors, like “at-risk” are wildly vague, discretionary and subject to overreach of probation. These “other factors” that predispose them are further clarified in a subsequent definition that suggests that youth with two or more problems in the following areas are at a higher risk: family dysfunction (problems of parental monitoring of child behavior or high conflict between youth and parent), school problems (truancy, misbehavior, or poor academic performance), and delinquent behavior (gang involvement, substance abuse or involvement in fights).<sup>82</sup> Probation does not have any obligation to investigate,

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CALIF. L. REV. 1, 53 (forthcoming 2021) (“[B]y relying on a false dichotomy between ‘order’ and ‘disorder’ disorderly conduct laws construct and reinforce “a hierarchy of normative behaviors that an imbued with racism, sexism, and ableism.”).

<sup>77</sup> Anya Kamenetz, *Delinquent. Dropout. At-Risk. When Words Become Labels*, NAT’L PUB. RADIO (Apr. 18, 2015), <https://www.npr.org/sections/ed/2015/04/28/399949478/delinquent-dropout-at-risk-whats-in-a-name> [perma.cc/D249-W5S2].

<sup>78</sup> Margaret L. Placier, *The Semantics of State Policy Making: The Case of “At Risk,”* 15 EDUC. EVALUATION & POL’Y ANALYSIS 380, 386 (1993).

<sup>79</sup> See Carla O’Connor et al., *Who’s at Risk in School and What’s Race Got to Do with It?*, 33 REV. RSCH. EDUC. 1, 2 (2009); see also Cinzia Pica-Smith & Carmen Veloria, “At Risk Means a Minority Kid:” *Deconstructing Deficit Discourses in the Study of Risk in Education and Human Services*, 2 PEDAGOGY & HUM. SCI. 33, 34 (2012).

<sup>80</sup> Valerie Strauss, *Why We Should Stop Labeling Students as At-Risk and the Best Alternative*, WASH. POST (Jan. 23, 2019 3:13 PM), <https://www.washingtonpost.com/education/2019/01/23/why-we-should-stop-labeling-students-risk-best-alternative/> [perma.cc/MZ8R-VZ78].

<sup>81</sup> Approved by California Governor Newsom. Education: At Promise Youth, A.B. 413, 2019–20 Sess. (Cal. 2019).

<sup>82</sup> Fain et al., *supra* note 75.

document, or support with evidence any of their claims about the youth. Once the child is identified as an “at-risk” youth, they may be referred to probation for supervision. Voluntary probation requires three conditions for their participation: (1) voluntary participation, (2) no prior legal classification, and (3) no current or prior probation.<sup>83</sup> It’s worth emphasizing that since Probation was under no obligation to support their claims about the youth, it was left up entirely to their discretion with no outside verification or check—leading Probation officers to default to whatever they feel. Given the hyper-surveillance nature of schools these days, it’s no surprise that the YAT Program resulted in an over-broad reach of students under a guise of “prevention” that felt more like “punishment.”

The YAT Program lawsuit<sup>84</sup> is riddled with stories of students who—despite no criminal behavior—were put on school-based probation under WIC 236. Marbella Munoz<sup>85</sup> is one such child who, due to her dependency status as a foster youth, moved between various schools but was able to keep her grades intact. When she was seventeen, school administrators put her on voluntary probation which she resisted; she failed to show up to meet with her probation officer and ended up dropping out high school altogether. Luckily, she ended up attending the Youth Justice Coalition’s FREE L.A. High School, a non-traditional public school. Here, Munoz was put on probation despite having broken no laws and with no history of court or probation system contact.

A comprehensive report on WIC 236 confirmed what was alleged in the lawsuit—that the nearly all (85 percent) of “at-risk” youth on voluntary probation supervision were not referred for issues related to safety of the community or for criminal behavior but instead, youth were referred for general school-related behavior or academic issues.<sup>86</sup> More specifically, 60.5 percent were placed under supervision because of poor attendance, grades, behavior, or overall performance at school. Another 4.3 percent for general lack of motivation. Only 2.7 percent were referred for suspected substance abuse problems, 1.5 percent for anger issues, and 1.5 percent for parent conflict. None were referred for gang involvement or fighting (per chart below).<sup>87</sup>

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<sup>83</sup> Soung et al., *supra* note 30, at 6.

<sup>84</sup> ASHLEY ET AL., *supra* note 58, at 4.

<sup>85</sup> Sara Krevoy, *LA County Puts Thousands of Kids on ‘Voluntary’ Probation for Merely Struggling with School*, JUV. JUST. INFO. EXCHANGE (May 31, 2017), <https://jjie.org/2017/05/31/la-county-puts-thousands-of-kids-on-voluntary-probation-for-merely-struggling-with-school/> [perma.cc/QRN9-GC76].

<sup>86</sup> See Soung et al., *supra* note 30.

<sup>87</sup> *Id.* (providing Table 1, which is adapted here).

TABLE 1: YOUTH REFERRALS TO VOLUNTARY PROBATION IN LOS ANGELES BY REASON

Reason for Referral	Number of Youth	Percentage of Total Youth	
Poor School Attendance	795	22.1%	80.5%
Poor School Grades	683	19.0%	
Poor School Behavior	451	12.6%	
Overall Poor School Performance	961	26.8%	
Unmotivated	155	4.3%	4.3%
Substance Abuse Problem	96	2.7%	15.2%
Beyond Parental Control	55	1.5%	
Anger Issues	54	1.5%	
Other	295	8.2%	
Data Not Provided	45	1.3%	
Total	3590	100%	100%

Perhaps most shocking is that the primary service provided to school-based “at-risk” youth is tutoring.<sup>88</sup> Advocates were not able to determine whether Probation contracted with a community-based service provider for the tutoring but given that juvenile probation was designed to prevent children from committing crimes and to keep the community safe, tutoring is a far stretch from what should be criminalized. Once again, the web of incarceration expands in the form of tutorials!

In a second case that speaks to the far reach of probation writ large and not just school-based probation is a story that caught widespread media attention: probation in Michigan made a determination to return a fifteen-year-old girl called Grace to juvenile incarceration during the Coronavirus pandemic for failing to do her homework because it was a violation of her probation condition. Probation conditions vary case to case and are determined by the juvenile probation officer.<sup>89</sup> In the Michigan case, Grace, who is Black,<sup>90</sup> was placed on probation in April 2020 via a Zoom juvenile court hearing after facing an assault and theft charge in 2019.<sup>91</sup> One of Grace’s probation terms was a requirement to do her schoolwork. However, it was reported that Grace’s proba-

<sup>88</sup> *Id.*

<sup>89</sup> Robert G. Schwartz, *A 21st Century Developmentally Appropriate Juvenile Probation Approach*, 69 JUV. & FAM. CT. J. 41, 42 (2018).

<sup>90</sup> Analogous to most jurisdictions in our country, Michigan’s juvenile court system has deep racial disparity. Black youth in Michigan are incarcerated four times as often as their white peers. *State-by-State Data*, SENT’G PROJECT, <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR> [perma.cc/FQB8-JY9C] (select Michigan on the interactive map).

<sup>91</sup> *Michigan Judge Refuses to Free Girl in Missed Homework Case*, BBC NEWS (July 21, 2020), <https://www.bbc.com/news/world-us-canada-53481539> [https://perma.cc/XR2U-QBR8].

tion coincided with the first few days of remote school, and she quickly became overwhelmed without the in-person support of her teachers.<sup>92</sup>

A few weeks later, Presiding Family Court Judge Mary Brennan decided she had violated probation because she was “guilty on failure to submit to any schoolwork and getting up for school.”<sup>93</sup> Grace was labeled a “threat to the community” because of her prior charge. “She hasn’t fulfilled the expectation with regard to school performance,” Brennan said as she sentenced Grace. “I told her she was on thin ice and I told her that I was going to hold her to the letter, to the order, of the probation.”<sup>94</sup> What is perhaps most revealing about this incident is that probation had the discretion at the outset to effectively address this issue but they failed to do so. See story below as reported:

Days after the court hearing, on April 24, Grace’s new caseworker, Rachel Giroux, made notes in her file that she was doing well: Grace had called to check in at 8:57 a.m.; she reported no issues at home and was getting ready to log in to do her schoolwork.

But by the start of the following week, Grace told Giroux she felt overwhelmed. She had forgotten to plug in her computer and her alarm didn’t go off, so she overslept. She felt anxious about the probation requirements. Charisse, feeling overwhelmed as well, confided in the caseworker that Grace had been staying up late to make food and going on the internet, then sleeping in. She said she was setting up a schedule for Grace and putting a desk in the living room where she could watch her work.

“Worker told mother that child is not going to be perfect and that teenagers aren’t always easy to work with but you have to give them the opportunity to change,” according to the case progress notes. “Child needs time to adjust to this new normal of being on probation and doing work from home.”

Five days later, after calling Charisse and learning that Grace had fallen back to sleep after her morning caseworker check-in, Giroux filed a violation of probation against her for not doing her schoolwork. Giroux told the prosecutor she planned to ask the judge to detain Grace because she “clearly doesn’t want to abide by the rules in the community,” according to the case notes.

Grace has said in court and in answers to questions from ProPublica that she was trying to do what was asked of her. She had checked in with her caseworker every day and complied with the other requirements of intensive probation, including staying at home and obeying all laws. She had told her special education teacher that she needed one-on-one help and began receiving daily tutoring the day after the probation violation was filed.

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Cohen, *supra* note 72.

Giroux filed the violation of probation before confirming whether Grace was meeting her academic requirements. She emailed Grace's teacher three days later, asking, "Is there a certain percentage of a class she is supposed to be completing a day/week?"

Grace's teacher, Katherine Tarpeh, responded in an email to Giroux that the teenager was "not out of alignment with most of my other students." "Let me be clear that this is no one's fault because we did not see this unprecedented global pandemic coming," she wrote. Grace, she wrote, "has a strong desire to do well." She "is trying to get to the other side of a steep learning curve mountain and we have a plan for her to get there."<sup>95</sup>

What then happened next in court further reveals the power of probation whose report was likely the entire basis for the judge's decision given both the defense attorney and prosecutors' seemingly unfamiliarity with the case and reliance on the probation officers' report:

Grace's attorney, concerned about his health, participated by Zoom, though he told the judge it was difficult to represent her without being there. He told the judge he decided not to request a postponement because the family was worried she would detain Grace if they waited for a later court date.

The prosecution called Giroux [probation], the caseworker, as its only witness. In response to questions from Grace's attorney, she acknowledged *she did not know what type of educational disabilities Grace had and did not answer a question about what accommodations those disabilities might require*. [emphasis added]. Her assessment that Grace hadn't done her schoolwork was based on a comment her mother made to her teacher, which Charisse testified she said in a moment of frustration and was untrue.

Grace's special education teacher, Tarpeh, could have provided more information and planned to testify but had to leave the hearing to teach a class, according to the prosecutor. Grace and her mother testified that she was handling her schoolwork more responsibly — and that she had permission to turn in her assignments at her own pace, as long as she finished by the end of the semester. And, Charisse said, Grace was behaving and not causing her any physical harm.

The transition to virtual school had been difficult, Grace testified, but she said she was making progress. "I just needed time to adjust to the schedule that my mom had prepared for me," she said. [Judge] Brennan was unconvinced. Grace's probation, she told her, was "zero tolerance, for lack of a better term."

She sent her to detention. Grace was taken out of the courtroom in handcuffs.<sup>96</sup>

About a month later, after national and widespread media attention,<sup>97</sup> the case was appealed, and the Michigan Court of Appeals supported her release.<sup>98</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (emphasis added).

Central to the narrative of outrage from organizers and elected officials across the country in Grace's case was how it highlighted the racial disparities in the system: ProPublica reported that from Grace's court (Oakland County court), 4,800 cases were heard from January 2016–June 2020.<sup>99</sup> Of those cases, “42 [percent] involved Black youth even though only about 15 [percent] of the county's youth are Black.”<sup>100</sup> In addition, lawmakers raised the notion that Grace had a learning disability that was overlooked—revealing yet again, how probation serves as a systemic gateway for children of color to enter the juvenile justice system.<sup>101</sup> The next section takes this up with respect to Grace and the YAT program.

*B. Due to subjective and incomplete determinations by probation officers at intake who lack accountability coupled with deficient school resources, probation outcomes have been and will continue to be more negative for youth with disabilities and BIPOC youth.*

Probation officers often fail at their core mission to rehabilitate youth—at every stage in their handling of the case. A specific example of this is their failure to consistently take into account a child's disability when making determinations about both conditions for probation and diversion.<sup>102</sup> As a result of their failure to focus on rehabilitation, they miss a ripe opportunity to divert youth and address their unmet needs. For youth with disabilities, this failure is particularly consequential since behavior that is due to an unknown, under-diagnosed or mistreated disability may unjustly land them inside the juvenile delinquency system. “Some estimate that as many as 70 percent of youth who enter the system have a mental health, sensory or learning disability, and anywhere between

<sup>97</sup> Jodi S. Cohen, *Prosecutor Reverses Course, Supports Release of Girl Detained for Skipping Homework*, DETROIT FREE PRESS (July 30, 2020), <https://www.freep.com/story/news/local/michigan/2020/07/30/grace-skipping-homework-jessica-cooper/5548354002/> [https://perma.cc/5NYL-XA49] (“Grace's case . . . sparked protests in Michigan, including one Wednesday night, and has drawn widespread attention. Members of Congress, state lawmakers and Birmingham Public Schools board members, among others, have called for her release, and more than 300,000 people have signed an online petition.”).

<sup>98</sup> As of November 2020, Grace is reportedly in a new school and has a new job. Since her release, she has not had any further problems with the law. Emily Riley, *Jailed for Not Doing Homework, Michigan Teen Tells Her Own Story*, CRIME REP. (Nov. 3, 2020), <https://thecrimereport.org/2020/11/03/jailed-for-not-doing-homework-michigan-teen-tells-her-own-story/> [https://perma.cc/K8UR-UQEY].

<sup>99</sup> Cohen, *supra* note 72.

<sup>100</sup> Jodi S. Cohen & Nisa Khan, *The Michigan Supreme Court is Reviewing the Case of a Teenager Incarcerated After Not Doing Online Schoolwork During the Pandemic*, PROPUBLICA (July 16, 2020, 9:44 PM), <https://www.propublica.org/article/the-michigan-supreme-court-is-reviewing-the-case-of-a-teenager-incarcerated-after-not-doing-online-schoolwork-during-the-pandemic> [https://perma.cc/GG73-MVS6].

<sup>101</sup> Cohen & Khan, *supra* note 100.

<sup>102</sup> Tulman & Weck, *supra* note 10, at 900–01.



28 percent and 43 percent of detained or incarcerated youth have special education needs.”<sup>103</sup> And for BIPOC youth the numbers are staggering: “African American youth are 43 percent more likely to have a learning disability than youth in the general population and American Indian youth are 80 percent more likely.”<sup>104</sup> These numbers may not be accurate reflections of the numbers of youth who face one or more apparent or hidden disabilities, for all races, but particularly for BIPOC youth.<sup>105</sup>

Moreover, given that a high number of youth enter the criminal justice system due to status offenses—offenses<sup>106</sup> that if committed by adults would not be crimes (such as skipping school, truancy, running away, and curfew violations)—it is especially incumbent on probation officers to re-route children with a disability away from the juvenile justice system who may be facing a status offense either as a probation violation or first time offense.<sup>107</sup> Often the conduct that leads to status offense system involvement relates to an unknown, under-diagnosed or mistreated disability. “For example, unmet special education needs can lead to truancy; untreated mental health issues can lead to con-

<sup>103</sup> COAL. FOR JUV. JUST., NATIONAL STANDARDS FOR THE CARE OF YOUTH CHARGED WITH STATUS OFFENSES 45 (2013), [http://www.juvjustice.org/sites/default/files/ckfinder/files/National%20Standards%20for%20the%20Care%20of%20Youth%20Charged%20with%20Status%20Offenses%20FINAL\(1\).pdf](http://www.juvjustice.org/sites/default/files/ckfinder/files/National%20Standards%20for%20the%20Care%20of%20Youth%20Charged%20with%20Status%20Offenses%20FINAL(1).pdf) [<https://perma.cc/2N82-QGZ3>]; see also Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD. 339, 341–42 (2005).

<sup>104</sup> COAL. FOR JUV. JUST., *supra* note 103, at 45. As this author has documented previously, it’s worth noting the complex impact of discipline, race, and perceived gender on Black girls, in particular. CRENSHAW ET AL., *supra* note 26, at 24, 29–30 (discussing how Black girls are devalued based on how others perceive them and finding that society’s deeply entrenched expectations of Black girls—influenced by racism and patriarchy—has led to a ritual whereby these young women are often mischaracterized and mislabeled because of how they look, dress, speak and act). See generally MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS (2016).

<sup>105</sup> The problems with (dis)ability diagnosis are many. Nanda, *supra* note 41, at 298 (“Identifying students with a disability is largely a highly subjective process from start to finish, with discretion built into each step. This discretion allows for bias to influence each step of the multilayered process as disability is constructed in ways that are both obvious and unassuming.”); see also Valentina Migliarini and Subini Annamma, *Applying Disability Critical Race Theory in the Practice of Teacher Education in the United States*, in OXFORD RESEARCH ENCYCLOPEDIA, EDUCATION 13 (2019), <https://doi.org/10.1093/acrefore/9780190264093.013.783> [<https://perma.cc/XZ4L-ZMP3>] (discussing how these problems are deeply structural and need to be addressed as such).

<sup>106</sup> The five major status offense categories where data is available are: “running away, truancy, curfew law violations, ungovernability (also known as incorrigibility or being beyond the control of one’s parents), and underage liquor law violations (e.g., a minor in possession of alcohol, underage drinking).” HOCKENBERRY & PUZZANCHERA, *supra* note 2, at 63–64.

<sup>107</sup> See *id.* at 29. In 2018, the most recent year for which national data is available, 97,800 status offenses cases were reported. Fortunately, “[t]he number of petitioned status offense cases processed by juvenile courts decreased [forty-nine percent] between 2000 and 2018.” *Id.* at 64.

flicts at home and/or running away.”<sup>108</sup> Age is also a factor. Trends show that status offenses tend to occur between ages fourteen to seventeen with the average age of sixteen.<sup>109</sup> There is no national accounting system for status offenses and probation violations. And while males account for slightly more than half of all status offenses (56 percent), and the majority of curfew violations in most areas, the one area where females represent a larger proportion of the cases than males is runaway cases.<sup>110</sup>

Turning to Grace’s case, as in most cases, there is no accountability if a juvenile probation officer fails to identify a child’s disability<sup>111</sup> based on the probation officer preliminary report; the issue falls upon the defense attorney to raise during a hearing.<sup>112</sup> Grace, an African American female, was fifteen-years-old and had a documented Attention Deficient Hyperactivity Disorder (ADHD); she likely benefited from aids or smaller classrooms—all of which were made moot during the pandemic.<sup>113</sup> Probation officers are particularly situated as gatekeepers for youth like Grace.<sup>114</sup> Juvenile probation have both statutory investigatory responsibilities and the discretion to consider whether to commence a proceeding.<sup>115</sup> Unfortunately, similar to what happened to Grace,

<sup>108</sup> COAL. FOR JUV. JUST., *supra* note 103, at 45.

<sup>109</sup> HOCKENBERRY & PUZZANCHERA, *supra* note 2, at 66.

<sup>110</sup> *Id.* at 69 (“In 2018, males accounted for the majority of curfew (70%), liquor law violation (58%), ungovernability (58%), and truancy (54%) cases. Females accounted for 54% of petitioned runaway cases in 2018 . . .”).

<sup>111</sup> There is no national data on juvenile probation officers and the accuracy of their reporting to court. However, studies have examined the supervision strategies of the juvenile probation officer and how they fit into a traditional juvenile justice framework. *See* Viglione et al., *supra* note 20, at 252 (examining the role of juvenile probation officers as a balancing act between “child saving” and community safety activities).

<sup>112</sup> COAL. FOR JUV. JUST., *supra* note 103, at 47. The court can use its supervisory authority to request documentation.

<sup>113</sup> Cohen & Khan, *supra* note 100; *see also* Faith Hill, *The Pandemic Is a Crisis for Students with Special Needs*, ATLANTIC (Apr. 18, 2020), <https://www.theatlantic.com/education/archive/2020/04/special-education-goes-remote-covid-19-pandemic/610231/> [<https://perma.cc/YC8B-WQQ8>]; Sonali Kohli, *Disability Laws Finally Gave Them an Education. School-From-Home Threatens to Make that Impossible*, L.A. TIMES (Mar. 25, 2020), <https://www.latimes.com/california/story/2020-03-25/coronavirus-school-special-education> [<https://perma.cc/9LL2-SZ3P>]; *see also* Sonali Kohli, *Children with Disabilities Are Regressing. How Much Is Distance Learning to Blame?*, L.A. TIMES (Aug. 7, 2020), <https://www.latimes.com/california/story/2020-08-07/covid-19-distance-learning-weakens-special-education> [<https://perma.cc/E9T7-UZBE>].

<sup>114</sup> As Joseph Tulman and Douglas Weck have argued, probation officers have a unique role in helping to shutting off the funnel that leads youth with special education needs, exactly like Grace, into the juvenile criminal justice system. This includes their investigative responsibilities and their duty to exercise discretion appropriately. Tulman & Weck, *supra* note 10, at 897–98; *see also* Schlesinger, *supra* note 70, at 59 (“Programs with police and school resource officers as gatekeepers divert black and Latino low-risk youth who, in police officers’ own words, they would have warned and released in the absence of these programs.”).

<sup>115</sup> Tulman & Weck, *supra* note 10, at 897–98.

probation often fails to act in a way that would fulfill its rehabilitative purpose.<sup>116</sup> Despite being charged with statutory obligations to investigate and exercise discretion, intake officers do not exercise, or exercise in only limited fashion, this decision-making role.<sup>117</sup> Rather than pushing back, probation officers tend to rubber stamp school recommendations as evidenced in Grace's case.<sup>118</sup> Grace was reprimanded for violating her probation due to what is similar to a "status offense" or failing to complete her homework.<sup>119</sup> Grace's case is tragically a perfect example of how probation often fails at its core mission to rehabilitate.

Similar dynamics existed in the YAT case where probation missed an opportunity to divert youth due to a possible unknown, under-diagnosed or mis-treated disability and instead they utilized a police-like or punitive function.<sup>120</sup> In YAT, the use of a broad definition of which children were to be included in their program created another discretionary opportunity for probation to widen the net and miss an opportunity to divert.<sup>121</sup> Here, by defining "at-risk" broadly, the true dangers of a police-like function of probation were revealed: thousands of mostly Black and Hispanic children were put on probation for issues as simple as "struggling with school."<sup>122</sup> This is especially alarming given the large number of students in Los Angeles, and most cities, whose learning issue is often under-identified or over-identified in incorrect categories which may contribute to struggles in school.<sup>123</sup> In an excerpt from *An Advocates Guide to Transforming Special Education*, the complexity of the identification process is examined:

For certain racial subgroups, students are over-identified for certain disability types — a phenomenon called "disproportionality." For example, 2.63% of all Black students, nationally, are identified with [an intellectual] disability. Though this may not be a large number at first glance, it's almost two and half times the

<sup>116</sup> *Id.* at 900.

<sup>117</sup> *Id.* at 898; *see also* State v. Trent N. (*ex rel.* Trent N.), 569 N.W.2d 719, 724 (Wis. Ct. App. 1997).

<sup>118</sup> Tulman & Weck, *supra* note 10, at 900; Cohen, *supra* note 72.

<sup>119</sup> Cohen, *supra* note 72.

<sup>120</sup> Hinger & Torres-Guillen, *supra* note 65.

<sup>121</sup> *Id.*

<sup>122</sup> Krevoy, *supra* note 85.

<sup>123</sup> As my prior research analysis examined, there are systemic reasons for why over and under identification occurs including teacher bias and/or psychologist bias in already under-resourced schools; this in turn leads to Black and Brown students receiving a misdiagnosis and/or given the wrong support which may lead to behavioral issues, increased discipline and in the worst case, snowballing and referrals to the criminal justice system. Nanda, *supra* note 41, at 271; *see also* CAL. TEACHERS ASS'N, STATE OF DENIAL: CALIFORNIA CHARTER SCHOOLS AND SPECIAL EDUCATION STUDENTS (2019), [https://www.utla.net/sites/default/files/report\\_-\\_final.pdf](https://www.utla.net/sites/default/files/report_-_final.pdf) [<https://perma.cc/7MG8-EMGQ>] (new report that does not address impact of probation officers in Charter Schools).

rate for White students. While 17% of school-age children are Black, they represent 33% of students identified as [having an intellectual disability].

At the same time, recent research suggests that paradoxically, under-identification is also a problem. One study compared Black and Latino students with White students at similar levels of achievement and with similar risk factors (such as low family education, low-income and low birth weight). In this analysis, the disproportionality actually reversed. They found that Black and Latino students were less likely to be identified for special education services across five disability categories. Black students were 58 [percent] less likely to be diagnosed for learning disabilities and Latino students were 29 [percent] less likely. In these cases, schools deprive students of color of the services they need.<sup>124</sup>

Concerns about the net widening of school based probation and the failure to divert students with disabilities away from probation is an on-going issue and raises serious questions about the source of funding and whether the monies are being utilized for their intended purpose(s).

*C. Expansion of noncriminal uses of probation leads to increased budgets for probation and monies are appropriated at the state level which means state sanctioning the criminalization of non-criminal behavior.*

This Article now turns to briefly analyzing the source and criteria of funding for voluntary school-based probation programs in Los Angeles County, the largest California county. It is critical to determine if the money allocated is being utilized for its intended purpose or if it is yet another opportunity for probation to widen its punitive net as part of the web-like surveillance apparatus in Los Angeles schools.<sup>125</sup> School based probation programs too broad in their scope and funded by state funds mean that states are funding and sanctioning the criminalization of non-criminal behavior. Moreover, if the data reveals, as it does in Los Angeles, that the number of “at-risk” youth is on the rise, while overall arrest numbers are low, it suggests that perhaps probation is utilizing

<sup>124</sup> AMANDA MACHADO & THOMAS MAFFAI, INNOVATE PUBLIC SCHOOLS, AN ADVOCATE’S GUIDE TO TRANSFORMING SPECIAL EDUCATION 21, <https://reports.innovateschools.org/wp-content/uploads/2018/06/An-Advocates-Guide-to-Transforming-Special-Education.pdf> [<https://perma.cc/7NXJ-BRAW>].

<sup>125</sup> School policing is a large part of this surveillance apparatus and currently under scrutiny. See Sonali Kohli & Howard Blume, *For Teen Activists, Defunding School Police Has Been a Decade in the Making*, L.A. TIMES (June 15, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-06-15/defund-police-schools-case-security-guards-campus> [<https://perma.cc/8CZ3-2S3V>]. This history of militarizing the police in LA is a long one. See Stephen Ceasar, *L.A. Schools Police Will Return Grenade Launchers but Keep Rifles, Armored Vehicle*, L.A. TIMES (Sept. 16, 2014, 8:27 PM), <https://www.latimes.com/local/lanow/la-me-schools-weapons-20140917-story.html> [<https://perma.cc/W62W-AVCY>]; see also Eric Mann, *How We Got the Tanks and M-16s Out of LA Schools*, COUNTERPUNCH (May 20, 2016), <https://www.counterpunch.org/2016/05/20/how-we-got-the-tanks-and-m-16s-out-of-la-schools/> [<https://perma.cc/KYA3-PHLR>].

school-based and voluntary probation to widen the net and not for its intended purpose to rehabilitate. In turn, the impact of this will be more detrimental for BIPOC students given compounding factors.

In Los Angeles, it has been documented that the funding for the school-based program derived from the Juvenile Justice Crime Prevention Act (JJCPA).<sup>126</sup> “The JJCPA was created by the Crime Prevention Act of 2000 (Chapter 353) to provide a stable funding source for local juvenile justice programs aimed at curbing crime and delinquency among at-risk youth and juvenile offenders.”<sup>127</sup> “The next [year,] in 2001, the funding was extended and re-named.”<sup>128</sup> The funds are all allocated on a per capita basis to the states’ participating counties which must demonstrate effective and proven programming that results in curbing crime among at-risk and juvenile offenders.<sup>129</sup>

Counties who apply for JJCPA funding have received about \$100 million.<sup>130</sup> In Los Angeles County, the “JJCPA is one of the major vehicles to provide services to juveniles in Los Angeles County.”<sup>131</sup> The JJCPA demographic reach is broad and again open to discretionary judgement. The JJCPA provides funds to counties for evidence-based programs and services for “at-risk youths who have not entered the probation system but who live or attend school in are-

<sup>126</sup> Soung et al., *supra* note 30, at 6; *see also* CAL. GOV’T CODE § 30061(b)(4) (West, current through 2021 Reg. Sess.).

<sup>127</sup> Schiff–Cardenas Crime Prevention Act of 2000, ch. 353, 2000 Cal. Stat. 2841, 2843; BD. OF STATE & CMTY. CORR., STATE OF CAL., JUVENILE JUSTICE CRIME AND PREVENTION ACT AND YOUTHFUL OFFENDER BLOCK GRANT: ANNUAL REPORT TO THE LEGISLATURE ii (2019), <https://www.bscc.ca.gov/wp-content/uploads/2019-JJCPA-YOBG-Leg-Report-FINAL.pdf> [<https://perma.cc/E6M7-N5Z5>].

<sup>128</sup> Soung et al., *supra* note 30, at 6. At this same time California allocated funding for prevention of delinquency, it also recommitted an equal amount of funding for the Citizens Option for Public Safety (COPS) Program, established in 1996 to resource front-line law enforcement, prosecutors, and jails. *Id.* This comes just after the late 1990s and early 2000s when there was fear “that crime committed by youth of color was hitting crisis levels in the United States.” *Id.*; *see also* JENNI GAINSBOROUGH & MARC MAUER, SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990S *passim* (2000), <https://www.prisonpolicy.org/scans/sp/DimRet.pdf> [<https://perma.cc/Y2X3-DPEY>] (examining crime trends in California); Tim Arango, *In California, Criminal Justice Reform Offers a Lesson for the Nation*, N.Y. TIMES (Jan. 21, 2019), <https://www.nytimes.com/2019/01/21/us/california-incarceration-reduction-penalties.html> [<https://perma.cc/XMF9-Z672>] (discussing how high profile crimes and politics can lead to inconsistent and fear-driven policy reforms).

<sup>129</sup> BD. OF STATE & CMTY. CORR., STATE OF CAL., JUVENILE JUSTICE CRIME PREVENTION ACT: ANNUAL REPORT 1–2 (2016), <http://www.bscc.ca.gov/wp-content/uploads/JJCPA-March-2016-Report.pdf> [<https://perma.cc/2YLR-Q9UL>]; *see also* FAIN ET AL., *supra* note 75, at 60.

<sup>130</sup> Fain et al., *supra* note 75, at 2.

<sup>131</sup> *Id.* In FY 2014–2015, California allocated about “\$30.9 million to Los Angeles County for JJCPA programs and services. The actual final budget was \$27.6 million. JJCPA funding represents roughly 15 percent of field expenditures for juvenile justice programs, or about 5 percent of all expenditures for programming for juveniles.” *Id.* at 2–3.

as of high crime or who have other factors that predispose them to participating in criminal activities.”<sup>132</sup>

The allocation of the funds provides an opportunity into understanding how the State and the County (and in turn the voters of California) are making decisions about how to keep communities safe while improving the lives of youth and caring for their wellbeing. “Statewide, the funds have been allocated for a range of programs—from policing and probation supervision in schools, public housing and parks, to mental health screening and services provided by community based-organizations.”<sup>133</sup> In 2014–15, California counties administered 150 JJCPA programs serving 84,450 “at-risk” and probation youth.<sup>134</sup>

The WIC 236 Report documented a dramatic rise in numbers of LA County youth under the voluntary probation guidelines, while the numbers of youth for involuntary (or court ordered probation) decreased from 2014–2015, the numbers of “at risk” youth in probation nearly doubled from 31.4 percent to 55.7 percent of all youth on probation or nearly doubled.<sup>135</sup> The RAND Corporation which is contracted to evaluate JJCPA suggests that the increasing numbers is a result of first, a steady decline of the arrest of youth since 2007 and second, “Los Angeles County Probation Department’s deliberate strategy of devoting an increasing number of resources to at-risk youths.”<sup>136</sup>

Given this rise, advocates investigated the reasons for the uptick in referrals for at-risk youth revealing shocking results: youth were referred to probation either voluntarily or for truancy.<sup>137</sup> Moreover, “‘at-risk’ youth [were] also targeted through three [additional] initiatives of JJCPA: 1) housing-based day supervision (which staffs probation officers in public housing developments); 2) park-based probation (assigning probation officers to public parks); and 3) Enhanced Services for High-Risk/High-Need Youths.”<sup>138</sup> It was reported in 2017 by a probation officer that voluntary probation (WIC 236) or supervision began to rise for “at-risk” youth to different departments with a probation officer admitting to advocates that supervision of youth “looks pretty much the

<sup>132</sup> *Id.* at 1.

<sup>133</sup> Soung et al., *supra* note 30, at 6.

<sup>134</sup> BD. OF STATE & CMTY. CORR., *supra* note 129, at 27.

<sup>135</sup> Soung et al., *supra* note 30, at 7 (citing Fain et al., *supra* note 75).

<sup>136</sup> Fain et al., *supra* note 75, at 96–97.

<sup>137</sup> Soung et al., *supra* note 30, at 8. The Report explains that:

Most WIC 236 “at risk” youth are part of one of two programs – school based probation supervision, or the Abolish Chronic Truancy (ACT) program, which is also school-based by administered by the Los Angeles County District Attorney’s office. In 2014–15, 15,409 of the 17,529 “at risk” youth served under JJCPA programming were part of school-based supervision or ACT.

*Id.* The ACT program is run by the Los Angeles District Attorney’s Office. JACKIE LACEY, DIST. ATT’Y L.A. COUNTY, DA-2050-U, TRUANCY INTERVENTION PROGRAMS (2016), <https://da.lacounty.gov/sites/default/files/pamphlet/TRUANCY-0919.pdf> [<https://perma.cc/4K5Z-AVM9>].

<sup>138</sup> Soung et al., *supra* note 30, at 8.

same” as any other probation youth.<sup>139</sup> The primary difference between youth on voluntary school-based (WIC 236) probation and other forms of probation is that voluntary probation is NOT enforceable in court because the young person *did not do a criminal activity*.<sup>140</sup> Moreover, the impact on BIPOC youth is significant with a disproportionate number of Black and Latino youth (designated as Hispanic on Probation charts) designated as “at-risk.”<sup>141</sup> Black youth, in particular, were overrepresented every year in the middle and high-school “at risk” program.<sup>142</sup> During the 2009–2010 school year, Black students comprised 11.2 percent of overall students in the Los Angeles Unified School District but 17.2 percent of high school youth and 27.2 percent of middle school youth labeled “at-risk.”<sup>143</sup> With state funds from the JJCPA, voluntary probation is used primarily to address non-criminal behavior and putting students into contact with the criminal justice system.<sup>144</sup>

Beyond the impact on youth of color and school based numbers, however, the impact of school-based probation is yet to be fully studied. What we do know, as we look ahead, is that scholars and advocates are increasingly calling for the goal to be limited contact with the criminal justice system—particularly for children and youth.<sup>145</sup> As we look ahead, limiting probation, if not eliminating it all together, should be explored.

## II. IMPACT OF PROBATION CONTACT AND LOOKING AHEAD

The impact of probation on the life of a child or youth cannot be quantified and yet studies show that any contact with the juvenile or criminal justice system has long lasting detrimental impacts on youth cautioning us to consider its value. Increasing volumes of literature suggest that contact with the juvenile justice system at any stage from probation to juvenile court, is ineffective at best, or harmful, at worst.<sup>146</sup> On every measure—likelihood of getting arrested as an adult,<sup>147</sup> re-arrested as a child,<sup>148</sup> long-term educational outcomes,<sup>149</sup> and

<sup>139</sup> *Id.* at 8 n.15.

<sup>140</sup> *Id.* at 8.

<sup>141</sup> *Id.* at 11.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 6–7.

<sup>145</sup> *Id.* at 12.

<sup>146</sup> *Id.* at 10, 11, 13.

<sup>147</sup> Maia Szalavitz, *Why Juvenile Detention Makes Teens Worse*, TIME (Aug. 7, 2009), <http://content.time.com/time/health/article/0,8599,1914837,00.htm> [<https://perma.cc/7ANV-RX89>] (“Being put on probation, which involves more contact with misbehaving peers, in counseling groups or even in waiting rooms at probation officers, raised teens’ odds of adult arrest by a factor of 14.”); see also Uberto Gatti et al., *Latrogenic Effect of Juvenile Justice*, 50 J. CHILD PSYCH. & PSYCHIATRY 991, 997 (2009), <https://www.acgov.org/probation/documents/EffectsofJuvyJusticeonYouth.pdf> [<https://perma.cc/R8TP-672W>].

adult health outcomes<sup>150</sup>—contact with the criminal justice system has negative impacts and children and youth should be diverted away, whenever possible.

Probation reforms, both adult and, in some cases, juvenile, have been underway in Los Angeles,<sup>151</sup> Seattle,<sup>152</sup> Philadelphia,<sup>153</sup> among others, to begin to rethink probation and its transformation. That such reform efforts are advancing speaks to a deeper recognition that probation is not working as it was intended to be and that we must rethink its purpose.

Most recently, in California, the new law that was signed by Governor Newsom is a sign of what is to come. This bill—authored by Assembly member Mike Gipson, who represents South Los Angeles, including the under-resourced areas of Compton and Watts—was focused on addressing *school-based*

<sup>148</sup> One study concluded that both diverted and formally processed youth were more likely than no-contact youth to be arrested, regardless of similar “antisocial and illegal behavior” suggesting the default policy should be to divert low-level offenders, and keep the justice system to a minimum for least harm. Jordan Bechtold Beardslee, *Under the Rader or Under Arrest: How Does Contact with the Juvenile Justice System Affect Delinquency and Academic Outcomes?* (Dec. 2014) (Ph.D. dissertation, U.C., Irvine), <https://www.ncjrs.gov/pdffiles1/nij/grants/248533.pdf> [<https://perma.cc/KJX8-XZJK>].

<sup>149</sup> Probation can actually lead to detention despite its intended purpose. See Soraya Shockley, *Meant to Keep Youths Out of Detention, Probation Often Leads Them There*, NPR (July 29, 2015), <https://www.npr.org/2015/07/29/427263478/some-youths-find-probation-more-challenging-than-juvenile-detention> [<https://perma.cc/M4V2-485Y>] (“Weisburd [Expert] says putting kids in the probation system can lead to further entanglement in the justice system, rather than providing an alternative to it.”).

<sup>150</sup> A study of 14,344 adults found that “incarceration during adolescence and early adulthood is independently associated with worse physical and mental health outcomes during adulthood.” See Elizabeth S. Barnert et al., *How Does Incarcerating Young People Affect Their Adult Health Outcomes?*, 139 PEDIATRICS 1, 2, 7 (2017).

<sup>151</sup> The Probation Reform and Implementation Team in Los Angeles has been working since 2018. *Probation Reform and Implementation Team*, L.A. CNTY., <http://prit.lacounty.gov> [<https://perma.cc/9VG7-5QMZ>] (discussing the Probation Reform and Implementation Team’s formation and ongoing work); see also Jaclyn Cosgrove, *L.A. County Moves to Create New Juvenile Justice System Focused on ‘Care,’ Not Punishment*, L.A. TIMES (Nov. 25, 2020, 7:00 AM), <https://www.latimes.com/california/story/2020-11-25/la-county-could-dismantle-juvenile-justice-system-for-care-first-model> [<https://perma.cc/T3FV-ME5H>] (“The Los Angeles County Board of Supervisors . . . took the first steps to transition juvenile probation to a proposed new Department of Youth Development, in a three-phase approach that will take at least five years. Similar approaches have been tried in San Francisco; Houston; New York City; King County, Wash.; and Oregon.”).

<sup>152</sup> See generally VERA INST. OF JUST., REPORT TO SEATTLE MUNICIPAL COURT PROBATION SERVICES ON STRATEGIES FOR IMPROVING POLICIES AND PRACTICES (2020), [http://www.seattle.gov/Documents/Departments/Court/VeraReport\\_SMCP probation%20Services\\_06222020.pdf](http://www.seattle.gov/Documents/Departments/Court/VeraReport_SMCP probation%20Services_06222020.pdf) [<https://perma.cc/2JFF-LWKW>] (discussing developments in probation in Seattle courts).

<sup>153</sup> Senate Bill 14 was passed in the Pennsylvania Senate in Philadelphia calling for the reform of Probation. See S.B. 14, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); see also Ron Southwick, *Pa. Senate Unanimously Passes Bill to Reform Probation System; Supporters Call It a ‘Milestone,’* PA. REAL-TIME NEWS (July 15, 2020), <https://www.pennlive.com/news/2020/07/pa-senate-unanimously-passes-bill-to-reform-probation-system-supporters-call-it-a-milestone.html> [<https://perma.cc/DJD2-2X8C>].



*probation programs* such as the YAT program discussed earlier.<sup>154</sup> The language of the bill prohibited judges in juvenile court from prosecuting youths for truancy in most cases; counties in California would have to find alternatives.<sup>155</sup>

Curtis Child, Legislative Director of Disability Rights California, summarized the purpose of the new law and hinted at the carceral state of our schools:

For too many years, youth who have never been accused of any criminal behavior and who have not had any prior criminal justice system contact are referred to probation programs without a court hearing. Often through their schools, they're subjected to 'voluntary' probation programs - required to check in with a probation officer, subjected to random searches, curfews, surprise home visits and interrogations - based on poor academic performance, truancy, poor attendance, or general school behavior issues to prevent juvenile delinquency. What this means is that they are then criminalized and, despite these programs being labeled 'voluntary,' parents and youth often feel coerced into them and do not have the benefit of speaking to an attorney. In other words, this process turns on the faucet to the school-to-prison pipeline.<sup>156</sup>

That the disciplinary process disproportionately affects those of color—who are consistently over-identified as 'at-risk' of delinquency and referred to informal supervision—was a given that needed to be planned for was made clear by the bill's author who stated:

AB 901 would ensure that youth receive appropriate interventions and are not criminalized for academic reasons or typical child/adolescent behavior by: limiting probation departments' overbroad discretion to provide services to any youth in the state they deem 'at-risk,' as well as ensuring that truancy or disobeying a teacher alone is not a reason to place a child under the jurisdiction of the juvenile court system.<sup>157</sup>

The bill gained support from youth organizations, youth defenders, and advocates.<sup>158</sup> It was opposed by the California District Attorneys Association, California State Sheriffs' Association, and the Chief Probation Officers Associ-

<sup>154</sup> Press Release, Assemb. Mike Gipson, California Bill to Eliminate 'Voluntary' Youth Probation Now onto Governor's Desk (Aug. 26, 2020), <https://a64.asmdc.org/press-releases/20200827-california-bill-eliminate-voluntary-youth-probation-now-governors-desk> [<https://perma.cc/H3P4-EJX7>].

<sup>155</sup> Mauricio Tellez-Sanchez, *California Considers Decriminalizing Truancy*, IMPRINT (Aug. 29, 2019, 9:00 AM), <https://imprintnews.org/justice/juvenile-justice-2/california-considers-decriminalizing-truancy/37319> [<https://perma.cc/87SU-NELH>].

<sup>156</sup> Letter from Curtis Child, Legis. Dir., Disability Rts. Cal., to Hon. Nancy Skinner, Chair, Pub. Safety Comm., Cal. State Senate (June 25, 2019), <https://www.disabilityrightsca.org/system/files/file-attachments/AB901GipsonJuvenilesSupportJune252019.rtf> [<https://perma.cc/6JB2-YDXS>].

<sup>157</sup> SOLANO CNTY. LEGIS. COMM., FILE 19-407, LEGISLATIVE UPDATE FROM THE MAY 6, 2019 AND MAY 22, 2019 LEGISLATIVE COMMITTEE MEETINGS 3 (2019), <https://solano.legistar.com/LegislationDetail.aspx?ID=3967773&GUID=98D5B85F-5CFF-4B57-81B6-B3492E3ADE8E&Options=&Search=&FullText=1> [<https://perma.cc/DFT7-353S>].

<sup>158</sup> Tellez-Sanchez, *supra* note 155.

ation.<sup>159</sup> At a hearing for the bill, the legislative advocate for the California District Attorneys Association, Tiffany Mathews, questioned the bill's decriminalization of truancy: "Habitual truancy is recognized as a reliable predictor of future criminality."<sup>160</sup>

In addition to new laws in California, counties across the country are beginning to explore novel ways to place juveniles on probation including Pierce County, Washington, where they are attempting to follow contemporary research revealing that youth respond better to positive rewards than threat of punishment or behavior.<sup>161</sup> And in Utah, lawmakers are starting to examine the effect of their bill "H.B. 239, a comprehensive set of research-based reforms designed to improve the juvenile justice system."<sup>162</sup> Early results show that if reforms continue, out of home youth placement will reduce by 47 percent.<sup>163</sup> Specific to probation, H.B. 239 sought to address the variation in probation guidelines by providing a standard scheme that is worthy of further scrutiny.<sup>164</sup> And in Michigan, Michigan Gov. Gretchen Whitmer issued an executive order that lessened the amount of youth in detention centers unless they were considered a "substantial and immediate safety risk to others."<sup>165</sup>

The future does look promising for probation reform, but only if a fundamental re-shift of thinking about its purpose occurs. In California, the District

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* In my next article, I undertake a comprehensive examination of juvenile probation under an "Abolition Framework" suggesting that it may time for us to do away with it all together.

<sup>161</sup> See ANNIE E. CASEY FOUND., *Pierce County: Trailblazer for Probation Transformation*, ANNIE E. CASEY FOUND.: BLOG (May 28, 2018), <https://www.aecf.org/blog/pierce-county-trailblazer-for-probation-transformation> [<https://perma.cc/UE3V-MTWZ>]; see also Carrie Appling, *Pierce County Juvenile Court Detention Alternatives 2019*, YOUTUBE (Jun. 27, 2019), [https://www.youtube.com/watch?v=54Uwbc1FMLw&feature=emb\\_logo](https://www.youtube.com/watch?v=54Uwbc1FMLw&feature=emb_logo) [<https://perma.cc/L775-SEYU>].

<sup>162</sup> NOAH BEIN & RUTH ROSENTHAL, PEW CHARITABLE TR., *UTAH'S 2017 JUVENILE JUSTICE REFORM SHOWS EARLY PROMISE 1* (2019), [https://www.pewtrusts.org/-/media/assets/2019/05/pspp\\_utahs-2017\\_juvenile\\_justice\\_reform\\_brief\\_v3.pdf](https://www.pewtrusts.org/-/media/assets/2019/05/pspp_utahs-2017_juvenile_justice_reform_brief_v3.pdf) [<https://perma.cc/HJN4-LCMH>].

<sup>163</sup> *Id.* at 2.

<sup>164</sup> See Suchada P. Bazzelle, *The Changing Landscape of Juvenile Justice*, UTAH BAR J., Mar.–Apr. 2020, at 16, 18 ("Despite their good faith efforts to achieve the right outcome [before the passage of H.B. 239], the broad discretion to consequence and then rehabilitate the children appearing before them caused results that were as varied as the judges and probation officers themselves.").

<sup>165</sup> See Paul Egan & Angie Jackson, *Gov. Whitmer Considering Release of Low-Risk, Vulnerable Prisoners Amid Coronavirus*, DETROIT FREE PRESS (Apr. 1, 2020), <https://www.freep.com/story/news/local/michigan/2020/03/30/whitmer-prisoners-early-release-coronavirus/5085951002> [<https://perma.cc/M395-4XKE>]; see also Jodi S. Cohen, *Out of Jail and Back in School, Grace Finds Her Voice*, PROPUBLICA (Oct. 31, 2020, 6:00 AM), <https://www.propublica.org/article/out-of-jail-and-back-in-school-grace-finds-her-voice> [<https://perma.cc/3MPJ-K9EE>].

Attorney's stated position opposing transformation is revealing of the fundamental problem:

While juvenile court proceedings cannot and should not be viewed as the only method of prevention in these cases, the structured supervision that can be provided by the juvenile court is a valuable tool in helping minors who may not have access to resources elsewhere.<sup>166</sup>

The District Attorney's position reveals that they see their fundamental purpose to "help minors" address non-criminal behaviors, which is not the purpose of the juvenile criminal system or juvenile probation. Until this fundamental underlying flaw in purpose is addressed, children and youth, particularly BIPOC and those in under-resourced and carceral schools reasoning, will continue to be trapped in their web of incarceration. Thus, scholars and advocates must be diligent in proposals that do more than just limit the net but actually address the underlying philosophical role of the juvenile court and in turn, juvenile probation.<sup>167</sup>

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<sup>166</sup> Tellez-Sanchez, *supra* note 155.

<sup>167</sup> This author is working on a forthcoming piece to address the widening net of juvenile probation, titled *Defund Probation*.