ARTICLES

TRANSFORMING THE CULTURE OF YOUTH JUSTICE IN THE WAKE OF YOUTH PRISON CLOSURES

by
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In 2019, the Governor of California vowed to fundamentally transform the state's youth justice system. The legislature endorsed this commitment by enacting SB 823, which began a phased closure of state-run youth prisons in 2021. California is not the first state—nor will it be the last—to close facilities in light of decreased youth crime and greater awareness of the harms associated with incarceration. Although a welcomed development, the closure of youth prisons should not be viewed as the culmination of reform; rather, it is only the beginning. To achieve far more impactful change, state and local jurisdictions must confront the long-standing punitive culture within youth justice systems that persists both inside and outside the walls of youth prisons.

This Article argues that the science of adolescent development embraced by the U.S. Supreme Court and the substantial evidence regarding what works to prevent youth reoffending provides states with the tools to transform the culture of youth justice. A proposed legislative agenda includes updating statutory purpose clauses and enacting statewide policies rooted in the lessons of history and

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the findings of contemporary research. With the novel concerns raised by a global pandemic and a renewed focus on racial injustice, this is an opportune time for California and other states to revisit and rebuild their systems to ensure they promote the well-being and safety of all children and their communities.

INTRODUCTION

"We are committed about ending the juvenile justice system as we know it once and for all."[1]

In one of his earliest statements as California's new governor in 2019, Gavin Newsom vowed to fundamentally alter the state's youth justice system. He began by eliminating the problematic Division of Juvenile Justice (DJJ), an entity positioned within the state correctional agency, creating instead the Department of Youth and Community Restoration (DYCR) within the state's human services agency. Following months of preparation for this shift, the Governor unexpectedly announced an even more significant change—a full closure of the state's youth justice facilities. His proposal discontinued admissions of youth to DJJ facilities, directing responsibility for all justice-involved youth back to individual counties—a full realignment of the youth justice system.[2] The measure found favor with the state legislature, which had rejected a similar proposal under a previous administration. With dwindling incarceration numbers, the halting of admissions to DJJ due to COVID-19, and anticipated long-term cost savings, the end of state prisons for youth in California became law on September 30, 2020, with the passage of SB 823.

California is not the only state to rethink its youth correctional system in recent years. In fact, since 1999, 66% of all youth facilities built to house more than 200 youth have shut down across the country.[3] Dramatically reduced rates of youth crime along with increased awareness of the harms and inequities associated with youth incarceration, particularly in state facilities historically characterized by punitive and abusive conditions, have spurred these closures. Concerns regarding the health and safety of incarcerated youth in light of COVID-19 have bolstered existing arguments and brought increased urgency to this current wave of reform.

As noteworthy as the closure of youth prisons is, it directly affects only a very small portion of the youth involved with the youth justice system. For example, in California, fewer than 700 youth were in DJJ custody as of December 2018. In 2019, 343 youth were committed to DJJ while almost 25,000 were instead subject

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[1] Jazmine Ulloa, *Newsom Plans to Move California Juvenile Justice Division out of Corrections Department*, L.A. TIMES (Jan. 22, 2019, 5:35 PM), https://www.latimes.com/politics/la-pol-ca-gavin-newsom-juvenile-justice-plan-20190122-story.html.

[2] CAL. DEP'T. OF FIN., 2020-21 MAY REVISION TO THE GOVERNOR'S BUDGET 88 (2021), https://www.ebudget.ca.gov/budget/publication/#/m/2021-22/BudgetSummary.

[3] VINCENT SCHIRALDI, JUST. LAB, COLUMBIA UNIV., CAN WE ELIMINATE THE YOUTH PRISON? (AND WHAT SHOULD WE REPLACE IT WITH?) 10 (2020), https://squareonejustice.org/wp-content/uploads/2020/08/CJLJ8431-Square-One-Youth-Prisons-Paper-200828-2-WEB.pdf.

to local informal or formal probation.[4] Thus, the shuttering of state facilities will only change circumstances for approximately 1% of justice-involved youth across California. These youth will join the other 99% who are the responsibility of local youth justice systems. It is within these local systems that change can have the most significant impact.

Vowing to change the system as we know it makes for a noteworthy soundbite, but developing, implementing, and ultimately sustaining a new approach to youth justice is a monumental undertaking for any state. Recurrent threats, such as fluctuating crime rates, changing political priorities, and other cultural and societal factors have undermined previous reform efforts and driven repeated shifts away from a therapeutic or human services approach to youth justice toward a more punitive one throughout history.[5] It is a persistent culture of custody and control that allows for continued criminalization of youth, particularly youth of color, and has long stymied the realization of the system's rehabilitative ideal.

Among scholars and policymakers, there is little examination of the importance and difficulty of changing the organizational culture within the youth justice system. Organizational culture can be viewed as the story embraced by those working within the organization and the values and practices that exist to reinforce the story.[6] This Article explores the story of youth justice throughout history, highlighting the long-standing reliance on incarceration and punitive intervention, and posits that, at this particular moment, states and local jurisdictions have the potential to change the narrative, to transform the culture within their systems. Unique to this moment is a widely endorsed and research-based understanding of adolescents, why they engage in delinquent behavior, and what can be done to effectively intervene (or why in some cases justice-system intervention should not occur at all).

This Article focuses on two opportunities, timely in light of recent youth prison closures. First is the opportunity to articulate a new vision for youth justice, one that encompasses all components of the youth justice system, focusing on promoting the welfare and development of all youth as the organizing principle, and incorporating developmental science and research-based responses to youth offending. Second is the opportunity to construct law and policy prioritizing the translation of this vision into local practice and programs, dismantling an outdated culture and promoting a culture of "doing what works" within the full continuum of youth justice. By taking advantage of these opportunities, California and other states have the potential to break the ongoing cycle of rehabilitative and punitive policy shifts and instead create

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[4] CAL. DEP'T. OF JUST., JUVENILE JUSTICE IN CALIFORNIA 89 tbl.29 (2019), https://data-openjustice.doj.ca.gov/sites/default/files/2020-06/Juvenile%20Justice%20In%20CA%202019.pdf.

[5] Kathryn Monahan, Laurence Steinberg & Alex R. Piquero, *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUST. 577, 578 (2015).

[6] Michael D. Watkins, *What is Organizational Culture? And Why Should We Care?*, HARV. BUS. REV. (May 15, 2013), https://hbr.org/2013/05/what-is-organizational-culture.

sustainable change. Importantly, taking advantage of these opportunities is not offered as a formula for ending all youth crime. Rather, the goal is to better define an effective role for the youth justice system as one component of a public commitment to improving the lives of youth, families, and communities.

Part I documents the history of the youth justice system, generally and in California, from its beginnings as an informal "child saving" movement and alternative to the adult criminal system to the more formalized juvenile court and correctional agencies of today, which strive yet struggle to effectively incorporate research-based policy and practice. Historically, the tendency to base policy on moral judgments of children and families has led to a culture emphasizing custody and control, driving inequities and challenges in reducing recidivism. Today, developments in neuroscience and psychology reveal a new and promising direction for addressing youth offending that offers an alternative to a historically punitive culture.

Part II examines foundational elements for establishing a new approach to youth justice: purpose, policy, and practice. First, this Part provides a brief review of state statutory clauses describing the purpose of juvenile courts and youth justice systems. Such statutory purpose clauses illustrate a state's core commitments to youth, families, and communities—commitments that guide policy and investments and ultimately the state's youth justice culture. This Part suggests that most states are overdue for an update to these important statutory provisions. Next, this Part identifies research-based policy and practice in youth justice, demonstrating that today far more is known about what works to address youth offending than at any point in history. Nevertheless, long-standing problems persist, in California and nationally, suggesting the existence of outdated organizational culture in many jurisdictions that continues to be resistant to change. These persistent challenges are outlined in this Part.

Part III introduces a research-based legislative agenda for states that begins with articulating a new purpose for youth justice, envisioning a commitment to youth development achieved through research-based policy and practice. The agenda also includes adoption of policies designed to transform outdated culture in youth justice. This change requires a deep understanding of the impact of adolescent development, trauma, family and community connection, and evidence-based[7] practice and programs. It also demands a true reckoning with historically racist policies in order to eliminate racial and ethnic disparities. This Part includes key recommendations for California and other jurisdictions at this opportune time.

In California, as in other states, supporters of the movement to close youth prisons applaud what they view as a step in the right direction—the end of troubled

[7] "Evidence-based" practices and programs are those that have been "rigorously evaluated and shown to be effective at preventing or reducing youth crime." *Key Issues: Evidence-Based Practices*, JUV. JUST. INFO. EXCH., https://jjie.org/hub/evidence-based-practices/key-issues/ (last visited Mar. 10, 2022).

facilities that may have undergone change but never truly transformed. Others voice concern about whether local youth justice systems will succeed in doing a better job than state agencies and facilities have done, and point out potential unwanted consequences of recent changes.[8] There is wisdom in such critiques. However, with the benefit of widely endorsed research about youth development and offending to inform policy, this moment has the potential to establish a new foundation and culture that may withstand the inevitable societal and political shifts that have reinforced a punitive approach to youth justice. The potential for this change is in the hands of local youth justice systems; it is the responsibility of states to provide the tools.

I. THE HISTORY OF YOUTH JUSTICE IN CALIFORNIA AND THE UNITED STATES

A. The Paternalistic Origins of the Youth Justice System

1. Refuge and Reformatories

Prior to the formal development of the juvenile court, children deemed in need of protection or guidance were frequently placed in reformatories such as the New York House of Refuge, established in 1825.[9] The movement establishing these institutions aimed to "rescue" children identified as impoverished or delinquent, without distinguishing between the two.[10] Poor children were viewed as victims in need

[8] For example, some advocates fear that youth between ages 18–25, who could be committed to DJJ in the past, will more likely be transferred to adult prisons after the closure of state facilities. Bob Egelko, *Newsom Proposes Closing Youth Prisons as Crime Drops, Coronavirus Drains Budget*, S.F. CHRON. (May 25, 2020, 11:57 AM), https://www.sfchronicle.com/news/article/Newsom-proposes-closing-youth-prisons-as-crime-15292274.php. An agreement between the governor and the legislature in late August 2020 addressed this concern by allowing some youth up to age 25 to remain in the youth justice system. Jeremy Loudenback, *California Legislature and Governor Reach Agreement to Close Youth Prison System*, IMPRINT (Aug. 31, 2020, 7:54 PM), https://imprintnews.org/justice/juvenile-justice-2/california-legislature-and-governor-reach-agreement-to-close-youth-prison-system/47036. Another concern shared by advocates and county officials is that some counties—particularly smaller ones—will struggle to provide the necessary specialized programs for youth with high needs. *See* Don Thompson, *California Moves to Phase Out Its State-Run Youth Prisons*, ASSOC. PRESS (June 29, 2021), https://apnews.com/article/ca-state-wire-california-prisons-government-and-politics-67457e29d8f6eb3a256175d3fb5bf5ad.

[9] In 1824, the Society for the Reformation of Juvenile Delinquents was granted authority by the New York legislature to take in children who had been "committed as vagrants" or convicted of crimes. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1189–90 (1970).

[10] Daniel Macallair, *The San Francisco Industrial School and the Origins of Juvenile Justice in California: A Glance at the Great Reformation*, 7 U.C. DAVIS J. JUV. L. & POL'Y 1, 3–4 (2003); *see also* Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 397 (2017) ("For the proponents of the movement, living in a state of

of saving from their family circumstances lest they become criminal or destitute.[11] The reformatories were considered preventive, allowing for the confinement of minor offenders and youth who had not yet been charged with a crime, providing both with "moral guidance."[12] More serious offenders were handled in the adult criminal system.[13] Black youth were generally excluded from reformatories altogether.[14]

Despite their purported benevolent purpose, in reality reformatories manifested harmful conditions. Originally characterized as providing rehabilitative care, these facilities quickly came to prioritize custody and control.[15] Corporal punishment was doled out in the extreme and children were forced into hard labor. This treatment was viewed as a moral imperative, justified on the premise that hard work, discipline, and punishment were required to instill appropriate work habits and respect for authority among wayward youth.[16] Children remained in reformatories indefinitely, sometimes spending years in these institutions.[17]

One such institution, the San Francisco Industrial School, was established in California in 1859. The year prior, the California Legislature passed the Industrial School Act with the purpose of providing detention, reformation, and education for both neglected and delinquent youth.[18] The stated intent was to house troubled children and give them shelter, schooling, and skills. Among the first group of 65 children committed to the Industrial School, all but 12 were committed for "leading an idle and dissolute life," a non-delinquent designation.[19] The average age of these youth was 12.[20]

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poverty and committing a criminal offense were virtually synonymous because both conditions were conceived of in strictly moral terms.").

[11] Birckhead, *supra* note 10, at 397; *see also* PATRICK MCCARTHY, VINCENT SCHIRALDI & MIRIAM SHARK, DEP'T OF JUST., THE FUTURE OF YOUTH JUSTICE: A COMMUNITY-BASED ALTERNATIVE TO THE YOUTH PRISON MODEL 2 (2016). Despite the charitable framing of the reformatory movement, reformers sought to use these institutions to correct what were viewed as immoral or undesirable behaviors of immigrant families and youth. *Id.*

[12] Birckhead, *supra* note 10, at 396. Controlling the behavior of children through legal means has a long history in the United States, with the first "stubborn child" law passed in 1646, allowing for punishment in response to noncriminal misbehavior. THOMAS J. BERNARD & MEGAN C. KURLYCHEK, THE CYCLE OF JUVENILE JUSTICE 16 (2d ed. 2010).

[13] Fox, *supra* note 9, at 1191.

[14] JAMES BELL & LAURA JOHN RIDOLFI, ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 4–5 (Shadi Rahimi ed., 2008).

[15] BERNARD & KURLYCHEK, *supra* note 12, at 58.

[16] Macallair, *supra* note 10, at 6; *see also* Birckhead, *supra* note 10, at 396–97.

[17] Macallair, *supra* note 10, at 5.

[18] *Id.* at 14.

[19] *Id.* at 17.

[20] *Id.* at 18.

Despite the promise of education and vocational training, both were largely absent in the Industrial School.[21] Children were kept in cells, later replaced with large dorm-like units with room for up to 150 children.[22] The food was often rotten and rancid, and the facilities were falling apart.[23] Frequent escapes led administrators to erect large fences and deny the children socks and shoes.[24] School officials used solitary confinement and flogging as common disciplinary techniques.[25] Youth who rebelled were subject to additional isolation and physical abuse.[26]

As a legal matter, the confinement of children within reformatories was permitted under the doctrine of *parens patriae*, which gives the state the power to step into the role of parent. It was assumed that the state would send children to institutions for their own good, not as a method of punishment, thus rendering procedural protections unnecessary.[27] This assumption was legally sanctioned by the Pennsylvania Supreme Court in the seminal case of *Ex parte Crouse*, which established *parens patriae* as the guiding principle in juvenile law.[28] Fourteen-year-old Mary Ann Crouse had been committed to the Philadelphia House of Refuge by her mother on the basis of incorrigibility. Her father sought her release, arguing due process violations. The court rejected his argument, rationalizing that the commitment was for her own good rather than a form of punishment; there was no constitutional violation in such a placement undertaken for the welfare and education of the child.[29]

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[21] *Id.* at 19–20.

[22] *Id.* at 21.

[23] *Id.* at 51–52.

[24] *Id.* at 22–23.

[25] *Id.* at 23. Grand jury investigations revealed evidence of cases in which youth were confined in dark cells, sleeping on the floor, and provided only bread and water. There were numerous cases of severe flogging, with some youth receiving over 100 lashes. *Id.* at 27.

[26] *Id.* at 27–28.

[27] BERNARD & KURLYCHEK, *supra* note 12, at 59. However, "the state" often engaged with the child through law enforcement mechanisms. In Chicago, an 1855 municipal ordinance authorized a justice of the peace or police magistrate to commit misdemeanant or non-offending children to the local reformatory. When later codified in state law, this power was extended to allow commitment of children for any non-capital offense and of those as young as seven years old. Fox, *supra* note 9, at 1212–13. The vast majority of commitments to California's first reformatory—the San Francisco Industrial School—were facilitated through police courts, which enforced local laws. Macallair, *supra* note 10, at 38. Interestingly, in the early days of police courts, delinquent youth could only be sentenced to a maximum of six months whereas children who were deemed victims of parental neglect could receive an indeterminate sentence since they were viewed as at-risk and in need of extensive preventative intervention. *Id.* at 39–40.

[28] *See Ex parte* Crouse, 4 Whart. 9 (Pa. 1839); *see also* Macallair, *supra* note 10, at 7–8.

[29] *Ex parte Crouse*, 4 Whart. at 10–12. ("The House of Refuge is not a prison, but a school."). The court reasoned that not only was her continued confinement legal, but to release her when she had been "snatched from a course which must have ended in confirmed depravity" would be "an act of extreme cruelty." *Id.* at 11–12.

As reformatories emerged in several states during the latter part of the 19th century, challenges to the frequent commitment of non-delinquent youth were raised in the courts. In *People ex rel. O'Connell v. Turner*, the Illinois Supreme Court departed from the decision in *Ex parte Crouse*, ruling that status offenders[30] could not be confined in what were prison-like facilities.[31] However, in *Ex parte Ah Peen*, the California Supreme Court rejected a similar challenge to the detention of a youth in the Industrial School for a non-criminal offense.[32] In rejecting the argument that the child was entitled to due process protections afforded criminal defendants under the Constitution, the court dismissively stated:

> It is obvious that these provisions of the Constitution have no application whatever to the case of this minor child. . . . The purpose in view is not punishment for offenses done, but reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority.[33]

Conditions within reformatories became a subject of public outrage, spurring development of alternatives to confinement. In 1873, the San Francisco Boys and Girls Aid Society was established to facilitate placement of neglected and delinquent children in non-institutional settings—the early iteration of foster care and juvenile probation.[34] This provided the foundation for California's Juvenile Probation Act, passed in 1883 as one of the first laws providing for probation services for children.[35] Although the Industrial School closed in 1892 amid criticism and scandal, such early reformatories, and the court's endorsement of them, nevertheless established punitive measures of custody and control as an enduring default approach to young offenders and those at risk.

2. A Special Tribunal

Following the decision in *People ex rel. O'Connell v. Turner*, Illinois judges could no longer send children to reformatories for behavior that was not criminal, leaving few options for intervening with non-offenders viewed as troubled.[36] At the same time, children who came before the trial courts on criminal charges were often

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[30] Status offenses are offenses that would not be crimes if committed by an adult, such as truancy, curfew violation, running away from home, or incorrigibility. *See* DEV. SERVS. GRP., OFF. OF JUV. JUST. & DELINQ. PREV., LITERATURE REVIEW: STATUS OFFENDERS 1 (2015).

[31] People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 281 (1870). Note that this decision was met with resistance and later distinguished and essentially considered overruled. Fox, *supra* note 9, at 1218 & n.157.

[32] *See Ex parte* Ah Peen, 51 Cal. 280 (1876).

[33] *Id.* at 280–81.

[34] Macallair, *supra* note 10, at 45–47.

[35] *Id.* at 46.

[36] BERNARD & KURLYCHEK, *supra* note 12, at 62, 76.

held in jails with adult criminals—a deeply unsafe circumstance.[37] To address these concerns, Illinois established the first formal juvenile court with the passage of the Illinois Juvenile Court Act in 1899. The premise of the juvenile court was to provide a tribunal separate from the adult court, recognizing that children are different from adults and that specialized rehabilitation efforts would increase public safety.[38] To avoid the problem posed by the *O'Connell* decision, this court would not be a criminal court but a chancery court grounded in the doctrine of *parens patriae*.[39]

The Act designated a judge and courtroom in every circuit court to oversee juvenile cases.[40] These new juvenile courts had jurisdiction over both dependent and delinquent children. The circumstances under which a child was deemed dependent encompassed essentially any conditions related to poverty.[41] Delinquent children were defined as children under the age of 16 charged with violating the law, with the exception of a capital offense, which would remain a criminal matter.[42] The juvenile court at its inception was essentially viewed as a child welfare agency—a public entity entrusted with responsibility for overseeing the youth's development throughout his or her childhood.[43] Empowered by the doctrine of *parens patriae*, the court was to ensure that "the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents . . . ."[44] The

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[37] Dianne Nunn & Christine Cleary, *From the Mexican California Frontier to Arnold-Kennick: Highlights in the Evolution of the California Juvenile Court, 1850–1961*, 5 J. CTR. FOR FAMS., CHILD. & CTS. 3, 10, 12 (2004).

[38] Diane Geraghty, *Bending the Curve: Reflections on a Decade of Illinois Juvenile Justice Reform*, 36 CHILD.'S LEGAL RTS. J. 71, 71 (2016).

[39] BERNARD & KURLYCHEK, *supra* note 12, at 62, 76 ("Chancery court was designed to help children who lacked proper parental care because their parents had died. But delinquent children lacked proper parental care because their parents were 'weak and criminal.'").

[40] Nunn & Cleary, *supra* note 37, at 12.

[41] The new court had jurisdiction over:

> [A]ny child who for any reason is destitute or homeless or abandoned; or dependent upon the public for support; or has not proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame or with any vicious or disreputable person; or whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such a child; and any child under the age of 8 years who is found peddling or selling any article or singing or playing any musical instrument upon the streets or giving any public entertainment.

BERNARD & KURLYCHEK, *supra* note 12, at 77–78 (quoting Juvenile Court Act of 1899, Ill. Laws 131–32 (current version at 705 ILL. COMP. STAT. 405/2-3 to -4) (1987)).

[42] ROBERT C. FELLMETH & JESSICA K. HELDMAN, CHILD RIGHTS AND REMEDIES 450 (2019) (excerpting Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, *in* KIDS, COURT AND COMMUNITY: PROVIDING CHILDREN ACCESS TO JUSTICE 11, 19 (Nat'l Assoc. of Counsel for Child., 1999)).

[43] *Id.* at 451.

[44] 1899 Ill. Laws 137.

"rehabilitative ideal" fueling the juvenile court was the vision of a system that provided individualized treatment based on the youth's needs rather than relying on punishment.[45]

During the 20th century, the establishment of juvenile courts led to the development of systems of youth justice consisting of government-run institutions and programs of supervision. In the example of California, the state passed its first juvenile court law in 1903.[46] Children before the court as the result of an arrest could be ordered under the supervision of a probation officer, committed to a reform school, or, for youth 12 and over, sent to jail.[47] In 1909, California passed the Detention Home Act, which required each county to establish what would eventually be known as a juvenile hall.[48] The first act of statewide supervision was passed in 1929, establishing the Probation Office under the State Department of Social Welfare.[49]

In 1941, California passed the Youth Corrections Authority Act, which mandated acceptance of all individuals under the age of 23 into a new Youth Corrections Authority. The Youth Corrections Authority soon was given oversight of the State reformatories, formally becoming a state department in 1953 and dropping "corrections" from its name.[50] The mission of the California Youth Authority (CYA) was to protect society by rehabilitating young offenders.[51] In its early years, the CYA was considered progressive with its focus on keeping youth close to their local communities.[52]

Juvenile courts ran informally and independently in the various California counties and elsewhere.[53] Juvenile courts favored ex parte conferences excluding parents and attorneys, with judges eschewing statutorily mandated hearings, viewing their function as counseling children and parents on morals and behavior rather

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[45] Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 824–25 (1988).

[46] Nunn & Cleary, *supra* note 37, at 12. By 1945, all states had established juvenile courts. BERNARD & KURLYCHEK, *supra* note 12, at 86.

[47] Nunn & Cleary, *supra* note 37, at 13.

[48] Dan Macallair, *Emerging from Darkness: Reinventing San Francisco's Juvenile Justice System*, STAN L. & POL'Y REV., Summer 1996, at 31, 32–33.

[49] *The History of the Division of Juvenile Justice*, CAL. DEP'T OF CORR. & REHAB., https://www.cdcr.ca.gov/juvenile-justice/history/ (last visited Mar. 10, 2022).

[50] *Id.*

[51] *See* Shawna L. Parks, *Innocence Lost: Mental Health Care and the California Youth Authority*, HUM. RTS., Spring 2003, at 14, 14.

[52] BARRY KRISBERG, LINH VUONG, CHRISTOPHER HARTNEY & SUSAN MARCHIONNA, NAT'L COUNCIL ON CRIME & DELINQ., A NEW ERA IN CALIFORNIA JUVENILE JUSTICE: DOWNSIZING THE STATE YOUTH CORRECTIONS SYSTEM (2010).

[53] *See* Nunn & Cleary, *supra* note 37, at 19.

than overseeing a legal process.[54] Operating in the absence of the formal procedures that characterized adult criminal courts, this venue provided judges with broad discretion.[55] While juvenile courts purported to promote the best interests of children, judges wielded unchecked authority that at times resulted in exceedingly punitive dispositions, including indeterminate confinement in reformatories.[56]

In the earliest days of juvenile courts, a disproportionate number of Black youth came before the court, yet there was a dearth of services available for Black children in the community.[57] Thus, Black youth experienced institutionalization at greater frequency than their white peers—and often in adult prisons.[58] Not only were youth of color more likely to be incarcerated, but they received especially poor treatment within facilities or exclusion from rehabilitative services within facilities altogether.[59]

As juvenile law in California and other states evolved, ongoing concerns with the lack of procedural consistency, arbitrariness of decisions, and the large number of confined children raised questions about the effectiveness of this new tribunal. The juvenile court was characterized as revolutionary, yet it largely relied upon the same approach to addressing the plight of children as the courts of the reformatory era—punitive interventions and institutionalization, particularly for youth of color.[60] Disillusionment with what had been hailed as a bold new era fueled ongoing advocacy for systemic reform.

B. Rights and Retribution in the Modern History of Youth Justice

1. The Due Process Era

The first half-century of the juvenile court was characterized by informal and paternalistic proceedings devoid of due process protections. Yet the consequences meted out by the juvenile court were not altogether distinct from what awaited

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[54] *Id.* at 20.

[55] Note that it is unclear whether youth tried in adult criminal courts were afforded due process protections even in that venue. Fox, *supra* note 9, at 1213.

[56] C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 668–69 (2005).

[57] JAMES BELL, W. HAYWOOD BURNS INST. FOR YOUTH JUST. FAIRNESS & EQUITY, REPAIRING THE BREACH: A BRIEF HISTORY OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 10 (2015), https://burnsinstitute.org/wp-content/uploads/2020/09/Repairing-the-Breach-BI_compressed.pdf.

[58] *Id.* at 11–12.

[59] CTR. FOR CHILD.'S L. & POL'Y, INTRODUCTION AND CHAPTER 1: BEGINNING OR RESTARTING WORK TO REDUCE RACIAL AND ETHNIC DISPARITIES 8 (2015), https://www.cclp.org/wp-content/uploads/2016/06/Introduction-and-Chapter-1-Beginning-or-Restarting-Work-to-Reduce-Racial-and-Ethnic-Disparities.pdf; *see also* BELL, *supra* note 57, at 5.

[60] *See* BERNARD & KURLYCHEK, *supra* note 12, at 88.

adults convicted of crimes. Youth facilities had not undergone significant transformation from the early days of reformatories, and youth could remain in such facilities until deemed rehabilitated or until becoming an adult. By the 1950s and 1960s, the treatment in such facilities was recognized as generally ineffective.[61] Yet youth continued to be regularly confined by juvenile courts, subject to what the U.S. Supreme Court deemed "the worst of both worlds . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[62]

In 1967, the U.S. Supreme Court concluded that children in juvenile court were entitled to due process protections under the Constitution. In the seminal case of *In re Gault,* the Court held that in juvenile court adjudication hearings in which confinement was possible, youth were entitled to notice, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.[63] The Court reasoned that confinement equated to punishment in light of the conditions within youth institutions, thus triggering Constitutional safeguards. The Court also recognized that a fairer process would likely have greater therapeutic impact.[64] This focus on fairness was a departure from the doctrine of *parens patriae* that had previously guided the juvenile court.

Despite the attempt to re-emphasize the therapeutic nature of the court, the *Gault* decision and others that followed resulted in a juvenile court that closely resembled the criminal court in many ways.[65] The court focused on whether the youth had actually committed the crime with which he was charged rather than on whether he needed intervention. No longer were delinquent youth seen primarily

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[61] NAT'L CTR. FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 84 (Melissa Sickmund & Charles Puzzanchera eds., 2014), https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf.

[62] Kent v. United States, 383 U.S. 541, 556 (1966). The *Kent* case, challenging a juvenile's transfer to the adult criminal court, was the first juvenile case upon which the U.S. Supreme Court ruled.

[63] Fifteen-year-old Gerald Gault was arrested for making a lewd phone call and received an indeterminate sentence in a youth facility after a hearing in which the complainant was not present, no counsel was provided, and no transcript was made of the proceedings. *See In re* Gault, 387 U.S. 1 (1967).

[64] *Id.* at 26. The Court cited sociological studies indicating that a child feeling unfairly treated may be less likely to engage in rehabilitative treatment. *See id.*

[65] Key decisions include *In re Winship*, 397 U.S. 358 (1970) (requiring the criminal standard of beyond a reasonable doubt in delinquency adjudications) and *Breed v. Jones*, 421 U.S. 519 (1975) (holding that double jeopardy was applicable to delinquency prosecutions). A later decision by the Court drew the line, however, at the right to trial by jury. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971). Failing to require a jury in juvenile court trials was a curious line to draw as this right is *expressly* provided for in the Constitution unlike several other due process protections previously afforded youth.

as children with needs similar to dependent youth; rather, they more closely resembled their adult criminal counterparts.[66]

Prior to the *Gault* decision, California had been viewed as a model of the "rehabilitative ideal" of the criminal justice system. With a commitment to research and innovation, the state was at the forefront of treatment-based programming.[67] Indicative of this treatment-oriented approach, CYA and the California Department of Corrections relocated to the state Human Relations Agency (HRA), the earlier iteration of the state's Health and Human Services Agency.[68] Beginning in the mid-1970s, however, California changed course, largely abandoning the goal of rehabilitation, focusing instead on punishment. Elected officials passed punitive legislation requiring minimum sentences and discontinued support for rehabilitation programs in the proliferating prisons around the state.[69] Many other states followed suit and the dormant punitive culture again emerged, this time with great fervor.

2. The "Tough on Crime" Era

The 1980s and 1990s saw growing alarm over an increase in crime overall, and youth crime in particular. An anxious public was inundated with predictions of an impending juvenile crime wave and the portrayal of youth as particularly violent and remorseless—a new breed of "super-predator."[70] A "bloodbath of teenaged violence" was considered inevitable.[71] Legislatures responded by enacting a series of increasingly punitive measures to respond to youth crime.[72] During this period, almost every state facilitated the transfer of more youth to criminal court by lowering

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[66] *See* BERNARD & KURLYCHEK, *supra* note 12, at 135–36.

[67] Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 331–32 (2013).

[68] GABRIEL PETEK, CAL. LEGIS. ANALYST'S OFF., THE 2019-20 BUDGET: REORGANIZATION OF THE DIVISION OF JUVENILE JUSTICE 5 (2019), https://lao.ca.gov/reports/2019/3998/juvenile-justice-041019.pdf.

[69] Cullen, *supra* note 67, at 332.

[70] *See* John DiLulio, *The Coming of the Super-Predators*, WASH. EXAM'R (Nov. 27, 1995), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators (asserting that an "army of young male predatory street criminals" would soon be "unleash[ed]" on society); *see also* Mark Soler, Dana Shoenberg & Marc Schindler, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. POVERTY L. & POL'Y 483, 486 (2009).

[71] *See The Lull Before the Storm?*, NEWSWEEK (Dec. 3, 1995), https://www.newsweek.com/lull-storm-180164.

[72] This legislative trend was not limited to youth justice. In general legislatures were moving away from individualized justice to a standardized system of penalties. By 1996 every state had enacted statutory mandatory minimums to remove the ability of judges to impose more lenient sentences, regarded as ineffective in combating crime. Cullen, *supra* note 67, at 330.

the age of criminal jurisdiction for all or certain offenses, or by authorizing prosecutors to directly file cases in adult court.[73]

Incarceration rates for all offenders, including youth, increased during this period.[74] Pre-adjudication detention of youth, akin to holding an adult in jail awaiting trial, passed constitutional muster. The U.S. Supreme Court concluded that the confinement of youth deemed a serious risk for reoffending was a legitimate state objective.[75] During this time, rehabilitative goals for both adults and youth were disfavored as a narrative of "nothing works" to rehabilitate offenders gained traction.[76] Ultimately, this period saw a rejection of the "rehabilitative ideal," replaced by an embrace of a "justice model" that viewed incarceration not as an opportunity to reform the offender, but as an instrument of retribution.[77]

Indicative of this policy shift, in 1980 both CYA and the California Department of Corrections moved away from what had become the Health and Welfare Agency[78] and into a new Youth and Adult Correctional Agency.[79] The stated goal was to increase policy coordination between adult and youth institutions. Such moves suggest a conflating of adult and youth justice, weakening the distinction that had originally characterized the youth system and departing from a more human services-oriented model of youth justice.

As a result, the building of secure facilities in the late 20th century and the early 21st century boomed in California and across the nation.[80] Despite the additional construction, facilities were regularly overcrowded. Along with the increasingly punitive measures that engulfed more youth in the system, the practice of detaining or incarcerating youth for violating probation orders or other non-violent minor offenses contributed to the high number of confined youths.[81]

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[73] Soler et al., *supra* note 70, at 497–98; *see also* Barry C. Feld, *Punishing Kids in Juvenile and Criminal Courts*, 47 CRIME & JUST. 417, 418–19 (2018).

[74] Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 667 (2016).

[75] Schall v. Martin, 467 U.S. 253, 255–57 (1984).

[76] *See* Soler et al., *supra* note 70, at 484–86; *see also* Feld, *supra* note 73, at 419–20.

[77] Cullen, *supra* note 67, at 330; *see also* GIUDI WEISS, NAT'L CAMPAIGN TO REFORM STATE JUV. JUST. SYS, THE FOURTH WAVE: JUVENILE JUSTICE REFORMS FOR THE TWENTY-FIRST CENTURY 3, 12 (2013), http://www.modelsforchange.net/publications/530.

[78] *About Us*, CAL. HEALTH & HUM. SERVS. AGENCY, https://www.chhs.ca.gov/home/about (last visited Mar. 10, 2022).

[79] PETEK, *supra* note 68.

[80] Jill Tucker & Joaquin Palomino, *Vanishing Violence: Empty Cells, Rising Costs*, S.F. CHRON. (Mar. 21, 2019, 4:00 AM), https://projects.sfchronicle.com/2019/vanishing-violence/part-2/.

[81] Soler et al., *supra* note 70, at 521.

In California, the increased number of arrests also led to higher caseloads for probation departments while funding remained stagnant.[82] Juvenile halls were overcrowded and a number of counties increased their commitments to state custody, in part to address the influx of offenders in local facilities.[83] This led to overcrowding in state facilities, at significant cost to the state. The state responded by increasing the costs to counties for the commitment of less serious offenders to state facilities. This incentivized counties to maintain these offenders at the local level, leaving the state to manage only the more serious offenders.[84] At the same time, state and federal funding encouraged and supported the development of new prevention and intervention programs.[85] County probation departments adapted to increased responsibility for the supervision of youth, driving investment in both secure facilities as well as a spectrum of programming including programs aimed at prevention with at-risk youth as well as reduction in recidivism for more serious offenders.

Over the next several decades, concerns emerged regarding conditions in youth facilities in California and across the nation. The Civil Rights of Institutionalized Persons Act was enacted in 1980, aimed at protecting the rights of incarcerated individuals, including those in youth facilities.[86] Yet harmful and abusive conditions

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[82] ELIZABETH G. HILL, CAL. LEGIS. ANALYST'S OFF., THE STATE OF CALIFORNIA'S PROBATION SYSTEM (1994), https://lao.ca.gov/1994/reports/state_of_cal_probation_system_281_0394.pdf.

[83] This practice differed across the state, with counties such as Alameda, Santa Cruz and Los Angeles generally sending only serious offenders to state facilities, while 20 other counties sent at least 50% of their non-serious offenders. Cal. Legis. Analyst's Off., *Judiciary & Criminal Justice: Major Issues*, *in* 1994-95 BUDGET ANALYSIS, at D-1, D-81 (1994), https://lao.ca.gov/analysis_1994/criminal_justice_anl94.pdf.

[84] SB 681, passed in 1996, was immediately effective, reducing youth commitments from counties to state facilities by 25%. *See* Cal. Legis. Analyst's Off., *Judiciary and Criminal Justice: Major Issues*, *in* 1998-99 BUDGET ANALYSIS, at D-1, D-100 (1998), https://lao.ca.gov/analysis_1998/pdfs_anl98/crim_justice_anl98.pdf.

[85] California's Repeat Offender Prevention Program supported counties in identifying and intervening with youth at risk of becoming repeat offenders. The Challenge Grant program was funded over two rounds to support select counties in designing interventions aimed at addressing gaps in the juvenile justice system. In 1997 alone, the state would spend over "$500 million to support more than 34 different juvenile crime prevention and intervention programs." Elizabeth G. Hill, Cal. Legis. Analyst's Off., *Reforming California's Juvenile Justice System*, *in* 1997-98 ANALYSIS OF THE GOVERNOR'S BUDGET, at D-25, D-27, D-31–32 (1997), https://lao.ca.gov/reports/1997/reforming_californias_juvenile_justice_system.pdf. By 2003, the California Legislative Analyst's Office reported that counties had received more than $353 million for crime prevention programs specifically designed to divert juveniles from commitment to the state agency. Cal. Legis. Analyst's Off., *Judiciary & Criminal Justice*, *in* 2003-04 BUDGET ANALYSIS, at D-1, D-53 (2003), https://lao.ca.gov/analysis_2003/crim_justice/crimjust_anl03.pdf.

[86] H.R. 10 authorized the Attorney General to initiate civil actions on behalf of individuals within state or local institutions including youth awaiting trial or otherwise residing in a

persisted. In 1988, Congress required the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to conduct a study on conditions of juvenile facilities.[87] The results showed significant issues with living space, health care, security, and suicidal behavior.[88]

In California, the legislature, the Office of Inspector General, and the Attorney General conducted investigations of the state youth facilities, and each found evidence of atrocious conditions and abuse.[89] This led to legislative hearings as well as litigation.[90] The myriad problems with facilities in California culminated with a lawsuit against CYA brought by the Prison Law Office in 2002, known as *Farrell v. Allen*.[91] The lawsuit alleged that youth were denied adequate medical, dental, and mental health care and experienced conditions and practices that threatened their safety. In 2005 the parties entered into a consent decree that required the state to develop and implement remedial plans in six areas: (1) education; (2) sex behavior treatment; (3) disabilities; (4) health care; (5) mental health; and (6) general corrections.[92]

Also in 2005, the Youth and Adult Corrections Agency was reorganized as the California Department of Corrections and Rehabilitation (CDCR), with CYA becoming the Division of Juvenile Justice (DJJ) within the CDCR. The goal was to

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government institution. Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified at 42 U.S.C. §§ 1997–1997j).

[87] DALE G. PARENT, VALERIE LEITER, STEPHEN KENNEDY, LISA LIVENS, DANIEL WENTWORTH & SARAH WILCOX, U.S. DEP'T OF JUST., CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES: RESEARCH SUMMARY 1, 10 (1994). Researchers studied just under 1000 public and private youth facilities, conducting site visits to 95 facilities and interviews with 475 youth. *Id.* at 11–12.

[88] *Id.* at 16. Among the findings were observations that crowding was a significant problem, leading to higher risk of injury among youth; also notable was the finding that one-third of youth in detention centers had health screenings done by staff with no training in screening and not in a timely manner. *Id.* at 20.

[89] *See, e.g.*, *Joint Informational Hearing on the California Youth Authority Before the S. and Assemb. Comms. on Pub. Safety*, 1999–2000 Leg., Reg. Sess. (Cal. 2000); *see also* OFF. OF THE INSPECTOR GEN., MANAGEMENT REVIEW AUDIT: PRESTON YOUTH CORRECTIONAL FACILITY (2000), https://www.oig.ca.gov/wp-content/uploads/2019/05/Preston-Youth-Correctional-Facility.pdf.

[90] *See* MCCARTHY ET AL., *supra* note 11, at 10. For example, in 2000, the legislature heard testimony about CYA mental health programs being short-staffed and in short supply, and in 2000, the Youth Law Center initiated and won a lawsuit to require CYA to license its mental health facilities. Parks, *supra* note 51, at 15, 23.

[91] PETEK, *supra* note 68, at 5 (discussing Farrell v. Allen, 2004 Cal. Super. LEXIS 2978 (2004)).

[92] Consent Decree at 5–9, Farrell v. Allen, 2004 Cal. Super. LEXIS 2978 (RG 03079344). The final consent decree and other case documents can be accessed at *Farrell v. Allen*, DISABILITY RTS. OR., https://dralegal.org/case/farrell-v-allen/ (last visited Mar. 10, 2022).

centralize shared youth and adult services in order to improve institutional efficiency.[93] With the agency remaining a part of the correctional infrastructure, lasting change in philosophy and practice, even after the *Farrell* litigation, would ultimately fail to take hold.

The policy shifts during this era hit youth of color particularly hard. The feared "superpredator" was largely portrayed as an inner-city Black youth.[94] This portrayal, coupled with new laws imposing particularly harsh sanctions on drug, gang, and weapon-related offenses, resulted in a significantly disproportionate number of incarcerated Black youth.[95] A history of policies and practices based on the subjugation of Black communities and the belief that Black children were irredeemable and unworthy of rehabilitative services justified the disproportionate rate of arrests of Black youth and long sentences imposed on them in the name of public safety and retribution.[96]

C. A Developmental and Local Approach

The dire predictions regarding uncontrollable youth crime proved to be wrong. Beginning in the 1990s, in the midst of the "tough on crime" era, youth crime rates actually started to decrease across the country.[97] These rates have continued to steeply and steadily decline.[98] In California, youth arrests for violent felonies declined by 55% between 2003 and 2016, bringing youth crime to a rate 86% lower than in 1988.[99] The reasons behind this significant decline are varied and debated, but it is clear that no single factor is solely responsible.[100] Importantly, as fewer youth were detained and incarcerated during this time, youth crime continued to subside, countering the argument that confinement was a necessary response to youth offending.

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[93] PETEK, *supra* note 68, at 5.

[94] *See, e.g.*, *So Young to Kill; So Young to Die*, TIME, Sept. 19, 1994, at cover; *see also* Birckhead, *supra* note 10, at 410.

[95] *See* Birckhead, *supra* note 10, at 411–12.

[96] *See* BERNARD & KURLYCHEK, *supra* note 12, at 156–57.

[97] *See* UNIV. OF PA., UNDERSTANDING THE "WHYS" BEHIND JUVENILE CRIME TRENDS 6 (2012), https://www.ncjrs.gov/pdffiles1/ojjdp/grants/248954.pdf.

[98] Jill Tucker & Joaquin Palomino, *Vanishing Violence: Youth Crime Continues Historic Drop Across US*, S.F. CHRON. (Oct. 3, 2019, 4:00 AM), https://www.sfchronicle.com/crime/article/Vanishing-Violence-Youth-crime-continues-14487543.php.

[99] Evan Sernoffsky & Joaquin Palomino, *Locked Up, Left Behind*, S.F. CHRON. (Oct. 3, 2019), https://www.sfchronicle.com/bayarea/article/California-once-sent-thousands-of-juveniles-to-14480958.php.

[100] For extensive discussion of multiple factors impacting youth crime trends, see UNIV. OF PA., *supra* note 97.

Over the past two decades, a new emphasis on understanding adolescent development[101] has spurred a retreat from the policies of the "tough on crime" era. This provides an opportunity to refocus the youth justice system on its original ostensible purpose—supporting the welfare of children. This refocusing is in large part the result of developments in neuro- and developmental science.[102] Research confirms and expands upon the commonsense notion that children and adolescents are different from adults. Studies show that the part of the brain responsible for impulse control, judgment, and rational decision-making—the pre-frontal cortex—does not fully develop until adulthood.[103] This development lags behind the earlier development of the reward-seeking and emotional arousal centers of the brain.[104] As a result of this developmental chronology, adolescents and young adults tend to exhibit poor self-control, are highly influenced by their peers, and struggle to recognize the long-term consequences of their actions.[105]

At the same time, as a result of their still developing brains, adolescents have greater potential for change. As brain maturation occurs during the period of mid-

[101] The phrase "adolescent development" in the youth justice context encompasses several varied concepts including: "adolescent development," which "refers to the psychosocial science discipline of understanding norms in adolescent behavior and thinking," and "brain development," which refers to "the neuroscientific study of how a typical brain matures over time." Samantha Buckingham, *Symposium: Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing*, 46 LOY. L.A. L. REV. 801, 832–33 (2013).

[102] A key development took place in 1995, when the John D. and Catherine T. MacArthur Foundation created the Adolescent Development and Juvenile Justice Research Network to examine youth justice in light of the emerging science and scholarship on child and adolescent brain development. Geraghty, *supra* note 38, at 72. For a list of published reports developed by Research Network members, see *MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice*, ADJJ, https://web.archive.org/web/20160731000558/https://adjj.org/downloads/6469Network%20Bibliography%20(1996-2005).pdf (last visited Mar. 10, 2022); *see also Research Network on Adolescent Development & Juvenile Justice*, MACARTHUR FOUND., https://www.macfound.org/networks/research-network-on-adolescent-development-juvenil (last visited Mar. 10, 2022).

[103] *See* Press Release, Nat'l Inst. of Mental Health, Imaging Study Shows Brain Maturing (May 17, 2004), http://web.archive.org/web/20080518104712/http://www.nimh.nih.gov/science-news/2004/imaging-study-shows-brain-maturing.shtml (describing a study by researchers at NIMH and UCLA); *see also* Feld, *supra* note 73, at 457–59; Buckingham, *supra* note 101, at 838–39.

[104] Feld, *supra* note 73, at 457–58.

[105] COMM. ON ASSESSING JUV. JUST. REFORM, NAT'L RSCH. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 89–100 (2013). Despite the widespread embrace of the principles of adolescent development and brain science, there has also been criticism of both the science and the conclusions drawn from it. Some argue that the conclusions paint with too broad a brush, generalizing youth as prone to offending due to their immaturity when each individual youth presents his or her own portfolio of risk and protective factors not captured by broad generalizations. *See* Buckingham, *supra* note 101, at 850.

adolescence through one's mid-20s, the ability to make good decisions and recognize the consequences of one's actions continues to develop.[106] This generally makes an adolescent a prime candidate for rehabilitation.[107] In fact, evidence indicates that most young people will naturally desist from offending as they mature.[108]

On the heels of this emerging brain research in the 1990s and 2000s, the U.S. Supreme Court issued a series of decisions redefining appropriate sentencing for youth charged as adults. The Court's view that children are generally less culpable than adults due to their developmental immaturity led to the prohibition of the death penalty for youth,[109] the prohibition of life without the possibility of parole (LWOP) for non-homicide crimes committed by youth,[110] and the end of automatic sentences of LWOP for youth convicted of homicide.[111] The Court concluded that the reduced culpability of youth coupled with the potential for young offenders to be rehabilitated made these most extreme retributive sentences "cruel and unusual" under the Eighth Amendment.

Further judicial acknowledgement of the developmental differences between children and adults came in 2011, when the Court in *J.D.B. v. North Carolina* held that the age of the minor must be considered in determining whether a minor is "in custody" for the purpose of *Miranda* warnings.[112] Recognizing that a minor may view circumstances differently than an adult, this decision re-emphasized the importance of distinguishing between children and adults in the legal context. It is suggested that these U.S. Supreme Court decisions in the aggregate established the

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[106] Monahan et al., *supra* note 5, at 578–79.

[107] COMM. ON ASSESSING JUV. JUST. REFORM, *supra* note 105.

[108] Monahan et al., *supra* note 5, at 578–79; *see also* COMM. ON ASSESSING JUV. JUST. REFORM, *supra* note 105, at 90; *see also* MODELS FOR CHANGE, JUVENILE DIVERSION GUIDEBOOK 7 (2011), http://www.modelsforchange.net/publications/301/Juvenile_Diversion_Guidebook.pdf.

[109] Roper v. Simmons, 543 U.S. 551 (2005). The Court in *Roper* emphasized the diminished culpability of youth based on the strong influence of peers in adolescence. The Court recognized that adolescents are more prone to risk taking in light of their susceptibility to peer influence and their pleasure-seeking drives. Feld, *supra* note 73, at 459.

[110] Graham v. Florida, 560 U.S. 48 (2010). In *Graham*, the Court explicitly referenced adolescent brain science in its rationale, solidifying the view of youth as less culpable than adults, ultimately requiring that states provide youth with a "meaningful opportunity" to demonstrate that they had matured and been rehabilitated, providing the eventual possibility of release. Feld, *supra* note 73, at 459–60.

[111] Miller v. Alabama, 567 U.S. 460 (2012). In *Miller*, the Court reemphasized the differences between children and adults and required individualized sentencing for youth convicted of homicide with consideration of the youth's age and maturity, as well as other factors. Feld, *supra* note 73, at 461.

[112] J.D.B. v. North Carolina, 564 U.S. 261 (2011).

principle that the distinction between children and adults must be a consideration in every aspect of youth and criminal justice.[113]

Adolescent development and brain research influenced the response to youth offending in state legislatures as well.[114] Over the past decade, ten states raised the age of juvenile court jurisdiction; in 2021 only three states—Georgia, Wisconsin, and Texas—remained with the upper age of juvenile jurisdiction under 17.[115] In 2018, Vermont became the first state to pass legislation extending juvenile court jurisdiction to age 20.[116] In addition, more than a third of states over the past five years changed law or policy to make it harder to transfer minors to adult court or keep them in adult facilities.[117]

A significant shift occurred in California's youth justice system during this time. In 2007, the state legislature enacted what is referred to as "realignment."[118] The remedial measures required by the *Farrell* consent decree increased the cost of running the state's youth facilities significantly, and the state sought to reduce the burden by limiting the number of youths eligible for state commitment. The realignment proposal in Senate Bill 81 banned future commitments of non-serious offenders to state facilities, leaving counties with the responsibility to supervise the vast majority of youth coming into the youth justice system.[119] To compensate counties for their increased costs, the legislature allocated funds to renovate or construct new secure facilities while also creating the Youthful Offender Block Grant to fund community-based programs and services.[120]

Realignment produced the intended results. The youth population in state facilities declined considerably. County probation departments, in order to avoid overcrowding, increased alternatives to detention and the diversion of low-risk youth. As the number of youths in locked facilities dwindled, so did the rates of

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[113] Buckingham, *supra* note 101, at 846.

[114] WEISS, *supra* note 77.

[115] John Kelly, *Michigan Raise the Age Law on Track to Pass, Leaving Three States with Juvenile Age Under 18*, IMPRINT (June 4, 2019, 5:00 AM), https://imprintnews.org/justice/michigan-set-to-raise-the-age-leaves-three-states-under-18/35340. Most recently, Missouri and Michigan raised the age of juvenile jurisdiction from 16 to 17. Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 8, 2020), https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx.

[116] Kelly, *supra* note 115.

[117] John Kelly, *19 States Have Narrowed Juvenile Involvement in Adult System Since 2015*, IMPRINT (Oct. 10, 2017, 10:46 PM), https://imprintnews.org/justice/juvenile-justice-2/19-states-narrowed-juvenile-involvement-adult-system-since-2015/28413.

[118] S.B. 81, 2007–2008 Leg., Reg. Sess. (Cal. 2007).

[119] DOUGLAS N. EVANS, PIONEERS OF YOUTH JUSTICE REFORM: ACHIEVING SYSTEM CHANGE USING RESOLUTION, REINVESTMENT, AND REALIGNMENT STRATEGIES 47–48 (2012).

[120] Cal. S.B. 81 § 30.

youth crime. It appeared that locking up fewer youth did not present a threat to public safety.[121] As a result of realignment, far fewer youth are confined within DJJ today—93% fewer than in 1996. By 2019, the state operated only three correctional facilities and one conservation camp, housing a total of approximately 650 youth.[122] In 2011, and again in 2012, closure of all facilities—total realignment—was proposed by Governor Brown but opposed by counties. Concerns focused on public safety, county capacity to address the special needs of serious offenders, and fear that judges would be prone to transferring youth to adult court if the option of DJJ did not exist.[123]

With research indicating better outcomes for youth who remain close to home, advocacy for rethinking the use of large, remote state facilities gained traction in recent years.[124] The efforts aligned with a wider embrace of adolescent brain development research and the recent dismantling of the "tough on crime"-era policies. In 2016, California voters passed Proposition 57, which ended "direct file"—the ability of prosecutors to unilaterally send minors to adult court, a power granted to them through passage of Proposition 21 in 2000. In 2018, Senate Bill 439 established age 12 as the minimum age for juvenile court jurisdiction,[125] and Senate Bill 1391 prohibited the transfer of anyone under the age of 16 to adult court.[126] Also in 2018, the legislature established the Youth Reinvestment Grant, which funds di-

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[121] *See* MIKE MALES & DANIEL MACALLAIR, CTR. ON JUV. & CRIM. JUST., THE CALIFORNIA MIRACLE: DRASTICALLY REDUCED YOUTH INCARCERATION, DRASTICALLY REDUCED YOUTH CRIME 4–5, 12 (2010), http://www.cjcj.org/uploads/cjcj/documents/The_California_Miracle.pdf.

[122] MAUREEN WASHBURN & RENEE MENART, CTR. ON JUV. & CRIM. JUST., UNMET PROMISES: CONTINUED VIOLENCE AND NEGLECT IN CALIFORNIA'S DIVISION OF JUVENILE JUSTICE 5, 8 (2019). Prior to realignment, the state ran 11 large institutions. *California Considers Final Closure of Its State Youth Corrections System*, ANNIE E. CASEY FOUND. (Mar. 17, 2012), https://www.aecf.org/blog/california-considers-final-closure-of-its-state-youth-corrections-system/.

[123] MAC TAYLOR, CAL. LEGIS. ANALYST'S OFF., THE 2012-13 BUDGET: COMPLETING JUVENILE JUSTICE REALIGNMENT 11 (2012), https://lao.ca.gov/analysis/2012/crimjustice/juvenile-justice-021512.pdf; *see also* Karen de Sá, *Gov. Jerry Brown Backtracks on Plan to Phase Out the State's Youth Prison System*, MERCURY NEWS (May 16, 2012, 6:05 AM), https://www.mercurynews.com/2012/05/15/gov-jerry-brown-backtracks-on-plan-to-phase-out-the-states-youth-prison-system/.

[124] *See* MCCARTHY ET AL., *supra* note 11.

[125] CAL. WELF. & INST. CODE § 602.1 (West 2021).

[126] CAL. WELF. & INST. CODE § 707(a)(1) (West 2021). Note that the law provides an exception for an individual who committed a serious crime, as enumerated in the statute, at age 14 or 15 and was not apprehended prior to the end of juvenile court jurisdiction. *Id.* at § 707(a)(2).

version and community-based programs that are "evidence-based, culturally relevant, trauma-informed, and developmentally appropriate."[127] A shift from policies of custody and control to an approach rooted in youth development was beginning to take shape.

Despite recent developments, a full embrace of a "developmental approach" throughout the youth justice continuum has not yet occurred in many jurisdictions across the nation. In the meantime, children remain subject to a wide variety of responses—some woefully outmoded—largely dependent upon a particular jurisdiction's philosophical orientation and funding priorities.

D. Opportunity on the Horizon

In California, the court terminated the *Farrell* lawsuit in 2016, finding that DJJ had complied with the remedial plans. However, a 2019 report detailed ongoing issues with DJJ facilities.[128] Overcrowding remains a problem despite the low number of youths committed to state custody.[129] Violence and use of force rates have increased in most of the facilities.[130] The facilities remain prison-like in their physical characteristics[131] as well as in their operations, in part as a result of hiring practices that emphasize corrections experience rather than youth development experience and training that reinforces that philosophy.[132] Youth experience high rates of injury and suicide attempts.[133] The remoteness of the facilities keeps youth apart from their families and communities.[134] Room confinement (more than 21 hours a day) reportedly continued even after the *Farrell* litigation and state law change.[135]

These conditions lent support to the calls for closure. Governor Newsom initially responded with policy short of shuttering DJJ facilities, instead relocating

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[127] *Youth Reinvestment Grant Program*, BD. OF STATE & COMM. CORRS., http://www.bscc.ca.gov/s_youthreinvestmentgrant/ (last visited Mar. 10, 2022).

[128] WASHBURN & MENART, *supra* note 122.

[129] *Id.* at 15. Facility populations reportedly do not comply with national standards for best practice to ensure safety and sufficient service provision. *Id.*

[130] *Id.* at 38–42.

[131] *Id.* at 16. DJJ facilities are characterized by high metal fences with razor wire, elevated surveillance stations, and living units with cells and bolted down furniture. *Id.*

[132] *Id.* at 8.

[133] *Id.* at 51.

[134] *Id.* at 8.

[135] In 2016, the California Legislature passed SB 1143, which defined "room confinement" and prohibited its use for more than four hours and not for punitive reasons. Sue Burrell & Ji Seon Song, *Ending "Solitary Confinement" of Youth in California*, 39 CHILD.'S LEGAL RTS. J. 42, 82–83 (2019).

youth corrections under the state human services agency, and renaming it the Department of Youth and Community Restoration (DYCR).[136] This was at least a symbolic move away from a correctional philosophy of youth justice to a human services-oriented one. The legislature supported the new department by allocating funds for the transition, the development of a training institute for staff to learn best practices in rehabilitation, programming to provide youth with job and skill training, and the establishment of "therapeutic communities."[137]

Yet, reforms of state facilities have come and gone in a variety of jurisdictions. Jerome Miller, former Massachusetts Secretary of the Department of Youth Services, who famously shut down all state-run juvenile institutions in Massachusetts in the 1970's cautioned:

> Reformers come and reformers go. State institutions carry on. Nothing in their history suggests they can sustain reform, no matter what money, what staff, and programs are pumped into them. The same crises that have plagued them for 150 years intrude today. Though the cast may change, the players go on producing failure.[138]

Governor Newsom may well have taken this critique to heart. In May 2020, in the midst of the COVID-19 pandemic, the governor unexpectedly announced a halt to the plan for DYCR, instead proposing the closure of all DJJ facilities in short order.[139] The state legislature agreed, enacting SB 823. Importantly, the bill also established the Office of Youth and Community Restoration (OYCR) within the California Health and Human Services Agency to promote rehabilitative practices across the state.[140] As of July 1, 2021, admissions to DJJ facilities have ceased—with full closure slated for 2023—and the OYCR has launched operations.[141]

History shows that the tendency to revert to a culture of custody and control remains a threat even as new approaches are implemented. A deep understanding and commitment to policies promoting the research and data behind the recent developmental approach provides an opportunity to break this cycle in California

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[136] Taylor Walker, *Gov. Newsom's Revised Budget Features Significant New Reform-Minded Criminal Justice Spending*, WITNESSLA (May 10, 2019), https://witnessla.com/gov-newsoms-revised-budget-features-significant-new-reform-minded-criminal-justice-spending/.

[137] CAL. DEP'T. OF FIN., CALIFORNIA STATE BUDGET 2019-20, at 87 (2019), https://www.ebudget.ca.gov/2019-20/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf.

[138] *See* MCCARTHY ET AL., *supra* note 11, at 10.

[139] Loudenback, *supra* note 8.

[140] S.B. 823, 2019–2020 Leg., Reg. Sess. (Cal. 2020). Among the responsibilities of the new Office are to identify and disseminate best practices to promote rehabilitative practices, provide technical assistance to expand youth diversion opportunities, and develop a report on youth outcomes when data becomes available. *Id*. The Office began operating on July 1, 2021.

[141] *See* Thompson, *supra* note 8.

and other states shifting away from the use of large correctional facilities and investing instead in local and developmentally appropriate programs and practices. A key challenge is ensuring this commitment is made by all components involved in a state's youth justice system—from the legislature to the local courts and agencies.

II. FOUNDATIONS FOR A NEW APPROACH: PURPOSE, POLICY, AND PRACTICE

A. Articulating the Purpose of Youth Justice

As the historical review above illustrates, youth justice has long been characterized by an uneasy relationship between the interests of the community and the welfare of the child. Ideally, these interests should work in concert with one another; when youth well-being improves, the community benefits. However, youth justice policy has evolved to focus more on the offense than on the offender at the expense of the welfare of youth.[142] As noted by Professor Barry Feld, "This imbalance inevitably occurs because states define delinquency jurisdiction on the basis of criminal behavior rather than children's welfare needs, which diverts attention from the criminogenic conditions in which many youths live."[143] This results in a culture that continues to rely on methods of controlling and punishing youth rather than investing in them.

To achieve a more symbiotic relationship between the community and the youth, and to avoid the tendency to revert to a punitive approach, this Article suggests that the underlying philosophy undergirding the system must reflect what is now known about youth development, and what is known about how the system supports or threatens the welfare and positive development of the youth. This philosophy can be articulated most effectively in the statutory language defining the purpose of a state's youth justice system. Specifically, the statutory purpose clauses related to the juvenile court in a state set the foundation for youth justice policy and practice guiding local courts and agencies.[144]

Juvenile court purpose clauses have changed along with the phases of youth justice policy described above. In 2016, the National Center for Juvenile Justice examined the juvenile court purpose clauses in all 50 states and the District of Columbia, distinguishing four classifications: (1) *parens patriae* clauses that emphasize the role of the court as the protector of the child; (2) due process clauses that reflect the principles of the due process era, focusing on the rights of youth within the

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[142] BERNARD & KURLYCHEK, *supra* note 12, at 154.

[143] Feld, *supra* note 73, at 420.

[144] *See* PATRICIA TORBET & LINDA SZYMANSKI, U.S. DEP'T OF JUST., STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996–97 UPDATE 1, 6, 9 (1998). A list of all 50 state clauses as of 2016 can be found at John D. Elliott & Anna M. Limoges, *Deserts, Determinacy, and Adolescent Development in the Juvenile Court*, 62 S.D. L. REV. 750, 755 n.40 (2017).

system; (3) Balanced and Restorative Justice clauses that promote a model that balances public safety, youth accountability, and the development of competencies;[145] and (4) developmental approach clauses, which retain elements of the other categories but incorporate adolescent development research and the importance of research based practice in the youth justice system.[146] In addition, during the "tough on crime" era, many state legislatures added language to their purpose statutes that emphasized public safety, accountability, and punishment.[147]

As of 2016, clauses described as primarily *parens patriae* were in place in 16% of states and due process era clauses were used in 14% of states.[148] Thus, 30% of states continue to define the purpose of their youth systems by the prevailing concepts of the early to mid-20th century, concepts that undergirded a paternalistic system and later infused it with procedures and processes mirroring criminal courts. The majority of states (57%) define the purpose of their youth justice system using a Balanced and Restorative Justice clause.[149] Only five states have incorporated principles of adolescent development into their purpose clauses.[150]

The Balanced and Restorative Justice (BARJ) approach, reflected in the majority of purpose clauses, emerged in response to the policies of the "tough on crime" era that promoted accountability through punishment.[151] The Balanced Approach views the youth justice system as responsible to communities, victims, and offenders in equal part, emphasizing that no single interest should benefit at the expense of the others.[152] In the BARJ model, accountability has meaning apart from punishment. It refers to taking responsibility for one's actions and working to repair any harms caused by those actions—this is the "restorative" aspect of BARJ.[153] The prin-

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[145] Melissa Sickmund, *The Balanced Approach {Revisited}*, 70 JUV. & FAM. CT. J. (SPECIAL ISSUE) 7, 9, fig.2 (2019) (reproducing in part Dennis Maloney, Dennis Romig & Troy Armstrong, *The Balanced Approach to Juvenile Probation,* 39 JUV. & FAM. CT. J. (SPECIAL ISSUE) 1 (1988)).

[146] *Juvenile Court Purpose Clauses*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STATS. (2016), http://www.jjgps.org/about/juvenile-court#purposeclauses.

[147] BERNARD & KURLYCHEK, *supra* note 12, at 163.

[148] *See Juvenile Court Purpose Clauses*, *supra* note 146.

[149] *See id.*

[150] These five states are Idaho, New Mexico, Kentucky, West Virginia, and Florida. *Id.*

[151] Feld, *supra* note 73, at 423–24; *see also* Geraghty, *supra* note 38, at 71.

[152] Sickmund, *supra* note 145, at 15.

[153] Restorative justice programming has emerged as "a promising practice in the juvenile justice system." Karl A. Racine & Elizabeth Wilkins, *Toward a Just System for Juveniles*, 22 UDC/DCSL 1, 11, 16 (2019). It has been shown to reduce further law enforcement contact and provides benefits to both offenders and victims. Kathleen J. Bergseth & Jeffrey A. Bouffard, *The Long-Term Impact of Restorative Justice Programming for Juvenile Offenders*, 35 J. CRIM. JUST. 433, 434 (2007).

ciples of youth justice under this approach are: (1) Community Protection, (2) Accountability, (3) Competency,[154] (4) Individualization,[155] and (5) Balance.[156]

The work of Balanced and Restorative Justice happens at the local level, where BARJ principles are translated into practice. The approach contemplates individualized youth assessment at all stages of the case including court intake, case planning, supervision, and evaluation.[157] Assessment tools can provide a clear picture of a youth's needs and level of risk to reoffend.[158] This can guide a response appropriate in intensity and restrictiveness, and allow for an efficient and effective dispersal of resources. Tailoring such responses to a youth's assessed risks and needs requires the availability of a continuum of options for intervention based on the youth, community, and victim interests.

More recently, a few states have incorporated elements of the developmental approach into their purpose clauses.[159] These clauses retain the elements of earlier approaches while incorporating some of the following hallmarks based in the science of adolescent development: (1) Accountability without criminalization; (2) Alternatives to justice system involvement; (3) Individualized response based on assessment of needs and risks; (4) Confinement only when necessary for public safety; (5) Genuine commitment to fairness; (6) Sensitivity to disparate treatment; and (7) Family engagement.[160] Additionally, the developmental approach includes promoting

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[154] In this context, competency refers to having youth leave the system with skills necessary to be productive and responsible members of the community. Sickmund, *supra* note 145, at 16–17.

[155] The BARJ approach requires the assessment of the individual youth's strengths and challenges, providing a unique case plan for each youth. *Id.*

[156] *Id.* at 16.

[157] *Id.* at 21–22.

[158] Assessment questions fall into three categories—those that assess the youth in relation to community protection (*e.g.*, Do the parents have the capability to control the youth's behavior?), those that assess accountability (*e.g.*, Is the victim identifiable?), and competency development (*e.g.*, Is there a need for educational supports such as tutoring?). *Id.* at 19. Importantly, although assessment processes are intended to provide a more objective basis for decision-making, there are concerns that they may nevertheless reflect bias and can contribute to the racial disproportionality and disparities within the juvenile justice system. DEV. SERVS. GRP., OFF. OF JUV. JUST. & DELINQ. PREVENTION, RISK/NEEDS ASSESSMENT FOR YOUTHS 1–2, 7 (2015), https://ojjdp.ojp.gov/mpg/literature-review/risk-needs-assessments-for-youths.pdf (noting that assessments that include factors such as prior offenses in calculating a youth's risk to reoffend can reflect racial disparities in response to youth offending).

[159] Sickmund, *supra* note 145, at 9.

[160] JOHN A. TUELL, JESSICA K. HELDMAN & KARI HARP, ROBERT F. KENNEDY NAT'L RES. CTR. FOR JUV. JUST., TRANSLATING THE SCIENCE OF ADOLESCENT DEVELOPMENT TO SUSTAINABLE BEST PRACTICE 5 (2017), https://rfknrcjj.org/wp-content/uploads/2017/09/Developmental_Reform_in_Juvenile_Justice_RFKNRCJJ.pdf.

trauma-informed responses and evidence-based practices and programs.[161]

The developmental approach builds upon the BARJ model, with greater emphasis on understanding the unique aspects of youth, and reflects the findings of extensive research on effective responses to youth offending. For example, the idea of accountability without criminalization holds that youth should be given the opportunity to take responsibility for their actions and make amends to those who have been harmed without the threat of criminal consequences.[162] This position is based on research indicating that developmentally appropriate accountability procedures can contribute to positive legal socialization whereas punitive interventions can undermine it.[163] Similarly, research demonstrates that for the majority of youth, engagement in well-designed community-based programs is more effective at reducing recidivism than justice system involvement and custodial placements and services.[164] For youth within the system, assessing risks and needs to guide treatment and service planning results in better outcomes for youth and communities.[165] Finally, commitment to principles of fairness, racial and ethnic equity, and the primacy of family relationships is key to promoting the positive development of youth and reducing the risk of future justice system involvement.[166]

As one of the states adopting aspects of the developmental approach in its purpose clause, Florida provides for "comprehensive standardized assessment of the child's needs,"[167] and caring for children "in the least restrictive and most appropriate service environments to ensure that children assessed as low and moderate risk to reoffend are not committed to residential programs, unless the court deems such placement appropriate."[168] This code section also directs the allocation of resources to "the most effective programs, services, and treatments . . . ."[169]

In addition, Florida law states that the intent of its youth justice system includes developing and implementing "effective programs to prevent delinquency, to divert children from the traditional juvenile justice system, to intervene at an early stage of delinquency, and to provide critically needed alternatives to institutionalization and deep-end commitment."[170] Florida law recognizes that residential facilities for youth offenders are necessary but directs that they be located close to children's home communities in order to facilitate family involvement in treatment,

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[161] *Id.* at 7–8.

[162] COMM. ON ASSESSING JUV. JUST. REFORM, *supra* note 105, at 5.

[163] *Id.*

[164] TUELL ET AL., *supra* note 160, at 5.

[165] *Id.* at 7.

[166] *Id.* at 4.

[167] FLA. STAT. § 985.01(d) (2021).

[168] *Id.* § 985.01(h).

[169] *Id.* § 985.01(i).

[170] *Id.* § 985.02(3)(b).

and limited to 90 beds.[171] It further states that trauma-informed care should be used for the treatment of children with trauma histories, highlighting that such an approach can ensure that services and programs avoid re-traumatization.[172] The law emphasizes the importance of "well-trained personnel" and supports increasing the capacity of public and private agencies to "provide research, evaluation, and training services" aimed at delinquency prevention.[173] Finally, the legislature articulates findings that families and community support systems are essential to a child's success, emphasizing the need for developing customized plans that incorporate the importance of family and community support systems.[174]

In 2017, Vermont added a section to its juvenile code, finding that its youth justice system "should be based on the implementation of data-driven evidence-based practices that offer a broad range of alternatives, such that the degree of intervention is commensurate with the risk of re-offense."[175] Furthermore, the legislature found, "High-intensity interventions with low-risk offenders not only decrease program effectiveness, but are contrary to the goal of public safety in that they increase the risk of recidivism. An effective youth justice system includes pre-charge options that keep low-risk offenders out of the criminal justice system altogether."[176] Recent amendments to Connecticut's youth justice purpose clause in 2018 incorporated aspects of the developmental approach by adding that probation case planning should be based upon the youth's individual risks and needs,[177] and that programs for youth should be "developmentally appropriate, trauma informed and gender responsive."[178]

These recent enactments elevate the emerging research-based approach to youth justice. Adoption of the language of the developmental approach in a purpose clause or statement of intent codifies the understanding that children are fundamentally different, setting the stage for embracing practices that promote a culture prioritizing the positive development of youth to the benefit of youth and the community.

B. Effective Policy and Practice in Youth Justice

While purpose statements serve an essential role in messaging state priorities and philosophies, such provisions alone do not guarantee change within local agencies and courts. In fact, it is reported that despite the adoption of purpose statements

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[171] *Id.* § 985.02(5)(c).

[172] *Id.* § 985.02(8).

[173] *Id.* § 985.02(3)(c)–(d).

[174] *Id.* § 985.02(9).

[175] VT. STAT. ANN. tit. 33, § 5101a(b) (2021).

[176] *Id.* § 5101a(c).

[177] CONN. GEN. STAT. § 46b-121h(6) (2021).

[178] *Id.* § 46b-121h(11).

reflecting BARJ principles in a majority of states, many jurisdictions have fallen short of the ideal of the Balanced Approach in practice.[179] As a result of failure to engage the community, a lack of needed resources, and the inability to transform intractable organizational culture within probation departments, the goals of BARJ continue to go unmet.[180] As youth justice expert Melissa Sickmund observed, "There linger too many vestiges across the country of the policies created in fear of juvenile super-predators."[181] In order to operationalize a state's updated purpose, research-based strategies must be promoted and funded and adoption and implementation must be required or incentivized within juvenile justice agencies and departments, ultimately resulting in a change of culture.[182]

The federal government plays a role, albeit a limited one, in directing youth justice strategies by conditioning funds, such as grants via the Juvenile Justice and Delinquency Prevention Act (JJDPA), on state compliance with certain prioritized policies, or "core requirements."[183] Otherwise, states control the policy and funding priorities of youth justice within their borders, guiding the administration of youth justice—a function shared by state and local entities in various configurations.[184] Local delinquency services operate through law enforcement agencies, juvenile courts, and county probation departments, along with partners such as schools, child welfare and behavioral health agencies, and non-profit and community providers. Much is written about the jurisdiction and authority of the juvenile courts, as well as the rights of the youth that come before them. Less commented upon by

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[179] Sickmund, *supra* note 145, at 34.

[180] *Id.*

[181] *Id.*

[182] *Id.* at 17.

[183] The "core requirements" of the JJDPA are the deinstitutionalization of status offenders, the prohibition of detention of youth in adult jails or lock-ups (with limited exceptions), the prohibition of sight and sound contact between youth and adult inmates, and the requirement that states address the racial and ethnic disparities within the youth justice system. *See* 34 U.S.C. § 11133.

[184] *Juvenile Justice Services*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STATS., http://www.jjgps.org/juvenile-justice-services#basic-services (last visited Mar. 10, 2022). As of 2017, 65% of states had delinquency services completely or mostly administered by the state, while 35% of states, including California, have most or all delinquency services administered on the local level. *Id.* In most states and the District of Columbia, detention services are operated by local governments. Community supervision, or probation, services are operated by a state agency in 22 states and locally operated in 20 states. The remaining states have probation services that are mostly state operated. In most states the long-term youth correctional facilities are managed by a state-level independent juvenile corrections agency or a human services agency. *Statistical Briefing Book: Juvenile Justice System Structure & Process: Organization & Administration of Delinquency Services*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (2017), https://www.ojjdp.gov/ojstatbb/structure_process/qa04201.asp?qaDate=2017.

scholars and policymakers is the role of local juvenile probation departments in the administration of youth justice.

Juvenile probation departments have been referred to as the "workhorse" of the system.[185] Specific duties vary among and within states, but some responsibilities and decision-making authority are standard in most jurisdictions.[186] When a youth is referred to the department, an intake officer can decide to close the case without any action, refer the youth to community services, place the youth into a voluntary diversion program, or proceed with formal processing of the youth through the juvenile court.[187] If a youth is formally processed, the juvenile probation department compiles information about the youth, his or her family, the details of the offense, and the youth's history of offending. The department uses this information to craft recommendations for the court regarding disposition, that is, what should happen with the youth if the allegations are found to be true.[188]

The vast majority of youth who come in contact with law enforcement or probation departments end up either diverted from the formal youth justice system or supervised in the community.[189] For those under community supervision, probation officers monitor and support compliance with court ordered conditions of probation. The probation officer can also provide services to the youth directly or refer the youth and family to community-based service providers.

Today there is a substantial body of research that helps define effective practices and programs in juvenile courts and probation departments. In the 1980s and 1990s, researchers set out to counter the prevailing narrative of "nothing works" by examining the effectiveness of various rehabilitation programs, particularly with youth.[190] Studies and meta-analyses identified reductions in recidivism attributable to treatment programs while also demonstrating that programs based on control and

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[185] Patricia McFall Torbet, *Juvenile Probation: The Workhorse of the Juvenile Justice System*, *in* JUVENILE JUSTICE BULLETIN (Off. of Juv. Just. & Delinq. Prevention, Juv. Just. Bull. No. NCJ 158534, 1996), https://www.ojp.gov/pdffiles/workhors.pdf.

[186] *Id.* at 2.

[187] In some jurisdictions the county prosecutor may handle or share decision-making responsibility regarding the response to a referral.

[188] The predisposition report is extremely influential, with research indicating that its recommendations are followed by the court in 90% of cases. CTR. ON JUV. & CRIM. JUST., RENEWING JUVENILE JUSTICE 14 (2011), http://www.cjcj.org/news/5953.

[189] Across the nation, probation is the most likely outcome for youth adjudicated delinquent. In 2019, of the delinquency cases that resulted in a sanction across the United States, 51% received probation. *Statistical Briefing Book: Juveniles on Probation: Overview*, OFF. OF JUV. JUST. & DELINQ., https://www.ojjdp.gov/ojstatbb/probation/overview.html (last visited Mar. 10, 2022).

[190] *See* Mark W. Lipsey, *Can Intervention Rehabilitate Serious Delinquents?*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 142 (1999).

deterrence—those considered primarily punitive—were not effective.[191] Researchers also found that youth prosecuted as adults suffered poor outcomes, as did their communities.[192] Specifically, several studies showed that youth transferred to adult court experienced greater recidivism than those who remained in juvenile court.[193] These findings suggest that the retribution-based policies and practices of the 1980s and 1990s were largely counter-productive.

This research gave rise to the now predominant framework for "what works" regarding intervention with offenders: the Risk-Need-Responsivity (RNR) Model.[194] The RNR model was developed for use within the criminal justice system and more recently has been applied in the youth justice context.[195] The model incorporates three principles: (1) the risk principle, which holds that services should be provided to individuals with the highest-risk of reoffending, recognizing that intervention with low-risk offenders is either ineffective or harmful; (2) the need principle, which focuses on criminogenic needs—those that influence the individual's risk of committing a crime, in particular those that are dynamic, meaning that they have the potential to change; [196] and (3) the responsivity principle, which holds that for treatment to be effective, it must be responsive to the problem (i.e., the identified risks and needs) and must be tailored to the characteristics of the individual.[197]

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[191] Mark W. Lipsey, *The Primary Factors that Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4 VICTIMS & OFFENDERS, 124 (2009). Among the interventions with the most positive effects were group counseling, family counseling, mentoring, and cognitive-behavioral programs. Sesha Kethineni & Jonathan A. Grubb, *An Evaluation of Redeploy Illinois on Juvenile Reoffending*, 65 INT'L. J. OF OFFENDER THERAPY & COMPAR. CRIMINOLOGY 1192 (2021).

[192] Geraghty, *supra* note 38, at 76 (citing Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, *in* JUVENILE JUSTICE BULLETIN 6 (Off. of Juv. Just. & Delinq. Prevention, Juv. Just. Bull. No. NCJ 220595, 2010), https://www.ojp.gov/pdffiles1/ojjdp/220595.pdf (reviewing studies on the effects of juvenile transfer)). Subsequent research emphasized the disproportionate impact of automatic transfer laws on youth of color, leading the Illinois legislature to eliminate automatic transfer for all 15-year-olds with limited transfer of those ages 16–17. *Id.* at 76–77.

[193] Soler et al., *supra* note 70, at 498–99. The Task Force on Community Prevention Services of the Centers for Disease Control and Prevention found that not only was transfer to adult court ineffective in preventing reoffending, it put youth in danger of abuse from adult inmates as well as led to higher rates of suicide among incarcerated youth. *Id.* at 499.

[194] Cullen, *supra* note 67, at 340.

[195] Leah Brogan, Emily Haney-Caron, Amanda NeMoyer & David DeMatteo, *Applying the Risk-Needs-Responsivity (RNR) Model to Juvenile Justice*, 40 CRIM. JUST. REV. 277, 279–80; *see also* ELIZABETH SEIGLE, NASTASSIA WALSH & JOSH WEBER, N.Y. COUNCIL OF STATE GOV'TS JUST. CTR., CORE PRINCIPLES FOR REDUCING RECIDIVISM AND IMPROVING OTHER OUTCOMES FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM 7 (2014).

[196] *See* Cullen, *supra* note 67, at 341–42.

[197] Jill Viglione, *The Risk-Need-Responsivity Model: How Do Probation Officers Implement the Principles of Effective Intervention?*, 46 CRIM. JUST. & BEHAV., 655, 656–57 (2019).

The RNR framework undergirds policies and practices promoted as part of the developmental approach.[198] These include maximizing alternatives to formal court processing (i.e., diversion) for low-risk youth, utilizing alternatives to confinement, decision-making and case planning informed by assessment of risks and needs, adopting a supervision model based on positive youth development and incorporating a system of graduated responses,[199] and providing trauma screening and treatment.[200]

1. Diversion of Low-Risk Youth

The term "diversion" encompasses decisions made by and programming provided by law enforcement, probation departments, and juvenile courts. The common thread is the opportunity to address a youth's behavior through means outside of the formal youth justice system (i.e., courts).[201] Diversion from the youth justice system altogether is identified as the best approach for youth determined to be at low-risk to reoffend.[202] There is evidence that the majority of low-risk youth will desist from offending with little to no intervention by the system.[203] In fact, studies have found that low-risk youth diverted from formal system involvement are less likely to reoffend than low-risk youth formally processed through the juvenile court.[204] Diversion programming that includes counseling and coordinated services appears to yield the most positive outcomes.[205]

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[198] TUELL ET AL., *supra* note 160, at 7, 9; *see also* COMM. ON ASSESSING JUV. JUST. REFORM, NAT'L RSCH. CTR., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH (2013).

[199] Graduated response or sanctions refers to "accountability-based, graduated series of sanctions (including incentives, treatment, and services) applicable to juveniles within the juvenile justice system to hold such juveniles accountable for their actions and to protect communities from the effects of juvenile delinquency by providing appropriate sanctions for every act for which a juvenile is adjudicated delinquent, by inducing their law-abiding behavior, and by preventing their subsequent involvement with the juvenile justice system." 34 U.S.C. § 11103(24).

[200] TUELL ET AL., *supra* note 160, at 7–8.

[201] *See* JOHN TUELL & KARI L. HARP, ROBERT F. KENNEDY NAT'L RES. CTR. FOR JUV. JUST., ALTERNATIVE RESPONSE INITIATIVE WORKBOOK 7 (2019), https://rfknrcjj.org/wp-content/uploads/2019/11/Alternative-Response-Initiative-ARI-Workbook.pdf. The importance of diversion from formal processing was recognized as early as 1967, when the President's Commission on Law Enforcement and Administration of Justice recommended that the juvenile court only address "cases of manifest danger." *Id.* at 6 (citing PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9 (1967).

[202] *See* SEIGLE ET AL., *supra* note 195, at 9.

[203] MCCARTHY ET AL., *supra* note 11, at 18–19; *see also* Lipsey, *supra* note 191, at 137–39.

[204] RICHARD A. MENDEL, ANNIE E. CASEY FOUND., TRANSFORMING JUVENILE PROBATION: A VISION FOR GETTING IT RIGHT 8–9 (2018), https://assets.aecf.org/m/resourcedoc/aecf-transformingjuvenileprobation-2018.pdf; *see also* Racine & Wilkins, *supra* note 153, at 11.

[205] Lipsey, *supra* note 191, at 137–39; *see also* Kethineni & Grubb, *supra* note 191, at 1193.

2. Alternatives to Confinement

Alternatives to secure confinement—both detention and incarceration—are most compatible with a rehabilitative approach to youth justice.[206] Reducing confinement is also effective policy, with research suggesting that incarcerated youth tend to experience increased recidivism.[207] State-by-state recidivism data shows that 70–80% of incarcerated youth are rearrested within 2–3 years.[208] There is evidence that community-based alternatives incorporating mental health services, substance abuse treatment and special education are more effective at reducing recidivism than traditional detention programs.[209] Therefore, maintaining youth in their communities with appropriate services is generally more effective than sanctions resulting in residential placement.[210] Incarceration of youth has also been shown to lead to poor outcomes beyond recidivism, particularly related to health and mental health.[211] Policies that promote the development of community-based alternatives to confinement and direct decision-makers to utilize these options are key.

3. Decision-Making and Case Planning Based on Assessment of Risks and Needs

As a departure from historical reliance on subjective decision-making of judges and probation officers, current research demonstrates that outcomes are improved when professional judgement is supplemented by objective assessment through the use of validated assessment tools.[212] Such tools can be used in initial decision-making regarding formal processing or detention, and more extensive assessments can be used to develop individualized case plans with targeted treatments and services.[213]

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[206] *See* RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 9–22 (2011), http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf.

[207] BARRY HOLMAN & JASON ZIEDENBERG, JUST. POL'Y INST., THE DANGERS OF DETENTION 4 (2006), http://www.justicepolicy.org/research/1978; *see also* SEIGLE ET AL., *supra* note 195, at 11.

[208] MCCARTHY ET AL., *supra* note 11, at 13; *see also* Buckingham, *supra* note 101, at 823 (explaining that the conditions of confinement are far from conducive to the rehabilitation of offenders, often increasing the changes of subsequent reoffending).

[209] HOLMAN & ZIEDENBERG, *supra* note 207, at 6. Although evidence-based interventions can be effective for youth who are confined, *see* Lipsey, *supra* note 191, at 141, research indicates that the same intervention would be even more effective if delivered in a community-based setting, avoiding the negative effects that incarceration itself produces. MCCARTHY ET AL., *supra* note 11, at 21.

[210] Gaylene S. Armstrong, Todd A. Armstrong, Vince J. Webb & Cassandra A. Atkin, *Can Financial Incentives Reduce Juvenile Confinement Levels? An Evaluation of the Redeploy Illinois Program*, 39 J. CRIM. JUST. 183, 184 (2011).

[211] Thalia González, *Youth Incarceration, Health, and Length of Stay*, 45 FORDHAM URB. L.J. 45, 45–47 (2017).

[212] SEIGLE ET AL., *supra* note 195, at 8.

[213] *Id.*

Research suggests that youth on probation are more successful when probation officers tailor responses and programming to address the youth's criminogenic needs.[214] Ideally youth can be connected with evidence-based programs.[215] Importantly, programs rated effective are still dependent on the local community's investment in ensuring access to the programs and staff training to ensure implementation of the programs with fidelity.[216]

4. Supervision Model Based on Positive Youth Development

For youth who are formally processed and receive probation as a disposition, the model of supervision or case management used by probation departments is a vital aspect of practice. Research suggests that traditional supervision focusing on surveillance and compliance has little long-term positive impact.[217] Probation officers can have more significant impact by focusing on positive youth development and supporting youth in developing competencies and achieving behavior change.[218] This can be facilitated by ensuring management caseloads that allow for more meaningful contacts with probationers as well as training in techniques demonstrated to help youth change behaviors.[219] Developing a continuum of options to address continued behavior issues and offending—a system of graduated responses—helps avoid defaulting to less effective punitive interventions.[220] Probation officers must also work to engage families, whose participation in services and interventions increases the chance of success.[221]

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[214] *Id.* at 12.

[215] The Office of Juvenile Justice and Delinquency Prevention maintains a Model Programs Guide that rates programs as effective, promising, or having no effect based on available evidence. Cullen, *supra* note 67, at 346.

[216] Feld, *supra* note 73, at 427–28. Furthermore, simply because a program or practice is deemed "evidence-based" does not guarantee successful outcomes. Rather, the evidence supports a greater likelihood that the program or practice will produce the anticipated results. *See* JEFFREY A. BUTTS, JOHN JAY COLL. CRIM. JUST., WHAT'S THE EVIDENCE FOR EVIDENCE-BASED PRACTICE? 1 (2012), https://adq631j7v3x1shge52cot6m1-wpengine.netdna-ssl.com/wp-content/uploads/2018/08/Whats-the-evidence-for-EB-Practice-butts-jeffrey-2012.pdf.

[217] SEIGLE ET AL., *supra* note 195, at 36.

[218] SAMANTHA HARVEL, HANNA LOVE, ELIZABETH PELLETIER, CHLOE WARNBERG, TERESA DERRICK-MILLS, MARCUS GADDY, CONSTANCE HULL, AKIVA LIBERMAN, MEGAN RUSSO, JANEEN BUCK WILLISON & MARY K. WINKLER, URB. INST., BRIDGING RESEARCH AND PRACTICE IN JUVENILE PROBATION: RETHINKING STRATEGIES TO PROMOTING LONG-TERM CHANGE 30–31 (2018), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/252234.pdf; *see also* MENDEL, *supra* note 204, at 16 (noting that juvenile courts and probation departments often focus on a youth's deficits, missing the opportunity to build skills and develop their talents).

[219] MENDEL, *supra* note 204, at 31; *see also* SEIGLE ET AL., *supra* note 195, at 37.

[220] SEIGLE ET AL., *supra* note 195, at 38.

[221] *Id.* at 18; *see also* Kethineni & Grubb, *supra* note 191, at 1195 (citing a study finding the most effective juvenile diversion programs were those that included family-based interventions and restorative justice components); *see also* MENDEL, *supra* note 204, at 38 (noting that all

5. Using a Trauma-Informed Approach Throughout the System

Understanding and effectively responding to trauma is an essential part of effective policy and practice. Research shows that as many as 75%–93% of justice-involved youth have experienced at least one traumatic event.[222] Youth offending behaviors can be the result of a trauma response—the tendency for an individual who has experienced trauma to experience hypervigilance and to overreact to situations, misinterpreting them as threatening. This is due to the effect that traumatic experiences have on the development of a child's brain, essentially rewiring it to automatically react in a fight-or-flight mode in stressful situations.[223] A trauma-informed system is characterized by a recognition of the impact of trauma on a youth and how it may affect their behaviors as a result. It is also characterized by a commitment to promote the child's resilience and ability to heal. Unfortunately, in many states key procedures and processes within the youth justice system remain far from trauma-informed.[224]

C. Persistent Challenges

In recent years, a number of local youth justice systems have undergone change in response to research about adolescent development and effective interventions. Nevertheless, many local courts and probation departments continue to operate in ways that fail to incorporate a developmental approach and research-based best practices, resulting in a tenuous embrace of reforms. This failure is often due to the difficulty of transforming system-wide organizational culture.[225]

Put simply, organizational culture is "how things are done." Some current youth justice leaders and staff began their careers during the "tough on crime" era, when punitive practices emphasized retribution rather than rehabilitation. The youth justice culture in some communities continues to reflect the norms and values

supportive adults must be involved in all stages of the probation process, including case planning and supervision).

[222] Buckingham, *supra* note 74, at 654 (referencing ERICA J. ADAMS, JUST. POL'Y INST., HEALING INVISIBLE WOUNDS: WHY INVESTING IN TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE (2010), http://www.justicepolicy.org/images/upload/10-07_REP_HealingInvisibleWounds_JJ-PS.pdf).

[223] *See id.* at 657.

[224] *Id.* at 645–46. It is suggested that the juvenile justice system currently fails to be trauma-informed in four key ways: "(1) it fails to accurately identify trauma exposures youth have had, (2) it fails to incorporate a contemporary understanding of trauma and its effects into legally significant transactions, particularly into its assessment of culpability, (3) it fails to provide modern trauma-specific interventions, and (4) it fails to employ trauma-sensitive dispositions and by the over-use of incarceration." *Id.* at 667.

[225] *See* JOHN A. TUELL & KARI L. HARP, ROBERT F. KENNEDY NAT'L RES. CTR. FOR JUV. JUST., PROBATION SYSTEM REVIEW GUIDEBOOK 9 (3d ed. 2019), https://rfknrcjj.org/wp-content/uploads/2019/02/Probation-System-Review-Guidebook-3rd-Edition.pdf.

of that period. In recent years, researchers, advocates, and policymakers have employed strategies aimed at dismantling this orientation, promoting evidence-based practices and using funding to incentivize their adoption. However, in the oft-quoted words attributed to management expert Peter Drucker, "Culture eats strategy for breakfast." The most well-intentioned reforms in policy and practice will fail to be implemented if the organizational culture remains resistant to change. An examination of local courts and locally administered probation departments provides examples of areas in which practice is out of step with what research directs, suggesting the existence of an outdated culture.[226]

1. Continued Confinement of Low-Risk Youth

Despite research emphasizing the harms of confinement, communities across the country continue to confine youth for non-violent offenses. In 2017, 22% of youth in secure facilities were held on the basis of property offenses, 5% were held for drug offenses, 13% for public order offenses, and 15% for technical violations. Another 4% were held on the basis of a status offense.[227] In California, amidst historically low numbers of youth in confinement, some counties continue to have high rates of youth confined for misdemeanors.[228] Youth are also subject to detention or incarceration for violations of probation in some counties.[229] In addition, some counties have continued to commit high numbers of youth to state facilities.[230] The rate of youth placed out of home can vary significantly between counties, even when comparing similar youth populations.[231] Whether this is the result of outdated philosophy or a failure (or inability) of the community to invest in programming

[226] *See* Sino Esthappan, Johanna Lacoe, Janine M. Zweig & Douglas W. Young, *Transforming Practice Through Culture Change: Probation Staff Perspectives on Juvenile Reform*, 18 YOUTH VIOLENCE & JUV. JUST. 274, 275 (2020). "Despite a growing literature base that encourages implementing risks and needs assessments, engaging youth and families, and matching youth to appropriate services, standard probation [practices] often do not align with the evidence on what works to improve outcomes for youth who interact with the juvenile justice system." *Id.*

[227] SARAH HOCKENBERRY, OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILES IN RESIDENTIAL PLACEMENT, 2017, at 4 (2020), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/juveniles-in-residential-placement-2017.pdf; *see also* ANNIE E. CASEY FOUND., ELIMINATE CONFINEMENT AS A RESPONSE TO PROBATION RULE VIOLATIONS 4 (2020), https://assets.aecf.org/m/resourcedoc/aecf-eliminateconfinementasresponse-2020.pdf.

[228] Joaquin Palomino & Jill Tucker, *Vanishing Violence: Minor Crimes, Major Time*, S.F. CHRON. (Nov. 21, 2019, 4:00 AM), https://projects.sfchronicle.com/2019/vanishing-violence-major-time/.

[229] PAC. JUV. DEF. CTR. & YOUTH LAW CTR., CALIFORNIA'S COUNTY JUVENILE LOCKUPS: EXPENSIVE, OVERUTILIZED, AND UNACCOUNTABLE 5–6 (2020), https://www.pjdc.org/wp-content/uploads/Californias-County-Juvenile-Lockups-November-2020-Final.pdf.

[230] RENEE MENART & BRIAN GOLDSTEIN, CTR. ON JUV. & CRIM. JUST., AN OPPORTUNITY FOR REINVESTMENT: CALIFORNIA STATE JUVENILE JUSTICE FUNDING IN FIVE BAY AREA COUNTIES 2–3 (2018).

[231] *Id.* at 9.

needed to address behaviors outside of confined settings, it suggests a system culture that is not aligned with a research-based approach.

2. Punitive Conditions of Confinement

The current conditions within many detention facilities reflect an outdated punitive approach to youth justice. Although some updated facilities reflect a more therapeutic milieu, many remain corrections-style environments.[232] This is the case in some California counties despite state law requiring juvenile hall to be a "safe and supportive homelike environment."[233] A 2015 report confirms that the practice of placing youth in solitary confinement remains widespread in many facilities throughout the nation.[234] This practice is harmful to youth, often exacerbating existing traumatic stress.[235] It has been linked to suicide, with a national survey indicating that approximately half of suicides in facilities occurred while the youth was in room confinement.[236] The harms caused by the use of chemical agents is also of concern. Although most states prohibit the use of chemical agents such as pepper spray in youth facilities, California remains one of only six states that currently still allow this practice despite evidence pointing to harmful and damaging effects on children.[237] Many facilities lack needed services for youth.[238] Researchers point to systemic issues such as understaffing, lack of training, and limited resources to account for the insufficiency of services and treatment.[239] This is concerning in light

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[232] *See* Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html [https://perma.cc/3T9N-3C74] (noting that two of every three confined youth are held in juvenile or adult jails and prisons); *see also* PAC. JUV. DEF. CTR. & YOUTH LAW CTR., *supra* note 229, at 9–10 (noting that some facilities still have locked doors with small windows, furniture bolted to the floor, and barbed wire fences).

[233] CAL. WELF. & INST. CODE § 851 (West 2021).

[234] RICHARD A. MENDEL, ANNIE E. CASEY FOUND., MALTREATMENT OF YOUTH IN U.S. JUVENILE CORRECTIONS FACILITIES: AN UPDATE 24 (2015), https://assets.aecf.org/m/resourcedoc/aecf-maltreatmentyouthuscorrections-2015.pdf.

[235] Buckingham, *supra* note 74, at 675.

[236] Carly B. Dierkhising, Andrea Lane & Misaki N. Natsuaki, *Victims Behind Bars: A Preliminary Study of Abuse During Juvenile Incarceration and Post-Release Social and Emotional Functioning*, 20 PSYCH. PUB. POL. & L. 181, 182 (2014).

[237] Jeremy Loudenback, *California Youth Have Been Pepper Sprayed More than 5,000 Times in Three Years*, IMPRINT (May 23, 2019, 8:37 AM), https://imprintnews.org/news-2/california-youth-have-been-pepper-sprayed-more-than-5000-times-in-three-years/35154.

[238] *See* González, *supra* note 211, at 62–63; *see also* PAC. JUV. DEF. CTR. & YOUTH LAW CTR., *supra* note 229, at 8.

[239] González, *supra* note 211, at 63. According to research by the Pacific Juvenile Defender Center and the Youth Law Center, probation officers in California receive core training that focuses primarily on administrative procedures, defensive tactics, and restraint techniques, providing only 3.5 hours of training on case planning and evidence-based practices. PAC. JUV. DEF. CTR. & YOUTH LAW CTR., *supra* note 229, at 9.

of the high rates of trauma and mental health disorders among youth within the youth justice system.[240]

3. Surveillance Rather than Support in Community Supervision

For youth supervised in the community, probation officers generally make recommendations regarding supervision and conditions of probation; courts ultimately make the orders and exercise significant discretion in crafting conditions.[241] In many jurisdictions, probation conditions imposed by juvenile courts are largely boilerplate, far too numerous, and lack a nexus to the particular youth's criminogenic risks and needs.[242] Courts and probation departments with an entrenched culture of surveillance and monitoring, rather than a culture committed to youth development, will continue to produce these problematic conditions and hold youth accountable for not complying—often with the threat of incarceration. Failure to utilize systems of graduated sanctions can perpetuate more punitive responses to continued violations. Such practices conflict with research that finds "supervision is most effective when less focused on catching youth doing something wrong and more focused on helping them do right."[243]

4. Disparate Treatment of Youth of Color

Of great concern are the ongoing racial and ethnic disparities in the youth justice system.[244] While rates of arrest, detention, and incarceration have fallen in re-

[240] According to the National Center for Mental Health and Juvenile Justice, 93% of detained youth reported exposure to traumatic events, with most experiencing multiple events. Among those in contact with the youth justice system, at least 75% have experienced traumatic victimization while as many as 70% have a diagnosable mental health disorder. González, *supra* note 211, at 60 n.69. The Northwestern Juvenile Project found similar rates of traumatic events among incarcerated youth. *See* Linda A. Teplin, Karen M. Abram, Jason J. Washburn, Leah J. Welty, Jennifer A. Hershfield & Mina K. Dulcan, *The Northwestern Juvenile Project: Overview*, *in* JUVENILE JUSTICE BULLETIN 3, 11–12 (Off. of Juv. Just. & Delinq. Prevention, Juv. Just. Bull. No. NCJ 234522, 2013), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/234522.pdf.

[241] For example, in California, a condition of probation is presumptively valid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." People v. Lent, 541 P.2d 545, 548 (Cal. 1975) (quoting People v. Dominguez, 64 Cal. Rptr. 290, 293 (Cal. Ct. App. 1967)).

[242] *See* Esthappan et al., *supra* note 226, at 277. It is reported that youth are subject to as many as 30 conditions in some cases. *Id.*; *see also* NAT'L JUV. DEF. CTR., PROMOTING POSITIVE DEVELOPMENT: THE CRITICAL NEED TO REFORM YOUTH PROBATION ORDERS (2016), https://njdc.info/wp-content/uploads/2016/12/Promoting-Positive-Development-Issue-Brief.pdf.

[243] SEIGLE ET AL., *supra* note 195, at 36.

[244] According to the Office of Juvenile Justice and Delinquency Prevention, racial and ethnic disparities exist when "a specific minority group's rate of contact at a particular point in the juvenile justice system is different than the rate of contact for non-Hispanic whites or other

cent years, racial disproportionality at each of these points in the youth justice continuum have not improved.[245] Although Black youth make up 16% of the population of children ages 10–17 in the United States, they account for half of all youth arrests for violent crimes and 42% of arrests for all property crimes.[246] In California, felony arrest rates of Black youth are more than eight times the rate of White youth.[247]

There is evidence to suggest that youth of color continue to be treated differently than white youth throughout the system. According to the National Center for Juvenile Justice, in 2018, cases involving white youth were more likely to be handled informally than cases involving youth of color.[248] White youth were less likely than Black and Hispanic youth to be detained in every category of offense.[249] Furthermore, once youth of color are detained, they tend to remain in secure confinement for longer periods of time.[250]

Among adjudicated youth, Black and Hispanic youth were more likely to end up in out of home placement as compared to white youth.[251] In 2018, the proportion of cases that resulted in out of home placement was lower than in 2005 for white and Asian youth but remained the same for Hispanic youth and increased for Black and Native American youth.[252] A 2016 report found that Black youth in particular were four times more likely to be incarcerated than their White peers.[253] In California, a 2018 report shows that youth of color remain more likely than white

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minority groups." *Racial and Ethnic Disparities*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Oct. 7, 2019), https://ojjdp.ojp.gov/programs/racial-and-ethnic-disparities.

[245] For example, the gap between incarceration rates of Black youth and those of white youth was no different in 2017 than in 1997. *United States of Disparities*, W. HAYWOOD BURNS INST., https://usdata.burnsinstitute.org/#comparison=3&placement=3&races=1,2,3,4,5,6&offenses=5,2,8,1,9,11,10&year=2017&view=graph (last visited Mar. 10, 2022).

[246] Charles Puzzanchera, *Juvenile Arrests, 2018*, *in* JUVENILE JUSTICE STATISTICS 8 (Off. of Juv. Just. & Delinq. Prevention, Nat'l Report Series Bull. No. NCJ 254499, 2020), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/254499.pdf.

[247] KIDS DATA, www.kidsdata.org (last visited Mar. 10, 2022) (select "Data by Topic," then "Emotional & Behavioral Health," then "Juvenile Arrests," then "Juvenile Felony Arrest Rate by Race/Ethnicity").

[248] SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., JUVENILE COURT STATISTICS 2018, at 59 (2020), https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2018.pdf.

[249] *Id.* at 33–34. Black and Hispanic youth represented 35% and 18%, respectively, of delinquency cases but represented 40% and 22% of the youth detained. *Id.* at 33.

[250] González, *supra* note 211, at 49.

[251] HOCKENBERRY & PUZZANCHERA, *supra* note 248, at 48.

[252] *Id.*

[253] González, *supra* note 211, at 48–49.

youth to be sent to an institutional placement in 41 of the 58 counties.[254] Disparities are also found in the rate at which youth are transferred to adult court.[255] In California, as recently as 2014, when prosecutors still had the authority to directly file, Black youth were filed directly into adult court at more than ten times the rate of their white peers.[256] Studies have confirmed that these disparities cannot simply be attributed to severity of offense and prior offending. When controlling for these factors, there remained more negative assessments of youth of color and more punitive sentencing recommendations.[257]

Despite ongoing research and increasing attention from policymakers, racial and ethnic disparities in youth justice persist, in part because the causes are deeply complex, with both structural and interpersonal components at play. The National Research Council concluded that such disparities "exist[] in the broader context of a 'racialized society' in which many public policies, institutional practices, and cultural representations operate to produce and maintain racial inequities."[258] The culture within many youth justice systems has yet to reflect a true understanding of the depth of the problem and the role that systemic racism plays. Progress on reducing disparities in local jurisdictions is often hampered by denial and defensiveness that arises when discussing not only the history of, but also the current existence of, racism and bias in the youth justice system.[259]

5. Lack of Data and Accountability

Changing system culture is difficult, if not impossible, if the case for change cannot be made with the support of meaningful local data. For example, having evidence of racial and ethnic disparities is critical in identifying and challenging disparate treatment.[260] Furthermore, the ability to monitor fidelity to newly adopted procedures and practices and to illustrate positive outcomes associated with these changes through data is crucial to institutionalizing change. Yet, the lack of such data is a nearly universal criticism of the youth justice system in California and many other states. In 1994, the California Legislative Analyst's Office identified this as a deficiency in the youth justice system, and voiced concern about the lack of data

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[254] ANNA WONG & LAURA RIDOLFI, THE W. HAYWOOD BURNS INST., UNLOCKING OPPORTUNITY: HOW RACE, ETHNICITY AND PLACE AFFECT THE USE OF INSTITUTIONAL PLACEMENTS IN CALIFORNIA 16 (2018), https://burnsinstitute.org/wp-content/uploads/2020/09/Unlocking-Opportunity_compressed.pdf.

[255] Soler et al., *supra* note 70, at 530.

[256] Sara Tiano, *In California, Data Shows a Widening Racial Gap as Juvenile Incarceration Has Declined*, IMPRINT (Nov. 28, 2017, 7:00 AM), https://imprintnews.org/analysis/california-data-shows-racial-gap-widened-juvenile-incarceration-declined/28784.

[257] MCCARTHY ET AL., *supra* note 11, at 16–17.

[258] COMM. ON ASSESSING JUV. JUST. REFORM, *supra* note 105, at 239.

[259] CTR. FOR CHILD.'S L. & POL'Y, *supra* note 59, at 30.

[260] *See id.* at 25–26, 29.

available to analyze probation caseloads and outcomes throughout the state.[261] Little has changed since that time.

The inability to analyze youth justice data within and among local jurisdictions also makes accountability problematic and policy and funding decisions uninformed. While flexibility in funding that allows for the tailoring of programming to meet the specific needs of the community can be beneficial, the passivity with which the legislature holds jurisdictions accountable for results can lead to complacency with the status quo, foreclosing the opportunity for systemic culture change.

III. A LEGISLATIVE AGENDA TO SUPPORT TRANSFORMATION

This Article argues that transforming the culture of youth justice requires adoption of a new philosophy and set of strategies guiding the entire continuum of the youth justice system based on research and lessons learned from the exploration of history, with a commitment to addressing long-standing challenges. Because the vast majority of youth are served on the local level, it is imperative that states establish a foundation that promotes effective practice and programs within their local jurisdictions. The legislative agenda below offers key components of such a foundation. It is designed for California, but applicable to any state willing to challenge its current approach to youth justice, as arguably most states are ripe to do.[262]

A. Update Statutory Purpose Clause

As a preliminary matter, many youth justice systems lack a clearly defined purpose and direction for the future.[263] When statutory purpose clauses fail to include a clear statement of contemporary philosophy and updated priorities, juvenile courts and probation departments are left without a guiding set of principles and practices to drive reform, which presents particular challenges for juvenile justice agencies that are typically viewed as resistant to change.[264]

Leaders of the Missouri Model, a well-regarded model of youth justice reform, discussed below, assert that among their most important achievements was the development of a sustainable new culture.[265] They highlight the "development of fundamentally different core beliefs" that would change the entire foundation of youth

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[261] HILL, *supra* note 82, at 6–7.

[262] Despite contemporary knowledge regarding best practice and programming, only a portion of states have undertaken implementation of evidence-based approaches to date. Kethineni & Grubb, *supra* note 191, at 1193.

[263] Francis T. Cullen, Cheryl Lero Johnson & Daniel P. Mears, *Reinventing Community Corrections*, 46 CRIME & JUST. 27, 30 (2017).

[264] Esthappan et al., *supra* note 226, at 277–78.

[265] Tim Decker, *Starting from a Different Place: The Missouri Model*, *in* A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 63, 67 (Nancy E. Dowd ed., 2015).

justice in the state.[266] Key among these beliefs are that meeting the youth's basic needs and ensuring the youth's physical and emotional safety are essential to effective treatment, that each individual has the potential for change and an inherent desire to succeed, that challenging behavior is a symptom of unmet needs, and that family and access to community resources are critical in the youth's treatment and success.[267]

As noted above, most legislatures are overdue in updating juvenile court purpose clauses to articulate a set of core beliefs related to the developmental approach to youth justice. As an example, California's youth justice purpose clause, contained in Welfare and Institutions Code § 202, retains *parens patriae* language as well as elements of the due process era philosophy, but is classified as primarily BARJ.[268] A key subsection reflecting this balanced approach notes that juvenile courts and public agencies responsible for enforcing the law "shall consider the safety and protection of the public, the importance of redressing injuries to victims, and the best interests of the minor in all deliberations pursuant to this chapter."[269]

The law states that minors are to "receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances," including "punishment that is consistent with the rehabilitative objectives of this chapter."[270] The first segment is an update of the original *parens patriae* juvenile court language which referred to "care, custody, and discipline." The replacement of custody and discipline with treatment and guidance and the inclusion of the child's best interest reflects the shift to a more rehabilitative orientation, as does the reference to punishment with the goal of rehabilitation. The code specifically notes that "punishment" refers to sanctions, not retribution.[271] However, the purpose clause has not been amended to incorporate the hallmarks of the developmental approach.

Furthermore, the language regarding system accountability is sorely lacking. The section states: "Participants in the juvenile justice system shall hold themselves accountable for its results."[272] No method for oversight or assurance is mentioned. The provision states that participants are to "act in conformity with a comprehensive

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[266] *Id.* at 68–69.

[267] *Id.* at 69–70.

[268] *Juvenile Court Purpose Clauses*, *supra* note 146.

[269] CAL. WELF. & INST. CODE § 202(d) (West 2021).

[270] *Id.* § 202(b).

[271] *Id.* § 202(e).

[272] *Id.* § 202(d).

set of objectives established to improve system performance in a vigorous and ongoing manner."[273] However, no further detail is provided in defining the objectives.[274]

Several recent provisions adopted by the California Legislature are significant steps toward an updated purpose in line with contemporary research. For example, in 2018, SB 439 prohibited the processing of children under age 12 through the youth justice system for most offenses. The relevant code section included a statement of intent that "counties pursue appropriate measures to serve and protect a child only as needed, avoiding any intervention whenever possible, and using the least restrictive alternatives through available school-, health-, and community-based services."[275] Research supports the expansion of such language to pertain not only to children under 12 but to all who come in contact with the youth justice system.

In 2020, California SB 823 included legislative intent language concerning youth justice, acknowledging evidence that youth are "more successful when they remain connected to their families and communities."[276] The bill also stated that county funding will aim "to meet the needs of youth by providing and implementing public health approaches to support positive youth development, building the capacity of a continuum of community based approaches, and reducing crime by youth."[277] Finally, the legislature stated its intent that counties:

> [U]se evidence-based and promising practices and programs that improve the outcomes of youth and public safety, reduce the transfer of youth into the adult criminal justice system, ensure that dispositions are in the least restrictive appropriate environment, reduce and then eliminate racial and ethnic disparities, and reduce the use of confinement in the juvenile justice system by utilizing community-based responses and interventions.[278]

Each of these provisions should now be codified in the state's youth justice purpose clause to promote a set of core beliefs that can be operationalized by local jurisdictions.

In addition, the stated purpose of the youth justice system must be updated to include a commitment to identifying and addressing trauma among youth. Where trauma is present, it must be stated that the priority is to provide the youth with treatment rather than involve the youth in a system that is known to be harmful to

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[273] *Id.*

[274] The statute only references Standard 5.40 of Title 5 of the California Standards of Judicial Administration, which encourages the juvenile court judge to play an active role in the community to assist in the development of needed resources and programs to benefit at-risk youth and families. CAL. STANDS. JUD. ADMIN. 5.40 (2021).

[275] CAL. WELF. & INST. CODE § 602.1 (West 2021).

[276] S.B. 823, 2019–2020 Leg., Reg. Sess. § 1(a) (Cal. 2020).

[277] *Id.* § 1(c).

[278] *Id.* § 1(e).

their well-being.[279] The state must direct that the youth justice system cannot be a mechanism for obtaining services for youth that could be better provided through the child welfare system, behavioral health system or through community providers.[280]

B. Establish Statewide Policies to Drive System-Wide Culture Change

1. Adopt a Human Services Approach to Youth Justice at the State Level

In order to best operationalize the newly articulated vision for a state's youth justice system, the administration of youth justice at the state and local levels should be driven by a human services model that focuses on the development of the youth. This is best achieved through designating the state human services agency to administer youth justice. As one example, the successful culture change in Missouri was supported by the designation of the Department of Social Services as the primary service provider rather than the state's correctional system.[281] In following the Missouri Model, the New York Close to Home Initiative, discussed below, also included the relocation of youth justice authority from within a correctional agency to within the social services department. It was reportedly helpful to have professionals working with the youth who were not part of the historically punitive youth justice system, instead bringing a more therapeutic culture to the program.[282]

California's restructuring includes establishing the Office of Youth and Community Restoration in the state's Department of Health and Human Services to manage the transition from state to county responsibility for all youth. The mission of the Office is to "promote trauma responsive, culturally informed services for youth involved in the juvenile justice system that support the youths' successful transition into adulthood and help them become responsible, thriving, and engaged members of their communities."[283] The Office is charged with identifying and disseminating best practices, reporting on youth outcomes and identifying policy recommendations for improved outcomes.[284]

Placing the work of youth justice within a human service agency can influence hiring priorities within local courts and agencies, emphasizing the need for skills and

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[279] *See* Buckingham, *supra* note 74, at 683.

[280] *Id.* at 684.

[281] MCCARTHY ET AL., *supra* note 11, at 25–26.

[282] JASON SZANYI & MARK SOLER, IMPLEMENTATION OF NEW YORK'S CLOSE TO HOME INITIATIVE: A NEW MODEL FOR YOUTH JUSTICE 26–27 (2018).

[283] CAL. WELF. & INST. CODE § 2200(b) (West 2021).

[284] *Id.* § (c)(1)–(3).

experience related to working with youth over correctional or criminal justice experience.[285] This also promotes the idea that probation officers can be effective in supporting behavioral change, as is shown by research.[286] This can support a shift in system culture to viewing a supervising probation officer as no longer a "case manager" but rather a "change agent."[287]

2. Establish Training Standards for All Youth Justice Professionals

Although counties function largely independently of the state in many jurisdictions, at a minimum, the state must require that all youth justice partners are trained in key aspects of the developmental approach: adolescent brain development, the impact of trauma on youth, racial discrimination and implicit bias, and effective practices and programs for reducing recidivism. In addition, probation officers must be trained in evidence-based supervision practices, including the use of validated risk assessments, and how to incorporate the results of assessments into case planning and probation conditions. [288] Some states have established statutory requirements for training on evidence-based practices and others have relied on state agencies to fund and provide updated training on effective approaches such as the incorporation of RNR principles into practice.[289]

Court partners, including judges and district attorneys, must also receive training to ensure that dispositions and conditions of probation are developed with a connection to the particular risks and needs of a youth. This is vital to correcting any tendency for courts to over-rely on institutionalization and to order boilerplate supervision terms that are applicable to all adjudicated youth, serving little rehabilitative purpose. [290] All trainings must be instituted during onboarding and must be

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[285] *See* Cullen et al., *supra* note 263, at 60 (arguing that probation officers "should be selected for their human services talents . . . .").

[286] *See id.* (citing evidence that "probation and parole officers can use office meetings with supervisees to effect behavioral change").

[287] *Id.* at 56 (citing the argument of researchers that probation officer visits should focus on promoting treatment outcomes). In a local version of this shift to a human services model, the Los Angeles County Board of Supervisors recently voted to study a plan to incentivize probation officers to obtain social work degrees, stating, "It is time to reimagine the role of individuals who are best positioned to connect with, influence, and mentor youth caught in this system." Susan Abram, *Los Angeles Wants to Turn More Probation Officers into Social Workers*, IMPRINT (Nov. 20, 2019, 9:24 AM), https://chronicleofsocialchange.org/justice/juvenile-justice-2/los-angeles-wants-to-turn-more-probation-officers-into-social-workers/39278. This proposal has stirred up controversy, with some arguing that the role of a probation officer is inherently "contradictory by training, certification, purpose and ethics of the field of social work." *Id.*

[288] Cullen et al., *supra* note 263, at 60.

[289] *See 50-State Report on Public Safety*, JUST. CTR., COUNCIL OF STATE GOVS., https://50statespublicsafety.us/part-2/strategy-3/action-item-2/ (noting that case studies show state leaders support efforts to train corrections and supervision staff).

[290] Cullen et al., *supra* note 263, at 74.

routinely revisited and updated. All local partners need to be evaluated in relation to their ability to perform as trained and removed from working with youth if unable to embody best practices.[291]

3. Establish Select Statewide Standards

Transformation of system culture can be supported by adoption of select standards that affect all counties. For example, in 2016, Kansas passed legislation establishing a system of structured community-based graduated responses for technical violations of probation to be used statewide. Specifically, the law stated that a technical probation violation can only be the basis for revocation of probation if it is the third or subsequent violation and if there is a history of documented failed responses and a documented determination that graduated responses are not sufficient.[292] Community supervision officers are required to develop a case plan in partnership with the youth and his or her family that incorporates results of a risk and needs assessment, referrals to programs, and documentation of violations and graduated responses. Finally, the legislation established case length limits of 12–18 months, determined by the level of offense as well as the assessed level of risk.[293]

In 2015, South Dakota passed the Juvenile Justice Public Safety Improvement Act,[294] having determined that diversion was not used consistently across the state due to a lack of standardized criteria to guide the diversion decision. The legislature also found that most committed youth were confined for misdemeanors, probation violations, and status offenses. In response, the legislation established diversion as the default sanction for nonviolent misdemeanors and status offenses for youth with no previous adjudications or diversions within the previous year. The legislature established a presumptive four-month term of probation for most youth, an eight-month term for higher-risk youth, and prohibited the placement of youth out of home solely on the basis of probation violations. Finally, the legislation mandated the use of a graduated response matrix for use in juvenile probation.[295]

States embarking on transformation of youth justice should establish similar standards. First, states should require comprehensive and standardized assessment of all youth in order to determine individualized risks and needs. In support of this goal, several states have recently passed legislation aimed at requiring the use of risk

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[291] *Id.* at 60.

[292] KAN. STAT. ANN. § 38-2392 (2021).

[293] *Id.* §§ 38-2391, -3494.

[294] S.B. 73, 2015 Leg., Reg. Sess. (S.D. 2015).

[295] PEW CHARITABLE TRS., SOUTH DAKOTA'S 2015 JUVENILE JUSTICE REFORM 7 (2016), https://www.pewtrusts.org/-/media/assets/2016/02/pew_south_dakota_juvenile_justice_reform_brief.pdf.

assessment tools.[296] Most California counties report using risk assessment instruments currently, but the fidelity with which they are used is unclear. States should provide training, or fund county investment in training, in the appropriate use of these instruments. In addition, states should establish accountability measures that require reporting of relevant process measures and outcome measures associated with use of these instruments. Finally, legislatures should clearly state that children assessed as low or moderate risk shall not be committed to residential programs unless found to be necessary by the court.

Second, states should require the use of graduated responses for technical violations of probation, prohibiting the use of confinement on the basis of such violations alone. Although the federal Juvenile Justice and Delinquency Prevention Act (JJDPA) prohibits secure confinement of status offenders, a 1980 amendment allows judges to detain if the status offender violates an order from the court.[297] In 2018, the reauthorization of the JJDPA fell short of closing this loophole, but clarified that the court must issue a written order indicating that there is "no appropriate less restrictive alternative available to placing the status offender in such a facility," and the length of time in detention cannot exceed seven days.[298] Currently, more than half of states have ceased allowing detention for violations of court orders.[299] The California Legislature has restricted the use of this exception in cases of truancy,[300] but has not prohibited these detentions altogether, although the reported use of the exception is very low.[301]

4. Reinvest Savings in Programs and Services, Including Reimagined Facilities

As efforts to reduce the number of detained and incarcerated youth continue, cost savings resulting from facility closures must be reinvested in effective community-based programming and services. An example of a strategy for such reinvestment is Ohio's "Reasoned and Equitable Community and Local Alternatives to the Incarceration of Minors" (RECLAIM Ohio) funding initiative which supports juvenile courts in developing community-based resources and programs for justice-

[296] For example, in 2019, Colorado legislation required the adoption and implementation of validated risk and needs assessment tools, including a diversion assessment to be used by district attorneys. The law also expanded diversion opportunities and limited detention to only youth who pose a safety risk. *See* S.B. 19-108, 2019 Gen. Assemb., Reg. Sess. (Colo. 2019).

[297] Juvenile Justice Amendments of 1980, Pub. L. No. 96-509 § 11(a)(13), 94 Stat. 2750, 2757 (codified as amended at 34 U.S.C. § 11114).

[298] Juvenile Justice Reform Act of 2018, Pub. L. No. 115-385 § 205(a)(15)(R)(iii)(I)(cc), 132 Stat. 5123, 5137 (codified as amended at 34 U.S.C. § 11114).

[299] COAL. FOR JUV. JUST., USE OF THE VALID COURT ORDER, STATE-BY-STATE COMPARISONS (2020), http://www.juvjustice.org/sites/default/files/resource-files/State%20VCO%20Usage%20-%20Updated%20Version%20Feb.%202020.pdf.

[300] S.B. 1296, 2013–2014 Leg., Reg. Sess., pmbl. (Cal. 2014).

[301] COAL. FOR JUV. JUST., *supra* note 299.

involved youth or those at risk of involvement. Funding increases as commitments to state and local secure facilities decrease, thus incentivizing counties to find ways of maintaining youth safely in the community.[302]

Wraparound Milwaukee is a well-known model of coordinated community programming that can be replicated with reinvestment of state and local savings from reduced commitments. Established in 1995, the program was originally funded by a $15 million federal grant and has continued as a result of funding pooled from a combination of state and county agencies including the county's Delinquency and Court Services, the county's Bureau of Milwaukee Child Welfare, and the State Division of Health Care Financing.[303] Wraparound provides cross-system services in lieu of confinement or residential placement outside the home. Use of this program in Milwaukee has resulted in a significant drop in the population of youth placed in residential treatment as well as the average length of stay.[304] Reported outcomes in 2019 include increases in permanency, school attendance, positive youth behavioral changes, as well as a 16% average decrease in recidivism over the past five years.[305]

California has utilized reinvestment strategies in the past. When California's first juvenile realignment occurred in 2007, the state anticipated cost savings associated with reduced populations in state facilities and established a new funding stream for counties—the Youthful Offender Block Grant (YOBG). The intent of the YOBG was to support counties in developing community-based programs, funding the use of risk and needs assessment instruments, and developing and using graduated sanctions. Grants such as the YOBG and the Youth Reinvestment Grant Program, established in 2018, allow funds to be used not only by county probation

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[302] *See RECLAIM*, OHIO DEP'T OF YOUTH SERVS., https://dys.ohio.gov/wps/portal/gov/dys/courts-and-community/RECLAIM/ (last visited Mar. 10, 2022). A similar initiative is known as Redeploy Illinois, which started as a pilot program aimed at keeping youth in their own communities rather than being sent to the state youth justice agency. The state provides funds to local jurisdictions to develop prevention and intervention services, including evidence-based programs, in exchange for a commitment to send fewer youth to state facilities. Geraghty, *supra* note 38, at 78. Cost savings calculated in 2015 show that the average cost to serve a youth through the Redeploy program was about 95% less than the cost to house the youth in a state facility. *Redeploy Illinois*, ILL. DEP'T OF HUM. SERVS., https://www.dhs.state.il.us/page.aspx?item=31991 (last visited Mar. 10, 2022). The average cost per youth in Redeploy programming in 2015 was $5,502 whereas the cost to house a youth in the Illinois Department of Juvenile Justice was $111,000. *Id.* Evaluation of the initiative has demonstrated reduced recidivism and decreases in risk factors among participants. Kethineni & Grubb, *supra* note 191, at 1218–19.

[303] *See* WRAPAROUND MILWAUKEE, http://wraparoundmke.com/ (last visited Mar. 10, 2022).

[304] MCCARTHY ET AL., *supra* note 11, at 28.

[305] WRAPAROUND MILWAUKEE, 2019 YEAR END REPORT 11–12 (2020), http://wraparoundmke.com/wp-content/uploads/2013/09/WCCF-2019-Wraparound-READ-56794-1-1-to-distribute.pdf.

departments, but also by partner agencies and community-based providers, supporting the increased utilization of community-based services and programs and a culture that reflects a more service- and community-oriented approach.[306] In establishing the Youth Reinvestment Grant Program, the legislature also required services to be "evidence based or research supported, trauma informed, culturally relevant, and developmentally appropriate."[307]

The significant decline in the number of youths detained and incarcerated also provides an opportunity to invest in changing how youth who may still require secure confinement experience it. Transformation of youth justice requires replacing remaining secure facilities that serve as vestiges of the punitive era with smaller, non-correctional programs. Such facilities are treatment-focused and emphasize relationship building, family engagement, and community connections. The research indicating that the traditional model of incarceration for youth is harmful and ineffective lends support for California's move to close the large, remote, and prison-like state-run correctional facilities, and suggests that large and costly local facilities should be replaced with reimagined environments that promote evidence-based practices and programs.

Most efforts to reimagine facilities derive from the Missouri Model. Key characteristics of the model include smaller facilities located closer to a youth's home, enabling family members to participate in treatment and planning for the transition home; service coordinators for each youth to ensure continuous case management during and following justice system involvement; facilities with a non-correctional style where youth are allowed to wear their own clothes and live in small dorm-like rooms, where staff employ intensive supervision rather than coercive correctional techniques; and communal activities in which youth eat, study, exercise and attend therapy together and address misbehavior as a group.[308] A 2010 report on the Missouri Model identified several positive characteristics as compared to other states' facilities such as lower rates of assaults and lower rates of use of mechanical restraints and isolation.[309] The facilities also reported better youth outcomes including lower recidivism rates as well as positive education and employment outcomes.[310] These

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[306] *See Youth Reinvestment Grant Program*, *supra* note 127; CAL. WELF. & INST. CODE § 1454(3) (West 2021). The legislature structured the grant such that 10% of the funds are distributed to the public agency coordinating the implementation of the diversion programs and alternatives to detention formal processing while 90% of the funds are to be passed through to the nonprofit organizations providing services, specifically within underserved communities with high rates of arrest.

[307] *Id.* § 1454(5)(A)–(B).

[308] Soler et al., *supra* note 70, at 525.

[309] RICHARD A. MENDEL, ANNIE E. CASEY FOUND., THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS 9–10 (2010), https://assets.aecf.org/m/resourcedoc/aecf-MissouriModelFullreport-2010.pdf.

[310] *Id.* at 6, 9–10.

facilities reportedly have produced cost savings while producing these better outcomes.[311]

In 2012, New York City launched its Close to Home Initiative based largely on the Missouri Model. A Task Force on Transforming Juvenile Justice created by New York's governor concluded that many of the youth in state-run facilities were not identified as a significant threat to public safety but were instead confined as a matter of routine.[312] The initiative produced numerous reforms, resulting in an expansion of nonresidential alternatives and practices aimed at keeping youth in the community.[313] For youth requiring out of home placement, newly established facilities "are in small (24 beds or smaller) settings almost exclusively within the city's boundaries and, therefore, close to family and community."[314]

The initiative employs the RNR framework as well as Positive Youth Development (PYD), which aims to provide youth with services that help build skills and maximize strengths rather than focusing on deficits.[315] Youth earn credits in community-based schools that keep them on track with requirements, allowing them to be promoted with their peers. Overall community reintegration has improved as youth remain in neighborhoods close to their home, able to connect to pro-social

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[311] *See id.* at 11–12. Notably, it is estimated that "steering just one high-risk delinquent teen away from a life of crime saves society $3 million to $6 million in reduced victim costs and criminal justice expenses, plus increased wages and tax payments over the young person's lifetime." *Id.* at 12.

[312] SZANYI & SOLER, *supra* note 282, at 26–27.

[313] Reforms included the development of programs providing alternatives to incarceration, the adoption of a risk assessment instrument for use during the detention decision, adoption of a risk/needs assessment instrument and a matrix to guide decision-making and service provision, and the merger of the city's Department of Juvenile Justice with the Administration for Children's Services (ACS), thus creating the Division of Youth and Family Justice at ACS and connecting juvenile justice services and staff to the child welfare system. *Id.* at 6–7. The Close to Home Initiative is guided by seven core principles: (1) Public safety, (2) Accountability—using data to guide policy and programming; (3) Evidence-based treatment—providing youth and families with services that have proven to be effective, (4) Educational continuity—supporting a youth's educational success while in placement and while transitioning back to community schools, (5) Community reintegration—developing supportive relationships within one's own community, (6) Family engagement and collaboration—family should be involved in treatment and services should continue beyond placement, (7) Permanency—ensuring ongoing connections to family members while in placement. *Id.* at 17–23.

[314] MCCARTHY ET AL., *supra* note 11, at 23. "Non-secure" placements house up to 13 youth in home-like repurposed homes throughout New York City and "limited-secure" placements house up to 20 higher risk youth. SZANYI & SOLER, *supra* note 282, at 10.

[315] PYD provides a framework for service delivery which focuses on "not . . . restricting opportunities to offend but expanding opportunities to grow." TUELL & HARP, *supra* note 201, at 8.

activities and opportunities they can continue upon their release.[316] Youth also benefit from regular visitation from family and the ability of family members to engage in evidence-based family therapy models, such as Multi-Systemic Therapy and Functional Family Therapy, which help stabilize the youth's home environment prior to and upon the youth's return home.[317] The Close to Home Initiative reports positive outcomes, such as reducing youth incarceration in New York City by 53% and cutting the number of youth arrests in half.[318] Less than 8% of the youth released from ACS facilities between 2014–2016 had aftercare revoked for violations such as a new arrest.[319]

With the pending closure of state youth justice facilities in California, all securely confined youth will be housed in local facilities, which have the opportunity to adopt components of the Missouri Model. The local facilities must be therapeutic rather than correctional in their physical characteristics and in their programming. In some local jurisdictions throughout California, this will require establishing a new set of guiding principles, ensuring that staff have experience working with youth and understand their rehabilitative role. All staff should receive extensive training in best practices and trauma-informed care. Facility staff must be evaluated on their ability to incorporate these components into their work. Additionally, California should finally join 45 other states in prohibiting the use of chemical agents in all detention and incarceration facilities.[320]

5. Increase Accountability

As states continue and expand investment in community-based alternatives and evidence-based programming, a lack of oversight and accountability for the use of funds can limit the effectiveness and sustainability of programming. [321] Successful reforms require collection and analysis of data, not just in relation to a particular project or program, but on a systemic level.[322] Therefore, the state must require the collection of data among local departments and the submission to a state agency with the capacity to analyze and report the data to the legislature, local governments,

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316 SZANYI & SOLER, *supra* note 282, at 22.

317 *Id.* at 23.

318 MCCARTHY ET AL., *supra* note 11, at 19.

319 SZANYI & SOLER, *supra* note 282, at 18.

320 In 2018, AB 2010 proposed the prohibition of pepper spray in youth facilities in California. The bill failed to pass. A.B. 2010, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

321 *See, e.g.*, Sara A. Gordon, *Juvenile Justice Reform in Texas: The Context, Content & Consequences of Senate Bill 1630*, 42 J. LEGIS. 232, 233–34 (2016) (citing Della Hasselle, *Critics Point to Problems in Louisiana's Reformed Juvenile Justice System*, JUV. JUST. INFO. EXCH. (Oct. 5, 2014), http://jjie.org/critics-point-to-problems-in-louisianas-reformed-juvenile-justice-system/).

322 Geraghty, *supra* note 38, at 85 ("Data is important not only because of what it can reveal about the nature and scope of an issue, but also because it provides an objective basis for fashioning workable policy recommendations and for lending credibility to calls for systems change.").

and the public.[323] It is suggested that increasing accountability for outcomes such as decreased recidivism will motivate youth justice system partners to more quickly invest in and adopt evidence-based practices and programming.[324] Beyond measuring recidivism, data related to intermediate outcomes—those that measure the youth's well-being and competencies—are important measures of what is working.[325]

California has a long history of financially supporting prevention and intervention programming; however, it has not always held counties accountable for spending the funds in compliance with these goals.[326] Continued funding of community-based prevention and intervention programming should include increased reporting requirements mandating that counties submit detailed expenditures as well as conduct process and outcome evaluations. Additionally, communities must be informed about how local contracts are awarded and how they are monitored for compliance, as well as the outcomes for which contracted providers are responsible and the measure of their success in relation to those outcomes.[327] In New York City, accountability has increased as a result of the Close to Home initiative. The state and city invested funds in staffing to ensure oversight of providers through contract monitoring and on-site visits. In addition, all providers participate in the Performance-based Standards program (PbS), which requires data collection and reporting on specific performance measures related to facility operations.[328]

With increased funds routed to counties in light of the closure of state facilities in California, greater oversight with respect to the effectiveness of these investments is crucial. The vague language in California's current juvenile court purpose clause indicating that courts and agencies are to hold themselves accountable for results should be replaced by a more specific commitment by the state to require youth justice system participants to collect and report meaningful data regarding practices,

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[323] *See* Feld, *supra* note 73, at 428.

[324] Cullen et al., *supra* note 263, at 52. "The main reason why recidivism rates are not reduced for probationers . . . is that nobody's job requires them to do so." *Id.* at 49.

[325] Racine & Wilkins, *supra* note 153, at 14.

[326] *See* RENEE MENART & BRIAN GOLDSTEIN, CTR. ON JUV. & CRIM. JUST., AN OPPORTUNITY FOR REINVESTMENT: CALIFORNIA STATE JUVENILE JUSTICE FUNDING IN FIVE BAY AREA COUNTIES 5 (2018), http://www.cjcj.org/uploads/cjcj/documents/california_state_juvenile_justice_funding_in_five_bay_area_counties.pdf.

[327] Gabrielle Prisco, *When the Cure Makes You Ill: Seven Core Principles to Change the Course of Youth Justice*, 56 N.Y. L. SCH. L. REV. 1433, 1447–48 (2011/12).

[328] *Id.* at 1447. Following the 1994 OJJDP study regarding conditions of confinement, the Council of Juvenile Correctional Administrators developed a set of national standards for facilities in the areas of safety, security, programming, health and mental health services, reintegration planning, and legal rights. The facilities collect data that is analyzed to identify areas of strength and areas in which improvement is needed. Soler et al., *supra* note 70, at 510.

programs, and outcomes in order to conduct valuable quality assurance within the system.

This can be supported by the requirement in SB 823 that the state Department of Justice submit a plan to update the current juvenile court and probation data and reporting system. Required data elements include recidivism measures for youth organized by demographics, caseload and placement change data, re-referrals due to violations of probation and warrants, use of detention and detention alternatives, and dispositional placements. The legislature also required assessment of the feasibility of including youth development and wellness data.[329] Inclusion of these elements is critical to prioritizing and institutionalizing accountability for implementing what works.

Furthermore, courts and agencies must explicitly be accountable for addressing issues of systemic racism and bias that perpetuate racial and ethnic disproportionality and disparities within the youth justice system. In fact, this priority must be woven throughout the implementation of all other strategies. Instituting the research-based policies and practices described above can have a positive impact on racial and ethnic disparities. For example, use of detention risk assessment tools, risk screening instruments, and graduated sanction programs have reduced disproportionate confinement of youth of color in several counties.[330] In addition, communities that have developed alternatives to formal processing in the youth justice system have seen reductions in the number of youths of color within their systems.[331]

The topic of racial and ethnic disparities has received some attention from the federal government,[332] but change has been slow. Effectively reducing racial and

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[329] S.B. 823, 2019–2020 Leg., Reg. Sess. § 15 (Cal. 2020).

[330] NAT'L JUV. JUST. NETWORK, REDUCING RACIAL AND ETHNIC DISPARITIES IN JUVENILE JUSTICE SYSTEMS: PROMISING PRACTICES 3–4 (2014), https://www.njjn.org/our-work/reducing-racial-and-ethnic-disparities-in-juvenile-justice-systems-promising-practices. For example, the state Division of Juvenile Justice in North Carolina reduced detention among Black youth by 24% during the piloting of a detention assessment instrument. Use of the Youth Assessment and Screening Instrument (YASI), along with a program of graduated sanctions in a Wisconsin county resulted in significant reductions of youth placed in state facilities and reductions in detention on the basis of probation violations for youth of color. *Id.* at 3.

[331] *Id.* at 3–4.

[332] In 1988, Congress amended the Juvenile Justice and Delinquency Prevention Act (JJDPA) to require states receiving funds from the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to collect data on "disproportionate minority confinement" (DMC) and develop and implement plans to address the issue. In 1992, this became a "core requirement" for states to comply with under penalty of withholding funds. In 2002, Congress amended the requirement to cover "contact" rather than only confinement, meaning that states had to identify racial and ethnic disparities within every stage of the youth justice process, determine their causes and develop and implement remedial strategies. Unfortunately, "compliance" was never clearly defined, and many states were found to be in compliance while failing to actually reduce identified disparities. The most recent reauthorization of the JJDPA included requirements that states create

ethnic disparities requires a targeted effort on the state and local level, supported by a coalition of stakeholders with the political will to ask difficult questions and to engage youth, families, and community members in developing solutions.[333] Any effort to reduce the number of youths in secure facilities must focus on addressing the disproportionate rate of youth of color in all types of residential facilities; any effort to replace large correctional facilities with smaller therapeutic facilities located near youths' homes must ensure a connection with the community and a recognition of historical racial and ethnic traumas and discriminatory practices impacting the availability of services in these communities; any reinvestment must help address the lack of services and adequate schools and facilities in communities of color; and any lasting culture change must acknowledge the existence of systemic racism and implicit bias.

CONCLUSION

This is a pivotal moment in the history of youth justice. By drawing upon the considerable research contributing to a deeper understanding of youth development and effective responses to youth offending, California and other states have an opportunity to establish a lasting new paradigm that can begin to address the enduring problems of the youth justice system.

The new vision for California as articulated by Governor Newsom begins at the end, with changes affecting youth at the deepest end of the youth justice continuum—those committed to the state's secure facilities. However, states can have the greatest impact by reshaping policy, investment, practice, and culture at every point in the youth justice system, from initial contact to incarceration, and among all partners, from local probation departments to community providers. By envisioning a system that essentially works to put itself out of business, states have the opportunity to disrupt the persistent systemic culture of custody and control, ushering in a new and effective approach that has the potential to endure.

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a plan with measurable goals to address racial disparities, using data to demonstrate progress. *Key Issues: Racial-Ethnic Fairness*, JUV. JUST. INFO. EXCH., https://jjie.org/hub/racial-ethnic-fairness/key-issues (last visited Mar. 10, 2022).

[333] *Id.*