ARTICLES

SET UP TO FAIL: YOUTH PROBATION CONDITIONS AS A DRIVER OF INCARCERATION

by
*Jyoti Nanda**

Youth probation is the most common form of punishment for youth in the United States criminal legal system, with nearly a quarter of a million youth currently under supervision. Yet the role youth probation conditions play in the incarceration of youth has not been the focus of legal scholarship. Youth probation is a court-imposed intervention where young people remain at home under the supervision of a youth probation officer and are required to adhere to probation conditions, rules, and court-ordered conditions. The orders rely on standardized terms on youth probation condition forms. This is the first scholarly Article to excavate original youth probation condition forms. It relies on data from 17 different urban and rural jurisdictions across the United States, including the five largest, and provides both a descriptive and

* Associate Professor, Golden Gate University School of Law; Reporter, American Bar Association Juvenile Justice Standards (2017-2025). This Article was inspired by youth clients I represented who were unjustly facing technical probation violations. For guidance on this Article, I am grateful to Robert Schwarz, Ingrid Eagly, Harit Trivedi, Benedetta Faedi Duramy, Laura Cisneros, Helen Kang, Rachel Van Cleave, Jonathan Glater, Ion Meyn, Marsha Levick, Patricia Soung, Nate Balis, Dr. Jacquelin van Wormer, Marty Fineman, Seema Patel, Suma Peesapati, Commissioner Ana Bermúdez, Lily Shapiro, Matthew Mitzel, participants in the No. California Jr. Scholars Workshop, GGU Law Faculty Workshop, CRT Summer School, and dozens of advocates who sent me probation conditions. I recognize Bacilio Mendez II for excellent research, and Stephanie Aguayo and Crystal Whybark for editing. Special thanks to the Lewis & Clark EIC Talia Brumfield and her dedicated team, including Brock Vasconcellos and JJ Caufield, for taking this to publication. Any errors are my own. This Article is dedicated to my immigrant parents, Vithlaish and Nirmala Nanda, for everything.

perspective analysis of the problems with the design and execution of probation conditions.

Based on my analysis of hundreds of youth probation conditions in these different jurisdictions, I argue that standard youth probation conditions are part of a youth probation system that is structurally flawed in its design and execution, and that probation conditions that lack an adolescent framework cause real harm to youth and their families—particularly those who are most vulnerable, especially youth of color. Simultaneously, youth probation systems concentrate power in probation officers, granting them inordinate discretionary power. Although youth probation is viewed as the ideal alternative to detention, I argue that youth probation in its current structure is a driver of incarceration—that should be viewed as part of a carceral state—in need of thoughtful re-imagination: perhaps even abolition.

Introduction 679
Basics of Youth Probation 681
I. Inequity by Design: Structural Flaws of Youth Probation 692
A. Origins of Juvenile Court: To Rehabilitate or Control? 692
B. The Discretionary and Powerful Role of the Youth Probation Officer 698
C. Judges as Gatekeepers to the Revolving Door of Youth Probation 701
II. Methodology for Original Research 702
III. Design Flaws in Probation Conditions 708
A. Adolescent Development Tenets Application to Probation Conditions 709
B. Youth Probation Conditions in Five Jurisdictions 715
1. Los Angeles County, California 715
2. Harris County, Texas 716
3. Miami-Dade County, Florida 716
4. New York, New York 717
5. Cook County, Illinois 718
C. Probation Conditions Analysis 719
1. Readability/Comprehension 719
2. Number of Conditions 725
3. Level of Intrusiveness 727
4. Tailored Conditions 728
5. Youth Participation 729
6. Family Involvement 730
IV. Driver of Incarceration and Need to Abolish (Defund and Reimagine) Probation 732
A. Specific Probation Conditions that Drive Incarceration 734
1. Follow the Law Conditions 736
2. "Be Good People" 736

3. We Control You Conditions 737
4. Punish Your Family Conditions 739
B. Abolish and Reimagine 740
1. Defund/Reform 741
a. Pierce County, Washington 742
b. New York 743
2. Abolish/Reimagine 744
a. Los Angeles, California 744
Conclusion 746

INTRODUCTION

Last year, the story of a 15-year-old Black child named Grace from suburban Detroit drew widespread national attention when she was incarcerated for failing to meet one of her probation requirements: completing her homework.[1] Grace violated the terms of her probation by skipping coursework when her school switched to remote learning because of the coronavirus pandemic. Grace's school district did not penalize her, but the judge said the decision was intended for the girl's own good.[2] Her case caused a national outcry leading to protests, a grassroots social media campaign, and calls by congressional members for a civil rights investigation which led to her release three weeks later. Michigan Lieutenant Governor, Garlin Gilchrist, highlighted Grace's case, calling it: "a complete and systemic failure of our youth justice system. Grace and her mother deserved resources that should have wrapped around them and supported them rather than putting this girl away. Simply put, incarceration was the wrong response."[3]

The outrage of this injustice led to calls for reform in Michigan, but what was lost in the national discourse was the true purpose of youth probation conditions or youth probation writ large.[4] This Article seeks to ensure the purpose and efficacy of

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[1] Jodi S. Cohen, *Case Closed: Michigan Judge Removes Grace, Black Teen Jailed for Not Doing Online Schoolwork, From Probation*, PROPUBLICA (Aug. 11, 2020, 12:47 PM), https://www.propublica.org/article/case-closed-michigan-judge-removes-grace-black-teen-jailed-for-not-doing-online-schoolwork-from-probation.

[2] Jenny Gross, *Judge Declines to Release Girl, 15, Held for Skipping Online Schoolwork*, N.Y. TIMES (July 21, 2020), https://www.nytimes.com/2020/07/21/us/michigan-teen-coursework-detention.html.

[3] Dave Boucher & Jodi Cohen, *Whitmer Creates Juvenile Justice Task Force, Says One Mistake Should Not Destroy a Life*, DETROIT FREE PRESS, https://www.freep.com/story/news/politics/2021/06/09/michigan-juvenile-justice-task-force-gretchen-whitmer/7616535002 (June 9, 2021, 4:35 PM) (quoting statements made by Lt. Gov. Garlin Gilchrist at a press conference).

[4] For a thoughtful discussion of the follow-up to this case and the limits of youth justice reform efforts in Michigan and beyond, see Jodi S. Cohen & Duaa Eldelb, *Judges Are Locking Up Children for Noncriminal Offenses Like Repeatedly Disobeying Their Parents and Skipping School*, PROPUBLICA (Dec. 22, 2020, 6:00 AM), https://www.propublica.org/article/judges-

youth probation conditions are questioned and scrutinized by evaluating the actual standard youth probation conditions that youth like Grace must follow.[5] In this analysis, I honor my youth clients who described youth probation to me as "the monkey on my back" and "rigged to fail."

Youth conditions articulate the standards and obligations that determine what it means to be on probation. They are the fundamental basics of this alternative to incarceration. Yet these terms are not publicly accessible in most places. This Article does a deep dive into probation conditions in a moment when youth probation reform is rapidly sweeping the nation.[6] Reform efforts, however, are limited and not based on reviewing actual probation conditions since there is no transparency regarding jurisdictional practices.[7] Moreover, practices can differ dramatically across jurisdictional borders with no consistent terms of probation. Thus, despite the growing interest in reform, there is no multi-jurisdictional view of youth practices to benefit policy-makers.

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are-locking-up-children-for-noncriminal-offenses-like-repeatedly-disobeying-their-parents-and-skipping-school.

[5] When discussing children, rhetoric matters, and the use of "child" and "youth" is deliberate. *See* Jyoti Nanda, *Blind Discretion: Girls of Color and Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1505 n.3 (2012) [hereinafter Nanda, *Blind Discretion*] ("The ways in which we refer to 'children, 'youth,' 'juvenile,' 'girl,' or 'boy' [or they] affects our framework and understanding of the juvenile justice system."). This Article uses the terms "children" and "youth" to refer to children under the age of 18 who interact with the youth justice system.

[6] Driving this reform may be the savings from closing youth carceral facilities. *See* Stephen Handelman, *How Juvenile Probation Lands More Youths in Jail,* CRIME REP. (Oct. 26, 2020), https://thecrimereport.org/2020/10/26/how-juvenile-probation-lands-more-young-people-in-jail ("An impetus for rethinking traditional juvenile probation might come from using the money saved from closing so many youth facilities."). National and state criminal justice advocacy reform groups like the ACLU, the National Center for Youth Law, the Juvenile Law Center, the Annie E. Casey Foundation, the Haywood Burns Institute, and the National Center of Family and Juvenile Court Judges are calling for reform with a primary focus on shrinking probation's utility. But it is not clear that legislatures, courts, and scholars fully recognize the stale and inflexible nature of youth probation conditions that are routinely imposed on youth in county after county, state after state, year after year.

[7] *See* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 294 (2016) (Discussing how "[c]ourts, legislators, and scholars have devoted almost no attention to analyzing (or even acknowledging) the conditions of probation that are routinely imposed on probationers in state after state, year after year."). Moreover, probation is administered at the local or state level. *Probation Systems in the United States and California*, REENTRY, REFERRAL, & LINKAGE NETWORK CARE, https://losangeles.networkofcare.org/pr/library/article.aspx?id=1831 (last visited Sept. 17, 2022) ("Over half of all juvenile probation services (2,120 agencies) are administered at the local level or by a combination of local and state agencies, and the rest are administered solely by state agencies (16 states). In all cases, the administration of juvenile probation is separate from adult probation services.").

This Article fills that gap as the first scholarly article to excavate and critically examine actual youth probation conditions (i.e., forms) from different jurisdictions across the country and provides both a descriptive and prescriptive analysis of the structural problems with the design and execution of probation conditions. At its foundation, it relies on data found in forms individually collected from 17 different jurisdictions (states and counties) in the United States, including the five most populous counties: New York, New York; Cook County, Illinois; Harris County, Texas; Miami-Dade, Florida; and Los Angeles, California. Based on a detailed analysis of 325 specific probation conditions in these 17 different jurisdictions, I argue that the very reliance on youth probation conditions contradicts everything we know about adolescent development: the conditions are generic and not uniquely tailored to the act or need of the young person, they are too many in number, not readable nor comprehensible to most youth, and compliance is enforced by probation officers who view adherence with a punitive mindset instead of a growth mindset. When youth fail to meet conditions, they are punished and sent back to court or in the worst case, detained and incarcerated. Ironically, youth probation conditions, a preferred alternative to incarceration, can end up trip-wiring a young person into a lifetime of incarceration and not away from it.[8] Examining the conditions, thus, is critical to reveal the depth of its dominant (and ineffective) role in the youth criminal justice system and mass incarceration.[9]

Basics of Youth Probation

To begin, an understanding of the basic elements and contours of youth probation standards is a necessary predicate for the legal deconstruction I employ in this Article. By way of background, youth probation has been dubbed the

[8] Emily Haney-Caron & Erika Fountain, *Young, Black, and Wrongfully Charged: A Cumulative Disadvantage Framework*, 125 DICK. L. REV. 653, 657 (2021) ("Juvenile Justice stakeholders and scientists alike recognize that applying overly punitive sanctions to low-risk youth can actually increase recidivism."). MIT economist, Joseph Doyle, and Associate Professor of Economics at Latinx University, Anna Aizer, found that "those who were incarcerated as juveniles are 23 percentage points more likely to end up in jail as an adult when compared with juvenile offenders who, by the grace of a lenient judge, avoided incarceration. Put another way: 40 percent of kids who went into juvenile detention ended up in prison by the age of 25." *See* Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges*, 130 Q.J. ECON. 759, 799 (2015); Chris Sweeney, *Juvenile Detention Drives Up Adult Incarceration Rates, MIT Study Finds*, BOS. MAG. (June 11, 2015, 11:25 AM), https://www.bostonmagazine.com/news/2015/06/11/juvenile-detention-mit-study.

[9] Ensuring youth probation is effective is essential to reversing mass incarceration. The consequences of front-end processing decisions heavily impact youth's trajectories toward or away from entrenchment into the youth justice system. *See* Margaret Goldman & Nancy Rodriguez, *The State as the "Ultimate Parent": The Implications of Family for Racial and Ethnic Disparities in the Juvenile Justice System*, RACE & JUST., May 2020, at 1, 3.

"workhorse" of the U.S. youth justice system.[10] It is a $2 billion endeavor.[11] Probation is the most commonly assigned disposition or outcome in the "juvenile justice system" (also known as the "juvenile legal system" or "youth justice system").[12] There are currently a quarter-million youth or children under the age of 18 on some form of probation in our criminal youth legal system,[13] almost five times

[10] PATRICIA MCFALL TORBET, U.S. DEP'T OF JUST., JUVENILE PROBATION: THE WORKHORSE OF THE JUVENILE JUSTICE SYSTEM 1 (1996).

[11] ANNIE E. CASEY FOUND., TRANSFORMING JUVENILE PROBATION: A VISION FOR GETTING IT RIGHT 6 (2018) ("Available evidence suggests that our nation's juvenile probation workforce includes 15,000 to 20,000 professionals, and that total juvenile probation costs nationwide—including personnel costs plus expenditures for probation-funded programming, supplies, technology, transportation, and administration—likely amount to more than $2 billion per year.").

[12] Erika N. Fountain & Dillon Mahmoudi, *Mapping Juvenile Justice: Identifying Existing Structural Barriers to Accessing Probation Services*, 67 AM. J. CMTY. PSYCH. 116, 116 (2021). Probation also plays a central role in the adult criminal legal system, the largest in the world. Fiona Doherty, *The Case for Moving Beyond Probation, and How To Do It*, APPEAL (May 4, 2021), https://theappeal.org/the-lab/report/the-case-for-moving-beyond-probation-and-how-to-do-it. In this analysis, I interchangeably use the words "criminal legal system" or "youth justice system" to describe our current county-based "juvenile justice system" because language matters. *See* Erica Bryant, *Why We Say "Criminal Legal Justice System," Not "Criminal Justice System,"* VERA (Dec. 1, 2021), https://www.vera.org/news/why-we-say-criminal-legal-system-not-criminal-justice-system; Anya Kamenetz, *Delinquent. Dropout. At-Risk. When Words Become Labels*, NPR (Apr. 28, 2015, 8:03 AM), https://www.npr.org/sections/ed/2015/04/28/399949478/delinquent-dropout-at-risk-whats-in-a-name.

[13] Between 2005 and 2018, probation was the most common outcome for delinquency cases. *Easy Access to Juvenile Court Statistics (EZAJCS): 1985-2019*, NAT'L CTR. FOR JUV. JUST., https://www.ojjdp.gov/ojstatbb/ezajcs (last visited Sept. 17, 2022) (select "Analyze Delinquency Cases;" then select "Disposition" in drop-down menu next to "Column Variable;" then select years 2005–2018 in "Year of Disposition" box; then select ages 12–17 and "<12" in "Age at Referral" box; and then select "SHOW TABLE"). In 2018, the last year for which national data is available, 139,800 young people were on probation after an adjudication (sentencing), 113,300 without an adjudication, and 50,400 on informal probation. *Id.* (select "Disposition" in drop-down menu next to "Column Variable;" then select years 2005–2018 in "Year of Disposition" box; then select ages 12–17 and "<12" in "Age at Referral" box; then select "Adjudicated" in "Adjudication" box; and then select "SHOW TABLE"); *Id.* (select "Disposition" in drop-down menu next to "Column Variable;" then select years 2005–2018 in "Year of Disposition" box; then select ages 12–17 and "<12" in "Age at Referral" box; then select "Not Adjudicated" in "Adjudication" box; and then select "SHOW TABLE"); *Id.* (select "Disposition" in drop-down menu next to "Column Variable;" then select years 2005–2018 in "Year of Disposition" box; then select ages 12–17 and "<12" in "Age at Referral" box; then select "Informal" in "Manner of Handling" box; and then select "SHOW TABLE").

as many youth than are incarcerated.[14] And Black and Brown youth, like in all aspects of the youth criminal justice system, are overrepresented.[15]

Youth probation is a central part of our American youth justice system that generally adheres to two simultaneous stated goals: first, to serve the best interest of young people who have committed a bad act by providing them adequate care, treatment, and guidance to prevent re-offending; second, to ensure protection and safety of the public.[16] Probation is a system that holds youth accountable with court-mandated specific rules or conditions youth must follow in lieu of confinement before or after adjudication or a trial.[17] Generally, after a youth has been petitioned for committing a delinquent act, the court must then hold a hearing to determine if the youth is adjudicated for the charges. Youth court proceedings are civil, not criminal, and youth are never convicted of a crime. If the youth has been adjudicated, the court will move forward with a dispositional hearing, which is similar to a sentencing hearing for adults and determines the outcome of the youth's case. At this time, the court can find that probation is appropriate for the youth.

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[14] *Id.* (select "Disposition" in drop-down menu next to "Column Variable," select years 2005–2018 in "Year of Disposition" box; then select ages 12–17 and "<12" in "Age at Referral" box; then select "Placed" in "Disposition" box; and then select "SHOW TABLE"). There are an additional 3.1 million adults on probation, almost twice as many people than are incarcerated. RICH KLUCKOW & ZHEN ZENG, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NJC 303184, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020 – STATISTICAL TABLES (Mar. 2022), https://bjs.ojp.gov/content/pub/pdf/cpus20st.pdf.

[15] "Probation plays a large role in perpetuating the vast and continuing overrepresentation of Black, Latino and other youth of color in juvenile justice." *Database Analyses Juvenile Probation Laws by State*, ANNIE E. CASEY FOUND.: BLOG (Apr. 7, 2021), https://www.aecf.org/blog/database-analyzes-juvenile-probation-laws-by-state ("In 2017, the most current year for which data is available, 55% of all probation dispositions involved youth of color—far higher than their share of the total youth population (46%). Even more worrisome, 64% of young people held in residential custody in 2017 for a technical violation—which usually involves breaking probation rules rather than being charged with a new offense—were youth of color.").

[16] *In re* Charles G., 9 Cal. Rptr. 3d 503, 614–15 (Cal. Ct. App. 2004). For example, the California Juvenile Justice System aims to serve the purposes through rehabilitation rather than punishment. While rehabilitation is the ultimate goal, certain punishment consistent with the goal may be appropriate as long as punishments are not retributive in nature. *In re* N.D., 84 Cal. Rptr. 3d 517, 523 (Cal. Ct. App. 2008); CAL. WELF. & INST. CODE § 202(e) (West 2022).

[17] To be sure, probation is not prison and it allows individuals to stay in their communities and with their families. This alternative is naturally preferred by nearly all defendants seeking to complete their punishment outside of a locked facility. Probation should not be confused with parole, which involves community supervision as a function of an adult inmate's early release from prison. Youth court does not have a parole system. Unlike parole, probation is an independent criminal sentence imposed and administered by a judge. *See* 1 NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE § 1:1 (2d ed. 1999) (observing that probation is "a sanction imposed by a court as punishment for a criminal offense," whereas parole is an "administrative rather than a judicial procedure").

If placed on probation, youth must follow a list of probation conditions; failing to follow them may result in a violation and a trip back to court, or potentially a locked facility. What is particularly unique about youth probation compared to adult probation is the inclusion of conditions that are "status offenses" or offenses that are deemed criminal because of a youth's status as a minor. Typical status offenses include school truancy, running away from home, violating curfew, underage use of alcohol, and general ungovernability.[18] When 15-year-old Grace failed to complete her homework (in the middle of a pandemic), she committed a status offense, which violated her probation conditions.[19]

In many jurisdictions, youth probation officers are afforded the discretion to select conditions to fit the youth, which may involve them obtaining extralegal information about the youth's family through a social history.[20] This discretion, in turn, is a double-edged sword: it allows for a probation officer to tailor conditions to meet the individual needs of a youth, an original tenant of the juvenile court; and it also allows for bias to seep in and lead to more controlled conditions based on the youth probation officer's perceptions of a youth's family involvement.[21] Instead of non-carceral treatment, probation conditions end up as the default. Angel, who was on probation as a youth, describes these systemic flaws:

> At thirteen years old, I was charged with a misdemeanor and put on probation for a year. During that year, I was charged with a technical violation[22] and my probation terms were extended. Rather than be provided with the support I needed as a teenager, I was punished and in and out of incarceration for

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[18] Barry C. Feld, *Violent Girls or Relabeled Status Offenders?: An Alternative Interpretation of the Data*, 55 CRIME & DELINQ. 241, 243 (2009) ("The juvenile court's delinquency jurisdiction initially encompassed only youths charged with criminal misconduct. However, reformers quickly added status offenses—noncriminal behaviors such as 'incorrigibility', running away, 'immorality', and 'indecent and lascivious conduct' . . . .").

[19] *See* Cohen, *supra* note 1; Cohen & Eldelb, *supra* note 4; Patricia Soung, *Is Juvenile Probation Obsolete? Reexamining and Reimagining Youth Probation Law, Policy, and Practice*, 112 J. CRIM. L. & CRIMINOLOGY 549, 565 (2022) (citing a 1957 probation study in California that found approximately 12,600 youth were detained for minor offenses like curfew violations, truancy, traffic violations (even for jay-walking), disturbing the peace, and liquor law violations).

[20] *See* Adam Fine, Sachiko Donley, Caitlin Cavanagh, Sarah Miltimore, Laurence Steinberg, Paul J. Frick & Elizabeth Cauffman, *And Justice for All: Determinants and Effects of Probation Officers' Processing Decisions Regarding First-Time Juvenile Offenders*, 23 PSYCH., PUB. POL'Y, & L., 105, 106 (2017).

[21] *See* Adam D. Fine, Zachary R. Rowan & Elizabeth Cauffman, *Partners or Adversaries? The Relation Between Juvenile Diversion Supervision and Parenting Practices*, 44 L. & HUM. BEHAV. 461, 463 (2020) (finding a link between a youth probation officer's personal perception that "parental monitoring [of their child] is lacking," and the officer's selection of more controlled conditions for youth, and calling for more integration of parents in the community supervision process for a more effective outcome).

[22] Technical probation violations mean that a youth violated a condition but did not commit another crime; this alone can result in detention or incarceration.

> struggling with mental health. . . . Probation terms should be considered on a case-by-case basis and it is important that restrictions are placed on those terms. Youth should not spend their entire teenage years in the system.[23]

When youth do not comply with the probation requirements, they can be charged with a technical violation, have probation revoked, and be confined. It is not an easy task to complete probation and ascribe to all the rules. Disturbingly, a significant percentage of youth on probation—upwards of 80%—fail to abide by their probation conditions.[24] In addition, many youth nationwide are detained for failing to meet the standards as technical violations.[25] This is salient because non-compliance is treated punitively rather than with care, pushing youth deeper into a system where the permanent harm to their development outcomes for justice-involved youth has been documented.[26] Psychology and youth law experts agree that because the structure of most youth probation systems fail to recognize the unique characteristics of adolescent development, many youth on probation fail to meet their conditions and face harsh consequences.[27] And youth probation has shown *insignificant effects* on recidivism (i.e., the likelihood of a youth re-offending) with

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[23] DAFNA GOZANI, LAURA RIDOLFI & ANNA WONG, ENDING ENDLESS PROBATION 4 (2021), https://burnsinstitute.org/wp-content/uploads/2021/03/FINAL-End-Endless-Probation-Report.pdf.

[24] *See* Craig S. J. Schwalbe & Deborah Koetzle, *Condition Comprehension Predicts Compliance for Adolescents Under Probation Supervision*, 26 PSYCH., PUB. POL'Y, & L. 286, 286 (2020) (citing Michael J. Leiber & Jennifer H. Peck, *Probation Violations and Juvenile Justice Decision Making: Implications for Blacks and Hispanics*, 11 YOUTH VIOLENCE & JUV. JUST., 60, 65–67 tbl.1 (2013)); *see also* Amanda NeMoyer, Naomi E. S. Goldstein, Rhonda L. McKitten, Ana Prelic, Jenna Ebbecke, Erika Foster & Casey Burkard, *Predictors of Juveniles' Noncompliance with Probation Requirements*, 38 L. & HUM. BEHAV. 580, 583 (2014) (In Philadelphia, Pennsylvania, a study found just over 50% of all youth "failed to comply with the terms of their probations at least once, and about 48% of studied youth were committed to a correctional facility after a probation revocation at least once during their time on probation for the examined arrest.").

[25] NeMoyer et al., *supra* note 24, at 581; Lieber & Peck, *supra* note 24, at 63 ("Probation violations and in particular technical violations represent about one third of detention referrals.").

[26] Elizabeth Cauffman, Jordan Beardslee, Adam Fine, Paul J. Frick & Laurence Steinberg, *Crossroads in Juvenile Justice: The Impact of Initial Processing Decision on Youth 5 Years After First Arrest*, 33 DEV. & PSYCHOPATHOLOGY 700, 710 (2021) ("[Y]outh who were formally processed [including probation] during adolescence were more likely to be re-arrested, more likely to be incarcerated, engaged in more violence, reported a greater affiliation with delinquent peers, reported lower school enrollment, were less likely to graduate high school within 5 years, reported less ability to suppress aggression, and had lower perceptions of opportunities than informally processed youth.").

[27] Naomi E. S. Goldstein, Amanda NeMoyer, Elizabeth Gale-Bentz, Marsha Levick & Jessica Feierman, *"You're on the Right Track!" Using Graduated Response System to Address Immaturity of Judgement and Enhance Youths' Capacities to Successfully Complete Probation*, 88 TEMP. L. REV. 803, 819 (2016).

especially poor results for youth at low risk of re-arrests.[28] In 2021, the largest organization of youth and family court judges affirmed that current youth practices are "not an effective strategy for reversing delinquent behavior, and [they] yield[ ] little or no effect on young people's likelihood of re-arrest."[29]

As a result of these structural failures, youth probation—and conditions specifically—become part of the web of incarceration that ensnarls children into the criminal legal system through schools, communities, streets, and courtrooms.[30] My analysis ultimately reveals that youth probation masquerades as a preferable alternative to incarceration.[31] Instead, being on probation is just a different form of incarceration, an "open-air" prison where adherence to incoherent and unreasonable boilerplate probation conditions creates constant punitive surveillance—a setup to fail.[32] The result is the criminalization of youth, positioning them deeper into a harmful criminal system.[33] It is a system in critical need of re-imagination and reform. My long-term project is to reframe our discussion of the youth legal system to describe it more accurately as this web of incarceration that ensnarls children into the criminal legal system with various sticky strands that trap youth in a lifetime of

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[28] NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, THE ROLE OF THE JUDGE IN TRANSFORMING JUVENILE PROBATION: A TOOLKIT FOR LEADERSHIP 15 (2021); *see also* EDWARD J. LATESSA, BRIAN LOVINS & JENNIFER LUX, EVALUATION OF OHIO'S RECLAIM PROGRAMS 30–38 (2014).

[29] NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, *supra* note 28, at 20.

[30] Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 COLUM. J. RACE & L. 265, 292 (2019) [hereinafter Nanda, *Criminalization of Disability in School*] (suggesting that "the formal and informal forms of surveillance in schools function as a sticky *web*, rather than a Pipeline, in which Black and Latinx children and their families are more likely to be watched, have their actions documented, and be categorized as deviant.").

[31] *See* Handelman, *supra* note 6 ("Juvenile probation, originally designed to keep young people out of jail, has become a 'significant driver' of youth incarceration across the U.S., according to a former senior probation official.").

[32] Scholar Fiona Doherty describes adult probation as an "open-air prison," the boundaries of which are hard to grasp given the elusive nature of court-mandated probation conditions. Doherty, *supra* note 12; *see also* Michelle Alexander, Opinion, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html (describing concern with GPS and bail reform, as part of open-air prisons and a part of "the next generation of racial and social control, a system of 'e-incarceration' that may prove more dangerous and more difficult to challenge than the one we leave behind.").

[33] At this point, it is helpful to define the term "criminalization" more specifically. "Criminalization" or "Criminalized" means the process by which disability is "rendered deviant and [is] treated with shame, exclusion, punishment, and incarceration." VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS, at xiv (2011). For youth of color, particularly Black youth, criminalization has been described as the default because of American society's fear of Black children. *See* Kristin Henning, *Fear of the Black Child*, INQUEST (Aug. 31, 2021), https://inquest.org/fear-of-the-black-child ("We live in a society that is uniquely afraid of Black children . . . Black children are dehumanized, exploited, and even killed to establish the boundaries of whiteness before they reach adulthood and assert their rights and independence.").

punishment.[34] I am particularly concerned with how our entire youth legal system harms Black, Native, and Latino youth.[35] In this analysis, I turn to how youth probation has an outsized impact on our youth carceral system and the reason we must examine it.

The rest of this introduction now lays out: first, the harmful societal impact of probation and contemporary issues that criminal justice scholars continually grapple with; second, a discussion of how this Article is situated within scholarly conversations on adult probation, criminalization of youth, and probation reforms; and third, lays out a roadmap for the research and analysis in this Article.

First, as discussed, youth probation can lead to increased contact with the justice system for youth, or in the worst case, a lifetime of incarceration. Moreover, the costs associated with youth probation services are sometimes borne by the family with devastating impacts on communities. In 21 states, families of youth on

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[34] This Article on youth probation conditions is part of that larger project. In my most recent article, I narrowly focused on an overlooked type of youth probation, school-based probation, where probation officers are housed in schools and oversee children and youth. Jyoti Nanda, *Web of Incarceration: School-Based Probation*, 21 NEV. L.J. 1117, 1119 (2021). An earlier piece critiqued the unfettered discretion afforded to youth court judges that allows for racial and gendered bias to impact their decisions regarding system-impacted girls. Nanda, *Blind Discretion*, *supra* note 5, at 1507. *See generally* KIMBERLÉ WILLIAMS CRENSHAW WITH PRISCILLA OCEN & JYOTI NANDA, BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED (2015), https://www.prisonpolicy.org/scans/aapf/AAPF_BlackGirlsMatterReport.pdf. A more recent article examined how for students of color, given the imprecise and fraught legal categories, disability can be weaponized as a mechanism through which they are criminalized and not treated. Nanda, *Criminalization of Disability in School*, *supra* note 30, at 269–70. Here the project's lens shifts to an examination of a specific aspect of youth punishment—youth probation—and how it serves as a net widener to punish more youth.

[35] Race influences whether youth are diverted away from the youth courts after an initial arrest; in a study of over 1,200 young people in three parts of the country, the odds of being formally processed—and, therefore, having greater contact with the legal system—were 67% higher for Black and Latino youth relative to white youth, after accounting for both legal and other factors (the odds of being formally arrested did not differ between Black and Latino youth). *See* Namita Tanya Padgaonkar, Amanda E. Baker, Mirella Dapretto, Adriana Galván, Laurence Steinberg, Paul J. Frick & Elizabeth Cauffman, *Exploring Disproportionate Minority Contact in the Juvenile Justice System Over the Year Following First Arrest*. 31 J. RSCH. ON ADOLESCENCE 317, 323 (2021). For Native or tribal youth, the numbers are even starker: tribal youth are roughly three times as likely as their white peers to be incarcerated. *See* JOSH ROVNER, THE SENTENCING PROJECT, RACIAL DISPARITIES IN YOUTH INCARCERATION PERSIST 9 (2021), https://www.sentencingproject.org/publications/racial-disparities-in-youth-incarceration-persist/ (citing *Easy Access to the Census of Juveniles in Residential Placement (EZACJRP): 1997–2019*, *National Crosstabs*, NAT'L CTR. FOR JUV. JUST., https://www.ojjdp.gov/ojstatbb/ezacjrp (May 21, 2021)); *see also* Addie C. Rolnick, *Native Youth and Juvenile Injustice in South Dakota*, 62 S.D. L. REV. 705, 705 (2017) ("Native youth also face significant disparities in places where they live in large enough numbers to register statistical analysis.").

probation are required to pay the fees for their services; these fees can bankrupt families, many of whom already face financial challenges.[36]

Second, probation is a factor in the disproportionality of non-white youth in the system. Historically and contemporarily, actual justice within the youth justice system has been unevenly distributed across racial/ethnic disparities.[37] Like other parts of the criminal justice system, the youth probation system is rife with racism[38] and racial inequities.[39] This has been true from the inception of the juvenile court.[40] At every stage, Black, Latino, and Native American youth have overwhelmingly borne the brunt of harsher justice system decision-making, often at the recommendation of probation officers; they are more likely to be arrested, charged, detained, sentenced, and severely tried as adults.[41] Youth of color are also less likely to be diverted or released at the early stage[42] and are overrepresented in probation and technical violations like those that befell Grace.[43] Studies have demonstrated

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[36] JESSICA FEIERMAN, WITH NAOMI GOLDSTEIN, EMILY HANEY-CARON & JAYMES FAIRFAX COLUMBO, JUV. L. CTR., DEBTORS' PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 5, app. A at i (2016). *See* Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. REV. 401, 406, 412 (2020); *see also* Beth Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L. REV. 1528, 1532 (2020).

[37] *See* BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE 89 (2017).

[38] The term "racism" here is used not to connote an individual believe in racial superiority, but a structural definition of racism that focuses on racialization and its effects. *See* Edward Bonilla-Silvia, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 475, 475 (1996) (suggesting a structural definition of racism that focuses on racialization and its effects); *see also* Addie C. Rolnick, *The Promise of* Mancari*: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 965 n.31 (2011) (defining racialization as "a discursive process by which particular groups have been classified as non-white, specific meanings have been attached to those groups, and those meanings have been used to support the hierarchical distribution of power, land, and resources.").

[39] Barry C. Feld & Perry L. Moriearty, *Race, Rights, and the Representation of Children*, 69 AM. U. L. REV. 743, 789 (2020). *See generally* FELD, *supra* note 37.

[40] Feld & Moriearty, *supra* note 39, at 753 ("The primary sources of racial injustice in the juvenile court were then [when *Gault* was decided by the Warren Court] what they continue to be today: the over-criminalization, over-policing, and over-punishment of juveniles of color . . . .").

[41] Black youth are over four times more likely than white youth to be incarcerated. Latinx youth are overall 28% more likely to be held in youth detention centers than their white peers with variation among states. Tribal youth are just under three times more likely to be incarcerated than their white peers. ROVNER, *supra* note 35, at 7–9.

[42] Michael J. Leiber, Joseph Johnson, Kristan Fox & Robyn Lacks, *Differentiating Among Racial/Ethnic Groups and Its Implications for Understanding Juvenile Justice Decision Making*, 35 J. OF CRIM. JUST. 471, 480 (2007).

[43] "For nearly 1 in 5 youth in juvenile facilities, the most serious charge levelled against them is a technical violation (15%) or a status offense (4%) . . . In 21 states, an even greater portion of

that while probation may not render the final decisions about prosecution, arrest, and disposition, their characterizations of youth to the court, and on which the court may rely, vary along racial lines. Decision-makers in the youth justice system (police, youth probation officers, and judges) treat youth of color more harshly than white youth.[44] Thus, the role of the youth probation officer (YPO) is essential to understand. Their purpose and the discretion they wield to influence probation conditions are essential to understanding the power of surveillance.

Third, in a just-released report by the National Council of Juvenile and Family Court Judges on the role of judges in youth probation, the bench admitted that *our current probation system is not working*, thereby suggesting that in many jurisdictions, probation resources are primarily focused on young people who should be diverted—referred to social services with no more interventions from the criminal system—at the expense of youth for whom probation could be a game-changer.[45] The report admits that "too many youth courts and youth probation departments impose conditions of probation that are not individualized, have too many requirements, and lead to unnecessary detention or incarceration for technical violations."[46] Children are caught up in these punishment sites with little procedural justice-given gaps in the laws and the wide discretion given to youth justice system actors. Moreover, these sites lack the nuance and individualization demanded to truly rehabilitate because they fail to address the intersectional identities of the youth they target.[47]

This Article aims to address gaps in the scholarly literature on different forms of carceral punishments and provides a roadmap for reformers by doing three things. First, it draws on original research and presents a wide-ranging study of the most

youth in juvenile facilities are held for these offenses, including 38% in New Mexico; 37% in Nebraska; 36% in North Carolina; 34% in Arizona; 32% in Alaska; 30% in West Virginia; 29% in Michigan; 27% in Alabama and New York; 26% in Pennsylvania; 25% in Wyoming; 23% in California, Kentucky, Montana, Nevada, and North Dakota; 22% in Arkansas, Oklahoma, and Texas; 21% in Virginia; and 20% in Hawaii." Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html (citing *Easy Access to the Census of Juveniles in Residential Placement (EZACJRP): 1997–2019*, *US & State Profiles 2017*, NAT'L CTR. FOR JUV. JUST., https://www.ojjdp.gov/ojstatbb/ezacjrp/ (May 21, 2021)).

[44] *See* Alex R. Piquero, *Disproportionate Minority Contact*, 18 FUTURE CHILD. 59, 65, 69 (2008).

[45] NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, *supra* note 28, at 65.

[46] *Id.* at 9 (quoting NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, RESOLUTION REGARDING JUVENILE PROBATION AND ADOLESCENT DEVELOPMENT 1 (2017)).

[47] "[T]he dearth of adequate gender/race intersectional analysis in the research and the stark absence of significant system tools directed at the specific characteristics of and circumstances faced by girls of color have tracked alarming trends such as the rising number of girls in the system and the relatively harsher punishment they receive compared to boys for similar offenses." Nanda, *Blind Discretion*, *supra* note 5, at 1508–09, 1523.

common conditions of probation in five of the largest youth court jurisdictions in the United States. By excavating the language in these conditions, it is clearly revealed how the law sets standards for the conduct and character of youth on probation and creates an enforcement structure to monitor and penalize behavior that fails to meet the standards. Mapping out the legal contours of probation provides the data to achieve the second objective of this Article. Second, once the conditions of probation have been made visible, it becomes possible to cross-check them with three basic questions that reveal the structural flaws of youth probation. I ask and answer:

> (a) What type of variation in youth probation conditions and enforcement exists among states and why?
>
> (b) How do the conditions relate to what the current literature tells us about adolescent development?[48]
>
> (c) Do the conditions serve the purpose of rehabilitation they were intended to serve, or do they instead contribute to a web of incarceration we should be resisting?

The third goal of this Article is to contribute to the larger conversation around surveillance and monitoring of youth and the net-widening impact this has on racialized communities.[49] I argue that, like all aspects of the youth criminal legal system, youth probation relies on discriminatory assessments that may exacerbate racial disparities. These assessments rely on the adultification of youth concept where youth of color are viewed as "adult-like."[50] This Article contributes to the

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[48] *See, e.g.*, NAT'L RSCH. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 91 (Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers & Julie A. Schuck, eds., 2013) (discussing the impact that the justice system can have on adolescents and advocating for an update to youth justice policies based on current knowledge of adolescent development and behavior).

[49] Michelle Phelps boldly suggests adult probation should be seen as part of a "mass probation" or "mass supervision" phenomenon, a net widener sweeping up adults with low level offenses into a criminal legal system that is marked by deep racial and class disparities. Michelle S. Phelps, *Ending Mass Probation*: *Sentencing, Supervision and Revocation*, 28 FUTURE CHILD. 125, 126–27 (2018). I argue that youth probation is worthy of this same vivid description. Kate Weisburd's scholarship on the use of electronic monitoring in youth cases influences my thinking here. *See* Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297, 302–03 (2015) (documenting how the use of electronic monitoring in youth cases results in "net-widening and net-deepening: more youth are subjected to court control for longer, and with heightened chances of being detained on probation violations or new charges.").

[50] *See* Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequence of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 526–27 (2014) (finding "converging evidence that Black boys are seen as older and less innocent and that they prompt a less essential conception of childhood than do their White same-age peers . . . [and] demonstrat[ing] that the Black/ape association predicted actual racial disparities in police violence

national dialogue happening around dismantling modes of confinement, surveillance, and control, rather than mere changes in rhetoric by centering youth probation as part of that conversation.[51] It suggests that reimagining another alternative to incarceration for youth is possible. Moreover, many of the questions raised by exposing the legal structure of probation share common ground with scholarship on other important systems such as the criminalization and overcriminalization of poverty,[52] immigration,[53] and schools.[54]

Having laid out the core legal structure of probation, I argue that youth probation conditions as utilized in most places do not address their intended goals to rehabilitate and keep our communities safe; instead, they serve as a net widener by setting up children to fail by design. Youth probation conditions are not drafted for children. In many ways, it's part of the adult-like nature of probation.[55] The

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toward children."); *see also* REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, GEO. L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK CHILDHOOD 2 (2017), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf.

[51] Cyrus J. O'Brien, *How America Disguised 65,000 Prison Beds*, ACLU (July 14, 2021), https://www.aclu.org/news/criminal-law-reform/how-america-disguised-35000-prison-beds ("Ending mass incarceration will require dismantling—not replicating, reproducing, or relocating—systems for involuntary confinement, surveillance, and control.").

[52] *See* Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 300 (2013) (describing "how and why the economic deprivations disproportionately affecting women of color and their children are being framed as issues of criminality rather than issues of poverty."); *see also* Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 59 (2019) (examining the way in which the inability to pay economic sanctions—fines, fees, surcharges, and restitution—may prevent people of limited means from voting).

[53] *See* Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM L. & CRIMINOLOGY 613, 614 (2012) (arguing that contemporary immigration policy is a site of overcriminalization).

[54] *See generally* FROM EDUCATION TO INCARCERATION: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE (Anthony J. Nocella II, Priya Parmar & David Stovall eds., 2014) (discussing the criminalization of education).

[55] This is part of adultification, the tendency for adults to believe children respond to events the way adults do, too. In the criminal justice system, this tendency has been found to have particularly negative impacts on the narrative of Black children, "robbing Black children of the very essence of what makes childhood distinct from all other developmental periods: innocence." EPSTEIN ET AL., *supra* note 50, at 1, 6 (finding that "adults view Black girls as *less innocent and more adult-like than their white peers*, especially in the age range of 5–14."); *see also* Goff et al., *supra* note 50, at 526 (finding that Black boys are "seen as less innocent than Whites and people generally . . . for every age group after the age of 9 . . . Black children and adults were rated as significantly less innocent than White children and adults or children and adults generally."). While this Article will not explicate the problematic nature of a youth criminal system that treats kids like adults and robs children of their innocence, it does proceed on the assumption that this is true—that our system's failure to recognize the essence of children is partly why the system is flawed by design.

bottom line is that the ambiguity in conditions causes harm to youth and even more so to system-impacted youth given their status as youth and their disproportionate exposure to trauma and likelihood of having learning and/or mental health challenges. The harm of probation conditions has been widely documented by various stakeholders. The Department of Justice acknowledged that unwieldy youth probation conditions can lead to technical violations and cause harm in the lives of children including removal from their communities and incarceration.[56] In many ways then, youth probation is yet another form of punishment or mass incarceration in need of dismantling and reimagination.

To analyze the full impact of youth probation conditions, this Article has four parts. Part I examines the structural flaws of youth probation tracing its history from its inception to the contemporary enforcement powers of probation officers and judges. Part II sets forth my original research methodology, explaining how I chose the jurisdictions studied. Part III examines the standard conditions of youth probation in different jurisdictions within an adolescence development framework to tease out how current conditions have the potential to cause real harm to youth and increase (and not decrease) recidivism. Part IV analyzes how the law of youth probation exemplifies the deep flaws within our youth criminal legal system and suggests the moment for thoughtful reform and abolition of probation is now.

I. INEQUITY BY DESIGN: STRUCTURAL FLAWS OF YOUTH PROBATION

A. Origins of Juvenile Court: To Rehabilitate or Control?

The history of youth probation is the crucial background for a story of how youth probation conditions punish youth and do more harm than good. Today, my argument that there is the adultification of youth probation conditions rests on the false premise that something has changed and that at one point, the youth justice system, and in particular, probation treated children as children. While the origins of the youth justice system are contested, it is well settled that there existed a tension at the inception of the first Juvenile Court about whether its intended purpose was to rehabilitate troubled youth or to punish and control them.[57]

Criminologist Barry Feld captures the core critique behind the founding of the first Juvenile Court in Chicago in 1899:

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[56] *See* Letter from Thomas E. Perez, Off. of the Assistant Att'y Gen., to Hon. Phil Bryant, Governor of Mississippi, Hon. Cheri M. Barry, Mayor of the City of Meridian, Hon. Frank Coleman, Cnty. Ct. J., Hon. Veldore Young, Cnty. Ct. J., Jim Hood, Att'y Gen. of Mississippi, J. Richard Barry, Att'y for Lauderdale Cnty., & Ronnie Walton, City Att'y for City of Meridian (Aug. 10, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/08/10/meridian_findletter_8-10-12.pdf.

[57] FELD, *supra* note 37, at 2–3.

> Progressive child-savers described the juvenile court as a benign therapeutic agency, although analysts differ whether their primary motivation was a humanitarian desire to save poor and immigrant children or to expand state control over them. Some critiques argued that the juvenile court's founders intended from the very beginning to use procedural informality as a mechanism as social control rather than to rehabilitate wayward youth . . . [I]t was not a benevolent enterprise gone awry but the very execution of social coercion operation behind the veil of rehabilitation informality.[58]

Three revelations come to mind from this history of the Juvenile Court that plays out in today's structure and execution of youth probation: first, the informality as a means of social control of youth court plays out in the inception and structure of youth probation and the discretion given to probation officers and merits attention given its significance in the youth justice system.[59]

Second, the goal of rehabilitation in youth court is a concept in probation most often applied exclusively to privileged youth, excluding Black youth and youth of color.[60] Thus, it is from this early conception that we see the racialized notions of childhood manifested today in disproportionate numbers of Black youth and youth of color on probation.[61] The goal of rehabilitation has also morphed over time to be balanced with public safety and varies across jurisdictions as noted next. What is important to note here is that the primary tools used to measure the likelihood of "rehabilitation" of youth are potentially flawed risk-assessment instruments, as will be highlighted in this Part of the Article.

Third, the inconsistent understanding of the actual purpose of juvenile court persists today in the variety of stated statutory "purpose clauses" of state constitutions which govern all aspects of the youth justice system, including law enforcement, prosecutors, and youth probation.[62] The clauses vary in priority with the majority of states employing a "Balanced and Restorative" purpose, a model of

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[58] *Id.* at 31 (internal citations omitted).

[59] Michelle Alexander aptly describes mass incarceration in the United States as a system of racial and social control. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 58–59 (rev. ed. 2018).

[60] TERA EVA AGYEPONG, THE CRIMINALIZATION OF BLACK CHILDREN: RACE, GENDER, AND DELINQUENCY IN CHICAGO'S JUVENILE JUSTICE SYSTEM, 1899–1945, at 3 (2018) ("Although whether the juvenile justice system was ever actually 'rehabilitative' in practice is debatable, what is clear is that the rehabilitative intentions and discourse surrounding juvenile justice did not emerge with [B]lack children in mind. Poor native white and European immigrant children were its intended beneficiaries.").

[61] JAMES BELL, W. HAYWOOD BURNS INST. FOR JUST. FAIRNESS & EQUITY, REPAIRING THE BREACH: A BRIEF HISTORY OF YOUTH OF COLOR IN THE JUVENILE JUSTICE SYSTEM 1, 6 (2016), https://burnsinstitute.org/wp-content/uploads/2020/09/Repairing-the-Breach-BI_compressed.pdf.

[62] *See generally Purpose Clauses*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC., & STATS., http://www.jjgps.org/juvenile-court (last visited Sept. 17, 2022) (categorizing youth justice purpose clauses in every state).

reform from the 1990s on the heels of the most punitive area, and with only five states employing a developmental approach based on the most modern interpretations of the court.[63] These conflicting purposes are reflected in the dual roles of the youth probation officer as both a counselor and police officer that begins with the origins of its conception.

These three youth court concepts of informal treatment, determining the rehabilitation of youth via risk assessments, and inconsistent principles behind the mission of probation are hallmarks of youth probation.

To begin, an examination of the history of youth probation makes clear that the concept of informal treatment or diversion was embedded in the modern concept of probation, which began more than 50 years prior to the establishment of the Juvenile Court in 1899. We see the emergence of formal concepts of "social control" at the founding of the Court.

Probation or community supervision and diversion in lieu of detention is an American concept that is traced back to 1841.[64] The concept is typically attributed to a bootmaker named John Augustus who convinced a Boston court to have mercy by releasing and deferring the sentence of a "common drunkard" into his custody and promising that man's appearance at his next hearing.[65] Over time, Augustus voluntarily supervised over 2,000 men being released from jails.[66] This, in turn, began a movement across the country to develop a probation system that offered an alternative to incarceration or detention. The first legislation in the country enabling youth probation was passed in 1878.[67] In 1899, the creation of a separate court system for children accelerated the evolution and expansion of probation, both intended as benign alternatives to criminal prosecutions.[68] The first published directory of probation officers in the United States showed that probation officers worked mainly in the youth courts in 1907.[69] By 1925, probation was available for youth in every state, and probation for adults soon followed suit.[70]

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[63] *Id.*

[64] Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM L. & CRIMINOLOGY 1015, 1022 (2013).

[65] BELL, *supra* note 61, at 6.

[66] Klingele, *supra* note 64, at 1023 n.29.

[67] By 1910, 34 states had adopted probation laws, and in 1925, the federal government followed suit. *Id.* at 1023. Over the years, administrative structures also grew in jurisdictions around the country to employ probation officers as civil servants under independent probation commissions, boards of charity, or other independent state agencies. Diane Nunn & Christine Cleary, *From the Mexican California Frontier to Arnold-Kennick: Highlights in the Evolution of the California Juvenile Court, 1850-1961*, 5 J. CTR. FOR FAM., CHILD. & CTS. 3, 5 (2004).

[68] MARCUS NIETO, CAL. RSCH. BUREAU, CBR-96-006, THE CHANGING ROLE OF PROBATION IN CALIFORNIA'S CRIMINAL JUSTICE SYSTEM 4 (1996).

[69] *Id.*

[70] *Id.*

The youth court's establishment in 1899 was on the heels of an earlier movement in history to save potentially criminal children—or rather, poor children—from becoming criminal or social control.[71] From the start, the system developed with embedded notions of race and identity and the provision of discretion to system actors treating youth. In response to the increasing number of pauper children running the streets of New York, the State of New York authorized the New York City House of Refuge.[72] The House of Refuge (which expanded to 16 cities in the northeast by 1860) was authorized to house vagrant children, or those who were found guilty of crimes by informal authorization—no criminal conviction was required.[73]

By the early 19th century, questions had arisen about the legitimacy of the emerging Refuge System; the success was mixed with several inmates running away due to harsh treatment or other violations.[74] But the System was cemented in 1839. In that year, *Ex parte Crouse*,[75] a Pennsylvania state court decision, solidified the legitimacy of the Refuge System.[76] More importantly, the case reinforced *parens patriae*, the notion that the court can assume the role of a parent—and, more particularly, the role of the father:[77]

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[71] Nanda, *Blind Discretion*, *supra* note 5, at 1510.

[72] Marvin Ventrell, *Evaluation of the Dependency Component of the Juvenile Court*, 49 JUV. & FAM. CT. J. 17, 22 (1998).

[73] *Id.* at 22–23. For an illustrative history of this movement leading up to the founding of the youth court, see Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187–88 (1970).

[74] Alexander W. Pisciotta, *Saving the Children: The Promise and Practice of* Parens Patriae, *1838-98*, 28 CRIME & DELINQ. 410, 420–23 (1982).

[75] *Ex parte Crouse*, 4 Whart. 9 (Pa. 1839).

[76] As explained in a previous article:

> The subject in this case, Mary Ann Crouse, a minor, was committed to the Philadelphia House of Refuge by a justice of the peace warrant. Crouse's mother executed the warrant because Crouse was beyond the control of her mother. Crouse's father had appealed the case and argued that the law's commitment of a child without a trial was unconstitutional. The court summarily rejected the father's argument on the basis that the House was not a prison (even though Crouse was not free to leave), and the child was there for her own reformation and not for punishment. In essence, the court here both acknowledged and sanctioned the state's authority to intervene in the family as ultimate parent via the *parens patriae* doctrine.

Nanda, *Blind Discretion*, *supra* note 5, at 1512 n.35 (citations omitted) (citing *Ex parte Crouse*, 4 Whart. at 9–11).

[77] Family structure and formation in this context was, of course, deeply gendered. Men had full control over both their children and their wives. The doctrine of *parens patriae* extended this authority to courts visà-vis children. That is to say, pursuant to *parens patriae*, the court—and indeed the state more generally—can legally stand in as the parent (historically, the father) of the child with many of the same explicit and implicit rights possessed by parents.

Nanda, *Blind Discretion*, *supra* note 5, at 1512.

> Parens patriae has its origins in medieval England's chancery courts. At that point it had more to do with property law than children; it was, essentially, a means for the crown to administer landed orphans' estates. Parens patriae established that the king, in his presumed role as the "father" of his country, had the legal authority to take care of "his" people, especially those who were unable, for various reasons (including age), to take care of themselves.[78]

This notion is the underlying theory of youth court. That the creation of youth probation was linked to that of the juvenile court made sense as the two-tiered system developed concurrently. Guided by the same doctrine of *parens patraie*, when the first juvenile court began in 1899, "the role of the juvenile probation officer was to act in the best interest of the child, as the court was specifically designed to see to the care, welfare, and treatment of the juvenile offenders who came to its attention."[79] But welfare and treatment were only part of a probation officer's concern. "The tension between a welfare orientation—the child's best interests—and control of criminal behavior created a fundamental and perhaps irreconcilable tension in juvenile courts' administration and disposition from their inception."[80]

The tension in youth court between welfare interests versus controlling criminal behavior blurred lines between criminal violators and non-criminal children and allowed the court to intervene in children's lives under the broad guise of "child welfare."[81] This in turn gave probation officers wide discretion to "supervise youths in their home, transfer them to another caretaker, or place them in a reformatory or institution."[82] The reformer's vision for the Court was one where social service personnel and probation officers sat at the core of the youth justice system, becoming "the chief means through which the juvenile court served delinquent youths."[83]

This combination of informality and social control gave judges and in turn, probation officers, unfettered discretion. Youth courts handled most cases informally and probation was the most common outcome. In many ways, the youth court was a social welfare agency. Community supervision or probation allowed

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[78] MEDA CHESNEY-LIND & RANDALL G. SHELDEN, GIRLS, DELINQUENCY, AND JUVENILE JUSTICE 160–61 (3rd ed. 2004).

[79] Benjamin Steiner, Elizabeth Roberts & Craig Hemmens, *Where Is Juvenile Probation Today? The Legally Prescribed Functions of Juvenile Probation Officers,* 16 CRIM. JUST. STUD. 267, 268 (2003).

[80] FELD, *supra* note 37, at 34.

[81] *Id.* at 25.

[82] *Id.* at 35.

[83] Craig S. Schwalbe & Tina Maschi, *Investigating Probation Strategies with Juvenile Offenders: The Influence of Officers' Attitudes and Youth Characteristics*, 33 L. HUM. BEHAV. 357, 357 (2009); NAT'L RSCH. COUNCIL & INST. OF MED., JUVENILE CRIME JUVENILE JUSTICE 157 (Joan McCord, Cathy Spatz Widom & Nancy A. Crowell eds., 2001), https://nap.nationalacademies.org/read/9747/chapter/7#157.

courts to operate efficiently; probation officers served as liaisons between the court and families providing the court information about the child who the judge returned to the community. But this also led to exposure to the youth's families.

The entire family, not just the child, became the subject of extended case work, which could involve demands to change jobs, find a new residence, become a better housekeeper, prepare different meals, give up alcohol, and abstain from sex.[84]

Thus, probation from its inception was envisioned to "fix" a child and can be described as a "family regulation system."[85] We see this same family regulation occurring today, manifested in both the conflicting purpose clauses of state statutes that regulate and design probation officers[86] and second, in the expanding punitive role of the youth probation officer.[87] The social control principle is what manifests itself in the most intrusive of the probation conditions I uncovered through research for this Article and what begs the question now of what is the purpose of these conditions? If the goal is rehabilitation, how is it defined, and by whose standards? Here we see the intertwining of youth court's hallmarks of rehabilitation, as well as an elusive singular purpose of the youth justice system, play out in impactful ways when we examine the role of the youth probation officer in their practice.

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[84] FELD, *supra* note 37, at 35.

[85] Ava Cilia, *The Family Regulation System: Why Those Committed to Racial Justice Must Interrogate It,* HARV. C.R.-C.L. L. REV. AMICUS BLOG (Feb. 17, 2021), https://harvardcrcl.org/the-family-regulation-system-why-those-committed-to-racial-justice-must-interrogate-it (describing the work of Dorothy Roberts who suggests that "[l]ike the criminal legal system, the family regulation system serves as another way for the state to police, surveil and traumatize Black, Indigenous, Latinx, and poor families."); *see also* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 35 (2022).

[86] While the statutory purpose of the youth justice system varies by state, a common theme is the premise that youth are different and thus any sanctions should include a rehabilitation component. Purpose clauses are usually written in statute to clarify the intention of the legislature for the state's youth justice system. *See Purpose Clauses*, *supra* note 62. A 2018 statutory analysis of the 50 states and the District of Columbia showed an overall increase over ten years in probation's rehabilitation-oriented and case manager-oriented tasks finding that youth probation is "a system that is inherently rehabilitation-focused, given the age of those supervised and the understanding that as a group they are more malleable; in fact, some states have even moved from a statutory definition of 'probation officer' to 'probation counselor.'" Moana Hafoka, Youngki Woo, Ming-Li Hsieh, Jacqueline van Wormer, Mary K. Stohr & Craig Hemmens, *What Legally Prescribed Functions Tell Us: Role Differences Between Adult and Juvenile Probation Officers*, 83 FED. PROB. 32, 36–37 (2017) (citation omitted). Despite this, the study found that law enforcement-oriented functions outweighed other tasks for both adult and youth probation officers. *Id.* at 36. This is particularly true for probation. Riane Miller Bolin, *Adultification in Juvenile Corrections: A Comparison of Juvenile and Adult Officers* (Aug. 9, 2014) (Ph.D. dissertation, University of South Carolina) (on file with Scholar Commons, University of South Carolina) (finding that "compared to adult probation and parole officers, juvenile officers tend to more strongly adhere to ideas of treatment, welfare, and offender-focused probation/parole").

[87] Soung, *supra* note 19, at 586–87.

B. The Discretionary and Powerful Role of the Youth Probation Officer

It is critical to examine the role of a youth probation officer (YPO) because they are given wide latitude to enforce conditions with little agency or judicial oversight which, in turn, gives them tremendous power and influence.[88] At the heart of the YPO's role is discretion and decision-making authority to determine both which conditions apply to youth and whether a youth has adequately compiled with numerous conditions.[89] YPOs have tremendous discretion when it comes to "checking the boxes" on the conditions forms. This discretion comes with many opportunities for a YPO to positively impact youth as well as low-visibility opportunities for abuse as a form of law enforcement.[90] Moreover, discretion may lead to varied results that are the cause of concern; in one jurisdiction, a state law was passed to provide guardrails for this discretion to YPOs and judges.[91]

The discretionary function is especially powerful for YPOs in that they are the gatekeepers of youth's depth of involvement in the youth criminal legal system. Diversion for youth can happen at several stages: police can choose to warn and release youth, probation officers can choose not to report probation violations to the judge, prosecutors can choose not to prosecute, and judges can dismiss probation orders and cases.[92] Once a youth is on probation, however, the role of the YPO expands significantly and is one that varies by jurisdiction.

Probation officers have been known to wear many hats and have been described as "synthetic officers or boundary spanners . . . somewhere between social workers and peace officers in managing diverse cases."[93] As a result, we see competing duties play out for probation officers in their role in managing probation conditions. The job of a YPO is not an easy one and the stress on YPOs is just beginning to be recognized by scholars as part of the systemic weakness of our system, particularly

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[88] *Id.* at 579 ("The available research shows that juvenile probation officers apply discretion under the design of their roles in ways that are often at odds with their stated overarching organizational objectives," as articulated by the youth justice system).

[89] Doherty, *supra* note 12.

[90] *Id.* ("Probation also creates too many opportunities for low-visibility abuse by law enforcement. A person on probation meets privately with their probation officer who is given a great deal of discretion and decision-making authority . . . the person under supervision generally has not ability to push back on a probation officer's demands.").

[91] In Utah, House Bill 239 was passed to reform the youth justice system. One of the reasons cited for this reform was the variation of results of probationary and judicial discretion. Suchada P. Bazzelle, *The Changing Landscape of Juvenile Justice*, 33 UTAH BAR J. 16, 16–17 (2020).

[92] At each of these points, there is an opportunity to divert youth which in turn decriminalizes youth of color who are disproportionately represented in the criminal justice system. *See generally* Traci Schlesinger, *Decriminalizing Racialized Youth Through Juvenile Diversion*, 28 FUTURE CHILD. 59 (2018).

[93] Hafoka et al., *supra* note 86, at 35.

those who work in rural areas with little support.[94] To complete all of their duties, "a juvenile probation officer takes on several roles, including police officer, counselor, family therapist and mentor."[95] Other literature concedes though that "[w]hether the motive is community protection or treatment, the primary goal of probation is the prevention of recidivism," and that "social control . . . is the guiding principle of probation conditions, although its expression may be disguised in more humanistic phraseology."[96]

A recent comprehensive study of YPOs found that while most YPOs aim to employ an approach balancing a law enforcement orientation and rehabilitation orientation, the majority of their focus is on law enforcement tasks.[97] In the best-case scenario, YPOs are youth mentors, coaches, or counselors, concerned with their wellbeing and invested in their completion of probation conditions; in the worst case, they are like "cops"—or as described by a probation expert: "Many of them [YPOs] wear bulletproof vests and carry firearms, and these are people who are visiting kids at home, going into the schools, going into various community organizations where these young people may be engaged in activities."[98]

The two consistencies among the research on YPOs are that they employ a variety of strategies in their work and that many rely on a form of a risk assessment tool to determine which conditions are applied.[99] The tool(s) used are critical to determining if there is any logical connection between the conditions and rehabilitation and crime prevention.

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[94] There is a growing body of literature on the stress of YPOs, which includes stress from working with youth's parents. A recent study examined the unique stress faced by YPOs in rural areas. *See* John Kelly, *Juvenile Probation Officer Stress in Rural Area Corrections Offices* (2020) (Ph.D. dissertation, Walden University) (on file with ScholarWorks, Walden University) (describing the rural environment stressors to include "isolation and certain kinds of safety and employment concerns.").

[95] Steiner et al., *supra* note 79, at 270.

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

[97] A 2017 study across 50 states over 10 years found that "although rehabilitation- and case manager-oriented tasks have been gradually increasing within contemporary probation work, law enforcement-oriented functions outweigh other tasks for both adult and juvenile probation officers." Hafoka et al., *supra* note 86, at 36.

[98] Handelman, *supra* note 6 (quoting Stephen Bishop, a senior associate in the Juvenile Justice Strategy Group at the Annie E. Casey Foundation, and a member of the Pennsylvania Commission on Crime & Delinquency).

[99] Jill Viglione, Danielle Rudes, Vienna Nightingale, Carolyn Watson & Faye Taxman, *The Many Hats of Juvenile Probation Officers: A Latent Class Analysis of Work-Related Activities*, 43 CRIM. JUST. REV. 252, 253–54 (2018) (a study of 223 YPOs across 15 youth probation agencies found that there is a variation of approaches to probation—case-by-case and holistic decision-making allowing for less conflict between the twin goals of rehabilitation and punishment).

Risk Assessment Instruments (RAIs) in particular are utilized to predict whether a youth is likely to recidivate.[100] These are the primary tools utilized by probation officers to form the basis for their recommendations of conditions and services. In essence, when given the discretion, the probation condition boxes checked by probation officers or any recommendation for services are determined by risk assessments. Given their role in conditions assessment, their value is not to be diminished.[101]

Generally, probation officers conduct structured interviews to provide a score to indicate a youth's risk of re-offending.[102] Risk assessments are grounded in the Risk Needs Responsivity model of offender rehabilitation, which is premised on the notion that justice systems should match treatment programs to address the criminogenic needs of youth according to their risk to re-offend.[103] The role of risk assessment varies depending on the jurisdiction; in some locales, the evaluation determines whether to formally process or divert youth and their eligibility for various programs.[104] The literature is mixed on whether risk assessments reliably predict recidivism, with some scholars arguing that any risk assessments are inherently racially biased because they are premised on "prior crime," which is a proxy for race.[105] Since risk assessments are designed to use data to best predict recidivism, they reflect systematic inequalities.[106] In turn, youth of color, particularly Black youth, are more likely to be classified as high-risk compared to

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[100] A proper examination of RAIs is beyond the scope of this Article; for a thoughtful discussion of the concerns with these tools, see Schlesinger, *supra* note 92, at 59.

[101] *See generally* Michael T. Baglivio & Katherine Jackowksi, *Examining the Validity of a Juvenile Offending Risk Assessment Instrument Across Gender and Race/Ethnicity*, 11 YOUTH VIOLENCE & JUV. JUST. 26 (2013) (finding that the predictive validity of the risk/needs assessment used by a criminal justice agency is paramount to its success).

[102] Fredrick Butcher & Jeff M. Kretschmar, *How Juvenile Justice Systems Must Balance Risk Assessment with Racial Equity*, JUV. JUST. INFO. EXCH. (Feb. 4, 2020), https://jjie.org/2020/02/04/how-juvenile-justice-systems-must-balance-risk-assessment-with-racial-equity.

[103] *Id.*

[104] *Id.*

[105] Bernard E. Harcourt, Commentary, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 237 (2015) ("The fact is, risk today has collapsed into prior criminal history, and prior criminal history has become a proxy for race. The combination of these two trends means that using risk-assessment tools is going to significantly exacerbate the unacceptable racial disparities in our criminal justice system."); *see also* Schlesinger, *supra* note 92, at 63 (despite serious concerns of risk assessments, with proper modifications risk assessment tools are the best way for jurisdictions to radically decrease punitiveness and increase fairness among racialized youth); *cf.* Rachael T. Perrault, Gina M. Vincent & Laura S. Guy, *Are Risk Assessments Racially Biased?: Field Study of the SAVRY and YLS/CMI in Probation*, 29 PSYCH. ASSESSMENT 664, 673–78 (2017) (study demonstrating that risk factors are not as susceptible to racial differences within the youth justice setting as are items based on youth history).

[106] Butcher & Kretschmar, *supra* note 102.

white youth.[107] Researchers have found in a sample of justice-involved youth who have behavioral health issues, that a significantly larger proportion of Black youth compared to white youth were identified as high risk to recidivate.[108] A high-risk classification can lead to different conditions than someone deemed low risk; these conditions are likely more punitive and with more surveillance which in turn means more tripwires for failure. Thus, in many ways, the use of risk assessment is central to the effectiveness of probation conditions.[109]

While risk assessment tools are used by YPOs, the discretionary role of judges in probation is also worth briefly noting.

C. Judges as Gatekeepers to the Revolving Door of Youth Probation

While the majority of youth probation officers make the initial determination of which specific conditions their youth clients must follow—they check the boxes—youth court judges are the ultimate gatekeepers. They hold immense power to influence probation practices and lead probation reform efforts. Judges exercise discretion in two primary ways as noted in a new report by the National Council of Juvenile and Family Court Judges: "[J]udges have the judges have ultimate authority to determine what conditions should or should not be included in young people's probation orders, and to limit or entirely eliminate the use of confinement in response to non-compliant behavior."[110]

In Grace's case, the story of the young girl earlier in this Article, the judge wielded her discretionary power and chose to confine Grace: Judge Brennan determined that Grace revoked her probation when she failed to complete her homework during the pandemic and that the punishment was to put her back into detention. Judge Brennan had the option to give Grace a second chance to complete her homework, lengthen her probation timeframe, or revisit the conditions altogether. Instead, she chose to revoke because Judge Brennan believed that Grace's underlying charge of theft and assault were a "threat to the community" and that

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[107] KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 99–100 (2021); *see also* Haney-Caron & Fountain, *supra* note 8, at 653, 667–68, 672 (expanding the discursive use of "wrongful conviction" and suggesting "how the intersection of youthfulness and race puts youth of color at risk of both wrongful conviction based on factual innocence and wrongful conviction based on criminalization of normative youthful behavior.").

[108] Butcher & Kretschmar, *supra* note 102 ("While the proportion of youth who were identified as moderate risk was nearly identical for both white and black youth, significant differences existed in the low and high risk categories.").

[109] A full assessment of RAIs and youth probation is beyond the scope of this Article. No survey to date has examined risk assessment tools and their direct impact on youth probation conditions; this may be due to lack of data. The author is also working on a forthcoming article involving original probation data of detained girls in the youth criminal justice system in Los Angeles County.

[110] NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, *supra* note 28, at 13.

"'[Grace] hasn't fulfilled the expectation with regard to school performance' . . . 'I told [Grace] she was on thin ice and I told her that I was going to hold her to the letter, to the order, of probation.'"[111]

It was later determined that Grace's failure to fulfill the homework condition of her probation was tied to learning disabilities which were not known by the probation officer who filed her violation of probation.[112] This oversight could have been caught by a judge and addressed differently (e.g., requiring a special education evaluation). In this way, judges have a significant gatekeeping role and are system actors that are subject to the same discretionary biases as probation officers.[113] Moreover, the fundamental underlying structure of probation is faulty in that the goal of youth probation is still debated. Is the goal of youth probation rehabilitation? Is it to ensure public safety and if so, whose safety? Is it to deter crime? The answers to these unresolved questions are critical as they impact youth, their families, and their communities and are the basis for the dysfunction of probation.[114] Without a national standard, we end up with a patchwork of youth probation conditions that vary across states and jurisdictions.[115]

II. METHODOLOGY FOR ORIGINAL RESEARCH

To study the legal framework of probation, I gathered the standard youth probation conditions from a variety of jurisdictions across the country. Most jurisdictions create a basic form, distributed to youth on probation with boxes checked as needed; these forms vary from jurisdiction to jurisdiction and state to state.

Although commonly applied in all youth cases, standard probation conditions are not readily available on county or state websites. These forms are generally not

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[111] Emily Riley, *Jailed for Not Doing Homework, Michigan Teen Tells Her Own Story*, CRIME REP. (Nov. 3, 2020), https://thecrimereport.org/2020/11/03/jailed-for-not-doing-homework-michigan-teen-tells-her-own-story.

[112] *Id.*

[113] *See* Prescott Loveland, *Acknowledging and Protecting Against Judicial Bias at Fact-Finding in Juvenile Court*, 45 FORDHAM URB. L.J. 283, 293 (2017) ("Without a jury or other procedural protections, juvenile court judges are susceptible to various types of bias that can undermine fact-finding, thereby threatening to subject innocent young people to the consequences of a juvenile conviction.").

[114] Ebony Ruhland, *What Purpose Should Probation Serve? Looking to Other Alternatives*, ROBINA INST. CRIM. L. & CRIM. JUST. (Jan. 31, 2018) https://robinainstitute.umn.edu/news-views/what-purpose-should-probation-serve-looking-other-alternatives ("Research shows that [adult] probation officers and departments that emphasize a focus on law enforcement (and see public safety as their overarching goal) file more violations, including technical violations, and produce higher revocation rates compared to those who have a social casework approach.").

[115] The American Bar Association has recommended guidelines but there is no national uniform standard.

housed anywhere accessible to the public. One researcher remarked to the author that youth probation forms are the "in the drawer" part of the system. Retrieving the actual forms is a lengthy and time-consuming project. The first step is determining which form is used and what the form is called (probation rules, probation conditions, and disposition orders). The next step is locating who within the probation department or clerk's office can locate the form. The majority of probation departments in the country do not make these forms publicly available.

My goal was to ensure I captured the far reach of youth probation conditions, so I examined conditions that impact the largest number of youth by focusing on the top five largest U.S. jurisdictions. These states also capture the South (Florida), Southwest (Texas), Midwest (Illinois), East (New York), and West (California). Moreover, I was curious about whether the city/rural distinction would drastically alter probation conditions (it does not) or whether a statewide county system (Kentucky) would impact conditions (it also does not). I was also fortunate to be provided recently modified forms in some places (New Mexico) that are noticeably different than the rest.

In total, I examined 325 conditions from 17 different jurisdictions (including states and counties). While this analysis is by no means a complete data set, it is designed to provide a thoughtful and intersectional snapshot of practices across the United States, taking into account factors impacting criminal justice policies.

To fully appreciate the scope of probation, I examined the probation conditions imposed in two different categories of states. The first category, captured in Figure 1, consists of the five states with the highest population of youth and the largest county within those states. The second category, captured in Figure 2 consists of a random smattering of smaller jurisdictions (counties or statewide agencies) with more political, economic, and geographic diversity to gauge whether the locale impacted conditions.

Figure 1 depicts my primary data set. In the five most populous states, I reviewed all the standard youth probation conditions utilized in their most populous counties or boroughs from the standardized court forms. While some states have statewide youth probation conditions, in these particular five states, the standards are set county by county and vary across their state.

Figure 1[116]			
State	**Population < 20 years old**	**Largest County**	**No. of Probation Conditions**
California	10,306,711	Los Angeles	56
Texas	8,651,100	Harris	9
Florida	4,976,919	Miami-Dade	19
New York	4,714,365	New York/Five Boroughs	6
Illinois	3,262,808	Cook	17

Figure 2 depicts an additional data set. This is a combination of jurisdictions that are the most populous in the state, rural,[117] politically conservative,[118] politically liberal, politically mixed, and economically poor.[119] In addition, some of these jurisdictions are counties in the ten states with the largest American Indian/Alaskan Native populations,[120] and five of these jurisdictions have statewide conditions; in

[116] *Easy Access to Juvenile Populations (EZAPOP), State Comparisons*, NAT'L CTR. FOR JUV. JUST., https://www.ojjdp.gov/ojstatbb/ezapop (Oct. 12, 2021) (follow "State Comparisons" hyperlink; then set "Year" to "2020"; set "Lower Age" to "0" and Upper Age" to "18–20" and click "set age"; then select "show table"); *Easy Access to Juvenile Populations (EZAPOP), County Comparisons*, NAT'L CTR. FOR JUV. JUST., https://www.ojjdp.gov/ojstatbb/ezapop (Oct. 12, 2021) (follow "County Comparisons" hyperlink; then select a state from the dropdown menu; then set "Year" to "2020"; then set the age range to "0" and "18 to 20" and click "set age"; then select "show table"; click on "Total" row header to sort data by ascending population).

[117] According to census data, rural "encompasses all population, housing, and territory not included within an urban area." To qualify as an urban area, the territory must have 2,500 inhabitants or more, at least 1,500 of whom reside outside of correctional facilities, nursing homes, mental hospitals, or the like. The classification of "rural" and "urban," however, has changed over time. *2010 Census Urban and Rural Classification and Urban Area Criteria*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html (Oct. 8, 2021).

[118] For descriptive purposes only, I use the term "politically conservative" to reflect where the majority of voters identify as Republican; "politically liberal" for jurisdictions where the majority voters identify as Democrats; and "politically mixed" when it's less than 3% difference between Republicans and Democrats.

[119] Here I define "poor" jurisdictions to be those in the top ten states based on poverty rates and low median household income according to U.S. Census Bureau data. *See* Elliott Davis Jr., *The States with the Highest Poverty Rates*, U.S. NEWS & WORLD REP. (June 25, 2021), https://www.usnews.com/news/best-states/slideshows/us-states-with-the-highest-poverty-rates.

[120] *Profile: American Indian/Alaska Native*, U.S. DEP'T HEALTH & HUM. SERVS., OFF. MINORITY HEALTH, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=62 (Jan. 1, 2022) ("In 2019, ten states with the largest American Indian/Alaska Native populations were: Arizona, California, Oklahoma, New Mexico, Texas, North Carolina, Alaska, Washington, South Dakota, New York.").

other words, in these states, there is one set of youth probation conditions that applies to all youth in the entire state. I examined this collection of various jurisdictions to assess whether the economies, political affiliations, size, or demographics factor into conditions. The analysis revealed that probation conditions are across the board not effective, regardless of these factors.

Figure 2

Jurisdiction (*statewide conditions)	Characteristics	No. of Probation Conditions
Orange County, California	Politically mixed[121]	30
San Francisco County, California	Politically liberal[122]	32
Fulton County, Georgia	Most populous county in Georgia,[123] liberal[124]	19
Kentucky*	Rural,[125] poor,[126] politically conservative[127]	14

[121] Orange County, California, has 1.8 million voters, with 37% Democrats and 24% Republicans. CAL. SEC'Y OF STATE, REPORT OF REGISTRATION AS OF FEBRUARY 10, 2021: REGISTRATION BY COUNTY (2021), https://elections.cdn.sos.ca.gov/ror/ror-odd-year-2021/county.pdf.

[122] San Francisco County, California, has about 513,200 voters, with 63% Democrats and 7% Republicans. *Id.*

[123] According to a 2010 estimate by the U.S. Census Bureau, Fulton County has the largest population of any county in Georgia. *Fulton County Demographics*, FULTON CNTY., https://fultoncountyga.gov/inside-fulton-county/about-fulton-county/demographics (last visited Sept. 17, 2022).

[124] In 2020, 72.6% of the people in Fulton County, Georgia, voted Democrat in the last Presidential Election, 26.2% voted for the Republican Party, and the remaining 1.2% voted Independent. *Politics and Voting in Fulton County, Georgia*, BEST PLACES, https://www.bestplaces.net/voting/county/georgia/fulton (last visited Sept. 17, 2022).

[125] Kentucky is eighth on a list of the most rural states. Andrew Lisa, *States with the Biggest Rural Populations*, STACKER (Apr. 8, 2019), https://stacker.com/stories/2779/states-biggest-rural-populations.

[126] Kentucky has the seventh lowest household income ($50,589) with a poverty rate of 16.3%. Serah Louis, *The Poorest States in America*, MONEYWISE (Feb. 5, 2021), https://moneywise.com/managing-money/employment/the-poorest-states-in-america.

[127] In the 2020 election, 62.1% of voters in Kentucky voted for the Republican candidate and 36.2% voted for the Democratic candidate. *Kentucky*, 270 TO WIN, https://www.270towin.com/states/kentucky (last visited Sept. 17, 2022).

Iosco County, Michigan	Politically conservative[128]	20
New Mexico*	Am. Indian/Alaskan Native,[129] politically liberal[130]	6
Multnomah County, Oregon	Most populous county in Oregon[131]	16
South Dakota*	Am. Indian/Alaskan Native[132]	9
Washington*	Politically liberal[133]	22
West Virginia*	Poor,[134] rural,[135] politically conservative[136]	19
Campbell County, Wyoming	Rural,[137] politically conservative[138]	21

[128] Oscoda County, Michigan, is strongly conservative. In the last presidential election, 63.4% voted for the Republican Party, 34.9% voted Democrat and 1.7% vote Independent. *Politics and Voting in Oscoda, Michigan*, BEST PLACES, https://www.bestplaces.net/voting/city/michigan/oscoda (last visited Sept. 17, 2022).

[129] Eleven percent of residents in New Mexico identify as American Indian and Alaska Native. *Quick Facts: New Mexico*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/NM (last visited Sept. 17, 2022); *see also Profile: American Indian/Alaska Native*, *supra* note 120.

[130] In the 2020 election, 54.3% of New Mexico voters voted for the Democratic candidate and 43.5% voted for the GOP candidate. *New Mexico*, 270 TO WIN, https://www.270towin.com/states/New_Mexico (last visited Sept. 17, 2022).

[131] Multnomah County, Oregon, has over 800,000 residents and is the most populous of Oregon's 36 counties. *About Multnomah County*, MULTNOMAH CNTY., https://www.multco.us/multnomah-county/about-multnomah-county (last visited Sept. 17, 2022).

[132] Nine percent of residents in South Dakota identify as American Indian and Alaska Native. *Quick Facts: South Dakota*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/SD (last visited Sept. 17, 2022); *see also Profile: American Indian/Alaska Native*, *supra* note 120 ("In 2019, ten states with the largest American Indian/Alaska Native populations were: Arizona, California, Oklahoma, New Mexico, Texas, North Carolina, Alaska, Washington, South Dakota, New York.").

[133] In the 2020 election, 58% of Washington voters voted for the Democratic candidate and 38.8% voted for the Republican candidate. *Washington*, 270 TO WIN, https://www.270towin.com/states/Washington (last visited Sept. 17, 2022).

[134] West Virginia has the second lowest household income in the country ($46,711) with a poverty rate of 16%. Louis, *supra* note 126.

[135] Virginia is third on a list of the most rural states with 51.3% of the state rural. Lisa, *supra* note 125.

[136] In the 2020 election, 68.6% of West Virginia voters voted for the Republican candidate and 29.7% voted for the Democratic candidate. *West Virginia*, 270 TO WIN, https://www.270towin.com/states/West_Virginia (last visited Sept. 17, 2022).

I also examined jurisdictions not included above where they have moved entirely away from standard or formal probation conditions and instead rely on a "case management" system that involves the youth. These areas are highlighted in the last Part of this Article. In many ways, this return is a full circle to the origins of the youth probation system.

There were many challenges to collect this data. First, the COVID-19 pandemic shut down courts and court-related administrative offices making it even more challenging to locate personnel.[139] At most, state and county websites contain vague language very similar to this language found on a Florida State's Attorney website: "If a juvenile is placed on probation, the juvenile is supervised by DJJ and assigned a Juvenile Probation Officer (JPO). Probation will include conditions/sanctions that include, but are not limited to, monetary restitution, community service work, curfew, and mental health and/or substance abuse treatment."[140]

Second, it was unclear who to contact for the forms. To add to the opaqueness of probation (similar to adult probation) youth court administration varies. In some states, youth probation is administrated state-wide and in other states at the county level. Conditions are either set by the state or county by county. State-administered systems have a single, unified structure and a unified set of probation conditions. County-based systems have their own probation conditions and rules resulting in an inconsistent set of probation conditions for youth in the same state. Studying standard conditions in one state, thus, requires obtaining forms from multiple counties.

This lack of transparency and inaccessibility explains why so little is known about actual youth probation conditions.[141] Similar to adult probation, as Professor

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[137] Wyoming is thirteenth on a list of the most rural states with 35.2% of the state being rural. Lisa, *supra* note 125.

[138] Campbell County, Wyoming, is conservative; 9.9% of the people voted Democrat in the last presidential election, 86.8% voted for the Republican Party, and the remaining 3.4% voted Independent. *Politics and Voting in Gillette, Wyoming*, BEST PLACES, https://www.bestplaces.net/voting/city/wyoming/gillette (last visited Sept. 17, 2022).

[139] *See Pandemic Disrupts Justice System, Courts,* AM. BAR ASS'N (Mar. 16, 2020), https://www.americanbar.org/news/abanews/aba-news-archives/2020/03/coronavirus-affecting-justice-system.

[140] *How the Juvenile Court Works*, OFF. STATE ATT'Y DAVE ARONBERG, http://www.sa15.state.fl.us/stateattorney/VictimWitness/indexJUV.htm (last visited Sept. 17, 2022).

[141] The Annie E. Casey Foundation completed a comprehensive study of youth probation in 2018; actual probation condition forms were not cited or archived. *See generally* ANNIE E. CASEY FOUND., *supra* note 11. As leaders in the field, their website offers a plethora of resources to reform youth probation but no specific database of actual probation conditions or forms. Dr. Goldstein, a leading scholar on youth probation reform has not publicly archived any youth probation forms. *See Lab Personnel*, JUV. JUST. RSCH. & REFORM LAB, http://www.jjrrlab.com (last visited Sept. 17, 2022).

Doherty noted: "probation receives little public scrutiny, not by intent but because the probation system is so complex and the data are scattered among hundreds of loosely connected agencies, each operating with a wide variety of rules and structures."[142] Without awareness of the actual youth probation conditions, it is difficult to assess the kinds of power youth probation systems are authorized to exert. This lack of knowledge about youth probation mirrors the opaqueness of the youth criminal legal system as a whole.[143] Moreover, the more youth and their families understand the system, the better their case outcomes and the less likelihood the youth will re-offend.[144]

III. DESIGN FLAWS IN PROBATION CONDITIONS

Part III of this Article moves us from a consideration of the structural inequities of youth probation toward a closer analysis of the specific conditions of five jurisdictions under an adolescent development framework which reveals that youth probation conditions are flawed by design. By examining actual conditions from the five various jurisdictions across the United States (Los Angeles, California; Harris County, Texas; New York, New York; Cook County, Illinois; and Miami-Dade, Florida) this Part reveals that current practices are not in line with what we know to be effective practices based on adolescent brain development.

To set the scene, any young person in a youth court proceeding already encounters an inaccessible court process and legal jargon. To make matters worse, their precise understanding of the process and that of their families can impact their "success" in the process or, in the most extreme cases, their very freedom.[145] Only one study has documented how much youth comprehend probation conditions: a 2012 study in Washington State found that only 1/3 of youth understood their probation conditions.[146]

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[142] Doherty, *supra* note 7, at 298 (quoting Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 153 (1997)).

[143] An advocacy project I am working on with a team seeks to address the gap in knowledge about the youth criminal legal system: a web-based application, *Youth Justice Navigator* (YJN) will provide young people and their families' knowledge about the legal process to empower them to be their best advocate. *Youth Justice Nav*, HACK FOR LA, https://www.hackforla.org/projects/youthjusticenav (last visited Sept. 17, 2022).

[144] Caitlin Cavanagh & Elizabeth Cauffman, *What They Don't Know* Can *Hurt Them: Mothers' Legal Knowledge and Youth Re-Offending*, 23 PSYCH. PUB. POL'Y & L. 141, 143, 149 (2017) (A survey of over 300 mother–son pairs (including female guardians) revealed that the mothers' legal knowledge of the youth court process was directly related to their sons' likelihood of re-offending; the more accurate information the mother knew about the process, the less likely her son re-offended.).

[145] *Id.*

[146] ROSA PERALTA, GEORGE YEANNAKIS, KIM AMBROSE, DENNIS YULE & SARA CUSWORTH WALKER, WASHINGTON JUDICIAL COLLOQUIES PROJECT: A GUIDE FOR IMPROVING COMMUNICATION AND

Here, I examine how age, experience, and varying degrees of child development will impact how any youth understands and processes probation conditions as part of an already stressful youth court proceeding. We know that youth appearing in youth court are more likely to have additional challenges understanding and acting on the information provided in court.[147] "The jargon, abstract language and complex terminology frequently used in the courtroom can be impossible to navigate, especially for young people."[148] To exacerbate this stress, "youth appearing in juvenile court are more likely to have additional challenges understanding and acting on information in court. Research documents the prevalence of language and linguistic delays, special education needs, mental health issues, trauma, and other adverse childhood experiences" that impact hearing, processing, and retaining information.[149] Understanding probation conditions is critical for youth's compliance. Yet, as the report describes:

> Judges may expect and be accustomed to youth responding in agreement to questions such as: "Do you understand that you are waiving your rights? Do you understand that you must follow all the conditions of my order or face additional consequences? Have you had sufficient time to review this plea with your attorney?" Youth may not know that answering "no" to a judge is an option.[150]

Before looking at the specifics of the various five jurisdictions, a brief understanding of the tenets of adolescent brain development relevant to probation is critical to how youth receive these conditions. It is especially important to understand both the normal adolescent cognitive development issues and the particularities facing system-impacted youth who disproportionately have had trauma experiences, learning challenges, and mental health issues.

A. Adolescent Development Tenets Applicable to Probation Conditions

Adolescence has been described as the age of opportunity by Lawrence Steinberg[151] and as a time of a child's greatest impulsivity, recklessness, and inability

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UNDERSTANDING IN JUVENILE COURT 9 (2012), https://www.goodjuvenileprobationpractice.org/resources/washington-judicial-colloquies-project-a-guide-for-improving-communication-and-understanding-in-juvenile-court.

[147] *Id.* at 6, 9 (The report also expands on how the traditional courtroom dynamics make it difficult for youth to speak up when they do not understand a question or terminology).

[148] *Id.* at 6; *see* ROSA PERALTA & GEORGE YEANNAKIS, JUDICIAL COLLOQUIES: COMMUNICATING WITH KIDS IN COURT 1 (Michael Curtis ed., 2013), http://www.juvjustice.org/sites/default/files/resource-files/Innovation%20Brief-%20Judicial%20Colloquies-Communicating%20with%20Kids%20in%20Court.pdf.

[149] PERALTA ET AL., *supra* note 146, at 6.

[150] *Id.*

[151] *See* LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 17 (2014).

to have full regulation of thoughts, emotions, and actions.[152] Not all youth, however, have been afforded this notion, as scholar Kristin Henning has argued poignantly: Black youth are eluded their childhood.[153] Nevertheless, American courts in the last 20 years have held that children and youth should be treated differently in the eyes of the law. David Slansky describes the impact of the main Supreme Court decisions *Roper*,[154] *Graham*,[155] and *Miller*,[156] which, in essence, returns to the origins of youth court: "[T]here is broad support among legal scholars and criminologists for the reasoning at the heart of these decisions; the idea that the impetuosity, suggestibility, and incomplete maturation of adolescents calls for treating them differently when they commit crimes, even serious crimes."[157] The impact of applying our understanding of adolescent development to probation has been extensively studied and documented by scholar Naomi Goldstein.[158] Probation conditions for youth that are punitive and restrictive raise concerns, given that cognitive processing and development differ significantly from adults.[159] Academic

[152] This is a notion that is held worldwide. *See* Laurence Steinberg, Grace Icenogle, Elizabeth P. Shulman, Kaitlyn Breiner, Jason Chein, Dario Bacchini, Lei Chang, Nandita Chaudhary, Laura Di Giunta, Kenneth A. Dodge, Kostas A. Fanti, Jennifer E. Lansford, Patrick S. Malone, Paul Oburu, Concetta Pastorelli, Ann T. Skinner, Emma Sorbring, Sombat Tapanya, Liliana Maria Uribe Tirado, Liane Peña Alampay, Suha M. Al-Hassan & Hanan M. S. Takash, *Around the World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, 21 DEV. SCI. 2018, at 2.

[153] Scholars assert Black youth are not treated as adolescents by society or in our application of laws. Henning, *supra* note 33 ("All of these behaviors arise out of the same impulsive, short-sighted features of adolescence that are common among youth of all races. Yet we don't treat youth of all races the same.").

[154] Roper v. Simmons, 543 U.S. 551, 572–73 (2005) ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.").

[155] Graham v. Florida, 560 U.S. 48, 92 (2010) (Roberts, C.J., concurring) (noting a "general presumption of diminished culpability that *Roper* indicates should apply to juvenile offenders.").

[156] Miller v. Alabama, 567 U.S. 460, 471 (2012) ("*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing."); *see also* Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) ("*Miller* . . . established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'") (quoting *Miller*, 567 U.S. at 472.); Note, *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, 130 HARV. L. REV. 994, 1006 (2017) (arguing that under Supreme Court precedent, children are treated differently in death penalty and life-without-parole sentence cases, and "the same immaturity, impulsivity, and susceptibility to influence that the Court noted might lead a juvenile offender to commit any other adult crime for which she could face federal charges.").

[157] DAVID SKLANKSY, A PATTERN OF VIOLENCE 173 (2021).

[158] *See generally* Goldstein et al., *supra* note 27.

[159] *See* Chaz Arnett, *Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts*, 108 J. CRIM. L. & CRIMINOLOGY 399, 409 (2018) (concluding that modern surveillance

studies suggest that young brains continue to develop until a person is roughly twenty-five, meaning that a youth's brain and personality are still forming.[160] Until the prefrontal cortex matures, youth are more likely to be influenced by peer pressure, engage in risky behavior, be apt to forgo contemplation of longer-term consequences for short-term rationales and be prone to poor decision-making.[161] Probation conditions may require intrusive searches (searching student backpacks at any time), and constant monitoring may cause stigma and shame. And psychological harms are destructive to the healthy development of youth and potentially have lifelong consequences on a child's chances of becoming a contributing member of society.[162] Finally, adolescents have immature thought processes including (1) not planning or following their plans and getting caught up in an unanticipated event, (2) decision-making influenced by fear or threats that may seem exaggerated to adults and are measured by the teens' perception at the time, (3) risk-taking impacting their decisions; youth rarely think of the worst possible scenario, and (4) youth's perception that they have one choice even when there are many.[163] These normal adolescent development traits contribute to the difficulties of understanding unwieldy probation conditions.

Any potential comprehension challenges to probation conditions facing adolescents due to their development are compounded when looking at youth who have been impacted by the youth criminal system. These youth face compounding

technology mandated by youth courts to monitor youth requires greater oversight because youth are still developing mentally).

[160] *Id.* at 408. *See* Sarah-Jayne Blackmore, *Imagining Brain Development: The Adolescent Brain*, 61 NEUROIMAGE, 397, 399–400 (2012) (analyzing studies that utilized MRI technology to examine adolescent brains for continued development and finding that brain growth continues during adolescence); Stephanie Burnett, Geoffrey Bird, Jorge Moll, Chris Frith & Sarah-Jayne Blakemore, *Development During Adolescence of the Neural Processing of Social Emotion*, 21 J. COGNITIVE NEUROSCIENCE 1736, 1744–45 (2009) (concluding from a comparison of fMRI data between youth and adults thinking about social emotions that youth rely on different parts of the brain for emotion processing than adults, implying continued brain development through adolescence).

[161] Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 CURRENT DIRECTIONS PSYCH. SCI. 55, 56 (2007); *see also* Arnett, *supra* note 159, at 408–09 ("Adolescence is not only marked with heightened concern and awareness of how others perceive you, but also a distinct vulnerability to negative perceptions of self-worth and life chances.").

[162] Arnett, *supra* note, 159, at 438–39 (citing Joseph Spinazzola, Hilary Hodgdon, Li-Jung Liang, Julian D. Ford, Christopher M. Layne, Robert Pynoos, Ernestine C. Briggs, Bradley Stolbach & Cassandra Kisiel, *Unseen Wounds: The Contribution of Psychological Maltreatment to Child and Adolescent Mental Health and Risk Outcomes*, 6 PSYCH. TRAUMA: THEORY, RSCH. PRAC., & POL'Y, 2014, at S18, S20).

[163] *See* Marty Beyer, *Adolescent Development*, STRENGTH/NEEDS-BASED SUPPORT FOR CHILD., YOUTH & FAMS., https://www.martybeyer.com/content/adolescent-development-0 (last visited Sept. 17, 2022).

harm as they face additional hurdles in critical ways that impact comprehending and following conditions: dis/abilities,[164] trauma, and immaturity. While cognitive development issues are typical for all youth, these are magnified by the number of system-impacted youth impacted by abuse, neglect, trauma, dis/abilities, gender, gender orientation, sexuality, immigration status, and of course, race and poverty.

First, the vast majority of system-impacted youth, 70–90%, have experienced trauma which we know, depending on the individual, can interfere with the child's functioning.[165] In some instances, the increased exposure to trauma places youth at risk for emotional, behavioral, developmental, and legal problems.[166] Trauma experienced by youth involved in the criminal legal system must be considered. Scholars and criminal justice reformers have consistently reported the harm caused to youth who are removed from their homes and placed in detention, suggesting that detention is always the last resort.[167] However, I argue that the current standard conditions of probation reproduce harm.[168] For example, consider the compounding trauma that an intrusive and random drug test may cause on an already traumatized youth when there are no drug charges; or the emotional harm caused by a male probation officer who conducts drug testing on a young girl.

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[164] This author prefers the use of the term dis/ability to call attention to an understanding of our ableist language as per Dis/Crit scholars' use. *See* Subini Ancy Annamma, David Connor & Beth Ferri, *Dis/Ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/Ability*, 16 RACE ETHNICITY & EDUC. 1, 24 n.1 (2013) ("[Authors] use 'dis/ability' instead of 'disability' . . . to call attention to ways in which the latter overwhelmingly signals a specific inability to perform culturally-defined expected tasks (such as learning or walking) that come to define the individual as primarily and generally 'unable' to navigate society. We believe the '/' in disability disrupts misleading understandings of disability, as it simultaneously conveys the mixture of ability and disability.").

[165] *See, e.g.*, Carly B. Dierkhising, Susan J. Ko, Briana Woods-Jaeger, Ernestine C. Briggs, Robert Lee & Robert S. Pynoos, *Trauma Histories Among Justice-Involved Youth: Findings from the National Child Traumatic Stress Network,* 4 EUR. J. PSYCHOTRAUMATOLOGY, no. 1, 2013, at 1 ("Up to 90% of justice-involved youth report exposure to some type of traumatic event. On average, 70% of youth meet criteria for a mental health disorder with approximately 30% of youth meeting criteria for post-traumatic stress disorder (PTSD).").

[166] *Essential Elements*, NAT'L CHILD TRAUMATIC STRESS NETWORK, https://www.nctsn.org/trauma-informed-care/trauma-informed-systems/justice/essential-elements (last visited Sept. 17, 2022) ("More than 80% of juvenile justice-involved youth report experiencing trauma, with many having experienced multiple, chronic, and pervasive interpersonal traumas. This exposure places them at risk for emotional, behavioral, developmental, and legal problems.").

[167] *See* SUE BURRELL, NAT'L CHILD TRAUMATIC STRESS NETWORK, TRAUMA AND THE ENVIRONMENT OF CARE IN JUVENILE INSTITUTIONS 2 (2013) ("The best way to prevent systemic traumatization is not to incarcerate youth in the first place. Accordingly, the first step in developing a trauma-informed environment of care is to examine the use of secure confinement.").

[168] My thoughts here are heavily influenced from a conversation I had with Dr. Jacqueline van Wormer, Director of Juvenile Training and Technical Assistance at the National Associate of Drug Court Professionals (NADCP) (notes on file with author).

Moreover, the lack of culturally appropriate responses to young people in their homes with the standardized nature of conditions can cause real harm.

Second, likely overlapping with those who have experienced trauma, a high percentage of system-impacted youth are victims of abuse or neglect. Youth who have experienced abuse or neglect are 47% more likely to engage in youth delinquency than those in the general population.[169]

In addition, a significant number of system-impacted youth intersecting with the criminal justice system have disproportionate numbers of dis/abilities,[170] both seen and unseen with an estimated range of roughly 40–70% of youth facing one or more learning and/or mental health dis/abilities.[171] Put differently, "[a]t least 1 in 3 youth in the juvenile justice system has a disability qualifying them for special education services under the Individuals with Disabilities Education Act (IDEA)—nearly four times the rate of youth in public schools. Less than half receive special education services while in custody."[172]

Finally, additional factors such as sexual orientation and immigration status of youth render those youth more vulnerable to systemic bias given their high

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[169] Leslee Morris, *Youth in Foster Care Who Commit Delinquent Acts*, 3 LINK 1, 1 (2004).

[170] "'Dis/ability' is used here in the broadest sense while acknowledging that youth with disabilities are ill-served by the breadth of the term because tailoring remedies to address specific needs is challenging." Nanda, *Criminalization of Disability in School*, *supra* note 30, at 277. *See also* Beth Ribet, *Emergent Disability and the Limits of Equality: A Critical Reading of the UN Convention on the Rights of Persons with Disabilities*, 14 YALE HUM. RTS. & DEV. L.J. 155, 165–66 (2011).

[171] Marty Beyer, *What's Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel*, 58 GUILD PRAC. 112, 112 (2001) ("17–53% of delinquents have learning disabilities, in comparison to 2–10% in the overall child population") (citing Alan Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youth*, *in* YOUTH ON TRIAL 33, 39 (Thomas Grisso & Robert G. Schwartz, eds., 2000)); *see* Mary Magee Quinn, Robert B. Rutherford, Peter E. Leone, David M. Osher & Jeffrey M. Poirier, *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD. 339, 340, 342 (2003). "Some estimate that as many as 70% of youth who enter the justice system have a mental health, sensory or learning disability, and anywhere between 28 percent and 43 percent of detained or incarcerated youth have special education needs." *Youth With Undiagnosed or Mistreated Disabilities*, COALITION FOR JUV. JUST., https://www.juvjustice.org/our-work/safety-opportunity-and-success-project/nationalstandards/section-i-principles-responding-2 (last visited Sept. 17, 2022).

[172] CHILD.'S DEF. FUND, THE STATE OF AMERICA'S CHILDREN 2020, at 29 (2020), https://www.childrensdefense.org/wp-content/uploads/2020/02/The-State-Of-Americas-Children-2020.pdf; *see also* U.S. OFF. SPECIAL EDUC. PROGRAMS, EDUCATIONAL PRACTICES: IMPROVING OUTCOMES FOR YOUTH WITH DISABILITIES IN JUVENILE CORRECTIONS 1 (2020), https://osepideasthatwork.org/sites/default/files/JJ-TIB-EducationalPractices-508.pdf; COUNCIL OF STATE GOV'TS JUST. CTR., LOCKED OUT: IMPROVING EDUCATIONAL & VOCATIONAL OUTCOMES FOR INCARCERATED YOUTH 1, 3 (2015), https://csgjusticecenter.org/wpcontent/uploads/2020/01/LOCKED_OUT_Improving_Educational_and_Vocational_Outcomes_for_Incarcerated_Youth.pdf.

numbers. Children identifying as LGBTQ+ make up approximately 7–9% of the general youth population, less than half of the share of children identifying as LGBTQ+ in the youth justice system population (20%); 85% of children in the youth justice system are LGBTQ+ children of color.[173] Given the changing landscape of immigration policies and emphasis on punitive measures, noncitizen youth involved in the youth justice system are at increased risk of arrest, detention, and deportation by U.S. Immigration and Customs Enforcement (ICE).[174]

For these reasons and so many more, probation conditions must be tailored to the development needs of youth in order for them to be effective. Youth law experts describe the ideal role of youth probation:

> Juvenile probation should be like a parent who holds onto the seat of a child who is learning to ride a bicycle. The child isn't punished when she can't ride on her own. Rather, parents learn to take their hands off the seat gradually. There is a developmental equivalent when probation officers work with teens who are learning how to behave.[175]

I engaged in my survey of probation conditions from around the country to answer this exact question: how many of our largest jurisdictions in the United States adhere to what we know about adolescent development in their design and execution of youth probation conditions? In order to determine this, I sought to examine probation conditions from a variety of jurisdictions and analyze them on several different metrics. In this next Section, I provide a snapshot of each jurisdiction and the current context of youth probation. This analysis will reveal that current probation conditions in nearly all jurisdictions surveyed do not wholly adhere to what we know about the brain development of youth. While some jurisdictions are attempting to remedy that (e.g., New York), in many ways, the

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[173] CHILD.'S DEF. FUND, *supra* note 172; CTR. FOR AM. PROGRESS, MOVEMENT ADVANCEMENT PROJECT & YOUTH FIRST, UNJUST: LGBTQ YOUTH INCARCERATED IN THE JUVENILE JUSTICE SYSTEM 2 (2017), https://www.lgbtmap.org/file/lgbtq-incarcerated-youth.pdf.

[174] Memorandum from John Kelly, Sec'y U.S. Dep't Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs and Border Prot., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf't, Lori Scialabba, Acting Dir., U.S. Citizenship & Immigr. Servs., Joseph B. Maher, Acting Gen. Couns., Dimple Shah, Acting Assistant Sec'y Int'l Affs., Chip Fulghum, Acting Undersecretary for Mgmt. 2 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (The memorandum notes that "the Department no longer will exempt classes or categories of removable aliens from potential enforcement" and that Department personnel should prioritize "removable aliens who: (1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense . . . .").

[175] ROBERT G. SCHWARTZ, YOUTH ON PROBATION: BRINGING A 20TH CENTURY SERVICE INTO A DEVELOPMENTALLY FRIENDLY 21ST CENTURY WORLD 6 (2017), https://stoneleighfoundation.org/wp-content/uploads/2018/02/Youth-on-Probation-Report.pdf.

current youth probation structure is the exact opposite of what we know about adolescents by nearly any metric.

B. Youth Probation Conditions in Five Jurisdictions

In this Section of the Article, I examine the specific probation conditions of various jurisdictions. The focus first is on the largest counties of each of the five states with the largest population of youth under the age of 20 as of the most recent data count: Los Angeles County, California; Harris County, Texas; Miami-Dade County, Florida; Five Boroughs Counties, New York; and Cook County, Illinois.[176] For each county, I provide a short summary of the context of the youth criminal justice system's efforts and reforms.

1. Los Angeles County, California

Los Angeles County has the largest number of youth in detention in the country and has undergone significant probation reform in the past few years.[177] In August 2019, the Los Angeles County Board of Supervisors voted unanimously to reimagine the nation's largest youth justice system, including eliminating youth probation—a division that employs over 3,400 staff and incarcerates and supervises more than 5,400 youth.[178] The Board's vote was one of lost confidence in youth probation; they tasked a local stakeholder body with designing an alternative "care-first system" to assume responsibility over court-involved youth in lieu of probation.[179] In 2021, Los Angeles County Probation was cited for maintaining halls that are "unsuitable to house young people" via a historic vote by the California Board of State and Community Corrections (BSCC).[180]

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[176] Below are the five states with the largest numbers of youth under 20 years of age:

California	10,306,711
Texas	8,651,100
Florida	4,976,919
New York	4,714,365
Illinois	3,262,808

Easy Access to Juvenile Populations (EZAPOP), State Comparisons, *supra* note 116.

[177] Soung, *supra* note 19, at 550.

[178] W. HAYWOOD BURNS INST., LOS ANGELES COUNTY: YOUTH JUSTICE REIMAGINED 5, 24, 70 (2020), https://burnsinstitute.org/wp-content/uploads/2020/12/YJC_report_11.pdf.

[179] Jaclyn Cosgrove, *L.A. County Moves to Create New Juvenile Justice System Focused on 'Care,' Not Punishment*, L.A. TIMES (Nov. 25, 2020, 7:00 AM), https://www.latimes.com/california/story/2020-11-25/la-county-could-dismantle-juvenile-justice-system-for-care-first-model ("After years of incremental reform, Los Angeles County is moving to dismantle the largest youth justice system in the country in favor of a 'care-first' model that would look less like prison and would emphasize emotional support, counseling and treatment.").

[180] Jaclyn Cosgrove & Leila Miller, *L.A. County Juvenile Halls are 'Unsuitable for the Confinement of Youth,' State Board Finds*, L.A. TIMES (Sept. 18, 2021, 5:00 AM), https://www.latimes.com/california/story/2021-09-18/state-finds-l-a-county-juvenile-halls-unsuitable-for-

2. Harris County, Texas

Harris County, Texas, is one of the many Juvenile Detention Alternatives Initiative (JDAI) counties that focuses on multiple stakeholders on youth justice reform.[181] During the pandemic, Harris County cut the youth incarceration population in half. While disparities between detaining Black and white youth have continued, the Executive Director of Probation is hopeful that a new screening tool for detention will help to decrease the overall population while also reducing racial and ethnic disparities.[182] In February 2021, Harris County announced it will invest $4 million in a youth justice community reinvestment fund to support community programs to prevent the incarceration of young people.[183] It is worth noting that Harris County has been plagued with concerns about its mistreatment of youth including concerns by public defenders that youth were locked up inhumanely.[184]

3. Miami-Dade County, Florida

Miami-Dade's youth justice system has been plagued by scandals in years past including one chronicled by the *Miami Herald*.[185] Most recently, "[t]he Florida Department of Juvenile Justice (DJJ) was selected as one of four states to participate in the Juvenile Justice System Improvement Project (JJSIP), a national initiative to reform the youth justice system by translating 'what works' into everyday practice

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the-confinement-of-youth; *see also* Celeste Fremon, *In Startling and Historic Vote, State Board Finds LA County's Two Juvenile Halls "Unsuitable for Youth Habitation,"* WITNESSLA (Sept. 16, 2021), https://witnessla.com/in-startling-historic-vote-state-board-finds-la-countys-two-juvenile-halls-unsuitable-for-youth-habitation.

[181] The Casey Foundation's Juvenile Detention Alternatives Initiative, or JDAI for short, began more than 25 years ago as a pilot project to reduce reliance on local detention. Interview by the Annie E. Casey Foundation with Thomas Brooks, Chief Juv. Prob. Officer, Harris Cnty., Tex. (Nov. 12, 2012), https://www.aecf.org/blog/jdai-interviews-thomas-brooks.

[182] *How Two JDAI Sites Are Accelerating Youth Justice Reforms During the Pandemic*, ANNIE E. CASEY FOUND. (Sept. 9, 2020), https://www.aecf.org/blog/how-two-jdai-sites-are-accelerating-youth-justice-reforms-during-the-pandem.

[183] Laure Isensee, *Harris County Will Spend $4 Million to Prevent Youth Incarceration*, HOUSTON PUB. MEDIA (Mar. 29, 2021, 6:13 PM), https://www.houstonpublicmedia.org/articles/news/criminal-justice/2021/03/29/394576/harris-county-to-invest-4-million-in-community-programs-as-an-alternative-to-youth-incarceration.

[184] Gabriella Banks, *Reports: Children Are in 23 1/2 Hour-a-Day Lockup at Harris County Juvenile Facility Amid COVID-19*, HOUS. CHRON., https://www.houstonchronicle.com/news/houston-texas/houston/article/Reports-Children-are-in-23-hour-a-day-lockup-15187249.php (Apr. 16, 2020, 2:34 PM).

[185] Carol Miller, *Grand Jury, Citing Herald Series, Laments Lack of Progress in Juvenile Justice*, MIA. HERALD, https://www.miamiherald.com/article215904890.html (Aug. 2, 2018, 10:07 AM) (The *Herald* series, called Fight Club, "detailed a pattern of conduct wherein guards within the juvenile detention facility created intolerable conditions and behavior by bribing certain juveniles with fast food, including pastry 'honeybuns', in order for those teens to discipline other juveniles within the facility.").

and policy."[186] In nearby surrounding counties, significant diversion reforms have been getting press.[187] Although Florida enacted youth civil citation in 1990, the practice only took hold after the passage of a state statute requiring diversion across all judicial circuits statewide.[188] However, a 2019 study showed that civil citations were not evenly issued across the state of Florida, suggesting that its effect on low-level youth crime recidivism was limited.[189]

4. New York, New York

Reform to New York's youth justice system has been heralded in the past few years; in particular, in 2017 New York raised the age of jurisdiction and moved 16- and 17-year old's out of the adult system.[190] An effort to house youth detainees closer to home to maintain personal connectedness has gained momentum.[191] Yet the treatment of youth around the state remains inconsistent.[192] New York City

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[186] *Juvenile Justice System Improvement Project (JJSIP)*, FLA. DEP'T JUV. JUST., https://www.djj.state.fl.us/research/latest-initiatives/juvenile-justice-system-improvement-project-jjsip (last visited Sept. 17, 2022).

[187] A pre-arrest diversion program in Duval County illustrates the potential success of taking a diversion approach. In 2016, only 27 percent of eligible youth in Duval County were diverted from the juvenile justice system. The other 73 percent of the county's youth were arrested and referred to the juvenile courts. In 2020, these numbers flipped: 76 percent of eligible youth were diverted into teen court and neighborhood accountability programs, and the arrest rate of youth eligible for the diversion program was only 23 percent.

Noella Sudbury, Opinion, *One Florida County Found the Right Way to Keep Youth Out of The Criminal Justice System*, MIA. HERALD (July 13, 2021, 6:11 PM), https://www.miamiherald.com/article252757833.html.

[188] Laura Lothman Lambert & Arthur L. Burnett Sr., *Juvenile Civil Citation: An Effective Innovation in Reducing Juvenile Crime and Recidivism*, 34 CRIM. JUST., Summer 2019, at 4.

[189] MELISSA NADEL, WILLIAM BALES & GEORGE PESTA, U.S. DEP'T OF JUST., NO. 254453, AN ASSESSMENT OF THE EFFECTIVENESS OF CIVIL CITATION AS AN ALTERNATIVE TO ARREST AMONG YOUTH APPREHENDED BY LAW ENFORCEMENT 17 (2019), https://www.ncjrs.gov/pdffiles1/nij/grants/254453.pdf.

[190] Devon Magliozzi, *New York Officials, Advocates Praise Early Progress of Cuomo's Youth Justice Overhaul*, IMPRINT (Sept. 20, 2019, 4:51 AM), https://imprintnews.org/news-2/juvenile-justice-progress-cuomo-new-york/37676; *see also* N.Y. STATE RAISE THE AGE IMPLEMENTATION TASK FORCE, FIRST ANNUAL REPORT AUGUST 2019, at 4, https://www.ny.gov/sites/ny.gov/files/atoms/files/NYS_RTA_Task_Force_First_Report.pdf.

[191] A 2018 report on New York's model, known as the Close to Home Initiative, found that moving teenagers from "large, dangerous, geographically remote institutions" to places near their families was far better "since those connections hold the greatest potential to help youth build new skills and stay out of trouble in the long term." JASON SZANYI & MARK SOLER, CTR. FOR CHILD.'S L. & POL'Y, IMPLEMENTATION OF NEW YORK'S CLOSE TO HOME INITIATIVE: A NEW MODEL FOR YOUTH JUSTICE 3 (2018).

[192] *Id.*; *see also* Devon Magliozzi, *New York's Raise the Age Overhaul Wins Early Praise*, CRIME REP. (Sept. 24, 2019) ("'The quality of justice should not depend on where their case happens to

Commissioner of Probation Ana Bermúdez is seen as among the most cutting-edge reformers across the country.[193] In a recent public discussion on reform, Bermúdez stated: "If we wanted to create the most antithetical system to adolescent development, it's the adversarial, law-based, guilt-or-innocence dichotomy we've created . . . To me, blow [metaphorically] the whole thing up."[194] New York City has had significant improvements in youth probation in the past several years although there is always more to do.[195]

5. Cook County, Illinois

Similar to other large jurisdictions, Cook County has also made significant reform strides in the last several years.[196] A recent effort includes a group of young people (some of whom have been incarcerated), their families, and advocates from Northwestern University's Children and Family Justice Center launching the Final 5 Campaign which calls for shutting down the last five state youth facilities in Illinois and ensuring that families are provided transportation to visit their children weekly in the replacement facilities.[197] Youth probation, in particular, however, has been looked at most closely since the start of the global pandemic with specific language by probation officers away from punishment towards mentorship. When it comes to high-risk youth, Avik Das, Director and Chief Probation Officer in Cook County, Illinois' youth justice system, believes that the youth justice system should be a "last-resort":[198]

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take place,' Leahy [Raise The Age Taskforce member] said, adding that reducing statewide inequities was a goal his task force colleagues seemed to share.").

[193] In a recent conversation the author had with leading youth reformers, she was consistently named as leading the youth reform efforts (notes on file with author).

[194] Michael Fitzgerald, *Some U.S. Probation Officials Want to 'Blow Up' Their Systems*, IMPRINT (Sept. 30, 2020, 5:46 AM), https://imprintnews.org/justice/juvenile-justice-2/probation-officials-want-to-blow-up-their-systems/47820.

[195] *See* Lisa F. Grumet, *Court-to-School Pipelines: Meeting Special Education Needs for Students on Juvenile Probation in New York*, 63 N.Y. L. SCH. L. REV. 73, 92 (2018–19) ("New York State has a number of positive juvenile justice reforms in place. As New York implements the Raise the Age legislation, it should consider ways to enhance the family court's authority to take steps that promote educational opportunities for students with disabilities.").

[196] Duaa Eldieb, *Illinois Has Promised to "Infuse Love" in Its Juvenile Justice System, but What Will Actually Change?*, PROPUBLICA (Aug. 7, 2020, 5:00 AM), https://www.propublica.org/article/718llinois-has-promised-to-infuse-love-in-its-juvenilejustice-system-but-what-will-actually-change; *see also Juvenile Justice Legislation Spring 2022*, JUV. JUST. INITIATIVE, https://jjustice.org/events-and-education (last visited Sept. 17, 2022).

[197] *About the F5C*, FINAL FIVE CAMPAIGN, https://www.thefinal5campaign.com/about (last visited Sept. 17, 2022).

[198] Gabe Stern, *Pandemic Is Opportunity to Reshape Family Courts, Probation, Experts Say,* JUV. JUST. INFO. EXCH. (July 7, 2020), https://jjie.org/2020/07/07/pandemic-is-opportunity-to-reshape-family-courts-probation-experts-say.

> I believe my home court, the oldest juvenile court in the nation, is being called on to reinvent itself, . . . Otherwise, it is at risk of being declared obsolete at best. Or at worst being downright injurious to the well-being of children and young people, particularly Black youth, families and neighborhoods, and other communities of color.[199]

C. Probation Conditions Analysis

This analysis now turns to look at the specific conditions around a few metrics based on adolescent development principles which will be described in full: (1) Readability and Comprehension based on the ideal reading level of eighth grade; (2) Number of Probation Conditions given that the fewer in number, the more likelihood of compliance and comprehension; (3) Level of Intrusiveness of Conditions (How violative of person and property are conditions? Does it seem too intrusive?); (4) Youth Engagement (Is there a way for youth to participate, write up their own conditions, come up with a plan?); (5) Family Involvement (Are there fees, fines, and mandatory involvement of family?); (6) Length of Probation (Is there a defined length or open? Shorter is deemed ideal); and (7) Tailoring Option (Can the YPO create specific conditions for youth or are there only boilerplate options?).

It is important to note the limits to this analysis: I examined all the youth probation conditions in each jurisdiction but most youth do not have to complete ALL the conditions, but a subset determined by the probation officer and/or youth court judge. It is impossible to know how many conditions are usually applied to youth as it varies from case to case. My analysis in this Section is to provide an overview or snapshot of a system by narrowing in on specific conditions.

1. Readability/Comprehension

The readability and comprehension of probation conditions are essential for youth to be able to adhere to their conditions and complete probation. Literacy-related and/or language development challenges, often undiagnosed, are prevalent among youth in the justice system.[200] Language challenges impact the ability of youth to process information and explain plans, perceive consequences, and

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[199] *Id.*

[200] Nanda, *Criminalization of Disability in School*, *supra* note 30, at 267; *see also* Amy E. Lansing, Jason J. Washburn, Karen M. Abram, Ursula C. Thomas, Leah J. Welty & Linda A. Teplin, *Cognitive and Academic Functioning of Juvenile Detainees: Implications for Correctional Populations and Public Health*, 20 J. CORR. HEALTH CARE 18, 25 (2014). One study found that 52% of youth in the system had a language impairment. Pamela C. Snow & Martine B. Powell, *Oral Language Competence, Social Skills and High-Risk Boys: What Are Juvenile Offenders Trying to Tell Us?*, 22 CHILD. & SOC. 16, 16–17, 22 (2008). As a comparison, 7.4% of youth have a language impairment. J. Bruce Tomblin, Nancy L. Records, Paula Buckwalter, Xuyang Zhang, Elaine Smith & Marlea O'Brien, *Prevalence of Specific Language Impairment in Kindergarten Children*, 40 J. SPEECH, LANGUAGE & HEARING RES. 1245, 1256 (1997).

contemplate resolution in a situation.[201] The conditions must be thus written in a way that renders them accessible. Literacy experts suggest that "[f]or audiences with limited literacy skills, or those in population groups shown to be at risk of limited literacy, text should be written at the 6th grade level or lower."[202] Even for adults, it is recommended legal documents should be written at a seventh or eighth grade level.[203] Some localities have mandates that all-important voting documents be written at an eighth grade level for maximum accessibility and use.[204] For the purposes of this Article, I analyzed the readability of all the conditions. To achieve this, each condition was run through the Flesch-Kincaid Reading Level analysis.[205]

The Flesch-Kincaid grade level parallels grade level education in the United States, indicating the education level necessary to comprehend text.[206] In this Flesch-reading-ease test, higher scores indicate material that is easier to read; lower numbers mark passages that are more difficult to read. The formula for the Flesch-reading-ease score test applied to youth probation conditions in this Article follows. The ideal score for our purposes is 90.00-100.00.

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[201] *See generally* Snow & Powell, *supra* note 200, at 17, 22.

[202] *Readability*, CLEAR LANGUAGE GRP., http://www.clearlanguagegroup.com/readability (last visited Sept. 17, 2022). *See generally* MARK KUTNER, ELIZABETH GREENBERG & JUSTIN BAER, NAT'L CTR. FOR EDUC. STATS., U.S. DEP'T OF EDUC., NCES 2006-470, NATIONAL ASSESSMENT OF ADULT LITERACY (NAAL): A FIRST LOOK AT THE LITERACY OF AMERICA'S ADULTS IN THE 21ST CENTURY 5, tbl.2 (2005) (describing population characteristics of adults with below basic prose literacy).

[203] *See, e.g.*, General Rules and Regulations, Securities Act of 1933, 17 CFR § 230.421(d) (2022) (requiring financial prospectuses to be written in "plain English"); John Aloysius Cogan Jr., *Readability, Contracts of Recurring Use, and the Problem of Ex Post Judicial Governance of Health Insurance Policies*, 15 ROGER WILLIAMS U. L. REV. 93, 126 (2010) (noting that Rhode Island requires health insurance contracts to be written at an eighth grade level to protect consumers).

> For the general public, text should be written at the 8th grade level or lower. Some people worry that 8th grade level text will offend highly skilled readers. However, most people are pressed for time and may be stressed when reading legal documents, so they appreciate quick, concise information written in everyday language.

Readability, *supra* note 202 (citing JOSEPH KIMBLE, WRITING FOR DOLLARS, WRITING TO PLEASE: THE CASE FOR PLAIN LANGUAGE IN BUSINESS, GOVERNMENT, AND LAW 11–13, 56 (2012)).

[204] Los Angeles City Election Code requires that official summaries of the ballot measures submitted to the voters must be drafted at an eighth grade readability level. LOS ANGELES, CAL., ELECTION CODE § 404(b).

[205] The Flesch–Kincaid readability tests assess the level of difficulty in understanding a text. The two subtypes include the Flesch–Kincaid Reading Ease and the Flesch–Kincaid Grade Level tests, which both analyze word and sentence length to determine how readable a text is. *See Flesch Reading Ease and the Flesch Kincaid Grade Level*, READABLE, https://readable.com/readability/flesch-reading-ease-flesch-kincaid-grade-level (last visited Sept. 17, 2022).

[206] *Id.*

Figure 3		
Score	**U.S. School Level**	**Notes**
100.00–90.00	5th grade	Very easy to read. Easily understood by an average 11-year-old student.
90.0–80.0	6th grade	Easy to read. Conversational English for consumers.
80.0–70.0	7th grade	Fairly easy to read.
70.0–60.0	8th & 9th grade	Plain English. Easily understood by 13- to 15-year-old students.
60.0–50.0	10th to 12th grade	Fairly difficult to read.
50.0–30.0	College	Difficult to read.
30.0–10.0	College graduate	Very difficult to read. Best understood by university graduates.
10.0–0.0	Professional	Extremely difficult to read. Best understood by university graduates.
< 0.00	[Too difficult]	[Not readable, should be edited.]

The Flesch-Kincaid reading score shows that, on average, the readability score of probation conditions of the five largest jurisdictions are as follows. In addition to reviewing the conditions in the five most populous jurisdictions, I examined the readability score of 12 more jurisdictions as follows with their number of form conditions in each jurisdiction:

Figure 4	
U.S. Jurisdiction (*statewide conditions)	**No. of Probation Conditions**
Los Angeles County, California	56
Orange County, California	30
San Francisco County, California	32
Miami-Dade County, Florida	19
Fulton County, Georgia	19
Cook County, Illinois	17

Kentucky*	14
Iosco County, Michigan	20
New Mexico*	6
Queens County, New York	10
Five Boroughs Counties, New York	6
Multnomah County, Oregon	16
South Dakota*	9
Harris County, Texas	9
Washington*	22
West Virginia*	19
Campbell County, Wyoming	21

Figure 5

Five Largest Counties	No. of Probation Conditions	Mean Score	Readability Score Level	Deficiency Below Ideal Score (100.00)
Los Angeles County, California	56	61.20	10th to 12th grade, fairly difficult	38.80
Harris County, Texas	9	27.21	College graduates, very difficult	72.79
Miami-Dade County, Florida	19	52.11	College, difficult	47.89
Five Boroughs Counties, New York	6	32.90	College graduates, very difficult	67.10
Cook County, Illinois	17	50.69	College, difficult	49.31
Average of Five Largest Jurisdictions		44.80	College, difficult	55.20
Average of Seventeen Jurisdictions		57.40	10th to 12th grade, fairly difficult	42.60
Total No. of Conditions in Five Largest Jurisdictions		107		
Total No. of Conditions in Seventeen Jurisdictions		325 (including 107 above)		

In essence, the average reading score level of the standard form youth probation conditions is college level.[207] This is particularly worrisome given that studies have shown that while the median age of children confined to youth correction facilities is 15.5 years old, the average reading level is only that of a fourth grader.[208] In essence, this means that youth on probation are unlikely to understand their probation conditions as a function of their ability to read. Moreover, given the poor reading scores in general in the United States, these youth probation conditions are challenging to comprehend for all youth.

Recent studies have shown that high percentages of all youth in many states are not proficient in reading.

Figure 6	
Five Largest Counties	**Percentage of ALL Fourth Graders NOT Proficient in Reading in 2021**[209]
Los Angeles County, California	68%
Harris County, Texas	70%
Miami-Dade County, Florida	62%
Five Boroughs, New York	66%
Cook County, Illinois	66%
Average Proficiency	66.4%

In other words, with 66.4% of fourth graders in the five states with the largest counties not able to read at a fourth grade level, it is safe to infer that the probation conditions in these jurisdictions written (on average) at a college-level comprehension level are *incomprehensible to most youth*. For youth inside a justice system whose understanding of conditions will impact their compliance and in some cases their freedom from detention or incarceration, understanding their conditions is essential. While overall reading comprehension is difficult, a careful look at specific conditions in these five jurisdictions reveals that in four jurisdictions, one or two particular conditions are nearly impossible for anyone to understand given

[207] As a comparison, *Time Magazine* scores about 52 and the *Harvard Law Review* has general readability in the law 30's. Rudolph Flesch, *How to Write Plain English*, U. CANTERBURY, https://web.archive.org/web/20160712094308/http://www.mang.canterbury.ac.nz/writing_guide/writing/flesch.shtml (last visited Sept. 17, 2022).

[208] OPEN SOC'Y INST., OCCASIONAL PAPER SERIES, NO. 2, RESEARCH BRIEF: EDUCATION AS CRIME PREVENTION: PROVIDING EDUCATION TO PRISONERS 2 (1997), https://www.prisonpolicy.org/scans/research_brief__2.pdf.

[209] Reading proficiency scores pulled from ANNIE E. CASEY FOUND., 2021 KIDS COUNT DATA BOOK INTERACTIVE 34 (2021), https://www.aecf.org/interactive/databook?d=ed&l=06.

their complexity. These conditions have a negative score meaning that they are beyond readability comprehension for university graduates given their structure, word choices, or formation.

Los Angeles Youth Probation Condition 10: You must attend and participate in tutoring, vocational training, recreational activities or any other activities as directed by your caregiver or Probation Officer.[210]

Readability Score: -0.80 (beyond college graduates)

Harris County Youth Probation Condition (not numbered): Special Instructions: Register as Sex Offender—Public; Register as Sex Offender—Non-Public; Deferred Sex Offender Registration; Sexual Behavior Treatment Counseling; No Sex Offender Registration Required; Letter Of Apology; No Contact—Complainant; No Contact—CoActors; No Contact with gang members apart from HCJPD activities; Zero Tolerance at School; Educational Specialist; Drug Assessment and Treatment; Decision Making Workshop; Random Drug Screens; Individual Counseling; Anger Management; Project Success.[211]

Readability Score: -42.60 (beyond college graduates)

Harris County Youth Probation Condition (not numbered): Respondent is ordered to participate in the following programs/assessments: Assess for Services Assess for ISP Assess for Female intervention Program Juvenile Firestoppers Program Assess for Special Needs Programs GED Program Sex Offender Caseload Assess for Gang Caseload Assess for Specialty Court O Assess for MST D RISE Program D Intensive Supervision Level.[212]

Readability Score: -7.00 (beyond college graduates)

Miami-Dade Youth Probation Condition (not numbered): Participate in and successfully complete anger management counseling/an anti-theft course/family counseling/individual counseling to commence within days.[213]

Readability Score: -42.60 (beyond college graduates)

Cook County Youth Probation Condition (not numbered): You are to reside in the home of your parent(s), guardian, custodian, or as otherwise placed by the Department of Children and Family Services, obeying all reasonable rules and regulations of such residence, whether in the parental home or elsewhere, and you are not to leave such residence overnight for any

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[210] Minute Order—Conditions of Probation, County of Los Angeles Juvenile Court, Superior Court of California.

[211] Judgment Order, District Court of Harris County, Texas.

[212] *Id.*

[213] Probation Order, CLK/CT. 109, Juvenile Division, Circuit and County Courts, Miami-Dade County, Florida.

purpose, unless you have the express permission of your parent, guardian, or custodian.[214]

Readability Score: -2.20 (beyond college graduates)

2. Number of Conditions

Similar to readability, the fewer in number the conditions, the better the comprehension for youth.[215] The higher the number of conditions, the harder it is for children to understand, follow, or even recall.[216] A 2020 study of 18,000 youth in Indiana found that "regardless of the race, age, gender, and charge severity, the more probation-required programs and probation-supervision conditions youth were assigned, the less time to technical violation . . . ."[217] As a result, the greater the number of conditions, the less time before a youth has a technical violation where the youth is found to have violated one or more of the violations.[218] Youth often struggle to recall and comprehend the conditions imposed upon them because the language used in courtrooms consists of complex legal jargon.[219]

While the number of conditions in a jurisdiction is not telling of conditions' variation in scope and structure, it is easy to speculate that the more choices probation officers have to check a box and assign a condition to a youth, the more likely they are to do so. However, the opposite is also possible: the more conditions that are available, the more tailored the condition is to the youth or the more selective and appropriate the condition. There is no data on the number of conditions probation officers assign. From an adolescent development framework, the fewer the conditions, the better.[220] The National Council of Juvenile and Family Court Judges (NCJFCJ) has suggested that probation orders or conditions should be limited to ideally four or fewer.[221] In the chart that follows, all 17 jurisdictions are listed with the five largest counties bolded.

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[214] Terms and Conditions of Probation (Supervision), Circuit Court of Cook County, Illinois.

[215] Dr. Naomi Goldstein has written extensively on the utility of graduated responses. *See generally* Goldstein et al., *supra* note 27.

[216] GOZANI ET AL., *supra* note 23, at 5; *see also* NAT'L JUV. DEF. CTR., PROMOTING POSITIVE DEVELOPMENT: THE CRITICAL NEED TO REFORM YOUTH PROBATION ORDERS 1 (2016), https://njdc.info/wp-content/uploads/2016/12/Promoting-Positive-Development-Issue-Brief.pdf.

[217] Allyson L. Dir, Lauren A. Magee, Richelle L. Clifton, Fangqian Ouyang, Wanzhu Tu, Sarah E. Wiehe & Matthew C. Aalsma, *The Point of Diminishing Returns in Juvenile Probation: Probation Requirements and Risk of Technical Probation Violations Among First-Time Probation-Involved Youth*, 27 PSYCH., PUB. POL'Y & L. 283, 288 (2021).

[218] *Id.*

[219] GOZANI ET AL., *supra* note 23, at 5.

[220] NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, *supra* note 28, at 26.

[221] *Id.*

Figure 7	
Jurisdictions Examined (*Statewide Conditions)	**No. of Probation Conditions [Ideal number per juvenile law judges is 4]**
Los Angeles County, California	56
Orange County, California	30
San Francisco County, California	32
Miami-Dade, Florida	19
Fulton County, Georgia	19
Cook County, Illinois	17
Kentucky*	14
Iosco County, Michigan	20
New Mexico*	6
Queens County, New York	10
Five Boroughs of New York City	6
Multnomah County, Oregon	16
South Dakota*	9
Harris County, Texas	9
Washington*	22
West Virginia*	19
Campbell County, Wyoming	21
Average No. of Conditions in Five Largest Jurisdictions	21
Average No. of Conditions in All Seventeen jurisdictions	19

The average number of conditions in the five largest jurisdictions is 21 conditions (and 19 among all), a far cry from the ideal of four conditions. In addition, there is quite a variance in the number of conditions in New York's five boroughs, with six standing out as closest to the ideal practice of four conditions. This reform is part of New York's reform efforts to transform youth probation as examined in Part IV of this Article.

While there is significant variation among the states, in New Mexico, a recent (2021) effort was made by probation officials of the state to redo youth probation conditions adhering to best practices and adolescent development and standardizing conditions for the entire state (all jurisdictions). The result was a form with only six

conditions written in more readable language and accessibility.[222] Similarly, in Oregon, a recent effort was made to redo youth probation conditions. The end result was 16 possible conditions.[223]

3. Level of Intrusiveness

The level of intrusiveness of probation conditions can hinder youth development and affect a youth's perception of the system. By subjecting youth to random searches that feel unwarranted and extreme, probation conditions are doing actual harm: a child's perception of the system may diminish and possibly lead to recidivism.[224] Moreover, some jurisdictions include conditions that on the surface seem to violate their constitutional rights. For example, #21 from the Los Angeles Juvenile Probation Conditions reads: "You must permit a law enforcement officer to search your person, house, or property at any time of the day or night with or without a warrant."[225]

While youth generally waive their rights including the right to be free of warrantless searches and/or searches without probable cause,[226] this type of condition is understandably one that may elicit distrust of the criminal legal system. While evaluating the five jurisdictions, four of the five continue to include such intrusive conditions with two of the four utilizing the exact same language—likely copied from the adult probation form(s). The results are as follows:

> **Los Angeles County, California Condition 15**: You must provide a DNA sample and palm print as directed by Probation but no later than _____.[227]

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[222] This recent reform in New Mexico was learned through a conversation with a probation official in New Mexico (notes on file with author). Also note that New Mexico has eliminated the use of administrative fines and fees related to offenses committed by youth. Press Release, N.M. Off. of the Governor, Michelle Lujan Grisham, Gov. Lujan Grisham Signs Measure Eliminating Fees for Juvenile Crimes (Mar. 30, 2021), https://www.governor.state.nm.us/2021/03/30/gov-lujan-grisham-signs-measure-eliminating-fees-for-juvenile-crimes.

[223] This recent reform in Oregon was learned through a conversation with a probation official in Oregon (notes on file with author).

[224] *See* SCHWARTZ, *supra* note 175, at 8–9.

[225] Superior Court of California, County of Los Angeles Juvenile Court, Minute Order – Conditions of Probation.

[226] For a thoughtful examination of the Fourth Amendment issues at play, see Soung, *supra* note 19, at 574. *See also* John R. Turner, Craig Hemmens & Adam K. Matz, *Is It Reasonable? A Legal Review of Warrantless Searches of Probationers and Parolees*, 27 CRIM. JUST. POL'Y REV. 684, 684–85 (2016) (Individuals on some form of community supervision, whether probation or parole, are generally required to waive many of their rights, including the right to be free of warrantless searches and/or searches without probable cause).

[227] Minute Order—Conditions of Probation, County of Los Angeles Juvenile Court, Superior Court of California.

Harris County, Texas Condition 38: You must provide a DNA sample and palm print as directed by Probation but no later than _____.[228]

Miami-Dade County, Florida (not numbered): DNA ordered.[229]

Cook County, Illinois (not numbered): Pursuant to state law you are required to submit to blood, saliva, or tissue sample for DNA Indexing, to Illinois State Police through the Probation Department at a location to be determined by the Probation Officer within 45 days of this order.[230]

4. Tailored Conditions

Under an adolescent framework, in order for youth probation conditions to be effective, conditions should be specifically tailored to the young person's situation; and they should be deemed necessary to protect public safety and/or minimize the likelihood of arrest or recidivism.[231] Similarly, the California Supreme Court has determined that probation conditions must have a relationship to the crime that was committed and can only order conduct reasonably related to the committed criminal act or "future criminality."[232] Despite this, a review of 325 conditions reveals that youth are still burdened with excessive and arbitrary probation conditions which, research has shown, harm their development and prospects for rehabilitation. Of the conditions reviewed, some (but not all) had a general condition for youth to participate in a "program" to be determined by the probation officer. These conditions, if stand-alone, would seemingly allow for a more specific plan but also increase the role of the probation officer in determining conditions which may be a doubled-edged sword. In the five most populous counties, only two of the jurisdictions have this option as follows:

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[228] Judgment Order, District Court of Harris County, Texas.

[229] Probation Order, CLK/CT. 109, Juvenile Division, Circuit and County Courts, Miami-Dade County, Florida.

[230] Terms and Conditions of Probation (Supervision), Circuit Court of Cook County, Illinois.

[231] NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, *supra* note 28, at 27.

[232] People v. Lent, 541 P.2d 545, 548 (Cal. 1975) (quoting People v. Dominquez, 64 Cal. Rptr. 290, 293 (Cal. Ct. App. 1967)) ("A condition of probation will not be held invalid unless it: '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct that is not itself criminal, and (3) requires or forbids conduct not reasonably related to future criminality.'"). "The Lent test is conjunctive, meaning all three prongs must be satisfied to invalidate a probation condition." Douglas Ankney, *California Supreme Court: Where Electronics Search Condition of Probation Is Not Reasonably Related to Future Criminality, Condition Is Invalid*, CRIM. LEGAL NEWS (Nov. 18, 2019), https://www.criminallegalnews.org/news/2019/nov/18/california-supreme-court-where-electronics-search-condition-probation-not-reasonably-related-future-criminality-condition-invalid (citing People v. Olguin, 198 P.3d 1, 4 (Cal. 2008) ("[A] reasonable condition of probation is not only fit and appropriate to the end in view but it must be a reasonable means to that end. Reasonable means are moderate, not excessive, not extreme, not demanding too much, well balanced.")); People v. Fritchey, 3 Cal. Rptr. 2d 585, 590 (Cal. Ct. App. 1992); *see also* GOZANI ET AL., *supra* note 23, at 5.

> **New York, New York (not numbered)**: Participate in the following program duly authorized as an alternative to detention [specify][233]
>
> **Harris County, Texas (not numbered)**: I will attend and successfully complete any program or service required by the case plan developed by the Harris County Juvenile Probation Department pursuant to any assessment noted above.[234]

In addition, New Mexico, which recently revised its form, provides a space for "special conditions" and a large box for individualized conditions which provides the officer and youth an opportunity to engage about which conditions are most realistic as well.

> **New Mexico #6**: Special conditions: _____.[235]

This broad condition, in turn, allows for probation officers to apply the principles of adolescent development but seems to be currently rarely utilized.

5. Youth Participation

Directly engaging youth in the development of their probation conditions is essential to ensuring their engagement and buy-in which is necessary for successful completion of probation.[236] The Supreme Court has recognized that youth are less susceptible to deterrence and more vulnerable to negative influences due to their developmental status.[237] Relatedly, youth are more likely to be motivated by positive reinforcement. Moreover, when youth, especially teens, understand why we put rules into place, they are more likely to both follow and appreciate them. In other words, when the consequences are tied to the action, they are more likely to follow the rules.[238]

Thus, involving youth in the process is critical for the completion of their conditions given what studies have shown about legal socialization—how we view legal actors and legal institutions and our obligation to obey the law. Research has demonstrated that if adults feel as though they have been treated with respect by court actors and are given an opportunity for meaningful participation in their judicial proceedings, they see the law as legitimate and feel more of an obligation to obey the law.[239]

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[233] Form 3-11a (Juvenile Delinquency—Order Directing Release of Respondent with Conditions), Family Court of the State of New York.

[234] Judgment Order, District Court of Harris County, Texas.

[235] Probation Agreement and Order, State of New Mexico.

[236] NAT'L RSCH. COUNCIL, *supra* note 48, at 4–5.

[237] Roper v. Simmons, 543 U.S. 551, 569–71 (2005).

[238] *See* Lisa Menegatos, Linda C. Lederman & Kory Floyd, *When Parents Talk About College Drinking: An Examination of Content, Frequency, and Associations with Students' Dangerous Drinking*, 31 HEALTH COMMC'N 287, 287–88 (2016).

[239] Emily Buss, *Failing Juvenile Courts, and What Lawyers and Judges Can Do About It,* 6 NW. J. L. & SOC. POL'Y 318, 331 (2011) ("The connection between adults' perceptions of

Professor Emily Buss argues that given what we know about this research and adolescent development, a more effective youth court would allow for youth to play an active role in their judicial process, which includes probation. As Buss suggests:

> Our aim should be to engage young people directly and repeatedly in discussions with a single judge to address all issues of planning and implementation associated with their dispositions. It should not be enough to give a young person an opportunity for input—whether that input is provided through legal representation or an occasional opportunity to speak in court. Rather, the juvenile should be given important responsibility and decision-making authority throughout the process.[240]

Applying Buss's recommendations to youth probation suggests that probation conditions should allow for youth engagement which they do not currently have—with the exception of jurisdictions that are experimenting with case plan methods involving the youth, including New York[241] and Florida. In Florida, youth and family engagement, as will be discussed in the next Section, has been codified by administrative statute. This Youth Empowered Success (YES) plan is a document that is developed with youth input and family input.

These novel practices to include youth in the development are not found in any of the form conditions examined; ironically, however, involving families is included but only when to engage them to pay fees.

6. Family Involvement

We know that for youth, positive family involvement can have a helpful impact.[242] Instead, the current surveillance model of probation seems to regulate families rather than employ them as helpers. Studies show that youth connect most productively with mentors from their community and adults who can support them to address their motivations to change.[243]

Studies verify that since probation officers' perception of youth is dependent on their perception of youth's parents' ability to supervise youth, "parents must be

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'procedural justice,' their belief in the law's legitimacy, and their sense of obligation to obey the law has been repeatedly demonstrated.").

[240] *Id.* at 328.

[241] Author's conversation with New York Probation Commissioner Ana Bermúdez suggested that youth probation officers engage directly with youth about their probation case plan (notes on file with author).

[242] NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, *supra* note 28, at 16 (citing JUST. FOR FAMS., FAMILIES UNLOCKING FUTURES: SOLUTIONS TO THE CRISIS IN JUVENILE JUSTICE (2012), https://njjn.org/uploads/digital-library/Families_Unlocking_FuturesFULLNOEMBARGO.pdf).

[243] Credible messengers or adults who themselves have had direct experience in the criminal justice system have been found to be most effective in helping transform youth. *Id.*; *see also* Ted Alcorn, *Reporting for Work Where You Once Reported for Probation*, ATLANTIC (Dec. 13, 2019), https://www.theatlantic.com/politics/archive/2019/12/credible-messengers-reform-criminal-justice-system/603514.

better integrated into the process to enhance the success of youth on community supervision."[244] Similar to the Section above, youth engagement may hinge on formal familial engagement.

In this examination of conditions, family engagement is minimal or nonexistent except to require administrative fines and fees, which scholars have argued are unconstitutional.[245] For example, in the most populous counties, fines and fees are as follows; one of which is discretionary and the second one is mandatory.[246]

> **Cook County, Illinois (not numbered)**: You are required to pay a probation fee of $_____ each month, payable through the Clerk of the Circuit Court (Total fee of $_____).[247]

Fines and fees have been shown to increase re-offending rates and exacerbate racial and ethnic disparities in the youth criminal legal system.[248] Thus the only time families are given a meaningful opportunity to engage is when they are charged money or when they are assessed: family stability is often a factor used in the Risk Assessment Instrument discussed previously. That is, if youth are not from stable family lives, this can be viewed as a risk factor for their assessment, and accordingly, youth are given different conditions. The irony is that positive family engagement is necessary for a youth on probation to complete the condition(s) of their probation. Conditions often require youth regularly attend school, programs that are off school campuses including drug treatment and therapy, and check in regularly with their probation officer during working hours.

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[244] Fine et al., *supra* note 21, at 461, 463.

[245] Beth Colgan is the United States scholar expert on the unconstitutionality of administrative fines and fees. *See generally* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 347 (2014); *see generally* Beth A. Colgan, *The Burdens of the Excessive Fines Clause*, 63 WM. & MARY L. REV. 407, 410 (2021). *See also* Leigh R. Shapiro, Comment, *The Crippling Costs of the Juvenile Justice System: A Legal and Policy Argument for Eliminating Fines and Fees for Youth Offenders*, 69 EMORY L.J. 1305, 1309, 1337 (2020) (suggesting that fines and fees in youth court are banned under a correct interpretation of the Excessive Fines Clause).

[246] 705 ILL. COMP. STAT. ANN. 405/5-615(10) (West 2022).

[247] Terms and Conditions of Probation (Supervision), Circuit Court of Cook County, Illinois. Under Illinois Law, a court may order a parent to contribute or fully pay supervision fees if a minor is unable to pay them. 705 ILL. COMP. STAT. ANN. 405/5-615(10) (West 2022). The supervision is set by statute at $50/month, though a lower amount can be authorized if a child and parent are unable to pay. *Id.*

[248] ANNIE E. CASEY FOUND., *supra* note 11, at 14–15. A recent study in Pennsylvania found that fines and fees and restitution imposed on youth had a large and statistically significant impact on their likelihood of re-offending, with greater financial obligations leading to higher recidivism, even when controlled for the young people's background and offending histories. Alex R. Piquero & Westley G. Jennings, *Research Note: Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 YOUTH VIOLENCE & JUV. JUST. 325, 325–26 (2017).

In the current youth probation structure, families are only utilized for the youth's detriment and not benefit. Here, I invoke the term "family regulation" or "family punishment system" that both scholars Emma Williams and Dorothy Roberts have relied on to describe the child welfare state.[249] They suggest that since a child does not exist in a vacuum, regulating and punishing the child in a family necessitates regulating and punishing the entire family.[250] Without their formal involvement, the family of youth in the criminal legal system are part of a system of family regulation or family punishment. This can be changed if youth probation conditions involved families in the process, as was examined in a prior Section in Florida.

After analyzing 325 conditions in 17 different jurisdictions across the country, it is evident that from the current youth probation structure, youth probation conditions do not adhere to what we know about adolescent development or best practices in important ways, including the readability of conditions, number of conditions, level of intrusiveness, lack of structure to individually tailor them to youth's needs, and lack of youth and family engagement. Moreover, the politics, rural versus urban distinction, and demographics do not seem to significantly impact the formation of youth probation conditions in meaningful ways, suggesting that the system is a permanent fixture. This is deeply problematic given the number of youth who touch the system and are facing potentially a lifetime of incarceration as a result of probation conditions that set them up for failure.

IV. DRIVER OF INCARCERATION AND NEED TO ABOLISH (DEFUND AND REIMAGINE) PROBATION

The current legal framework for youth probation has perpetuated several key issues that scholars have criticized in the past about the youth criminal justice system: it further criminalizes the most vulnerable youth,[251] the entire system needs to be rethought,[252] politics have driven the policies of our youth court (heavily influenced by race, poverty and fears of politicians),[253] and our failure to treat youth as children—especially Black youth, who we unduly criminalize.[254] Indeed, I will argue that the impact of being on probation for youth takes these criticisms to an

[249] Emma Williams, Opinion, *'Family Regulation' Not 'Child Welfare': Abolition Starts with Changing Our Language*, IMPRINT (July 28, 2020, 11:45 PM), https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586.

[250] *See also* ROBERTS, *supra* note 85, at 35.

[251] Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 408, 419 (2013).

[252] *See generally* NELL BERNSTEIN, BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON 17 (2014).

[253] FELD, *supra* note 37, at 89.

[254] HENNING, *supra* note 107, at 99–100, 195, 267.

entirely new level despite the irony that youth probation is seen as a "solution" to keeping children out of the criminal legal system. In this final Part, I demonstrate how probation is set up to fail: the extreme and often unreasonable conditions imposed on youth and lack of support lead to technical violations. This Article concludes with a nod to the future and suggests that true reform will not occur unless there is a systemic commitment to "abolition"—a rethinking of the entire purpose and structure of probation.

The law of youth probation has avoided scrutiny for three main reasons. The first is, as aptly described by Fiona Doherty, "probation continues to suffer from its outdated reputation as a progressive alternative to incarceration."[255] Hailed as the best diversion option for youth and where services can be provided within their own communities, youth probation has been shielded from the scrutiny and examination it merits. Scholars have, in turn, tilted to focus on the youth court, legal arguments on adolescence culpability, and reforming our understanding of adolescence—all of which are central to probation policies and yet rarely applied. Moreover, the hope that youth probation may address the failures of the youth court has led policymakers to gloss over the problems created by probation itself.

Second, the probation conditions are difficult to access. It was remarkably challenging to locate standard probation conditions, the essential law of youth probation, across multiple jurisdictions. One of the major goals of this Article was to begin to map out the standard conditions because it has not been done and any examination of the system is impossible unless we know the basic contours of probation.

Third, the expectations set by many youth standard probation conditions fall differently on those youth and their families who are poor and with the least resources and least able to make their experiences visible—often resulting in a technical violation.[256] A youth with a private lawyer or support from a law clinic, for example, can call on the lawyer to intercede with the probation officers and create a sense of accountability for how power is being exercised by the officer.[257] Nearly all the probation conditions require youth to participate in regular sessions (therapy, drug treatment, anger management, tutoring, etc.). This requires family support and money to transport youth to and from sessions. Moreover, the most fundamental probation condition, to "attend school every day, on time," can be a nearly impossible task for youth who have been disconnected from school for

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[255] Doherty, *supra* note 7, at 344.

[256] *See* Dawn R. Wolfe, *Thousands of Children on Probation are Incarcerated Each Year for Nonviolent, Noncriminal Behavior*, APPEAL (Sept. 4, 2020), https://theappeal.org/thousands-of-children-on-parole-are-incarcerated-each-year-for-nonviolent-noncriminal-behaviors.

[257] This is what I experienced in my own Youth & Justice Clinic at UCLA School of Law (2014-2019); we helped youth clients navigate their probation conditions and created a record of their challenges that we share with the youth court and their court-appointed attorney.

months, if not years, prior to their interaction with the criminal system.[258] For many youth, their home school will not allow their enrollment after contact with the criminal justice system.[259] "One study found that one year after institutional release, only 28% of youth were enrolled in school, 27% had withdrawn, and 45% never reentered."[260] Court-appointed lawyers for youth are not required to be on a diversion case (one that has not been adjudicated) and are not always on the case post-sentencing or while the youth is on probation.[261] Thus, a poor youth probationer is for the most part on their own, especially with respect to the extrajudicial sanctions and imposition of control effectuated by probation officers with technical violations, which can impact upwards of nearly one in six youth in our youth facilities.[262]

A. Specific Probation Conditions that Drive Incarceration

Building on the literature of scholars who have examined the failures of the youth court system to effectively address the safety of society in a way that is fair

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[258] In New York City it was documented that "two-thirds of high school age offenders do not return to school after release. Research in Kentucky showed a 95 percent dropout rate between release and entrance into a public school system or transitional educational center. The key to preventing this, as suggested by some research, is engagement." LESLIE BROCK, MINDEE O'CUMMINGS & DEANGELA MILLIGAN, NAT'L EVALUATION & TECH. ASSISTANCE CTR., TRANSITION TOOLKIT 2.0: MEETING THE EDUCATIONAL NEEDS OF YOUTH EXPOSED TO THE JUVENILE JUSTICE SYSTEM 30 (2008), https://humanrights.iowa.gov/sites/default/files/media/2%20-%20NDTAC_full_transition_toolkit.pdf.

[259] "Reenrollment of youth in schools following discharge from a juvenile correctional facility has been a perennial challenge as schools and school districts have resisted reenrollment of formerly incarcerated youth." PETER LEONE & LOIS WEINBERG, CTR. FOR JUV. JUST. REFORM, ADDRESSING THE UNMET EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS, 19 (2010), https://www.aecf.org/resources/addressing-the-unmet-educational-needs. One study revealed that "[i]n spite of juvenile court orders requiring that they attend school; youth were regularly denied reentry into their home school." *Id.* at 18.

[260] YOUTH L. CTR., EDUCATIONAL INJUSTICE: BARRIERS TO ACHIEVEMENT AND HIGHER EDUCATION FOR YOUTH IN CALIFORNIA JUVENILE COURT SCHOOLS 19 (2016), https://ylc.org/wp-content/uploads/2019/05/EDUCATIONAL-INJUSTICE.pdf.

[261] Sue Burrell, *Contracts for Appointed Counsel in Juvenile Delinquency Cases: Defining Expectations,* 16 U.C. DAVIS J. JUV. L. & POL'Y 313, 333, 336, 342 (2012) (describing the scope of duties that should be mandated for youth lawyers including "providing post-disposition representation, including regular contact to maintain the attorney client relationship and monitoring implantation of the client's court-ordered treatment plan; active representation at all review or [probation] violation hearings . . . ."); *see also* ROBIN WALKER STERLING WITH CATHRYN CRAWFORD, STEPHANIE HARRISON & KRISTIN HENNING, NAT'L JUV. DEF. CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 13–14 (2009), https://njdc.info/wp-content/uploads/2013/11/NJDC-Role-of-Counsel.pdf.

[262] Sawyer, *supra*, note 43.

and just, this study reveals that youth probation conditions can be drivers of incarceration. The fact that some jurisdictions make "obeying all laws" part of the required conditions demonstrates the far-reaching power and control of probation. A close examination of actual conditions illustrates that probation seeks to regulate many aspects of a child's behavior, far beyond what is covered by the criminal law. This broadening in turn means that any violation of a condition can result in a custodial sentence. This can happen when a violation is substantive (a new crime) or a technical (violation of a specific condition).[263] To avoid the threat of incarceration, a child has to follow all the rules of probation and not just be deterred from committing an act.

The use of vague and moralistic standards raises complex questions about who is setting these standards and how consistently (or not) they are enforced. Who defines "good behavior"? Who decides which crimes are "violent"?[264] Are there any race and class implications?[265] While these philosophical questions are beyond the scope of this Article, they underlie the very existence and standard of conditions regulating behavior.[266]

These questions also become relevant when considering the immense power of a probation officer in the youth's life. Scholars have reported that the relationship between a youth and a probation officer is critical to a successful outcome.[267] A youth probation officer is essentially afforded free reign to regulate a youth's life. First, they have some discretion with setting conditions; in almost all jurisdictions, probation officers are responsible for determining which conditions apply—they check the boxes. Here, they get to determine who is safe and unsafe for a youth to visit. While there are occasionally standard statutory conditions, probation officers have an outsized role in the child's life. Then, after setting the conditions, they can make unannounced visits to a child's home, school, or social setting. They can sanction a child for any behavior they deem inappropriate while also asking intrusive questions as they deem appropriate. See examples below of various types of conditions that suggest the far reach of YPOs.

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[263] To prove a violation, the evidentiary standards are very low. *See* Klingele, *supra* note 64, at 1040 n.24. ("The rules of evidence do not ordinarily apply at such hearings, and the state's burden of proof is usually set at a preponderance of the evidence standard.").

[264] *See generally* SKLANKSY, *supra* note 157, at 6 (examining the underlying beliefs of which crimes are "violent" and suggesting these beliefs which dictate our criminal justice system are political and not eternal truths).

[265] *Id.* at 155 ("Children and adolescents of color, particularly when they are implicated in acts of violence, are far more likely than white youth to forfeit their status a minors.").

[266] Doherty, *supra* note 7, at 296.

[267] *See* Adam D. Fine, Erika Fountain & Sarah Vidal, *Juveniles' Beliefs About and Perceptions of Probation Predict Technical Violations and Delinquency*, 25 PSYCH., PUB. POL'Y & L. 116, 120 (2019) ("study suggests that youth's perceptions of the role of probation may affect their *responsivity*.").

1. Follow the Law Conditions

San Francisco, California Condition 1: Obey all laws.[268]

Cook County, Illinois Condition 1: You are to refrain from violating any local, state, federal, or county laws. This includes traffic violations, curfew violations, drinking alcoholic beverages, or using illegal drugs.[269]

New York (state) (not numbered): Abstain from any act which if done by an adult would constitute a crime.[270]

Campbell County, Wyoming Condition 1: I will obey all Court Orders. I will obey all Municipal, County, State, and Federal laws. I will report all contact with Law Enforcement within twenty-four (24) hours, even if I do not receive a citation.[271]

Washington (state) Condition 4.14.A. The Respondent is ordered to refrain from committing new offenses.[272]

At the same time, courts continue to impose patriarchal standards that border on moralistic standards from the Progressive Era. This is likely borrowed from adult probation which has not modified its standard conditions since the 1970s when there was a public assault on the progressive policies in the criminal justice system.[273] This is particularly intrusive for youth who may already feel alienated from society. More significantly, unlike adults, youth face conditions that are essentially status offenses—criminal charges that are levied on youth by virtue of their age. Examples include: refusing to obey their parents, skipping school, running away, or experimenting with alcohol. These "offenses" are criminalized solely because of the age of the people engaged in them, merely because they are teenagers.[274]

2. "Be Good People" [275]

Los Angeles, California Condition 2: You must obey the rules of your Parents, Caregivers, Teachers, School Officials, and Children's Services Workers.[276]

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[268] Terms and Conditions, Juvenile Justice Center, County of San Francisco, Superior Court of California.

[269] Terms and Conditions of Probation (Supervision), Circuit Court of Cook County, Illinois.

[270] Form 3-11a (Juvenile Delinquency—Order Directing Release of Respondent with Conditions), Family Court of the State of New York.

[271] Juvenile Probation Terms and Conditions, Campbell County, Wyoming.

[272] Order on Adjudication and Disposition, Juvenile Court, Superior Court of Washington.

[273] Doherty, *supra* note 7, at 345–46.

[274] Wolfe, *supra* note 256.

[275] Doherty, *supra* note 7, at 295.

[276] Minute Order—Conditions of Probation, County of Los Angeles Juvenile Court, Superior Court of California.

Fulton County, Georgia (not numbered): Follow the rules of your parent/guardian and the rules of your home: do your chores when asked, come home on time, don't leave home unless you have permission, don't hang around folks your parent doesn't approve of.[277]

Campbell, Wyoming Condition 20: CORRECTIVE THINKING GROUP: I will participate in, and successfully complete, the Corrective Thinking Group at the Juvenile Probation Office as directed.[278]

South Dakota (state) Condition 1: General Behavior: a. You must obey all laws. b. You must keep your parent/guardian informed of your whereabouts at all times.[279]

West Virginia Condition 6: You must answer truthfully the questions asked by your probation officer.[280]

Washington (state) Condition 4.14.N: Respondent shall not knowingly associate with any person, adult or juvenile, who is under the supervision of any court of this or any other state for any juvenile offense or crime.[281]

Scholars have opined about the widening role of prosecutors and police to regulate behavior given the broad nature of criminal statutes and discretion afforded to them.[282] This power is magnified and a systemic feature of probation. The language of youth probation standards essentially deputizes probation officers into lawmaker status, perhaps even more so than police officers who are still bound by constitutional limitations.[283] A sampling of conditions reveals the far reach of their power to intrude into the everyday lives of young people.

3. We Control You Conditions

Los Angeles, California Condition 19: You must give a sample of your urine to test for drugs or alcohol whenever asked.[284]

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[277] Order of Adjudication/Disposition Child Placed on Probation or Trial Release, Juvenile Court, Fulton County, Georgia.

[278] Juvenile Probation Terms and Conditions, Campbell County, Wyoming.

[279] Order of Conditions of Juvenile Probation, UJS 420, Court Services Department, Juvenile Division, State of South Dakota.

[280] Standard Conditions of Probation and Supervised Release, U.S. District Court, Northern District of West Virginia.

[281] Order on Adjudication and Disposition, Juvenile Court, Superior Court of Washington.

[282] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 528, 539 (2001); *see also* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION, at xxv (2019).

[283] *See generally* Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 HARV. L. REV. 471, 529 (2018).

[284] Minute Order—Conditions of Probation, County of Los Angeles Juvenile Court, Superior Court of California.

Los Angeles, California Condition 39: You are ordered to submit to AIDS testing per PC 1202.1.[285]

Orange County, California Condition 18: Submit your person, residence and property to search and seizure by any peace officer/probation officer/authorized school official at any time of day or night, with or without a warrant, probable cause or reasonable suspicion.[286]

San Francisco, California Condition 30: Submit all electronic devices under your control to a search of any text messages, voicemail messages, call logs, photographs, email accounts and social media accounts, or other content, with or without a warrant, at any time of the day or night, and provide the probation officer, or peace officer with any passwords necessary to access the information specified below.[287]

Washington (state) Condition 4.14.G: Respondent shall *not use or possess firearms, ammunition, or other dangerous weapons* during this period of community supervision. The probation counselor is authorized to search Respondent and items carried or controlled by Respondent at scheduled appointments and other reasonable times, and may specify in writing further details of this prohibition.[288]

San Francisco, California Condition 13: Wear a continuous alcohol monitoring ("CAM") ankle monitor and follow the CAM rules given to you by the Probation Department.[289]

Kentucky (state) Condition 3: You are required to be home at certain times. This is called a curfew. Your curfew is _____ Sunday thru Thursday and _____ Friday and Saturday. Once you get home, you will remain at home until 6:00 a.m. the following morning. Changes to curfew times are documented below by change in time, date of change, and youth/parent initials.[290]

Iosco, Michigan Condition 5: The minor is to strictly observe the 7:00 p.m. to 7:00 a.m. curfew as imposed by this Court, except for supervised school or youth activities. If the minor is employed, he or she shall have a 1/2 hour

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[285] *Id.*

[286] Terms and Conditions of Probation, Juvenile Court of Orange County, California, F057-5030.16.

[287] Terms and Conditions, Juvenile Justice Center, County of San Francisco, Superior Court of California.

[288] Order on Adjudication and Disposition, Juvenile Court, Superior Court of Washington.

[289] Terms and Conditions, Juvenile Justice Center, County of San Francisco, Superior Court of California.

[290] Conditions of Probation for Public Offenders, Kentucky Department of Juvenile Justice, DJJ 6-018.

> leeway each way to and from work. In the event the minor's grades fall below a C average, the curfew shall be 5:00 p.m. to 7:00 a.m.[291]

Finally, the burden on families who have children under probation supervision is high as well. Evelyn Canal, a young girl once on probation in Alameda County Juvenile Hall (and now a 20-year-old college student), recalled the burden her family faced each time she was scheduled to report in from Oakland: "It was hard for my dad to drive me," Evelyn explained, "and you have to remember some families don't even have cars."[292]

In addition, some specific conditions cause long-term harm to both the youth and the family. In 2017, the Department of Justice recognized the harm that can result from fees[293] and there has been a national call for the department to end youth system fees and fines altogether.[294] Nevertheless, several probation conditions require fees as part of the conditions, demonstrating how probation powers have far surpassed that of police.

4. Punish Your Family Conditions

> **Los Angeles, California Condition 31**: Your parents/caregivers must participate in a Parent Education program; Anti-gang Violence Program; Other _____.[295]

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[291] Terms of Probation, Iosco County Family Court, Michigan.

[292] Katarina Sayally, *California Bill Limiting Youth Probation Will Be Considered Next Year*, IMPRINT (Sept. 17, 2021 1:13 PM), https://imprintnews.org/youth-voice/california-bill-limiting-youth-probation-will-be-considered-next-year/58859.

[293] *See generally* OFF. FOR C.R., U.S. DEP'T OF JUSTICE, ADVISORY FOR RECIPIENTS OF FINANCIAL ASSISTANCE FOR THE U.S DEPARTMENT OF JUSTICE ON LEVYING FINES AND FEES 1, 10 (2017), https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/documents/AdvisoryJuvFinesFees.pdf (highlighting the legal and practical harms that can result from the imposition of fees and fines and offered recommendations to ensure the imposition of fees and fines on youth aligned with federal law and the youth justice system's rehabilitative goals). This letter was unfortunately rescinded by Attorney General Jeff Sessions later that same year. Lisa Foster, Opinion, *Jeff Sessions Has Endorsed an Unconstitutional Fine on the Poor*, WASH. POST (Jan. 9, 2018), https://www.washingtonpost.com/opinions/jeff-sessions-just-endorsed-an-unconstitutional-fine-on-the-poor/2018/01/09/87ccffc6-f268-11e7-97bf-bba379b809ab_story.html. Subsequently, a Dear Colleague letter was issued by the Department of Justice. Letter from Vanita Gupta, Principal Deputy Assistant Att'y Gen., & Lisa Foster, Dir., Off. for Access to Just., to Colleague 2 (Mar. 14, 2016), https://finesandfeesjusticecenter.org/content/uploads/2018/11/Dear-Colleague-letter.pdf.

[294] Press Release, Katy Otto, Juv. L. Ctr., More than 180 Organizations Sign on to Letter Urging Department of Justice to Reissue and Update Advisory to Eliminate Juvenile Fees and Fines (June 8, 2021), https://jlc.org/news/more-200-organizations-sign-letter-urging-department-justice-reissue-and-update-advisory.

[295] Minute Order—Conditions of Probation, County of Los Angeles Juvenile Court, Superior Court of California.

Cook County, Illinois (not numbered): You are required to pay a probation fee of $_____ each month, payable through the Clerk of the Circuit Court (Total fee of $_____).[296]

In many ways then, for violations of probation that do not lead to court-based hearings where judges determine whether a violation has occurred, probation officers assume the roles of the investigator, prosecutor, and judge of the youth.[297] In this role, the probation officer has an opportunity to be a driver of incarceration or in the alternative, to offer a youth an off-ramp by way of meaningful services. The multiple roles of the youth probation officer deserve careful study and legal scrutiny.

B. Abolish and Reimagine

It is worth noting that contemporary studies have demonstrated that youth probation conditions are outdated and ineffective and yet the practice continues.[298] This, in turn, begs the question, how do we fix the systemic issues with youth probation? An exhaustive examination of the theory of abolition and its various critiques is beyond the scope of this Article.[299] However, for this final Part of the Article, I focus on the reform horizon and efforts to defund and reimagine youth probation efforts. Here I apply the same context described by scholar Amna Akbar, who examines the historical, material, and ideological critiques of abolition and creates a framework for understanding the fundamental problems with policing.[300] She suggests: "[P]olicing is not broken, but working in ways that reflect and extend the status quo social relations. [Theory and critiques] give context for why abolitionist campaigns focus not on fixing and relegitimizing the police, but on defunding, dismantling, and delegitimizing it."[301]

This same context is at play for youth probation. Reform efforts are underway, and while this Section is not exhaustive of the various efforts underway in this area, a few specific jurisdictions are worth highlighting as they seek to address the exact failures of the failure to apply a developmental lens to youth probation. Relying on Akbar's framework, I modify it slightly for youth probation by suggesting that reform efforts fall into two broad categories: (1) Defund/Reform, and (2) Abolish

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[296] Terms and Conditions of Probation (Supervision), Circuit Court of Cook County, Illinois.

[297] Doherty, *supra* note 7, at 347.

[298] NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, *supra* note 28, at 89.

[299] For a brilliant analysis on abolition, see MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 2–5 (2021).

[300] Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1824 (2020).

[301] *Id.* at 1824–25.

and Reimagine. Each category is briefly described broadly, followed by a short analysis of the current backdrop of reform before concluding.

1. Defund/Reform

Defund/Reform: the term "defund" caught fire in the last few years surrounding protests and uprisings in response to allegations of police use of excessive force against individuals, particularly Black men, women, and children, although the call for reform can be traced much farther back.[302] The working use of this definition applicable here suggests that defund, by definition, suggests reform: a shrinking or reallocation of funding within a department allows for more efficient use of funds.

Of the 325 conditions reviewed, three jurisdictions stood out in terms of the positive language they employed or the number of conditions:

> **New York, New York**: six conditions but more in line with best practices because they are few in number, contain simple conditions (despite difficulty reading level), and contain directive language. For example: "Attend school regularly."[303]
>
> **New Mexico (state)**: six conditions, a section for tailored conditions, language that is child friendly and a preamble that suggests empowering youth. For example: "I will participate in developing a plan of care that will help support my success on probation and I have the ability to earn early release."[304]
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> **Fulton County, Georgia**: while large in number with 19 conditions, probation conditions are simple in language and seem appropriately drafted for a child's understanding. For example:
>
> > Go to school like you are supposed to. Go to all of your classes on time. Do your work and if you don't understand the work, ASK QUESTIONS. Respect your teachers, administrators and classmates. Follow the rules of the school. Make sure you know your grades and if you are on track to graduate on time.[305]

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[302] Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html ("I've been advocating for the abolition of the police for years. . . . here's an immediate demand we can all make: Cut the number of police in half and cut their budget in half."); *see also* Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOS. REV. (Aug. 1, 2017), https://bostonreview.net/articles/tracey-l-meares-public-good-gone-bad ("[P]olicing as we know it must be abolished before it can be transformed.").

[303] Form 3-11a (Juvenile Delinquency—Order Directing Release of Respondent with Conditions), Family Court of the State of New York.

[304] Probation Agreement and Order, State of New Mexico.

[305] Order of Adjudication/Disposition Child Placed on Probation or Trial Release, Juvenile Court, Fulton County, Georgia.

a. Pierce County, Washington

Pierce County, Washington: this model suggests a reallocation of funding from more punitive treatment to one focused on the ideals laid out in the NCJFC 2017 resolution which represents a "paradigm shift"[306] affirming changes that:

> Modernize juvenile probation approaches to incorporate knowledge on adolescent development and behavioral decision making will (1) help youths understand, appreciate, and remember their probation requirements; (2) emphasize short-term, positive outcomes for probation compliant behaviors; (3) deliver sanctions for noncompliant behaviors in ways that enable youths to learn from their mistakes and modify their behaviors in the future; and (4) promote affiliation with positive peers.[307]

Pierce County youth probation reformers developed Opportunity-Based-Probation (OBP),[308] an incentive- and opportunity-based model, which was developed for moderate-and high-risk youth and operationalized with a partnership between the juvenile court, University of Washington Department of Psychiatry and Behavioral Sciences, and the Center for Study & Advancement of Justice Effectiveness (SAJE Center) (a collaboration among Washington universities and the Washington State Center for Court Research). The OBP model integrates new practices within the four phases of typical probation: pretrial, assessment, case planning, and supervision. The new practices reflect guideline principles around: (1) family engagement, (2) structured goal setting, (3) rewards, and (4) positive principles around youth development.

This reformed probation system has a few relevant components highlighting the application of adolescent development tenants examined in this Article:

- Youth probation officers are called "juvenile probation counselors" indicating perhaps through semantics that the probation officer is a "counselor" or "helper" versus an "officer." In some jurisdictions, the role of the youth probation officer and youth counselor are similar; in other places, it varies.[309]

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[306] Naomi E. S. Goldstein, Elizabeth Gale-Bentz, Jeanne McPhee, Amanda NeMoyer, Sarah Walker, Steve Bishop, Mark Soler, Jason Szanyi & Robert G. Schwartz, *Applying the National Council of Juvenile and Family Court Judges' Resolution to Juvenile Probation Reform*, 5 TRANSLATIONAL ISSUES PSYCH. SCI. 170, 171 (2019); *see also* Cosgrove & Miller, *supra* note 180; Stern, *supra* note 198.

[307] NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, RESOLUTION REGARDING JUVENILE PROBATION AND ADOLESCENT DEVELOPMENT 2 (2017).

[308] *See* PIERCE CNTY. JUV. CT., OPPORTUNITY-BASED PROBATION 1 (2022), https://www.co.pierce.wa.us/DocumentCenter/View/66072/Opportunity-Based-Probation.

[309] "In certain states or other jurisdictions, juvenile probation counselors perform the same duties as their counterparts specializing in juvenile probation. In some jurisdictions, they have different responsibilities." This varies by locale. *Juvenile Probation Counselor Career, Job, Degrees*

- There are no standardized conditions or forms but rather the probation counselors tailor probation to each youth with a case plan, an individualized treatment plan based on the risk/need assessment.
- Probation conditions focus on "building skills to avoid re-arrest and are broken into 1-3 concrete action steps each week."[310]
- Graduated responses are utilized: as youth are successful with goals, the JPC begins to expect slightly more of the youth and reaching certain benchmarks allows youth to earn points to be released early.
- Parental involvement: the JPC works with the caregiver to determine reasonable expectations and monitor compliance. Reaching a specific benchmark of earned points also allows the youth to earn early time off from probation.

b. New York

In New York, the transformation of youth probation has been underway for over ten years and has been a true transformation of the entire process from the inside out. While this summary does not fully capture the full extent of this change, it highlights what is possible when there is true systemic reform:

- Complete transformation of probation conditions—limited in number (5–6 total).
- Post-adjudication probation leveling with limited contact between the probation officer and youth (based on levels).[311]
- New York reformers have been deliberate in creating a culture among probation officers and have tried to ensure that their ideal probation officer "loves kids."
- Counseling philosophy is one where probation officers serve as a "coach" versus a "referee." In other words, the success of the youth is tied to that of the probation officer as opposed to someone who merely monitors youth and penalized them for violations.[312]

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and Training Information, CRIM. JUST. PROFILES, https://www.criminaljusticeprofiles.org/juvenile-probation-counselor.html (Feb. 3, 2015).

[310] CTR. FOR STUDY & ADVANCEMENT JUST. EFFECTIVENESS, OPPORTUNITY-BASED PROBATION (OBP): A BRIEF REPORT (2019), https://static1.squarespace.com/static/5935ee95893fc011586f1304/t/5de8007ec172cb20cebf2aab/1575485567786/OBP+report+10.9.2019.pdf ("The JPC then meets with the youth and caregiver again to hold a case planning meeting where they review the results of the risk/needs assessment and caregiver meeting. This information is used to develop goals in three areas: probation goals, responsibility goals, and life goals. Probation goals focus on building skills to avoid re-arrest and are broken into 1-3 concrete action steps each week.").

[311] NYC Probation Slides and notes of author's conversations with New York Probation Commissioner Bermudez (on file with author).

[312] *Id.*

- Ideal tenants of their reform efforts include a focus on diversion, managing youth and probation success based on carefully documented data, and ensuring small caseloads (to allow for in-depth work with youth one-on-one).
- Utilization of "credible messengers" through The Advocate, Intervene, Mentor (AIM) program—an alternative to placement program serving "high-risk adolescents, ages 13 to 18, who are under probation supervision by the New York City Department of Probation."[313]

2. Abolish/Reimagine

Abolish/Reimagine—for the purpose of categorizing forward-looking probation efforts, I invoke a definition of "abolish" from scholar and author Mariame Kaba who writes:

> [A]bolition is a vision of a restructured society in a world where we have everything we need: food, shelter, education, health, art, beauty, clean water, and more things that are foundation to our personal and community safety.
>
> . . . .
>
> . . . [A]bolition is a positive project that focuses, in part, on building a society where it is possible to address harm without relying on structural forms of oppression or the violent systems that increase it.[314]

a. Los Angeles, California

In Los Angeles, two recent promising developments and one setback are reflective of efforts to both limit the footprint of probation and abolish it. First, a state bill, Assembly Bill 503[315] was introduced—but not yet passed—earlier in 2021. It reduces youth probation conditions to developmentally appropriate levels and is dubbed by advocates as "The End Endless Probation Act."[316] The Bill requires formal court "status reviews" every six months; this ensures supportive services reach young people as soon as possible. The primary goal of this reform is to prevent the tendency of youth to re-offend by violating probation conditions beyond the scope of the original probation order and to ensure the needs of youth are tailored.

Furthermore, regular six-month check-ins help ensure young people are connected to supportive services. Data supporting this bill demonstrated a wide variance among the average length a youth was on probation ranging from 6 months

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[313] LINDSEY CRAMER, MATHEW LYNCH, MICAELA LIPMAN, LILLY YU & NAN MARIE ASTONE, URB. INST., EVALUATION REPORT ON NEW YORK CITY'S ADVOCATE, INTERVENE, MENTOR PROGRAM, at ix (Oct. 2018), https://www.urban.org/research/publication/evaluation-report-nycs-advocate-intervene-mentor-program.

[314] KABA, *supra* note 299, at 2.

[315] Assemb. B. 503, 2021–22 Reg. Sess. (Cal. 2021).

[316] Sayally, *supra* note 292. *See generally* GOZANI ET AL., *supra* note 23.

to nearly 30 months.[317] Moreover, the racial disparities were jarring: Black youth were nearly nine times as likely to be placed on probation compared with white youth, and Latinx youth are more than twice as likely.[318] The Bill was met with some resistance from the District Attorney's Association and will be taken up again in 2022.[319]

Second, nearly two years ago, the Los Angeles County Board of Supervisors had a vote of no-confidence in Los Angeles County Probation, the largest youth justice system in the country.[320] As a result, they tasked a stakeholder body to designate an alternative "care-first youth justice system" to assume responsibility over court-involved youth in lieu of probation.[321] Patricia Soung, a leader and member of the Youth Justice Workshop in Los Angeles writes that the task to "propose an altogether-new system to replace juvenile probation is perhaps the largest scale youth justice reform so far in the country."[322] While the outcome of the reform is to be determined, early signs indicate that reform will not occur easily.[323]

Finally, a recent setback reveals the challenges of reforming a large bureaucratic system: the California Board of State and Community Corrections unanimously declared that two of the juvenile halls in Los Angeles County run by the County Probation Department are "unsuitable to house young people" giving the county a restricted time limit to address the safety needs.[324]

Nevertheless, reform is possible as we consider the historic moment we are in today given our global pandemic. In our unique COVID-19 pandemic world, admission to youth facilities dropped by half from the beginning of March to the end of April 2020.[325] At this moment, youth justice experts are suggesting that this is a reform moment to rethink our entire system. Vincent Schiraldi, former Probation Commissioner in New York and Co-Director of the Columbia Justice Lab, urges justice systems across the nation to reevaluate whether youth should even be on probation in the first place: "If we didn't exist, would you invent us? Or would

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317 GOZANI ET AL., *supra* note 23, at 9.

318 *Id.* at 3.

319 Sayally, *supra* note 292; ASSEMB. COMM. ON PUB. SAFETY, 2021–2022 REG. SESS., AB-503 BILL ANALYSIS, 8–9 (Comm. Print) (Cal. 2021).

320 W. HAYWOOD BURNS INST., *supra* note 178, at 18, 24.

321 Soung, *supra* note 19, at 588–89.

322 *Id.*

323 Editorial, *L.A. County Supervisors, Don't Stray from Solid Juvenile Justice Goals*, L.A. TIMES (Sept. 15, 2021, 3:15 AM), https://www.latimes.com/opinion/story/2021-09-15/recommit-to-juvenile-justice-reform ("If the L.A. Model and Youth Justice Reimagined are to have a real chance to move forward, a good chunk of the budget—and perhaps some positions in the Probation Department—will have to be transferred.").

324 Cosgrove & Miller, *supra* note 180.

325 Stern, *supra* note 198.

you pay churches, pay nonprofit organizations, pay credible messengers[326] in your community to provide some level of support and services, without inventing probation?"[327]

The increase in savings from the pandemic provides an opportunity for jurisdictions to reallocate the money. Some have suggested these funds be funneled into community-based programs. David Muhammed, Executive Director of the National Institute for Criminal Justice Reform, suggested recently that we are in a moment to rethink probation: "'We should rewrite the position of a probation officer,' Muhammad said. Their main responsibility would be to connect with high-risk incarcerated youth who are left in the youth system once the 'low-risk' population is reduced."[328]

In other words, probation would be left for those with serious charges and all others would be diverted. This is in tune with what scholar Fiona Doherty suggests for reform to adult probation: shrinking the footprint of probation, increasing protections for those on probation, eliminating technical violations, providing treatment outside of the criminal justice system, restructuring probation terms to promote success, minimizing harm, and advancing racial equity.[329] I echo Doherty's suggestions and only add an adolescent framework to the analysis to ensure harm is minimized.

CONCLUSION

Youth probation is, by far, the most commonly imposed alternative to detention for youth in the youth criminal system in the United States, with nearly a quarter of a million youth under supervision. And yet, the critical analysis that has been applied to youth detention and incarceration has, for the most part, avoided the subject of probation entirely.

In this Article, I examine the standard conditions of probation in 17 different U.S. jurisdictions including the five most populous jurisdictions. Analyzing the details of these conditions is important because the extent of the state's authority to control and punish probationers depends on the substance of the conditions imposed.

Based on the results of my analysis, I argue that the standard youth probation conditions lack an adolescent lens and, in turn, harm youth more than help them. Moreover, youth probation officers wield enormous discretionary power that is often unseen. As a result, youth probation is a form of supervision that sets youth up for failure and has become a driver of incarceration. I also conclude that,

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[326] Credible messengers or adults who themselves have had direct experience in the criminal justice system have been found to be most effective in helping transform youth.

[327] Fitzgerald, *supra* note 194.

[328] Stern, *supra* note 198.

[329] Doherty, *supra* note 12.

although youth probation is often invoked as a diversion for youth avoiding systemic detention, it should instead be analyzed as part of the web of incarceration that criminalizes our most vulnerable youth who often are poor and youth of color. Thus, this process of surveillance deserves to be scrutinized in a manner commensurate with its dominant role in the U.S. youth criminal justice system. And as long as we continue to rely on criminal justice tools such as standard probation conditions to support the healing and rehabilitation of young people—"the ultimate key to community safety"[330]—any effort to reform youth probation or shrink its footprint is likely to continue to serve as a net widener, sweeping youth deeper into our carceral state.

[330] Soung, *supra* note 19, at 591.