NOTE

Aim Higher: Expanding Procedural Protections at Intake for California Youth

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SB 203 and SB 395, passed in 2017 and 2020 respectively, amended section 625.6 of the California Welfare and Institutions Code to require attorney consultations for all youth in California prior to custodial interrogation and before waiving their Miranda *rights. These bills made California one of only two states in the country that require an attorney consultation before a* Miranda *waiver for youth fifteen years or younger, and they undoubtedly represent progress in reforming California's punitive juvenile legal system. Both SB 203 and SB 395, however, contain a gaping loophole; they exclude interviews with probation officers under section 628. Probation officers' virtually unlimited discretion in conducting these interviews, when combined with weak use immunity for youths' statements made during the interview and judicial discretion at disposition, expose youth to a heightened risk of self-incrimination, system involvement, and harsher dispositions. Why would these two pieces of historic legislation leave an exception that threatens the rule, and how can it be fixed?*

This Note aims to answer that question by exploring the ideological and historical origins of juvenile courts, probation officers, and procedural

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protections for young people. Then, the Note compares protections for young people and adults to find legal justifications for shifting the scope, role, and impact of probation officers in the juvenile legal system. Finally, the Note provides concrete solutions for closing the loophole — the most obvious of which is new legislation.

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INTRODUCTION

When SB 395 became California law in 2017, it was immediately lauded as a first-of-its-kind protection for the procedural rights of children during interactions with the juvenile legal system.[1] The bill, codified in section 625.6 of the Welfare and Institutions Code, mandated attorney consultations for youth fifteen years or younger "prior to a custodial interrogation and before waiving any [*Miranda*] rights," and prohibited waiver of the consultation.[2] The reform made California one of only two states in the country that require an attorney consultation before a *Miranda* waiver for youth fifteen years or younger.[3] On September 30, 2020, Governor Gavin Newsom signed SB 203 into law,[4] expanding these protections to all California youth by raising the age of coverage to seventeen years or younger.[5] As other jurisdictions look to pass similar legislation, California appears to be on the cutting edge of juvenile legal reform.[6]

But there is a catch. Both pieces of landmark legislation relieve probation officers of compliance with the new laws "in the normal performance of [their] duties under," *inter alia*, section 628 of the Welfare and Institutions Code.[7] The statute governs what is commonly known as a detention interview, which occurs after a youth has been

[1] *See What They're Saying About Criminal Justice Reform Legislation*, OFF. OF GOV. EDMUND G. BROWN JR. (Oct. 11, 2017), https://www.ca.gov/archive/gov39/2017/10/11/news20012/index.html [https://perma.cc/HCJ3-NQPC] ("[The bill is part of] the most enlightened package of criminal and juvenile justice reform bills in the nation.").

[2] S.B. 395, 2017–18 Leg., Reg. Sess. (Cal. 2017).

[3] Jeremy Loudenback, *California Bill Seeks Strengthened Miranda Rights for Minors*, IMPRINT (Aug. 5, 2020, 10:45 PM), https://imprintnews.org/justice/juvenile-justice-2/california-bill-seeks-strengthened-miranda-rights-for-minors/46324 [https://perma.cc/KN2H-MGM9].

[4] Samantha Solomon, *Reparations, Police Reform, Cannabis: Here Is What Governor Newsom Signed into Law on Last Day Bill-Signing Period*, ABC 10 (Oct. 1, 2020, 12:23 PM PDT), https://www.abc10.com/article/news/politics/newsom-signs-bills-last-day/103-2dcbe3eb-2ce8-4647-804c-2b5786d823d2 [https://perma.cc/HQE5-G6WN].

[5] S.B. 203, 2019–20 Leg., Reg. Sess. (Cal. 2020).

[6] *See* Loudenback, *supra* note 3 (noting that New York and King County, Washington are considering similar reforms). But see Darwin BondGraham, *Public Defender Accuses Oakland Police of Violating* Miranda *Law for Juveniles*, OAKLANDSIDE (Dec. 10, 2021), https://oaklandside.org/2021/12/10/alameda-public-defender-opd-juveniles-miranda/ [https://perma.cc/44ZE-XYJR], for an example of how the law is only as good as compliance with it. The Alameda County Public Defender's Office has reported that Oakland police officers are "circumventing the spirit of [SB 395]" by waiting for hours between the youth's mandated phone call with an attorney and interrogation, to the point that they are "able to wear down the young person . . . and it's more likely a child will waive their rights and make a statement." *Id.*

[7] CAL. WELF. & INST. CODE § 625.6(d) (2021).

taken into temporary custody by a peace officer, and wherein a probation officer "investigate[s] the circumstances of the minor and the facts surrounding [their] being taken into custody."[8] This Note argues that this loophole leaves youth at enormous risk of self-incrimination during the detention interview, counteracting the progress made by the legislation and strengthening a prosecutorial role for probation officers in the juvenile legal scheme.

Probation officers conduct detention interviews to determine whether the interviewed youth falls into one of the statutorily prescribed categories that justify detention.[9] The scope of the interview is therefore narrow under statute; in theory, officers should only need to ask questions relevant to those categories. In practice, however, courts have recognized almost-unlimited discretion in questioning,[10] tacitly permitting probation officers to ask questions about conduct underlying or collateral to arrest — a function more suited to police officers and prosecutors.[11] This latitude is authorized by the broader statutory mandate to "investigate the circumstances of the minor and the facts surrounding [their] being taken into custody,"[12] which widens the scope of the interview and allows officers to dig into the facts underlying the charge.

If the officer detains the youth on the belief that they fall into one of the prescribed categories, the officer must compose a detention report explaining their reasoning and any recommendations for further detention.[13] The report may therefore contain facts about the

[8] *Id.* § 628(a)(1).

[9] Those findings are that "continuance in the home is contrary to the minor's welfare," and that "continued detention of the minor" is necessary "for the protection of the person or property of another"; "[t]he minor is likely to flee the jurisdiction of the court"; or "[t]he minor has violated an order of the juvenile court." *Id.* § 628(a)(1), (a)(1)(a)-(c).

[10] *See* Alfredo A. v. Superior Ct., 865 P.2d 56, 61 (Cal. 1994) ("[The interview] is much broader in scope than a determination . . . of whether 'factual' probable cause exists."); *In re* Wayne H., 596 P.2d 1, 5 (Cal. 1979) ("[The] latitude given the probation officer in reaching a detention decision . . . [is] substantial.").

[11] *See* Tamar R. Birckhead, *Closing the Widening Net: The Rights of Juveniles at Intake*, 46 TEX. TECH. L. REV. 157, 170 (2013) (proposing that, "if the purpose of intake is not mere screening," the probation officer is, "in essence, functioning as a police officer . . . by imposing sanctions that compromise the child's liberty").

[12] WELF. & INST. § 628(a)(1).

[13] PACIFIC JUV. DEF. CTR., *Introduction to Juvenile Law – Philosophy and Overview of Court Process*, *in* RECOGNIZING YOUTH IN PRACTICE: JUVENILE DELINQUENCY DEFENSE 1, 2 (2017) (on file with author) (defining a detention report as "a report completed by the probation department detailing the reasons they detained a youth pending his/her court appearance").

underlying conduct or statements by the youth. Although statements made during the interview ("detention statements") are not admissible for findings of guilt,[14] they may be used for impeachment of inconsistent testimony,[15] the detention hearing (at which the court determines whether the child will remain in custody until the adjudicatory hearing), and disposition.[16] They may also be used as a basis for further investigation by prosecutors. Given this ripple effect, the detention interview can heavily influence the impact and outcomes of a child's interaction with the juvenile legal system.[17] The following hypothetical illustrates how, despite the new protections of SB 395 and SB 203, the mechanisms and effects of detention interviews can still put youth at enormous risk.

Suppose a 16-year-old youth, Sean, is arrested for possession of a firearm. The arresting officer takes Sean into temporary custody. Pursuant to section 625.6, as modified by SB 203, the officer Mirandizes Sean and facilitates his mandatory consultation with an attorney. After the consultation, Sean invokes his right to remain silent, saying nothing about the offense.

The officer then takes Sean to a probation officer pursuant to section 628. The probation officer Mirandizes Sean again, and then conducts the detention interview.[18] During the course of the detention interview, the probation officer asks Sean where he procured the weapon. Sean tells the officer everything, including that he got the gun from his 17-year-old friend William.[19] The probation officer then asks more

[14] *Wayne H.*, 596 P.2d at 5-6.

[15] People v. Humiston, 24 Cal. Rptr. 2d 515, 524 (Ct. App. 1993).

[16] There is no case law explicitly approving the admissibility of detention statements at disposition, but under section 725.5 of the Welfare and Institutions Code, judges have wide latitude to consider "the circumstances and gravity of the offense committed by the minor." WELF. & INST. CODE § 725.5 (2021). Courts have interpreted this statute to mean that "the court considers 'the broadest range of information' in determining how best to rehabilitate a minor and afford him adequate care." *In re* Robert H., 117 Cal. Rptr. 2d 899, 907 (Ct. App. 2002) (quoting *In re* Jimmy P., 58 Cal. Rptr. 2d 632, 635 (Ct. App. 1996)).

[17] *See* Birckhead, *supra* note 11, at 165 ("[T]he preliminary detention of juveniles is another front-end decision point that adversely impacts what happens to young people at intake and beyond."); Michael J. Leiber, *Race, Pre- and Postdetention, and Juvenile Justice Decision Making*, 59 CRIME & DELINQ. 396, 399 (2013) ("Studies have found that preadjudication detention affects outcomes at later stages and in particular judicial disposition.").

[18] See notes 83–86 and accompanying text for a fuller description of the probationary *Miranda* warning.

[19] Some may argue that, since Sean just consulted with an attorney during his interaction with the police officer, he fully understands his right to remain silent and

questions about Sean's friends, including questions about possible gang involvement. Sean never affirmatively says he is in a gang, but the probation officer notes his questions and Sean's answers in the detention report. The report is submitted to the court and made available to the District Attorney's office, which sends an investigator to talk to William.

At Sean's detention hearing, the judge determines, based on the detention report, that the fuzzy origins of the weapon and Sean's risk of gang involvement warrant further detention until his adjudication hearing, up to fifteen days.[20] Prohibited from entering the detention report into evidence at the adjudication hearing, the prosecution does not bring up Sean's possible gang involvement, but they do submit an inculpatory statement made by William to the District Attorney's investigator. The presiding judge determines that Sean committed the accused offense.

At disposition, the judge, considering all relevant materials including the original detention report, states that while she was on the fence as to whether Sean should return home on an ankle monitor or be placed at a locked facility, his possible gang involvement warrants the harsher disposition to remove him from "a dangerous environment." Sean is placed at a ranch or other "home-like" facility for a total of three months.[21]

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therefore, his subsequent statements to a probation officer are voluntary and consensual. This argument, however, discounts two factors. First, refusing to talk to a probation officer has important ramifications for the detention hearing and disposition — different ramifications than those resulting from a refusal to talk to police. *See infra* Part II.A.1. Second, children cannot possibly understand or weigh those ramifications without an opportunity to consult with an attorney. *Cf.* Sarah Vidal, Hayley Cleary, Jennifer Woolard & Jaime Michel, *Adolescents' Legal Socialization: Effects of Interrogation and* Miranda *Knowledge on Legitimacy, Cynicism, and Procedural Justice*, 15 YOUTH VIOLENCE & JUV. JUST. 419, 422 (2017) ("[E]ven if adolescents are able to understand the basic components of Miranda [warnings], research indicates they often have difficulty with Miranda appreciation — that is, grasping the relevance of the warnings to their own legal situation."). While some research has explored the impact of children's perception of probation officers on their outcomes in the juvenile legal system, it appears that little has been done on the relationship between that perception and interrogation. *See* Sarah Vidal & Jennifer Woolard, *Youth's Perceptions of Parental Support and Parental Knowledge as Moderators of the Association Between Youth-Probation Officer Relationship and Probation Non-compliance*, 46 J. YOUTH ADOLESCENCE 1452, 1453-55 (2017).

[20] *See* WELF. & INST. § 657(a)(1) (2021) (mandating adjudicatory hearings within fifteen days of detention for youth in custody).

[21] This hypothetical draws from the facts of In re *Robert H.*, 117 Cal. Rptr. 2d at 900-01, discussed *infra* Part I.B, and the hypothetical in John C. Lore III, *Pretrial Self-Incrimination in Juvenile Court: Why a Comprehensive Pretrial Privilege Is Needed to*

Sean's alleged gang involvement, which appeared *only* in the detention report, has now earned him nearly four months of incarceration without ever being proved in court.[22] Additionally, his statement about the origins of the gun has formed the basis for a possible delinquency case against William. Furthermore, if Sean admitted to any additional uncharged offenses during the detention interview, the District Attorney could file new charges against him after further investigation. If Sean had discussed any truancy from school, his statements could spur a dependency petition against his caregivers. Because of the exemption for section 628 interviews, these possible results are completely unaffected by the passage of SB 395 or SB 203.

Even a short period of incarceration comes at a cost for Sean. Custodial punishment is rife with risk factors that can impact youths' long-term cognitive functions, including stress, trauma, sleep deprivation, and "institutional violence exposure."[23] In a 2018 study of incarcerated teenagers, those factors led to a significant cognitive decline after only four months in custody.[24] Other studies have shown that "*any incarceration* during adolescence . . . is associated with worse general health, severe functional limitations, [and] stress-related illnesses."[25]

Given these enormous stakes, why are procedural protections not extended to an interview that heavily informs the juvenile justice system's impact on young people? Why do our courts and legislature not think it as necessary to shield young people from the possible risk

Protect Children and Enhance the Goal of Rehabilitation, 47 U. LOUISVILLE L. REV. 439, 439-40 (2009).

[22] Facts alluding to gang affiliation is just one type of information that can enter at intake and end up at disposition. Information about a youth's motivation can also come into play. *See* Lore III, *supra* note 21, at 439-40 (describing how a child's charge was elevated from simple to aggravated assault following a conversation with an intake counselor about her growing anger with her mother's boyfriend). So can information about a youth's mental health. *See* Aaron J. Curtis, *Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 GEO. L.J. 1251, 1268 (2014) (describing how *parens patriae* enables courts to prescribe out-of-home placements for children with mental illness, even if their original offense would not justify such a disposition); *see also infra* note 28 (describing how simple facts gathered at intake that are not immediately relevant to the charge can come into play at disposition); *infra* notes 29–30 (describing the same).

[23] Rebecca Umbach, Adrian Raine & Noelle R. Leonard, *Cognitive Decline as a Result of Incarceration and the Effects of a CBT/MT Intervention: A Cluster-Randomized Controlled Trial*, 45 CRIM. JUST. & BEHAV. 31, 35 (2018).

[24] *Id.* at 47.

[25] Elizabeth S. Barnert, Rebecca Dudovitz, Bergen B. Nelson, Tumaini R. Coker, Christopher Biely, Ning Li & Paul J. Chung, *How Does Incarcerating Young People Affect Their Adult Health Outcomes?*, 139 PEDIATRICS 1, 2 (2017) (emphasis added).

of fact-finding interactions with probation officers, when the ramifications of those interviews match or even dwarf those of interactions with police officers?

This Note argues that denying procedural protections to young people in section 628 interviews leaves them vulnerable to the very dangers against which SB 395 and SB 203 were meant to guard. Part I describes how competing historical values of the juvenile legal system gave rise to the unique role of probation officers and how the evolution of interrogation protections as applied to children leaves them vulnerable to questioning by probation officers. Part I then applies both of these historical trends to specific risks of the section 628 interview. Part II discusses illogical gaps between constitutional procedural protections for adults and children, and identifies constitutional and philosophical arguments for improved procedural protections at intake. Finally, Part III builds on those arguments to identify legislative, judicial, and executive solutions extending or expanding the protections of SB 203 and SB 395 to section 628 interviews.

I. ROLES AND RISKS OF PROBATION

This Part provides the historical frameworks for thinking about the role and risk of probation officers in the juvenile legal system. Part I consists of three Sections. The first Section examines how the foundational principle of *parens patriae* left children vulnerable to the power of the state and how procedural protections aimed at counteracting that vulnerability glossed over, either inadvertently or purposefully, threats posed by probation officers. The second Section recounts the evolution of procedural protections during interrogation for adults and youth, and their applications to probationary interviews. Finally, the third Section identifies vulnerabilities in modern probationary interviews resulting from these historical frameworks and discusses the implications of these vulnerabilities.

A. Historical Frameworks: Parens Patriae

The history of juvenile courts has largely informed the peculiar role of probation officers within the juvenile legal system. The first juvenile court was established in 1899 as an outgrowth of broader social reform movements to "save," rather than punish, errant children.[26] This

[26] Comment, *The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution to a Due Process Dilemma*, 132 U. PA. L. REV. 95, 98 (1983) [hereinafter *Principled Solution*].

attitude marked the American institutionalization of the ancient common law doctrine of *parens patriae*.[27] *Parens patriae* refers to the state's role as "sovereign and guardian of . . . juveniles"[28] and formed the philosophical basis for a "nonadversarial, informal" courtroom, where a "fatherly family court judge was to determine each child's individual needs and then prescribe the best remedy."[29]

However, courts found that the informality and unfettered discretion of *parens patriae* was not "providing an adequate remedy in practice."[30] Children were receiving neither the rehabilitation promised by *parens patriae* nor sufficient legal protections.[31] Beginning in the mid-1960s, the Supreme Court increasingly recognized constitutional rights in adjudicative court proceedings, transforming the juvenile legal system from unregimented paternalism to something more closely resembling the adult criminal legal system.[32] Increased protections included a right to due process;[33] the rights to notification of charges, counsel, confrontation, and privilege against self-incrimination;[34] and proof beyond a reasonable doubt for a finding of guilt.[35] Additional cases nationwide defined protections in the pre-adjudication detention hearing.[36] However, the Supreme Court has declined to provide children in the juvenile legal system with a full kit of procedural rights,

[27] Claudia Worrell, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the* Parens Patriae *Doctrine*, 95 YALE L.J. 174, 176 n.8 (1985).

[28] *Id.*

[29] *Principled Solution*, *supra* note 26, at 98-99.

[30] *Id.* at 99.

[31] William H. Ralston, Jr., *Intake: Informal Disposition or Adversary Proceeding?*, 17 CRIME & DELINQ. 160, 160 (1971).

[32] *See Principled Solution*, *supra* note 26, at 99-100.

[33] Kent v. United States, 383 U.S. 541, 562 (1966).

[34] *In re* Gault, 387 U.S. 1, 31-57 (1967).

[35] *In re* Winship, 397 U.S. 358, 368 (1970) (holding that the Fourteenth Amendment requires proof beyond a reasonable doubt for youth as well as adults); *see also Principled Solution*, *supra* note 26, at 99-100 (placing *Kent*, *Gault*, and *Winship* in a line of cases "delineat[ing] the constitutional rights that attach to the adjudicative phase of juvenile court proceedings").

[36] *See, e.g.*, Kinney v. Lenon, 425 F.2d 209, 210 (9th Cir. 1970) (holding that pre-adjudication detention of a child is unconstitutional where his release is necessary to assist in his own defense); *In re* William M., 473 P.2d 737, 738 (Cal. 1970) (prohibiting "a rule that all juveniles accused of a specified type of offense should automatically be detained" as the basis of pre-adjudication detention); Commonwealth *ex rel.* Sprowal v. Hendrick, 265 A.2d 348, 349-50 (Pa. 1970) (requiring individualized findings supporting pre-adjudication detention); *see also Principled Solution*, *supra* note 26, at 101 (discussing successful challenges of pre-adjudication hearing procedures).

in part to preserve enough informality and flexibility "to permit the benefits of the juvenile system to operate."[37]

The Court found an outer boundary to procedural protections in *Schall v. Martin*,[38] where it declined to prohibit the use of pre-trial detention for youth, finding that detention served the "legitimate interests of protecting the child and society" and that the "existing procedural safeguards afforded by *Gault* were enough to protect against the unnecessary deprivation of liberty."[39] In *Schall*, the Court expressly recognized the State's continued *parens patriae* interest, and remarked on their efforts to "strike a balance" between the informality of that doctrine while ensuring due process.[40] Youth advocates at the time were surprised by this outcome, given the Court's decades-long trend of *increasing* procedural safeguards for young people,[41] but in retrospect, *Schall* is perhaps better characterized as a distinctive waypoint in the Court's continued dedication to maintaining distance between the juvenile and adult systems.[42]

The tension between *parens patriae* and due process outlasted *Schall*. Juvenile courts continue to reference *parens patriae* when they discuss the importance of discretion in their decision-making as compared to adult courts,[43] even as they increasingly recognize the importance of procedural protections for young people.[44] Courts are now in a sticky

[37] McKeiver v. Pennsylvania, 403 U.S. 528, 539, 545 (1971) (declining to extend the right to a jury trial to juveniles, partially on the basis that such an "imposition" would impair "the juvenile court's assumed ability to function in a unique manner").

[38] Schall v. Martin, 467 U.S. 253, 272 (1984); *see also* Jean Koh Peters, Schall v. Martin *and the Transformation of Judicial Precedent*, 31 B.C. L. REV. 641, 642-44 (1990).

[39] Hillela B. Simpson, *Parents Not* Parens*: Parental Rights Versus the State in the Pre-Trial Detention of Youth*, 41 N.Y.U. REV. L. & SOC. CHANGE 477, 487 (2017); *see also supra* note 34 and accompanying text describing the *Gault* holding.

[40] *Schall*, 467 U.S. at 263.

[41] Peters, *supra* note 38, at 643.

[42] *See* Nancy L. Fishman, *Reducing Juvenile Detention: Notes from an Experiment on Staten Island*, 56 N.Y.L. SCH. L. REV. 1475, 1481 n.19 (2012).

[43] For examples in the dependency context, see *In re* D.Y., 237 Cal. Rptr. 3d 654, 661 (2018) (rejecting an effort by youth and their grandmother to forestall termination of dependency because "restricting the trial court's discretion . . . at the behest of the legal guardian . . . would undermine the juvenile court's 'special responsibility to the child as *parens patriae*'" (quoting *In re* Chantal S., 51 Cal. Rptr. 2d 866, 869 (1996))); San Joaquin Cnty. Hum. Servs. Agency v. Marcus W., 110 Cal. Rptr. 3d 232, 235 (Ct. App. 2010) (showcasing a debate between counsels about whether California follows, in whole or in part, a "mature minor" doctrine enabling certain youths to make independent healthcare decisions. The county counsel argued specifically that such a doctrine runs counter to the state's "interest as *parens patriae*").

[44] *See* Robin Walker Sterling, *Fundamental Unfairness: In re* Gault *and the Road Not Taken*, 72 MD. L. REV. 607, 679 (2013) (describing *Gault*'s combination of *parens patriae*

position, attempting to reconcile *parens patriae* and due process, the youth and the state, even where those interests are "mutually exclusive."[45] The tension between "the purposes of rehabilitation and demands for procedural protections . . . and between idealistic hopes and realistic disappointments" has become a defining feature of juvenile courts.[46]

Probation officers are primary occupants of this confused territory.[47] They are recognized agents of *parens patriae*,[48] with few due process restraints on their interactions with youth. This position may be by design. It is more difficult to dispute the practice of granting broad discretion to probation officers in making detention determinations when that discretion is "motivated by the benevolence of the *parens patriae* philosophy."[49] Relatedly, it is also difficult to argue that young people should be afforded more procedural protections in probation interviews where absolute candor is deemed necessary for

and due process ideals as a "deficient prototype" forming the basis of the modern court system through a formulation of ideals rather than clear jurisprudence); Worrell, *supra* note 27, at 190 ("The 'benevolent' motives of the *parens patriae* doctrine presently function as the fallback justification for juvenile courts' actions, but the doctrine itself is the quintessential example of the overall confusion within the system.").

[45] Worrell, *supra* note 27, at 190.

[46] Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037, 1040-41 (1995); *cf.* Emily R. Mowry, *When Big Brother Becomes "Big Father": Examining the Continued Use of* Parens Patriae *in State Juvenile Delinquency Proceedings*, 124 DICK. L. REV. 499 (2020) (examining the tension between the Michigan Juvenile Code, rooted in *parens patriae*, and the juvenile courts' "lack of consistency" in applying the Juvenile Code). See generally *id.* at 504-19 for an excellent, and more in-depth, historical overview of the evolution of juvenile courts.

[47] *See* Danielle S. Rudes, Jill Vilgione & Faye S. Taxman, *Juvenile Probation Officers: How the Perception of Roles Affects Training Experiences for Evidence-Based Practice Implementation*, 75 FED. PROB. 3, 3 (2011) ("Within criminal justice settings, juvenile [probation officers] are the most likely justice actors to experience tensions between [the goals of punishment and rehabilitation] as they experience conflict between rehabilitating youthful offenders and ensuring community safety.").

[48] *See, e.g.*, *In re* Michael C., 579 P.2d 7, 10 (Cal. 1978) (describing a probation officer as a "figure who exercises the authority of the state as parens patriae and whose duty it is to implement the protective and rehabilitative powers of the juvenile court"); *In re* Harold E., No. H044085, 2017 WL 1953141, at *2 (Cal. Ct. App. May 11, 2017) (citing *In re* Frank V., 285 Cal. Rptr. 16, 22 (1991)) ("Acting as *parens patriae*, the juvenile probation officer is tasked with promoting and nurturing minor's rehabilitation."); Worrell, *supra* note 27, at 177 n.14 ("The *parens patriae* doctrine . . . may be exercised . . . [by] probation officers, depending upon the state.").

[49] Worrell, *supra* note 27, at 176-77.

rehabilitation.[50] By using *parens patriae* to justify potential infringements on due process by probation officers, and deferring to their discretionary judgment, courts can avoid the traditional balancing test between "the State's interest in detaining the juveniles against the juveniles' own interests in liberty."[51]

Despite this deference, courts realize that probation officers are not simply child advocates. In *Fare v. Michael C.*, the Supreme Court rejected the assertion that a child's request for their probation officer was akin to a request for a parent, and that consultation with the officer was analogous to consultation with an attorney.[52] In reply to the California Supreme Court's holding that the probation officer is a "trusted guardian figure who exercises the authority of the state as *parens patriae*,"[53] Justice Rehnquist quipped that many relationships of trust and understanding "would come to mind long before the probationer-probation officer relationship."[54] The Court found that, as an "employee of the State which seeks to prosecute the alleged offender," the probation officer will always owe a greater obligation to the government, and therefore cannot, and should not, be a "trusted guardian figure" to the child.[55]

As exemplified in *Michael C.*, a probation officer's allegiance to the child they serve must rationally give way to their professional duty to disclose information about the child to the state. But it can never go the other way around — their professional duty can never give way to allegiance. This highwire act threatens to sustain the Supreme Court's decades-old characterization of the juvenile legal system as "the worst of both worlds."[56] As originally conceived, *parens patriae* was a way to shield youths from the full power of the state in favor of their

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[50] *See* Donald E. McInnis, Shannon Cullen & Julia Schon, *The Evolution of Juvenile Justice from the Book of Leviticus to Parens Patriae: The Next Step After* In re Gault, 53 LOY. L.A. L. REV. 553, 570 (2020) ("Many are of the belief that, when juveniles confess to a criminal act, they are not incriminating themselves since no criminal conviction may result in juvenile court. . . . This is nothing more than a continuing belief in the practice of parens patriae when dealing with juveniles. . . . [T]he refusal to admit one's wrongs indicates that the child does not understand his or her antisocial behavior and needs further reform, which again is a reflection of the parens patriae theory.").

[51] Worrell, *supra* note 27, at 178, 190.

[52] Fare v. Michael C., 442 U.S. 707, 723-24 (1979).

[53] *Michael C.*, 579 P.2d at 10.

[54] Fare v. Michael C., 439 U.S. 1310, 1313 (1978).

[55] *Michael C.*, 442 U.S. at 714, 720.

[56] Kent v. United States, 383 U.S. 541, 556 (1966) ("[Youth receive] neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.").

rehabilitation.[57] As embodied in probation officers, however, *parens patriae* provides neither protection nor rehabilitation. Rather, the notion of *parens patriae* provides cover for the state to extract information without explicitly implicating due process, permitting courts to excuse themselves from calculating the balance of state and individual interests.[58] Framed this way, as long as probation officers are involved, the state will never owe children the same due process protections as adults.[59] It is this peculiar state of affairs that led family behavioral therapist and legal scholar Claudia Worrell to advocate for the abandonment of *parens patriae*, particularly for pretrial detention functions, and for the adoption of "an approach that keeps due process and caretaking concerns separate."[60]

Finally, *parens patriae* and its attendant discretion plays a significant part in the virulent racism, both historical and modern, of the juvenile legal system. In the early days of juvenile courts, the leniency and benefits of *parens patriae* only accrued to white children.[61] For Black children in the northern states prior to the Civil War, *parens patriae* meant exclusion from resources meant to rehabilitate their white counterparts, on the basis that Black children would "debase" and "degrade" these efforts.[62] When "houses of refuge" were eventually erected for Black children, the children were subjected to corporal punishment and manual labor.[63] In cities without separate facilities, Black children were sent to *adult prisons* rather than youth facilities for white children.[64] Houses of refuge in the southern states didn't come until after the Civil War and even then, the first and only facility, in Maryland, was little more than a venue for child slavery and trafficking, sending out Black youths to provide free domestic and agricultural labor.[65]

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[57] *See supra* Part I.A.

[58] *See* Worrell, *supra* note 27, at 181-82 (describing how the state uses *parens patriae* "to cover up a motive" unrelated to juveniles, like subjecting them to harsher detention statutes "to look like they are taking concrete measures to fight crime").

[59] *See id.* at 182 (describing pretrial detention statutes for juveniles as "much harsher" than those for adults).

[60] *Id.* at 191.

[61] Sterling, *supra* note 44, at 623.

[62] *Id.* at 623-24.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 625. See Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1510-14 (2012), for a fuller history of the relationship between racism and *parens patriae*.

Although its infrastructure has changed, the paternalism and discretion of the juvenile legal system maintains these racist roots.[66] With a wide reach and purview, there is evidence that probation officers "perpetuat[e] . . . the vast and continuing overrepresentation of youth of color" because of their "outsized" role in the juvenile legal system — a role that has continued to grow even as the system contracts and reforms.[67] Pre-detention processes involving probation present particular "risks of arbitrariness and implicit bias,"[68] driven by the sheer amount of discretionary decision-making that results, or does not, in charging and detaining a child.[69] In 2015, Black youth in California were 6.1 times more likely than white youth to be detained after arrest, up from 4.9 times more likely in 1997, even as the overall youth incarceration rate had declined.[70] These figures indicate that detention decisions made by probation officers may be a significant contributor to racial disparities in youth incarceration. Given the grave impact of those decisions, the section 628 detention interview deserves swift attention in the fight for reform.

[66] *See* Shaun A. Thomas, Stacy C. Moak & Jeffery T. Walker, *The Contingent Effect of Race in Juvenile Court Detention Decisions: The Role of Racial and Symbolic Threat*, 3 RACE & JUST. 239, 240-41 (2012) ("Guided by the principle of *parens patria* [sic], juvenile court practitioners have wide discretion in reaching a detention decision."); *id.* at 241 (finding that, as recently as 2010, "minority youth are disproportionately represented at crucial decision points in the juvenile justice system," and that little had changed between 1999, when "Black juveniles were more likely to be detained during every year" of the past decade, and 2005, when Black youth accounted for 40% of detainees).

[67] ANNIE E. CASEY FOUND., TRANSFORMING JUVENILE PROBATION 5 (2018), https://www.aecf.org/m/resourcedoc/aecf-transformingjuvenileprobation-2018.pdf [https://perma.cc/YW7N-Q8RF]. It is not hard to see a direct line between the overrepresentation and overincarceration of Black youths in the juvenile legal system today and similar statistics in 1850. *See* Sterling, *supra* note 44, at 624 (finding that, "in spite of the cities' predominantly white populations, approximately 50% of youth under fifteen in the Providence, Rhode Island jail were black, 60% of the youth at the Maryland penitentiary in Baltimore were black, and all youth in the Washington, D.C., penitentiary were black").

[68] Simpson, *supra* note 39, at 488.

[69] *See* Nanda, *supra* note 65, at 1514-21.

[70] Sara Tiano, *In California, Data Shows a Widening Racial Gap as Juvenile Incarceration Has Declined*, IMPRINT (Nov. 28, 2017, 7:00 AM), https://imprintnews.org/analysis/california-data-shows-racial-gap-widened-juvenile-incarceration-declined/28784 [https://perma.cc/S8R9-5597]; *see also* Nanda, *supra* note 65, at 1521-27 (describing disparate outcomes for girls of color).

B. Historical Frameworks: Interrogation

Interrogation jurisprudence developed alongside the procedural revolution in juvenile courts. While adult protections during interrogation were quickly applied to youth, courts have been reluctant to include interactions with probation officers in those protections.

The Supreme Court decided *Miranda v. Arizona* in 1966, establishing standard admonitions for people in custody as a safeguard for the Fifth Amendment right against self-incrimination.[71] The Court also established that Fifth Amendment rights could be waived only if the waiver was voluntary, knowing, and intelligent, as evaluated under a totality of the circumstances test.[72] A year later, the Court extended *Miranda*'s protections to youth in *In re Gault* but, while the Court remarked that "special problems may rise with respect to waiver of the privilege by or on behalf of children," it did not specify if or how the test for waiver might change when applied to youth.[73] The Court resolved the issue a decade later in *Fare v. Michael C.* by formally extending *Miranda*'s totality-of-the-circumstances test to youth waivers, finding that the test could accommodate factors unique to children, like age and education level.[74] Since then, the Court has repeatedly emphasized the particular vulnerability of children to the pressures of police custody and interrogation — and reasserted that the *Miranda* test is enough to protect them.[75]

But the *Miranda* test only measures what a court believes a child *should* understand,[76] not what children *actually* understand. There is ample evidence that children do not comprehend the meaning of *Miranda* warnings or the ramifications of waiving their Fifth Amendment rights. Several widely quoted studies show that children waive their *Miranda* rights about ninety percent of the time.[77] A 2017 study found that children with impaired reasoning, resulting from

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[71] *See* Miranda v. Arizona, 384 U.S. 436, 444, 467 (1966).

[72] *Id.* at 444, 503.

[73] *In re* Gault, 387 U.S. 1, 55 (1967); *see also* Sara Cressey, Comment, *Overawed and Overwhelmed: Juvenile* Miranda *Comprehension*, 70 ME. L. REV. 87, 93 (2017).

[74] Fare v. Michael C., 442 U.S. 707, 725 (1979).

[75] *See* J.D.B. v. North Carolina, 564 U.S. 261, 272-73 (2011) (surveying some of the Court's characterizations of the vulnerability children experience in custody).

[76] *See id.* at 274-75 (emphasizing the objectivity of using age as an indicator of a valid *Miranda* waiver).

[77] Lorelei Laird, *Police Routine Read Juveniles Their* Miranda *Rights, but Do Kids Really Understand Them?*, ABA J. (June 1, 2016, 2:50 AM CDT), https://www.abajournal.com/magazine/article/police_routinely_read_juveniles_their_miranda_rights_but_do_kids_really_und [https://perma.cc/S7WF-938T].

either mistaken factual beliefs about the juvenile legal system or "compromised" reasoning skills, were more likely to misunderstand their right to counsel and right to silence — the two "most influential [factors in] deciding to invoke their *Miranda* rights."[78] Expanding the scenarios mandating *Miranda* rights for children are of limited effect if the children do not understand their rights.[79] A few states have attempted to solve this problem by drafting more child-friendly *Miranda* language, while others mitigate the issue by codifying specific factors in the totality-of-circumstances test or providing use immunity for self-incriminating statements.[80] Of course, California has made its own imperfect attempt to address the issues endemic to youth interrogations by passing SB 203 and SB 395. But its loophole for probation interviews raises another historical question — how does *Miranda* apply, if at all, to questioning by probation officers?

In *Minnesota v. Murphy*, the Supreme Court found that an adult criminal suspect was not "'in custody' for purposes of receiving *Miranda* protections" when he was interviewed about the underlying offense by a probation officer, even though the officer could compel Murphy's appearance and answers, the answers were likely to be incriminating, and Murphy was unable to consult with counsel before the meeting. The Court concluded that Murphy's confession to the probation officer was therefore admissible at trial.[81] Various state courts have arrived at similar results for probation interviews of children.[82]

In California, prior to the *Murphy* decision, section 628 interviews were also deemed outside the scope of *Miranda* protection because the

[78] Allyson J. Sharf, Richard Rogers, Margot M. Williams & Eric Y. Drogin, *Evaluating Juvenile Detainee's* Miranda *Misconceptions: The Discriminant Validity of the Juvenile* Miranda *Quiz*, 29 PSYCH. ASSESSMENT 556, 561, 565 (2017); *see id.* at 564 (noting the overrepresentation of children with impaired cognitive abilities among young detainees).

[79] *See, e.g.*, Nina Totenberg, *High Court: Age Must Be Considered in Interrogation*, NPR (June 16, 2011), https://www.npr.org/2011/06/17/137236801/high-court-age-must-be-considered-in-interrogation [https://perma.cc/KB4B-XL7Z] (quoting Professor Stephen A. Saltzburg's reaction to *J.D.B. v. North Carolina*, which found that questioning in a school setting constituted a custodial interrogation and warranted *Miranda* warnings, stating, "[E]ven with Miranda warnings, it's doubtful that young people understand exactly what it all means and understand their choices, and so . . . I doubt that there will be many fewer confessions because of this opinion.")

[80] Cressey, *supra* note 73, at 100-01.

[81] Minnesota v. Murphy, 465 U.S. 420, 430-32 (1984).

[82] *See, e.g.*, Johnson v. State, 117 N.E.3d 581, 587-88 (Ind. Ct. App. 2018) (holding that a *Miranda* warning was not required before questioning by a probation officer); State v. Taylor E., 385 P.3d 639, 646 (N.M. Ct. App. 2016) (finding that a *Miranda* warning was not required before questioning by a probation officer).

interview is "clearly nonaccusatorial."[83] Though probation officers are required to Mirandize minors before the section 628 interview,[84] the California Supreme Court found that the purpose of the admonition had no constitutional teeth; it "was simply to assure that the minor would be advised as early as possible of his rights in 'any' interrogation, and to make the probation officer responsible for seeing that a request for counsel is honored." The court did find that admission of detention statements as substantive evidence would frustrate the purpose of the interview but permitted their admission at detention and disposition.[85] In California, then, protections for children's inculpatory statements to probation officers are matters of statutory interpretation, rather than Fifth Amendment protections.[86]

C. Roles and Risks of Probation in the Pre-Detention Process

The historical and conceptual place of probation officers in the juvenile legal scheme helps explain why SB 395 and SB 203 might leave officers, and section 628 interviews, out of reform. The juvenile system is defined by its dual functions as a social service and delinquency court and attempts to reconcile the two often lead to confounding or illogical results.[87] Perhaps because probation officers have their feet in both worlds, it is easier to leave them out of reform than resolve the goals of a modern juvenile legal system on a conceptual level. Armed with this understanding, this Section describes the pre-detention process and the attendant risks of making incriminating detention statements to a probation officer.

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[83] *In re* Wayne H., 596 P.2d 1, 5 (Cal. 1979).

[84] CAL. WELF. & INST. CODE § 627.5 (2022).

[85] *Wayne H.*, 596 P.2d at 5.

[86] Contrast this result with a recently contemplated Nevada bill, which would have extended the right to consult with an adult prior to questioning by a police officer as a matter of Fifth Amendment interpretation. *See Assembly Bill 251—Concerning the Custodial Interrogation of a Child and Juvenile Records*, 2021 Leg., 81st Sess. (Mar. 16, 2021) (statement of Assemb. Lisa Krasner, Assemb. District 26). The bill passed into law without this provision in June 2021. *See also* IOWA CODE § 232.11(2) (2022) (forbidding waiver of representation by counsel by any child under the age of 16 during questioning by a probation officer).

[87] See, for example, Peters, *supra* note 38, for an in-depth analysis of how the Court "distort[ed] significantly settled constitutional law" to come to its preferred result in *Schall v. Martin*. *See generally* Stacy C. Moak & Lisa Hutchinson Wallace, *Legal Changes in Juvenile Justice: Then and Now*, 1 YOUTH VIOLENCE & JUV. JUST. 289 (exploring the logical inconsistencies of treating youth like children in the real world and adults in court).

After a child is arrested and detained by a police officer, the officer may release them, deliver them to a public or private agency, write a notice requiring the youth to appear before a probation officer at a later time, or hold the youth and deliver custody to a probation officer, along with a statement of probable cause for taking the youth into custody.[88] The probation officer is required to advise the youth of their constitutional rights and notify the juvenile court judge of any request for counsel.[89] The officer must immediately interview the youth about their circumstances and "the facts surrounding [their] being taken into custody."[90] The officer must then release the youth to their guardian unless "continuance in the home is contrary to the minor's welfare" *and* one of the following conditions are true: continued detention is necessary for the protection of the child or another, the child is likely to flee, or the child has violated a court order.[91] The officer then prepares a detention report based on statements made by the child during the detention interview and submits it to the court at the detention hearing, along with a recommendation for whether the child should be detained until their adjudicatory hearing, up to fifteen days.[92]

There are no substantive limits on questioning during the detention interview.[93] In practice, this means that probation officers can ask about conduct that is not directly implicated in the statement of probable cause.[94] This information may not be used during findings of guilt,[95] but it can be used to impeach inconsistent testimony,[96] during the detention hearing, and at disposition.[97] Disposition is likely the most important

[88] WELF. & INST. §§ 626(a)-(d), 626.6. See Richard S. Baum, *Denial of Fourth Amendment Protections in the Pretrial Detention of Juveniles*, 35 SANTA CLARA L. REV. 689, 699 (1995), for a succinct narrative description of the pre-detention intake process.

[89] WELF. & INST. § 627.5.

[90] *Id.* § 628(a)(1).

[91] *Id.* § 628(a)(1), (a)(1)(A)-(C).

[92] *Id.* § 657(a)(1).

[93] *See In re* Wayne H., 596 P.2d 1, 5 (Cal. 1979) (finding that the "latitude given the probation officer in reaching a detention decision . . . [is] substantial").

[94] *See* Alfredo A. v. Superior Ct., 865 P.2d 56, 61 (Cal. 1994) (finding that the interview "is much broader in scope than a determination . . . of whether 'factual' probable cause exists").

[95] *Wayne H.*, 596 P.2d at 5-6.

[96] People v. Humiston, 24 Cal. Rptr. 2d 515, 524 (Ct. App. 1993).

[97] There is no case law explicitly approving the admissibility of detention statements at disposition, but under section 725.5 of the Welfare and Institutions Code, judges have wide latitude to consider "the circumstances and gravity of the offense committed by the minor." Courts have interpreted this statute to mean that "the court consider[s] 'the broadest range of information' in determining how best to rehabilitate a minor and

part of a child's interaction with the justice system. Allowing information not proven at trial to inform a child's disposition can result in "the minor being 'punished' for conduct which may not be true."[98] The stakes are even higher given that dispositions rarely receive appellate review.[99]

In *In re Robert H.*, a youth was originally charged for assault with a firearm.[100] Robert described behavior consistent with that charge to his evaluating psychologist, and the same behavior was described in the probation officer's original social study, another type of probation report prepared specifically for disposition.[101] Robert's counsel negotiated a lesser charge of illegal possession of a firearm, and the probation officer submitted a new social study consistent with those negotiations.[102] However, the trial court considered the new social study, original social study, and the psychologist's evaluations in deciding the disposition, effectively holding the youth responsible for the original charge.[103] On appeal, the court held that the settlement agreement reducing the youth's charge "did not contemplate disposition would be determined on something less than the full truth," and therefore, the trial court did not abuse its discretion by basing its disposition on the underlying facts of a dismissed charge.[104] The court further held that the gravity of the offense was enhanced by the "minor's possession of a firearm [which] suggested that he was operating on the periphery of a gang," even though there was no evidence of gang activity in his file.[105] This was offered as justification for the harsher disposition issued by the trial court.[106]

afford him adequate care." *In re* Robert H., 117 Cal. Rptr. 2d 899, 907 (Ct. App. 2002) (quoting *In re* Jimmy P., 58 Cal. Rptr. 2d 632, 635 (Ct. App. 1996)).

98 GARY C. SEISER & KURT KUMLI, CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE § 3.92[3][d] (2019).

99 *See* Megan Annitto, *Juvenile Justice Appeals*, 66 U. MIAMI L. REV 671, 727-28 (2012) (finding that dispositional matters make up twelve percent of appellate delinquency opinions, which are themselves few and far between).

100 *Robert H.*, 117 Cal. Rptr. 2d at 900.

101 *Id.* at 900-06; *see* CAL. WELF. & INST. CODE § 706.5 (2022) (describing the contents and scope of the social study); *id.* at § 706 (2022) (describing how the social study is taken into consideration at disposition).

102 *Robert H.*, 117 Cal. Rptr. 2d. at 906.

103 *Id.* at 903-06.

104 *Id.* at 907.

105 *Id.* at 908.

106 *Id.*

Both *Robert H.* and the opening hypothetical about Sean,[107] the young man saddled with a harsher sentence because of alleged gang affiliations uncovered during his section 628 interview, illustrate how information from the intake process can make its way to disposition. Although *Robert H.* relies on section 706 social studies, rather than the detention report resulting from a section 628 interview, the disposition still relied upon facts that were only discussed during the intake process. The case also illustrates the remarkable breadth of the court's considerations at disposition, including unproven facts.[108] Courts have since interpreted *Robert H.* to mean that they may "consider facts and details of *all* evidence submitted, even if it does not support charges that were actually sustained."[109] Disposition, then, retains much of the character of *parens patriae* by permitting complete discretion in selecting which information to use and how.

II. PROSECUTOR, *PARENS*, OR PROBATION?

What would it mean for section 628 interviews if we take up the suggestion to "adopt an approach" towards the role of probation officers in the juvenile legal scheme "that keeps due process and caretaking concerns separate"?[110] A simple way to approach the issue is to ask whether we should adhere to the reality that probation officers serve a distinctly prosecutorial function, or aspire to update the role for a new era of juvenile justice reform, building on the outdated and partially abandoned concept of *parens patriae*. If probation officers are prosecutorial, then the legislature should provide young people with a right to counsel at the section 628 interview.[111] If, however, the legislature imagines a place for probation officers in a reformist juvenile justice scheme, the task is to bring their role into a new era — no longer

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107 *See supra* Introduction.

108 *See In re* Jimmy P., 58 Cal. Rptr. 2d 632, 633 (Ct. App. 1996) (stating that the court may consider "all available reliable, social and behavioral evidence bearing upon the minor's fitness in reaching the placement decision").

109 SEISER & KUMLI, *supra* note 98, at § 3.92[3][d] (emphasis added).

110 Worrell, *supra* note 27, at 191; *see supra* Part I.A. There is evidence that officers are conscious of and struggle with this dual role. *See* Moana Hafoka, Youngki Woo, Ming-Li Hsieh, Jacqueline van Wormer, Mary K. Stohr & Craig Hemmens, *What Legally Prescribed Functions Tell Us: Role Differences Between Adult and Juvenile Probation Officers*, 81 FED. PROB. 32, 34 (2017) ("The law enforcement versus rehabilitation debate has created a struggle for probation officers uncertain about which to employ in their work.").

111 *See* Lore III, *supra* note 21, at 464 (noting that youths' "inability to consult with counsel frequently results in children making self-incriminating statements that affect their cases").

paternalistic but facilitative.[112] In this regime, the existing carve-out in SB 395 and SB 203 can remain if the scope of the section 628 interview is heavily restricted to information-gathering in sole service of the youth's safety and the interview has no impact on adjudication or disposition.[113]

To arrive at appropriate solutions, this Part first compares procedural protections for children in stages crucial to the detention interview and disposition with protections for adults in functionally equivalent stages of those proceedings. This comparison reveals the illogical gaps between the constitutional procedural protections provided to children and adults. The second half of this Part provides philosophical arguments for rethinking the role of probation officers in the juvenile legal scheme, an essential aspect of improving the procedural protections at intake.

A. Comparing Constitutions: Fifth and Sixth Amendment Protections for Children and Adults

Detention interviews, and relevant constitutional due process protections (or lack thereof), bring together three procedural areas of concern: the Sixth Amendment right to counsel, the Fifth Amendment right against self-incrimination, and information available at disposition. This Section addresses each in turn.

1. Sixth Amendment Right to Counsel: Defining a "Critical Stage"

Under the Sixth Amendment, an adult defendant is entitled to counsel "at every stage of a criminal proceeding where substantial rights may be affected."[114] These "critical" stages are "points of time at or after the initiation of adversar[ial] judicial criminal proceedings."[115] Relevant to

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[112] For one example of how probation officers might play a major facilitative role in restorative justice reforms, see GORDON BAZEMORE & MARA SCHIFF, JUVENILE JUSTICE REFORM AND RESTORATIVE JUSTICE: BUILDING THEORY AND POLICY FROM PRACTICE 213 (2005) (noting that "the probation officer plays a rather strong prompting role in managing the dialogue" in a victim-offender meeting because they "know[] all the personalities involved").

[113] *See* URB. INST., BRIDGING RESEARCH AND PRACTICE IN JUVENILE PROBATION: RETHINKING STRATEGIES TO PROMOTE LONG-TERM CHANGE 13 (2018) (providing evidence that use of uniform detention risk assessment instruments reduces the number of youths detained); Birckhead, *supra* note 11, at 181 (discussing the importance of uniform interview instruments at intake).

[114] Mempa v. Rhay, 389 U.S. 128, 134 (1967).

[115] *Id.*; Kirby v. Illinois, 406 U.S. 682, 689 (1972).

this inquiry, adults have a right to counsel at initial interrogation[116] and preliminary hearings,[117] where a magistrate adduces whether the government has met their burden of probable cause.[118]

The Sixth Amendment protects the rights of criminal defendants, but juvenile court proceedings are not criminal by definition.[119] As the juvenile system grew more carceral, however, the Supreme Court recognized that due process required protections during any part of adjudicative proceedings that could result in "commit[ment] to a state institution."[120] The landmark case *In re Gault* extended due process procedural protections to youth via the Fourteenth Amendment,[121] and while the Court has never specifically applied the Sixth Amendment to youth,[122] California courts have.[123] If the Sixth Amendment is applicable to youth, "the question becomes whether intake is considered to be a 'critical stage' of the proceedings and, thus, requires the appointment of counsel."[124]

It is difficult, however, to determine critical stages in juvenile proceedings because they are not directly analogous to critical stages in adult proceedings — there is no "formal charge, preliminary hearing, indictment, information, or arraignment."[125] No California court has attempted to define what constitutes a critical stage in juvenile delinquency proceedings, but there are several reasons why the detention interview should count as a critical stage.

First, the detention interview combines elements of adult interrogation and preliminary hearings.[126] The interview is similar to interrogation because, although probation officers are not "conducted

[116] Massiah v. United States, 377 U.S. 201, 205-06 (1964); People v. Viray, 36 Cal. Rptr. 3d 693, 708-09 (Ct. App. 2005).

[117] Coleman v. Alabama, 399 U.S. 1, 10 (1970).

[118] People v. Slaughter, 677 P.2d 854, 857-58 (Cal. 1984).

[119] Catherine L. Bonventre, *Sixth Amendment and Juveniles*, *in* ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 1, 1 (Jay S. Albanese ed., 2014).

[120] McKeiver v. Pennsylvania, 403 U.S. 528, 532 (1971) (quoting *In re* Gault, 387 U.S. 1, 44 (1967)).

[121] *In re* Gault, 387 U.S. 1, 41 (1967).

[122] *See* Birckhead, *supra* note 11, at 167-68.

[123] *In re* Elijah C., 203 Cal. Rptr. 3d 870, 875 (Ct. App. 2016).

[124] Birckhead, *supra* note 11, at 167.

[125] Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[126] *See* Birckhead, *supra* note 11, at 171 (comparing intake interviews to interrogation for Fifth Amendment purposes); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 305-06 (2003) ("[T]he intake process could be viewed as a preliminary hearing. . . .").

with a view toward eliciting guilt or obtaining evidence," the child's answers "may be used against [them] in a variety of ways."[127] Additionally, the probation officer plays an adjudicatory role in determining whether and how a petition should proceed against the child, partially on the basis of a statement of probable cause, which is akin to the judicial determination of probable cause required at adult preliminary hearings.[128] California courts have shown a willingness to apply the Sixth Amendment to juvenile proceedings where they are functionally comparable to adult proceedings.[129] Why should the section 628 interview not be accorded the same protections?

One likely answer is that detention statements are not admissible at adjudicatory hearings, which mitigates the risk of speaking with a probation officer without counsel.[130] Another analogous adult proceeding may rebut this argument, however. Adults facing felony charges in criminal court are generally required to undergo a pre-sentencing probation interview.[131] The Ninth Circuit, faced with the same problem in *United States v. Herrera-Figueroa*, declined to address whether this interview is a critical stage sufficient for a Sixth Amendment right to counsel, but found it was important enough to exercise their supervisory power to require that "probation officers must permit defendants to have their attorneys present at the pre-sentence interview."[132] The court's reasoning was twofold: first, the interview poses an enormous risk to the uncounseled defendant because the officer is entitled to ask questions about "allegedly criminal conduct of which the defendant has not been convicted," the results of which

[127] Birckhead, *supra* note 11, at 171-72.

[128] *See* CAL. WELF. & INST. CODE § 652 (2022) ("[T]he probation officer shall immediately make an investigation he or she deems necessary to determine whether proceedings in the juvenile court should be commenced."); *id.* § 626(d) (noting that, before delivering the youth, the arresting police officer must prepare a statement of probable cause and provide the statement to the probation officer).

[129] *See, e.g.*, *In re* Elijah C., 203 Cal. Rptr. 3d 870, 875 (Ct. App. 2016) (discussing a juvenile's entitlement to representation under the Sixth Amendment using criminal defendant standards); Ahmad A. v. Superior Ct., 263 Cal. Rptr. 3d 747, 753 (Ct. App. 1989) (declining to extend protections to the disputed circumstance but considering it as a Sixth Amendment matter).

[130] *See* Birckhead, *supra* note 11, at 168; McInnis et al., *supra* note 50, at 570 ("Many are of the belief that, when juveniles confess to a criminal act, they are not incriminating themselves since no criminal conviction may result in juvenile court.").

[131] *See generally Presentence Investigation*, U.S. PROB. S. DIST. OF CAL., https://www.casp.uscourts.gov/presentence-investigation (last visited Feb. 11, 2022) [https://perma.cc/Z6Q2-UE2C] (detailing the types of information gathered at pre-sentencing probation interviews).

[132] United States v. Herrera-Figueroa, 918 F.2d 1430, 1433 (9th Cir. 1990).

are relied on heavily by judges in sentencing;[133] second, when the probation officer is preparing the report, "he is acting as an arm of the court."[134]

The Ninth Circuit's reasoning supports a similar determination by state courts, grounded in the same Sixth Amendment concerns.[135] Although adult pre-sentencing interviews occur after adjudication and detention interviews occur before adjudication, both types of interviews are conducted by a probation officer and form a meaningful part of the record for review at sentencing. Furthermore, intake interviews with probation officers are effectively "a dispositional hearing at the front end" because the child's statements at intake become so important at the disposition stage.[136] Juvenile dispositions are cumulative, perhaps even more so than adult dispositions.[137] If a pre-sentence probation interview is critical for adults, it is doubly so for children. Detention statements follow the youth forever. In Sean's case, for example, he will be labeled in every subsequent probation report as gang-involved.[138] This risk is analogous to that posed to adults in pre-sentencing interviews and merits the same protections awarded in *Herrera-Figueroa*.

California courts have already recognized the risk posed by probation interviews in another juvenile court context. In *In re Paul T.*, a probation officer went to a represented youth's home to question him about an offense in preparation for a section 706 social study.[139] During the interview, Paul made incriminating statements which were admitted as evidence during the jurisdictional hearing.[140] The court found no "'permissible reason' as to why counsel was not present" and, lacking evidence that counsel had been notified, could not determine whether

[133] *Id.* at 1435.

[134] *Id.* at 1434.

[135] For a discussion of a state court's use of supervisory powers "inspired by constitutional values, but not necessarily required by specific constitutional rules," see Bennett L. Gershman, *Supervisory Power of the New York Courts*, 14 PACE L. REV. 41, 80-81 (1994).

[136] Marrus, *supra* note 126, at 305.

[137] *See id.* at 305 & n.91; Birckhead, *supra* note 11, at 178.

[138] *See supra* Introduction.

[139] *In re* Paul T., 93 Cal. Rptr. 510, 512 (Ct. App. 1971); *see* CAL. WELF. & INST. CODE § 706 (2022). The section 706 social study is analogous to the detention report in that it includes more information about the youth than is considered at adjudication, including social services, treatment, and dependency matters, like case and permanency plans. *See id.* § 706.5. As with the detention report, the court is not permitted to consider the social study during adjudication. *In re* Gladys R., 464 P.2d 127, 130 (Cal. 1970).

[140] *Paul T.*, 93 Cal. Rptr. at 512.

the statements were truly voluntary.[141] Furthermore, the court held that the officer put Paul in an impossible position; if he refused to answer questions without counsel, he could be found "uncooperative and possibly not a fit subject for probation."[142] If he did answer questions, he could have made prejudicial statements.[143] This predicament made the waiver of counsel coerced and therefore invalid, and rendered the officer's testimony concerning the appellant's statements inadmissible.[144]

Paul T. is not perfectly comparable to the circumstances of a section 628 interview, given that the case focuses on the admissibility of the child's confession for findings of guilt, whereas detention interviews focus on the admissibility of detention statements for disposition. However, the tensions present in a section 628 interview are similar to those present in a section 706 interview in *Paul T.* Should the child refuse to answer detention interview questions, they may be seen as uncooperative and put themselves at greater risk for continued detention. If the child does answer questions about their offense, they may make unfavorable admissions or confessions which could be used against them at disposition, which is particularly concerning given the liberal admissibility of evidence at that stage.

2. Fifth Amendment Right Against Self-Incrimination: The Routine Booking Exception

During traditional custodial interrogations, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[145] Interrogation includes "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response" from the subject. [146] This rule extends to youth in California and includes casual conversation where the tone of the officer is accusatory, even where the officer did not intend to elicit a response.[147]

Generally, in adult proceedings, routine booking questions are an exception to the rule, and therefore exempt from the requirements of

[141] *Id.* at 514.
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] Miranda v. Arizona, 384 U.S. 436, 473-74 (1966).
[146] Rhode Island v. Innis, 446 U.S. 291, 292 (1980).
[147] *See In re* Albert R., 169 Cal. Rptr. 553, 558 (Ct. App. 1980).

Miranda.[148] However, it was recently held in *People v. Roberts* that the use of an un-Mirandized defendant's "response to routine questions about gang affiliations during jailhouse intake interviews" violates the Fifth Amendment.[149]

The hypothetical set forth in the Introduction of this Note describes how information about conduct unrelated to the underlying charge (e.g., gang affiliations) may make its way from the detention interview to disposition. Probation officers are required by section 627.5 of the Welfare and Institution Code to read *Miranda* rights to children prior to the detention interview. The officer must notify the juvenile court judge of a request for counsel but they are not mandated by statute or case law to stop the interview after the request.[150] Indeed, as discussed in Part I, the court has minimized Fifth Amendment protections for detention interviews, stating that the purpose of section 627.5 is "simply" to assure the child "as early as possible of his rights . . . and to make the probation officer responsible for seeing that a request for counsel is honored."[151]

Characterized this way, the section 627.5 *Miranda* warning provides insufficient protection. Yes, the officer must inform the child of their rights and yes, those rights will be honored — but not until after the potentially hazardous interaction with the probation officer is over. A detention interview certainly is not routine booking. Booking questions usually cover basic biographical data or scripted questions to check understanding about the criminal process, while probation officers can ask youth questions that venture much farther afield than birth date and home address.[152] The interview, then, ends up looking something like

[148] People v. Williams, 294 P.3d 1005, 1021 (Cal. 2013), *abrogated by* People v. Elizalde, 351 P.3d 1010 (Cal. 2015).

[149] People v. Roberts, 220 Cal. Rptr. 3d 703, 708-09 (Ct. App. 2017) (citing *Elizalde*, 351 P.3d at 1010).

[150] CAL. WELF. & INST. CODE § 627.5 (2022).

[151] *In re* Wayne H., 596 P.2d 1, 5 (Cal. 1979).

[152] *See* Birckhead, *supra* note 11, at 159. Professor Birckhead illuminates the problems with wide-ranging probation interviews in an anecdote about "Deanna," a fictionalized composite of her clients. Deanna confirmed to a probation officer that she had heard a rumor about a possible school shooting, later discovered to be unfounded, and was charged with a felony of making a false report concerning mass violence on educational property. The interview focused not on the requirements of that charge, which include knowingly falsifying information (something Deanna plainly had not done), but on Deanna's grades and her mother's unemployment. Such "unfettered" discretion in questioning increases both the chances that the probation officer sees the child as someone in need of court supervision, regardless of the merits of their case (that pesky *parens patriae*), and that the officer uncovers incriminating information unrelated to the case at hand. *See also* Meghan S. Skelton & James G. Connell III, *The Routine*

the un-Mirandized and unconstitutional questioning about gang affiliations at issue in *Roberts*.

3. Information Available at Sentencing

Most adult felonies in California are punished under the Determinate Sentencing Law, which prescribes three tiers of sentences in an effort to provide uniformity.[153] In 2007, the Supreme Court held in *Cunningham v. California* that the scheme was unconstitutional under the Sixth Amendment because "it permitted upper-term sentences to be based on facts found by the sentencing judge . . . rather than on facts found by the jury."[154] Since *Cunningham*, "defense counsel is strongly advised to object on Sixth Amendment grounds if the court appears to be using 'facts' not found true by a jury or admitted by the defendant to increase a sentence above the statutory maximum."[155] Additionally, any enhancements, including gang enhancements, must be "alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."[156] This requirement "cannot be satisfied merely by alleging the facts underlying an enhancement as the basis for a substantive offense or for a different enhancement."[157]

There is an extensive body of California case law asserting that the juvenile judge should have all relevant information available to them at disposition because of the rehabilitative demands of juvenile court, which resists any comparison to adult sentencing schemes.[158] These assertions are based largely on policy grounds about the nature of *parens patraie*, however, and there is nothing preventing state legislatures from providing youth with additional protections at intake *because of* the impact at disposition.[159]

Booking Question Exception to Miranda, 34 U. BALT. L. REV. 55, 55-57 (2004) (describing the exception and how, even in the adult context, the exception "can be used to broaden custodial interrogations beyond constitutional limits").

153 *See* Travis Bailey, Note, *California's Determinate Sentencing Law: How California Got It Wrong . . . Twice*, 11 CHAP. L. REV. 87, 87 (2008).

154 Matthew C. Braner, *Overview: Felony Sentencing*, *in* CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE § 37.1 (2020).

155 *Id.*

156 CAL. PENAL CODE § 1170.1(e) (2022).

157 People v. Nguyen, 226 Cal. Rptr. 3d 615, 616 (Ct. App. 2017).

158 *See supra* note 16 and accompanying text.

159 Hannah Frank, Note, *Unambiguous Deterrence: Ambiguity Attitudes in the Juvenile Justice System and the Case for a Right to Counsel During Intake Proceedings*, 70 VAND. L. REV. 709, 733, 733 n.124 (2017).

First, the admission of detention statements subjects youth to a *de facto* enhancement scheme because their dispositions can be predicated on aggravating behavior, even if that behavior is not proven in court, though the same concerns led to the end of a similar scheme for adults in the *Cunningham* decision. This is the case even though "[i]n many cases, children in juvenile court are subjected to longer periods of incarceration than adults for committing the same offense."[160] Although this Note certainly does not advocate for more formal sentencing enhancements for minors, this disparity in result highlights how a lack of formal criminal procedure, a hallmark of juvenile court, can cut against minors' interests.[161]

Second, courts have recognized that the candor demanded in probation interviews and the impact of resulting statements in court puts young people in an impossible position.[162] If they are not candid, the probation officer may find them obstinate or otherwise report their behavior unfavorably, which could have a negative effect on disposition.[163] If they are candid, they run the risk of incriminating themselves, which could *also* have a negative effect on disposition.[164] Although discretion at disposition is one of the hallmarks of juvenile court, "unchecked" discretion compounds the effects of this dilemma because *all* choices that the child makes at intake can worm their way into judicial consideration; damned if they do, damned if they don't.[165] The courts' selective blindness to the impact of their own discretion is

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[160] Marrus, *supra* note 126, at 303 n.84 (citing Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 837 (1988)).

[161] *See* Shana Conklin, Note, *Juveniles Locked in Limbo: Why Pretrial Detention Implicates a Fundamental Right*, 96 MINN. L. REV. 2150, 2173 (2012) ("[P]roviding juveniles with additional safeguards, such as jury trials, aids the rehabilitative aims of the juvenile court.").

[162] *See, e.g.*, Ramona R. v. Superior Ct., 693 P.2d 789, 794 (Cal. 1985) (prohibiting use of fitness hearing testimony at trial because it would put the child in a "trilemma of self-accusation, perjury or contempt" (quoting People v. Coleman, 533 P.2d 1024, 1034 (Cal. 1975))); *In re* Paul T., 93 Cal. Rptr. 510, 514 (Ct. App. 1971) (finding that a probation interview in preparation for a section 706 social study without counsel put the child in a "very unfair position").

[163] If the youth refuses to answer questions from a probation officer without counsel, he could be found "uncooperative and possibly not a fit subject for probation." *Paul T.*, 93 Cal. Rptr. at 514. If he did answer questions, however, he "would have made admissions or confessions that would have been prejudicial at the jurisdictional hearing." *Id.*

[164] *See id.*

[165] *See* Sterling, *supra* note 44, at 675 (finding that two misperceptions, that juvenile court is "low-stakes," and that it is "geared primarily to support" rehabilitation, "allow discretion to flourish unchecked").

as old as the modern juvenile legal system itself, and represents a major site of "unresolved conflicts" between the conflicting tenets of that system.[166]

B. Resolving the Role of Probation in the Juvenile Legal Scheme

Resolving the issue of procedural protections for children in probation interviews requires resolving the role of probation officers, and *parens patriae*, within the juvenile legal scheme in an era of reform and abolition. *Parens patriae* is not an inherently reformist concept for two reasons. First, paternalism is the opposite of reform — the goal of total system transformation is to hand responsibility for struggling young people back to communities and give youth more agency in their own healing. Second, *parens patriae* is merely "a general attitude of protectiveness" and discretion; it does not dictate how, specifically, discretion is to be exercised.[167]

If probation officers are agents of *parens patriae*, but there is no role for *parens patriae* in reform, then transitively, what is the role of a probation officer in reform? It depends on who you ask. Probation officers have taken on more facilitative tasks and have or want to become front-line workers in the move towards restorative justice and decarceration.[168] Despite those moves, the reality is that juvenile probation is, at its core, "a system of monitoring and control."[169] Even as probation officers take on more "rehabilitation- and case-manager-oriented tasks," those tasks "remain outweighed by law-enforcement-oriented functions."[170]

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[166] Ross, *supra* note 46, at 1040-41; *see id.* at 1055 ("[T]he majority [in *Gault*] expressly reserved opinion on the question of the 'post-adjudication disposition' of juveniles which it deemed 'unique to the juvenile process.' By inference, the Court did not reach the role of discretion in disposition.").

[167] Ralph A. Weisheit & Diane M. Alexander, *Juvenile Justice Philosophy and the Demise of* Parens Patriae, 52 FED. PROB. 56, 56-57 (1988).

[168] *See* GALE BURFORD, SARAH GALLAGHER, KAREN GENNETTE, JOHN GORCZYK, GEORGE SHALER & JOHANNES WHEELDON, ME. JUV. JUST. ADVISORY GRP., AN INITIATIVE TO DEVELOP A SUSTAINABLE RESTORATIVE JUVENILE JUSTICE SYSTEM: APPENDICES TO THE FINAL REPORT TO MAINE'S JUVENILE JUSTICE ADVISORY GROUP 48 (2016) (identifying referrals from "statutory workers," including probation officers, as necessary for success of restorative justice programs); URB. INST., *supra* note 113, at 54-56 (describing the use of restorative justice by probation officers as key to "provid[ing] opportunities [for youth] to take responsibility for their actions" without incarceration).

[169] Adam D. Fine, Erika Fountain & Sarah Vidal, *Juveniles' Belief About and Perceptions of Probation Predict Technical Violations and Delinquency*, 25 PSYCH., PUB. POL'Y, & L. 116, 117 (2019).

[170] *Id.*

There are three ways to resolve these mounting contradictions. One is to eliminate law enforcement functions and fully integrate probation officers into the reform scheme as case workers and community liaisons. On this view, improved due process protections during probation interviews are either unnecessary, because probation officers are no longer conducting detention interviews, or compulsory, because, as the officer gains the child's trust, they also gain information that can be used against them in court. Otherwise, the perverse result would be the more an officer can help by collecting vulnerable information about the child's harms and needs, the more they can hurt. Either way, though, the goal for many activists is to involve state actors less, not more. There are already many qualified people and settled or growing community infrastructures that can help a young person reconnect and repair — why should a probation officer be one of them?[171]

Another way to resolve the contradictions is to admit that probation officers have interests that are adverse to youth's interests. On this view, increased procedural protections should be extended because the probation interview is as impactful as a police interrogation.

The third and probably most realistic way is to permit the contradictions to stand but narrow the scope of the detention interview in response. Probation officers would be allowed to ask any questions that have the sole purpose of protecting the child's health and safety. The statutory directive to explore the "circumstances" would constrict the probation officer to reviewing the probable cause declaration and police report, which officers do anyway, prohibiting them from asking questions about the facts underlying or collateral to the offense. This would permit the probation officer to connect the youth with any needed services but reduce the possibility of obtaining incriminating statements related to the offense.

As discussed above, many of the gaps between procedural protections for youth and adults are illogical, making youth more vulnerable to self-incrimination. Probationary interviews, and detention interviews in particular, live in those gaps, leaving space for juvenile courts to reach into youths' lives in a way that was ideologically repelled long ago by *In re Gault*. This peculiar space is exactly why it is so important that progressive states interested in reforming the juvenile legal system do not leave detention interviews out of solutions. Improving procedural

[171] Examples of community-based organizations managing restorative justice diversion programs for youth include RYSE Center, rysecenter.org, in Contra Costa County; Everychild Restorative Justice Center, everychildfoundation.org, in Los Angeles County; and Community Works, communityworkswest.org, in Alameda and San Francisco Counties.

protections at intake for juveniles also requires a philosophical rethinking of the role of probation officers and the concept of *parens patriae* in the juvenile legal scheme and juvenile legal reform.

III. SOLUTIONS

Ideally, as juvenile justice systems turn away from incarceration, they also turn away from court involvement entirely, including probation systems.[172] Abolitionists, restorative and transformative justice advocates, and community leaders envision a future where, increasingly, the locus of responsibility for system-involved youth is the community, the home, the social network, rather than the government.[173] In that future, there is no section 628 detention interview because there is no detention, and potentially no probation officers because youth supervision has been delegated to community-based organizations. In the meantime, however, the state legislative and judicial branches could still take meaningful action to address the particular vulnerabilities of a section 628 interview, and to inspire other states to pass legislation mirroring the strengths of SBs 203 and 395, while also solving their weaknesses.

A. Legislative

The most obvious solution is to amend Welfare and Institutions Code 625.6, the codification of SBs 395 and 203, to include section 628 interviews. Section 625.6 already contains a framework for such a

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[172] *See* Scott Wm. Bowman, *The Kids Are Alright: Making a Case for Abolition of the Juvenile Justice System*, 26 CRITICAL CRIMINOLOGY 393, 402 ("[T]here are numerous alternatives to the current penal system that can provide juveniles a better opportunity for success than being incarcerated in *any* system. . . . [In an alternative system,] prevention and treatment programs . . . would be coordinated directly with the families, schools, and other entities in the juvenile's life.").

[173] *See* PATRICK MCCARTHY, VINCENT SCHIRALDI & MIRIAM SHARK, EXEC. SESSION ON COMM. CORR., THE FUTURE OF YOUTH JUSTICE: A COMMUNITY-BASED ALTERNATIVE TO THE YOUTH PRISON MODEL, 19-23 (2016) (giving community-based services and facilities, and family-based interventions primacy over institutional intervention); Charisa Smith, *Nothing About Us Without Us! The Failure of the Modern Juvenile Justice System and a Call for Community-Based Justice*, 4 J. APPLIED RSCH. ON CHILD.: INFORMING POL'Y FOR CHILD. AT RISK 1, 16 (recommending the reduction of "approaches that call for more professional intervention" and an increase in "meaningful dialogue and participation of families and youth in actual decision-making and service provision"); *see, e.g.*, *id.* at 17-18 (advocating for "[c]ommunity-based Alternatives to Detention (ATDs) and Alternatives to Incarceration (ATIs) [which] enable indigenous community organizations to work with the youth they know firsthand" over "governmental ATDs and ATIs").

protection in section 627.5, which instructs probation officers to advise children of their *Miranda* rights upon first interaction.[174] If the protections of 625.6 were extended to section 628 interviews, it would add the requirement that the child consult with an attorney before a waiver of rights, and before the interview proceeds. As it stands, and as is discussed previously in this Note, an invocation of *Miranda* rights under 627.5 does not seem to have much practical effect on the section 628 interview, given that no waiver is required before the probation officer can proceed with questioning.[175] Seen this way, extended coverage under additional legislation would simply add teeth to section 627.5.

A more child-protective iteration of this solution would be an early assignment of counsel, with counsel present at the probation detention interview. There are two objections to this solution. First, it may be difficult for public defense offices to staff interviews, given that it is already difficult for rural offices to provide coverage for the additional procedural protections already afforded.[176] However, the state could easily attach a funding mechanism to any new legislation to pay for additional coverage — and with a historic state budget surplus, now seems like a particularly good time to do it.[177] Second, probation officers need to ask basic questions to confirm the identity of the child and ensure their safety. However, the routine booking exception may be enough to encompass these requirements and still ensure the integrity of *Miranda* protections.

If the legislature were afraid of curtailing probation officers' ability to ask wide-ranging questions, it could follow other states and pass additional legislation providing automatic use immunity for detention statements through disposition.[178] In a 2014 survey by the National

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174 CAL. WELF. & INST. CODE § 627.5 (2022).

175 *See supra* Part B.

176 *See* David Smith, *On Call: Public Defenders Adjust to Requirements of SB 395*, SISKIYOU DAILY NEWS (Feb. 16, 2018, 9:13 AM), https://www.siskiyoudaily.com/news/20180216/on-call8200public-defenders-adjust-to-requirements-of-sb8200395 [https://perma.cc/ZE8A-W7XP].

177 *See* Adam Beam, *California Analyst Predicts $31 Billion Budget Surplus*, U.S. NEWS (Nov. 17, 2021), https://www.usnews.com/news/best-states/california/articles/2021-11-17/california-analyst-predicts-31-billion-budget-surplus [https://perma.cc/5FFK-QF5Q].

178 *See, e.g.*, ARK. CODE ANN. § 9-27-321 (2022) ("Statements made by a juvenile to the intake officer or probation officer during the intake process . . . are not admissible against the juvenile at any stage of any proceedings."); TEX. FAM. CODE ANN. § 53.03(c) (2022) ("An incriminating statement made by a participant in a Deferred Prosecution Meeting to the person giving advice . . . may not be used against the declarant in any court hearings."). *See generally* NAT'L. JUV. DEF. CTR., THE USE OF JUVENILE STATEMENTS MADE IN UNCOUNSELED INTERVIEWS, ASSESSMENTS, AND EVALUATIONS: A SURVEY OF

Juvenile Defender Center, California was the *only* state without codified use immunities or limits on admissions for "statements made during the initial stages of court involvement";[179] all existing use immunities for statements made by children have been created exclusively by the courts.[180] The legislature could take this opportunity to codify existing immunities while extending a new one. Full use immunity would prevent the statements' use at any subsequent criminal proceedings, and expanded derivative use immunity would prevent prosecutors from using detention statements "to develop other evidence."[181]

The least child-protective option would be to allow the interview in its current iteration but allow the child to invoke immunity for the statements through disposition, should they so desire. New Mexico provides a good example of this more flexible option. In that state, "a child has privilege to refuse to disclose and to prevent others from disclosing confidential communications made to probation officers . . . during the preliminary inquiry phase."[182] This language enables the child to more safely furnish information but places the onus on the child's counsel to withhold potentially incriminating information from the interview. It also does not mitigate the collateral effects of detention interviews, such as admitting to uncharged offenses or making inculpatory statements about other minors that can, in the same way as full use immunity.

B. Judicial

We return here to the Ninth Circuit decision, *U.S. v. Herrera-Figueroa*.[183] In that case, the court found that while an adult pre-sentencing interview was not necessarily a "critical stage" for Sixth Amendment purposes, a right to counsel was warranted under the court's supervisory powers to ensure fairness and due process. If a

NATIONAL PRACTICES (2014), http://njdc.info/wp-content/uploads/2014/05/Summary-of-Admissibility-of-Statements-FINAL-5-14-14.pdf [https://perma.cc/9DG5-SLVD] [hereinafter THE USE OF JUVENILE STATEMENTS] (summarizing limitations on the use of statements made at intake).

179 THE USE OF JUVENILE STATEMENTS, *supra* note 178, at 5.

180 *See, e.g.*, Ramona R. v. Superior Ct., 693 P.2d 789, 793-95 (1985) (holding that a child's testimony at the fitness hearing may not be used against them at a subsequent trial for the offense).

181 *See* THE USE OF JUVENILE STATEMENTS, *supra* note 178, at 12 (describing an Indiana statute providing full and derivative use immunity for statements made to mental health professionals).

182 N.M. R. EVID. 11-509.

183 918 F.2d 1430 (9th Cir. 1990).

section 628 interview is analogous to the presentencing interview, California courts could exercise their supervisory power to provide a right to counsel. Section 625.6(d) of the California Welfare and Institutions Code, codifying SB 203 and 395's exemption for section 628 interviews, states that the statute "does not require" probation officers to comply with representation requirements, but it does not bar the possibility. This leaves room for California courts to exercise their supervisory power without risking direct conflict with legislative intent. A state court's use of supervisory powers is particularly appropriate for issues "inspired by constitutional values, but not necessarily required by specific constitutional rules," and where the statute at issue is non-determinative, like 625.6(d).[184]

CONCLUSION

Over the past decade, "California has evolved from having one of the most draconian, costly juvenile justice systems to becoming a model of reform."[185] SB 203 and SB 395, providing an early and unwaivable right to counsel, afford children some of the strongest Fifth Amendment protections in the country.[186] Early representation has long been at the forefront of juvenile legal reform priorities, and the two Senate Bills undoubtedly represent a major win for reformers.[187] But every rose has its thorn. With these bills, California missed the opportunity to provide young people with full representation at intake, including interviews with probation officers. The exception in both bills for section 628 interviews leaves young people vulnerable to some of the same dangers that warranted the bills to begin with.[188]

Filling the gaps in SBs 203 and 395 also provides California with an opportunity to resolve the role of probation officers within the juvenile legal scheme.[189] Without the risk of self-incrimination from detention interviews, conversations between probation officers and children can

[184] Gershman, *supra* note 135, at 81.

[185] David Muhammad, *California is Becoming a Model of Juvenile Justice Reform, Thanks to Progressive Legislation*, JUV. JUST. INFO. EXCH. (Jan. 4, 2019), https://jjie.org/2019/01/04/california-is-becoming-a-model-of-juvenile-justice-reform-thanks-to-progressive-legislation [https://perma.cc/A9X8-F44P].

[186] *See supra* notes 1–6 and accompanying text.

[187] See *Appointment of Counsel/Access to Counsel*, NAT'L JUV. DEF. CTR., https://njdc.info/appointment-of-counselaccess-to-counsel/ (last visited Jan. 22, 2021) [https://perma.cc/Y9VE-6KFL], for more information about and resources on the importance of early representation in youth defense.

[188] *See supra* Part III.

[189] *See supra* Part I (defining that role and discussing its risks).

focus on rehabilitative needs, if any.[190] Because children can be more honest without the threat of increased punishment at disposition, they can form a more facilitative relationship with their interviewing officers so that officers can connect them with any needed services or participate more fully in restorative justice efforts if necessary.[191] Officers, neither *parens patriae* nor prosecutor, can assume a new role that more strongly complements California's efforts to become a leader in juvenile justice reform.

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

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