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# The Anti-Racist Imperative of Infancy

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ABSTRACT

*In 2019, a widely disseminated video of the arrest of a six-year-old girl in her Florida elementary school provoked outrage across the country. The footage shows the girl sobbing as an armed police officer in full uniform and bullet-proof vest handcuffs and leads her from the principal's office to a waiting patrol car. Her crime was having a temper tantrum in class after a sleepless night. When it was revealed that another six-year-old was arrested at the same school by the same officer on the same day and for similar reasons, media pundits and the general public debated questions of school discipline and the role of law enforcement in educational settings. The far more important issue, however, is why, and for what purpose, should a six-year-old be arrested at all? This is not an academic question; twenty-four of the fifty states currently set no minimum jurisdictional age for the arrest and prosecution of children, and eighteen others set jurisdictional boundary of ten years old. As a result, between 2013 and 2018, over 30,000 children under the age of ten were arrested in the United States, and, in 2019, more than fifteen percent of incarcerated youth were age fourteen or younger. Such criminalization of childhood is contrary to the teachings of developmental science; drives the gross racial disparities that have defined the juvenile legal system since its inception; and inflicts myriad harms on children, their families, and their communities, including school push-out, negative health and mental health outcomes, the threat of incarceration, and the trauma and stigma that attach to any interaction with police, among others. It also runs afoul of international human rights standards, which require adoption of a minimum age of criminal responsibility of at least fourteen.*

*This Article stakes out new ground by arguing that the only redress for these deep and continuing harms is the categorical exclusion of developmentally immature children from juvenile court jurisdiction and, with it, the abolition of the juvenile court in its current iteration. Part I charts the harms of legal system involvement, focusing on the immediate and long-term effects of arrest and prosecution of young children. Part II provides a history of the juvenile legal system, focusing on its deep-rooted racial inequities. Part III explores some of the causes of those injustices, including discretionary decision-making, adultification bias, and police in schools. Part IV considers the large body of developmental science establishing children's lesser culpability, lack of adjudicative competency, and capacity for change. Part V considers and ultimately rejects revival of*

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*the common law defense of infancy within juvenile court proceedings and proposes a new doctrine of infancy rooted in the categorical exclusion of young children from arrest and prosecution, rather than case-by-case determinations. The Article concludes by providing examples of effective alternatives to prosecution and positioning age-based jurisdictional boundaries as a pathway to abolition of the structurally biased and discriminatory juvenile legal system.*

**Keywords:** Juvenile Court, Jurisdictional Boundaries, Minimum Age, Children, Youth, Race

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## INTRODUCTION

"*Officer, please don't do this to me*," pleaded the terrified nine-year-old Black girl. Her mother had called for help in the midst of a family argument, during which the girl threatened to kill herself. Rather than a team of mental health professionals, nine armed and uniformed white police officers arrived at the family's home in Rochester, New York on the snowy January day. They chased the girl down the icy street, wrestled her down into the snow, and handcuffed her—even as she cried that she had a "bad arm" and begged for mercy.

Chilling body-worn camera footage from the incident showed the girl sobbing, calling out for her father, and pleading with the police not to pepper spray her as they forcibly shoved her into the back seat of a patrol car. Finally, an officer barked, "Just spray her." A gloved hand reached into the back seat, pointed a black bottle at the girl, and pumped the handle twice. The girl shrieked and doubled over in pain. At one point in the encounter, an officer snaps, "Stop acting like a child." The girl replied, with the clarity and simplicity born of truth, "I *am* a child."[1]

At the time, Rochester authorities were already under intense scrutiny in the wake of the police killing of an unarmed Black man less than a year earlier. They quickly released the bodycam footage, which went viral. Several days later, Nikki Jones, a professor of African-American studies at U.C. Berkeley, placed the police terrorization of this young girl in the larger, racialized context of police interaction with Black children:

> Black children, historically, have not gotten the benefit of innocence. . . . [They] are seen as older than they are . . . [and] not afforded the privileges of being a child. . . . I see profound wisdom in 'I am a child.' And it echoes all the Black children who have been treated this way by the police.[2]

In contrast, the privilege of childhood is a birthright for most white children. Had this nine-year-old girl been white, the governmental response to this crisis likely would have been one of treatment and care, rather than criminalization and control.[3]

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[1] Rochester NY Police, *RPD BWC CR2021-00017779 (2 of 2)*, YOUTUBE (Jan. 31, 2021), https://www.youtube.com/watch?v=ku41-899CHo; Paul Blest, *Cops Pepper-Sprayed a 9-Year-Old Girl and Told Her She Was 'Acting Like a Child,'* VICE (Feb. 1, 2021, 12:42 PM), https://www.vice.com/en/article/y3ge9k/cops-pepper-sprayed-a-9-year-old-girl-and-told-her-she-was-acting-like-a-child [https://perma.cc/LW75-6KHC].

[2] Eric Westervelt, Renee Klahr, & Liz Baker, *What Went Wrong: Analysis Of Police Handcuffing, Pepper-Spraying 9-Year-Old Girl*, NPR (Mar. 9, 2021, 6:01 AM), https://www.npr.org/2021/03/09/974896307/what-went-wrong-analysis-of-police-handcuffing-pepper-spraying-9-year-old-girl [https://perma.cc/QWH2-YBTV].

[3] *See* NAT'L ACADS. OF SCIS., ENG'G, & MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 251–301 (David Weisburd & Malay K. Majmundar eds., 2018).

In the wake of this horrifying incident, community activists, children's rights advocates, and mental health professionals raised many essential questions about racial bias in policing; the police officers' excessive use of force and failure to de-escalate the situation; and the obvious need for a mental health-focused rather than law enforcement response to the situation. Catalyzing the confrontation, however, and enabling the police to treat a child in crisis as a criminal, was an often-overlooked, structural defect in New York's juvenile legal system: its minimum jurisdictional age of just seven years old[4]

Aggressive actions like those used by the Rochester police—handcuffing, arresting, and pepper spraying the young—can only occur when juvenile codes permit the prosecution of pre- and early adolescent children. If young children are excluded from juvenile court jurisdiction, on the other hand, no justification exists for reliance on law enforcement as the primary response mechanism in moments of crisis or to address youthful misbehavior in the community and in school.

Criminalization of childhood runs counter to developmental science, traumatizes the young, and permits the transfer of school discipline from educators to the police.[5] Yet, in contravention of international human rights standards and global norms, twenty-four of the fifty states and the District of Columbia currently set no minimum age for arrest, court referral, or prosecution;[6] and eighteen set a minimum age of ten or younger.[7] As a result, 30%—or 217,380 children—of the 728,280 juveniles arrested in the United States in 2018 were under 15 years old.[8] Between 2013 and 2018, at least 30,467 children under the age

[4] N.Y. FAM. CT. ACT § 301.2(1) (LexisNexis 2024). In 2022, New York raised the minimum age of Family Court jurisdiction to twelve.

[5] *See generally* Andrew Bacher-Hicks, Stephen B. Billings, & David J. Deming, *Proving the School-to-Prison Pipeline*, 21 EDUC. NEXT 52, 52–57 (2021), https://www.educationnext.org/proving-school-to-prison-pipeline-stricter-middle-schools-raise-risk-of-adult-arrests/ [https://perma.cc/G84Z-JM2D].

[6] *See* ALA. CODE § 12–15–114 (2014); ALASKA STAT. § 47.12.020 (West 2021); D.C. CODE § 16-2301 (2021); GA. CODE. ANN. § 15–11–2 (West 2022); HAW. REV. STAT. § 571–11; IDAHO CODE ANN. § 20–502 (West 2022); 705 ILL. COMP. STAT. 405/1-3(1) (2023); IND. CODE ANN. § 31-30-1-1 (West 2023); IOWA CODE §§ 232.8(1), 232.2(5) (2019); KY. REV. STAT. ANN. § 601.010(1); ME. STAT. tit. 15, § 3003(14) (2023); MICH. COMP. LAWS SERV. § 712A.2 (LexisNexis 2023); MO. REV. STAT. § 211.031 (2022); MONT. CODE ANN. § 41-5-203 (2001); N.J. STAT. ANN. § 2A:4A-22 (West 2012); N.M. STAT. ANN. § 32A-1-4(C) (West 2023); OHIO REV. CODE ANN. § 2151.011(6) (West 2023); OKLA. STAT. ANN. tit. 10A § 2-1-103(6) (West 2017); OR. REV. STAT. § 419C.005(1) (2020); 14 R.I. GEN. LAWS ANN. § 14-1-3 (West 2022); S.C. CODE ANN. § 63-19-20 (2019); TENN. CODE ANN. § 37-1-102(5) (West 2023); VA. CODE ANN. § 16.1-228 (West 2023); W. VA. CODE § 49-1-202 (2015); WYO. STAT. ANN. §§ 14-1-101, 14-6-201 (2009).

[7] *See* ARIZ. REV. STAT. § 8-307(A) (LexisNexis 1998); ARK. CODE ANN. § 9-27-306(a)(1)(A) (West 2023); COLO. REV. STAT. ANN. § 19-2.5-103(1) (West 2023); CONN. GEN. STAT. ANN. § 46b-120(1) (West 2023); FLA. STAT. § 985.031 (2021); KAN. STAT. ANN. § 38-2302(s) (West 2023); LA. CHILD. CODE ANN. art. 804(3) (2018); MINN. STAT. §§ 260C.007(6)(12), 611.14 (West 2023); MISS. CODE ANN. § 43-21-105(i) (West 2019); NEV. REV. STAT. § 194.010 (2015); N.C. GEN. STAT. ANN. § 7B-1501(7) (West 2022); N.D. CENT. CODE ANN. § 12.1-04-01(1) (West 2023); 42 PA. STAT. AND CONS. STAT. ANN. § 6302 (West 2018); S.D. CODIFIED LAWS § 26-8C-2 (2004); TEX. FAM. CODE ANN. § 51.02(2)(A) (West 2023); VT. STAT. ANN. tit. 33, § 5102(2)(C) (2023); WASH. REV. CODE § 9A.04.050 (2011); WIS. STAT. § 938.12(1) (2023).

[8] CHARLES PUZZANCHERA, JUVENILE ARRESTS, 2018, at 3 (2020), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/254499.pdf [https://perma.cc/74RW-S7AC]; *Statistical Briefing Book*, OFF. JUV. JUST. & DELINQ. PREVENTION (Oct. 31, 2019), https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qaDate=2018 [https://perma.cc/72RQ-6PNG].

of ten were arrested in the United States.[9] In 2019 (the most recent year for which data are available), of 36,479 children incarcerated in juvenile detention centers or youth prisons, 15.5% were fourteen or younger.[10]

The lack of a uniform, rational minimum age of juvenile court jurisdiction not only ensnares developmentally immature children in the legal system far too early but also perpetuates structural racism within that system. Arrests and prosecutions of youth are, like every other aspect of the carceral state, driven and defined by racial inequities. Although Black and white children offend at similar rates,[11] the nearly boundless discretion accorded police in determining whether to arrest and charge youth, and the equally broad discretion embedded in juvenile court decision-making, are fodder for bias and give rise to seemingly intractable disparities.[12] Of the 62,627 children age twelve and under referred to U.S. juvenile courts in 2019, 46.3% were white, 36.2% were Black, 14.5% were Latinx, and 2% were Native American.[13] Of those aged thirteen to fifteen, 41.8% were white, 36% were Black, 19.2% were Latinx, and 1.9% were Native American.[14] In contrast, in 2019, 50% of U.S. children under the age of 18 were white, 14% were Black, 25% were Latinx, and 1% were Native American.[15] These disparities are not new. To the contrary, they are tightly woven into the historical fabric of the juvenile legal system and continue to increase, even as the total number of system-involved children declines.[16]

Even when children are not incarcerated, arrest and the possibility of prosecution subject them to profoundly negative direct and collateral consequences. These include, among others, exclusion from school, housing instability, immigration consequences, accumulation of juvenile records, the threat of entanglement with the legal system, and the

[9] Bill Hutchinson, *More Than 30,000 Children Under Age 10 Have Been Arrested in the US Since 2013: FBI*, ABC NEWS (Oct. 1, 2019, 8:31 AM), https://abcnews.go.com/US/30000-children-age-10-arrested-us-2013-fbi/story?id=65798787 [https://perma/cc/3TV9-FZXC].

[10] Charles Puzzanchera, T.J. Sladky, & Wei Kang, *Easy Access to the Census of Juveniles in Residential Placement: 1997–2021: Year of Census by Age*, OFF. JUV. JUST. & DELINQ. PREVENTION (2023), https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/display.asp?row_var=v01&col_var=v04&display_type=counts&export_file=&printer_friendly= [https://perma.cc/XT9D-NFND].

[11] According to a 2016 report by the Sentencing Project, African American youth were 129% more likely to be arrested than white youth despite similar rates of offending. JOSHUA ROVNER, SENT'G PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS 8 (Apr. 2016), https://www.sentencingproject.org/app/uploads/2022/08/Racial-Disparities-in-Youth-Commitments-and-Arrests.pdf [https://perma.cc/G3AC-D4K7].

[12] DEV. SERVS. GRP., INC., *Racial and Ethnic Disparities in Juvenile Justice Processing: Literature Review*, OFF. JUV. JUST. & DELINQ. PREVENTION (2022), https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity#5-0 [https://perma.cc/8FLQ-AA62] (select "Contributing Factors to Racial and Ethnic Disparities).

[13] Charles Puzzanchera, Anthony Sladky, & Wei Kang, *Easy Access to Juvenile Court Statistics: 1985–2020*, OFF. JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/ezajcs/asp/selection.asp [https://perma.cc/8YXW-UYMK] (select "2019" for "Year of Disposition," "<12" and "12" for "Age at Referral," "Year of Disposition" for "Row Variable," and "Race" for "Column Variable").

[14] *Id.* (select "2019" for "Year of Disposition;" "13," "14," and "15" for "Age at Referral;" "Year of Disposition" for "Row Variable;" and "Race" for "Column Variable").

[15] *Child Population by Race and Ethnicity in United States*, ANNIE E. CASEY FOUND. (July 2023), https://datacenter.aecf.org/data/tables/103-child-population-by-race-and-ethnicity#detailed/1/any/false/1729/68,69,67,12,70,66,71,72/423,424 [https://perma.cc/UT23-BSQC].

[16] Puzzanchera, Sladky, & Kang, *supra* note 13 (select "Race" for "Column Variable").

stigma that attaches to any interaction with police.[17] In addition, any form of short- or long-term custody threatens lifelong harm to children's physical and emotional well-being.[18] Yet, when referral to juvenile court is possible, children in over-policed communities—most often communities of color—are exponentially more likely than their white or wealthier peers to be arrested, prosecuted, detained, and committed to long-term state custody. These disparities increase as children become further enmeshed in the legal system. For example, Black children are five times, Native American children are three times, and Latinx children are almost one and one-half times as likely to be detained as white children.[19]

The only possible redress for these deep and continuing harms is the categorical exclusion of developmentally immature children from prosecution and, with it, the end of the juvenile court in its current iteration. Legal scholars have accorded scant attention to the imperative of a minimum jurisdictional age,[20] and even less to the nexus between jurisdictional boundaries and the structural racism that has defined American youth justice

[17] *See, e.g.*, David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 88 SOCIO. EDUC. 36, 39 (2013) (discussing educational consequences of juvenile arrest); CORP. FOR SUPPORTIVE HOUS., ADDRESSING THE INTERSECTIONS OF JUVENILE JUSTICE INVOLVEMENT AND YOUTH HOMELESSNESS: PRINCIPLES FOR CHANGE (2017), http://www.csh.org/wp-content/uploads/2017/03/Principles_FINAL.pdf [https://perma.cc/6W85-QWZN] (discussing housing instability resulting from juvenile arrests); Rebecca Phipps, *Starting Over: The Immigration Consequences of Juvenile Delinquency and Rehabilitation*, 40 N.Y.U. REV. L. & SOC. CHANGE 515, 520 (2016) (discussing immigration consequences of juvenile arrest); Judith G. McMullen, *Invisible Stripes: The Problem of Youth Criminal Records*, 27 S. CAL. REV. L. & SOC. JUST. 1, 22–23 (2018) (discussing accumulation of juvenile records resulting from arrests).

[18] Richard Mendel, *Why Youth Incarceration Fails: An Updated Review of the Evidence*, SENT'G PROJECT (Mar. 1, 2023), https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/ [https://perma.cc/8EGV-DWKB] (collecting studies of negative impacts of youth incarceration on young people's physical and mental health).

[19] Josh Rovner, *Racial Disparities in Youth Incarceration Persist*, SENT'G PROJECT (Feb. 3, 2021), https://www.sentencingproject.org/fact-sheet/racial-disparities-in-youth-incarceration-persist/ [https://perma.cc/BD7G-76C2].

[20] There are some exceptions. *See, e.g.*, Merril Sobie, *The Delinquent "Toddler": The Minimum Age of Responsibility*, 26 CRIM. JUST. 36 (2012); Travis Watson, Note, *From the Playhouse to the Courthouse: Indiana's Need for a Statutory Minimum Age for Juvenile Delinquency Adjudication*, 53 IND. L. REV. 433 (2020); Madison R. Duncan, Note, *Too Young for the System: What the United States Can Learn From International Law on the Minimum Age of Criminal Responsibility*, 32 IND. INT'L & COMP. L. REV. 601 (2022); *cf.* Richard Bogatto & Thomas M. Sewell, Jr., Comment, *Age and Related Jurisdictional Problems of the Juvenile Courts*, 36 TEX. L. REV. 323 (1958) (offering a pre-*In re Gault* commentary). Scholars have paid far more attention to the related issues of upper jurisdictional boundaries of juvenile court and prosecution of children in adult courts. *See, e.g.*, Charles E. Loeffler & Ben Grunwald, *Decriminalizing Delinquency: The Effect of Raising the Age of Majority on Juvenile Recidivism*, 44 J. LEGAL STUD. 361 (2015); Jonathan Lippman, *Juvenile (In)Justice: Criminal Justice Reform Is Not for the Short-Winded: How the Judiciary's Proactive Pursuit of Justice Helped Achieve "Raise the Age" Reform in New York*, 45 FORDHAM URB. L.J. 241 (2017); Elizabeth Cauffman, Adam Fine, Alissa Mahler, & Cortney Simmons, *How Developmental Science Influences Juvenile Justice Reform*, 8 U.C. IRVINE L. REV. 21 (2018); Christopher Northrop, Jill Ward, Jonathan Ruterbories, & Jess Mizzi, *What's My Age Again?: Adolescent Development and the Case for Expanding Original Juvenile Court Jurisdiction and Investing in Alternatives for Emerging Adults Involved in Maine's Justice System*, 74 ME. L. REV. 243 (2022); Brittany L. Briggs, Note, *Children Are Our Future: Resurrecting Juvenile Rehabilitation Through "Raise the Age" Legislation in Missouri*, 85 MO. L. REV. 191 (2020).

since the colonial era.[21] In making that connection and calling for universal adoption of a minimum age of at least fourteen, this Article stakes out new ground.

Part II charts the radiating harms of legal system involvement for young children, focusing on the immediate and long-term effects of arrest and prosecution on themselves, their families, and their communities. Part III offers a brief history of the juvenile legal system, from the earliest iterations of the common law doctrine of infancy through today, focusing on the racial disparities and injustice that have defined that system since its beginnings. Part IV analyzes some of the causes of those perpetual inequities, including the symbiosis of discretion and racial disparities in police, prosecutorial, and judicial decision-making; implicit bias, specifically, adultification bias; and criminalization of normative childhood behaviors of children of color. This part further argues that the lack of a rational minimum jurisdictional age legitimizes the over-policing and surveillance of children of color, justifies police presence in schools, and fuels the school-to-prison pipeline. Part V summarizes the large body of developmental science establishing children's lesser culpability, lack of adjudicative competency, and capacity for change. Part VI considers the potential revival of the common law defense of infancy within juvenile court proceedings and concludes that embrace of the defense in its historical iteration fails on two fronts: (1) it would devalue the universal applicability of developmental science and, (2) in its insistence on case-by-case determinations, the infancy defense would amplify and perpetuate, rather than reduce, racial disparities. This Article proposes, instead, a new doctrine of infancy, grounded in the categorical exclusion of children younger than fourteen from juvenile court jurisdiction and consistent with international human rights standards and norms. Unlike the infancy defense, categorical exclusion shields young children from the myriad harms caused by discriminatory policing, arrest, and other aspects of system involvement. Part VI anticipates and responds to arguments against this proposal and offers examples of effective alternatives to prosecution from other countries and within the United States. This section contributes to existing scholarship by positioning age-based jurisdictional boundaries as a pathway to abolition of the structurally biased and discriminatory juvenile court.

## I. THE PERVASIVE HARMS OF SYSTEM INVOLVEMENT

### *A. Harms to Children*

The failure of juvenile codes to establish a rational, developmentally appropriate minimum jurisdictional age subjects young children, their families, and their communities to a multitude of inter-connected and intractable harms. The American Academy of Pediatrics has declared involvement in the juvenile legal system "a critical social determinant of health" that negatively affects the way children "grow, work, live, and age."[22] Worse still, the most vulnerable children disproportionately endure the harms of systemic involvement. Children who are arrested and prosecuted are substantially more

[21] *See generally* JANE M. SPINAK, THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES (2023); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

[22] Maria Trent, Danielle G. Dooley, & Jacqueline Dougé, *The Impact of Racism on Child and Adolescent Health*, 144 PEDIATRICS 1, 1–2 (2019).

likely to be involved in the child welfare system; have learning or emotional disabilities and special education needs; or have unaddressed mental health needs than their non-system-involved peers.[23] Up to 97% of court-involved young people report having experienced one or more adverse childhood experience (ACEs),[24] including child abuse and neglect; witnessing the death of friends or family members and other forms of violence; having a family member attempt or die by suicide; substance abuse or mental illness in the home; and the incarceration of a parent or close family member, among others.[25] Many also have post-traumatic stress disorder ("PTSD").[26]

### 1. Arrest

Even when arrest does not lead to adjudication or incarceration, it has potentially life-long and life-altering consequences for children.[27] This is true for all youths, but particularly so for the very young. Media reports of the arrests of prepubescent children document the lasting trauma of confrontational interactions with police at a young age. Consider, for example, one high-profile case. Six-year-old Kaia Rolle loved to dance, sing

[23] *See* MARK E. COURTNEY, AMY DWORSKY, ADAM BROWN, COLLEEN CARY, KARA LOVE, & VANESSA VORHIES, CHAPIN HALL CTR. UNIV. CHI., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, at 90–93 (2011) (discussing high rates of involvement in criminal legal system for youth previously in foster care in longitudinal study), https://www.chapinhall.org/wp-content/uploads/Midwest-Eval-Outcomes-at-Age-26.pdf [https://perma.cc/C5ZG-FY8F]; BARRY HOLMAN & JASON ZIEDENBERG, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 8–9 (2022), https://justicepolicy.org/wp-content/uploads/2022/02/06-11_rep_dangersofdetention_jj.pdf [https://perma.cc/3C7X-9XAM] (explaining that approximate 40 percent of incarcerated youth have a learning disability); DEV. SERVS. GRP., INC., *Intersection Between Mental Health and the Juvenile Justice System*, OFF. JUV. JUST. & DELINQ. PREVENTION 1, 2–3 (2022), https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/intsection_between_mental_health_and_the_juvenile_justice_system.pdf [https://perma.cc/D5HP-9R4Q] (explaining that approximately 70% of young people who have contact with the juvenile justice system have a diagnosable mental health problem). *See generally* ROBERTS, *supra* note 21.

[24] *See* Michael T. Baglivio, Nathan Epps, Kimberly Swartz, Mona Sayedul Huq, Amy Sheer, & Nancy S. Hardt, *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 J. JUV. JUST., Spring 2014, at 1 ("Adverse childhood experiences (ACEs) are potentially traumatic events that occur before a child reaches the age of 18. Such experiences can interfere with a person's health, opportunities and stability throughout his or her lifetime—and can even affect future generations."); *see also Adverse Childhood Experiences*, NAT'L CONF. STATE LEG. (Aug. 23, 2022), https://www.ncsl.org/health/adverse-childhood-experiences [https://perma.cc/K9WW-7CFV].

[25] Johanna B. Folk, Kathleen Kemp, Allison Yurasek, Jill Barr-Walker, & Marina Tolou-Shams, *Adverse Childhood Experiences Among Justice-Involved Youth: Data-Driven Recommendations for Action Using the Sequential Intercept Model*, 76 AM. PSYCH. 268, 269 (2021).

[26] Elizabeth S. Barnert, Laura S. Abrams, Cheryl Maxson, Lauren Gase, Patricia Soung, Paul Carroll, & Eraka Bath, *Setting a Minimum Age for Juvenile Justice Jurisdiction in California*, 13 INT'L J. PRISON HEALTH 49, 51–52 (2018); Julian D. Ford, John F. Chapman, Josephine Hawke, & David Albert, *Trauma Among Youth in the Juvenile Justice System: Critical Issues and New Directions*, NAT'L CTR. MENTAL HEALTH & JUV. JUST. (June 2007), https://www.courts.ca.gov/documents/BTB25-1G-02.pdf [https://perma.cc/8R7R-JUWD].

[27] ROLF LOEBER, DAVID P. FARRINGTON, & DAVID PETECHUK, CHILD DELINQUENCY: EARLY INTERVENTION AND PREVENTION 11 (2003), https://www.ncjrs.gov/pdffiles1/ojjdp/186162.pdf [https://perma.cc/C4RV-YWYZ].

gospel songs, and "hugged everyone around her."[28] Kaia was arrested in her Orlando, Florida school when she had a tantrum that was triggered by her documented sleep apnea.[29] According to news reports, by the time police arrived, Kaia was sitting calmly in the principal's office reading a book.[30] Nevertheless, she was arrested and charged with misdemeanor battery of school staff.[31] Body camera footage shows the arresting officer—who is in full uniform, carrying a holstered gun, and appears to be wearing a bullet-proof vest—pulling Kaia's hands behind her back and restraining her as she sobs, "Don't put handcuffs on! . . . . Please let me go! . . . . Give me a second chance!"[32] The handcuffs slid off her tiny wrists; instead, police used "zip ties" to shackle her. As the officer escorts her from the principal's office, past the school playground, and into a marked patrol car, she cries, brokenheartedly, "No, please! . . . . I don't want to go!"[33] She is so small that she has to be lifted into the car and, later, stand on a stool when police take her mug shot.[34] (That a mug shot of a six-year-old even exists encapsulates the preposterousness of current law.)

Kaia is now nine years old. She suffers from "extreme post-traumatic stress disorder, separation anxiety, oppositional defiance disorder and phobias of simple things like bugs. She rarely smiles. . . . Police officers terrify her."[35] According to her grandmother, Kaia is dying, "bit by bit, day after day."[36]

As Kaia's case painfully illustrates, encounters with police, and even the fear of such encounters, create lasting trauma in children, particularly for Black children.[37] Even if children are not arrested or ultimately prosecuted, such intrusive and accusatory interactions with police negatively affect both society's perception of them and their

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[28] Taylor Ardrey, *Kaia Rolle Was Arrested at School When She Was 6. Nearly Two Years Later, She Still 'Has to Bring Herself Out of Despair,'* INSIDER (Mar. 17, 2021, 2:47 PM), https://www.insider.com/6-year-old-black-girl-arrested-school-disturbing-trend-criminalization-2021-3 [https://perma.cc/N49S-PQK4].

[29] *Id.*

[30] Alex Horton, *Body-Cam Video Shows 6-Year-Old Crying for Help as Officers Zip-Tie Her*, WASH. POST (Feb. 26, 2020, 1:37 PM), https://www.washingtonpost.com/education/2020/02/26/video-florida-girl-arrested/ [https://perma.cc/55FZ-WFGB].

[31] *Id.*

[32] FOX 2 St. Louis, *Bodycam Videos Show 6-Year-Old Sobbing, Pleading With Officers During Arrest*, YOUTUBE (Feb. 26, 2020), https://www.youtube.com/watch?v=I6geTDOfv2w.

[33] *Id.*

[34] Horton, *supra* note 30.

[35] Andrea Ball, Dian Zhang, & Mary Claire Molloy, *'She Looks Like a Baby': Why Do Kids as Young as 5 or 6 Still Get Arrested at Schools?*, CTR. PUB. INTEGRITY (Feb. 10, 2022), https://publicintegrity.org/education/criminalizing-kids/young-kids-arrested-at-schools/ [https://perma.cc/2Q5W-HXWQ].

[36] *Id.*

[37] *See generally* Kristin Henning, *Policing as Trauma*, 37 CRIM. JUST. 42 (2022); Dylan B. Jackson, Chantal Fahmy, Michael G. Vaughn, & Alexander Testa, *Police Stops Among At-Risk Youth: Repercussions for Mental Health*, 65 J. ADOLESCENT HEALTH 627 (2019); Craig B. Futterman, Chaclyn Hunt, & Jamie Kalven, *Youth/Police Encounters on Chicago's South Side: Acknowledge the Realities*, 2016 U. CHI. LEGAL F. 125 (2016); Todd J. Clark, Caleb Gregory Conrad, André Douglas Pond Cummings, & Amy Dunn Johnson, *Trauma: Community of Color Exposure to the Criminal Justice System as an Adverse Childhood Experience*, 90 U. CIN. L. REV. 857 (2022); Rhea W. Boyd, Angela M. Ellison, & Ivor B. Horn, *Police, Equity, and Child Health*, 137 PEDIATRICS 1 (2016); Jacob Bor, Atheendar S. Venkataramani, David R. Williams, & Alexander C. Tsai, *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302 (2018); Amanda Geller, *Youth-Police Contact: Burdens and Inequities in an Adverse Childhood Experience, 2014–2017*, 111 AM. J. PUB. HEALTH 1300 (2021).

perception of themselves.[38] And, when the law permits prosecution of young children, policing them is implicitly authorized. With that authority comes the dehumanizing, traumatic machinations of law enforcement: stops, demands for identifying information and documents, invasive questioning, frisks, handcuffs, transport in marked patrol cars, custodial interrogations, fingerprints, photographs, and placement in holding cells.

The most aggressive interactions, of course, are the most traumatic and cause the greatest harm. The American Academy of Pediatrics has determined that children who are the targets of use of force by police or who witness police shootings and other violent civilian-police encounters experience ongoing post-traumatic stress throughout their lives.[39] Researchers studying street stops of children have found that:

> [y]outh who were stopped more frequently were more likely to report feeling angry, scared, and unsafe and more likely to experience stigma and shame. Those who experienced more invasive stops like searches, frisks, harsh language, and racial slurs were more likely to report both emotional distress during the stop and post-traumatic stress after the stop. Youth experienced stress regardless of whether they were engaged in delinquent behavior. Even youth who had an extensive history of delinquency were not immune from the emotional distress, trauma, and stigma associated with the most intrusive stops.[40]

Furthermore, a well-established cause and effect relationship exists between negative childhood interactions with police and subsequent system involvement. Even police contact at a young age that does not lead to formal arrests or charges exponentially increases the likelihood of future arrest, particularly for children of color. One recent longitudinal study determined that Black children who have been stopped by police by the eighth grade are eleven times more likely to be arrested by their twentieth birthday than white children.[41] Because youth of all races break the law at approximately the same rate, this phenomenon is not explained by differential rates of offending but, instead, by the impact of a child's prior arrest on police perceptions of them.[42] Police stops, arrests, and juvenile court referrals also increase rather than decrease the likelihood of future offending.[43]

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[38] *See generally* Clark, Conrad, Cummings, & Johnson, *supra* note 37; Boyd, Ellison, & Horn, *supra* note 37; Bor, Venkataramani, Williams, & Tsai, *supra* note 37; Geller, *supra* note 37.
[39] Boyd, Ellison, & Horn, *supra* note 37, at 2.
[40] Henning, *supra* note 37, at 44.
[41] Anne McGlynn-Wright, Robert D. Crutchfield, Martie L. Skinner, & Kevin P. Haggerty, *The Usual, Racialized, Suspects: The Consequence of Police Contacts with Black and White Youth on Adult Arrest*, 69 SOC. PROBS. 299, 310 (2020).
[42] *Id.* at 300.
[43] *Id.* Due to their developmental immaturity and consequent vulnerability to standard police interrogation tactics, children are more than twice as likely to confess falsely and, therefore, to be wrongfully convicted than adults. *See, e.g.*, Steven A. Drizin & Beth A. Colgan, *Tales From the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions From Juvenile Suspects*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 128 (G. D. Lassiter ed., 2004); Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCH. SCI. PUB. INT. 33, 52 (2004).

### 2. Court Referral, Diversion, and Probation

The majority of children fourteen and younger who are arrested are either referred to a "diversion" program or receive a non-carceral sentence, if they are formally prosecuted.[44] But such purportedly diversionary or "rehabilitative" measures often propel children further into the system rather than extricate them from it. Once children become known to court decision-makers, they are variously labeled as delinquent, deviant, or criminal.[45] This stigmatization follows them throughout their lifetimes and negatively affects subsequent legal decisions and outcomes.[46]

In many jurisdictions, furthermore, children are afforded only one opportunity for adjustment or diversion.[47] If a child receives that single diversionary referral at a young age and is arrested again later on, even for a minor offense, they will be formally charged and prosecuted, with cascading negative effects. Additionally, diversionary programs often require children to enter uncounseled guilty pleas.[48] Failure to complete or comply with the conditions of the programs can lead to violation petitions, contempt charges, formal adjudication, and re-sentencing.[49] Probation has been the "cornerstone" of the juvenile court since its inception at the end of the nineteenth century.[50] Operating behind a façade of child-centrism that often provided cover for punitive and discriminatory decision-making,[51] probation officers controlled—and, in many jurisdictions, continue to exert outsized influence over—the core functions of the court.[52] Probation officers control

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[44] Charles Puzzanchera, Anthony Sladsky, & Wei Kang, *Easy Access to Juvenile Court Statistics: 1985–2021*, OFF. JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/ezajcs/asp/selection.asp [https://perma.cc/5JL2-53FK] (last visited Mar. 31, 2024) (select ""<12," "12," 13," and "14" for "Age at Referral," "Year of Disposition" for "Row Variable," and "Disposition" for "Column Variable").

[45] Zachary R. Rowan, Adam Fine, Laurence Steinberg, Paul J. Frick, & Elizabeth Cauffman, *Labeling Effects of Initial Juvenile Justice System Processing Decision on Youth Interpersonal Ties*, 61 CRIMINOLOGY 731, 732 (2023).

[46] For a useful discussion of labeling theory, see McGlynn-Wright, Crutchfield, Skinner, & Haggerty, *supra* note 41.

[47] RICHARD A. MENDEL, DIVERSION: A HIDDEN KEY TO COMBATING RACIAL AND ETHNIC DISPARITIES IN JUVENILE JUSTICE 14 (2022), https://www.sentencingproject.org/app/uploads/2022/10/Diversion-A-Hidden-Key-to-Combating-Racial-and-Ethnic-Disparities-in-Juvenile-Justice.pdf. [https://perma.cc/TE6M-ZZ64].

[48] *Id.* at 16.

[49] *Id.* at 16–17.

[50] *Overview*, OFF. JUV. JUST. & DELINQ. PREVENTION (Aug. 1999), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/jaibgbulletin/over.html [https://perma.cc/XT87-JWV3]. For a brief history of the juvenile court, see *infra* Part II.

[51] *See, e.g.*, Allyson L. Dir, Lauren A. Magee, Richelle L. Clifton, Fangqian Ouyang, Wanzhu Tu, Sarah E. Wiehe, & Matthew C. Aalsma, *The Point of Diminishing Returns in Juvenile Probation: Probation Requirements and Risk of Technical Probation Violations Among First-Time Probation-Involved Youth*, 72 PSYCH., PUB. POL'Y, & L. 283, 288 (2021) (documenting racial disparities in technical youth probation violations).

[52] The almost unchecked powers of the probation officer are evident in the case history of *In re Gault*, 387 U.S. 1 (1967), which Chief Justice Earl Warren famously described as the "Magna Carta for juveniles." Letter from Earl Warren, C.J. of the U.S., to Abe Fortas, Associate J. of the U.S. (Mar. 17, 1967), *in* Kimberly Ambrose & George Yeannakis, *The Magna Carta for Juveniles:* In re Gault *Turns 50*, 71 NW. LAW., June 2017, at 35. For a discussion of a modern-day probation system operating in a pre-*In re Gault* manner, see Josh Gupta-Kagan, *Where the Judiciary Prosecutes in Front of Itself: Missouri's Unconstitutional Juvenile Court Structure*, 78 MO. L. REV. 1245, 1273–74 (2013); Mae C. Quinn, *The Other Missouri Model: Systemic Juvenile Injustice in the Show-Me State*, 78 MO. L. REV. 1193, 1231–34 (2013); U.S. DEP'T JUST. CIV. RTS.

intake, diversion, charging, pretrial detention, and sentencing, or "disposition," in juvenile court parlance.[53] They also implement and oversee what is by far the most commonly imposed juvenile court disposition: probation supervision. In 2020, 68% or 46,100 of the 67,700 children under the age of sixteen adjudicated[54] in juvenile courts nationally were placed on probation.[55] Another 20,000 were placed on "informal" probation, which does not require an adjudication of guilt but can subject children to supervision and monitoring akin to those that accompany formal probation. Failure to comply with such "informal" conditions can lead to violation petitions that drive children further into the system.

Typically, children placed on probation must comply with a long list of conditions, which are often unrelated to the offense that led to their court involvement. These conditions might include compliance with an officer-imposed curfew; daily school attendance; completion of all homework assignments; participation in various, purportedly rehabilitative programs; obtaining and maintaining employment; completion of community service requirements; and writing book reports or essays for the probation officer or judge.[56] Almost without exception, youth probation also includes the hallmarks of the adult system: regular meetings with the probation officer; random drug and alcohol testing; unannounced home, school, and workplace checks; movement and location restrictions; and, increasingly, compliance with electronic monitoring. For young children in particular, these conditions give rise to developmental impediments and stigmatization.[57] Compliance is also difficult for many young people, as they are reliant on adults who may not be reliable or present for transportation and other logistics.

"Technical" violation of conditions of probation can, and does, lead to probation revocation and incarceration, even for young children and even without a new arrest.[58] In 2019, 12% of incarcerated children were committed for technical violations of probation; in several states, technical violations accounted for more than one-quarter of youth in long-term state custody.[59] Instead of diverting children from the system or being a benign intervention, probation is a net-widener, "part of the continuum of excessive penal control"

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DIV., INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT 2 (2015) [hereinafter St. Louis Findings Report]. For a more extensive discussion of the role, outsized discretion, and power of contemporary youth probation officers, see Jyuti Nanda, *Set up to Fail: Youth Probation Conditions as a Driver of Incarceration*, 26 LEWIS & CLARK L. REV. 677, 698–701 (2022).

[53] *See* St. Louis Findings Report, *supra* note 52.

[54] The argot of juvenile court is intended to convey its rehabilitative goals and distinguish it from the primarily punitive adult criminal legal system. Consequently, youth are "adjudicated" for, rather than convicted of, offenses. *See, e.g.*, N.J. STAT. ANN. § 2A:4A-43 (West 2024); N.Y. FAM. CT. ACT § 380.1 (McKinney 2024).

[55] SARAH HOCKENBERRY & CHARLES PUZZANCHERA, JUVENILE COURT STATISTICS 2020, at 56 (2023), https://ojjdp.ojp.gov/jcs2020.pdf [https://perma.cc/4KQS-DUK8].

[56] *Promoting Positive Development: The Critical Need to Reform Youth Probation Orders*, NAT'L JUV. DEF. CTR. 2–3 (Sept. 2016), https://njdc.info/wp-content/uploads/2016/12/Promoting-Positive-Development-Issue-Brief.pdf [https://perma.cc/TR5Z-MWQF].

[57] *See* Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297, 330, 336 (2015).

[58] *See* Nanda, *supra* note 52, at 684.

[59] CHARLES PUZZANCHERRA, SARAH HOCKENBERRY, & MELISSA SICKMUND, YOUTH AND THE JUVENILE JUSTICE SYSTEM: 2022 NATIONAL REPORT 189 (2022), https://ojjdp.ojp.gov/publications/2022-national-report.pdf [https://perma.cc/C9GL-W7A5].

that defines the youth and adult criminal legal systems.[60] As is true at every discretionary decision-making point across those systems, furthermore, the nearly unfettered discretion afforded to probation officers breeds significant racial disparities in the number and severity of probation conditions imposed on children, the types of behaviors that lead to violation petitions, and the likelihood of revocation and subsequent incarceration.[61]

### 3. Incarceration

When children are confined in any carceral setting, the harms associated with system involvement multiply and are magnified. Although the number of youth in custody has declined by almost 80% since peaking in the late 1990s, a one-day census undertaken in 2020 counted more than 25,000 children behind bars, most of whom were charged with nonviolent offenses.[62] Study after study has documented the "unsafe, unhealthy, and unconstitutional" conditions in which children are held in pre-trial detention centers and youth prisons across the country.[63] A 2023 report by the Sentencing Project provides a harrowing overview.[64] Maltreatment and abuse are "pervasive."[65] Rather than being nurtured, incarcerated children, especially those under the age of fifteen, suffer physical, sexual, and emotional abuse at the hands of institutional staff and other youth; experience educational disruption and family separation; are denied mental health and medical treatment; and face myriad other forms of maltreatment while in custody.[66]

Not surprisingly, the long-term mental health and medical prognoses for all incarcerated children, particularly the youngest among them, are abysmal. A 2018 study found that incarceration before age thirteen is associated with "substantially worse physical and mental health outcomes during adulthood, including worse adult general health,

[60] Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 291 (2016); *see* Michelle S. Phelps, *Ending Mass Probation: Sentencing, Supervision, Revocation*, 28 FUTURE CHILD. 125, 126 ("For young people in vulnerable communities, the cumulative effect of aggressive policing, repeated criminal infractions, and the piling on of sanctions can be disastrous."); *see also*, Emily Haney-Caron & Erika Fountain, *Young, Black, and Wrongfully Charged: A Cumulative Disadvantage Framework*, 125 DICK. L. REV. 653, 705, 707 (2021).

[61] Nanda, *supra* note 52, at 687.

[62] Richard A. Mendel, THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS 2 (2010), http://www.aecf.org/m/resourcedoc/aecf-MissouriModelFullreport-2010.pdf [https://perma.cc/8USP-JDA7].

[63] *Id.*

[64] Mendel, *supra* note 18.

[65] *See, e.g., id.*; NAT'L JUV. JUST. NETWORK, THE REAL COSTS AND BENEFITS OF CHANGE: FINDING OPPORTUNITIES FOR REFORM DURING DIFFICULT FISCAL TIMES 11–12 (2010), http://www.njjn.org/uploads/digital-library/resource_1613.pdf [https://perma.cc/MEL7-8MW9]; JUST. POL'Y INST., THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE, 7-9 (2009), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/09_05_rep_costsofconfinement_jj_ps.pdf [https://perma.cc/Y2WS-HM4D]; HOLMAN & ZIEDENBERG, *supra* note 23, at 2, 8. For a discussion of the impact of the COVID-19 pandemic on conditions of confinement in youth detention facilities and prisons, see generally Laura Cohen, *Incarcerated Youth and COVID-19: Notes from the Field*, 72 RUTGERS L. REV. 101 (2021).

[66] *See supra* note 65.

functional limitations, depressive symptoms, and suicidality."[67] Incarcerated children of any age also have a shorter life expectancy than their non-incarcerated peers.[68]

The most frequently articulated justifications for subjecting children to the perils of detention and incarceration are protection of public safety and deterrence. Yet, numerous studies have concluded that youth incarceration increases, rather than decreases, recidivism, or, at most, has no deterrent effect on future offending.[69] In fact, an inverse relationship exists between the length of incarceration and the likelihood of recidivism.[70]

#### 4. Collateral Consequences

Legal system involvement, even for minor offenses, also gives rise to collateral consequences that permanently impair children's personal trajectories and long-term financial stability. Juvenile records, even when a child is simply arrested and not adjudicated in juvenile court, erect barriers to school enrollment and graduation, college admissions, military enlistment, employment, and stable housing.[71] In many states, children's juvenile adjudications can be used as sentence enhancements in later adult criminal convictions, despite the denial of the right to trial by jury in juvenile court.[72]

### *B. Harms to Family*

As legal scholar Barbara Fedders reminds us, juvenile court involvement also impinges on family integrity and the right of parents to make decisions about and on behalf of their children.[73] The doctrine of *parens patriae* serves as the philosophical foundation of the juvenile court.[74] By definition and operation, this doctrine divests parents of decisional authority over the lives and well-being of their children and transfers it to various governmental decision-makers, including judges, probation officers, and wardens of youth detention centers and prisons.[75] The United States Supreme Court's 1967 decision

[67] Elizabeth S. Barnert, Laura S. Abrams, Lello Tesema, Rebecca Dudovitz, Bergen B. Nelson, Tumaini Coker, Eraka Bath, Christopher Biely, Ning Li, & Paul J. Chung, *Childhood Incarceration and Long-Term Adult Health Outcomes: A Longitudinal Study*, 14 INT'L. J. PRISON HEALTH 26, 27 (2018). The researchers who shaped and conducted the study chose to focus on children aged thirteen and younger because "because several European countries have set a minimum age of juvenile jurisdiction at 14 or higher. Further, in the USA, common law and court decisions have established that children under 14 are presumed to lack criminal capacity (i.e. the ability to know right from wrong) because of their young age, and may lack the competency to stand trial." *Id.* at 27 (internal citations omitted).

[68] Mendel, *supra* note 18.

[69] *Id.*; EDWARD P. MULVEY, CAROL A. SCHUBERT, & ALEX PIQUERO, PATHWAYS TO DESISTANCE—FINAL TECHNICAL REPORT 13 (Jan. 2014), https://www.ncjrs.gov/pdffiles1/nij/grants/244689.pdf [https://perma.cc/2HJW-KC6M].

[70] MULVEY, SCHUBERT, & PIQUERO, *supra* note 69, at 13.

[71] *Id.* at 11–12.

[72] *See* Robin Walker Sterling, *Fundamental Unfairness: In Re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 613–14 n.26 (2013); Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 111 (2003).

[73] Barbara Fedders, *The Anti-Parent Juvenile Court*, 69 UCLA L. Rev. 746, 753 (2022).

[74] *See* CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE 37 (1998). For a more detailed explication of the doctrine of *parens patriae*, see *infra* Part II.

[75] *See* MANFREDI, *supra* note 74, at 37.

in *In re Gault*,[76] which first accorded due process protections to children at the adjudicatory stage of delinquency proceedings, and the other "due process" decisions of the same era[77] curtailed somewhat the nearly unlimited control that *parens patriae* accorded juvenile court stakeholders. But even today, in most jurisdictions, juvenile court judges are charged with making decisions based at least in part on their assessment of children's "best interests," an intrinsically subjective and virtually unreviewable determination.[78] When very young children are alleged to have broken the law, courts are quick to assume (often due to bias and without factual support) that the wrongdoing was the product of inadequate supervision, failure to provide for the child's physical or emotional needs, or some other parental shortcoming. In such situations, "best interests" leads to the imposition of stringent probation supervision conditions that can affect family stability or, all too often, placement of the child in state custody.[79]

Interestingly, the origin story of *In re Gault* includes consideration and judicial rejection of constitutional arguments grounded in parents', rather than children's, rights. As Amelia Lewis, Gerald Gault's first attorney, asserted in her petition for a writ of habeas corpus in the Arizona Supreme Court: "Petitioner [Gerald Gault's mother, Marjorie] believe[d] that there is not sufficient [evidence?] to show her child to be delinquent; she ha[d] not found him anything than an obedient boy who ha[d] gotten into some trouble, not of a serious enough nature for the punishment meted out to him."[80] The petition further argued that the family court's decision to commit fifteen-year-old Gerald to the State Industrial School for the remainder of his minority for the minor offense of making a lewd phone call violated not only Gerald's due process rights, but also those of his parents, who were deprived of their right to custody of their son.[81] In rejecting that claim, the court also rebuffed its foundational premise: because parents have a fundamental liberty interest in raising their children and are best positioned and equipped to address their children's wrongdoing, courts must not deprive them of custody without first making a finding of parental unfitness.[82] The Court emphasized that

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

[77] Kent v. U.S., 383 U.S. 541 (1966); *In re* Winship, 397 U.S. 358 (1970); *cf.* McKeiver v. Pennsylvania, 403 U.S. 528 (1970); Schall v. Martin, 467 U.S. 253 (1984); Fare v. Michael C., 442 U.S. 707 (1979).

[78] For examples of statutes describing "best interests" evaluations, see, e.g., N.J. STAT. ANN. § 30:4C-1.1(a), (c)-(g) (West 2006); OHIO REV. CODE ANN. § 2151.414(D)(1), (E)(7)–(11) (West 2023); TENN. CODE ANN. § 36-1-113(i) (West 2023). For commentary on the dangers of "best interests," see Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 4 (1987); Raymie H. Wayne, *The Best Interests of the Child: A Silent Standard—Will You Know It When You Hear It?*, 2 J. PUB. CHILD WELFARE 33, 34–36, 41 (2008). Note that, in the wake of the fearmongering of the 1990s, many state legislatures amended their juvenile codes to prioritize "punishment" or "accountability" and, in some cases, deleted "best interests" language altogether. *See, e.g.*, Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s*, 71 LA. L. REV. 1, 8 (2010). Such mirroring of adult criminal schemes further infringes on family autonomy.

[79] *See generally* JUST. FOR FAMS., FAMILIES UNLOCKING FUTURES: SOLUTIONS TO THE CRISIS IN JUVENILE JUSTICE (2012), http://njjn.org/uploads/digital-library/Families_Unlocking_FuturesFULLNOEMBARGO.pdf [https://perma.cc/BKJ9-CCRR].

[80] David S. Tanenhaus, *Pursuing Justice for the Child: The Forgotten Women of* In re Gault, 13 WHITTIER J. CHILD. & FAM. ADVOC., 36, 42 (2014).

[81] *In re* Gault, 407 P.2d 760, 762 (Ariz. 1965).

[82] *Id.* at 769.

> the child's welfare is the primary consideration before the juvenile court and the judge will make such order as the child's welfare and the interests of the state require. It is apparent that the best interest of a child and the fitness of his parent are not necessarily inter-dependent.[83]

In reaching this conclusion, the court engaged in a judicial sleight of hand. Long before Gerald Gault's sham trial sparked what scholars have dubbed the "due process revolution" in juvenile court, the United States Supreme Court recognized and had accorded constitutional protections to parents' rights to maintain custody of and make decisions on behalf of their children.[84] Lurking beneath the surface of these cases is an understanding that when government invades the core spaces of child-rearing—education, religion, and health and well-being—it threatens not only the constitutional rights of parents but also the integrity and independence of the family as well as the sinew of the social fabric. The refusal of the Arizona Supreme Court to lend credence to the Gaults' claim was, in a sense, a willful disregard of this reality.

Of course, parental wishes should not control juvenile court decision-making, and determinations of parental fitness should not be incorporated into delinquency proceedings. To the contrary, *Gault*'s core recognition of children's autonomous liberty interest and attendant due process rights is essential and sacrosanct.[85] However, any measurement of the harms perpetrated by the arrest and prosecution of young children must take into account the fracturing of families that results from (and, often, is the intent of) government monitoring of, supervision over, and interference in the parent-child relationship.[86]

As is true across the carceral continuum, Black children and their families experience such disruptions disproportionately and unjustly. In her landmark book, *Shattered Bonds: The Color of Child Welfare*, Professor Dorothy Roberts describes the devastating symbiosis of the child welfare, or family regulation, and juvenile legal systems:

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[83] *Id.*

[84] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (criminal statute prohibiting teaching of foreign languages in public schools interfered with "the power of parents to control the education of their own"); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925) (compulsory public school education statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *cf.* Prince v. Massachusetts, 321 U.S. 158, 159–160, 166–67, 171 (1944) (conviction for violation of child labor laws upheld where the custodian aunt allowed child to sell Jehovah's Witness magazines at night; "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty . . . the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction"). In a series of post-*In re Gault* cases, the Court continued to center parents' rights within the foster care context. *See* Stanley v. Illinois, 405 U.S. 645, 658 (1972) (statutory presumption of unfitness of unwed fathers violated Equal Protection); Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (due process requires clear and convincing evidence standard of proof in proceedings to terminate parental rights).

[85] *In re* Gault, 387 U.S. at 27–28 (1967) ("[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."); *see* Zawadi Baharanyi & Randy Hertz, *The Many Stories of* In re Gault, *in* RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM 3, 6–11(Kristin Henning, Laura Cohen, & Ellen Marrus eds., 2018) (summarizing the due process rights accorded children by *In re Gault*).

[86] *See* Fedders, *supra* note 73, at 803.

> There is a disturbing overlap… between Black teens who are involved in both the child welfare and criminal justice systems, moving from foster care to juvenile detention and prison. Just as destructive is the combined impact of these two systems that regulate essentially the same population. Independently, each system enforces the inequitable state supervision of Black children. . . . [W]e know that the nation's foster homes, juvenile detention centers, and prisons house far too many children, and we know that most of them are Black. . . . Juvenile justice . . . inflicts a disproportionate amount of collateral damage on Black families.[87]

Regardless of the basis for governmental interference with parental autonomy, the results are the same: the continuing denigration of Black families and the perpetuation of harm to Black children.

### *C. Harms to Community*

Criminalization of childhood also destabilizes communities.[88] System involvement, even for minor offenses, disrupts children's educational trajectories and relationships; frays family ties; and undermines their long-term economic stability. These cumulative adverse effects negatively impact not only the children themselves but also the communities in which they live. Similarly, as Tom R. Tyler, Jeffrey Fagan, and others have established, the harms of inequitable and aggressive policing reverberate beyond the individual children who are targeted. "Stops interpreted as harassing, unfair, or discriminatory damage public trust in police, encourage avoidance of police and other record-keeping institutions (e.g., hospitals and schools), and negatively influence community member and individual mental health." [89] The corrosion spreads throughout over-policed communities and across generations.

Because communities of color, and particularly Black communities, are disproportionately the targets of over-policing, they disproportionately experience its effects.[90] Dorothy Roberts articulates a theory of harm inflicted by the family regulation system that applies with equal force to the juvenile legal system:

> The system's racial disparity also *inflicts* a group-based harm. . . . [T]he harmful impact of a racist child welfare system is also felt by Blacks who are not directly involved in it. The negative consequences of disrupting large numbers of Black families and placing them under state supervision affects Black people's status and welfare as a group. . . . Family disruption historically has served as a tool of group oppression.[91]

Whether the purported justification for that disruption is the alleged child maltreatment by a parent or an allegedly delinquent act by a child, the racialized impact on the community is the same.

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[87] ROBERTS, *supra* note 21, at 205–06, 213.
[88] Mendel, *supra* note 18.
[89] McGlynn-Wright, Crutchfield, Skinner, & Haggerty, *supra* note 41, at 299 (internal citations omitted).
[90] KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 246 (2021).
[91] ROBERTS, *supra* note 21, at 229, 233.

These many harms to individual children, to their families, and to their communities could be reduced by shielding young children from arrest and prosecution. Pre-pubescent and early adolescent children overwhelmingly are arrested for minor offenses; of the nearly 122,000 documented arrests of children fourteen and younger in the United States in 2020, roughly 85% were for non-violent crimes.[92] Major, longitudinal studies have established that the majority of youth who have broken the law will simply outgrow their delinquent behavior without legal intervention and, conversely, the most commonly imposed sanctions increase, rather than decrease, the likelihood of recidivism.[93] Arrest and prosecution of the youngest children thus are directly adverse to the juvenile court system's twin goals of rehabilitation and public safety.[94] And yet, the devastation will continue unchecked, unless and until those children are removed from juvenile court jurisdiction.

## II. THE HISTORY AND STRUCTURAL RACISM OF THE JUVENILE COURT

> *All our phrasing—race relations, racial chasm, racial justice, racial profiling, white privilege, even white supremacy—serves to obscure that racism is a visceral experience, that it dislodges brains, blocks airway, rips muscle, extracts organs, cracks bones, breaks teeth. You must never look away from this. You must always remember that the sociology, the history, the economics, the graphs, the charts, the regressions all land, with great violence, upon the body.* — Ta-Nehisi Coates[95]

All of this—the complex trauma perpetrated by confrontational policing, arrest, prosecution, and incarceration; the pain of separation from family and community; the erosion of health and mental health; the interruption of life's trajectories, the denigration of family and community—is inflicted disproportionately and unjustly on children of color and on Black children in particular. Simply put, the system is rotten at its core. Although Black youth comprise only 14% of the total U.S. population of minors under eighteen years old, they made up 34% of the children "handled" by the nation's juvenile courts in 2020.[96] The many harms of legal system involvement, and the consequent irrationality and inutility of that system, thus are inextricable from structural biases that have defined it from its

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[92] *Estimated Number of Arrests by Offense and Age Group, 2020*, OFF. JUV. JUST. & DELINQ. PREVENTION (Jul. 8, 2022), https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp [https://perma.cc/9X4Z-VW42].

[93] Anthony Petrosino, Carolyn Turpin-Petrosino, & Sarah Guckenberg, *Formal System Processing of Juveniles: Effects on Delinquency*, 2010 CAMPBELL SYSTEMATIC REVS. 1, 7, 28; MULVEY, SCHUBERT, & PIQUERO, *supra* note 69, at 12.

[94] Laura Garnette, *Juvenile Court is No Place for Kids—California Must Set a Minimum Age*, S.F. CHRON. (Aug. 13, 2018), https://www.sfchronicle.com/opinion/openforum/article/Juvenile-court-is-no-place-for-kids-13153447.php [https://perma.cc/NQ3D-C58S].

[95] TA-NEHISI COATES, BETWEEN THE WORLD AND ME 10 (2015).

[96] *Child Population by Race and Ethnicity in United States*, KIDS COUNT DATA CTR. (Jul. 2023), https://datacenter.aecf.org/data/tables/103-child-population-by-race-and-ethnicity#detailed/1/any/false/1729/68,69,67,12,70,66,71,72/423,424 [https://perma.cc/4JHL-G9EJ]; *Demographic Characteristics of Cases Handled by Juvenile Courts*, OFF. JUV. JUST. & DELINQ. PREVENTION (2023), https://www.ojjdp.gov/ojstatbb/ezajcs/asp/demo.asp [https://perma.cc/AYN7-F6MZ].

beginnings.[97] When referred to juvenile court, children in over-policed communities are exponentially more likely than their whiter and wealthier peers to be arrested, prosecuted, detained, and committed to long-term state custody. According to a 2016 report by the Sentencing Project, Black children were more than twice as likely to be arrested as white youth, despite similar rates of offending.[98]

The inequities are starkest, among the youngest children. Of the 900 children ages twelve and under committed to state custody by juvenile courts in 2020, 42.3% were Black. Similarly, Black children comprised 43.6% of the youth ages thirteen to fifteen who are incarcerated or otherwise removed from their homes by juvenile courts in the same year.[99] Perhaps most disturbingly, Black children comprised 43% percent of the five- to nine-year-olds arrested between 2000 and 2019, even though they make up only 15% of all American children in that age group.[100]

The persistent and profound racial disparities in juvenile court referrals, prosecutions, and dispositions have triggered investigations and findings reports by the U.S. Department of Justice Civil Rights Division in several jurisdictions around the country.[101] The investigations determined that Black children were denied equal protection across the continuum of legal system involvement. In St. Louis County, Missouri, for example, the DOJ concluded,

> Black children are disproportionately represented in four decision points of the St. Louis County juvenile justice system [formal petition, pretrial detention, commitment, and post-adjudication placement]. While there are many factors that contribute to racial disparities in any juvenile justice system, *the data we examined from the Court strongly suggest that during these four decision points, race is—in and of itself—a significant contributing factor*.[102]

Racial injustice is an inherent violation of human rights and human dignity.[103] It also radiates harm. In the context of children's interactions with the legal system, the American Academy of Pediatrics had declared:

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[97] *See generally* GEOFF K. WARD, THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE (2012); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 124–25 (2010).

[98] ROVNER, *supra* note 11, at 6–7.

[99] *Demographic Characteristics of Cases Handled by Juvenile Courts, Age 13 to 15*, OFF. JUV. JUST. & DELINQ. PREVENTION (2023), https://www.ojjdp.gov/ojstatbb/ezajcs/asp/demo.asp?printer_friendly=yes&display_type=percents&export_file=no&varv02=2&varv03=0&varv04=0&varv05=0&varv06=0&varv07=0&varv08=0&varv09=2 [https://perma.cc/LE2D-9HJV].

[100] Ball, Zhang, & Molloy, *supra* note 35.

[101] *See, e.g.*, U.S. DEP'T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE SHELBY COUNTY JUVENILE COURT (2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/04/26/shelbycountyjuv_findingsrpt_4-26-12.pdf [https://perma.cc/H74M-4RD8]; St. Louis Findings Report, *supra* note 52. The author was the Due Process Expert Consultant in the St. Louis County investigation.

[102] St. Louis Findings Report, *supra* note 52, at 35 (emphasis added). For crucial discussions of constitutional violations in the Missouri juvenile court system, see Gupta-Kagan, *supra* note 52, at 1260–69; Quinn, *supra* note 52, at 1218–38.

[103] *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

> Because racial inequity continues to shape the juvenile justice system, this area is a modern example of race being an important determinant of short- and long-term outcomes. . . . Differential treatment of youth offenders on the basis of race shapes an individual's participation and ultimate function in society. This type of modern racism must be recognized and addressed if the United States seeks to attain health equity.[104]

Throughout its history, the juvenile court's child-centric rhetoric of care and compassion has conflicted with its reality, especially for Black children. The gross racist disparities that define youth "justice" in the United States are not a new phenomenon. To the contrary, structural racism has scaffolded the juvenile court and the various systems that feed into and out of it from their early beginnings. It is entwined in the helix of the juvenile legal system's DNA, ensuring that, in every era and at every stage of system involvement, Black children have been and continue to be treated more harshly and less like children than their white counterparts.[105]

### *A. Common Law Doctrine of Infancy*

Since ancient times, substantive criminal law has acknowledged and made accommodation for children's lesser culpability and responsibility for their actions.[106] At common law, the "tension" between this recognition and a system in which children charged with crimes were prosecuted in the same courts and faced the same penalties as adults found resolution in the doctrine, or defense, of infancy.[107] The infancy defense "was grounded in an unwillingness to punish individuals incapable of forming criminal intent and thus incapable of assuming responsibility for their acts," as well as "the common sense judgment that punishment cannot deter an individual from commission of future wrongful acts where he is in fact incapable of knowing right from wrong."[108] Pursuant to the doctrine of infancy, children under the age of seven could not be prosecuted, while children over fourteen years old were deemed to be *doli capax*, or capable of criminal responsibility and subject to precisely the same punishments as adults.[109] For children between the ages of seven and fourteen, there existed a presumption of legal incompetency, which was rebuttable by the prosecution.[110] When children in this age group were found to be

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[104] Trent, Dooley, & Dougé, *supra* note 22, at 2, 3.

[105] For a comprehensive, probing, and important examination of the early youth justice system's disparate treatment of Black children and the efforts of the Black community to create alternative, child-focused systems of care, treatment, and education, see generally WARD, *supra* note 97.

[106] *See* Barbara Kaban & James Orlando, *Revitalizing the Infancy Defense in the Contemporary Juvenile Court*, 60 RUTGERS L. REV. 33, 35 (2007); Tara Schiraldi, Note, *For They Know Not What They Do: Reintroducing Infancy Protections for Child Sex Offender in Light of* In Re B.W., 52 AM. CRIM. L. REV. 679, 681 (2015).

[107] *See* Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 510–11 (1984). For general treatments of the infancy defense, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 351–53 (1972). For early expositions of the defense, see 1 MATTHEW HALE, PLEAS OF THE CROWN 24–28 (1678); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 12–14 (1769); 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 4 (1644).

[108] Walkover, *supra* note 107, at 512.

[109] *Id.* at 510–11.

[110] *Id.* See *infra* Part III for a more detailed discussion of the common law infancy defense.

competent, however, they, too, faced the possibility of the full range of adult sanctions.[111] Not surprisingly, the presumption was more easily overcome in cases involving older children and those charged with more serious offenses.[112]

It is widely reported and assumed that courts routinely meted out harsh punishments to children, including incarceration, flogging, or even the death penalty, even when they were found to have committed relatively minor offenses. In operation, however,

> [t]he criminal responsibility of children in the United States during the nineteenth century was determined . . . by the elaboration of rules of procedure and evidence, which leaned toward the protection of the defendant. There seems to be no justification for the proposition that children were regularly executed; to the contrary, the courts were extremely hesitant to sentence a child under fourteen to death.[113]

Instead, judges and prosecutors engaged in various legal gymnastics and nullification strategies, including reduction of charges and sentence commutations, among others, to avoid draconian results.[114]

As Professor Robin Walker Sterling makes clear, however, the infancy doctrine generally (and nullification, in particular) disproportionately benefitted white children and disadvantaged Black children from the colonial era forward.[115] Of the children involved in the fourteen leading nineteenth century cases addressing the infancy defense, ten were acquitted, two received prison sentences, and "only" two were executed. One was eleven years old; the other was twelve. Both were Black and both were enslaved. From the very beginnings of the American legal system, then, "Black children . . . were not granted the same immunities as white children, and it seems unlikely that [the two boys] would have been executed if they had been white."[116]

Early approaches to youth crime and punishment reflected contemporary societal conceptions of childhood. Prior to the Industrial Revolution, the U.S. was largely white, rural, and agrarian.[117] Even pre-pubescent children worked the fields or in other jobs to contribute to the support and survival of their families. For this reason, and due to high infant mortality rates, children were viewed "as small adults who should be quickly integrated into grownup economic and social roles."[118] The notion of childhood as a separate developmental stage, defined by intellectual, social, and emotional differences that compel adult nurturing and protection, did not emerge until the early nineteenth century,

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[111] Kaban & Orlando, *supra* note 106, at 37. Legal historians point to evidence of various forms of nullification intended to shield some children from the harshest sanctions. *See* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 183 (1969).
[112] Walkover, *supra* note 107, at 556–58.
[113] PLATT, *supra* note 111, at 201–02.
[114] *See* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1194 (1970) (noting that in 1823, the District Attorney of New York reported that many children "have been discharged [by judges and juries], from an unwillingness to imprison, in hope of reformation, or under peculiar circumstances").
[115] Sterling, *supra* note 72.
[116] PLATT, *supra* note 111, at 202.
[117] BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZATION OF JUVENILE JUSTICE 20 (2017).
[118] *Id.* at 21.

as the population began to shift to cities. With urbanization came a fundamental shift in views about childhood, as young children were no longer needed as field hands and could not work in factors or perform the types of manual labor necessitated by the Industrial Revolution. Families became smaller, life expectancy and literacy increased, and middle- and upper-class parents began to view their children not as mini-adults but, instead, as "vulnerable, dependent, and innocent," requiring "special protection and supervision."[119]

During the same period, the wave of European migration to the United States and the rise of the industrialized economy, which atomized the family, sparked widespread concern about social deviance and juvenile delinquency. The white, Anglo-Saxon majority was determined to "Americanize" the poor and working-class immigrants who flooded the cities, particularly those of Irish and German descent, by exerting governmental control over them.[120] As Professor Geoff K. Ward writes:

> Much of delinquency's novelty was attributed to the foreign element alleged to be common among young offenders. Similar to today's rhetoric, a complex mix of genuine concern for public safety and child welfare, sensationalism, elitism, and xenophobia shaded portrayals of juvenile delinquents and appeals for their control across emerging industrial centers. In 1853, Charles L. Brace, the founder of New York's Children's Aid Society, characterized delinquents in that city as "mainly American-born, but the children of Irish and German immigrants . . . as ignorant as London flashmen [and] far more brutal than the peasantry from which they descend." Rivaling the spectacular "superpredator" rhetoric of over a century later, Brace warned that menaces then were "ready for any offense or crime, however degraded or bloody," and that, without normalizing influences of juvenile social control, "we should see an explosion from this class which might leave [the cities] in ashes and blood."[121]

### *B. Houses of Refuge*

The first House of Refuge was established in New York in 1824 to address a complex stew of concerns, including childhood arrests and resultant incarceration in notoriously brutal adult prisons. A growing aversion to such cruelty led some judges to dismiss cases and, sometimes, to jury nullification.[122] At the same time, many members of the public believed that a growing population of incorrigible or violent immigrant youth, whose parents did not adequately supervise them or instill in them the mores and norms of white America, were wreaking havoc in cities.[123] The House of Refuge was intended to quell critics on both sides of the debate, and, within a few years, similar institutions sprang up throughout the Northeast and Midwest.[124] Houses of refuge were the first age-segregated,

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[119] *Id.* at 22.
[120] DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 23 (2004).
[121] WARD, *supra* note 97, at 24–25.
[122] FELD, *supra* note 117, at 26; RANDALL G. SHELDEN, FROM HOUSES OF REFUGE TO "YOUTH CORRECTIONS": SAME STORY, DIFFERENT DAY 3 (2005), https://files.eric.ed.gov/fulltext/ED495133.pdf [https://perma.cc/9SFX-K32H].
[123] *See* FELD, *supra* note 122.
[124] SHELDEN, *supra* note 122, at 4; WARD, *supra* note 97, at 26.

state-controlled institutions for "wayward" children. In addition to those charged with criminal offenses, the houses of refuge confined children deemed to be disobedient, disrespectful, or promiscuous, the precursors to modern-day "status offenses."[125]

Contrary to their appellation, the houses of refuge were anything but safe havens. Many subjected children to horrific conditions that mirrored or exceeded those of adult prisons.[126] According to Professor Randall Shelden,

> Children confined in the houses of refuge were subjected to strict discipline and control. A former army colonel working in the New York House of Refuge said: "He (the delinquent) is taught that prompt unquestioning obedience is a fundamental military principle." It was strongly believed that this latter practice would add to a youth's training in "self control" (evidently to avoid the "temptations" of evil surroundings) and "respect for authority" (which was a basic requirement of a disciplined labor force). Corporal punishments (including hanging children from their thumbs, the use of the "ducking stool" for girls, and severe beatings), solitary confinement, handcuffs, the "ball and chain," uniform dress, the "silent system," and other practices were commonly used in houses of refuge.[127]

Simultaneously with the emergence of houses of refuge, and to provide legal justification for committing children to them, U.S. courts began to embrace the common law doctrine of *parens patriae. Parens patriae* accorded to the king, as "parent of the country," legal authority to assume guardianship of those who lacked capacity to care for themselves, especially regarding the administration of children's property.[128] In 1839, the Pennsylvania Supreme Court became the first court in the country to embrace the doctrine explicitly within the youth justice context. In *Ex Parte Crouse*, the father of twelve-year-old Mary Crouse, sought his daughter's release from the Pennsylvania House of Refuge and challenged the constitutionality of its authorizing legislation.[129] Mary had been taken into custody at the request of her mother on the basis of unspecified "vicious conduct."[130] In rejecting the father's claim that his daughter was being unlawfully detained and,

[125] While there is not a universal definition for status offenses, there are generally five categories of status offenses: truancy, running away, ungovernability (or incorrigibility or unruliness), underage drinking, and curfew violations. *See* Mahsa Jafarian & Vidhya Ananthakrishnan, *Just Kids: When Misbehaving is a Crime*, VERA INST. (Aug. 2017), https://www.vera.org/when-misbehaving-is-a-crime [https://perma.cc/4NMZ-RA82]. The Society for the Reform of Juvenile Delinquents, which advocated for the founding of the first House of Refuge in New York, articulated the breadth of the institution's jurisdiction as follows: "The design of the proposed institution is, to furnish, in the first place, an asylum, in which boys under a certain age, who become subject to the notice of our police, either as vagrants, or homeless, or charged with petty crimes, may be received, judiciously classed according to their degree of depravity or innocence . . . ." SHELDEN, *supra* note 122, at 4.

[126] Liz Ryan & Carmen Daugherty, Gault *at 50: What Juvenile Defenders Can Do to Dismantle the Youth Prison Model*, *in* RACE, RIGHTS AND REFORM: 50 YEARS OF CHILD ADVOCACY IN JUVENILE COURT 256–57 (Kristin Henning, Laura Cohen, & Ellen Marrus eds., 2018).

[127] SHELDEN, *supra* note 122, at 4.

[128] *Id.* at 2.

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

[130] *Id.* at 10.

therefore, denying habeas relief, the court declared, "the House of Refuge is not a prison, but a school."[131] It further observed:

> The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates. To this end, may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriæ*, or common guardian of the community?[132]

*Parens patriae* thus "supplied . . . the legal basis for court intervention into the relationship between children and their families," and, with it, legal cover for the white majority to exert social control over immigrant children and mold them in its own image.[133]

As inhumane as the houses of refuge were, they at least permitted the mostly white children they housed to avoid the crueler fate to which Black children were consigned: incarceration in adult prisons or "almshouses" and, sometimes, execution.[134] The early houses of refuge excluded Black children altogether, either by law or in practice.[135] While this began to change in the 1830s, the institutions never achieved or even aspired to true equality. Whether they were housed in the same buildings as white youth or separately, Black children were segregated. They were afforded inferior facilities, education, vocational training, and other support, and were only trained for jobs as servants rather than skilled workers.[136] Perpetuation of white supremacy was a driving force and separate was never anywhere close to equal.

For Black children in the antebellum South, the situation was far worse than for those in the North. Even in those few southern states that embraced the emerging rehabilitative ideal of youth justice, newly built houses of refuge and other child-serving institutions were solely for the "benefit" of white youth. For Black children,

> the South looked to available penal institutions and old techniques . . . including disciplinary regimes of chattel slavery, court-ordered apprenticeships, jails, prisons, and the whip. Before the Civil War, this was simply practical. Mass reliance on formal criminal prosecution and institutionalization to control black adult and young offenders would have undermined the exploitation of slave labor and required public expenditures. Instead, '. . . Southern states were more likely . . . to rely on extra-legal and informal . . . authority; vigilantism instead of professional police forces, dueling as an alternative for litigation, [and] the lash and the noose as much cheaper expedients than regular prison discipline.' Throughout the nineteenth century, a 'penchant for business rather than

[131] *Id.* at 11.
[132] *Id.*
[133] SHELDEN, *supra* note 122, at 2–3; Cecile P. Frey, *The House of Refuge for Colored Children*, 66 J. NEGRO HIST. 10, 10 (1981).
[134] WARD, *supra* note 97, at 52.
[135] *Id.* at 52–53.
[136] *Id.* at 53.

> institutional solutions for crime' distinguished justice systems in the South from those in the North and West. This slowed the adoption of modern juvenile justice in the antebellum South and distinguished racialized juvenile social control in the region well into the twentieth century.[137]

The emergence of the Progressive Movement in the second half of the nineteenth century coincided with the rise of Jim Crow, and the confluence of these historical eras and events further ossified the structural inequities of the juvenile legal system. Among other issues, the progressive reformers were committed to confronting the social and economic challenges wrought by rapid urbanization and industrialization: poverty, public health, inadequate housing and social services, and crime, among others.[138] They believed in the power of science and rational thought to address these seemingly intractable problems. They also were concerned with "citizen building," or using the power of the state both to the ends of social good and to acculturate the growing European immigrant population. Progressives, however, did not seek to achieve racial or ethnic equality. To the contrary, the reformers "viewed immigrants as indigenous whites, albeit of lower orders, and ultimately culturally, economically, and biologically assimilable, unlike members of [other] races."[139]

### *C. The Child Savers and the Children's Court*

The "Child Savers," a cadre of Progressives who were keenly interested in assimilating European immigrant children into the white mainstream, launched a number of initiatives that engaged the power of the state to inculcate them with "American" values and "protect [them] during the transition from childhood to adulthood and to prevent them from assuming adult economic and social roles prematurely."[140] Chief among these, in addition to compulsory school attendance and child labor laws, was the establishment of the first "Children's Court" in Chicago in 1899, for the purported purpose of providing rehabilitation and supervision, rather than adult punishment, for "delinquent" children.[141] In the words of Julia Lathrop, one of the court's founders, "the growing child must not be treated by those rigid rules of criminal procedure which confessedly fail to prevent offenses on the part of adults or cure adult offenders."[142]

Much has been written about the history and practices of the Children's Court that does not require repetition here.[143] A few key distinguishing characteristics bear mention, however. The new court had expansive jurisdiction over "delinquency," which included both alleged violation of criminal laws by minors and other normative, adolescent behaviors that challenged adult authority.[144] In this system, the "best interests" of the

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[137] *Id.* at 62 (internal citations omitted).
[138] FELD, *supra* note 117, at 23.
[139] *Id.* at 24.
[140] *Id.* at 25.
[141] *Id.* at 27.
[142] Julia C. Lathrop, *Introduction* to THE DELINQUENT CHILD AND THE HOME 1, 5 (Sophinisba P. Breckinridge & Edith Abbott, eds., 1912).
[143] *See generally, e.g.*, FELD, *supra* note 117; SPINAK, *supra* note 21; MANFREDI, *supra* note 74; KRISTIN HENNING, LAURA COHEN, & ELLEN MARRUS, RACE, RIGHTS AND REFORM: 50 YEARS OF CHILD ADVOCACY IN JUVENILE COURT (2018); Sterling, *supra* note 72.
[144] Sterling, *supra* note 72, at 616–22.

child—a vestige of *parens patriae*—was the paramount concern of judges as they evaluated children's actions and the attendant consequences, rather than the traditional justifications for adult punishment.[145] This centering of "best interests" accorded almost unbounded discretion to the judge, enabling widely disparate decision-making. It also purported to justify the denial of any semblance of procedural protections to children, including the rights to notice, counsel, confrontation, cross-examination, and trial by jury, as well as the privilege against self-incrimination.[146] Finally, despite the court's "rehabilitative" aims, the judge was authorized to transfer, or waive, children to adult court, where they could be prosecuted and sentenced as if they were any adult defendant.

The children's courts operated in private, with no scrutiny or oversight. In the name of promoting young people's "best interests," judges routinely removed children from their homes and committed them to state "training schools," which had been established around the country to replace the houses of refuge. These forced removals of children from their parents' custody occurred without formal proceedings or ongoing monitoring of the conditions in which they were held.[147] Conditions in the training schools were often worse than those of the houses of refuge. Successive investigations of the Arizona State Industrial School, for example, described a "'brutal institution' in which children were forced to work in "physically demanding jobs under inhumane conditions'" and were shot, beaten with razor-straps, held in solitary confinement, deprived of food, and subjected to monetary fines.[148] Many of these conditions persist in youth prisons today.[149]

"Best interests" further justified the lack of a minimum jurisdictional age, since the court, in accordance with the doctrine of *parens patriae,* had usurped the parental role. In fact, most states eventually rejected the infancy doctrine either legislatively or judicially, at least with regard to juvenile court proceedings, reasoning that the allegedly non-punitive and "rehabilitative" focus of the court rendered the presumption of incompetency unnecessary and contrary to the goals of the court.[150]

The children's court model quickly took root across the country. By 1925, every state

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[145] *Id.* at 619.

[146] *See In re* Gault, 387 U.S. 1, 14–31 (1967) (summarizing juvenile court history and according rights to notice, counsel, confrontation and cross-examination, and privilege against self-incrimination to children under the Due Process Clause); McKeiver v. Pennsylvania, 403 U.S. 528, 534 (1970) (holding that right to trial by jury is not one of "the essentials of due process and fair treatment" in juvenile court); PLATT, *supra* note 111.

[147] Laura Cohen & Sandra Simkins, *No More "Desert Devil's Island": The Right to Counsel for Incarcerated Children*, *in* HENNING, COHEN, & MARRUS, *supra* note 143, at 230.

[148] *Id.* at 228. Investigations of training schools in other states revealed and continue to reveal similar abuses. *See, e.g.*, U.S. DEP'T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE LANSING RESIDENTIAL CENTER, LOUIS GOSSETT, JR. RESIDENTIAL CENTER, TRYON RESIDENTIAL CENTER, AND TRYON GIRLS CENTER 5 (2009), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/NY_juvenile_facilities_findlet_08-14-2009.pdf [https://perma.cc/T2W5-SLGD] (staff at four New York State youth prisons "consistently used a high degree of force to gain control in nearly every type of situation . . . ." The letter documented numerous instances of excessive force for even minor rule violations, resulting in injuries to children that included multiple head injuries, a fractured collarbone, abrasions, lacerations, and bruising).

[149] *See* Mendel, *supra* note 18; RICHARD A. MENDEL, THE MALTREATMENT OF YOUTH IN UNITED STATES JUVENILE CORRECTION FACILITIES, AN UPDATE (2015).

[150] Kaban and Orlando, *supra* note 106, at 52. Many states also have rejected or limited application of the doctrine of infancy within the context of juvenile waiver. *See* Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687, 693 (2006).

except Maine and Wyoming had enacted a version of it.[151] But, as was the case in the houses of refuge era, Black children once again were largely excluded from whatever benefits this new system accorded their white counterparts. Even progressive activist and Nobel Peace Prize winner Jane Addams, the co-founder of the Chicago Children's Court, "did not write about Black youth the same way she wrote about white and immigrant youth."[152] As historian Khalil Gibran Muhammed reflects,

> [w]ithin the progressive black crime discourse, Addams attacked racism but simultaneously excused it on the grounds that African Americans lacked sufficient 'inherited' resources to deal with the challenges of modern city life. Within the progressive white crime discourse, Addams framed immigrant crime and immorality as social problems wholly divorced from any inherited defects of the Old World.[153]

Consequently, "rehabilitative efforts were often reserved for native-born and immigrant Anglo Americans in white-dominated juvenile court communities, where common European ancestry and white skin rendered them less threatening, distinctly 'salvageable,' and ultimately more assimilable—culturally, economically, and politically—than black and other nonwhite youth."[154]

In the earliest days of the children's court, ninety percent of all Black Americans still lived in the South and, so, few Black children were pulled within the court's ambit.[155] Between 1916 and 1970, however, the combined forces of Jim Crow oppression, racist violence, and economic despair led six million Black people to migrate northward. By the end of the Great Migration, 47% of African-Americans lived in the North and West, primarily in the cities that previously were populated by immigrant communities.[156] This influx gave rise to a sharp increase in the number of Black children referred to Northern juvenile courts. In these fora, despite their escape from the de jure segregation of Jim Crow, they encountered de facto discrimination at every stage of the judicial process. Professor Jane Spinak writes that "This disparate treatment was based on popular eugenic theories, more prone to immorality and delinquency, and thus less likely to benefit from rehabilitative rather than punitive interventions."[157] Implicit bias, in other words, drove decision-making and created racist disparities from the court's very beginnings.

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[151] David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42, 45 (2002).

[152] KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 124 (2010).

[153] *Id.* at 123; Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1366 ("In adopting eugenics and other race-based theories of delinquency, the juvenile court failed to depart from a decades-old legacy of racial discrimination, originally imposed upon immigrant and black children by criminal courts and the early juvenile Houses of Refuge. Just as the [*Plessy v. Ferguson*] decision had imposed a stain of inferiority on black people by enforcing state-sanctioned segregation, so did the juvenile court."). *See generally* HENNING, *supra* note 90.

[154] MUHAMMAD, *supra* note 152, at 124.

[155] ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 10 (2010).

[156] *Id.* at 9.

[157] SPINAK, *supra* note 21, at 61.

A 1925 study of the New York City Children's Court offers a snapshot of this already unequal and unjust system. Although Black people comprised just 2.7% of New Yorkers, 8% of the children arraigned in 1925 were Black.[158] A higher percentage of delinquency cases involved Black children than white; these proportions were reversed for neglect matters.[159] Forty-three percent of those children charged with delinquency were younger than thirteen years old.[160] The pervasiveness and intransigence of the disparities are detailed in the report's observations and conclusions, which presage those of more modern studies. The authors pay particular attention to the impact of over-policing of Black children in 1920s New York: "[These] cases obviously are less frequently those which should require the attention of the police, but in a surprisingly large number of instances these children were actually brought into the courts by the police."[161] Black children were most frequently charged with the minor and vague offenses of disorderly conduct and "desertion of home." White children, on the other hand, were most likely to be charged with the more serious crimes of stealing and burglary.[162] "The disproportion in offences of [Black] children which may be classed as serious," the authors concluded, "suggests that these children get into the courts more readily."[163] Among other recommendations, the report called for expanded recreation programs, facilities for play, and after-school programs for Black children.[164]

In another study, published in 1940, Mary Huff Diggs documented similar disparities in the juvenile courts around the country:

> It is found that [Black] children are represented in a much larger proportion of the delinquency cases than they are in the general population. . . . [A]n appreciably larger percent of the [Black] children came in contact with the courts at an earlier age than was true with the white children . . . . [C]ases of [Black] boys were less frequently dismissed than were white boys. Besides, they were committed to an institution or referred to an agency or individual much more frequently than were white boys.[165]

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[158] JOINT COMM. ON NEGRO CHILD STUDY, A STUDY OF DELINQUENT AND NEGLECTED NEGRO CHILDREN BEFORE THE NEW YORK CITY CHILDREN'S COURT 12–13 (1927).
[159] *Id.* at 15.
[160] *Id.* at 19.
[161] *Id.* at 21.
[162] *Id.* at 20.
[163] *Id.* Interestingly, Black children were less likely than Whites to be committed to training schools and other youth-serving institutions. Given what we now know about the abusive and inhumane conditions in many of these facilities, this may have been a stroke of luck for many of these children. In the view of the report's authors, however, Black children were being denied the "child-saving" benefits of such placements due to the race-based exclusionary practices of the organizations that ran them. According to Judge Franklin Chase Hoyt, Presiding Justice of the Children's Court, "The Children's Court is confronted almost daily with its inability to deal constructively with colored children under sixteen years of age who are in need of custodial care by reason of the scarcity of institutions willing to accept such children. The community should be fully informed of these deplorable conditions in order that the colored child may receive its proper share of institutional education and training." *Id.* at 1.
[164] *Id.*
[165] Mary Huff Diggs, *Some Problems and Needs of Negro Children as Revealed by Comparative Delinquency and Crime Statistics*, 9 J. NEGRO EDUC. 311, 313 (1940), *quoted in* JAMES BELL & LAURA JOHN RIDOLFI,

In the southern states, meanwhile, "Jim Crow juvenile justice"[166] ensured that Black children were far more likely than whites to be prosecuted in the adult system or subjected to vigilante brutality. Even the very young "suffered severe corporal punishment, imprisonment that led to convict leasing—an especially inhumane treatment that often resulted in death—and lynchings."[167] In one horrifying example, in March 1944, fourteen-year-old George Stinney, Jr., who weighed just ninety pounds, was playing with his sisters in the yard of his family home in Alcolu, South Carolina. Two young white girls approached the Stinney children and asked where they could find some flowers. The girls later went missing and, when a search party was organized, George joined it and mentioned that he had seen them earlier in the day. When the bodies of the girls were found the following morning, George was arrested, interrogated for hours without his parents or a lawyer present, and charged as an adult with capital murder. One month later, he "faced a sham trial virtually alone."[168] No other Black people were allowed to attend, including his parents, and his court-appointed attorney failed to call even one witness. Although the only evidence of his guilt was his "confession," which was neither written nor recorded, an all-white jury convicted George of rape and murder in less than ten minutes. He was executed by electrocution on June 16, 1944.[169] He was so small that the straps of the electric chair were too big for his wrists, and he had to sit on a book for the execution to be carried out.[170] Seventy years later, in 2014, George was exonerated in a South Carolina courtroom, over the objection of the prosecution.[171]

Even when they did come within the jurisdiction of the juvenile court, Southern Black children received far harsher sanctions than white youths, regardless of offense severity. In 1958, for example, two young boys, ages eight and nine, barely escaped a lynch mob and ultimately were incarcerated for three months when a white girl told her parents that she had kissed one of them on the cheek.[172] Those children who were committed to state "training schools," the successor institutions to the Houses of Refuge, were forced into a form of agricultural peonage, while white youth in the same institutions received industrial skills training that prepared them for life after prison.[173]

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ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL AND ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 8 (2008).

[166] WARD, supra note 97, at 1.

[167] SPINAK, *supra* note 21, at 58.

[168] *Court Acknowledges Wrongful Execution of 14-Year-Old George Stinney*, EQUAL JUST. INITIATIVE (Dec. 19, 2014), https://eji.org/news/george-stinney-exonerated/ [https://perma.cc/NS6V-C39Z].

[169] *Fourteen-Year-Old George Stinney Executed in South Carolina*, EQUAL JUST. INITIATIVE, https://calendar.eji.org/racial-injustice/jun/16 [https://perma.cc/9WDC-BS48] (last visited Aug. 7, 2023).

[170] *Id.*

[171] Equal Just. Initiative, *supra* note 168.

[172] *Police in Monroe, North Carolina, Arrest, Jail, and Beat Two Black Boys After a White Girl Kisses Them on the Cheek*, EQUAL JUST. INITIATIVE, https://calendar.eji.org/racial-injustice/oct/28 [https://perma.cc/RNR2-M727] (last visited Aug. 7, 2023).

[173] SPINAK, *supra* note 21, at 60. To combat these racist inequities and enable system-involved Black children to receive similar educational and vocational training opportunities to those afforded white children, Black community leaders created separate programs and institutions to address their needs. *See* Sterling, *supra* note 72; Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1340 (2012); *see generally* WARD, *supra* note 97.

### *D. The Due Process Era*

Almost from its inception, recognition that the children's court had failed to realize its rehabilitative promise and countervailing concerns of "conservative critics [who] perceived a moral crisis in rising crime rates, civil rights protests, urban [uprisings]" triggered calls for change.[174] These coalesced in the juvenile "due process revolution" of the late 1960s, an outcropping of the Warren Court's broader reshaping of the constitutional criminal procedure landscape.[175] In the space of one year, the Court decided two landmark cases, *Kent v. United States*[176] and *In re Gault*,[177] that fundamentally altered the workings of the juvenile court by injecting into it most (but not all) of the procedural protections afforded adults. *Kent* focused on proceedings to waive, or transfer, children to adult court, while *Gault* addressed delinquency proceedings more generally. Both, however, were grounded in the Court's acknowledgement of

> serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. . . . There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[178]

Collectively, *Kent* and *Gault* afforded children the rights to counsel, to notice of the charges, to confrontation and cross-examination, and to a hearing before and statement of reasons for waiver, as well as the privilege against self-incrimination.[179] *In re Winship*, decided three years after *Gault*, expanded the list of procedural protections to include proof beyond a reasonable doubt at the adjudicative stage of delinquency proceedings.[180]

Procedural protections are, of course, essential. But pro forma compliance with the

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[174] FELD, *supra* note 117, at 58–59.

[175] *Id.* at 56. The Warren Court had several criminal procedure cases. *E.g.*, Mallory v. United States, 354 U.S. 449, 455 (1957) (confession obtained after lengthy detention and interrogation suppressed in federal court); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (extending exclusionary rule to state court proceedings); Gideon v. Wainwright, 372 U.S. 335, 348 (1963) (Sixth Amendment right to counsel incorporated against states); Escobedo v. Illinois, 378 U.S. 478, 488 (1964) (custodial interrogation is a "critical stage" at which right to counsel attaches); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (Fifth Amendment requires police to advise suspect and obtain waivers of right to remain silent and right to counsel before custodial interrogation may proceed); Katz v. United States, 389 U.S. 347, 359 (1967) (wiretapping triggers Fourth Amendment protections); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (Sixth Amendment right to trial by jury incorporated against the states).

[176] Kent v. United States, 383 U.S. 541, 561 (1966).

[177] *In re* Gault, 387 U.S. 1, 77 (1967). The history of Gault is explored in greater depth above, see *supra* Part I.B.

[178] *Kent*, 383 U.S. at 555.

[179] *Gault*, 387 U.S. at 34–58; *Kent*, 383 U.S. at 557.

[180] *In re* Winship, 397 U.S. 358, 368 (1970). In the three decades following *Winship*, however, the Court repeatedly rebuffed attempts to expand these rights, basing its decisions in the long since disproven child-saving rhetoric of the early juvenile court. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (denying children right to trial by jury in juvenile court); Fare v. Michael C., 442 U.S. 707, 724 (1979) (holding child's request to speak to his probation officer was not invocation of right to counsel under *Miranda*); Schall v. Martin, 467 U.S. 253, 272 (1984) (upholding preventive pre-trial detention of children).

Court's due process mandates has failed to check the biases and practices that increase disparities and drive Black children further into the system. For example, as crucial as the rights to notice and counsel are, serving individual children with formal complaints and providing them with overworked and overwhelmed lawyers do not in themselves offer relief to over-policed communities, confront the implicit bias that drives discretionary decision-making, or repeal laws that disparately impact children of color. To the contrary, scholars have argued persuasively that because the *Gault* Court disregarded the systemic racism that has defined the juvenile court from its inception, the due process "revolution" glossed over it with the patina of legality. Professor Robin Walker Sterling, for example, asserts persuasively that the Warren Court's decision to ground procedural protections for children in fundamental fairness pursuant to the Fourteenth Amendment, rather than in the doctrine of fundamental rights that undergirded its adult criminal procedure reforms, resulted in a "flawed prototype that allowed future courts to turn a blind eye to race disparities in juvenile delinquency proceedings."[181]

### *E. The Retributive Era*

Beginning with the wrongful arrests and convictions of five innocent Black boys (well known as the Central Park Five) in the rape of a white female investment banker in New York City's Central Park in 1989, and continuing through the next decade, media-stoked, racialized fears of youth crime gripped the country. Erroneously relying on a short-lived increase in juvenile crime rates, Princeton political scientist John DiIulio and others warned of a "coming Armageddon" of "juvenile super-predators" who were "subhuman," "amoral," and "feral."[182] In a 1996 report to the United States Department of Justice, Northeastern University Professor James Alan Fox made an even more overtly racist prediction that echoed those of the previous century. Claiming that a projected increase in the population of Black youth would lead to soaring rates of violence, Fox wrote:

> [Adolescents], particularly those in urban areas, are plagued with idleness and even hopelessness. A growing number of teens and preteens see few feasible or attractive alternatives to violence, drug use, and gang membership. For them, the American Dream is a nightmare: There may be little to live for and to strive for, but plenty to die for and even to kill for.[183]

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[181] Sterling, *supra* note 72, at 609.

[182] Steven Drizin, *Trayvon and the Myth of the "Juvenile Super-Predator,"* HUFFPOST (Nov. 17, 2013), https://www.huffpost.com/entry/superpredator-myth-lives_b_3923140 [https://perma.cc/ZGM7-6DEL]. DiIulio later retracted his statements, but the damage was done. *See* Elizabeth Becker, *As Ex-Theorist on Young "Superpredators," Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html [https://perma.cc/SFD2-FUQE].

[183] JAMES ALAN FOX, U.S. DEP'T JUST., TRENDS IN JUVENILE VIOLENCE 2 (1996), https://www.ojp.gov/library/publications/trends-juvenile-violence-report-united-states-attorney-general-current-and [https://perma.cc/86WD-WDPP]. In an amicus curiae brief submitted in *Miller v. Alabama*, 567 U.S. 460 (2012), which outlawed mandatory life without parole sentences for youth, DiIulio and Fox, together with other leading criminologists and social scientists, acknowledged their errors: "the superpredator myth contributed to the dismantling of transfer restrictions, the lowering of the minimum age for adult prosecution of children, and it threw thousands of children into an ill-suited and excessive punishment

The media latched onto this pseudo-scientific rhetoric, which gave them license to vilify Black and Brown children overtly.[184] In response, state and federal lawmakers, spurred on by law enforcement and the public, trampled over each other in their efforts to be "toughest" on youth. Children as young as ten or twelve years old were portrayed as irredeemable criminals,[185] normal adolescent behavior was criminalized—further feeding the ongoing crisis of mass incarceration—and the unconscionable racial disparities already embedded in the criminal and juvenile justice systems intensified.[186]

The flurry of retributive legislation fundamentally altered the articulated purposes of the youth justice system. Although youth crime rates had already begun what would prove to be a steep, three-decades-long decline by the time DiIulio issued his declaration and, although juvenile murder arrests would fall by more than two-thirds by 2000, forty-nine states and the District of Columbia enacted new laws that increased the number of children prosecuted as adults and lowered the age at which adult prosecution was mandated or permitted during the 1990s. These measures significantly increased the length and frequency of youth incarceration and eliminated or eroded traditional juvenile court confidentiality protections.[187] A number of states also amended their juvenile codes to compel juvenile courts to balance goals of "accountability," "community safety," or "deterrence" with those of rehabilitation and treatment, blurring the lines between youth and adult prosecution.[188]

Today, with advances in understanding of child and adolescent development, rising public concern for children in the legal system, and political pressure to reduce youth incarceration, the rhetorical pendulum has begun to swing back in some jurisdictions.[189] In reality, however, the philosophical bright lines that legal historians and other scholars tend to draw between the various youth justice epochs are misleading. The juvenile court has always meted out punishment, even when it draped itself in child-saving rhetoric. As Professor Elizabeth Scott observes,

> [B]oth the romanticized vision of youth offered by the early Progressive reformers and the harsh account of modern conservatives are distortions—and both have been the basis of unsatisfactory policies. The architects of the

regime." Brief of Jeffrey Fagan et al. as Amici Curiae Supporting Petitioners at 37, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9647, 10-9646), 2012 WL 174240.

[184] *See* Perry Moriearty, *Framing Bias: Media, Bias, and Legal Decision-Making*, 69 MD. L. REV. 849, 853 (2010).

[185] Perhaps the most well-known example is twelve-year-old Lionel Tate, who became the youngest person sentenced to life without parole in the United States when he was convicted of murder in Florida in 2001. The victim was a six-year-old neighbor, Tiffany Eunick, for whom Lionel's mother was babysitting. Lionel told police that he accidentally killed Tiffany when he was practicing some professional wrestling moves, which he had seen on television. *See* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 1 (2008).

[186] *See generally* Laura Cohen & Jane Spinak, *Busting the Juvenile Super-Predator Myth*, *in* RIGHTS, RACE, AND REFORM: FIFTY YEARS OF CHILD ADVOCACY IN JUVENILE COURT 269 (2018).

[187] MELISSA SICKMUND, JUVENILES IN COURT *passim* (2003), https://www.ojp.gov/pdffiles1/ojjdp/195420.pdf [https://perma.cc/EY7J-EBPX].

[188] *Id.*

[189] *See, e.g.*, S. 48, 218th Leg., Reg. Sess. (N.J. 2019) (reforming juvenile code in New Jersey to reduce incarcerated youth population); Colleen O'Dea, *Murphy Moves on Juvenile Justice Reform, Ahead of His Own Task Force*, NJ SPOTLIGHT NEWS (Jan. 29, 2020), https://www.njspotlightnews.org/2020/01/murphy-moves-on-juvenile-justice-reform-ahead-of-his-own-task-force/ [https://perma.cc/QQL7-K494].

> traditional juvenile court pretended that youth welfare was the only goal of juvenile justice policy. This fiction ignored the government's interest in punishment and public protection, and ultimately, it did not serve the interests of young offenders or that of society. Modern reformers focus only on punishment and public protection, and ignore any differences between juvenile offenders and adults. A policy that ignores youth welfare is not only anomalous, but is unlikely to achieve the utilitarian goal of reducing the social costs of youth crime.[190]

## III. DRIVERS OF DISPARITY

### *A. Discretion*

Even within the modern-day due process framework, the broad discretion afforded to decision-makers at each stage of the juvenile legal system remains the *sine qua non* of the juvenile court and is what continues to distinguish it from the adult criminal legal system. But discretion invites disparate decision-making. Social scientists have analyzed national data and concluded that the decisional points at which discretion is least bridled are those at which racial disparities are greatest: arrest, referral to juvenile court, pretrial detention, charging, and disposition, or sentencing.[191] One recent study, for example, analyzed arrest and booking data and identified "larger disparities for age ranges and offenses where the greatest discretion is exercised"—i.e., the youngest children.[192] Another survey of two decades of research found significant race effects in referrals for mental health and substance abuse treatment, referrals that can serve to extricate children from formal court processing.[193] The disproportionate entanglement of children of color in the legal system, then, is at least partly attributable to biased decision-making that goes unchecked in a discretionary decisional schema.[194]

This is of critical importance to younger children, because "slight differences in treatment beginning at a young age may have a cumulative impact on future criminal justice involvement and perpetuate and exacerbate racial disparities within specific birth

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[190] Elizabeth Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 549 (2000).

[191] Michael Leiber & Jennifer H. Peck, *Race in Juvenile Justice and Sentencing Policy: An Overview of Research and Policy Recommendations*, 31 LAW & INEQ. 331, 337 (2013); *see* Steven N. Zane & Jhon A. Pupo, *Disproportionate Minority Contact in the Juvenile Justice System: A Systematic Review and Meta-Analysis*, 38 JUST. Q. 1293, 1313 (2021) (finding race effects at intake, detention, and disposition); Jennifer H. Peck & Wesley G. Jennings, *A Critical Examination of "Being Black" in the Juvenile Justice System*, 40 L. & HUM. BEHAV. 219, 221 (2016); *see also* Emily Haney-Caron & Erika Fountain, *supra* note 60, at 674–715 (tracking the cumulative effects of developmental immaturity and race on wrongful convictions and adjudications across the continuum of the juvenile legal system).

[192] Stephen Raphael & Sandra V. Rozo, *Racial Disparities in the Acquisition of Juvenile Arrest Records*, 37 J. LAB. ECON. S125, S156 (2019).

[193] *See* Elizabeth Spinney, Martha Yeide, William Feyerherm, & Marcia Cohen, *Racial Disparities in Referrals to Mental Health and Substance Abuse Services from the Juvenile Justice System: A Review of the Literature*, 39 J. CRIME & JUST. 153 (2016).

[194] For an overview of the impact of implicit bias along the continuum of juvenile court decision-making, see Nadia Seeratan & Ellen Marrus, *What's Race Got to Do with It? Just About Everything—Challenging Implicit Bias to Reduce Minority Youth Incarceration in America*, 8 J. MARSHALL L.J. 437 (2015).

cohorts."[195] The earlier a child comes under the scrutiny of the system, the wider and deeper those ripples of unjust and unequal cumulative impact will be throughout their lives.

> Cumulative disadvantage can be displayed in at least two different ways. First, simple accumulation occurs when a higher rate of arrest for minority youth is subsequently followed by a lower rate of diversion, higher rates of formal processing as delinquent, and so forth. Thus, although the differential treatment at any particular stage may appear 'small,' the cumulative impact across the entire juvenile justice system may be relatively large. Second, decisions made at earlier stages, such as detention, can affect outcomes at later stages—in particular, judicial disposition.[196]

With such differential treatment, furthermore, comes differential cumulative effects in other domains, such as health, education, employment, and housing.[197]

### *B. Implicit Bias and Adultification*

Without question, race-based differential treatment, as opposed to differential rates of offending, drives the disparities that define and are amplified across the continuum of juvenile legal system involvement. That differential treatment reflects, and is, in part, the product of the racial biases of system decision makers.[198] Much has been written about implicit bias and its impact on criminal and youth legal system decision-making generally,[199] but of particular import to the question of minimum age is "adultification bias." "Adultification bias" engenders a "practice of perceiving and treating children and youth of color unfairly based on explicit or implicit negative racial beliefs" and has obvious implications for juvenile legal system decision-making.[200] In their foundational study, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, Philip Attiba Goff and his colleagues determined that Black boys are perceived as being less innocent, more culpable for their actions, and older than similarly aged boys of other races.[201] Furthermore, that pervasive and stereotypical "implicit dehumanization" of Black people "not only

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[195] Raphael & Rozo, *supra* note 192, at S128.
[196] DEV. SERVS. GRP., INC., *supra* note 12.
[197] Raphael & Rozo, *supra* note 192, at S127.
[198] *See* DEV. SERVS. GRP., INC., *supra* note 12.
[199] *See, e.g.*, Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383 (2013); HENNING, *supra* note 153; DEV. SERVS. GRP., INC., *supra* note 12; *Transforming Perception: Black Men and Boys*, PERCEPTION INST. (2013), https://perception.org/wp-content/uploads/2014/11/Transforming-Perception.pdf [https://perma.cc/3QDW-VNT4]. The effects of judicial implicit bias are amplified in juvenile court, where the absence of juries means that all decisions, from pre-trial detention through adjudication and sentencing, are made by judges. *See* Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039 (2019).
[200] CTR. FOR THE STUDY OF SOC. POL'Y, SHIFTING THE PERCEPTIONS AND TREATMENT OF BLACK, NATIVE, AND LATINX YOUTH INVOLVED IN SYSTEMS OF CARE 6 (2022), https://cssp.org/wp-content/uploads/2022/01/Shifting-the-Perception-of-Black-Latinx-Native-Youth-in-Systems-of-Care.pdf [https://perma.cc/3XV5-N9A5].
[201] Phillip A. Goff, Matthew C. Jackson, Brooke A. Di Leone, Carmen M. Culotta, & Natalie A. DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 540 (2014).

predicts racially disparate perceptions of Black boys but also predicts racially disparate police violence toward, Black children in real-world settings."[202] Because of this, Black children are viewed as "more . . . deviant, not deserving of leniency to make mistakes, and less in need of nurturing, protection, comfort, and support" than their white peers.[203]

Although much of the research focuses on Black boys, adultification bias also adversely affects Black girls, who are viewed and treated as being older than they are at all stages of development, "beginning most significantly at the age of 5, peaking during the ages of 10 to 14, and continuing during the ages of 15 to 19"[204]—hence, the nine-year-old Rochester girl's heart-rending retort: "I *am* a child."[205] Rather than being viewed as more violent and culpable than white children, Black girls historically have been perceived and portrayed as being more "immoral, erotic, seductive" than girls of other races.[206] Even pre-pubescent Black girls are presumed to be sexually mature, older than their actual or disclosed ages, more knowledgeable about adult topics, and more likely to assume adult roles and responsibilities than their white counterparts.[207] These obviously flawed and biased assumptions lead to the imposition of harsher penalties on Black girls, who are three and one-half times more likely to be incarcerated than white girls charged with similar offenses.[208] As a result, Black girls are not afforded the space to "make mistakes and to learn, grow, and benefit from correction for youthful missteps to the same degree as white children."[209]

One of the manifestations of adultification bias is a pernicious and reflexive suspicion and cynicism about Black children on the part of legal system decision makers, which is evident even in routine police encounters. Body-worn camera footage of the recent arrest of a fifteen-year-old New Jersey girl provides chilling documentation of this phenomenon at work. The film shows the girl, who is Black, just over five feet tall, and just over one hundred pounds, sitting in the back of a police car, handcuffed. Her face is awash in fright; this is her first arrest. When, in response to questioning, she tells the arresting officer her age, he chortles in disbelief and accuses her of lying about her age and her name. When she insists that she is telling the truth, he snarls, "[y]ou look at least twenty-one or twenty-two" and threatens to charge her with obstruction of justice for providing false information.[210]

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[202] *Id.*

[203] *See* CTR. FOR THE STUDY OF SOC. POL'Y, *supra* note 200.

[204] REBECCA EPSTEIN, JAMILIA BLAKE, & THALIA GONZALEZ, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 6 (2017), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf [https://perma.cc/7SF9-MATU].

[205] *See* Blest, *supra* note 1.

[206] HENNING, *supra* note 90, at 100. For an exegesis of the symbiosis of bias and discretionary decision-making and its impact on girls in the youth legal system, see Jyoti Nanda, *Blind Discretion: Girls of Color and Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012).

[207] See HENNING, *supra* note 90, at 101.

[208] *Id.* at 100–05; *see* EPSTEIN, BLAKE, & GONZALEZ, *supra* note 204, at 12; JAMILIA J. BLAKE & REBECCA EPSTEIN, LISTENING TO BLACK WOMEN AND GIRLS: LIVED EXPERIENCES OF ADULTIFICATION BIAS 1 (2019), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2019/05/Listening-to-Black-Women-and-Girls.pdf [https://perma.cc/AKA9-2984] (exploring the impact of adultification bias on focus group participants ages twelve through sixty).

[209] EPSTEIN, BLAKE, & GONZALEZ., *supra* note 204, at 6.

[210] Video on file with the author.

Because adultification bias negatively affects perceptions and treatment of even very young Black children, it has obvious implications for the jurisdictional boundaries of juvenile court. In short, the inequities that infect every decision-making point in the youth legal system are greatest for the youngest children, and adultification ossifies those injustices.

### *C. Police in Schools*

The gross racial disparities in the arrests and prosecution of very young children also are fed by the delegation of school discipline to police.[211] On the same day that little Kaia Rolle was arrested, the same school resource officer arrested another six-year-old student with misdemeanor battery under similar circumstances.[212] Dennis Turner, a twenty-three-year veteran of the Orlando Police Department who worked as a school resource officer at the school, was terminated several days later for not following police procedures in making the arrests, and the charges eventually were dropped against both children.[213] Nevertheless, they had to experience the trauma of arrest, with potentially irreversible damage to their self-esteem, socialization, and educational engagement.

Kaia Rolle's school is far from alone in having a police officer regularly assigned to patrol its hallways and classrooms. In the 2016-2017 academic year, 45.4% of U.S. primary schools had one or more security staff members (up from 28.6% the previous year), as do 73.4% of middle schools.[214] More than thirty percent of primary schools and 60% of middle schools have at least one sworn law enforcement officer who regularly carries a gun.[215] And, among all grades, schools with higher percentages of Black and Brown children were far more likely to have security on site than those with predominantly white students: 63.7% of schools with a population that is 50% or more children of color, compared with only 44.7% of schools with fewer than 5% minority students.[216] This means that young children of color are more likely than white children to have negative interactions with police and to be referred to the juvenile legal system at an earlier age, even if they engage in similar behaviors.

Over the last three decades, school systems have drastically altered disciplinary practices by increasing police presence in schools and criminalizing student misbehavior, with profoundly negative consequences for children of color.[217] In 2015-2016, for example, Black children represented 15% of student enrollment but 31% of students

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[211] *See* Bacher-Hicks, Billings, & Deming, *supra* note 5, at 57.

[212] Mariel Padilla, *Officer Under Investigation After Arresting 6-Year-Olds, Chief Says*, N.Y. TIMES (Sept. 23, 2019), https://www.nytimes.com/2019/09/22/us/6-year-old-arrested-orlando-florida.html [https://perma.cc/3DRP-RFH8].

[213] *Id.*

[214] *Percentage of Public Schools with Security Staff Present at Least Once a Week, and Percentage of Security Staff with Security Staff Routinely Carrying a Firearm, By Selected School Characteristics: 2005–06 Through 2015–16*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d18/tables/dt18_233.70.asp [https://perma.cc/RC8Y-3PPX] (last visited Aug. 7, 2023).

[215] *Id.*

[216] *Id.*

[217] Kelli L. Cover, *Baltimore City Schools Need Many Things—A Personal Police Force Is Not Once Of Them*, 48 U. BALT. L. F. 69, 71 (2018).

referred by their schools to the police or arrested for school-based incidents.[218] In contrast, white children comprised 49% of student enrollment but only 36% of those arrested for school-based offenses.[219] Again, these disparities cannot be explained by differential rates of offending; to the contrary, study after study has established that Black and white youth break the law in equal numbers.[220] Instead, children are treated differently depending on where they go to school and the color of their skin.

Children who are arrested are excluded from and drop out of school at substantially higher rates than their peers, and children who do not attend school are substantially more likely to re-offend than those who do.[221] Numerous studies establish a strong correlation between exclusionary discipline practices and increased behavioral problems, substance abuse, and involvement with the juvenile legal system.[222] Removal from school paradoxically cuts children off from resources and programs that might address their needs.[223] As a result, the community pays the costs associated with increased dropout rates, unemployment, and youth incarceration.[224]

When schools rely on police to intervene, normal childhood behaviors are perceived as and escalated to acts of delinquency. Researchers have documented arrests of children for "texting, passing gas in class, violating the school dress code, stealing two dollars from a classmate, bringing a cell phone to class, arriving late to school, or telling classmates waiting in the school lunch line that he would "get them" if they ate all of the potatoes."[225] The mere presence of police in schools, moreover, can lead to significant mental and emotional trauma for students, even if they are not arrested or formally processed in juvenile court.[226]

The lack of a minimum jurisdictional age, or jurisdictional boundaries that permit the arrest and prosecution of pre-adolescent children, invites the deployment of law enforcement personnel to elementary and middle schools.[227] If prosecution of young children is permitted under state law, there is a *raison d'etre* for police presence in these settings and for the delegation of school discipline to those officers. A minimum

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[218] *See* U.S. DEP'T OF EDUC. OFF. OF CIV. RTS., SCHOOL CLIMATE AND SAFETY 1, 3 (2018), https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf [https://perma.cc/2NH7-EA2H].

[219] *Id.*

[220] *See, e.g.*, Equal Justice Initiative, *Black Children Five Times More Likely Than White Youth to Be Incarcerated* (Sept. 14, 2017), https://eji.org/news/black-children-five-times-more-likely-than-whites-to-be-incarcerated [https://perma.cc/WT54-PU3U]; Rovner, *supra* note 19, at 7.

[221] Paul Hirschfield, *Another Way Out: The Impact of Juvenile Arrests on High School Dropout Rates*, 82 SOC. EDUC. 368, 368 (2009).

[222] Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 103.

[223] *Id.*

[224] *Id.*

[225] Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH U. L. REV. 919, 922 (2016).

[226] Travis M. Andrews, *Six-Year-Old Handcuffed and Several Other Children Under Age 11 Arrested in Tennessee, Sparking Outrage*, WASH. POST (Apr. 20, 2016, 6:30 AM), https://www.washingtonpost.com/news/morning-mix/wp/2016/04/20/six-year-old-handcuffed-and-several-other-children-under-age-11-arrested-in-tennessee-sparking-outrage/?utm_term=.e20d3d1138f1 [https://perma.cc/YA7R-3GGB]; Associated Press, *Family Suing Murfeesboro Over Arrest of Children Settles for $86,500*, FOX17 NASHVILLE (Aug. 24, 2017), https://fox17.com/news/local/family-suing-murfreesboro-over-arrest-of-children-settles-for-86500 [https://perma.cc/A638-PEP8] (describing case in which family was awarded monetary compensation for trauma children suffered due to arrest in school).

[227] Deborah N. Archer, *Challenging the School to Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 868 (2009).

jurisdictional age of fourteen, on the other hand, would take the option of arrest off the table for younger children, thereby eliminating that justification. This, in turn, would compel schools to re-assume responsibility for school discipline; encourage the use of alternative strategies for addressing misbehavior, regardless of the color of a student's skin; and stem the flow of the school-to-prison pipeline.

## IV. DEVELOPMENTAL IMMATURITY AND LEGAL COMPETENCY

Over the last two decades, rapid advancements in neuro- and social science have established that children do not reach full cognitive maturity until mid-adolescence. In fact, people do not reach psychosocial maturity until as late as age thirty.[228] Children younger than twelve years old can generally engage in concrete operations, such as comparatively analyzing quantity or size, and to organize their thinking around specific objects, people, or events.[229] But they do not begin to think abstractly, reason from principle rather than tangible experience, or consider and integrate multiple points of view until sometime between the ages of twelve and fifteen.[230] Cognitive development ultimately peaks at age sixteen or seventeen.[231]

Psychosocial maturation proceeds across an even longer trajectory. The prefrontal cortex of the brain, which is the locus of "executive" functions—the ability to make autonomous choices; self-manage; perceive and assess risks and benefits; and calculate and integrate the future consequences of one's actions into decision-making—does not complete the process of synaptic pruning until age twenty five or later.[232] For this reason, children and adolescents are more impulsive and more easily influenced by peers.[233] They tend to accord short-term benefits greater weight than long-term risks in decision-making, than older adults.[234] Axiomatically, however, they also have greater capacity for change,

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[228] *See, e.g.*, Mariam Arain, Maliha Haque, Lina Johal, Puja Mathur, Wynand Nel, Afsha Rais, Ranbir Sandhu, & Sushil Sharma, *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 453 (2013); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCH. 459, 482 (2009); Developments in magnetic resonance imaging over the past two decades have provided a neurological explanation for these cognitive and psycho-social development phenomena. *See, e.g.*, Kayt Sukel, *When is the Brain "Mature"?*, DANA FOUND. (Apr. 4, 2017), https://www.labxchange.org/library/items/lb:LabXchange:506946dc:html:1.

[229] Alicia Nortje, *Piaget's Stages: 4 Stages of Cognitive Development & Theory*, POSITIVE PSYCH. (May 3, 2021), https://positivepsychology.com/piaget-stages-theory/ [https://perma.cc/R3WL-D75C].

[230] BARBEL INHELDER & JEAN PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE: AN ESSAY ON THE CONSTRUCTION OF FORMAL OPERATIONAL STRUCTURES 4, 335 (Routledge 1958).

[231] Laurence Steinberg, Elizabeth Cauffman, Jennifer Woolard, Sandra Graham, & Marie Banich, *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AMERICAN PSYCHOLOGIST 583, 590–91 (2009).

[232] *See* Elizabeth S. Scott, N. Dickon Reppucci, & Jennifer L. Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 230 (1995); Sara B. Johnson, Robert W. Blum, & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 3, 216–21 (2009).

[233] *Id.*

[234] *Id.* Developments in magnetic resonance imaging over the past two decades have provided a neurological explanation for these cognitive and psycho-social development findings. The prefrontal cortex of the brain has been found to control the executive functions of reasoning and decision-making. This cortex continues to mature until people reach their mid-twenties. Young children can demonstrate impulse control, but only

for as they reach developmental maturity, their thought processes, judgement, and decision-making become more measured, less impulsive, and more autonomous.[235]

Since 2005, the United States Supreme Court has relied on developmental science to shape a still-evolving jurisprudence of youth. In a remarkable quartet of cases, the Court recognized that children's developmental immaturity renders them less culpable than adults who have committed similar crimes and also requires differential treatment for young people in the contexts of sentencing and custodial interrogations.[236] State supreme courts around the country similarly have embraced behavioral science and applied it in other situations, including, among others, waiver to adult court, search and seizure, and false confessions.[237] Pre-adolescent children are routinely denied decisional autonomy in other legal contexts. In most states, for example, they cannot work, enter into legally enforceable contracts, buy alcohol or cigarettes, marry, or obtain driver's licenses.[238]

Can children formulate *mens rea*, a condition for most criminal liability, if they are unable to predict and understand the potential repercussions of their actions, and if their developmental immaturity prevents them from effectively weighing risks and engaging in autonomous decision-making?[239] A growing number of scholars argue that they may not be able to do so. As Professor Jenny Carroll observes,

> the doctrine of mens rea [is grounded] in the notion that any given citizen is capable of making independent choices to abide by or to disregard social norms and law and that these choices will be driven by an analytic process that takes into account communal values and restrictions and the actor's own needs or desires.. . . [T]he concept of mens rea renders an act of

with age comes the ability to use it consistently. *See* Daniel Romer, *Adolescent Risk Taking, Impulsivity, and Brain Development: Implications for Prevention*, 52 DEV. PSYCHOBIOLOGY 263, 272 (2010).

[235] Much has been written about developmental immaturity and its impact on adolescent judgement and decision-making. *See, e.g.*, Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1015–17 (2003); Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 FUTURE OF CHILD. 15, 21 (2008); Eduardo Ferrer, *A New Juvenile Jurisprudence: How Adolescent Development Research and Relentless Defense Advocacy Revolutionized Criminal Law and Jurisprudence*, *in* RIGHTS, RACE, AND REFORM: FIFTY YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM 52, 60–66 (2018).

[236] Roper v. Simmons, 543 U.S. 551, 569–72 (2005); Graham v. Florida, 560 U.S. 48, 67 (2010); Miller v. Alabama, 567 U.S. 460, 471–72 (2012); J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011); Haley v. Ohio, 332 U.S. 596, 604–07 (1948).

[237] *See, e.g.*, State v. Comer, 249 N.J. 359, 395–98 (2021) (waived youth sentenced to thirty years or longer have right to review of sentence after twenty years for consideration of evidence of maturation and rehabilitation); State *ex rel.* C.K., 233 N.J. 44, 48–55 (2018) (due to developmental immaturity, statute requiring lifetime inclusion of adjudicated youth on sex offender registry with no possibility of removal violated due process); State *ex rel.* A.A., 240 N.J. 341, 351–59 (2020) (special protections for youth in custodial interrogations).

[238] *See* Cynthia Soohoo, *You Have the Right to Remain a Child: The Right to Juvenile Treatment for Youth in Conflict with the Law*, 48 COLUM. HUM. RTS. L. REV. 1, 32 (2017).

[239] The Texas Supreme Court implicitly acknowledged children's categorical lack of capacity for mens rea, albeit in a limited context. *In re* B.W., 313 S.W.3d 818, 826 (Tex. 2010) (holding that, because children under fourteen lacked capacity to consent to sex under state law, they could not formulate the necessary mens rea to be prosecuted for prostitution).

> disobedience an active one, a decision *not* to comply in a world where the norm is compliance.[240]

If developmental immaturity renders a child—or, for our purposes, a cohort of children—unable to engage in such sophisticated weighing of societal norms against personal desires, they do not act with *mens rea*.

Professor Carroll stops short of asserting that all youth should be shielded from prosecution due to their cognitive and psychosocial immaturity. Instead, she proposes a differential *mens rea* standard and assessment process for young people, on the ground that "they should only be held accountable for the *mens rea* they actually achieved."[241] In making this proposal, she does not distinguish children who are under fourteen and have not yet reached full cognitive maturity from older youth, but, as discussed above, developmental science teaches that this younger cohort cannot and does not formulate the "guilty knowledge" required for criminal liability.[242]

Developmental scientists similarly have concluded that pre- and early adolescent children also lack adjudicative competency. In *Dusky v. United States*, the Supreme Court articulated a two-factor test for competency to stand trial in a criminal case: the defendant must have the mental capacity to understand the nature of the proceedings against them and to assist in their own defense.[243] Challenges to adjudicative competency in the adult criminal context focus on mental illness and developmental disabilities, yet cognitive and psychosocial immaturity similarly undermine young children's ability to understand and participate fully in the legal process.[244]

The leading study of children's adjudicative competency, the MacArthur Juvenile Adjudicative Competence Study, compared a cohort of adolescents (ages 11–17) to one of young adults (age 18–24).[245] The researchers found that youth aged fifteen and younger were substantially less able to reason and understand trial-related issues than sixteen and seventeen-year-olds. Similarly, children younger than fourteen were less likely to focus on the long-term consequences of legal decisions than older youth.[246] Researchers further have determined that youth aged fifteen and younger are less active participants in their legal cases; less able to understand legal terminology; less likely to have adequate legal

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[240] Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 548 (2016).
[241] *Id.* at 598.
[242] Other scholars have made similar arguments with regard to specific mental states. *See* Christopher Northrup & Kristina Rotheley Rozan, *Kids Will Be Kids: Time for a "Reasonable Child" Standard for Proof of Objective Mens Rea Elements*, 69 ME. L. REV. 109, 125 (2016) (arguing for adoption of "reasonable child" standard in youth prosecutions for negligence-based crimes); Kimberly Thomas, *Reckless Juveniles*, 52 U.C. DAVIS L. REV. 1665, 1687 (2019) (recklessness); *see also* LEGIS. & POL'Y CLINIC, CIVITAS CHILDLAW CTR., INCAPABLE OF FORMING CRIMINAL INTENT: THE CASE FOR SETTING A MINIMUM AGE OF CRIMINAL RESPONSIBILITY IN ILLINOIS 1, 2 (2021), https://www.luc.edu/media/lucedu/law/centers/childlaw/pdfs/incapable_of_criminal_intent.pdf. [https://perma.cc/V84J-CZHJ].
[243] Dusky v. United States, 362 U.S. 402, 403 (1960).
[244] Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci, & Robert Scwartz, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW HUM. BEHAV. 333, 359 (2003).
[245] *Id.* at 336.
[246] *Id.* at 356.

knowledge and understanding, including in the *Miranda* context; and more likely to waive their legal rights than adults.[247]

Developmental immaturity also affects the attorney-client relationship. Younger children's still-nascent understanding of themselves and capacity for autonomous decision-making inhibit their willingness and ability to express their own viewpoints or participate actively in their own defense.[248] "Identity formation involves a process of change in one's conceptualization of self, during which personal preferences often are unstable. A thing chosen for one's life at an early or middle stage of this process often will misrepresent what one would choose when the process of identity formation has begun to stabilize, as it typically does in late adolescence."[249] Adjudicative competency demands a level of active engagement that they are developmentally unable to undertake.[250]

The neuro- and social science advancements of the last two decades have led several state courts to recognize developmental immaturity as a ground for a determination of incompetency to stand trial. A California appellate court, for example, has observed, "[n]o significant difference [exists] between an incompetent adult who functions mentally at the level of a ten- or eleven-year-old due to a developmental disability and that of a normal eleven-year-old whose mental development and capacity is likewise not equal to that of a normal adult."[251]

Until the 1990s, challenges to adjudicative competency were relatively rare in juvenile court. With the onset of the punitive era, however, youth defenders began to raise competency issues more frequently. Today, every state permits children charged with delinquency to challenge their competency to stand trial in juvenile court, and twenty-one states have adopted youth-specific competency laws that include developmental immaturity as a condition or factor for consideration in the competency determination.

## V. A NEW DOCTRINE OF INFANCY: CATEGORICAL JURISDICTIONAL EXCLUSION

Collectively, then, children under fifteen years old lack the cognitive and psychosocial maturity necessary to formulate *mens rea*, comprehend the legal process, and participate in their own defense. Therefore, their arrest and prosecution fail to comport with the demands of either substantive criminal law or criminal procedure. Because these deficiencies are universal and not exceptional, they compel categorical, age-based exclusion from juvenile court jurisdiction: a modern doctrine of infancy.

Such an approach also is compelled by the foundational history, current reality, and seeming intractability of racial bias and injustice in the juvenile legal system. The arrest and prosecution of young children drives and amplifies racial disparities in that system and beyond and inflicts devastating, cumulative harms on them across the arc of their lives. In short, adoption of a minimum jurisdictional age of fourteen is nothing short of a racial justice imperative.

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[247] Alison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: An Analysis of Juvenile and Adult True and False Plea Decisions*, 40 LAW & HUMAN BEHAVIOR 611, 612 (2016).
[248] Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCH., PUB. POL'Y, & L. 3, 19 (1997).
[249] *Id.*
[250] Grisso, *supra* note 244, at 358.
[251] Timothy J. v. Superior Court, 58 Cal. Rptr. 3d 746, 748 (Ct. App. 2007).

### *A. International Human Rights Standards and Global Practices Compel a Minimum Jurisdictional Age of Fourteen*

In its failure to embrace a rational, developmentally appropriate minimum jurisdictional age, the United States is an outlier among Western democracies. International human rights standards call for a minimum age of criminal responsibility of at least twelve and preferably fourteen years old. Since its introduction in 1989, the International Convention on the Rights of the Child ("the Convention") has been ratified by every member nation of the United Nations except for the United States—a total of 196 countries around the globe.[252] Article 40 of the Convention articulates the obligations of signatory states in the area of youth justice, including a directive that countries "seek to promote . . . the establishment of a minimum age below which children *shall be presumed not to have the capacity* to infringe the penal law."[253] Subsequent interpretations of this provision clarify that it applies to both juvenile and adult court prosecutions of youth.[254]

Even before adopting the Convention in 1989, the United Nations General Assembly issued the *Standard Minimum Rules for the Administration of Juvenile Justice* ("the Beijing Rules"). Beijing Rule 4.1 states, "[i]n those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity."[255] The rule further reminds member states that "[i]n general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.)" and exhorts them to make "efforts . . . to agree on a reasonable lowest age limit that is applicable internationally."[256] Subsequently, in 2007, the United Nations Committee on the Rights of the Child issued a comment, which stated that, consistent with the Convention's rehabilitative goals, "[a] minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable."[257] Finally, in 2019, a report of the independent expert leading a United Nations global study on children deprived of liberty recommended that countries establish a minimum age of criminal responsibility of fourteen years old.[258]

In keeping with this international consensus, the majority of Western European countries have set a minimum age of juvenile justice jurisdiction of at least twelve and, in some cases, higher. Finland, for example, has a minimum age of fifteen for any type of prosecution and prohibits incarceration of children under the age of eighteen except in

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[252] *See Status of Ratification Interactive Dashboard*, U.N. OFF. HIGH COMM'R FOR HUM. RTS. https://indicators.ohchr.org/ [https://perma.cc/PMR8-4F76] (last visited Aug. 7, 2023) (select "Convention on the Rights of the Child" from "Select a Treaty").

[253] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456.

[254] *See* UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 615 (2007), https://www.unicef.org/lac/media/22071/file/Implementation%20Handbook%20for%20the%20CRC.pdf [https://perma.cc/ZG6P-Y3KQ].

[255] G.A. Res. 40/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Nov. 29, 1985).

[256] G.A. Res. 40/33 r. 4.1 (Nov. 29, 1985).

[257] Comm. on the Rts. of the Child, *Children's Rights in Juvenile Justice*, at 10, U.N. Doc. CRC/C/GC/10 (2017).

[258] U.N. Secretary-General, Letter dated July 11, 2019, from the Secretary-General addressed to the General Assembly Pursuant to Resolution 72/245, U.N. Doc. A/74/136 (July 11, 2019).

extraordinary situations.[259] Other European nations, including Germany and Austria, set a minimum age of fourteen.[260] Many of these countries also have enacted differential sentencing schemes for those youth who are prosecuted, in order to protect them from the harms of system involvement, and have created a network of alternative responses to wrongdoing, such as educational, child protective, therapeutic, and family support programs.[261]

Globally, thirty-three countries have set a minimum age of fourteen years old.[262] Nineteen other nations have set minimum ages of fifteen years old or older, including Timor-Leste and Mozambique, in which the minimum age is sixteen.[263] In contrast, the United States continues to subject even our youngest children to arrest, prosecution, and possible incarceration, in defiance of widely-embraced international practices and norms.[264]

### *B. Why Not the Common Law Infancy Defense?*

As discussed in Section II, the emergence and rapid rise of the juvenile court led to explicit or presumptive rejection of the common law defense of infancy in delinquency proceedings in a substantial majority of states.[265] Over the last four decades, however, as the myth of the benevolent juvenile court eroded and its punitive goals and effects have become more evident, legal scholars have called for reinvigoration of the doctrine and expansion of its reach to delinquency proceedings.[266] For all of the reasons discussed in this Article, extricating children younger than fourteen from the grasp of the legal system would be consistent with developmental science and a step toward reducing the system's well-documented, centuries-long racial disparities and injustices. The traditional, case-by-case application of the infancy doctrine, however, is an inadequate response to the far-reaching individual, familial, and societal harms caused by the arrest and prosecution of

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[259] Elizabeth S. Barnert, Laura S. Abrams, Cheryl Maxson, Lauren Gase, Patricia Soung, Paul Carroll, & Eraka Bath, *Setting a Minimum Age for Juvenile Court Jurisdiction in California*, 13 INT'L J. PRISON HEALTH 49, 52 (2018).

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] Although the United States has not ratified the Convention, the Supreme Court relied on it and other international human rights instruments and norms to invalidate the juvenile death penalty in *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

[265] Only three states—California, Maryland, and Washington—specifically permit the infancy defense to be raised in juvenile court. *See In re* Gladys R., 1 Cal. 3d 855, 862, (Cal. 1970); *In re* Devon T., 584 A.2d 1287, 1290-91 (Md. Ct. Spec. App. 1991); State v. Q.D., 685 P.2d 557, 560 (Wash. 1984). Sixteen others have judicially or legislatively rejected the defense, while its status in the remainder of states is "unclear." *See* Kaban & Orlando, *supra* note 106, at 35–36.

[266] *See* Walkover, *supra* note 107, at 506; Kaban and Orlando, *supra* note 106, at 52–53; Lara Bazelon, Note, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 198 (2000) (calling for exclusion of children eleven and younger from juvenile court jurisdiction); Tara Schiraldi, Note, *For They Know Not What They Do: Reintroducing Infancy Protections for Child Sex Offenders In Light of* In Re B.W., 52 AM. CRIM. L. REV. 679, 680 (2015). Courts in a number of states have abrogated or rejected the infancy defense in adult criminal prosecutions of children between ages eight and fourteen. *See* Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687 (2006) (arguing that due process requires revival of infancy defense in adult criminal prosecutions of children younger than fourteen).

young children. The traditional formulation of the infancy doctrine also fails to incorporate and account for the advancements in developmental science of the last two decades, which establishes that, *as a group*, children younger than fourteen lack the cognitive and psychosocial maturity required for legal competency.

Vivification of the common law doctrine of infancy in juvenile court raises a number of concerns. First, as it operated historically (and continues to operate in those states that recognize it), the infancy defense was a trial defense, raised in the adjudicative context.[267] However, many of the harms that flow from lack of a rational jurisdictional floor—the school-to-prison pipeline, the trauma and long-term collateral consequences of arrest, the negative cumulative effects of early court referrals, and the racial disparities that are the product of and driven by the involvement of young children in the system—occur before and regardless of whether children ultimately are prosecuted. If a case is not prosecuted, it never reaches the adjudication stage, and the infancy defense offers no protection to individual children and no bulwark against systemic racism. Instead, a new infancy paradigm is needed, one that operates not as a trial defense but, instead, shields young children from both the threat and the actuality of arrest, prosecution, and punishment.[268]

Evaluating infancy on an individual basis also threatens to increase, rather than reduce, racial disparities. Although the common law defense places the burden on the prosecution to rebut the presumption of incapacity, decisional authority rests with juvenile court judge. As discussed above, throughout the tortured history of youth justice in the United States, discretionary decision-making points have driven racial disparities, including decisions rejecting the infancy defense.[269] Given the well-established impact of adultification bias and disparate treatment of Black children in the legal system, a discretionary process would continue to invite biased decision-making when judges must determine whether a child is mature enough to formulate the requisite mens rea. Adultification bias negatively skews perceptions not just of children's physical appearance but also their maturity and their characters.[270] Judges and evaluators who view Black children as being older and more violent than they are will disproportionately and inaccurately find them to have legal capacity. White children will be extricated from the system; Black children will not.

Litigating infancy, furthermore, would involve individual psychological evaluations; production and review of educational, therapeutic, legal, and social services records; and hearings with extensive and competing expert testimony. The burdens of such litigation on already overwhelmed courts, prosecutors, and public defenders are counterproductive and unnecessary, in light of the universal applicability of developmental science and its

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[267] *See* Kaban & Orlando, *supra* note 106, at 35.

[268] For similar reasons, challenges to legal competency or substantive defenses grounded in lack of mens rea are inadequate to protect young, developmentally immature children from the myriad harms of arrest and prosecution. Further militating against reliance on competency is the burden of proof, which in some states—unlike in the common law infancy context—lies with the defendant. *See* Medina v. California, 505 U.S. 437, 446 (1992). In addition, a finding of adjudicative incompetency based on developmental immaturity may simply result in the case being held in abeyance until the child completes a competency "restoration" or "remediation" program. *See* NAT'L CTR. FOR STATE CTS., JUVENILE COMPETENCY 5 (2022), https://www.ncsc.org/__data/assets/pdf_file/0027/90882/Juvenile-Competency-to-Stand-Trial.pdf [https://perma.cc/XD3C-A5JA].

[269] Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1044–45 (2013).

[270] Goff, Jackson, Di Leone, Culotta, & DiTomass, *supra* note 201, at 540.

truths.[271]

### *C. The Essentiality of Categorical Exclusion*

The many shortcomings of the common law defense as a juvenile court gatekeeper compels embrace of a new approach to infancy: the categorical exclusion of children younger than fourteen from the jurisdictional reach of the juvenile court. Universal adoption of such a rule would be consistent with developmental science; help neutralize the criminalizing effects of adultification and other forms of implicit bias vis-à-vis young children; slow the flow of the school-to-prison pipeline; limit the cumulative effects of system involvement; and, perhaps, begin to chisel away at the disparities and inequities that the American legal system's treatment of children created and has perpetuated across nearly three centuries.

Growing public recognition of the myriad of harms and dangers posed by policing and prosecuting the very young has led to a chorus of calls for categorical jurisdictional exclusions. Professional organizations across disciplines have issued policy statements and resolutions demanding adoption of a minimum age of at least twelve and, in some cases, fourteen, including Youth Correctional Leaders for Justice, the American Academy of Pediatrics, the Society for Adolescent Health and Mental Health, the American Bar Association, the National Juvenile Justice Network, and the NFL Players' Association.[272] Outside of the legal academy, social scientists have undertaken research studies and made similar recommendations.[273]

State legislatures are starting to take heed, as well. According to the National Governors Association, "[t]here is growing movement to right-size juvenile justice systems to better meet the developmental needs of youth and young adults by examining the parameters of juvenile court jurisdiction."[274] Although no state has yet complied with the dictates of international law and established a minimum age of fourteen, as of July 2023, two states and Puerto Rico now have a jurisdictional floor of thirteen[275] and five others have set a floor of twelve years old.[276]

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[271] *See* J.D.B. v. North Carolina, 564 U.S. 261, 273 (2011) (citing 1 E. FARNSWORTH, CONTRACTS § 4.4, p. 379, and n.1 (1990)) ("Like this Court's own generalizations, the legal disqualifications placed on children . . . exhibit the settled understanding that the differentiating characteristics of youth are universal.").

[272] *Raising the Minimum Age for Prosecuting Children*, NAT'L JUV. JUST. NETWORK, https://www.njjn.org/our-work/raising-the-minimum-age-for-prosecuting-children [https://perma.cc/7LGQ-LXUZ] (last visited Aug. 7, 2023).

[273] *See generally, e.g.*, Laura Abrams, Elizabeth S. Barnert, Matthew L. Mizel, Antoinette Bedros, Erica Webster, & Isaac Bryan, *When Is a Child Too Young for Juvenile Court? A Comparative Case Study of State Law and Implementation in Six Major Metropolitan Areas*, 66 CRIME & DELINQ. 219 (2020); Elizabeth S. Barnet, Laura S. Abrams, Cheryl Maxson, Lauren Gase, Patricia Soung, Paul Carroll, & Eraka Bath, *Setting a Minimum Age for Juvenile Justice Jurisdiction in California*, 13 INT'L J. PRISONER HEALTH 49, 54 (2017).

[274] *Age Boundaries in Juvenile Justice Systems*, NAT'L GOVERNORS ASS'N (Aug. 12, 2021), https://www.nga.org/publications/age-boundaries-in-juvenile-justice-systems/ [https://perma.cc/HGE8-CU6K].

[275] MD. CODE. ANN., CTS. & JUD. PROC. § 3-8A-03(a)(1) (West 2023); N.H. REV. STAT. ANN. § 169-B:2 (2021).

[276] *Brief: Charting U.S. Minimum Ages of Jurisdiction, Detention, and Commitment*, NAT'L JUV. JUST. NETWORK (July 2023), https://www.njjn.org/uploads/digital-library/Minimum%20Age%20Laws%20for%20Juvenile%20Court%20Jurisdiction%20and%20Confineme

Shielding young children from arrest and prosecution, furthermore, would re-center youth justice within the civil rights context that shaped the Warren Court's constitutional criminal procedure jurisprudence. As Professor Robin Walker Sterling has written, the *Gault* Court's decision to locate juvenile court procedural protections in due process rather than in the fundamental rights set forth in the Bill of Rights severed *Gault* from that line of cases and, in doing so, disregarded three centuries of racial disparities and oppression in America's treatment of children accused of breaking the law.[277] That erasure, in turn, legitimized and perpetuated those harms. Adoption of a jurisdictional floor would help stem the tide of injustice.

Finally, although jurisdictional boundaries historically have been creations of statute, the United States Supreme Court's reliance on developmental science to carve out categorical, age-based rules in other contexts provides a useful roadmap here.[278] Constitutional arguments in support of categorical prohibitions against waiving children to adult court similarly are rooted in children's lesser culpability and greater potential for change.[279]

## VI. VISIONING CHANGE

In *Are Prisons Obsolete,* Angela Y. Davis writes,

> rather than try to imagine one single alternative to the existing system of incarceration, we might envision an array of alternatives that will require radical transformations of many aspects of our society. Alternatives that fail to address racism, male dominance, homophobia, class bias, and other structures of domination will not, in the final analysis, lead to decarceration[.][280]

Prohibiting the arrest or prosecution of younger children will not prevent schools, child welfare agencies, or mental health systems from intervening when necessary to address misbehavior. To the contrary, the states that have adopted jurisdictional floors of twelve or thirteen have developed holistic alterative response mechanisms designed to meet

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nt_NJJN%20July%202023_2.pdf [https://perma.cc/6U5C-F9UZ]. It should be noted that of the seven states that have adopted a jurisdictional floor of age twelve or above, all but Massachusetts have "carve-outs" for homicide and certain other violent felonies. Similarly, Puerto Rico has adopted a minimum age of thirteen for misdemeanors only. At the time this Article was written, a bill had been introduced in both houses of the New Jersey State Legislature that would create a jurisdictional floor of fourteen years old. *See* G.A. A5169, 2022 Sess. (N.J.); S. S3911, 2022 Sess. (N.J.).

[277] Sterling, *supra* note 72, at 607.

[278] *See* Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012); *see also* J.D.B. v. North Carolina, 564 U.S. 261 (2011).

[279] *See* Hannah Duncan, *Youth Always Matters: Replacing Eighth Amendment Pseudoscience with an Age-Based Ban on Juvenile Life Without Parole*, 131 YALE L.J. 1936 (2022). Legal scholars have suggested that, despite the limiting force of *McKeiver*, the Due Process underpinnings of *In re Gault* may provide fertile ground for expansion of children's rights in the developmental science era. *See, e.g.*, Mae C. Quinn, *Giving Kids Their Due: Theorizing a Modern Framework for Juvenile Defense Representation*, 99 IOWA L. REV. 2185 (2014) (right to counsel). The question of whether due process itself compels categorical exclusion of young children from arrest and prosecution is beyond the scope of this Article but something I hope to explore in a subsequent piece.

[280] ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 100 (2003).

children's educational, treatment, and social work needs without inflicting the harms of legal system involvement.[281] These generally draw on and attempt to engage children and their families in existing systems of service delivery, but, crucially, do not penalize or criminalize children or families if they choose not to participate.[282]

In addition, other Western countries and some United States jurisdictions have turned to developmentally appropriate, individualized alternatives, such as restorative practice initiatives, mediation, mental health treatment, substance abuse counseling, mentoring, educational and vocational programs, and family therapy, all of which are more effective, less harmful, and less expensive than formal arrest and juvenile court processing. Scholars and reformers point to two of these alternatives as being particularly needed and effective: restorative justice practices and enhanced children's mental health services.

### *A. Community- and School-Based Restorative Justice*

In its historical and current iterations, the criminal legal system focuses on individual culpability, responsibility, penance, and restoration. Restorative justice, in contrast,

> looks through the lens of community and relationships rather than individuals. Restorative practices, which are deeply rooted in the conflict resolution systems of indigenous societies, offer 'an opportunity to establish ... just relationship[s] among victims, offenders, and communities,' rooting the responsibility for responding to crime in the hands of community members, without whom 'the relational web broken by crime cannot be fully repaired and the needs of victims and offenders cannot be fully satisfied.'[283]

Restorative justice encompasses a variety of approaches and strategies but usually centers around mediational, healing interactions among the person who committed a harmful act, the person harmed by that act, and members of the community. As Professor Adriaan Lanni describes it,

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[281] *See, e.g.*, N.Y. STATE OFF. CHILDREN AND FAM. SERVS., ADMINISTRATIVE DIRECTIVE: NY ALTERNATIVE RESPONSE: RAISING THE LOWER AGE OF JUVENILE DELINQUENCY—A DIFFERENTIAL RESPONSE FOR CHILDREN UNDER 12 YEARS OF AGE (2022) (hereinafter N.Y. ALTERNATIVE RESPONSE), https://ocfs.ny.gov/main/policies/external/2022/adm/22-OCFS-ADM-23.pdf [https://perma.cc/V77Q-RYYN]; MD. DEP'T YOUTH SERVS., 2022 JUVENILE JUSTICE REFORM IMPLEMENTATION MANUAL (2022), https://djs.maryland.gov/Documents/JJRC/JJRC-Implementation-Manual-Public_2022.pdf [https://perma.cc/58CT-SLFK].

[282] *See, e.g.*, NY ALTERNATIVE RESPONSE, *supra* note 281. In contrast to New York's approach which removes children under twelve from prosecution, and creates an entirely voluntary alternative system of service delivery, Christopher Slobogin and Mark Fondacaro propose reframing of juvenile court to focus on "individualized prevention," rather than retribution. *See* Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1 (2009). According to the authors, such a system would be "single-mindedly focused on recidivism reduction rather than the broader goal of creating a well-socialized individual." *Id.* at 3. The proposed model would, however, retain all of the mechanisms and machinations of the current juvenile court, including arrest, adjudication, and incarceration, when it was deemed to be most likely to deter future offending and, therefore, would inadequately address the structural harms discussed in this Article.

[283] Beth Caldwell, *Shifting the Paradigm: An Abolitionist Analysis of the Recent Juvenile Justice "Revolution,"* 23 NEV. L. REV. 115, 166 (2022) (internal citations omitted).

> [i]n this meeting, the offender expresses remorse for the harm caused and the group agrees on actions the offender can take to repair the harm and prevent re-offending. . . . Proponents argue that restorative processes offer victims more satisfaction than the criminal process and do a better job of holding the offender accountable while promoting reintegration and avoiding or reducing incarceration.[284]

Since 2010, a number of states have passed laws embracing restorative justice practices into their criminal or juvenile codes.[285] In the youth justice context, most of these programs are built into the existing juvenile court structures and function either as diversion programs for children charged with minor offenses, as probation conditions, or as a basis for sentence reductions for youth adjudicated for more serious crimes. Meta-analyses have established that children who participate in restorative justice programs have lower rates of delinquency and are less likely to recidivate than those who are referred to juvenile court.[286] In addition, victims of youth crime who participate in restorative justice programs have more positive perceptions of fairness of the justice system than those whose cases are formally processed. Children who participate in diversionary restorative justice interventions, furthermore, are more likely to satisfy their dispositional, or sentencing, obligations than those who do not.[287]

Because interactions with and intervention of police and court personnel are a condition precedent to participation in most restorative justice programs, simply integrating restorative practices into the existing juvenile legal system may reduce but does not eliminate or prevent the many harms of system involvement, especially for younger children. With a rational jurisdictional floor, on the other hand, restorative justice mechanisms would be the primary and default response to wrongdoing by children who are categorically excluded from prosecution.[288]

Some school systems also are instituting restorative practices as a prevention strategy and an alternative to law enforcement involvement in disciplinary incidents. When implemented well, restorative practices reduce racial disparities, reduce punitive discipline, and build communities both within and outside of school buildings by teaching children the pro-social and conflict resolution skills necessary to reduce disciplinary incidents. In Denver, for example, schools have embraced peace circles, conferencing, and peer-led mediation in order to promote "a restorative culture seek[ing] to address the missing piece of teaching social-emotional and conflict-resolution skills by turning behaviors into

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[284] Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 637 (2021).

[285] *See generally* Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027.

[286] Jennifer S. Wong, *Practice Profile: Restorative Justice Programs for Juveniles*, NAT'L INST. JUST. (July 25, 2018), https://www.crimesolutions.gov/PracticeDetails.aspx?ID=70 [https://perma.cc/LD3W-X79D].

[287] *Id.*

[288] In New Zealand, for example, every child accused of a crime is referred for a Family Group Conference, which are based on the practices of the Maori indigenous people. In these conferences, a meeting takes place among the accused child, the victim, family members, friends, defense attorneys, prosecutors, and social service providers. This group "meets to discuss the problems and to develop—by consensus—a recommendation for the outcome of the case. This framework allows for a holistic approach to problem-solving that takes into account the multidimensional layers that typically contribute to the situation surrounding a young person who breaks the law, and that prioritizes being culturally appropriate and empowering families." Caldwell, *supra* note 283, at 169.

learning opportunities . . . . When implemented with a race-conscious lens, restorative practices improve school climate, increase academic achievement and reduce racial disparities in school discipline."[289] Other cities, including San Francisco, Oakland, Minneapolis, and Chicago, also have adopted restorative practices.[290]

Given the high percentage of arrests of younger children that occur in school, wresting responsibility for school discipline away from police and returning it to educators will substantially reduce the number of children younger than fourteen who are referred to juvenile court. As Angela Y. Davis reminds us,

> [u]nless the current structures of violence are eliminated from schools in impoverished communities of color—including the presence of armed security guards and police—and unless schools become places that encourage the joy of learning, these schools will remain the major conduits to prisons. The alternative would be to transform schools into vehicles for decarceration.[291]

### *B. Improved Access to Mental Health and Trauma-Informed Treatment*

Children involved in the legal system are disproportionately likely to have unmet mental health needs. Researchers estimate that between 50 to 75% of children involved in the legal system meet the diagnostic criteria for at least one mental health condition and an additional 10% have a substance abuse disorder.[292] Similarly, and also disproportionately, more than 90% of system-involved children have experienced at least one, and often multiple, forms of trauma, including facing physical and sexual abuse, witnessing violence, and experiencing the death of loved ones.[293] As many as 25 to 33% of these young people have post-traumatic stress disorder (PTSD), compared with just 5% in the larger community.[294]

Improving access to and the quality of mental health and trauma-informed treatment would provide more effective responses to youthful misbehavior than arrest and court referral. In addition to individual therapy, numerous evidence-based programs—including,

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[289] ADVANCEMENT PROJECT, SCHOOL-WIDE RESTORATIVE PRACTICES: STEP-BY-STEP 3 (2017), https://rjpartnership.org/wp-content/uploads/Implementation-Guide-FINAL.pdf [https://perma.cc/75GR-BMSH].

[290] *Id.* at 4.

[291] DAVIS, *supra* note 280, at 101.

[292] Lee A. Underwood & Aryssa Washington, *Mental Illness and Juvenile Offenders*, 13 INT'L J. ENV'T RSCH. & PUB. HEALTH 228, 229 (2016).

[293] KAREN M. ABRAM, LINDA A. TEPLIN, DEVON C. KING, SANDRA L. LONGWORTH, KRISTIN M. EMANUEL, ERIN G. ROMERO, GARY M. MCCLELLAND, MINA K. DULCAN, JASON J. WASHBURN, LEAH J. WELTY, & NICHOLE D. OLSON, PTSD, TRAUMA, AND COMORBID PSYCHIATRIC DISORDERS IN DETAINED YOUTH (2013), https://www.ojjdp.gov/pubs/239603.pdf [https://perma.cc/HL4B-JEHG].

[294] Julian Ford, *What is a 'Trauma-Informed' Juvenile Justice System? A TARGETed Approach*, JUV. JUSTICE INFO. EXCH. (June 20, 2016), https://jjie.org/2016/06/20/what-is-a-trauma-informed-juvenile-justice-system-a-targeted-approach/ [https://perma.cc/52D4-JUMM].

among others, multi-systemic therapy[295] and cognitive behavioral therapy[296]—have been evaluated and determined to reduce recidivism. Other strategies and interventions, such as mentoring, "wrap-around" services for families, and after-school programs, abound. Together, these options provide a panoply of more effective, less harmful, and less expensive alternatives to arrest and court referral and render a minimum age of fourteen consistent with public safety, racial equity, and children's well-being.

### *C. Categorical Exclusion as a Pathway to Abolition*

Because the many pervasive and intractable harms of the juvenile legal system affect not only the very young but all youth who fall within its ambit, scholars and activists have long argued for its (at least partial) dismantling. Early abolitionists recognized that youth exceptionalism and the juvenile court's paternalistic, purportedly protectionist and "problem-solving" purposes provided cover for its racially biased and punitive decision-making.[297] Counter-intuitively, however, rather than advocating for extrication of young children from the system, they called for all youth to be tried in the adult criminal system, where, they posited, procedural protections were stronger.[298] Most of these commentators, including noted scholar Barry C. Feld, later rethought and retracted their proposals.[299] More recently, a groundswell of support for abolition (or, at least, reduction) of youth incarceration has grown among the medical community,[300] social scientists,[301] legal

[295] *See, e.g.*, WASH. STATE INST. PUB. POL'Y, MULTI-SYSTEMIC THERAPY OUTCOMES IN AN EVIDENCE-BASED PRACTICE PILOT (2011), https://www.wsipp.wa.gov/ReportFile/1084 [https://perma.cc/UBJ5-MMUT].

[296] *See generally* Mark W. Lipsey, Nana A. Landenberger, & Sandra J. Wilson, *Effects of Cognitive-Behavioral Programs for Serious Criminal Offenders*, 3 CAMPBELL SYSTEMATIC REVS. 1 (2007) (finding cognitive-behavioral programs reduce recidivism by at least 25% and, in some cases by 50%).

[297] *See, e.g.*, Martin Guggenheim, *A Call to Abolish the Juvenile Justice System*, CHILDREN'S RTS. REP., June 1978, at 1, 3; Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120 (1977); Katherine H. Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990).

[298] BARRY C. FELD, BAD KIDS 327–30 (1999) (calling for abolition of juvenile court and prosecution of youth in adult criminal courts, with "enhanced procedural safeguards, to develop a separate sentencing system—a Youth Discount—that formally recognized youthfulness as a mitigating factor, and to provide young offenders with resources and room to reform").

[299] *See* Barry C. Feld, *My Life in Crime: An Intellectual History of the Juvenile Court*, 17 NEV. L.J. 299, 321 (2017).

[300] *Protect Children, Reform the Juvenile Justice System*, AM. ACAD. PEDIATRICS, https://downloads.aap.org/AAP/PDF/Reform-the-Juvenile-Justice-System-Factsheet.pdf [https://perma.cc/JYV2-VBFQ].

[301] *See, e.g.*, PATRICK MCCARTHY, VINCENT SCHIRALDI, & MIRIAM SHARK, THE FUTURE OF YOUTH JUSTICE: A COMMUNITY-BASED ALTERNATIVE TO THE YOUTH PRISON MODEL (2016), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/ntcc_the_future_of_youth_justice.pdf [https://perma.cc/XPB8-BRN7].

scholars,[302] and youth and community activists.[303] Their arguments are centered in and tethered to the larger prison abolition movement that has gathered force over the last three decades.[304]

Youth prison abolition alone, however, will not prevent or cure the pervasive, lifelong damage wrought by the arrest and prosecution of young people. As Professor Jane Spinak argues, those harms will only be reduced by the abolition of the juvenile legal system as a whole and a reimagining of how we respond to and nurture children who break the law: "radical non-intervention."[305] "Radical non-intervention asks us . . . to look at each practice that sends or draws families into court and ask how that practice can be shrunken and eventually eliminated."[306]

Immediate and complete elimination of the juvenile legal system would be fraught with political and logistical challenges. Incremental "shrinkage," however, is not only possible but has already begun to occur.[307] One incrementalist strategy is to reduce the reach of that system by constricting its jurisdiction over certain behaviors and certain children, particularly the very young.

Embracing a minimum jurisdictional age of fourteen would constitute such a constriction and pave a pathway toward abolition of a system that has been unjust, ineffective, and irrational since its inception. To do so would reduce or eliminate the pervasive, well-documented harms of system involvement. It would decrease racial disparities across the system and help prevent school push-out. It would be consistent with behavioral and neuroscience and widely-embraced international human rights standards. And it helps ensure that children like Kaia Rolle will never again be handcuffed, forced into a police car, and stigmatized, simply for being a child. We owe them that much.

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[302] *See, e.g.*, Caldwell, *supra* note 283, at 166; Subini Ancy Annamma & Jamelia Morgan, *Youth Incarceration and Abolition*, 45 N.Y.U. REV. L & SOC. CHANGE 471 (2022); Nancy E. Dowd, *Black Lives Matter: Trayvon Martin, the Abolition of Youth Justice, and #BlackYouthMatter*, 31 U. FLA. J.L. & PUB. POL'Y 43 (2020); *see also* Emily Buss, *Kids Are Not So Different: The Path from Juvenile Exceptionalism to Prison Abolition*, 89 U. CHIC. L. REV. 843 (2022).

[303] *See, e.g.*, *About Us*, NO KIDS IN PRISON, https://www.nokidsinprison.org/about-us [https://perma.cc/UV4S-C6YB].

[304] *See, e.g.*, DAVIS, *supra* note 280; Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1160–61 (2015).

[305] SPINAK, *supra* note 21, at 259; *see also* ROBERTS, *supra* note 21, at 276 (arguing for abolition of the child welfare system).

[306] SPINAK, *supra* note 21, at 264.

[307] *See* Caldwell, *supra* note 283, at 117 ("This change in the tide of juvenile justice policy comes at a time where a broader segment of US society has awakened to the realities of racism that have plagued this country since its inception–awareness triggered by the disturbing images of the murder of George Floyd by a Minneapolis police officer. This increased concern about the racial biases endemic to policing, criminal justice and juvenile justice has triggered widespread calls for reform. This is a remarkable time in US history where there is a sense that real, lasting, transformative change *may* be possible.").