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Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts

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CRIMINAL LAW

VIRTUAL SHACKLES: ELECTRONIC SURVEILLANCE AND THE ADULTIFICATION OF JUVENILE COURTS

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*In recent years, there has been a groundswell of attention directed at problems within the American criminal justice system, led in part by Michelle Alexander's groundbreaking book, *The New Jim Crow*, and most recently through the efforts of the Black Lives Matter movement. This increased focus on the harms of over-incarceration and net-widening, has had the benefit of introducing to the public other practices utilized in the criminal justice system, such as the widespread use of ankle monitors to track the location of defendants and released offenders. Yet, despite this greater attention, legal scholarship has only recently begun to grapple with many of the issues arising at the intersection of criminal justice and technology, and even more, how these issues affect the juvenile justice system. This paper seeks to draw attention to and generate greater discussion on the ways in which advancing surveillance technologies are deployed in the criminal justice system and the reciprocal impact it has on the development of juvenile justice policies and practices. Specifically, it examines the use of electronic surveillance technology by juvenile courts as a manifestation of adultification, where juvenile courts adopt a "one size fits all" approach and implement tools and practices from the adult criminal justice system, despite having great discretion to explore alternatives. This paper analyzes these connections and argues that correctional practices, adopted from the adult criminal justice system for implementation with youth, should be validated for effectiveness*

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by social science evidence and community-informed policymaking. This form of accountability is crucial not only for garnering critical reflection on the use of electronic surveillance, but also for positioning juvenile courts to make better decisions in the future when contemplating adoption of even more advanced and powerful surveillance technologies.

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Not too long ago, I sat in the halls of a juvenile court and jail where I had a very interesting talk with a ten-year-old. As we sat on the benches outside of the courtroom, he swung his skinny brown legs, which came nowhere near to touching the ground, and you could see this black strap around his ankle, with a much larger rectangular unit attached to the strap protruding off his tiny legs. I proceeded to ask him how it was over the last sixty days with this, as he called it, “box” on his leg. He told me that he hated it, and when he went to school and church, the few times he was allowed to go out with his mother, and people saw him, everyone assumed he was this terrible kid; some sort of monster. Most of the time, when he was confined to his home, just he and “the box” in his room, he said he felt like he was caged or on a leash, like an animal. He wondered if it would have

*even been better if he had just remained jailed.*¹

INTRODUCTION

A. SURVEILLANCE STUDIES AND ELECTRONIC MONITORING

Surveillance as a field of study is relatively young.² However, the theoretical groundwork for the field extends further back in history.³ The subject of surveillance as a tool of the criminal justice system for discipline and shaping behaviors and norms can be traced to the eighteenth century work of Jeremy Bentham.⁴ Bentham believed that people could internalize discipline through being subjected to surveillance and the pressures of knowing that one is under constant watch.⁵ He saw great use for this idea within the prison system and proposed a prison design, the Panopticon, that maximized the use of surveillance.⁶ The Panopticon structure consisted of a central observation room around which the cells of the prison would be built in a circular pattern.⁷ The design would, in theory, allow a single watchman to observe all the prisoners at every point. However, the inmates would not be able to ascertain when or where they were being surveilled, giving the impression of omnipresent surveillance.⁸ Bentham believed that omnipresent surveillance would lend itself to perfect discipline amongst the prisoners, impacted by the perception of an all-seeing and omnipotent watchman.⁹ Bentham imagined Panopticons as progressive tools that would provide solutions to many of the social and economic problems of his time.¹⁰ Through temporary subjection to the power of surveillance, disciplinary reform of the troublesome segments of the population, those engaging in

¹ The author worked as a public defender in the Juvenile Division of the Maryland Office of the Public Defender and had frequent interactions with youth at the courthouse. This was one such interaction—a conversation between the author and a juvenile defendant at Baltimore Juvenile Justice Center in May 2015. The author did not represent this child as a client. While waiting in between cases being called, both the child and the author happened to be seated next to each other on the benches outside of the courtroom.

² DAVID LYON, *SURVEILLANCE STUDIES: AN OVERVIEW* 22 (2007).

³ *Id.* at 19.

⁴ Maša Galič et al., *Bentham, Deleuze and Beyond: An Overview of Surveillance Theories from the Panopticon to Participation*, 30 *PHILOS. TECH.* 10, 11 (2016).

⁵ *Id.*

⁶ See generally Jeremy Bentham, *Letters from Jeremy Bentham, to a Friend in England (1787)*, in 4 *THE WORKS OF JEREMY BENTHAM* 37 (1843).

⁷ See generally *id.*

⁸ Jacques-Alain Miller & Richard Miller, *Jeremy Bentham's Panoptic Device*, 41 *OCTOBER* 3, 4 (1987).

⁹ See Galič et al., *supra* note 4, at 11–12.

¹⁰ *Id.*

crime and unwilling to work, could be realized, leading to the greater good for all citizens while sparing inmates from more barbaric and violent measures typically associated with prison.¹¹

Although Bentham's Panopticon prison design was never fully implemented, the idea influenced scholars who revisited the work in the late twentieth century, most notably Michael Foucault.¹² In expanding upon Bentham's Panopticon penitentiary idea, Foucault argued that similar surveillance measures were being used in different aspects of Western societies in ways more ubiquitous, and thus more powerful, than the Panopticon.¹³ He analyzed institutions such as schools, hospitals, factories, and the military as utilizing panoptical mechanisms for surveillance.¹⁴ Whereas Bentham argued for temporary surveillance with the Panopticon, with the hope that discipline and changed behaviors would one day eliminate the need for surveillance, Foucault noted that by the late twentieth century, there had been a shift in focus with the pervasive use of surveillance from discipline to control, from the goal of establishing discipline societies to maintaining control societies.¹⁵ For example, by the 1970s and early 1980s, surveillance was propelled and enhanced by what could be understood as an electronic Panopticon, with miniature microphones, wiretaps, hidden tracking devices, and discreet video cameras. In Bentham's Panopticon, inmates would know that they were being watched, but with the modern forms of surveillance, the subjects are not even aware they are being observed. With these more modern modes of surveillance, information and data can be gathered and used to perpetually regulate large swaths of people. No longer is the aim of surveillance, as Bentham imagined in governance and regulation, the building of self-discipline within individuals, but rather the controlling of populations. Foucault argued that this critical shift, from targeted, temporal surveillance to ubiquitous, enduring surveillance, occurred because of these developing surveillance technologies and their accompanying greater reach and power.¹⁶ He warned that this de-individualization in control societies could ultimately evolve into dehumanization, as individuals are not targeted directly as human subjects, but rather through representations.¹⁷

¹¹ *Id.*

¹² *Id.* at 15.

¹³ *Id.* at 16.

¹⁴ *Id.*

¹⁵ *Id.* at 18.

¹⁶ *Id.*

¹⁷ *Id.* See also Malcolm Feely & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 *CRIMINOLOGY* 449, 474 (1992)

More recently, surveillance studies have discussed the impact of developments in technologies.¹⁸ Scholars have documented the proliferation of advanced devices and have proposed theories, argued grounds upon which over-surveillance may be opposed, and developed measures and frameworks for potentially containing device use.¹⁹ They suggest that the ubiquity of such technologies today makes ours a “surveillance society,” one that poses a number of privacy concerns for citizens.²⁰ Contemporary surveillance scholars also largely argue that the classical panoptic metaphor has minimal utility when attempting to capture new electronic surveillance technologies and stress the need for newer scholarly tools of analysis.²¹ For example, surveillance and social control scholar Gilles Deleuze noted that the power dynamics between institutions and individuals are no longer as defined as they were in Bentham’s or even Foucault’s analysis.²² Deleuze concluded that institutions, such as schools, factories, hospitals, prisons, and the military, and their ways of disciplining, no longer existed, or at least were shifting into newer forms of surveillance and exercising power.²³ Deleuze argues that the new sources of power are incredibly different and impact the socio-technical landscape in ways that classical theorists could not have imagined.²⁴ He rejects the idea of discipline as the aim of governing.²⁵ He identifies corporations as the new driving forces of power and control in the capitalistic structures, in which the family, the factory, the army, the hospital, and the prison are no longer distinct spaces, but coded figures, “deformable and transformable” to the whims of a single corporation that now only has stock holders.²⁶ Where discipline seeks to establish a long-term, stable, and docile society striving for the optimal use of resources to reach government-

(noting the shift in corrections from a focus on the rehabilitation of individuals to the management of offender populations).

¹⁸ See generally KIRSTIE BALL ET AL., A REPORT ON THE SURVEILLANCE SOCIETY: FOR THE INFORMATION COMMISSIONER BY THE SURVEILLANCE STUDIES NETWORK (David Murakami Wood ed., 2006) (detailing the myriad ways that the use of surveillance technologies impact society).

¹⁹ See generally DAVID LYON, THE ELECTRONIC EYE: THE RISE OF SURVEILLANCE SOCIETY (1994); THE SURVEILLANCE STUDIES READER (Sean P. Hier & Joshua Greenberg eds., 2007). These works provide good examples of the scholarship that has been produced related to surveillance theory.

²⁰ Richard Jones, *The Electronic Monitoring of Offenders: Penal Moderation or Penal Excess?*, 62 CRIM. L. SOC. CHANGE 475, 480 (2014).

²¹ See Galič et al., *supra* note 4, at 18.

²² Gilles Deleuze, *Postscript on the Societies of Control*, 59 OCTOBER 3, 4 (1992).

²³ *Id.*

²⁴ *Id.* at 7.

²⁵ *Id.* at 6.

²⁶ *Id.*

defined goals, corporations focus on short-term results.²⁷ To achieve this, corporations demand constant control, through continuous monitoring and assessment of markets, workforces, and strategies.²⁸ For Deleuze, the corporation is a fundamentally different being than the nation-state because it does not strive for progress of society as a whole, but rather attempts to control certain specific parts of markets.²⁹

The modern architects of surveillance studies diverge even further from panoptical thinking and have in many ways eroded the theoretical ground upon which the study of surveillance rests.³⁰ Currently, there is no foundational theory guiding this young field, leading to ideas and scholarship on surveillance that are often technology-dependent. The problem of surveillance theory here is that the rapid evolution of the power, breadth, and complexity of surveillance tools and practices seems to frustrate efforts to develop an over-arching theory of surveillance that captures it as a largely unitary concept or phenomenon.³¹ It also has led to gaps in scholarship and disjointed coverage. Some modes and devices of electronic surveillance within surveillance studies have garnered less theoretical exploration, and subsequently reduced examination of the law and policy implications associated with their use. In particular, little attention has been paid to electronic monitoring of criminal offenders in surveillance studies.³² There

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See Kevin D. Haggerty & Richard V. Ericson, *The Surveillant Assemblage*, 51 BRIT. J. SOC. 4 605, 606–08 (2000) (arguing Foucault’s theory has limited utility in analyzing current forms of surveillance); David Lyon, *An Electronic Panopticon? A Sociological Critique of Surveillance Theory*, 41 SOC. REV. 653, 673–74 (1993); David Murakami Wood, *Beyond the Panopticon? Foucault and Surveillance Studies*, in SPACE, KNOWLEDGE AND POWER: FOUCAULT AND GEOGRAPHY 245, 249–53 (Jeremy W. Crampton & Stuart Elden eds., 2007).

³¹ See Galič et al., *supra* note 4, at 26.

³² See generally JAMES KILGORE, ELECTRONIC MONITORING IS NOT THE ANSWER: CRITICAL REFLECTIONS ON A FLAWED ALTERNATIVE (Urbana-Champaign Independent Media Center 2015) (describing how electronic monitoring works and impacts those under surveillance). Electronic surveillance consists of either radio frequency transmission or global positioning system (GPS) monitoring. While radio frequency transmitters alert authorities to when an individual leaves a designated area, like the home, GPS monitoring uses satellite technology to track everywhere an individual may go. Electronic monitoring operates through ankle units that strap, typically around the leg, to the person monitored. Like cell phones, these devices run on batteries and constantly need to be charged through bases that connect to electric outlets. Both radio and GPS devices, when in operation, collect and share information with a central computer and data system, usually maintained by the corrections department or a correctional affiliate. See Robert Gable, *Left to Their Own Devices: Should Manufacturers of Offender Monitoring Equipment be Liable for Design Defect?*, 2009 U. ILL. J.L. TECH. & POL’Y 333, 335–41.

may be several reasons for this lack of attention. Only recently has electronic monitoring technology allowed for anything more than rudimentary surveillance, so there may not have been serious concerns about the harms that could arise. Also, electronic monitoring may not appear as pervasive in comparison to other modes of surveillance. An estimated 300,000 people experience electronic monitoring every year through the criminal justice system versus, for example, the tens of millions of people identified by whistleblower Edward Snowden as having their phone communications surveilled by the U.S. government.³³ Even more, the targets for surveillance are criminal offenders who already suffer lower social status and are presumed to have a diminished expectation of privacy. Additionally, electronic monitoring of criminal offenders may be seen as more suitable for discussion in the field of criminology versus the privacy sphere, which has dominated recent scholarship on the proliferation of surveillance technology.³⁴ This is particularly surprising, given surveillance's original connection to prison practices with Bentham's work.

Criminologists dedicate some attention to electronic monitoring of offenders.³⁵ However, the scholarship tends to: 1) focus narrowly on evaluations of the effectiveness of the technology in curbing recidivism and promoting public safety, 2) exclude the opinions and experiences of those surveilled, and 3) support the use of the technology despite acknowledged "shortcomings."³⁶ There is a noticeably limited number of studies that

³³ See *id.* at 8 (estimated statistics on electronic monitoring); *Edward Snowden: Leaks that exposed US spy programme*, BBC NEWS (Jan. 17, 2014), <http://www.bbc.com/news/world-us-canada-23123964> (giving estimates of those impacted by National Security Administration (NSA) phone surveillance).

³⁴ See Jones, *supra* note 20, at 480; see generally GLENN GREENWALD, *NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE* (2014) (providing details on the extent of government surveillance's impact on privacy).

³⁵ See generally William D. Burrell & Robert S. Gable, *From B. F. Skinner to Spiderman to Martha Stewart: The Past, Present and Future of Electronic Monitoring of Offenders*, 46 J. OFFENDER REHABILITATION 101 (2008) (exploring the history of the use of electronic monitoring in the criminal justice system); Deeanna Button et al., *Using Electronic Monitoring to Supervise Sex Offenders*, 20 CRIM. JUST. POL'Y REV. 414 (2009) (analyzing the proliferation of the use of electronic monitoring for those convicted of sex offenses); Mary Lynch & Michael Tonry, *Intermediate Sanctions*, 20 CRIME & JUST. 99 (1996) (noting the move in corrections to provide more "intermediate sanctions" for criminal offenders that allow for public safety while also not being overly harsh, and further describing and examining electronic monitoring as an intermediate sanction and whether it is effective). See also Mike Nellis, *Surveillance, Rehabilitation, and Electronic Monitoring: Getting the Issues Clear*, 5 CRIMINOLOGY & PUB. POL'Y 103 (2006) (examining the rehabilitative contributions of electronic monitoring and concluding that by itself, it holds little rehabilitative value).

³⁶ See generally Anthea Hucklesby, *Understanding Offenders' Compliance: A Case Study of Electronically Monitored Curfew Orders*, 36(2) J. L. & SOC. 248 (2009) (examining

critically interrogate the potential harms and punitive aspects of electronic monitoring or, as Foucault warns, the risk of dehumanization. This hesitancy to critically examine this form of surveillance rests in large part on the tendency of scholars interested in prison reform to compare the release from jail on electronic monitoring to the prospects of confinement.³⁷ Criminologists, who have invested much effort over the years in analyzing and revealing how the most deplorable features of American prisons have severely damaging effects on inmates, have a vested interest in reform attempts, and anything short of detention is often seen as a normatively good proposition.³⁸ In this logic, it is the degree of harm associated with imprisonment that casts electronic surveillance, as an alternative to detention, as a moderate, if not more humane, penalty.³⁹

Indeed, it is reasonable to argue that being released from prison, even under surveillance, may be “better” than being locked away.⁴⁰ However,

compliance issues and giving minimal attention to the lived experiences of offenders that may bear on compliance issues); Stephen Mainprize, *Electronic Monitoring in Corrections: Assessing Cost-Effectiveness and the Potential for Widening the Net of Social Control*, 34 CANADIAN J. CRIMINOLOGY 161 (1992) (criticizing misguided evaluations of electronic monitoring effectiveness, while overlooking the problem of net-widening); Kathy G. Padgett et al., *Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring*, 5 CRIMINOLOGY & PUB. POL’Y 61 (2006) (study ultimately supporting the use of electronic monitoring despite potential shortcomings with net-widening); Marc Renzema & Evan Mayo-Wilson, *Can Electronic Monitoring Reduce Crime for Moderate to High-risk Offenders?*, 1 J. EXPERIMENTAL CRIMINOLOGY 215 (2005) (demonstrating the narrow focus on evaluation of electronic monitoring, without exploration of qualitative perspectives of offenders); Jonathan J. Wroblewski, *Re-START: GPS, Offender Reentry, and a new Paradigm for Determinate Sentencing*, 20 SENT’G REP. 314 (2008) (promoting the use of electronic monitoring despite acknowledged problems).

³⁷ See generally Randy R. Gainey et al., *The Relationships Between Time in Jail, Time on Electronic Monitoring, and Recidivism: An Event History Analysis of a Jail-Based Program*, 17 JUST. Q. 733 (2000); Brian K. Payne & Randy R. Gainey, *The Electronic Monitoring of Offenders Released from Jail or Prison: Safety, Control, and Comparisons to the Incarceration Experience*, 84 PRISON J. 413 (2004); Stuart S. Yeh, *The Electronic Monitoring Paradigm: A Proposal for Transforming Criminal Justice in the USA*, 4 LAW 60 (2015). These articles all make direct comparisons between electronic monitoring and jail in weighing the alternatives.

³⁸ See Jones, *supra* note 20, at 475.

³⁹ *Id.* at 478.

⁴⁰ In fact, with so many people today voluntarily agreeing to be monitored through the recent proliferation of tracking devices for the wrist and ankle, such as Fitbit, Garmin’s VivioSmart, Apple Watch, Nike Fuel Band, and Samsung’s Gear Fit, which constantly monitor a person’s location, heart rate, sleep patterns, and increasingly much more, society may be unwittingly primed for the future of mass monitoring and less inclined to view it as problematic or offensive. There are even plans to use health data to share with insurance companies to better track the health of those insured. The sales in the wearable technology market are already significant. The worldwide wearable technology market reached a new all-

such comparisons leave little room for critical reflection into how electronic surveillance may create its own penal excesses, how advancing capabilities through future development of the technology could lead to even more powerful forms of social control, and how perceptions of electronic monitoring as a moderate penal tool for criminal justice reform blurs its punitive aspects. For individuals who experience electronic monitoring, it is a virtual extension of prison with real consequences leading to lack of job prospects, strains on familial ties, increases in levels of shame and depression, and disparate treatment from the stigma of criminal justice involvement.⁴¹

B. IMPACT OF THE GAP IN CRITICAL ANALYSIS OF ELECTRONIC MONITORING ON THE JUVENILE JUSTICE SYSTEM

The failure of surveillance studies to theoretically grapple with the punitive and dehumanizing aspects of surveillance through electronic monitoring has paved the way for the continued use of this penal practice in the adult correctional system in recent years and the presentation of the technology as a progressive tool and minor sanction.⁴² Notwithstanding these concerns, electronic monitoring, which was developed and intended as an adult correctional tool, has now been adopted by juvenile courts.⁴³ This has led to thousands of youth being electronically monitored on any given day, even though the overwhelming majority of youth are charged with nonviolent misdemeanor offenses.⁴⁴ The introduction of electronic surveillance as a viable solution for concerns with juvenile detention was led by a number of liberal advocates and organizations. For example, the Juvenile Detention

time high in 2016. Shipments for the entire year grew 25%, with 102.4 million devices shipped. See Press Release, International Data Corporation, Wearables Aren't Dead, They're Just Shifting Focus as the Market Grows 16.9% in the Fourth Quarter, According to IDC (Mar. 2, 2017), available at <https://www.idc.com/getdoc.jsp?containerId=prUS42342317>.

⁴¹ See Mike Nellis, *Surveillance, Stigma and Spatial Constraint: the Ethical Challenges of Electronic Monitoring*, in ELECTRONICALLY MONITORED PUNISHMENT: INTERNATIONAL AND CRITICAL PERSPECTIVES, 203–05 (Mike Nellis, Kristel Beyens & Dan Kaminski eds., 2013).

⁴² See *supra* note 37.

⁴³ See generally PRETRIAL JUSTICE INST., USING TECHNOLOGY TO ENHANCE PRETRIAL SERVICES: CURRENT APPLICATIONS AND FUTURE POSSIBILITIES (2012).

⁴⁴ See JOSHUA ROVNER, THE SENTENCING PROJECT, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM (2014), available at <https://sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf>. Most juvenile arrests, over two-thirds, are for nonviolent offenses (mostly property crimes, public order offenses, status offenses, and technical violations). *Id.* at 7. African American and Latino youth are more likely to contact the juvenile justice system and be arrested. *Id.* at 2. Youth of color make up over two-thirds of the youth detained in juvenile detentions. *Id.* at 7.

Alternatives Initiative, a reform model promoting the use of electronic monitoring of youth, has been adopted in nearly 300 jurisdictions in thirty-nine states and the District of Columbia.⁴⁵

The practice of subjecting youth to electronic monitoring, which is often accompanied by house arrest provisions that narrow the times when a child may leave the home, raises its own unique set of concerns.⁴⁶ Unlike adults, youth are still in the midst of adolescent growth, brain maturation, and personality development. Recent studies on the adolescent brain have demonstrated that it continues to develop until a person reaches their mid-twenties.⁴⁷ Thus, before the prefrontal cortex of the brain, the part that

⁴⁵ See generally RICHARD A. MENDEL, THE ANNIE E. CASEY FOUND., JUVENILE DETENTION ALTERNATIVES INITIATIVE: PROGRESS REPORT 2014 (2014), <http://www.aecf.org/m/resource/doc/aecf-2014JDAIProgressReport-2014.pdf>; ROCHELLE STANFIELD, THE ANNIE E. CASEY FOUND., PATHWAYS TO JUVENILE DETENTION REFORM: THE JDAI STORY, BUILDING A BETTER JUVENILE DETENTION SYSTEM, available at <http://www.aecf.org/m/resourcedoc/AECF-TheJDAIStoryOverview-1999.pdf> (last visited Jan. 28, 2017); DAVID STEINHART, THE ANNIE E. CASEY FOUND.: JUVENILE DETENTION ALTERNATIVES INITIATIVE, JUVENILE DETENTION RISK ASSESSMENT: A PRACTICE GUIDE TO JUVENILE DETENTION REFORM (2006), available at <http://www.aecf.org/m/resourcedoc/aecf-juviledetentionriskassessment1-2006.pdf> (last visited Jan. 28, 2017); THE ANNIE E. CASEY FOUND., JUVENILE DETENTION ALTERNATIVES INITIATIVE: 2013 ANNUAL RESULTS REPORT, INTER-SITE CONFERENCE SUMMARY (2014), <http://www.aecf.org/m/resourcedoc/aecf-JDAI2013AnnualResultsReport-2014.pdf>; THE ANNIE E. CASEY FOUND., DETENTION REFORM: AN EFFECTIVE PUBLIC SAFETY STRATEGY, <http://www.aecf.org/m/resourceimg/aecf-DetentionReform2PublicSafetyStrategy-2007.pdf> (last visited Jan. 28, 2017).

⁴⁶ See generally KILGORE, *supra* note 32. Electronic monitors that utilize radio frequency are designed to create an alert when a monitored individual moves beyond a defined distance from the base unit that plugs into an outlet. These units are specifically created to work in the home, with the distance points being the front and rear of a house. Because monitored youth need to leave their homes for legitimate reasons, like school, medical needs, and other court-sanctioned curricular activities, judges determine the times in which leaving the home should and should not alert juvenile justice personnel. Thus, for electronic monitoring to work, house arrest provisions must be provided by the court. The same is the practice when juveniles are under monitoring with electronic devices that use constant GPS surveillance rather than radio frequency monitoring. For juvenile justice personnel to make sense of the GPS data coordinates they gather from monitored youth, they must be given the addresses of court-sanctioned activities, locations, and times. Courts rely on house arrest provisions for minors, with scheduled times to be in and out of the home, to effectively monitor and make sense of the location data gathered. OFF. OF JUV. JUST. & DELINQ. PREVENTION, HOME CONFINEMENT AND ELECTRONIC MONITORING (2014), available at https://www.ojjdp.gov/mpg/litreviews/Home_Confinement_EM.pdf.

⁴⁷ See Sarah-Jayne Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397, 399–400 (2012); Stephanie Burnett et al., *Development during Adolescence of the Neural Processing of Social Emotion*, 21 J. COGNITIVE NEUROSCIENCE 1736, 1744–45 (2009); Anna van Duijvenvoorde et al., *Testing a dual-systems model of adolescent brain development using resting-state connectivity analyses*, 124 NEUROIMAGE 409, 414–418 (2016); Jay N. Giedd et al., *Brain development during childhood and*

controls impulse and reasoning, fully matures, youth are likely to engage in risky behaviors, be easily influenced by peer pressure, be apt to forego contemplation of long term consequences for short term rationales, and be prone to poor decision-making.⁴⁸ Adolescence is not only marked by a heightened concern and awareness of how others perceive you, but also a distinct vulnerability to negative perceptions of self-worth and life chances.⁴⁹ Combine this reality with the use of locked-on ankle monitors that follow a child twenty-four hours a day, from taking a bath and attempting to not get the unit wet, to turning in homework in front of the class with all his or her peers looking on, to being confined in the home and marginalized from the community at-large, and one potentially creates a disastrous combination of stigma and shame.⁵⁰ Any psychological harms experienced by adults are amplified for youth, destructive to healthy development, and potentially have lifelong consequences to a child's chances at becoming a contributing member of society.⁵¹

adolescence: a longitudinal MRI study, 2 NATURE NEUROSCIENCE 861, 861 (1999); Elizabeth A. Olson et al., *White Matter Integrity Predicts Delay Discounting Behavior in 9- to 23-Year-Olds: A Diffusion Tensor Imaging Study*, 21 J. COGNITIVE NEUROSCIENCE 1406, 1416–18 (2009); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8827 (2001); Teena Willoughby et al., *Examining the link between adolescent brain development and risk taking from a social-developmental perspective*, 83 BRAIN AND COGNITION 315, 315 (2013).

⁴⁸ Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives From Brain and Behavioral Science*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 55, 56 (2007).

⁴⁹ See, e.g., Maja Deković & Wim Meeus, *Peer relations in adolescence: Effects of parenting and adolescents' self-concept*, 20 J. ADOLESCENCE 163, 165 (1997); William Scott Forney et al., *Self-Concepts and Self-Worth as Predictors of Self-Perception of Morality: Implications for Delinquent Risk Behavior Associated With Shoplifting*, 35 FAM. CONSUMER SCI. RES. J. 24, 24 (2006).

⁵⁰ It should be noted that most electronic monitoring devices are waterproof. However, like other devices that claim to be waterproof, 1) many still do not willingly expose them to water, for risk of damage, and 2) they are not fail proof. See Russ McQuaid, *Reliability problems plague home detention technology*, FOX (Oct. 2, 2016), <http://fox59.com/2016/10/02/reliability-problems-plague-home-detention-technology/>.

⁵¹ See Joseph Spinazzola et al., *Unseen Wounds: The Contribution of Psychological Maltreatment to Child and Adolescent Mental Health and Risk Outcomes*, 6 PSYCHOL. TRAUMA: THEORY, RES., PRAC. & POL'Y No. S1, S18–S26 (2014); Nansook Park, *The Role of Subjective Well-Being in Positive Youth Development*, 591(1) ANNALS AM. ACAD. POL. & SOC. SCI. (2004); see generally VALERIE L. FROMAN-HOFFMAN ET AL., AGENCY FOR HEALTHCARE RES. AND QUALITY, U.S. DEP'T OF HEALTH AND HUM. SERV., *CHILD AND ADOLESCENT EXPOSURE TO TRAUMA: COMPARATIVE EFFECTIVENESS OF INTERVENTIONS ADDRESSING TRAUMA OTHER THAN MALTREATMENT OR FAMILY VIOLENCE* (2013); *Stress in America: Are Teens Adopting Adults' Stress Habits?*, AM. PSYCHOLOGICAL ASS'N, <https://www.apa.org/news/press/releases/stress/2013/stress-report.pdf> (last visited Jan. 28, 2017).

In recent successive cases, the United States Supreme Court has reiterated the stark differences between adults and youth and the necessity of different treatment when accused and convicted of crimes.⁵² Despite these rulings, the juvenile court struggles with the tendency to adopt adult criminal justice policies and practices. Today, many juvenile court jurisdictions employ probation and parole schemes for youth that are uncannily similar to adult correctional regimes. Juvenile courts also use shackles on juvenile defendants while in court, identical to adult defendants. Even more, juvenile courts across the country utilize secured juvenile placement facilities that are mostly indistinguishable from adult jails. And most explicitly, juvenile courts execute policies that enable youth to be tried as adults in criminal courts.⁵³ These practices are best understood as the adultification of juvenile justice. Adultification is a concept frequently used in the fields of child welfare, social work, child psychology and psychiatry, and adolescent development to describe processes that act to impart adult responsibilities, behaviors, and treatment upon children.⁵⁴ The imparting of this treatment can come from a number of sources, parents, schools, communities, programs, law, and policy.⁵⁵ In the juvenile justice system, adultification is an apt framework to understand the replication of adult criminal justice policies and practices by juvenile courts as an act of “adultifying” treatment of youth.

This practice of mimicking adult corrections and court practices is both current and historical. At the turn of the twentieth century, when the first juvenile court was created in Illinois, Progressive Era reformers aimed to create an institution with the “rehabilitative ideal,” which would focus on the rehabilitation of youth and citizen-building, while eschewing adult-like

⁵² See *Montgomery v. Louisiana*, 136 S. Ct. 718, 732–33 (2016); *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012); *J.D.B. v. North Carolina* 564 U.S. 261, 272 (2011); *Graham v. Florida* 560 U.S. 48, 67–69 (2010); *Roper v. Simmons* 543 U.S. 551, 572–75 (2008).

⁵³ Juvenile waiver is the most punitive policy and practice in juvenile court. Black youth are disproportionately waived from juvenile jurisdiction, charged as adults, and punished harshly. Despite life sentences without parole being ruled unconstitutional for non-homicide offenses committed by minors in *Graham v. Florida*, Black youth are often given extreme sentences that are the equivalent of life sentences for non-homicide offenses. See *Ohio Supreme Court rejects teen’s 112-year sentence for kidnapping, rape of Youngstown State University student*, N.Y. DAILY NEWS (Dec. 22, 2016), <http://www.nydailynews.com/news/national/ohio-supreme-court-rejects-teen-rapist-112-year-sentence-article-1.2920109>.

⁵⁴ See Linda Burton, *Childhood Adultification in Economically Disadvantaged Families: A Conceptual Model*, 56 FAM. REL. 329, 329–45 (Oct. 2007); Kevin Roy et al., *Growing up as ‘man of the house’: adultification and transition into adulthood for young men in economically disadvantaged families*, 143 NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV. 55, 55–72 (2014).

⁵⁵ Burton, *supra* note 54, at 331.

punishment regimes for youth-friendly treatment alternatives.⁵⁶ Rehabilitation was envisioned by Progressive Era reformers as providing wayward youth with positive, age-appropriate tools and resources for successful development into adulthood, helping to grow citizens that would be contributors in their communities and society.⁵⁷ The hope was to divert youth from the horrors of the adult criminal justice machinery, sparing them of harmful prison conditions, violence, and abuse, and to put them in position to become productive citizens with democratic values.⁵⁸ This original aim of the juvenile court is the purported goal today, as demonstrated by court rulings that consistently refer to the aim in shaping jurisprudence and policy.⁵⁹

Despite the professed unique rehabilitative and therapeutic aims of juvenile justice, early juvenile justice institutions frequently sanctioned practices and policies more akin to adult punishment.⁶⁰ Such punitive methods, like solitary confinement, corporal punishment, physical restraints, and lengthy sentences, were carried over from adult corrections and limited the rehabilitative aspirations of these new institutions from the early nineteenth century through the twentieth century. One of the most cited critiques of the early juvenile institutions and courts is that they used the illusory promise of rehabilitation to mask their adult-like treatment of youth, in a warped logic that promoted the institutions' goals over interrogation of the means and outcomes used to achieve those goals.⁶¹

The juvenile court's use of electronic monitoring is a prime example of

⁵⁶ See Anthony Platt, *The Rise of the Child-Saving Movement: A Study in Social Policy and Correctional Reform*, 381 ANNALS AM. ACAD. POL. & SOC. SCI. 21, 28–38 (1969); John R. Sutton, *The Juvenile Court and Social Welfare: Dynamics of Progressive Reform*, 19 L. & SOC. REV. 107, 107–11 (1985).

⁵⁷ Preston Elrod & R. Scott Ryder, *Juvenile Justice: A Social, Historical and Legal Perspective*, in JONES & BARTLETT LEARNING 118–19 (2011).

⁵⁸ *Id.*

⁵⁹ See generally *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974) (ruling that youth have a constitutional right to rehabilitative treatment); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972) (finding that youth have a state and federal constitutional right to rehabilitative treatment).

⁶⁰ GEOFF WARD, *THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE* 90 (2012).

⁶¹ See Lloyd Braithwaite & Allen Shore, *Treatment Rhetoric versus Waiver Decisions*, 72 J. CRIM. L. & CRIMINOLOGY 867, 867–69 (1981); Robert O. Dawson, *The Future of Juvenile Justice: Is it time to Abolish the System*, 81 J. CRIM. L. & CRIMINOLOGY 136, 140–41 (1990); Anna Louise Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CAL. L. REV. 984, 987–90 (1976); Charisa Smith, *Nothing About Us Without Us! The Failure of the Modern Juvenile Justice System and a Call for Community-Based Justice*, 4 J. APPLIED RES. ON CHILD.: INFORMING POL'Y FOR CHILD. AT RISK Art. 1–3 (2013).

an adult correctional practice adopted in the absence of critical reflection and evaluation of potential harms for minors. Thus, the juvenile justice system faces a two-fold problem: 1) undertheorizing and examination of electronic monitoring by the scholarly community that could provide guidance and shape the ways in which the juvenile justice system views the practice of electronic monitoring, and 2) the immediacy of harm with the current use of this surveillance device on minors. This article contributes both to the gap in the law and surveillance literature examining the dehumanizing and punitive aspects of electronic monitoring and to the dearth of policy solutions that could immediately provide better outcomes in the juvenile justice system in the interim. It argues that the juvenile court must develop procedures for validating the adoption and implementation of adult correctional practices, to ensure that they are beneficial, effective, and appropriate for youth. It further argues that procedures developed to help guide juvenile courts in validating and making these decisions should prioritize social science evidence and community-informed decision and policymaking.

The paper is organized into three parts. Part I provides a brief history of the development of the juvenile court, describing how in the initial period of its adaptation, the founding aspirational rehabilitative goals were not enough to prevent adult punitive practices from being carried over and implemented on youth. Part II reviews research studies that have been conducted with adults under electronic monitoring, notes concerning trends, and highlights the lack of scientific research on youth experiences. It also describes how electronic monitoring is potentially troubling and damaging to youth development given the vast vulnerabilities evidenced in recent advances in adolescent brain research. Part III examines the gaps in accountability for juvenile court judges. It stresses that juvenile courts should not make decisions about adopting adult detention alternatives for youth in a vacuum, and argues that in addition to social science backing, juvenile courts should allow community members, particularly those whose children are most impacted, to weigh in on these decisions. The paper concludes that advancing surveillance technologies present frightening prospects for the extension of mass incarceration beyond prison walls and necessitate critical examination when used on youth, if the juvenile court is to remain true to its founding rehabilitative principle.

I. ADULTIFICATION OF JUVENILE COURT

A. EARLY FOUNDATIONS FOR ADULTIFIED JUVENILE JUSTICE

1. Houses of Refuge and Reformatories

The first juvenile institutions arose at the intersection of changing ideals of childhood, criminal punishment, and social control. To truly understand the sociopolitical factors and subsequent movement that drove the establishment of separate institutions to handle youth delinquency and the ultimate failure of these institutions to shield youth from adult correctional practices, one must understand the precarious position of youth charged with crimes prior to the invention of the juvenile court. Until the early nineteenth century, children were treated in the American criminal justice system with the same standards as adults.⁶² Youth were charged with the same sorts of crimes, detained in the same jails, and subjected to identical degrees of sentencing, including capital punishment.⁶³ The only legal reprieve that children were provided as a result of their youthfulness was the common law infancy defense.⁶⁴ Under the common law, the criminal court presumed that children younger than seven years old lacked criminal capacity, observed a rebuttable presumption that those between the ages of seven and fourteen lacked criminal capacity, and treated those youth fourteen years of age and older as fully responsible adults.⁶⁵ Such treatment resulted in untold numbers of youth being abused, violated, and brutalized while being processed through the adult criminal justice system.⁶⁶

By the early nineteenth century, however, a new understanding of childhood and adolescence was taking hold. This new social construction of childhood viewed adolescence as a separate developmental stage distinct from adulthood.⁶⁷ Adolescence was understood as a stage in which children were inherently innocent, highly susceptible to negative influences, debilitated by immaturity, and in great need of guidance and protection by adults.⁶⁸ The perspective of adolescence as a distinct and vulnerable stage

⁶² C. BARRY FELD, *CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION* 1–21 (4th ed., West Academic 2013).

⁶³ *Id.*

⁶⁴ *Id.* at 2.

⁶⁵ See Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 *UCLA L. REV.* 503, 509–14 (1984).

⁶⁶ ALBERT R. ROBERTS, *JUVENILE JUSTICE SOURCEBOOK: PAST, PRESENT, AND FUTURE* 131–32 (2004).

⁶⁷ FELD, *supra* note 62, at 1.

⁶⁸ *Id.*

for youth challenged former notions of culpability of children for crimes and sharply contradicted the prior treatment youth received. Locking youth up with mature adult criminals and subjecting them to adult correctional practices was seen as a contamination of adolescence.⁶⁹ As a result, many states between the early and mid-nineteenth century experimented with age exclusive institutions, such as the House of Refuge.⁷⁰ These facilities were deemed alternatives to adult criminal conviction for those poor, vagrant, and wayward youth that could be properly rehabilitated and saved.⁷¹ The first Houses of Refuge were opened in New York and Boston in 1825, and Philadelphia in 1828.⁷² Children sent to the House of Refuge were given indeterminate sentences with the expectation that they would participate in learning and treatment for as long as it would take for them to be “saved.”⁷³ Rehabilitation was imagined as capturing youth pre-delinquency, and steering them away from the vices and antisocial conduct that would put them on inevitable paths to criminal behavior.⁷⁴ It was considered the more enlightened and humane option for responding to youth misconduct and delinquency.⁷⁵

However, after several decades of the House of Refuge movement, it became apparent that it fell victim to the same “increasingly repressive emphasis” that characterized the earlier treatment of youth within the adult penal system.⁷⁶ Youth were subjected to corporal punishments, religious suppression, solitary confinement, and hard labor.⁷⁷ Sanford Fox highlights these obvious contradictions and overlapping practices through reviewing two New York reports focused on the adult penitentiary and the House of Refuge for youth and notes:

The founding of the House [of Refuge] should be seen as the embodiment of the idea that children should be treated instead of punished; this was no more than a specific application of common penological doctrine. The emphasis on discipline and submissiveness, however, pervades the report’s discussion of the juvenile as well as the adult regime. The Report on the Penitentiary System concluded that “it is absolutely

⁶⁹ *Id.*

⁷⁰ Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1188–93 (1970).

⁷¹ *Id.* at 1190. This of course excluded African-American children who were seen as incapable of reform and saving.

⁷² FELD, *supra* note 62, at 17.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Fox, *supra* note 70, at 1199.

⁷⁷ Negley K. Teeters, *The Early Days of the Philadelphia House of Refuge*, PA. HIST. 165, 183–84 (1960).

essential to anything like success in the Penitentiary System, that criminals should sleep in solitary cells, even when they are not kept in solitude during the day.” Compare this with the statement in the same report that “[a]s to the construction of these prisons for juvenile offenders, it is believed that they should sleep in separate and solitary cells, and that during the day, they should be divided into classes.” Nightly solitary confinement came to be one hallmark of New York’s famous Auburn system of imprisonment and a feature of the New York House of Refuge.⁷⁸

In addition to overcrowding and an exceptionally high death rate among the youth committed to these early juvenile institutions, they were also more likely to be used as indentured laborers in dull and repetitive work versus being afforded opportunities as apprentices, learning a trade, mimicking the adult correctional practice of using inmates for labor.⁷⁹ Even more, Houses of Refuge frequently adopted the adult correctional practice of lengthy sentencing for minor offenses.⁸⁰ In the first few decades of the House of Refuge in Philadelphia, 20% of Black youth and 4% of White youth stayed in the refuge for more than two years.⁸¹ By the 1880s, the average stay for Black youth was almost three years and seventeen months for White youth.⁸² These longer stints appear even more unreasonable when considering that many youth were brought into the House of Refuge for offenses such as “want of friends,” “on complaint,” and “vagrancy.”⁸³

In the South, youth faced even worse prospects for being treated like adults. Many of the southern states were late to establish unique juvenile

⁷⁸ Fox, *supra* note 70, at 1198–99; *see generally* SOCIETY FOR THE PREVENTION OF PAUPERISM IN THE CITY OF NEW YORK, REPORT ON THE PENITENTIARY SYSTEM IN THE U.S. (1822).

⁷⁹ Cecile P. Frey, *The House of Refuge for Colored Children*, 66 J. NEGRO HIST. 10, 17 (1981); *see generally* DOUGLAS A. BLACKMUN, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (Anchor Reprint ed. 2009); DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1997). In the years following the ending of slavery, Blacks were subjected to schemes that yet again sought to exploit their labor for free. Many states passed “Black Codes” that criminalized vague offenses such as “vagrancy” to target and fine Black men who were alleged not to be employed and idle. When these men were unable to pay the associated fines, they were jailed and made to work in many of the same coal mines and plantation fields they and their parents were forced to work prior to emancipation. These men spent years attempting to pay off the fines through dangerous and harsh labor, with many dying before ever being able to do so. A number of major American companies utilized this labor and provided money to the sheriffs and districts that continually found ways to round men up. *Id.*

⁸⁰ TWENTY-EIGHTH ANNUAL REPORT OF THE BOARD OF MANAGERS OF THE HOUSE OF REFUGE 20 (1856) [hereinafter TWENTY-EIGHTH ANNUAL REPORT].

⁸¹ WARD, *supra* note 60, at 58.

⁸² *Id.*

⁸³ *See* TWENTY-EIGHTH ANNUAL REPORT, *supra* note 80.

institutions.⁸⁴ In 1847, New Orleans opened the first House of Refuge in the South, which was exclusively for White boys.⁸⁵ However, most southern states embarked on juvenile reform efforts toward the end of the nineteenth century and during the beginning of the twentieth century. These efforts mostly manifested in the building of juvenile reformatories, which were similar to the Houses of Refuge in that they were deliberately separate youth institutions with youth reform goals.⁸⁶ However, besides the separation from adult offenders, reformatories met the criteria for adult correctional facilities in every other imaginable category.⁸⁷

Perhaps one of the most notorious juvenile reformatories in the country was the Florida School for Boys (later known as Arthur G. Dozier School for Boys), which was in operation from 1900 to 2011.⁸⁸ One of its main goals was to provide a place where young offenders might be separated from “older more vicious associates.”⁸⁹ Almost immediately, the reformatory gained a reputation for extreme punishment and adult-like treatment of youth, including the use of solitary confinement in dark cells deprived of sunlight, whipping, flogging, sexual abuse, and murder.⁹⁰ The continued reports of abuse throughout its 111-year history led to repeated investigations by the state into conditions at the reformatory, some involving inspection of the mass grave sites on location.⁹¹

In 2008, former governor Charlie Crist directed the Florida Department of Law Enforcement to investigate thirty-two unmarked graves at Dozier to determine: 1) the entity that owned or operated the property at the time the graves were placed; 2) identification, where possible, of the remains of those individuals buried on the site; and 3) if any crimes were committed, and if

⁸⁴ WARD, *supra* note 60, at 60.

⁸⁵ *Id.* The majority of Black youth at the time in New Orleans were held as slaves and were subject to the brute injustice of plantation life. *Id.* The free Black youth were processed in the adult criminal justice system and were too often victims of extrajudicial punishment and lynchings. *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Maya Salam, *Florida Prepares to Apologize for Horrors at Boys' School*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/dozier-school-for-boys-florida-apology.html>.

⁸⁹ THE FLA. CHILD. COMM'N, RECOMMENDATION REPORT 1953, available at http://digitalcommons.unf.edu/cgi/viewcontent.cgi?article=1017&context=earth_materials (last visited Jan. 7, 2018).

⁹⁰ ERIN H. KIMMERLE ET AL., REPORT ON THE INVESTIGATION INTO THE DEATHS AND BURIALS AT THE FORMER ARTHUR G. DOZIER SCHOOL FOR BOYS IN MARIANNA, FLORIDA 14, 27, 29 (2016).

⁹¹ See Salam, *supra* note 88.

so, the perpetrators of those crimes.⁹² In addition to determining the entity that operated the property, the department “conducted over one hundred interviews of former students, family of former students, and former staff members of the School.”⁹³ The interviews confirmed that staff utilized physical punishment as a tool to encourage obedience and revealed further reports of sexual abuse, isolation, murder, and severe psychological harms.⁹⁴ Ultimately, the Florida Department of Environmental Protection and the University of South Florida were asked to assist in the investigation.⁹⁵ This work culminated in the University of South Florida’s Institute for Forensic Anthropology and Applied Sciences releasing a report in January 2016 on the four-year investigation conducted into the burial sites at Dozier.⁹⁶

These early juvenile institutions across the country succeeded in physically separating more youth from adults in correctional facilities; however, they ultimately failed to live up to their ambitious rehabilitative reform efforts for many children. Untold numbers of youth suffered punitive practices and sanctions because of this failure. Thus, the House of Refuge and juvenile reformatory as parts of a humanitarian movement to “save” youth from adult treatment were unsuccessful, as they increasingly reflected a retrenchment of adult correctional practices, repression, and punishment. The ambitious ideal of youth being nurtured to rehabilitation by a caring state that assumed the role of a caregiver never materialized. In reality, these early institutions acted as correctional facilities adopted for youth, with jail-like buildings and accommodations, regimented daily schedules, brute physical discipline, and the denial of therapeutic interventions. It can be argued that this failure eventually paved the way for the birth of the juvenile court, which was proposed as a solution to all the shortcomings of these earlier juvenile institutions.

2. *Birth of the Juvenile Court*

American society by late nineteenth century was transforming from being primarily agrarian to an urban industrial society.⁹⁷ The country experienced great influxes and movements of people domestically and

⁹² FLA. DEP’T OF LAW ENFORCEMENT, ARTHUR G. DOZIER SCHOOL FOR BOYS ABUSE INVESTIGATION REPORT 1 (Jan. 29, 2010), <http://thewhitehouseboys.com/abusereport.pdf> (last visited Dec. 18, 2016).

⁹³ *Id.* at 13.

⁹⁴ *Id.* at 8–9.

⁹⁵ See KIMMERLE ET AL., *supra* note 90, at 14, 27, 29.

⁹⁶ See generally *id.*

⁹⁷ FELD, *supra* note 62, at 3.

internationally.⁹⁸ Rural residents were moving in large numbers to densely populated cities and many European immigrants followed suit, after landing on the shores of America in droves all throughout the nineteenth century.⁹⁹ The changes in family life, work, politics, governance, and economics created new challenges and concerns. Amid these social changes arose the Progressive Reform Movement. From the 1890s to the 1920s, the Progressive Reform Movement was characterized by great social activism and political reform.¹⁰⁰ Some of the areas targeted for reform centered on women's rights, labor and trade unionism, trust busting, health and medicine, education, and conservation.¹⁰¹ Progressives also took great interest in the ways in which the children of recent European immigrants were being treated like adults in the Houses of Refuge and criminal justice system.¹⁰² This interest ultimately drove Progressive leaders to establish a separate process for dealing with juvenile delinquency, one that could correct the inadequacies of the Houses of Refuge and be more effective at shielding youth from harsh adult treatment and ultimately changing behaviors.¹⁰³ These Progressive Reformers became known as the "Child Savers."¹⁰⁴

For decades, scholars have debated the motives of progressives in leading the development of juvenile courts. Some argue that they were led

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ For more on the Progressive Era, see MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE REFORM MOVEMENT IN AMERICA, 1870–1920* (2005) and JOHN WHITECLAY CHAMBERS II, *THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1890–1920* (2d ed. 2000).

¹⁰¹ See LAWRENCE A. CREMIN, *THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957* 9–11 (1st ed. 1961) (detailing the history of the major changes in the education system led by Progressive Era reformers); See generally JAMES GORDON BURROW, *ORGANIZED MEDICINE IN THE PROGRESSIVE ERA: THE MOVE TOWARD MONOPOLY* (1977) (arguing that medical professionals during the Progressive Era adopted the business principles of corporate capitalism in ways that forever changed the medical industry); MICHAEL KAZIN, *BARONS OF LABOR: THE SAN FRANCISCO BUILDING TRADES AND UNION POWER IN THE PROGRESSIVE ERA* (1989) (exploring the gains workers made in labor reform during the Progressive Era, mostly through the development of unions and the fight for worker dignity); JULIE NOVKOV, *CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS* (2001) (addressing the role that the Progressive Era had on women as laborers, and their struggles for protections like minimum wage standards); DOROTHY SCHNEIDER & CARL J. SCHNEIDER, *AMERICAN WOMEN IN THE PROGRESSIVE ERA, 1900–1920* (1994) (chronicling the lives and work of women during the Progressive Era and demonstrating how they played a leading role in ushering in changes that would ultimately benefit themselves and the country).

¹⁰² FELD, *supra* note 62, at 3.

¹⁰³ DAVID TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* 25 (2004).

¹⁰⁴ See Miroslava Chavez-Garcia, *In Retrospect: Anthony M. Platt's The Child Savers: The Invention of Delinquency*, 35 *REVIEWS AM. HIST.* 464, 467 (2007).

by liberal thoughts and practices, which rebuked the individualism promoted by capitalism, to see the plight of poor children as a humanitarian effort that needed the support of larger society to address.¹⁰⁵ Implicit in this philosophy was the idea that children were inherently innocent and could be molded into respectable men and women, and ultimately saved from a life of vice and crime. Illinois reformers instrumental in passing legislation to establish the first juvenile court noted that “[i]f the child is the material out of which men and women are made, the neglected child is the material out of which paupers and criminals are made.”¹⁰⁶ However, other scholars have critiqued the depiction of the “Child Savers” as upstanding people morally driven by empathy for poor youth.¹⁰⁷ These scholars argue that Progressive reformers were members of the middle and upper class with ties to industry and capitalists who were worried about the dangers of urban areas filled with poor, uneducated, European immigrant children.¹⁰⁸ Thus reformers were concerned with controlling the masses for their own preservation, and with shaping youth who would become laborers and virtuous citizens and needed new special judicial and correctional institutions to do so.¹⁰⁹

What has not been debated, regardless of their motives, is that Progressive reformers believed that a benevolent state could create benign, nonpunitive, and therapeutic juvenile courts, distinct from harmful adult correctional schemes.¹¹⁰ The effectiveness of these juvenile courts would rest upon the philosophy of *parens patriae*, where the court would act in the best interests of youth charged with crimes in the same way a parent would.¹¹¹ The Illinois Juvenile Court Act of 1899, which created the first juvenile court, notes “that the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents”¹¹² The use of rehabilitative and therapeutic treatments, with judges acting as fatherly figures and court staff as social workers, aimed to further the work of responding to youth criminality outside of adult punitive frameworks, which began at common law and with the Houses of Refuge and reformatories

¹⁰⁵ See TANENHAUS, *supra* note 103, at 25.

¹⁰⁶ OFFICE OF BD. OF PUB. CHARITIES, FIFTEENTH BIENNIAL REPORT OF THE BOARD OF ST. COMMISSIONERS OF PUB. CHARITIES OF THE STATE OF ILLINOIS 7, 62 (1898).

¹⁰⁷ Chavez-Garcia, *supra* note 104, at 466–67.

¹⁰⁸ See *id.*

¹⁰⁹ *Id.*

¹¹⁰ See TANENHAUS, *supra* note 103.

¹¹¹ *Parens patriae* refers to the court’s power to substitute its authority for that of a parent over their children. For more on the history of *parens patriae*, see Lawrence Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978); see generally TANENHAUS, *supra* note 103.

¹¹² FELD, *supra* note 62, at 7.

movement.¹¹³ This rehabilitative ideal has remained the guiding principle behind the juvenile court and has been used to justify the substantive and procedural differences between juvenile proceedings and adult criminal proceedings.¹¹⁴

The birth of the juvenile court at the turn of the twentieth century was heralded as the shining example of enlightened progress in juvenile justice.¹¹⁵ The hope was that the juvenile court would succeed at saving delinquent youth by connecting them to a network of services geared toward rehabilitation versus retribution, processing them in informal judicial settings with empathetic judges, and deploying a public health model where delinquency would be diagnosed and treated through scientifically proven methods for behavioral reform.¹¹⁶ Yet, one of the first moves made by the juvenile courts was to adopt the role of probation officers, a practice that had gained traction in the adult criminal justice system at the time.¹¹⁷ Although during the early twentieth century this feature could have been perceived as progressive, it is important to note that from its very founding, the juvenile court set a pattern of adopting practices from the adult criminal justice system.

Even more, during the first few decades of the juvenile court movement, when rehabilitative treatment resources were limited, juvenile courts resorted to adult treatment of youth, particularly for Black youth. As evidenced in a 1927 report by the chief probation officer of the juvenile court in Chicago, Black youth's access to rehabilitation was "complicated by a lack of resources in the community comparable with those available for white children in the same circumstances . . . practically no institutions are to be found in the community to which [Black] children may be admitted."¹¹⁸ With limited options, officials in Chicago and other cities committed Black youth to detention facilities and jail at great rates and for long periods.¹¹⁹ In stark contrast to the principle of juvenile justice reform, large numbers of youth

¹¹³ *Id.* at 18.

¹¹⁴ *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1976) (holding that extending a federal right to jury trial for juveniles would frustrate the rehabilitative aims of the juvenile court).

¹¹⁵ See ELIZABETH J. CLAPP, *MOTHERS OF ALL CHILDREN: WOMEN REFORMERS AND THE RISE OF JUVENILE COURTS IN PROGRESSIVE ERA AMERICA* 165–96 (1998).

¹¹⁶ FELD, *supra* note 62, at 16.

¹¹⁷ See OFFICE OF BD. OF PUB. CHARITIES, *supra* note 106, at 331; see also James T. McCafferty & Lawrence F. Travis, *History of Probation and Parole in the United States*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIM. JUST.* 1, 2217–27 (Gerben Bruinsma & David Weisburd eds., 2014).

¹¹⁸ HARRY HILL, *ANNUAL REPORT OF THE CHIEF PROBATION OFFICER OF THE JUVENILE COURT* 364 (1927).

¹¹⁹ WARD, *supra* note 60, at 84.

were sent to adult prisons by juvenile courts.¹²⁰ In 1910, the U.S. Bureau of the Census noted that 72% of committed Black male youth, and 35% of committed White male youth, were confined in adult correctional facilities.¹²¹ Essentially, not much changed for youth with the introduction of the juvenile court, as many continued to be locked out of rehabilitative efforts, and locked into adult facilities that relied upon retribution.

In addition to youth being detained in adult prisons during the first few decades of the juvenile court movement, they were also given death sentences. On June 16, 1944, George Junius Stinney, Jr., a fourteen-year-old Black boy, became the youngest person to be executed in the twentieth century when he was electrocuted in South Carolina.¹²² Stinney was accused of raping and murdering two White girls, aged seven and eleven, and was arrested shortly after the bodies were found, as he assisted with the search party.¹²³ Stinney was interrogated by police officers and ultimately confessed, despite the implausibility of a five foot tall and ninety-five pound boy overpowering both girls at the same time and dragging their bodies.¹²⁴ His case was tried in adult court in a few hours, the jury rendered a guilty verdict in ten minutes, and Stinney was ushered into the electric chair only three months after his arrest.¹²⁵ It is alleged that he was too short to reach the electrodes on the electric chair, so he was asked to sit on books so that he could reach.¹²⁶ In December 2014, seventy years after his execution, Stinney was posthumously exonerated by a South Carolina court.¹²⁷

The juvenile court continued from its founding through the first half of

¹²⁰ See generally DEP'T COMM'N.: BUREAU CENSUS, PRISONERS AND JUVENILE DELINQUENTS IN THE UNITED STATES 1910 11, 11 (1923).

¹²¹ *Id.*

¹²² See Bruck I. David, *Executing Teen Killers Again*, WASH. POST (Sept. 15, 1985), https://www.washingtonpost.com/archive/opinions/1985/09/15/executing-teen-killers-again/a54f3a4c-a934-42ba-8fdd-c673b5ac764a/?utm_term=.a5b424a6e2c7.

¹²³ See generally BRUCE L. PEARSON, *THE DEATH PENALTY IN SOUTH CAROLINA: OUTLOOK FOR THE 1980S* (1st ed. 1981).

¹²⁴ See Lindsey Bever, *It Took 10 Minutes to Convict 14-year-old George Stinney Jr. It Took 70 Years after His Execution to Exonerate Him*, WASH. POST: MORNING MIX (Dec. 18, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/12/18/the-rush-job-conviction-of-14-year-old-george-stinney-exonerated-70-years-after-execution/?utm_term=.7f154ae43e10.

¹²⁵ *Id.*

¹²⁶ Sheri L. Johnson et al., *The Pre-Furman Juvenile Death Penalty in South Carolina: Young Black Life Was Cheap*, 68 S.C. L. REV. 331, 336 (2017). For more on the execution, see CHARLES KELLY, *NEXT STOP, ETERNITY: A HUMAN JOURNEY INTO THE EXECUTION CHAMBER WITH A SOUTH CAROLINA PRISON CHAPLAIN DURING THE PRE-CIVIL RIGHTS, PRE-MIRANDA DECADE OF THE NINETEEN FORTIES* (2016).

¹²⁷ Bever, *supra* note 124.

the twentieth century chartering a course upon which adultification, in correctional practices and treatment of youth, became commonplace, and almost expected, for certain youth. A deeper examination of the relationship between race, punishment, and childhood is required for a fuller understanding of how an institution born on the promise of separate treatment of children from adults could be complicit in the severe punishment of Black youth. However, here, it is important to note that not only did the juvenile court rely upon and normalize adultification in its earliest days, but that it also failed to develop procedural measures for validating practices directly carried over from the adult criminal justice system.

B. CURRENT JUVENILE ADULTIFICATION POLICIES AND PRACTICES

Some scholars argue that a second and third wave of adultification in the juvenile court occurred in the second half of the twentieth century.¹²⁸ This second wave is presumed to have begun with the *In re Gault* decision.¹²⁹ In *Gault*, the United States Supreme Court considered whether the Due Process Clause of the Fourteenth Amendment applied to juvenile delinquency adjudications.¹³⁰ Gerald Francis Gault, fifteen years old, was arrested for making a prank phone call to a neighbor.¹³¹ Upon arrest, his parents were not notified, he was denied the right to counsel, the right to cross examine the neighbor at his hearing, the right against self-incrimination when questioned by the court, and ultimately when he was sentenced to six years at a state juvenile facility, the juvenile court judge gave no formal reasoning for the disposition.¹³² The Court took note of the original aim of the juvenile court to spare youth of adultification:

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned.¹³³

The Court ultimately concluded that the Due Process Clause does apply

¹²⁸ R. M. Bolin, *Adultification in Juvenile Corrections: A Comparison of Juvenile and Adult Officers* (Aug. 9, 2014) (unpublished doctoral dissertation, University of South Carolina-Columbia) (on file at <http://scholarcommons.sc.edu/etd/2791>).

¹²⁹ Application of *In re Gault*, 387 U.S. 1 (1967).

¹³⁰ *Id.*

¹³¹ *Id.* at 4.

¹³² *Id.* at 4–12.

¹³³ *Id.* at 15.

to juvenile court, and it demands that youth are afforded a number of rights, including the right to counsel, the right against self-incrimination, the right to cross examine witnesses, the right to notice, and the right to a transcript of the proceedings so there are protections against harsh adult treatment.¹³⁴

Despite the Court's insistence on upholding the original aim of the juvenile court reformers, to protect youth from adult treatment, its ruling in *Gault* had several consequences, with unintended effects. The due process rights afforded youth, in the years after *Gault*, made juvenile adjudications more adversarial and virtually indistinguishable from adult criminal trials.¹³⁵ These adult-like proceedings and protections acted to justify further harsh sentencing of youth when minimal thresholds of due process were met. Yet, youth were still denied a constitutional right to an appeal and to a trial by jury, leaving them essentially with the worst of both worlds: vulnerable to adult sentencing and treatment, without the full canopy of constitutional protections afforded to adults.

The third wave of adultification in juvenile court began in the 1980s when states across the country began amending the purposes clause of their juvenile court acts to include language centered on personal accountability and public safety, and passing juvenile waiver legislation that allowed judges to deny juvenile jurisdiction to some youth, so that they may be tried, convicted, and sentenced in the adult criminal justice system.¹³⁶ These changes moved adult treatment of youth from an indirect consequence of failed policies adopted from the adult system to a direct conversion back to the identical treatment of youth like adults at common law. Many of these changes toward the end of the twentieth century can be attributed to the "Get Tough" on crime movement that used increasing youth crime statistics as a prediction for the beginning of a wave of child "superpredators."¹³⁷ It is no surprise then that some estimates of the number of youth prosecuted in the adult criminal justice system are as high as 250,000 per year.¹³⁸ The U.S.

¹³⁴ *Id.* at 59.

¹³⁵ HOWARD SYNDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, OFF. OF JUV. JUST. AND DELINQ. PREVENTION 96 (2006), <http://files.eric.ed.gov/fulltext/ED495786.pdf>

¹³⁶ Bolin, *supra* note 128, at 21–22.

¹³⁷ See Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 165–68 (2000); Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES (Apr. 6, 2014), https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html?_r=0.

¹³⁸ See Neelum Arya, *State Trends: Legislative Victories from 2005 to 2010 Removing Youth from the Adult Criminal Justice System*, CAMPAIGN FOR YOUTH JUST. 3 (2011), <http://www.modelsforchange.net/publications/294>.

Supreme Court has made clear that such a decision is “critically important” because it is the harshest punishment that the juvenile court can provide.¹³⁹ Even more, a significant number of juveniles waived to adult court are ultimately sentenced to life without parole. In 2012, the Sentencing Project conducted a national survey with the aim of exploring the lives of “juvenile lifers.”¹⁴⁰ With only a survey response rate of 68.4%, the researchers identified and gathered data from 1,579 respondents who were sentenced to life for crimes committed as minors.¹⁴¹

Most recently, electronic monitoring has presented an example of an adult correctional practice that was adopted by juvenile courts in the absence of procedural methods of evaluation and external feedback. The first use of electronic monitoring in the criminal justice system was inspired by a court in New Mexico. In 1979, district court judge Jack Love read a comic from the Spiderman series and became intrigued when he saw one of Spiderman’s villains, Kingpin, attach an electronic tracking device onto Spiderman, enabling Spiderman to be controlled from afar.¹⁴² Judge Love then began imagining how such a device could be used in real life to track the whereabouts of defendants that he released.¹⁴³ He contacted an electrical engineer with his idea and proposed development of a similar monitoring device for use in the criminal justice system.¹⁴⁴ Several years later, the first electronic monitoring device model resembling the ones still used today was created by National Incarceration Monitoring and Control Systems, Inc.¹⁴⁵ Accordingly, Judge Love was the first to develop a judicially sanctioned program and implement use of the technology on adult probation violators during the 1980s.¹⁴⁶ However, it would be another two decades before the practice would significantly expand across the country.¹⁴⁷

As glaring problems with mass incarceration have been increasingly

¹³⁹ See generally *Kent v. United States*, 86 S. Ct. 1045 (1966) (ruling that youth must be afforded procedural due process protections in juvenile waiver hearings).

¹⁴⁰ ASHLEY NELLIS, SENT’G PROJECT, *THE LIVES OF JUVENILE LIFERS: FINDS FROM A NATIONAL SURVEY*, 1 (Mar. 2012), available at <http://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf> (last visited Dec. 18, 2016).

¹⁴¹ *Id.* at 8.

¹⁴² Dee Reid, *High-Tech House Arrest: Electronic Bracelets Used to Monitor Prisoners under Home Detention*, 89 *TECH. REV.* 1, 12–14 (1986).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ David Savold, *Electronic Jailer*, 5 *SCIENCE* 81, 81 (1984).

¹⁴⁶ Robert S. Gable, *Let’s Stop Using Ankle Bracelets to Monitor Offenders*, *IEEE SPECTRUM* (July 20, 2017), <https://spectrum.ieee.org/consumer-electronics/portable-devices/lets-stop-using-ankle-bracelets-to-monitor-offenders>.

¹⁴⁷ *Id.*

revealed, the use of electronic monitoring, as an alternative to imprisonment, has gained much acceptance in recent years.¹⁴⁸ Some scholars have even argued that criminal offenders should have a right to be monitored, while others note that it should be used in limited situations.¹⁴⁹ Its wholesale adoption by juvenile courts emerged shortly thereafter, expedited in large part by the Annie E. Casey Foundation's promotion of the practice as a viable, progressive alternative to detention.¹⁵⁰ Over the past decade the juvenile justice system has also struggled to address concerns with over-incarceration.¹⁵¹ Thus, it is not surprising that the expansion of the practice to the juvenile justice system did not immediately trigger concerns. What should be surprising is that in the years since this practice was extended to minors, there has been scant research into the potential social and developmental harms and whether it promotes public safety, supports rehabilitation and is truly cost-effective.¹⁵² Currently, youth receive the same treatment as adults under electronic surveillance: limited social activities and interaction, conspicuous ankle devices that signal criminal justice involvement, marginalization from their community, and treatment that prioritizes limited notions of public safety over community reintegration.¹⁵³

Youth on electronic monitoring are also subject to collateral prosecutorial consequences while on electronic monitoring that further indicate a punitive adult approach versus juvenile rehabilitation. For example, under Illinois and Maryland law, youth on electronic monitoring who violate the provisions may be charged with "escape."¹⁵⁴ Maryland's

¹⁴⁸ See generally Pew Charitable Trusts, Pub. Safety Performance Project, *Use of Electronic Offender-Tracking Devices Expands Sharply* (Sept. 7, 2016), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/09/use-of-electronic-offender-tracking-devices-expands-sharply>; see also Annie E. Casey Found., Juv. Detention Alternatives Initiative, *Detention Reform: An Effective Public Safety Strategy* (Jan. 1, 2007), <http://www.aecf.org/m/resourceimg/aecf-DetentionReform2PublicSafetyStrategy-2007.pdf>.

¹⁴⁹ See Avlana Eisenberg, *Mass Monitoring*, S. CAL. L. REV. (forthcoming 2018); Samuel R. Wiseman, *The Right to be Monitored*, 123 YALE L.J. 1344, 1348–50 (2014).

¹⁵⁰ See STANFIELD, *supra* note 45.

¹⁵¹ See generally Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUST. POL'Y INS. (2006), http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf.

¹⁵² See generally Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297 (2015) (arguing that the use of electronic monitoring on youth should be considered criminal punishment, at odds with the rehabilitative ideal of juvenile justice, and refuting three key misperceptions about electronic monitoring of youth: (1) that it lowers incarceration rates because it is used only on youth who would otherwise be detained; (2) that it effectively rehabilitates youth; and (3) that it is cost-effective).

¹⁵³ *Id.*

¹⁵⁴ MD. CODE ANN., CRIM. LAW § 9-405(3)(ii–iii) (West 2013); 730 ILCS 5/5-8A-4 (West 2016).

criminal code defines the offense of escape in the second degree as escaping from “a place identified in a home detention order or agreement” or “a place identified in a juvenile community detention order.”¹⁵⁵ A juvenile community detention order “includes electronic monitoring.”¹⁵⁶ Illinois Unified Code of Corrections gives advance warning to those on electronic monitoring that they “may subject the participant to prosecution for the crime of escape.”¹⁵⁷ Youth who violate the terms of electronic monitoring, by running away or cutting the device off of their ankle, are not only prosecuted for escape, but also face charges for tampering with and destroying property. In Louisiana, youth are frequently prosecuted for tampering with electronic monitoring equipment, defined as “the intentional alteration, destruction, removal, or disabling of electronic monitoring equipment.”¹⁵⁸ Even more, youth on electronic monitoring risk having the GPS data generated from their monitoring used against them in subsequent prosecutions.¹⁵⁹

Overall, the experience of a minor in the juvenile justice system today is remarkably similar to that of an adult in the criminal justice system. The juvenile justice system does not even remotely resemble the separate and unique institution imagined by Progressive era reformers. Youth are arrested by the same police officers as adults, most often for the same sorts of offenses as adults; are shuffled through the booking process, being fingerprinted, photographed in similar ways; have to stand before judges at arraignment proceedings similar to adult bail hearings where detention alternatives are contemplated; when convicted, most likely face probation or placement at a state or privately run correctional facility; and are straddled with collateral consequences in very similar ways.¹⁶⁰ This enduring disproportionate exposure to punitive measures has become normalized in juvenile justice and has paved the way for policies and practices that continue to be more reflective of adult correctional aims than genuine rehabilitative efforts.

¹⁵⁵ MD. CODE ANN., CRIM. LAW § 9-405(3)(ii–iii).

¹⁵⁶ MD. CODE ANN., CTS. & JUD. PROC. CRIM. § 3-8A-01(h)(2) (West 2013).

¹⁵⁷ 730 ILCS 5/5-8A-4 (West 2016).

¹⁵⁸ LA. STAT. ANN. § 14:110.2 (2003).

¹⁵⁹ David Earl, *Police Have GPS Evidence That Puts Teen Murder Suspects at Crime Scene*, KETV OMAHA (Dec. 30, 2015), www.ketv.com/article/police-have-gps-evidence-that-puts-teen-murder-suspects-at-crime-scene-1/7657145.

¹⁶⁰ Jeffrey A. Butts & Ojmarrh Mitchell, *Brick by Brick: Dismantling the Border Between Juvenile and Adult Justice*, *Boundary Changes in Criminal Justice Organizations*, 2 CRIM. JUST. 2000 167, 202–05 (2000). See generally Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997) (arguing in part that the juvenile justice system and adult criminal justice system are so similar in aim and impact that the juvenile court should be abolished to afford young offenders greater protections).

II. HARMS OF ELECTRONIC MONITORING

The vast majority of youth come in contact with the juvenile justice system as a result of experiencing trauma, abuse, neglect, disruptions in the family, drug or alcohol dependency, and mental and behavioral disabilities.¹⁶¹ The delinquent behavior that results is often symptomatic of severe disconnects in the household, peer relationships, schooling, familial ties, health services, and community and social programming.¹⁶² Along the way to the juvenile court, several systems, agencies, and groups fail these minors. Instead of addressing these root causes of delinquency, juvenile courts' reliance on electronic surveillance exacerbates these harms in a similar way to jail, by widening the disconnect and perpetuating the failures. Electronic monitoring not only drives a wedge between youth and their communities by requiring them to be isolated in their homes under house arrest, it also visibly marks them as criminal justice-involved youth, seen as pariahs by the larger public. Yet, it is the strength of a minor's connection to their community, family, and school that decreases their chances of entering the juvenile justice system.¹⁶³

Detention alternatives that aim to bridge these disconnections, repair relationships, and support youth feeling invested in the community, are more effective in helping juvenile courts live up to their rehabilitative ideals and ease public safety concerns. Such detention alternatives include family therapy, drug counseling, community-based mental health and behavioral services, restorative circles for dispute resolution, work and leadership development training, and sports and arts programming.¹⁶⁴ The urgency of

¹⁶¹ See Carly B. Dierkhising et al., *Trauma Histories Among Justice-Involved Youth: Findings from the National Child Traumatic Stress Network*, 4 EUR. J. PSYCHOTRAUMATOLOGY 1, 1–3, 6–9 (2013); J.D. Ford et al., *Complex Trauma and Aggression in Secure Juvenile Justice Settings*, 39 CRIM. JUST. & BEHAV. 694, 694–97 (2012); Nat'l Child Traumatic Stress Network, *Judges and Child Trauma: Findings from the National Child Traumatic Stress Network/National Council of Juvenile and Family Court Judges Focus Groups*, 2 NCTSN SERV. SYS. BRIEFS (Aug. 2008), <http://www.nctsn.org/sites/default/files/assets/pdfs/judicialbrief.pdf>.

¹⁶² See Dierkhising et al., *supra* note 161, at 9.

¹⁶³ See DELINQUENCY PREVENTION & INTERVENTION: JUVENILE JUSTICE GUIDEBOOK FOR LEGISLATORS, NAT'L CONF. OF ST. LEGISLATURES (2011), available at <http://www.ncsl.org/documents/cj/jjguidebook-delinquency.pdf>.

¹⁶⁴ For example, in Chicago, the Lawndale Christian Legal Center has developed an alternative to incarceration that utilizes after school programs that run Tuesday through Saturday. Youth in the program are engaged in mentoring, tutoring, and community projects. The program helps them with vocational training, resume writing, cover letter writing, job searching, academic tutoring, and engage through hands-on work. See *Community Restorative Justice Hub*, LAWDALE CHRISTIAN LEGAL CENTER, <http://lclc.net/programs/rjhub/> (last visited Jan. 7, 2018). In Baltimore, the Community Conferencing Center uses a restorative

the need for juvenile courts to shift focus and direction is further supported by studies noting negative impacts of electronic surveillance on criminal defendants, and recent studies that demonstrate adolescents' particular vulnerability to developmental harms.

A. SOCIAL SCIENCE ON ELECTRONIC MONITORING

Electronic monitoring has been presented in mainstream culture as an alternative to punishment.¹⁶⁵ This depiction, however, betrays the social science research examining the impact of the practice on criminal offenders. It should be noted that there have not been any studies conducted that capture the experiences of juvenile offenders on electronic monitoring, which draws into question the juvenile court's wholesale adoption of the practice. However, several adult studies conducted have noted the negative impacts of electronic monitoring on offenders.¹⁶⁶ In one of the first studies to explore

justice model to bring juvenile defendants, victims, and community members together to resolve issues through strategic dialogue and dispute resolution. See *The Impact of Community Conferencing*, CMTY. CONFERENCING CTR., <http://www.communityconferencing.org/impact-of-community-conferencing/> (last visited Jan. 7, 2018). In New York, the South Bronx Community Connections is a detention alternative program run by local grassroots faith and neighborhood organizations. With its restorative justice model, a network of faith and community organizations in a given police precinct form a network to engage youth, who have been arrested, in mentoring and positive youth development activities. The program's approach is built on three principles: (1) a community-driven grassroots neighborhood approach instead of a top-down system-led approach; (2) a positive youth development approach to youth that focuses on strengths and assets, instead of risk and needs; and (3) the importance of connecting youth to their communities through youth-led civic engagement projects with mentors who are "credible messengers." See *South Bronx Community Connections*, CMTY. CONNECTIONS FOR YOUTH, <https://cc-fy.org/project/south-bronx-community-connections/> (last visited Jan. 7, 2018).

¹⁶⁵ *XFINITY NFL Red Zone TV Commercial, 'I'm With the Team'*, ISPOT.TV, <https://www.ispot.tv/ad/79To/xfinity-nfl-red-zone-im-with-the-team#> (last visited Jan. 7, 2018). This commercial features a man in his mid-to-late thirties who describes himself as an avid NFL fan that keeps close tabs on every team. The commercial then shows the guy hiding in the luggage area underneath the team bus for the Philadelphia Eagles. His humorous attempt to be a stowaway with the team becomes apparent as security officers walk up and easily point him out. "RedZone" is then presented as a better alternative for "keeping tabs" on all the teams than attempting to hide in the luggage compartment of a team bus. The comedic high point is reached when the commercial turns to the gentleman at home on the couch after the incident, with presumably his wife and daughter by his side in a cozy suburban living room, and he lifts his leg up on the coffee table to reveal an electronic monitoring unit strapped to his ankle. He goes on to explain that he is happy to now have "RedZone" because he "was encouraged to keep within a thirty-yard radius of [his] dwelling." The commercial leaves the viewer to believe that electronic monitoring is a "soft" penalty for petty offenses, worthy of laughter for those who make silly, forgivable mistakes. *Id.*

¹⁶⁶ The author selected the studies discussed in this section because they are the only studies that capture the lived experiences of individuals under electronic monitoring.

the question of whether offenders experience electronic monitoring as punishment, Brian Payne and Randy Gainey interviewed offender participants in Norfolk, Virginia for one year.¹⁶⁷ The study found that the participants experienced pain and punishment in similar ways to individuals who are incarcerated.¹⁶⁸ For the purposes of the study, the authors identified five “pains of punishment” experienced by those who are incarcerated: 1) deprivation of autonomy, 2) deprivation of goods and services, 3) deprivation of liberty, 4) deprivation of social relationships, and 5) deprivation of security.¹⁶⁹ The study found that participants suffered all five of the pains of punishment typically associated with incarceration while under electronic surveillance, in addition to other “pains” not experienced by inmates.¹⁷⁰

In the study, deprivation of autonomy was defined as loss of control and freedom for the inmate due to a vast number of rules imposed on them in confinement.¹⁷¹ These rules act to take away the inmates’ sense of self and change the offender from an independent individual to one with no ability to make decisions about daily routines.¹⁷² The vast majority of participants (92%) in the study noted similar experiences under electronic monitoring. In fact, participants’ comments consistently expressed feelings of being caged, such as “this is jail inside your home,” “the only thing this lacks is bars on windows,” and “the only difference between this and jail is that I’m not in a cell, but in a house.”¹⁷³ One participant even described feeling like a dog on a leash.¹⁷⁴

¹⁶⁷ See generally Brian K. Payne & Randy R. Gainey, *A Qualitative Assessment of the Pains Experienced on Electronic Monitoring*, 42(2) INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 149 (1998). Payne & Gainey interviewed twenty-seven participants in Norfolk, Virginia for one year.

¹⁶⁸ *Id.* at 149.

¹⁶⁹ *Id.* at 150.

¹⁷⁰ *Id.* at 154. It must be noted that these U.S.-based studies are heavily male-focused. It is not clear if this was intentionally done by the researchers. More research needs to be done to explore the experiences of women subjected to electronic monitoring in the U.S. For more on how electronic monitoring is experienced by women abroad, see generally Ella Holdsworth & Anthea Hucklesbury, *Designed for Men, but Also Worn by Women*, 95 CRIM. JUST. MATTERS 1, 1–3 (2014); Madonna R. Maidment, *Toward a “Woman-Centered” Approach to Community-Based Corrections: Gendered Analysis of Electronic Monitoring (EM) in Eastern Canada*, 13 WOMEN & CRIM. JUST. 47, 48–49 (2002).

¹⁷¹ Payne & Gainey, *supra* note 167, at 153.

¹⁷² *Id.* at 154.

¹⁷³ *Id.* It should be noted that almost all of the participants in the study experienced incarceration at some point prior to making these comments, giving them good grounds to make comparisons.

¹⁷⁴ *Id.* at 154.

Analogous barriers were described with the pain of deprivation of goods and services. In reflecting upon imprisonment, it becomes obvious how inmates are deprived of goods and services that would be available if they were not confined. Such deprivations for those electronically monitored are less obvious. However, 85% of the participants made comments indicating a deprivation of goods and services.¹⁷⁵ These comments tended to focus on participants' abilities to shop, eat out, go to church, work extra hours, and do many of the things others take for granted. One participant described not liking electronic monitoring because "it is summertime and I can't enjoy it. It is like being at the beach and not being able to touch the sand, [or] water . . ."¹⁷⁶

When looking to determine the deprivation of social relationships, the authors defined it as including both physical and psychological losses by the inmates.¹⁷⁷ The physical losses for those detained are clear, as they physically are separated, with walls and fences between them and their loved ones, friends, and family. Those sentenced to electronic monitoring have the advantage of physical intimacy and relationships. However, participants in the study noted increased stress in their relationships because of the sanction.¹⁷⁸ One of the study participants noticed how his limitations in contributing to the family due to electronic surveillance generated a level of resentment in his partner.¹⁷⁹ He noted: "My wife goes out more, and leaves me more often, and is more friendly with men. She responds to me hatefully."¹⁸⁰ Another participant explained how it had the opposite effect on him, where he began to resent his live-in relatives: "They get a free ride. I have to pay the phone and electric bill. If I don't, I'm back in jail and they know that."¹⁸¹

In examining security, the study defined such deprivation for inmates as being in an environment where they are vulnerable to be preyed upon by both malicious guards and fellow inmates.¹⁸² Although this direct source of insecurity was not present for the participants on electronic monitoring, they did indicate that being confined at home, knowing the corrections system was monitoring their every movement, did replicate many of the aspects of prison

¹⁷⁵ *Id.* at 155.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 156.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* Electronic monitoring programs require participants to have a phone where they can be reached, and electricity is needed to charge the device's battery. *Id.*

¹⁸² *Id.*

which often led to a similar experience of vulnerability.¹⁸³ As one study participant explained, “sometimes I become paranoid.”¹⁸⁴

In addition to electronic monitoring perpetuating similarly punitive experiences to those imprisoned, this study noted that participants highlighted pains of punishment different from those typically associated with confinement. Four additional pains of punishment were identified: 1) “family effects,” 2) “monetary costs,” 3) “watching others effects [sic],” and 4) “bracelet effects.”¹⁸⁵ Family effects were noted where over 61% of participants indicated that being on electronic monitoring negatively impacted their family relations.¹⁸⁶ These participants shared that electronic monitoring interfered with their daily routines, making it seem almost as if everyone in the household was placed on monitoring as well, because they had to shape their lives around it.¹⁸⁷ Monetary costs, which were indicated by over 40% of the participants, described the expenses associated with electronic monitoring.¹⁸⁸ These costs were identified as additional sanctions because most offenders have a hard time making ends meet with criminal records.¹⁸⁹ “Watching others effects,” were used as a descriptor for the statements of 33% of the participants who noted that while jail largely kept them isolated from life on the outside, being on electronic monitoring allowed them to be released but limited what they could do, leaving them to watch as others lived full lives around them.¹⁹⁰ Lastly, 25% of the participants noted concerns with comfort and appearance in public while having to wear the monitoring device, and these responses were categorized as bracelet effects.¹⁹¹

More recent U.S. studies have made comparable findings of negative experiences with electronic monitoring. In 2010, the Florida State University College of Criminology and Criminal Justice Center for Criminology and Public Policy Research released a report with significant quantitative and qualitative findings, from a study conducted on offenders assigned to electronic monitoring in Florida.¹⁹² One of the goals of this study was to

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 157.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 158.

¹⁹¹ *Id.*

¹⁹² WILLIAM BALES ET AL., A QUANTITATIVE AND QUALITATIVE ASSESSMENT OF ELECTRONIC MONITORING vii–xii (2010).

present findings indicating how the electronic monitoring experience impacts offenders' relationships with their families and friends, employment experiences, and their adjustment to communities.¹⁹³ The general impressions of their experiences were negative.¹⁹⁴ The impact on their families was notable.¹⁹⁵ One person remarked that being on electronic monitoring "serves as a scarlet letter" and has had a detrimental impact on his relationship with his family.¹⁹⁶ Another noted that "every time it goes off, we think the police are coming to arrest me."¹⁹⁷ Other individuals experienced this as well, and one explained how "when it beeps, the kids worry about whether the probation officer is coming to take [him] to jail. The kids run for it, when it beeps."¹⁹⁸

Participants also indicated that electronic monitoring often marginalized them from interpersonal relationships. The study notes that 32% of the offenders said it created distance and negatively impacted their relationships, while 14% said it limited the places they can go with their children.¹⁹⁹ One person interviewed admitted that he felt like family members are in prison too, and another stated, "I've got a child who straps a watch on his ankle to be like daddy."²⁰⁰ Electronic monitoring was described as taking a toll on friendships as well. One interviewee stated that he tries not to let his friends know about it by attempting to hide the device, while another participant struggled with having no friends, as a result of cutting off ties because he could not go anywhere.²⁰¹

Barriers to employment were also highlighted by the offenders studied. The majority (61%) of those interviewed stated that electronic monitoring did impact their ability to obtain employment.²⁰² All the offenders who claimed that electronic monitoring had impacted their efforts to find a job

¹⁹³ *Id.* at 3.

¹⁹⁴ *Id.* at 90.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* Electronic monitoring devices send signals to correction agency administrators and officers when a person monitored leaves their home, visits a restricted location, and/or is not present at a location where they are scheduled to be. These audible signal alerts often lead to law enforcement showing up to the person's home or designated locale, even for glitches caused by the technology. This response is often an extreme source of embarrassment in front of family and neighbors as multiple police units arrive to one's home while a person suffers a misread, such as if they stand too close to the back door of their home.

¹⁹⁸ *Id.* at 90.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 91.

²⁰² *Id.* at 94.

asserted that the impact was overwhelmingly negative.²⁰³ It is not too difficult to imagine how electronic monitoring could prove problematic for employment prospects. The technology itself could prove hard to navigate in the work space. Electronic monitoring devices need to be periodically recharged. This would require an employee to either limit their work hours (something they may not have too much control over, particularly if they want to stay employed) or carry the electric charging base to work. If an employee needs to charge the device, they would be restricted to the very limited area where the cord to the electrical outlet could reach. This may be manageable for someone working at a desk job, but in most low-skilled jobs, individuals are often on their feet and required to move. Even more, if an employee works at a job that requires interaction with the public, customers/clients may view the device and generate negative assumptions about the employee and employer, knowing that the individual is involved in the criminal justice system. Also, depending upon where a person may work (large building or warehouse), if they are on an electronic monitoring device that relies on GPS with satellite positioning, the signal from the device may be lost, requiring the employee to abandon their work to go outside so that their position can be reconnected, or worse, have correctional and law enforcement officers show up at their workplace in response to the lost signal.²⁰⁴

Financial challenges and barriers to obtaining housing were also highlighted in the study. Of the people interviewed who noted an impact on housing prospects, 94% said it was due to limitations on available housing by reluctant landlords and frequent law enforcement patrol.²⁰⁵ When questioned about the financial impacts, 63% of offenders said they have a difficult time paying for it.²⁰⁶ The report further notes that based on the

²⁰³ *Id.*

²⁰⁴ For more on instances of failure in monitoring devices leading to law enforcement response, see Mike Beaudet, *Ankle bracelet breakdown: Mass. losing track of criminals*, BOSTON 25 NEWS (Apr. 23, 2015, 10:29 PM), <http://www.fox25boston.com/news/fox-25-investigates/ankle-bracelet-breakdown-mass-losing-track-of-criminals/143478092>; Bryan Polcyn & Stephen Davis, *Offenders threatened, jailed for 'false' alerts from alcohol-monitoring bracelets: 'I didn't do anything wrong!'*, FOX 6 NOW (Mar. 13, 2016), <http://fox6now.com/2016/03/13/alcohol-monitoring-bracelets-questioned/>; Paige St. John, *Tests found major flaws in parolee GPS monitoring devices*, L.A. TIMES (Mar. 30, 2013), <http://articles.latimes.com/2013/mar/30/local/la-me-ff-gps-monitors-20130331>; Kerana Todorov, *Malfunctioning GPS bracelet triggers false arrest*, NAPA VALLEY REGISTER (Nov. 4, 2011), http://napavalleyregister.com/news/local/malfunctioning-gps-bracelet-triggers-false-arrest/article_8e410026-0694-11e1-972a-001cc4c03286.html.

²⁰⁵ BALES ET AL., *supra* note 192, at 97.

²⁰⁶ *Id.* at 102. In many adult criminal jurisdictions, offenders are required to pay the costs associated with being monitored. Most programs require offenders to have a telephone as well

findings indicating the relatively low educational levels of offenders on electronic monitoring and their inability to obtain and maintain employment, it is no surprise that a significant percentage of them have difficulty paying the fees mandated by the courts for the cost of supervision.²⁰⁷ As a result, the report documents significant levels of shame and stigma experienced while on electronic monitoring.²⁰⁸ And perhaps most telling is the fact that the vast majority of those interviewed (82.7%) considered their electronic surveillance experience a severe form of punishment.²⁰⁹

One of the most recent studies focused on electronic monitoring in the criminal justice system, “Mass Incarceration Through a Different Lens: Race, Subcontext, and Perceptions of Punitiveness of Correctional Alternatives When Compared to Prison,” provides much needed insight into how electronic monitoring may be experienced across racial groups.²¹⁰ This study reviewed data from over 1,000 Kentucky inmates, who were within twelve months of their release or parole date, to examine the impact of sociodemographic factors on perceptions of the punitiveness of alternatives to incarceration.²¹¹ This study looked at probation, community service, and electronic monitoring as alternatives to incarceration.²¹² Most notably, the study found that Black inmates have significantly lower odds of preferring electronic monitoring over prison than White inmates, demonstrating that Blacks view electronic monitoring as highly punitive, and may in some cases prefer more time in prison to avoid being released on long periods of electronic monitoring.²¹³

Although social scientists have done a better job in examining and evaluating electronic monitoring as a criminal justice tool in recent years, more studies are needed to capture the experiences of individuals subjected to this practice.²¹⁴ Thus far, these studies demonstrate a few common

so that they can be reached at times of technical difficulty and also to be able to speak to administrators and confirm location. However, the vast majority of juvenile court jurisdictions cover the costs of electronic monitoring for juvenile offenders.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 100.

²⁰⁹ *Id.* at 124.

²¹⁰ Yasmiyn Irizarry et al., *Mass Incarceration Through a Different Lens: Race, Subcontext, and Perceptions of Punitiveness of Correctional Alternatives When Compared to Prison*, 6 RACE & JUST. 236–56 (2015)

²¹¹ *Id.* at 236.

²¹² *Id.*

²¹³ *Id.* at 245.

²¹⁴ See Alexander M. Esteves, *Electronic Incarceration in Massachusetts: A Critical Analysis*, 17 SOC. JUST. 76, 77–79 (1990); STEPHEN V. GIES ET AL., NAT’L CRIM. JUST. REFERENCE SERVICE, MONITORING HIGH-RISK SEX OFFENDERS WITH GPS TECHNOLOGY: AN EVALUATION OF THE CALIFORNIA SUPERVISION PROGRAM FINAL REPORT vii (2012), *available*

impacts: a) shame and stigma from the way that others view those under monitoring, creating embarrassment, lowered self-esteem, and leading to disparate treatment; b) monitoring reaching beyond the individual and causing strains on all household members who have to work around the sanction and cooperate with correctional agencies in relaying information; c) trauma from lingering feelings of being caged, unsafe, and vulnerable; and d) financial constraints from the associated costs imposed for monitoring.²¹⁵

Such impacts should be a cause of concern for those who promote the technology as a detention alternative, and a source of motivation for further research by social scientists and legal scholars interested in understanding this potential shift from our present dilemma of mass incarceration to a future correctional scheme of mass monitoring. Even more, it highlights the troubling nature of juvenile courts adopting this practice without the backing of social science evidence to demonstrate that it does not pose many of these same harms and negative experiences upon youth. The juvenile court must develop procedural measures, for determining what corrections' technology from the adult criminal justice system, if any, should be introduced to minors. These measures should prioritize, prior to adoption, evaluation of potential technological practices, based upon social science research that speaks to impacts on the socio-emotional development of youth, age appropriateness, compliance with rehabilitative and therapeutic aims, and disparate impacts along the lines of race, gender, disability, sexual orientation, immigration status, and socioeconomic status. When there is little consensus on the presumed positive benefits of a practice, or when there has not been much research conducted, juvenile courts should be wary of mimicking the adult correctional regime.

Juvenile courts already rely heavily upon state-run juvenile justice agencies for data collection, research, and guidance on a wide range of issues in shaping their policy and practice decisions, including delinquency trends, detention and recidivism rates, spending on probation services, and

at <https://www.ncjrs.gov/pdffiles1/nij/grants/238481.pdf>; Sudipto Roy, *5 Years of Electronic Monitoring of Adults and Juveniles in Lake County, Indiana: Comparative Study on Factors Related to Failure*, 20 J. CRIME & JUST. 1, 141 (1997); see generally MIKE NELLIS ET AL., ELECTRONICALLY MONITORED PUNISHMENT: INTERNATIONAL AND CRITICAL PERSPECTIVES (2014); Jenny Ardley, *The Theory, Development and Application of Electronic Monitoring in Britain*, INTERNET J. CRIMINOLOGY (2005) (exploring how electronic monitoring is used in various countries around the world, the politics that surround its use, and the challenges it presents); Lisa R. Muftic et al., *Bosnian and American Students' Attitudes Toward Electronic Monitoring: Is It About What We Know or Where We Come From?*, 59(6) INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 611, 616–17 (2015).

²¹⁵ See *supra* notes 214, 193, and 211.

disproportionate minority contact.²¹⁶ Requiring, as an addition, that courts engage in this evaluative and reflective procedure when determining whether an adult practice should be replicated would make neither unreasonable nor unfamiliar demands upon the court.

B. ELECTRONIC MONITORING AND ADOLESCENT UNDERDEVELOPMENT

Negative experiences under electronic surveillance are only magnified for adolescents, making it even more important for juvenile courts to avoid adultification through use of electronic monitors. The associated harms and collateral consequences could strain a child's connection to their community and family, through isolation and marginalization, at a time when it is critical for a child to gain greater connection and investment in their own communities. In fact, the aim of rehabilitation envisions putting youth on the track to being healthy, contributing members of their communities and of society.²¹⁷ Yet, such marginalization could lead to even greater anti-social conduct and misbehavior that juvenile courts attempt to steer youth away from. This becomes even more vital when considering that life paths set in adolescence can have a major impact later in life, and there are reasons to believe that early altering of these trajectories in positive ways can have a larger effect than the same intervention applied later in adulthood.²¹⁸ Thus, electronic monitoring may actually be a counterproductive measure that jeopardizes a child's chances at successful life outcomes.

²¹⁶ See U.S. Dep't of Justice, Off. of Just. Programs, Off. of Juv. Delinq. Prevention, *OJJDP Policy: Monitoring of State Compliance with the Juvenile Justice and Delinquency Prevention Act*, <https://www.ojjdp.gov/compliance/monitoring-state-compliance-JJDP-policy.pdf> (2017) (Under the federal Juvenile Justice and Delinquency Prevention Act, state juvenile courts must commit to compliance with four core requirements: 1) deinstitutionalization of status offenders, 2) separation of juveniles from adults in secure facilities, 3) removal of juveniles from adult jails and lockups, and 4) reduction of disproportionate minority contact within the juvenile justice system. *Id.* When states fail to meet compliance, they are subject to a reduction of federal formula grants used to support their juvenile justice systems. *Id.* Meeting compliance requires state departments of juvenile justice and juvenile courts to collect and monitor data annually. Forty-eight states (excluding Wyoming and Nebraska), and the District of Columbia, received formula grants in 2017 under JJDP and were mandated to collect and report on juvenile justice data. See Off. of Juv. Just. and Delinq. Prevention, *State Compliance With JJDP Act Core Requirements*, <https://www.ojjdp.gov/compliance/compliancedata.html> (last visited May 2, 2018). States use this data gathering to evaluate their compliance and to shape juvenile court policies and practices to promote achieving the four core requirements, amongst other goals.

²¹⁷ Melissa M. Moon et al., *Is Child Saving Dead? Public Support for Juvenile Rehabilitation*, 46 CRIME & DELINQ. 38, 39 (2000).

²¹⁸ Ronald E. Dahl, *Adolescent Brain Development: A Period of Vulnerabilities and Opportunities*. Keynote Address, 1021 ANN. N.Y. ACAD. SCI. 1, 7 (2004).

Absent from the social science literature touching upon the impact of electronic monitoring are studies that explore the lived experiences of juvenile offenders. Although the current scientific research limits what can be claimed about the experience of minors, reasonable assumptions can be made based upon the negative experiences of adults²¹⁹ and new understandings in adolescent brain development. In less than twenty years, we have seen a rapid increase in studies focused on the adolescent brain that have generated profound new insights into how it develops throughout the lifetime of humans.²²⁰ Since the nineteenth century, people have taken for granted that childhood and adolescence are distinct periods of growth and maturation much different from adulthood.²²¹ It has been generally believed that an adolescent thinks and processes the world around her in a fundamentally different way than adults.²²² Recent progress in science now helps us to understand exactly why there is such a difference.

Adolescence is the period between childhood and adulthood encompassed by changes in physical, psychological, and social development, which scientists now estimate can continue until a person reaches their mid-twenties.²²³ Much of our recent understanding of the adolescent brain has come from advances in neuroimaging methodologies that can be used with developing human populations.²²⁴ This advancing medical technology has enabled scientists to confidently determine that the period of adolescence is a highly transitional developmental stage with distinct attributes.²²⁵ These cognitive and behavioral attributes are generally understood to be: impulsivity, propensity for risky behavior, susceptibility to peer pressure, diminished appreciation for long-term consequences, and poor decision-making.²²⁶ It is these marks of adolescence that often lead youth to

²¹⁹ Mike Nellis, *Surveillance and Confinement: Explaining and Understanding the Experience of Electronically Monitored Curfews*, 1 EUR. J. PROB. 41, 45 (2009).

²²⁰ Laurence Steinberg, *Commentary: A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160, 160–64 (2010).

²²¹ FELD, *supra* note 62, at 2.

²²² Lucy Foulkes & Sarah-Jayne Blakemore, *Studying Individual Differences in Human Adolescent Brain Development*, NATURE NEUROSCIENCE 1 (2018).

²²³ Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 216–18 (2009). It can be argued that the advances in adolescent brain science has itself experienced a rapid growth from infancy in knowledge to a period of greater understanding, not dissimilar to the growth that happens during adolescence, in such a short period of time.

²²⁴ B.J. Casey et al., *The Adolescent Brain*, 1124 N.Y. ACAD. SCI. 111, 113 (2008).

²²⁵ *Id.*

²²⁶ L.P. Spear, *The adolescent brain and age-related behavioral manifestations*, 24 NEUROSCI. & BIOBEHAVIORAL REV. 417, 417–24 (2000). *See also* Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. OF RES. ON ADOLESCENCE

experimenting with drugs and alcohol, challenging parents and authority figures, and engaging in delinquent behavior.²²⁷ They are also the reason why we deem youth as less blameworthy and deserving of adult punishments, not only because they are more easily influenced and less able to make sound decisions in the moment, but also because punitive responses, given these cognitive and behavioral developmental delays, are less effective and fair.²²⁸ The penological justifications for punishments provided for adults are severely limited in effectiveness in curbing delinquent behavior precisely because youth struggle to appreciate long-term consequences of their behaviors.²²⁹ And such punishment is unfair for youth who are the victims of peer pressure and bad decision-making.

Beyond new insights into how brain development in adolescents impacts their abilities to control behaviors and make good judgments, it has also revealed how adolescents are particularly vulnerable to psycho-emotional impairments and harms due to heightened emotional reactivity.²³⁰ As adolescents are highly impressionable and very sensitive to how they are perceived and treated by others, they have an increased vulnerability to anxiety, stress, and depression.²³¹ Indeed, adolescence is an important time for developing a new sense of self and identity along with the cognitive ability to imagine oneself in the future in ways that can create positive emotions (picturing oneself as highly successful) as well as linked to negative affective appraisals (imagining the consequences of failure or humiliation). This complex processing of thoughts and images can create strong feelings in adolescence that are capable of altering motivation.²³² So when faced with trauma, stress, and lowered self-esteem, adolescents experience deep emotions that they are seldom equipped to deal with in positive ways.²³³ In

211, 211–14; Dustin Albert et al., *The Teenage Brain: Peer Influences on Adolescent Decision Making*, 22 CURR. DIR. PSYCHOL. SCI. 114, 114–15 (2013).

²²⁷ See Scott E. Hadland, *Trajectories of Substance Use Frequency Among Adolescents Seen in Primary Care: Implications for Screening*, 184 J. PEDIATR. 178, 178–79 (2017); Alejandro Meruelo et al., *Cannabis and Alcohol Use, and the Developing Brain*, 325 BEHAV. BRAIN RES. 44, 45–48 (2017); Thomas Ashby Wills, *Novelty seeking, risk taking, and related constructs as predictors of adolescent substance use: An application of Cloninger's theory*, 6 J. SUBSTANCE ABUSE 1, 7 (1994).

²²⁸ Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 756–57 (2000).

²²⁹ *Id.*

²³⁰ Casey et al., *supra* note 224, at 112.

²³¹ A.E. Kelley, T. Schochet and C.F. Landry, *Risk Taking and Novelty Seeking in Adolescence: Introduction to Part I*, ANN. N.Y. ACAD. SCI. 1021, 1027–32 (2004).

²³² Dahl, *supra* note 218, at 22.

²³³ Casey et al., *supra* note 224, at 120 Normal adolescent development can be interpreted

fact, adolescence's "time of greater emotional reactivity" is also a period when symptoms of many psychiatric disorders (e.g., schizophrenia, depression, anxiety) manifest.²³⁴ It is estimated that about one-third to one-half of adolescents at any point in time report significant depressed mood or affective disturbances that could be described as "inner turmoil" or "feeling miserable."²³⁵ In fact, not only do incidences of depressed mood increase notably from childhood to adolescence, but they also reach rates that are often higher than in adulthood, with greater extremes in mood, as this "emotional volatility, anxiety, and self-consciousness" appears to reach its peak during this transitional period.²³⁶

Thus, in considering the potential harms of electronic monitoring, effects such as stigma and shame can have potentially crippling impacts on healthy youth development. Stigma and shame can be understood as causing both external and internal impacts on youth. Having to go to juvenile court is often a traumatic experience for minors.²³⁷ When that experience is coupled with the minor returning home with an electronic anklet locked to them, it potentially paves the way for that trauma to endure and even increase. While on electronic monitoring, youth must attempt to cope with being labeled as criminal while already having to navigate the challenges of adolescence. Youth attend school, where their peers, teachers, and administrators note their criminal justice system involvement, through seeing the electronic device, and may treat them accordingly. Students, particularly males, are perceived by teachers as more likely to engage in misbehavior, even as early as preschool.²³⁸ The presence of an electronic monitor would presumably feed those assumptions and heighten the negative impacts of stigma. This would seemingly place some youth at greater risk of entering the school-to-prison pipeline.²³⁹ Additionally, youth may be stigmatized by

as the coordination of emotions and behavior in the social and intellectual environment, and the development of psychopathology during adolescence can be seen as resulting from a difficulty in balancing these factors. *Id.*

²³⁴ *Id.*

²³⁵ Spear, *supra* note 226, at 429.

²³⁶ *Id.*

²³⁷ See Shantel D. Crosby, *School Staff Perspectives on the Challenges and Solutions to Working with Court-Involved Students*, 85 J. SCH. HEALTH 347, 348 (2015).

²³⁸ See generally WALTER S. GILLIAM ET AL., YALE CHILD STUDY CTR., DO EARLY EDUCATORS' IMPLICIT BIASES REGARDING SEX AND RACE RELATE TO BEHAVIOR EXPECTATIONS AND RECOMMENDATIONS OF PRESCHOOL EXPULSIONS AND SUSPENSIONS?, YALE CHILD STUDY CTR. (2016).

²³⁹ See generally CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM (2010). The authors note that the school-to-prison pipeline is the term given to describe policies and practices at school that increase the chance that youth encounter the juvenile justice system. The school-to-prison pipeline works in numerous ways

their own families and neighbors, leading to deeper psycho-emotional harms.²⁴⁰

Additional burdens that contribute to stigma and shame experienced by youth may stem from the policies governing the detention alternative. In a report produced by Berkeley Law School's Samuelson Law, Technology, and Public Policy Clinic and the East Bay Community Law Center, the authors examine the electronic monitoring policies for juveniles across all fifty-eight California counties.²⁴¹ The report offers an overview of the terms and conditions commonly used in California with youth under electronic monitoring and concludes that the governing policies are often extremely burdensome.²⁴² The report highlights five key takeaways. First, some terms and conditions may disproportionately burden low-income families, due to daily, weekly, or monthly payment requirements to participate; difficulties in demonstrating inability to pay, requirements for landline or cell phone for participation; and requirements for parental supervision and stable means of transportation that prove hard for families with lower financial means.²⁴³

including: 1) proliferation of zero-tolerance school discipline policies to push youth out of school through suspension and expulsion for minor misbehavior, leading to missed school days that increase the risk of a student dropping out and engaging in delinquent behavior; and 2) increased presence of, and reliance upon, law enforcement and student resource officers at schools that are more likely to criminalize school misconduct and respond with arrests and juvenile court referrals. *Id.* For more on the school-to-prison pipeline, see *Test, Punish, Pushout: How "Zero Tolerance" and High-Stakes Testing Funnel Youth Into the School-to-Prison Pipeline*, ADVANCEMENT PROJECT (2010) (giving one of the first reports to analyze the school-to-prison pipeline and adequately describe the extent of problem and suggest solutions).

²⁴⁰ See James R. Andretta et al., *The Effects of Stigma Priming on Forensic Screening in African American Youth*, 43 COUNSELING PSYCHOLOGIST 1162, 1162–89 (2015) (noting that African-American youth with court contact may be especially vulnerable to stigma because their experience of detention has made the negative stereotypes about their racial group particularly salient); see generally Akiva M. Liberman et al., *Labeling Effects of First Juvenile Arrests: Secondary Deviance and Secondary Sanctioning*, 52 CRIMINOLOGY 345 (2014) (suggesting that criminal labels of youth trigger “secondary sanctioning” processes, which lead to escalating punitive effects of societal responses. Such that, a first juvenile arrest seems to increase subsequent law enforcement responses compared with other youth who offend at a comparable level, but have managed to evade a first arrest.); Anne Rankin Mahoney, *The Effect of Labeling Upon Youths in the Juvenile Justice System: A Review of the Evidence*, 8 LAW & SOC'Y REV. 583 (1974) (exploring the role of the juvenile justice system as a labeling agent and noting that labeling youth may have significant impacts on subsequent delinquent behavior, community and family reaction to juvenile justice contact, and youth's self-image).

²⁴¹ U.C. BERKELEY LAW SCH., SAMUELSON LAW, TECH. & PUB. POL'Y CLINIC, EAST BAY COMMUNITY LAW CENTER, *Electronic Monitoring of Youth in the California Juvenile Justice System 2–3* (2017), available at https://www.law.berkeley.edu/wp-content/uploads/2017/04/Report_Final_Electronic_Monitoring.pdf.

²⁴² *Id.* at 3.

²⁴³ *Id.* at 6–8.

Second, some terms and conditions may raise privacy concerns because of the collecting of movement data as official records and omissions in policies that leave the use of collected data without regulation or oversight.²⁴⁴ Third, some terms and conditions are overly rigid and inadvertently set youth up to fail due to inflexibility.²⁴⁵ Two examples were highlighted: a) rules requiring youth and their families to obtain approval every time the youth leaves the home, and b) zero tolerance rules that do not exempt the youth from responsibility when equipment is damaged through no fault of their own.²⁴⁶ Fourth, the authors stress the unfairness of some terms and conditions that are overly vague and hard to comprehend, due to policies containing lengthy rules with advanced language and unclear mandates.²⁴⁷ Finally, some terms and conditions may be insufficiently related to the goals of rehabilitation, such as the requirements that youth maintain a clean and sanitary residence, avoid growing their hair long, and refrain from getting a tattoo or piercing, without explicit court approval, while participating in an electronic monitoring program.²⁴⁸

Presumably, some of the burden of electronic monitoring would be eased if technology developed to the point where surveillance devices were tiny and unnoticeable to the greater public. Yet, despite possibly lowering stigma from external sources, youth would potentially still be impacted internally by the shame of criminal justice involvement, knowing that they are being constantly watched by the correctional system.²⁴⁹ This shame only

²⁴⁴ *Id.* at 9.

²⁴⁵ *Id.* at 10.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 10–11.

²⁴⁸ *Id.* at 11.

²⁴⁹ It should also be noted that although most juvenile court hearings are not open to the public, and juvenile records are not available at-large to the public, most people who a youth interacts with daily are aware of their criminal justice involvement. For example, many youth arrests happen at schools (either because police or school resource officers have a presence at the school and/or the school has reporting duties for certain offenses that require them to report directly to the juvenile court). Even more, many schools have probation officers stationed at schools, as educational and juvenile justice systems communicate more and overlap in multiple ways. *See, e.g.*, Tom Jewell, *Court program places probation officers in school districts*, TRIB LIVE (Oct. 14, 2001), http://triblive.com/x/pittsburghtrib/news/pittsburgh/s_41519.html; Natalie Kornicks, *School-Based Probation Officers Keep Close Eye on Students*, CAP. NEWS SERV. (Dec. 6, 2013), <http://cnsmaryland.org/2013/12/06/school-based-probation-officers-keep-close-eye-on-students/>; Lauren Lee White, *Why Are L.A. High Schoolers Getting Probation Without Committing a Crime?*, LA WEEKLY (Jul. 14, 2017, 7:05 AM), available at <http://www.laweekly.com/news/la-high-school-students-are-getting-voluntary-probation-without-committing-a-crime-8425607>. Family members, neighbors, and religious leaders are often all made aware by parents or by youth having to participate in mandatory programs based in the community, such as drug treatment centers, recreational and

works to deepen the attendant self-consciousness, anxiety, and stress of adolescence.²⁵⁰ Similar arguments were made in the campaign against the use of shackles on youth in court, another practice adopted from the adult criminal justice system.²⁵¹ The use of shackling of minors was described as humiliating, shame engendering, reflective of the treatment of wild animals, and severely damaging to an adolescent's fragile sense of self, despite the fact that it only occurred inside of the courtroom, away from the public.²⁵² This movement was ultimately successful in garnering the support of unlikely allies, such as prosecutors and judges.²⁵³ Both the American Academy of Child & Adolescent Psychiatry and the American Orthopsychiatric Association released reports condemning the use of shackles because of the

reporting centers, and community service providers. Most of the people that make up the center of a child's world and frequent interactions, from family to peers to teachers, will know about their criminal justice system involvement.

²⁵⁰ See Alicia Harden, *Rethinking the Shame: The Intersection of Shaming Punishments and American Juvenile Justice*, 16 U.C. DAVIS J. JUV. L. & POL'Y 93 (2012) (contending that shaming punishments conflict with juvenile justice in four ways: 1) because the effectiveness of shaming as a deterrent is unknown, imposing shaming punishments instead of rehabilitative services fails to promote traditional juvenile justice goals, 2) juvenile shaming punishments create public stigma, 3) shaming creates the potential of dangerous public exposure by placing youths in emotionally and physically vulnerable positions, and 4) shaming punishments are generally inconsistent with the individual purposes states have announced as goals for juvenile courts). See generally Regina Austin, "The Shame of it All": *Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173 (2004) (exploring stigma as a permanent collateral consequence of criminal justice involvement, and arguing that stigma leads to significant amounts of shame with negative impacts); June Price Tangney et al., *Shame, Guilt and Remorse: Implications for Offender Populations*, 22(5) J. FORENS. PSYCHIATRY PSYCHOL. 706 (2011) (noting that research argues strongly against "shaming" sentences designed to shame and humiliate offenders and highlighting how shame is associated with outcomes directly contrary to the public interest: denial of responsibility, substance abuse, psychological symptoms, predictors of recidivism, and recidivism itself).

²⁵¹ See Anita Nabha, *Shuffling to Justice: Why Children Should Not Be Shackled in Court*, 73 BROOK. L. REV. 1549, 1549–52 (2008).

²⁵² Bernard P. Perlmutter, "Unchain the Children": *Gault, Therapeutic Jurisprudence, and Shackling*, 9 BARRY L. REV. 1, 19 (2007).

²⁵³ ASS'N OF NAT'L PROSECUTING ATTYS., STATEMENT OF PRINCIPLES, available at http://njdc.info/wp-content/uploads/2015/12/Association-of-Prosecuting-Attorneys_Policy-Statement-on-Juvenile-Shackling.pdf (last visited Jan. 28, 2017) ("Juveniles are impressionable and the indiscriminate use of restraints in court has been shown to influence juveniles such that it negatively impacts their future behavior and also fosters a negative perception of the criminal justice system, including decreasing their level of cooperation and engagement with courtroom stakeholders . . ."); ABA, CRIMINAL JUSTICE SECTION, PROPOSED RESOLUTION AND REPORT TO THE HOUSE OF DELEGATES, available at http://www.americanbar.org/news/reporter_resources/midyear-meeting-2015/house-of-delegates-resolutions/107a.html (last visited Jan. 28, 2017) ("The practice of automatically shackling children and adolescents is contrary to the purpose of the juvenile justice system.").

psychological harms it poses for youth.²⁵⁴ In some ways, electronic monitoring is reminiscent of shackling. They both limit the movement of youth and act as depressing reminders of juvenile justice involvement and the power of the court to control an adolescent's body. Even more, electronic monitoring is strikingly similar to shackling in its ability to seriously impact the psycho-emotional well-being of youth. Yet, electronic monitoring takes these harms beyond the courtroom to the child's community and to the insides of their very own homes.

By understanding that adolescence proves to be one of the most difficult periods for youth to develop positive abilities to think strategically, make long term plans, set life goals, learn the social rules, and navigate complex situations as the cognitive and emotional systems are integrated, the punitiveness of electronic surveillance of youth is better assessed.²⁵⁵ Adolescents are at great risk for a wide range of behavioral and emotional problems, and not just from risk-taking, recklessness, and sensation-seeking, but also in just navigating highly complex social institutions and attempting to master strong emotions.²⁵⁶ Indeed, some of the most important questions that juvenile courts must face are: "How are adolescent passions being captured in modern society? How are these new intense motivational systems in the adolescent brain being shaped in ways that are healthy or unhealthy?"²⁵⁷ Electronic monitoring may be shaping youth development in very unhealthy ways, prompting one to seriously consider not only whether the perceived benefits of this practice with minors is worth all the apparent harms, but also if the juvenile court is undermining its own rehabilitative goals by failing to implement procedural measures that look to determine the scientific validation, through evidenced effectiveness and benefit for youth, of adult correctional practices before adoption for minors.

²⁵⁴ AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, POLICY STATEMENT (Feb. 17, 2015) https://www.aacap.org/aacap/Policy_Statements/2015/Mandatory_Shackling_in_Juvenile_Court_Settings.aspx ("The practice of indiscriminate shackling adds to the trauma that many of these youth have already experienced. It is also unnecessarily demeaning, humiliating and stigmatizing."); AM. ORTHOPSYCHIATRIC ASS'N, SHACKLING CHILDREN IN COURT: IMPLICATIONS FOR ADOLESCENT DEVELOPMENT (Jan. 27, 2015), available at http://njdc.info/wp-content/uploads/2014/09/Shackling_Reform_Position_Statement.pdf (last visited Jan. 28, 2017) ("... physical restraints are counterproductive to helping children and adolescents learn to control their own behavior . . . a policy of indiscriminate juvenile shackling is in essence a policy of retraumatization").

²⁵⁵ Dahl, *supra* note 218, at 18.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 21.

III. THE NEED FOR COMMUNITY INPUT

There are significant challenges presented in proposing that juvenile courts rely upon evidenced-based research and social science. Determining what is “harmful” is frequently hard to capture and open to interpretation, and some practices may initially indicate positive benefits yet prove harmful over time or when applied for certain populations or in certain jurisdictions. Even more, it presumes that in the ideal case where there is clear scientific evidence that an adult practice is not appropriate for use on minors, juvenile court judges could be held accountable for still implementing the practice. However, the juvenile justice system has proven to lack adequate accountability mechanisms. Thus, an emphasis on procedural measures that prioritize scientific validation must be coupled with external accountability through community input. Furthermore, communities most impacted by the policies and practices of the juvenile court have been more likely to promote rehabilitative measures; thus, their input is essential in holding juvenile courts accountable to implementing practices aimed at addressing the root causes of delinquency and restoring the child in the community.

A. ACCOUNTABILITY GAPS IN JUVENILE COURT DECISION-MAKING

Juvenile court judges have great discretion and decision-making power over juvenile court matters.²⁵⁸ When the first juvenile courts were established, judicial discretion and flexibility were seen as not only more effective, but also ultimately necessary for judges to be able to address the unique and individual rehabilitative needs of youth.²⁵⁹ So, unlike adult courts, one of the most defining features of juvenile court jurisdiction is that judges are bound by fewer requirements when deciding on detention alternatives and rendering dispositions for youth.²⁶⁰ For example, one child could be arrested and found guilty of shoplifting. For an adult, the options would be limited to either probation or a jail sentence, but for the juvenile, the judge could give a disposition that requires the child to write an apology

²⁵⁸ See Michele Benedetto Neitz, *A Unique Bench, a Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 129–35 (2011); Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037, 1037–45 (1993).

²⁵⁹ See William Barton, *Discretionary Decision-making in Juvenile Justice*, CRIME & DELINQ. (Oct. 1976), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/67946/10.1177_001112877602200408.pdf?sequence=2; Charles W. Thomas & W. Anthony Fitch, *The Exercise of Discretion in the Juvenile Justice System*, 32 JUV. & FAM. CT. J. 31, 50 (1981).

²⁶⁰ For clarity, the author is not suggesting that judges in adult criminal court do not have discretion, but rather that juvenile court judges have a significantly greater degree of discretion.

letter.²⁶¹ Another child could come before the same judge, be found guilty for the same offense with identical facts, and given a disposition requiring the child to spend six months at a boot camp. This discretion can be a source for positive judicial innovation and experimentation in new rehabilitative efforts, but it can also be the source of deep gaps in accountability and unregulated adultification practices and outcomes.

One of the areas in which juvenile court judges' discretion is often critiqued is in judicial waiver hearings, in part because of the vast racial disparities that mark these decisions.²⁶² Indeed, juvenile court judges' discretion often leads to harsher juvenile dispositions and treatment for Black youth versus their White peers, making Black youth more likely to be detained pending trial, more likely to be sentenced to lengthy terms at secured juvenile detention facilities versus therapeutic treatment programs, more likely to be excluded from juvenile jurisdiction and tried as adults, and more likely to have their probation revoked.²⁶³ A recent study conducted by economists at Louisiana State University (LSU) noted that juvenile court judges' sentencing varied by how well the LSU football team played.²⁶⁴ The study looked at juvenile court decisions in Louisiana between 1996 and 2012, analyzing the effects of emotional shocks associated with unexpected outcomes of football games.²⁶⁵ The researchers found that when there were losses by LSU football team, when they were expected to win, disposition lengths imposed by judges on juvenile defendants increased.²⁶⁶ The study also found evidence that Black youth were almost always the victims of the judges' wrath due to this emotional shock, indicating a negative

²⁶¹ Morgan Cook, *ESCONDIDO: Youth court gives young offenders second chance*, SAN DIEGO UNION-TRIB. (Aug. 22, 2011), <http://www.sandiegouniontribune.com/sdut-escondido-youth-court-gives-young-offenders-2011aug22-story.html>.

²⁶² See Thomas F. Geraghty & Rhee Will, *Learning From Tragedy: Representing Children in Discretionary Transfer Hearings*, 33 WAKE FOREST L. REV. 595 (1998); Tracey M. Hodson, *The Effect of Race on the Decision to Try a Juvenile as an Adult*, 20 J. JUV. L. 82 (1999); Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 L. & INEQ. 73 (1995).

²⁶³ See Lori Guevara, Lorenzo M. Boyd, Angela P. Taylor & Robert A. Brown, *Racial Disparities in Juvenile Court Outcomes: A Test of the Liberation Hypothesis*, 9 J. ETHNICITY IN CRIM. JUST. 200, 206–11 (2011); Jennifer H. Peck, *A Critical Examination of "Being Black" in The Juvenile Justice System*, 40 L. & HUM. BEHAV. 219, 224–28 (2016); Alan J. Tomkins, Andrew J. Slain, Marianne N. Hallinan & Cynthia E. Willis, *Subtle Discrimination in Juvenile Justice Decisionmaking: Social Scientific Perspectives and Explanations*, 29 CREIGHTON L. REV. 1619, 1631–36 (1996).

²⁶⁴ Ozkan Eren & Naci Mocan, *Emotional Judges and Unlucky Juveniles*, NBER WORKING PAPER NO. 22611 (2016).

²⁶⁵ *Id.* at 3.

²⁶⁶ *Id.*

predisposition towards Black youth.²⁶⁷ It is telling that in this high stakes context, juvenile judges, who are expected to be trained, impartial actors, lash out at Black youth over something as trivial as the outcome of a college football game. Perhaps no less telling is the absence of accountability toward these departures from efforts to protect youth from adult treatment.

Most states exclude the general public from delinquency hearings.²⁶⁸ Thus, another one of the challenges to fostering more accountability in juvenile courts is the anonymity requirement.²⁶⁹ It is one of the more traditional and known practices of the juvenile court to limit public access to case matters.²⁷⁰ Juvenile courts typically justify this secrecy by arguing that rehabilitation is more easily achieved for youth who are not stigmatized by juvenile justice involvement, with the public knowing all of their “youthful indiscretions.”²⁷¹ Yet, the irony is that for most youth, juvenile justice involvement is often very public in their daily lives. In addition to the visibility of electronic monitoring devices, many school districts and juvenile courts work together to comply with mandatory reporting requirements and juvenile justice personnel and probation officers often meet youth at school, their places of employment, and in their communities.²⁷² In the public spaces that matter the most to youth, their juvenile justice involvement is made apparent. Where the limited public access seems to be effective is with obfuscating the rationale behind judicial decision-making and discretion.

²⁶⁷ *Id.*

²⁶⁸ FELD, *supra* note 62, at 784.

²⁶⁹ See Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1131 (1991); Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors be Open or Closed?*, 18 YALE L. & POL'Y REV. 155, 155–59 (1999); Joshua M. Dalton, *At the Crossroads of Richmond and Gault: Addressing Media Access to Juvenile Delinquency Proceedings Through a Functional Analysis*, 28 SETON HALL L. REV. 1155, 1155–66 (1998); Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-McKeiver World*, 91 NEB. L. REV. 1, 25–33 (2012); Kathleen Laubenstein, *Media Access to Juvenile Justice: Should Freedom of the Press be Limited to Promote Rehabilitation of Youthful Offenders?*, 68 TEMP. L. REV. 1897, 1898–99 (1995); Mich. L. Rev. Ass'n, *The Public Right of Access to Juvenile Delinquency Hearings*, 81 MICH. L. REV. 1540, 1554–59 (1983); Joseph B. Sanborn Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile Court*, 15 CHILD. LEGAL RTS. J. 35, 35 (1995); Jan L. Trasen, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?*, 15 B.C. THIRD WORLD L. J. 359, 372–74 (1995).

²⁷⁰ FELD, *supra* note 62, at 787.

²⁷¹ See Barbara Bennett Woodhouse, *Youthful Indiscretions: Culture, Class Status, and the Passage to Adulthood*, 51 DEPAUL L. REV. 743, 744 (2002).

²⁷² See, e.g., Natalie Kornicks, “School-Based Probation Officers Keep Close Eye on Students,” CAP. NEWS SERV., (Dec. 6, 2013), <http://cnsmaryland.org/2013/12/06/school-based-probation-officers-keep-close-eye-on-students/>.

Rarely are the daily decisions made by juvenile judges and the practices implemented by the court put to any meaningful scrutiny. This limited access has made it harder to be able to hold the juvenile court accountable and has paved the way for numerous judicial scandals.²⁷³

The great degree of harm that youth are exposed to in these highly discretionary, closed proceedings was brought to light in the “Kids For Cash” scandal in Pennsylvania, which drew national and international attention.²⁷⁴ In Luzerne County, two juvenile court judges received financial kickbacks for sending youth with minor offenses, such as making fun of a principal on a Myspace website, to private juvenile placement facilities.²⁷⁵ This illicit operation, where the judges forced youth to waive the right to counsel, netted the judges well over two million dollars during the course of their stints on the bench.²⁷⁶ After this scandal, Pennsylvania made substantial changes to its law governing when a child may appear before a judge without an attorney, making it one of the strongest laws in protecting the right to counsel for youth in the country.²⁷⁷ However, oddly enough, similar measures were not taken to ensure greater accountability of juvenile court judges’ decisions to forego rehabilitative efforts versus adult-like treatment.

The presence of a lawyer, while impactful in helping youth understand their rights and navigate the juvenile justice system, is not a counterbalance to the great power that juvenile court judges exercise in determining dispositions for youth. Indeed, juvenile court judges have limited internal accountability measures to ensure that they are pursuing the rehabilitative ideal. This is even more concerning given that appellate practice in juvenile court is virtually nonexistent, with only 1% of juvenile cases being appealed, weakening the power of higher courts to review biased and harsh dispositions.²⁷⁸ These realities put juvenile courts in positions to make

²⁷³ Martin Guggenheim & Randy Hertz, *Selling Kids Short: How “Rights for Kids” Turned Into “Kids for Cash”*, 88 TEMP. L. REV. 653, 667–70 (2016).

²⁷⁴ Stephanie Chen, *Pennsylvania rocked by ‘jailing kids for cash’ scandal*, CNN (Feb. 24, 2009), <http://www.cnn.com/2009/CRIME/02/23/pennsylvania.corrupt.judges/>.

²⁷⁵ Sarah L. Primrose, *When Canaries Won’t Sing: The Failure of the Attorney Self-Reporting System in the “Cash-For-Kids” Scheme*, 36 J. LEGAL PROF. 139, 147 (2011).

²⁷⁶ *Id.*

²⁷⁷ See 42 PA. C.S. § 6337.1.

²⁷⁸ See Megan Annitto, *Juvenile Justice on Appeal*, 66 U. MIAMI L. REV. 671, 686 (2012); Steven A. Drizin & Gregory Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 294–300 (2007); Sarah Gerwig-Moore & Leigh S. Schrope, *Hush, Little Baby, Don’t Say a Word: How Seeking the “Best Interests of the Child” Fostered a Lack of Accountability in Georgia’s Juvenile Courts*, 58 MERCER L. REV. 531, 535 (2007). Juvenile cases are less likely to be appealed than adult criminal matters for a number of reasons: 1) juvenile divisions in most public defender offices do not have dedicated

seemingly unregulated decisions in a vacuum when determining whether to adopt an adult correctional practice as a detention alternative to be used on minors. These highly discretionary decisions hold major implications for justice, fairness, and ultimately the goal of “saving children.”

B. “COMMUNITY-INFORMED” DECISION-MAKING

The juvenile court could benefit from establishing procedures that incorporate a “community-informed” model of juvenile justice. This model would elevate the role of families and communities, particularly those that are most impacted by the policies and practices of the juvenile court, to act as partners in helping juvenile courts develop services and rehabilitate youth. These models could be in the form of review boards, community/court partnership agreements and memorandums of understanding, advisory committees, or other vehicles through which community members may find a seat at the decision-making table of local juvenile court policies. In collaboration with juvenile courts, these partnerships would promote several features: a) data collection and accessibility to evaluate programming outcomes, b) reliance upon scientific research on best practices for rehabilitation, c) space for the voices/concerns of those impacted most by juvenile court policies, d) agreed upon norms/values for juvenile services and practices, and e) true participation through voting, veto, or proposal powers. Under this model, juvenile court judges would retain a degree of discretion to pursue rehabilitative strategies for youth and experiment with detention alternatives, yet they would operate with guidance and collaboration of communities.

Data collection would be important in understanding how frequently electronic monitoring is used, what categories of youth (race, disability, gender, etc.) are primarily subjected to the practice, what charged offenses and juvenile history typically lead to electronic monitoring, and whether the use of the practice is having the intended outcomes in a particular jurisdiction. As noted in Part II, scientific data on the impact of electronic monitoring on minors is lacking. Further research on such impacts and how the practice is experienced by youth would be crucial in determining its

appellate units, forcing already overburdened juvenile defenders to have to take those matters; 2) where there are appellate resources in a public defender office they are often devoted to cases perceived as more serious, such as adult felony cases; 3) juveniles often spend less time in detention than an adult would when sentenced, making lengthy appeal processes moot when a juvenile has already completed their sentence; and 4) the lack of jury trials and the nature of closed proceedings places a negative incentive for juvenile defenders to curry favor with the judges they appear before daily, not wanting to upset a judge by taking an appeal for one juvenile and expose other clients to the judge’s potential backlash.

rehabilitative value. This information can be gleaned both through research and collaboration with communities most impacted by the juvenile court's experimentation with detention alternatives. These communities and individuals will have the clearest view of all the pitfalls of any practice, ways to improve, alternative paths to explore, and the real needs of the community. Additionally, agreed upon values would be necessary and useful as accountability measures. If a juvenile court and jurisdiction commits to rehabilitation, reducing trauma, and positive adolescent development, then it can be held accountable and challenged when it introduces practices that undermine these values. Establishing avenues for greater accountability is critical here; thus, community members should be able to not only weigh in on juvenile court policies and practices but also exercise power to vote on the adoption of practices, to introduce their own proposals, and to veto practices that offend agreed upon values and goals.

Similar models have been developed in the fields of education and public health. In education there is substantial scholarship exploring "parental and community involvement" models for holding schools accountable to the promise of high quality education.²⁷⁹ These models aim to not only encourage communities to be more involved with schools, but to also promote the development of true collaboration with communities, through input on the coordination of resources and including communities in decision-making and school governance.²⁸⁰ In Ohio, for example, the Department of Education promotes the involvement of communities as a best practice in ensuring that schools are accountable to quality education and the needs and values of the communities they serve.²⁸¹ These best practices aim to involve communities in school planning and leadership by providing roles for community members on "all decision-making and advisory committees, properly training them for areas in which they will serve (e.g., curriculum,

²⁷⁹ See JOYCE L. EPSTEIN, *SCHOOL, FAMILY, AND COMMUNITY PARTNERSHIPS: PREPARING EDUCATORS AND IMPROVING SCHOOLS 9–11* (2001); Carl Corter & Janette Pelletier, *Parent and Community Involvement in Schools: Policy Panacea or Pandemic?*, in INTERNATIONAL HANDBOOK OF EDUCATION POLICY 295, 295 (2005); Joyce L. Epstein, *Improving Family and Community Involvement in Secondary Schools*, 73 EDUC. DIG. No. 6, 9, 10–12 (2008); Mavis G. Sanders & Karla C. Lewis, *Building Bridges Toward Excellence: Community Involvement in High Schools*, 88 HIGH SCH. J. 3 1, 2–9 (2005); Mavis G. Sanders, *Community Involvement in Schools: From Concept to Practice*, 35(2) URB. & EDUC. SOC. 161, 165–73 (2003).

²⁸⁰ Joyce L. Epstein & Karen Salinas, *School and Family Partnerships*, in ENCYCLOPEDIA OF EDUCATION RESEARCH (6th ed. 1992).

²⁸¹ *Sample Best Practices for Parent Involvement in Schools*, OHIO DEP'T OF EDUC., <http://education.ohio.gov/Topics/Other-Resources/Family-and-Community-Engagement/Getting-Parents-Involved/Sample-Best-Practices-for-Parent-Involvement-in-Schools> (last modified June 7, 2016).

budget, or school safety)” and “equal representation” in school governing bodies.²⁸²

In public health, there is a rich literature on the effectiveness of “community engagement” models in securing positive public health outcomes.²⁸³ These models promote communities developing agency in directing the delivery of health services and shaping the health policies and strategies used in their neighborhoods. In East Los Angeles, for example, a community engagement model was used to increase access to high quality, affordable produce to counteract high rates of cardiovascular disease within the community.²⁸⁴ With this project, state universities worked with community residents to transform local grocery stores to improve purchasing options and dietary behaviors.²⁸⁵ The project development and strategies implementation directly involved the leadership of community partners through the use of Community Advisory Boards.²⁸⁶

These models have, of course, been a work in progress and refined over time, with local communities adapting them to their particular needs and concerns, and experiencing varying levels of success and effectiveness.²⁸⁷ What has been shown to be effective is genuine involvement and engagement with communities, particularly with communities that have been historically

²⁸² *Id.*

²⁸³ See Syed M. Ahmed et al., *Overcoming Barriers to Effective Community Based Participatory Research in US Medical Schools*, 17 *EDUC. FOR HEALTH* 2, 141, 142–43 (2004); Eugenie Hildebrandt, *A model for community involvement in health (CIH) program development*, 39 *SOC. SCI. & MED.* 247, 249–54 (1994); Barbara A. Israel et al., *Review of Community-Based Research: Assessing Partnership Approaches to Improve Public Health*, 19 *ANN. REV. PUB. HEALTH* 173, 177–81 (1998); Kathleen M. Macqueen et al., *What Is Community? An Evidence-Based Definition for Participatory Public Health*, 91(12) *AJPH* 1929, 1935–36 (2001); Beth Milton et al., *The impact of community engagement on health and social outcomes: a systematic review*, 47 *CMTY. DEV. J.* 316, 321 (2012); Alison O’Mara-Eves et al., *The effectiveness of community engagement in public health interventions for disadvantaged groups: a meta-analysis*, 15 *BMC PUB. HEALTH* 129, 130 (2015); F. Douglas Scutchfield et al., *The public and public health organizations: Issues for community engagement in public health*, 77(1) *HEALTH POL’Y* 76, 78–79 (2006); Nina B. Wallerstein & Bonnie Duran, *Using Community-Based Participatory Research to Address Health Disparities*, 7 *HEALTH PROMOTION PRAC.* 312, 312–19 (2006).

²⁸⁴ Deborah C. Glik et al., *Community-Engagement to Support Cardiovascular Disease Prevention in Disparities Populations: Three Case Studies*, 9 *J. HEALTH DISPARITIES RES. & PRAC.* 92, 93–98 (2016).

²⁸⁵ *Id.* at 94.

²⁸⁶ *Id.*

²⁸⁷ See Aaron Schutz, *Home Is a Prison in the Global City: The Tragic Failure of School-Based Community Engagement Strategies*, 76 *REV. EDUC. RES.* 4, 691, 693–95 (2006) (noting that community involvement models are only effective when there is genuine community power that goes beyond superficial participation).

marginalized and excluded from education and health institutions' decision-making processes, such as economically depressed communities of color.²⁸⁸ Overall, the exploration and implementation of these models that elevate the role of communities has been successful in altering the ways in which education and public health services are understood, from institutions engaged in linear service delivery to institutions that require community participation and partnership to achieve effectiveness and ensure external institutional accountability.

Although no current models exist for similarly effective engagement of communities in the juvenile justice system, the influential participation of communities in ensuring juvenile courts provide access to rehabilitative programming over punitive measures is not without some precedent.²⁸⁹ A similar approach was used in the juvenile justice system during the mid-twentieth century, and history has shown that when given the opportunity to have influence over juvenile justice programming, communities of color, in particular, are less inclined to promote punitive measures.²⁹⁰ During the 1950s and 1960s, the marginalization of Black youth from rehabilitative efforts became a civil rights issue for Black communities, and great strides were made by Black "Child-Savers" to build the power of influence over juvenile court policies and practices.²⁹¹ Black communities were overwhelmingly more supportive of rehabilitative practices for Black youth in these efforts and viewed it as key to being able to build and maintain strong communities.²⁹² Unfortunately, this rise in influence and external accountability, which led to more Black youth breaking barriers and gaining access to the rehabilitative resources of the juvenile justice system, coincided with the move of the juvenile court from essentially a social welfare

²⁸⁸ See generally Sheila Cyril et al., *Exploring the role of community engagement in improving the health of disadvantaged populations: a systematic review*, 8 GLOBAL HEALTH ACTION 1 (2015); Christine A. Lam et al., *The Impact of Community Engagement on Health, Social, and Utilization Outcomes in Depressed, Impoverished Populations: Secondary Findings from a Randomized Trial*, 29 J. AM. BD. FAM. MED., 325, 334–36 (2016); Victoria K. Ngo et al., *Community Engagement Compared With Technical Assistance to Disseminate Depression Care Among Low-Income, Minority Women: A Randomized Controlled Effectiveness Study*, 106 AM. J. PUB. HEALTH, 1833, 1839–40 (2016); O'Mara-Eves et al., *supra* note 283; Camille Wilson & Lauri Johnson, *Black Educational Activism for Community Empowerment: International Leadership Perspectives*, 17 INT'L J. MULTICULTURAL EDUC., 102, 111–15 (2015).

²⁸⁹ See Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1341 (2013).

²⁹⁰ WARD, *supra* note 60, at 129 (highlighting how Black Child-Savers pushed back against the punitive treatment of Black youth and sought access to rehabilitative services).

²⁹¹ *Id.*

²⁹² *Id.*

institution to a more formal criminal court for youth.²⁹³ This new formality, along with the “Get Tough” on crime movement and culture of punishment, which in blatant racial overtones exclaimed the coming of dangerous Black juvenile super-predators, weakened the role of impacted communities and the progress that had been made, and paved the way for more punitive treatment.²⁹⁴ Thus, it is not without coincidence that as juvenile court became more Black, it also became more punitive.

Despite the potential advantages that could come from re-establishing this approach to juvenile justice, there are several obvious challenges to implementing this model within the juvenile justice system today. First, the community-informed approach assumes a degree of democratic muscle on behalf of communities to get juvenile jurisdictions to agree to have community members exercise influence in the operations and policies of the court. Second, the community-informed model presumes a cohesive “community” at a time when many of the historically impacted communities are changing and gentrifying.²⁹⁵ This could require community members to act together and mobilize even when all kids in the community may not be impacted. Even more, how is community defined? Third, the community-informed model assumes that if impacted communities exercised influence over juvenile court policies and programming, they would be less inclined to perpetuate adultification than courts traditionally have been. Finally, the community-informed model could be susceptible to juvenile courts’ exploitation of the power imbalances between courts and communities and incorporation of community partnerships in name only, without any real

²⁹³ WARD, *supra* note 60, at 234. Ward argues that this shift happened as a result of two changes. First, as the last few decades of the twentieth century approached and the “Get Tough” on crime movement grew, two classes of juvenile offenders were delineated: minor delinquent and the serious delinquent, or “super predators,” who were “uniquely dangerous and morally depraved.” *Id.* The minor delinquent would still be afforded rehabilitative services and resources, while the serious delinquent would be presumed to have forfeited the benefits of rehabilitation and childhood. *Id.* These distinctive categories were overwhelmingly delineated along racial lines. *Id.* Black youth were characterized as extremely dangerous and without conscience. *Id.* Second, as these changes were happening, formal racial integration into the rehabilitative opportunities of the juvenile court waned with a renewed alienation of the Black community from juvenile justice governance, and an erosion of community controls, in a backlash against Black youth, who were portrayed as leading the rise of serious youth crime. *Id.*

²⁹⁴ *Id.*

²⁹⁵ See Jackelyn Hwang, *Gentrification in Changing Cities: Immigration, New Diversity, and Racial Inequality in Neighborhood Renewal*, 660(1) ANNALS AM. ACAD. POL. & SOC. SCI. 319, 319–20 (2015); B.J. Newman et al., *Diversity of a Different Kind: Gentrification and Its Impact on Social Capital and Political Participation in Black Communities*, 1(2) J. RACE, ETHNICITY & POL. 316, 322–24 (2016).

attendant power.²⁹⁶

Much more research and scholarship will be needed to explore what a community-informed model would look like and mean for challenging the treatment of youth as adults, how to navigate the associated challenges to implementation, and how effective it could be in addressing practices that appear to be much more punitive than rehabilitative, such as electronic monitoring.²⁹⁷ Such a focus could prove to be a promising new way forward that capitalizes on the strengths and assets of communities, progress that has already been made to de-emphasize juvenile detention and punishment, and the need to counterbalance the unregulated power of juvenile courts. Community members from communities whose children are disproportionately represented in the juvenile justice system are uniquely positioned to advocate for practices that address root causes of delinquency in youth because they have a greater understanding of their needs, affinity toward restorative practices, and a higher stake in the positive growth, development, and rehabilitation of those youth that ultimately will return to the community.

CONCLUSION

As the capabilities of surveillance technologies increase—potentially leading to even more powerful devices that can provide video feeds, record audio, test for illegal substances, and even immobilize a person—the juvenile court's discretion to experiment with these devices in the name of rehabilitation demands more oversight. The use of new technology to surveil youth appears to be particularly concerning given that they are still developing their sense of self and that punitive measures have been proven to be less effective on minors. Certainly, more research is needed to capture the experiences of youth under electronic surveillance and gauge the degree of punitiveness youth suffer. Yet, even today, one must appreciate the power of courts to extend the arm of corrections and punishment into homes and communities with little to no meaningful regulation from within or without, particularly for youth. The for-profit prison industry's recent movement in acquiring companies developing these technologies should raise additional concerns for decarceration advocates that have spent years fighting these very

²⁹⁶ See Patricia Baquedano-Lopez et al., *Equity Issues in Parental and Community Involvement in Schools: What Teacher Educators Need to Know*, 37 REV. RES. IN EDUC. 149,156–63 (2013).

²⁹⁷ The author intends to further explore these issues centered on surveillance, accountability, and models for community control and influence over the increasing use of technology in the criminal justice system in future projects.

same companies' roles in mass incarceration.²⁹⁸ Thus, in attempting to address the harms of mass incarceration, the potential to replicate similar harms in a new mass monitoring regime must not be overlooked or underestimated.

²⁹⁸ In the Pub. Int., *GEO Group and Corrections Corporation of America spend billions of taxpayer dollars purchasing smaller companies*, IN THE PUB. INT. (Sept. 2016), https://www.inthepublicinterest.org/wp-content/uploads/ITPI_PrivatePrisonsMnA_FactSheet_Sept2016.pdf; George Joseph, *The Private Prison Industry's New Criminal Justice Ventures*, CITYLAB (Sept. 14, 2016), <http://www.citylab.com/crime/2016/09/the-private-prison-industrys-new-criminal-justice-ventures/499964/> (last visited Jan. 28, 2017); James Kilgore, *Electronic Monitoring: Some Causes for Concern*, PRISON LEGAL NEWS (Mar. 2012), <https://www.prisonlegalnews.org/news/2012/mar/15/electronic-monitoring-some-causes-for-concern/> (last visited Jan. 28, 2017); Jeff Sommer, *Trump's Win Gives Stocks in Private Prison Companies a Reprieve*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/your-money/trumps-win-gives-stocks-in-private-prison-companies-a-reprieve.html>.