

SHIFTING THE PARADIGM:  
AN ABOLITIONIST ANALYSIS OF THE  
RECENT JUVENILE JUSTICE  
“REVOLUTION”

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## INTRODUCTION

A wave of reforms to juvenile justice policy have swept through the United States in recent years, bringing about tremendous hope and optimism for the future of juvenile justice in this country. Nationwide, courts, legislatures, and even prosecutors have been moving away from the extraordinarily punitive juvenile justice policies enacted in the 1990s and are embracing more rehabilitative policies that recognize the well-established differences between adolescents and adults. This sea of change can be traced back to the United States Supreme Court's groundbreaking 2005 decision in *Roper v. Simmons*, where the Court ruled that imposing the death penalty for juvenile offenders is cruel and unusual punishment.<sup>1</sup>

That the *Roper* decision was groundbreaking signals the abysmal starting point for the current wave of reforms; until 2005, the United States was the only country to execute people based on crimes they committed when they were under the age of eighteen.<sup>2</sup> The United States is now the only country *in the world* that sentences youth under the age of eighteen to life without the possibility of parole, or to de facto life sentences, based on crimes committed as juveniles.<sup>3</sup>

This is, without a doubt, a time where many policymakers, courts, and prosecutors are embracing a more lenient approach to juvenile justice—one that contrasts sharply with the “superpredator” myth that drove punitive, fear-based juvenile justice policies throughout the 1990s and early 2000s. The Supreme Court has weighed in through a series of decisions that incorporate adolescent brain development science to explain why youth should be treated differently from adults when it comes to extreme sentences such as life without the possibility of parole.<sup>4</sup> Law professor Cara Drinan has characterized this Supreme Court jurisprudence as inspiring a “revolution” in the field of juvenile justice.<sup>5</sup>

<sup>1</sup> *Roper v. Simmons*, 543 U.S. 551, 575 (2005). Many scholars trace the recent wave of changes back to the *Roper v. Simmons* case and the subsequent cases that followed from *Roper*. See, e.g., Cara H. Drinan, *The Miller Revolution*, 101 IOWA L. REV. 1787, 1795–96 (2016); THOMAS J. BERNARD & MEGAN C. KURLYCHEK, *THE CYCLE OF JUVENILE JUSTICE* 178–79 (2d ed. 2010).

<sup>2</sup> *Roper*, 543 U.S. at 575 (“Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”).

<sup>3</sup> See Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 983, 985 (2008) (reporting that while there are a handful of other countries that statutorily allow the sentence, the United States is the only country to impose life without parole sentences on people under the age of eighteen at the time they committed the crime).

<sup>4</sup> See *Roper*, 543 U.S. at 569–70 (reasoning that the lack of maturity, susceptibility to outside influences, and capacity to change distinguish adolescents from adults and undermine the legitimacy of imposing the death penalty on juveniles); *Graham v. Florida*, 560 U.S. 48,

States across the country have enacted legislation that limits transfers from juvenile to adult court,<sup>6</sup> and that creates mechanisms to consider release for people serving life sentences for crimes they committed as youth.<sup>7</sup> Progressive prosecutors have been elected in counties across the country, embracing prosecution policies that focus on diverting people from the courts and reducing transfers of juveniles to adult court.<sup>8</sup> The number of youth who are incarcerated in juvenile facilities in the United States is down 60 percent since 2000,<sup>9</sup> and 80 percent fewer youth are prosecuted in adult courts each year when compared to the mid-1990s.<sup>10</sup>

This change in the tide of juvenile justice policy comes at a time where a broader segment of US society has awakened to the realities of racism that have plagued this country since its inception—awareness triggered by the disturbing images of the murder of George Floyd by a Minneapolis police officer.<sup>11</sup> This increased concern about the racial biases endemic to policing, criminal justice,

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71–74 (2010) (considering the penological justifications for punishment in light of the hallmark features of youth and concluding that “penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders”); *Miller v. Alabama*, 567 U.S. 460, 470–71, 479 (2012) (relying upon *Roper* and *Graham*’s conclusion “that children are constitutionally different from adults for purposes of sentencing” to conclude that mandatory life without parole sentences for juveniles who have committed homicide violate the Eighth Amendment); *Montgomery v. Louisiana*, 577 U.S. 190, 206, 208 (2016) (concluding that *Miller* is retroactive because it announced a substantive change to the law and reiterating that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” (quoting *Miller*, 567 U.S. at 479)).

<sup>5</sup> Drinan, *supra* note 1, at 1788 (“[a] juvenile justice revolution in America is underway.”).

<sup>6</sup> See MARCY MISTRETT & MARIANA ESPINOZA, SENT’G PROJECT, YOUTH IN ADULT COURTS, JAILS, AND PRISONS 8 (2021), <https://www.sentencingproject.org/publications/youth-in-adult-courts-jails-and-prisons/> [<https://perma.cc/YAL4-CNJH>] (reporting that “half the states have narrowed or eliminated pathways to adult court” since 2000).

<sup>7</sup> See Beth Caldwell, *Creating Meaningful Opportunities for Release: Graham, Miller and California’s Youth Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE 245, 251–62 (2016) (discussing various states’ responses to creating “meaningful opportunities for release” and other resentencing procedures in response to the Supreme Court’s opinions in *Graham* and *Miller*).

<sup>8</sup> See *infra* text accompanying notes 202–27.

<sup>9</sup> WENDY SAWYER, PRISON POL’Y INITIATIVE, YOUTH CONFINEMENT: THE WHOLE PIE 2019 (2019), <https://www.prisonpolicy.org/reports/youth2019.html> [<https://perma.cc/54KJ-8YW4>].

<sup>10</sup> John Kelly, *Estimate Shows Adult Court is Increasingly Rare Destination for Youth*, THE IMPRINT (Nov. 9, 2021, 12:26 PM), <https://imprintnews.org/youth-services-insider/estimate-shows-adult-court-is-increasingly-rare-destination-for-youth/60281> [<https://perma.cc/LAGT-6BH9>] (reporting on data published by the National Center for Juvenile Justice and comparing the 250,000 youth prosecuted in adult courts annually in the mid-1990s to the 53,000 youth prosecuted in adult courts in 2019).

<sup>11</sup> See, e.g., Andy Olin, *The Killing of George Floyd Altered Views of Racial Discrimination in Houston*, KINDER INST. FOR URB. RSCH.: URB. EDGE (May 12, 2021), <https://kinder.rice.edu/urbanedge/2021/05/12/killing-george-floyd-altered-houston-area-views-racial-discrimination> [<https://perma.cc/9YRC-29S9>] (reporting that George Floyd’s murder “prompted a new sensitivity to systemic racism”).

and juvenile justice has triggered widespread calls for reform.<sup>12</sup> This is a remarkable time in US history where there is a sense that real, lasting, transformative change *may* be possible.<sup>13</sup>

This Article is inspired by the transformative potential of this moment, as well as by a concern that the current wave of reforms may fall short of accomplishing the kind of change that is needed to undo the profound harms of the juvenile justice system as it is currently constructed in the United States. While the importance of recent changes to juvenile justice policy cannot be overstated in terms of the harm prevented and the lives saved,<sup>14</sup> there is also tremendous risk that these reforms will be short-lived.

When we look at the current reforms in the context of the historical patterns of juvenile justice policies in the United States, the more lenient reforms of the past decade fit into a predictable cyclical pattern that has repeated itself in juvenile justice policy in the United States—a pendulum that has swung back and forth, oscillating between lenient and harsh responses to juvenile crime over time.<sup>15</sup> If recent reforms are merely a predictable step in this cycle, the next step will be a reversal back to a more punitive approach. The United States is, however, at a point where it may be possible to break this cycle so that the more lenient approach currently being embraced is not overcome by a punitive response ten years from now.<sup>16</sup>

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<sup>12</sup> See Audra D. S. Burch et al., *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES, <https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html> [<https://perma.cc/EFZ9-XK4U>] (Oct. 5, 2021) (reporting that in the months after George Floyd’s death, “calls for racial justice would touch seemingly every aspect of American life on a scale that historians say had not happened since the civil rights movement of the 1960s”).

<sup>13</sup> See Jamillah Bowman Williams et al., *#BlackLivesMatter—Getting from Contemporary Social Movements to Structural Change*, 12 CAL. L. REV. ONLINE 1, 2 (2021) (discussing the Black Lives Matter movement’s potential to bring about structural change and acknowledging that, as a result of the movement, “we have seen this begin to inspire deeper social, cultural, and legal change, in ways that previously felt like distant hope”); Daniel Druckman & Esra Çuhadar, *Civil Society and Peaceful Social Change: Black Lives Matter*, 13 GLOBAL-E J. (2020), <https://globalejournal.org/print/pdf/node/2981> [<https://perma.cc/7PAH-JS3A>] (discussing the potential for the Black Lives Matter movement to lead to “durable change”).

<sup>14</sup> See Kelly, *supra* note 10 (explaining that nearly 200,000 fewer young people each year are prosecuted in adult court, which is a major victory and likely to enhance the life opportunities of these youth in more ways than imaginable.) I have seen firsthand the importance of recent reforms on the lives of individuals I have helped to represent through Southwestern Law School’s Youth Offender Parole Clinic and do not mean to minimize the import of obtaining release in individual cases. Rather, my goal here is to acknowledge the positive aspects of the recent changes while also recognizing their limits.

<sup>15</sup> See BERNARD & KURLYCHEK, *supra* note 1, at 3 (tracing the historical patterns of juvenile justice policy in the United States and arguing that it follows a predictable cycle that moves between leniency and punitiveness).

<sup>16</sup> There are signs of backlash and criticisms of the wave of more lenient juvenile justice policies and progressive prosecution policies, which could be paving the road for this pendulum shift. See, e.g., James Queally, *Sexual Assault of 10-year-old Sparks Latest Criticism of L.A. District Attorney’s Policies*, L.A. TIMES (Jan. 15, 2022, 5:00 AM), <https://www.latimes>

My central claim is that in order to break out of the cycle that has historically characterized US juvenile justice—where the pendulum swings back and forth between lenient, rehabilitative policies and harsh, punitive policies over time—a paradigm shift that fundamentally alters the theoretical conceptualization of the problem of juvenile crime and delinquency is needed. This would require a shift away from centering the locus of inquiry on individual actors and toward a structural analysis that calls for a dramatic redistribution of resources. This shift would acknowledge the well-substantiated role of structural racial, ethnic, and economic inequality in causing juvenile crime and delinquency. And this shift should be rooted in a commitment to prison abolition, which “may be understood . . . as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement.”<sup>17</sup>

This article builds upon the theoretical framework for considering prison abolition that Angela Y. Davis set forth in *Are Prisons Obsolete?*, where she argues that “[i]n thinking about the possible obsolescence of the prison, we should ask how it is that so many people could end up in prison without major debates regarding the efficacy of incarceration.”<sup>18</sup> In the case of juvenile detention—which is inextricably linked to the juvenile justice system—the research is clear: not only does detaining young people increase criminality, it also causes long-lasting harmful effects to young people’s educational and employment opportunities, as well as to their physical and mental health.<sup>19</sup> Tragically, in

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.com/california/story/2022-01-15/sexual-assault-of-10-year-old-sparks-latest-criticism-of-l-a-district-attorneys-policies [https://perma.cc/GST4-U3NC] (criticizing the policy of Los Angeles District Attorney George Gascón not to transfer juveniles to adult court).

<sup>17</sup> Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015). In a law review article about prison abolition, Allegra McLeod describes abolition as adopting different alternatives, such as

“reinvestment to strengthen the social arm of the state and improve human welfare; decriminalizing less serious infractions; improved design of spaces and products to reduce opportunities for offending; urban redevelopment and ‘greening’ projects; proliferating restorative forms of redress; and creating both safe harbors for individuals at risk of or fleeing violence and alternative livelihoods for persons otherwise subject to criminal law enforcement.” *Id.*

<sup>18</sup> ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 11 (2003).

<sup>19</sup> See BARRY HOLMAN & JASON ZIEDENBERG, JUST. POL’Y INST., *THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES* 2–10 (2006); see also Nancy E. Dowd, *Introduction*, in *A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM* 1, 3 (Nancy E. Dowd ed., 2015) (“Many have criticized and critiqued the current system—including judges, prosecutors, public defenders, defense lawyers, advocates for youth, teachers, and scholars. Judged solely on its outcomes (with pockets of exceptions), it is a failed system.”).

many instances the juvenile justice system “deliberately places youth into hostile environments that adversely affect their mental health and wellbeing.”<sup>20</sup>

This Article makes important contributions to the legal scholarship on juvenile justice by (1) linking the theoretical underpinnings of the juvenile court from the time it emerged to the current failures of the juvenile justice system, and (2) arguing for a paradigm shift that moves away from the focus on the individual as the cause of juvenile crime and instead focuses on systemic, structural issues that can only be resolved through a dramatic redistribution of resources and a reconceptualization of juvenile crime. This analysis is rooted in prison abolition theory, which is particularly important because the academic literature linking the juvenile justice system to prison abolitionist theory is scarce.<sup>21</sup> This Article applies prison abolition theory not only to juvenile incarceration facilities but also to the entire system of juvenile justice, arguing that true change will not be possible within the constraints of the framework of the juvenile justice system as it has been conceptualized in the United States since the 1800s. It discusses the historical and theoretical underpinnings of the current juvenile justice paradigm and argues for a paradigm shift away from the focus on the individual, and toward a more holistic, structural framework that incorporates a restorative justice model to respond to juvenile crime, and that reframes the very concept of “juvenile crime.” This analysis urges caution in celebrating the recent wave of change in the field and argues that in order to accomplish lasting change, it is important to think more broadly.

Part I will present a history of the juvenile court and the two primary theoretical arguments that have been employed historically, and that continue to be employed, to justify the juvenile justice system. On the one hand, young people are framed as deserving of protection; on the other hand, youth are constructed as threats. From both perspectives, the state is constructed as needing to exercise social control over the young person—either to help or to punish—and the “problem” of juvenile crime is linked to individual behavior rather than structural or systemic issues. Efforts to “help” often include punitive sanctions such as incarceration, calling into question the legitimacy of framing these state interventions as helpful. This framework, which attaches the locus of responsibil-

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<sup>20</sup> Durrell M. Washington et al., *Achieving Juvenile Justice Through Abolition: A Critical Review of Social Work's Role in Shaping the Juvenile Legal System and Steps Toward Achieving an Antiracist Future*, 10 SOC. SCIS. 211, 212 (2021).

<sup>21</sup> See generally Nancy E. Dowd, *Black Lives Matter: Trayvon Martin, The Abolition of Juvenile Justice and #BlackYouthMatter*, 31 U. FLA. J.L. & PUB. POL'Y 43 (2020) (arguing for the abolition of the juvenile justice system because it is developmentally inappropriate and is characterized by a pattern of racial, ethnic, and gender disparities). Outside of legal academia, others have broached the subject. See Scott Wm. Bowman, *The Kids Are Alright: Making a Case for Abolition of the Juvenile Justice System*, 26 CRITICAL CRIMINOLOGY 393, 394 (2018) (arguing “for the full abolition of the entire juvenile justice system”). A group of social workers published an article in 2021 outlining the anti-Black racism of the current juvenile legal system and calling “for a radical reimagining of how society treats young people” by arguing that “social workers must ardently embrace the abolitionist framework” regarding the juvenile legal system and youth prisons. Washington et al., *supra* note 20, at 211.

ity on the individual rather than social structures, is one that is ripe for reconsideration, and an abolitionist framework calls for this kind of re-examination.

Part II will describe the current wave of reforms in the field of juvenile justice—reforms that are truly remarkable and should be celebrated because of the tremendous work they have done to reduce the harms of the system for individuals and their families. Specifically, it will consider legislative, judicial, and prosecutorial changes in the United States since 2005. This Part’s focus on progressive prosecutors’ role in the field of juvenile justice is novel as other academic discussion of the progressive prosecution movement have not focused specifically on the impact on juvenile justice policy. While acknowledging the importance of recent changes, this Part will also highlight how the reforms of the current era, while significant, may fall short of bringing about deep and long-lasting change or transformation.

Part III will sketch out what true transformation to the juvenile justice system might look like, presenting information shared by young people who have engaged in re-envisioning exercises and describing the role that restorative justice could play in a different paradigm.

Before moving on, it is important for the reader to know that there are two court systems where a juvenile can be prosecuted for committing a crime. Most states define a “juvenile” as someone under the age of eighteen, although the exact age varies by state,<sup>22</sup> and three states currently set the age of juvenile court jurisdiction at younger than eighteen.<sup>23</sup> Most of the time, when someone under eighteen breaks a criminal law, they will be prosecuted in a juvenile delinquency court rather than an adult criminal court. This has been the practice in the United States since the founding of the first juvenile court in Chicago in 1899.<sup>24</sup>

However, there are some young people whose age would normally qualify them for prosecution in the juvenile court, but who, for policy reasons, are prosecuted in adult criminal court, where they are subject to the same procedural rules as adults, and with a few limited exceptions, to the same sentences

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<sup>22</sup> Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer in the 1990s*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 37, 43 (David S. Tanenhaus & Franklin E. Zimring eds., 2014).

<sup>23</sup> Melissa D. Carter, *Bending the Arc Toward Justice: The Current Era of Juvenile Justice Reform in Georgia*, 54 GA. L. REV. 1133, 1166 (2020) (discussing Georgia as one of three states that sets the age of legal majority for criminal responsibility at younger than eighteen years old); see Zimring, *supra* note 22, at 43 (“Thirty-eight states extend the jurisdiction of juvenile courts to the eighteenth birthday, while two states make the age transition at sixteen.”); Jeffrey Fagan & Aaron Kupchik, *Juvenile Incarceration and the Pains of Imprisonment*, 3 DUKE F. FOR L. & SOC. CHANGE 29, 43–44 (2011) (discussing the different approaches of New York, where anyone sixteen or older is processed in adult court, and New Jersey, where the cut-off is eighteen).

<sup>24</sup> After the founding of the first juvenile court in Chicago, states across the country followed suit and created juvenile courts, as did other countries. See Franklin E. Zimring et al., *Introduction*, in JUVENILE JUSTICE IN GLOBAL PERSPECTIVE 1, 1 (Franklin E. Zimring et al. eds., 2015).

as adults.<sup>25</sup> The difference between being prosecuted in juvenile versus adult court is tremendous. A young person prosecuted in the juvenile court may only be incarcerated through their teenage years or, in some cases, until their early twenties. However, a young person in the adult court may be sentenced to spend the rest of their life in prison. Some advocates explain that juveniles in adult court may be sentenced to “death in prison.”<sup>26</sup>

While it is certainly better for a young person’s case to be handled in the juvenile justice system, and to be incarcerated with other youth rather than with adults, the juvenile justice system and its approach to crime is remarkably similar to the adult criminal justice system. The two systems have become so similar over time that Barry Feld, a law professor who has championed the rights of young people for decades, even argued in the 1990s that the juvenile court should be eliminated because it was so similar to adult criminal court.<sup>27</sup> Although the juvenile court at least rhetorically favors rehabilitation over retribution, the juvenile justice system is quite punitive in practice, often embracing the goals of retribution, deterrence, and incapacitation that drive criminal courts more generally.

#### I. THE THEORETICAL ROOTS OF US JUVENILE JUSTICE POLICY

Juvenile justice policy in the United States has been, and continues to be, shaped by two distinct ways of framing the need for governmental intervention when a young person breaks the law or otherwise fails to obey their parents or comply with social norms: (1) that young people who break the law need the government to protect them from their parents or other negative influences—the “protectionist approach,” and (2) that young people who break the law deserve harsh punishments because they are threats to society—the “superpredator approach.”<sup>28</sup>

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<sup>25</sup> See Zimring, *supra* note 22, at 37 (explaining that “[w]hatever the general age boundaries imposed by state legislation between juvenile and criminal court, there are always in the United States special proceedings that are available to facilitate the transfer of youth under the usual age threshold from the juvenile to the criminal court”).

<sup>26</sup> *Children in Adult Prisons*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/children-in-prison/> [<https://perma.cc/R4ZY-XD2R>] (last visited Feb. 19, 2023). As of 2000, 250,000 young people each year were prosecuted in adult courts in the United States. See Fagan & Kupchik, *supra* note 23, at 31–32. Nearly twenty years later, in 2019, only 53,000 juveniles were tried as adults each year. MISTRETT & ESPINOZA, *supra* note 6, at 1.

<sup>27</sup> Barry C. Feld, *Juvenile (In)Justice and the Criminal Court Alternative*, 39 CRIME & DELINQUENCY 403, 413, 419–21 (1993).

<sup>28</sup> See BERNARD & KURLYCHEK, *supra* note 1, at 5 (describing two perspectives, one which frames juvenile delinquents as victims and the other that frames them as hardened criminals). Not everyone would divide the theoretical approaches of juvenile justice into these two categories. In his 2017 book *The Evolution of the Juvenile Court*, Barry C. Feld describes four periods through which the juvenile court has evolved since its creation: the Progressive Era, which was firmly rooted in a protectionist approach, the Due Process Era, which recognized the need to imbue young people with more due process protections because their rights were being infringed upon in the name of protecting them, the Get Tough Era, which is firmly



On the surface, these approaches seem diametrically opposed—one frames young people who break the law as vulnerable children who should be protected, and the other frames them as threats *from* whom society needs protection. But below the surface, these two distinct approaches share a similar theoretical framework for understanding juvenile criminality—they both view an individual’s choices and behavior as the root of juvenile crime and delinquency. By viewing juvenile justice issues through the lens of individualism, both of these approaches obscure the role that structural inequities play in creating conditions that promote delinquency and frame the issue as one of individual responsibility. From the protectionist perspective, the family of the young person is seen as deficient, “inadequate,” or unable to properly care for the child.<sup>29</sup> Thus, the state is justified in taking over the parental role of caring for the child.<sup>30</sup> From the superpredator perspective, it is the young person rather than the family who is to blame, and the state is justified in intervening to protect society from the threat posed by the young person.

Both of these theoretical justifications for state intervention in the lives of young people and their families through the juvenile courts are used to justify social control, and they are often used interchangeably to justify the *same* interventions. This pattern is most evident in justifications for incarcerating young people. Courts routinely justify incarcerating youth in punitive detention facilities, many of which have well-documented patterns of abuse, “for their own good” or “to help.”<sup>31</sup> Of course, incarceration is also justified on the ground that the young person is a threat and deserves punishment.<sup>32</sup> No matter

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rooted in the juveniles as threats framing, and the Kids Are Different Era, which is the more recent recognition that children and teenagers are developmentally different from adults and should therefore be treated differently. *See generally* BARRY C. FELD, *THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE* (2017). While acknowledging the differences in these various approaches, Feld still traces juvenile justice theory back over the past century to “two competing social constructions or visions,” one in which children are characterized as immature, vulnerable, and dependent children, and the other where young people are characterized as autonomous, mature, and responsible for their behavior. *Id.* at 2.

<sup>29</sup> MISTRETT & ESPINOZA, *supra* note 6, at 1.

<sup>30</sup> This is the long-standing doctrine of *parens patriae* in the juvenile court. *See infra* notes 76–82 and accompanying text.

<sup>31</sup> When I worked as a public defender in juvenile court, I routinely heard judges use the reasoning of “helping” children by detaining them in juvenile halls that were subject to federal consent decrees for the abusive conditions that had been established in federal court. This is consistent with Barry C. Feld’s argument “that judges and legislators selectively choose between the two constructs—immature versus responsible—to maximize social control of young people.” FELD, *supra* note 28, at 2; *see also* Richard E. Redding et al., *Juvenile Delinquency: Past and Present*, in *JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT, AND INTERVENTION* 3, 8 (Kirk Heilbrun et al. eds., 2005) (“[I]t not being uncommon (even today) for juvenile court judges to adjudicate a juvenile ‘delinquent’ without sufficient evidence of guilt to ensure juvenile court jurisdiction for the delivery of services.”).

<sup>32</sup> For example, Texas state law provides that a juvenile accused of a crime should be released while a delinquency case is pending unless certain conditions apply, including that the juvenile is not being appropriately supervised or cared for by their parent or guardian or that

what the language, the young person's freedom is limited, and they are subject to the most invasive form of social control—incarceration.<sup>33</sup> These theoretical justifications for juvenile court intervention are so foundational to juvenile justice jurisprudence that they are often employed at the same time, in the same case, so that punishment is simultaneously presented as an act that will benefit a young person who deserves protection while at the same time being justified as fair retribution for a young person who poses a threat to society.<sup>34</sup>

This Part describes the historical roots and evolution of these two distinct approaches to framing the issue of juvenile delinquency and argues that although these two approaches seem quite different, they are more similar than they seem at first glance. Both of these approaches are rooted in a neoliberalist, individualistic approach to framing the issue of juvenile crime.<sup>35</sup> They share a focus on the culpability of the individual, and thus obscure the larger role of society, politics, and economics in shaping juvenile crime. Both are also rooted in racially and ethnically biased stereotypes that drive support for punitive policies.

I argue that the current paradigm, founded on these theoretical approaches to justifying the existence of current juvenile justice policy, has skewed the social and legal responses to juvenile crime in the United States in harmful but often invisible ways. After discussing the history of the theoretical underpinnings of the current juvenile justice paradigm, I highlight the problems with this approach, setting the stage for the Article's central claim that a paradigm shift is needed—away from the individual and toward a more holistic, structural vision—in order to accomplish lasting change.

#### A. *The Protectionist Approach*

The emergence of a separate juvenile delinquency court system in the United States is rooted in what I refer to in this Article as the “protectionist approach,” which frames young people who break the law as needing protection

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“[the juvenile] may be dangerous to himself or may threaten the safety of the public if released.” TEX. FAM. CODE ANN. § 54.01(e)(2), (4); *see, e.g.*, *Ex parte I.A.*, 611 S.W.3d 638, 644 (Tex. App. 2020) (where a judge ordered a juvenile detained while a delinquency case was pending based on the conclusion that “appellant may be a danger to himself and the safety of the public”).

<sup>33</sup> This is well documented in the literature and is often referred to as the “double-edged sword” of juvenile justice. *See, e.g.*, Madison C. Jaros, Note, *The Double-Edged Sword of Parens Patriae: Status Offenders and the Punitive Reach of the Juvenile Justice System*, 94 NOTRE DAME L. REV. 2189, 2189–90 (2019).

<sup>34</sup> *See* Albert R. Roberts et al., *An Overview of Juvenile Justice and Juvenile Delinquency*, in JUVENILE JUSTICE SOURCEBOOK 3, 6 (Wesley T. Church II et al. eds., 2d ed. 2014) (“Although the goal of justice-oriented agencies is to protect society and to humanely care for and rehabilitate our deviant children and youth, in actuality the juvenile justice system sometimes labels, stigmatizes, mistakenly punishes, and reinforces delinquent patterns of behavior.”).

<sup>35</sup> *See infra* notes 138–43 and accompanying text.

from parents or families who are failing to teach them how to behave appropriately, or who are otherwise failing to control their children. Through this lens, young people are seen as deserving the state's protection, and the state is perceived as a benevolent actor taking care of its children. Central to the protectionist approach is the principle that children are different from adults, and that they should therefore be treated differently than adults when they break the law.<sup>36</sup>

### 1. *Houses of Refuge and the Child-Saving Movement*

The roots of the juvenile court in the United States lie in this protectionist approach. In the late 1800s, social reformers championed the use of residential facilities to reform "wayward youth."<sup>37</sup> Focusing on blaming "parents [who] were not properly controlling and disciplining their children," nineteenth century reformers established "houses of refuge" and other institutions designed to house young people who were deemed to be out of the control of their parents.<sup>38</sup> The young people targeted for housing in these institutions were disproportionately poor and the children of immigrants, and these houses functioned as an assimilation tool that targeted the children of Irish and Eastern European immigrants, who were widely looked down upon at the time.<sup>39</sup>

One of the primary purposes of the Houses of Refuge was social control.<sup>40</sup> The administrators of the Houses sought to reform the children of poor Irish immigrants they perceived as a "dangerous class" in order to ensure that they would grow up to enter the labor force and to otherwise function within the newly industrialized society.<sup>41</sup> The people who created Houses of Refuge were primarily wealthy, white men seeking to preserve their wealth and status, and to ensure that the industrialized society they were benefiting from would continue to function.<sup>42</sup> They viewed their efforts to help "[t]he poor and the deviant" as a moral imperative driven by their religious convictions and presumed a moral

<sup>36</sup> See Franklin E. Zimring & David S. Tanenhaus, *Introduction*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 1, 1 (Franklin E. Zimring & David S. Tanenhaus eds., 2014) ("The first enduring principle of the juvenile court was the radical idea that the law should treat children differently from adults. . . . That bedrock assumption is still alive and well in 2014.").

<sup>37</sup> RICHARD LAWRENCE & CRAIG HEMMENS, JUVENILE JUSTICE: A TEXT/READER 21, 23 (2008) (The child-savers consisted of reformers whose philosophy was built on children being looked at as inherently good, and they argued that children should be treated as such.).

<sup>38</sup> *Id.* at 21.

<sup>39</sup> BARRY KRISBERG, JUVENILE JUSTICE: REDEEMING OUR CHILDREN 26–28 (2005).

<sup>40</sup> *Id.* at 27.

<sup>41</sup> *Id.* at 26 (describing the emergence of Houses of Refuge in the context of fear of the growth of a "dangerous class" during the growth of factories and the arrival of large numbers of Irish immigrants).

<sup>42</sup> *Id.*

superiority to those they were “saving.”<sup>43</sup> They were explicitly concerned about “social unrest and chaos,” and developed interventions to attempt to prevent unrest and “reestablish[] social order, while preserving the existing property and status relationships.”<sup>44</sup> Children who were delinquent, abused, or neglected were all candidates for Houses of Refuge.<sup>45</sup>

Despite their function as tools for social control and assimilation, Houses of Refuge were framed as helpful, non-punitive housing opportunities. The Pennsylvania Supreme Court’s reasoning in the case of Mary Crouse, a girl who had been incarcerated<sup>46</sup> in a House of Refuge, demonstrates the dominant ideology of the time. The court explained,

The House of Refuge is not a prison, but a school. . . . The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates.<sup>47</sup>

However, commentators widely agree that the Houses of Refuge functioned for the purpose of social control and were quite punitive in nature.<sup>48</sup>

Houses of Refuge and juvenile reform schools emerged around the same time as Indian Boarding Schools, which were also an assimilation project. Beginning in the late 1800s, Native American families were pushed to send their children to these boarding schools, generally managed by Christian missionaries, with the explicit goal of teaching Native children “‘the habits and arts of civilization’ while encouraging them to abandon their traditional languages, cultures, and practices.”<sup>49</sup> People who attended these schools recount being beaten, having food withheld, and receiving regular messages that Native Americans were racially inferior beings.<sup>50</sup> The infamous Carlisle Indian Industrial School explicitly aimed to “‘kill the Indian, save the man,’ forcing their assimilation to white culture by forbidding the use of native languages and cultural practices.”<sup>51</sup>

<sup>43</sup> *Id.* at 26–27 (discussing the nineteenth-century philanthropists who created the Houses of Refuge and later the juvenile court).

<sup>44</sup> *Id.* at 27.

<sup>45</sup> *Id.* at 28.

<sup>46</sup> Juvenile courts use language such as “detain,” “custody,” or “place” to refer to incarcerating youth in locked facilities where their freedom is restricted. I use the term incarceration throughout this Article to acknowledge the reality that youth are imprisoned in these institutions.

<sup>47</sup> *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839).

<sup>48</sup> *See, e.g.*, Carter, *supra* note 23, at 1140.

<sup>49</sup> Mary Annette Pember, *Death by Civilization*, THE ATLANTIC (Mar. 8, 2019), <https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/> [<https://perma.cc/PXE7-S75V>].

<sup>50</sup> *Id.*

<sup>51</sup> Erin Blakemore, *A Century of Trauma at U.S. Boarding Schools for Native American Children*, NAT’L GEOGRAPHIC (July 9, 2021), <https://www.nationalgeographic.com/history/>

Although the governmental interventions into the lives of young people and their families were often quite harmful, much of the harm was hidden by rhetoric that sounded helpful or, at the very least, neutral. For example, in the early 1900s jails and detention facilities were called “vocational schools” or “training schools,” but, according to Barry C. Feld, despite this “rehabilitative rhetoric, juvenile institutions and reformatories were essentially custodial, punitive, and ineffective.”<sup>52</sup> According to Richard Lawrence and Craig Hemmens’s historical account, “[t]he early juvenile reform schools were intended for education and treatment, not for punishment, but hard work, strict regimentation, and whippings were common. Discriminatory treatment against African Americans, Mexican Americans, American Indians, and poor whites remained a problem in the schools,” as did sexual and physical abuse.<sup>53</sup> Benevolent language obscured the abusive practices, as incarcerating young people in these facilities was framed as a benefit rather than a punishment, and a review of “legal decisions revealed that judges in the nineteenth century were committing minors to reformatories for noncriminal acts on the premise that the juvenile institutions would have a beneficial effect.”<sup>54</sup>

Then, as now, Black children were treated more harshly by the juvenile justice system.<sup>55</sup> Black children were initially excluded from juvenile Houses of Refuge, but by 1835, many of the Houses of Refuge had added designated sections for “colored children.”<sup>56</sup> Even once they were allowed to be housed in these institutions, Black children were treated as disposable. In the Philadelphia House of Refuge, officials attempted to develop “‘placing out’ programs that would send Black youth back to Africa rather than integrating them into programs created for [w]hite youth.”<sup>57</sup> There were also reported deaths of Black children in Houses of Refuge due to poor living conditions and poor nutrition.<sup>58</sup> Further, white immigrant youth tended to be selected for juvenile facilities

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article/a-century-of-trauma-at-boarding-schools-for-native-american-children-in-the-united-states [https://perma.cc/MSE8-4LGJ].

<sup>52</sup> FELD, *supra* note 28, at 36.

<sup>53</sup> LAWRENCE & HEMMENS, *supra* note 37, at 22; *see also* KRISBERG, *supra* note 39, at 29–30 (describing “daily activities [that] stress regimentation, absolute subordination to authority,” and corporal punishment, solitary confinement, and whipping in Houses of Refuge).

<sup>54</sup> LAWRENCE & HEMMENS, *supra* note 37, at 23.

<sup>55</sup> Black children have always been treated more punitively in the juvenile justice system. Mary Huff Diggs reviewed the records of fifty-three juvenile courts and found that Black children were overly represented in delinquency cases, that they came into contact with the courts at younger ages, and that their cases were less likely to be dismissed. Mary Huff Diggs, *The Problems and Needs of Negro Youth as Revealed by Delinquency Statistics*, 9 J. NEGRO EDUC. 311, 313 (1940); KRISBERG, *supra* note 39, at 29; *see also* James Bell, *Child Well-Being: Toward a Fair and Equitable Public Safety Strategy for the New Century*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 23, 26–27 (Nancy E. Dowd ed., 2015).

<sup>56</sup> JAMES BELL, NAT’L INST. OF CORR., REPAIRING THE BREACH: A BRIEF HISTORY OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 5 (2015).

<sup>57</sup> *Id.*

<sup>58</sup> Washington et al., *supra* note 20, at 215.

while Black youth were processed through the adult system.<sup>59</sup> The explicit reason stated for opening the Baltimore House of Reformation for Black Children in Maryland was “the need for agricultural labor through [the] state, as well as the great want of competent house servants.”<sup>60</sup>

Young women in Houses of Refuge were also viewed as “sexually promiscuous with little hope for eventual reform,” and they too “received discriminatory treatment” based on their failure to comply with gender norms of the time.<sup>61</sup>

Patterns that originated in the nineteenth century when the juvenile justice system first emerged in the United States continue to this day.<sup>62</sup> Punitive policies continue to be justified by benevolent language.<sup>63</sup> Immigrant parents continue to be blamed for their children’s transgressions.<sup>64</sup> Black youth, and other young people of color, are routinely treated more harshly than white youth.<sup>65</sup> And girls too are treated more harshly than boys, often because of perceptions that they need protection from their sexual deviance.<sup>66</sup>

## 2. *The Juvenile Court & Parens Patriae*

In the late 1800s, a movement of Progressive Reformers advocated for the creation of a juvenile court that would treat juveniles separately from adults, and the first juvenile court was established in Chicago in 1899.<sup>67</sup> Within ten

<sup>59</sup> The juvenile justice system would “send Black youth to chain gangs and prisons while sending White youth to more rehabilitative institutions.” *Id.* at 216; *see also* Cecile P. Frey, *The House of Refuge for Colored Children*, 66 J. NEGRO HIST. 10, 10 (1981) (“Until 1850, when the House of Refuge for Colored Children was opened in Philadelphia, youthful offenders of that race were placed in adult prisons rather than in any separate facility.”); Bell, *supra* note 55, at 25 (explaining that in the nineteenth century, Black children were excluded from juvenile facilities and were instead incarcerated in adult prisons).

<sup>60</sup> Bell, *supra* note 55, at 25 (quoting GEOFF K. WARD, *THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE* 74 (2012)).

<sup>61</sup> Barry KRISBERG & JAMES F. AUSTIN, *REINVENTING JUVENILE JUSTICE* 19 (1993).

<sup>62</sup> *See infra* Section I.A.4.

<sup>63</sup> *See infra* notes 105–09 and accompanying text.

<sup>64</sup> *See* Stephanie A. Fryberg & Megan Bang, *Blaming Parents of Color for Their Own Oppression Is an American Pastime*, EDUC. WEEK (June 29, 2018), <https://www.edweek.org/leadership/opinion-blaming-parents-of-color-for-their-own-oppression-is-an-american-pastime/2018/06> [<https://perma.cc/QA4D-F9DQ>] (arguing that parent-blaming narratives “suggest that poor outcomes for children of color are the fault of poor child-rearing, not of inequitable systems”).

<sup>65</sup> Joshua Rovner, *Racial Disparities in Youth Commitments and Arrests*, SENT’G PROJECT (Apr. 1, 2016), <https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/> [<https://perma.cc/W56P-2JS8>].

<sup>66</sup> *See* Meda Chesney-Lind, *Female Status Offenders and the Double Standard of Juvenile Justice*, 39–40 INT’L REV. CRIM. POL’Y 105, 105 (1990) (discussing pervasive systemic discrimination against female delinquents and their regular “punish[ment] . . . for behaviour [sic] that is either ignored or tolerated in males”).

<sup>67</sup> Zimring et al., *supra* note 24, at 1; Quinn Myers, *How Chicago Women Created the World’s First Juvenile Justice System*, NPR (May 13, 2019), <https://www.npr.org/local/309/>

years, ten states had established juvenile courts;<sup>68</sup> and by 1925, forty-six states had created juvenile courts.<sup>69</sup> By 1945, every state in the country had a juvenile court.<sup>70</sup> The early juvenile court's philosophy was informed by the Progressives' child-saving approach to social control. According to Barry Krisberg, "[t]he thrust of [the] Progressive Era reforms was to found a more perfect control system to restore social stability while guaranteeing the continued hegemony of those with wealth and privilege."<sup>71</sup> In an effort to push the moral behavior that Progressive Reformers believed in, "early juvenile courts became involved in monitoring and controlling all aspects of youthful behaviour [sic]."<sup>72</sup>

John R. Sutton conducted a study that reviewed data on the juvenile court movement at the time of the court's founding.<sup>73</sup> He concluded that "the juvenile court was primarily a ceremonial institution through which the ideology of the broader charity organization movement was enacted" in order to allow "the routine practices of child-saving established in the nineteenth century [to] be continued in a more legitimate form."<sup>74</sup> According to Sutton, the court was not revolutionary, but was created to allow the Progressives' practices of "discretionary social control activities based on a medical model of deviance" to continue despite criticisms that had been mounting regarding the widespread use of detention facilities such as training schools for children.<sup>75</sup> Thus, a key purpose behind the creation of the juvenile court was to legitimize the continued incarceration of marginalized youth.

Juvenile courts embraced the legal concept of *parens patriae*—the idea that the court plays the role of a benevolent parent responsible for taking care of children and teenagers who had broken the law. In an article published in the *Harvard Law Review* in 1909, Judge Julian Mack described the concept of *parens patriae* in detail, comparing the state to "a wise and merciful father" who, if he learns his child "is treading the path that leads to criminality, [should] take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."<sup>76</sup> Under this doctrine, state intervention was seen as both justified and necessary "because the parent is either unwilling or unable to train the child properly."<sup>77</sup>

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2019/05/13/722351881/how-chicago-women-created-the-world-s-first-juvenile-justice-system [https://perma.cc/55ML-45AU].

<sup>68</sup> KRISBERG, *supra* note 39, at 39.

<sup>69</sup> *Id.* at 40.

<sup>70</sup> Carter, *supra* note 23, at 1141.

<sup>71</sup> KRISBERG, *supra* note 39, at 41.

<sup>72</sup> Chesney-Lind, *supra* note 66, at 105.

<sup>73</sup> See generally John R. Sutton, *The Juvenile Court and Social Welfare: Dynamics of Progressive Reform*, 19 L. & SOC'Y REV. 107 (1985).

<sup>74</sup> *Id.* at 108.

<sup>75</sup> *Id.* at 109.

<sup>76</sup> Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107, 109 (1909–1910).

<sup>77</sup> *Id.* at 109.

As the Supreme Court has acknowledged, the concept of *parens patriae* “is murky,” but it was widely employed to imply that a child’s rights are much more limited than an adult’s because children are subject to the control of their parents.<sup>78</sup> Thus, if the “parents default in effectively performing their custodial functions—that is, if the child is ‘delinquent’—the state may intervene” without depriving the child of any rights because the state is merely stepping into the shoes of the parents.<sup>79</sup> The concept of *parens patriae* was seen as necessary in order “to protect children from destitute or neglectful parents.”<sup>80</sup>

In *Ex parte Crouse*, an 1838 Pennsylvania Supreme Court case, the court explained the doctrine:

“[M]ay not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it. . . . The infant has been snatched from a course which must have ended in confirmed depravity; and not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it.”<sup>81</sup>

Central to the reasoning behind *parens patriae* is the presumption that the parents whose role the state is taking over are to blame for the child’s delinquency. Sometimes, this is an unstated assumption. Other times, this perception is more explicitly stated. In *Ex parte Crouse*, the Pennsylvania Supreme Court referred to parents who are “unequal to the task of education, or unworthy of it,” also referring to parents of delinquents as “‘incompetent or corrupt.’”<sup>82</sup>

The protectionist approach to juvenile crime and delinquency has always been rooted in troubling racialized beliefs that have constructed parents from marginalized racial and ethnic groups as inadequate or bad parents. According to Barry C. Feld’s history of the juvenile court, “[b]ecause some parents did not subscribe to the Progressives’ views of child rearing, one of the juvenile courts’ functions was to control and regulate poor and immigrant families and youths.”<sup>83</sup> Like with the Houses of Refuge, much of the focus of juvenile courts at this time was “to assimilate and Americanize children of the Southern and Eastern European immigrants pouring into Eastern and Midwestern cities.”<sup>84</sup>

The courts also heavily policed the morality and sexuality of girls.<sup>85</sup> Almost all young women who were charged in juvenile courts were charged with

<sup>78</sup> *In re Gault*, 387 U.S. 1, 16–17 (1967).

<sup>79</sup> *Id.* at 17.

<sup>80</sup> FELD, *supra* note 28, at 24.

<sup>81</sup> *Id.* at 26–27 (quoting *Ex parte Crouse*, 4 Whart. 9, 11–12 (1838)).

<sup>82</sup> Mack, *supra* note 76, at 111 (quoting *Ex parte Crouse*, 4 Whart. at 11).

<sup>83</sup> FELD, *supra* note 28, at 19.

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., Barry C. Feld, *My Life in Crime: An Intellectual History of the Juvenile Court*, 17 NEV. L.J. 299, 301 (2017) (“During the Progressive era, Victorian sensibilities and concerns about female sexuality encouraged regulation of girls for waywardness, incorrigibility, and sexual precocity.”).



“immorality” or “waywardness,” and were frequently incarcerated on the basis of these charges.<sup>86</sup> Immorality generally “meant evidence of sexual intercourse.”<sup>87</sup> In an effort to “protect” and control, girls were incarcerated more frequently than their male counterparts.<sup>88</sup>

### 3. *Emergence of Due Process Rights*

In juvenile court, young people were not entitled to the due process rights that would normally attach in a criminal court because the court was framed as *helping*, rather than depriving people of their liberty interests. Accordingly, due process rights were not seen as needed.

The Supreme Court of Pennsylvania’s reasoning in a 1905 case exemplifies this way of thinking:

The action is not for the trial of a child charged with a crime, but is mercifully to save it from such an ordeal, with the prison or penitentiary in its wake, if the child’s own good and the best interests of the state justify such salvation. Whether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it. The act is but an exercise by the state of its supreme power over the welfare of its children . . . .<sup>89</sup>

At least one court acknowledged the double-edged sword of using protectionist rhetoric to deny young people due process protections despite the fact that they were often subject to incarceration and punishment. The Illinois Supreme Court “released a child from the reformatory on the ground that the reformatory was a prison; that incarceration therein was necessarily punishment for a crime, and that such a punishment could be inflicted only after criminal proceedings conducted with due regard to the constitutional rights of the defendant.”<sup>90</sup>

Over time, this punitive side of the juvenile court focused on social control became impossible for courts to ignore, and the United States Supreme Court incorporated a new set of due process protections into juvenile delinquency law.<sup>91</sup> In a series of groundbreaking decisions in the 1960s and 1970s, beginning with *In re Gault* in 1967, the Court held that most procedural due process rights attach to juvenile delinquency cases, including the right to appointed defense counsel and the privilege against self-incrimination.<sup>92</sup>

<sup>86</sup> Chesney-Lind, *supra* note 66, at 105.

<sup>87</sup> *Id.*

<sup>88</sup> *See id.*

<sup>89</sup> Mack, *supra* note 76, at 109–10 (citing *Commonwealth v. Fisher*, 62 A. 198, 200 (Pa. 1905)).

<sup>90</sup> *Id.* at 114 (citing *People ex rel. O’Connell v. Turner*, 55 Ill. 280 (Ill. 1870)).

<sup>91</sup> *See generally In re Gault*, 387 U.S. 1 (1967) (requiring the right to appointed counsel and the privilege against self-incrimination in juvenile delinquency cases); *In re Winship*, 397 U.S. 358 (1970) (requiring the reasonable-doubt standard in juvenile delinquency cases).

<sup>92</sup> *In re Gault*, 387 U.S. at 41, 55 (describing the right to appointed counsel and privilege against self-incrimination). Protectionist rhetoric is still used to deny juveniles some funda-

Through these cases, which scholars refer to as bringing about a “due process revolution” in the juvenile court,<sup>93</sup> the Supreme Court recognized that the benevolent, helping language of the juvenile court system obscured the reality that young people were being punished, and were being deprived of fundamental rights, under the guise of helping them.<sup>94</sup> Supreme Court Justice Abe Fortas observed in 1967 that in juvenile court, “the child receives the worst of both worlds . . . he gets neither the protections accorded to adults, nor the solicitous care and regenerative treatment postulated for children.”<sup>95</sup>

Because young people’s rights were being affected, the Court concluded that the constitutional principles of due process needed to attach to juvenile delinquency proceedings.<sup>96</sup> Thus, the protectionist philosophy expanded to also include protecting the rights of young people.

#### 4. *Current Manifestations of the Protectionist Approach*

While due process rights are now a constitutionally-mandated component of juvenile delinquency law, the protectionist philosophy is still regularly employed to justify court intervention into young people’s lives. And, in some situations, young people are treated more harshly than adults in the name of protection.

##### a. *Status Offenses*

For instance, young people are regularly criminalized for behavior that would not be considered criminal if they were adults through the prosecution of status offenses. Status offenses are crimes that are only criminal because of the juvenile status of the offender,<sup>97</sup> and they are one clear example of how protectionist rhetoric is used to criminalize young people in the present day.<sup>98</sup>

Typical examples of status offenses include running away, curfew violations, underage drinking, and “incurability,” which is generally defined as

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mental due process rights in delinquency proceedings, including most notably the right to a jury.

<sup>93</sup> See FELD, *supra* note 28, at 43.

<sup>94</sup> See Zimring & Tanenhaus, *supra* note 36, at 2 (explaining that “[w]hile the mission of the court for kids has remained popular, the informal structure and paternalist assumptions of the court were sharply curtailed by the US Supreme Court in *In re Gault* in 1967”).

<sup>95</sup> *In re Gault*, 387 U.S. at 18 n. 23.

<sup>96</sup> *Id.* at 41.

<sup>97</sup> See Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception That Swallowed the Rule*, 7 SEATTLE J. FOR SOC. JUST. 555, 555 (2008) (defining status offenses).

<sup>98</sup> In 1974, Congress barred juvenile detention based on status offense in the Juvenile Justice and Delinquency Prevention Act (JJDP). *Id.* However, in 1980 an amendment was added that allows young people to be detained for status offenses if they violate a court order. *Id.* Now, the common practice is for a judge to order a young person to do something like attend school or obey curfew; if they do not obey, they may then be detained for violating the court order. See, e.g., CAL. WELF. & INST. CODE § 601.

failing to abide by a parent's rules.<sup>99</sup> Young people may also be incarcerated or put on probation for chronic absences in school, or for chronic lateness. Thirty-three states allow young people to be incarcerated for status offenses, and an estimated one-third of incarcerated youth are detained for these kinds of offenses.<sup>100</sup>

Girls are much more frequently prosecuted for status offenses than are boys, in a pattern consistent with the early juvenile courts.<sup>101</sup> Although girls are not more likely to engage in conduct that amounts to a status offense, they are far more likely to be prosecuted and detained for status offenses.<sup>102</sup> There is widespread agreement in the literature that girls are treated more harshly for status offenses because of paternalistic gender norms.<sup>103</sup> Girls of color—particularly Black and Latina girls—bear the brunt of this disparate treatment and are more likely than their white female counterparts to be detained for status offenses.<sup>104</sup>

*b. Justifications for Probation and Incarceration*

Judges and prosecutors regularly use helping rhetoric to justify incarcerating young people or putting them on probation. This rhetoric contradicts the evidence about the detrimental effects of incarceration on young people.<sup>105</sup> And yet, despite the evidence, the long-standing rationale that juvenile court interventions, and juvenile detention, help rather than hurt is persistent.<sup>106</sup>

<sup>99</sup> Arthur & Waugh, *supra* note 97, at 555–56.

<sup>100</sup> *Id.* at 556.

<sup>101</sup> See Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1097, 1101–03 (2014) (summarizing research demonstrating that girls have historically been, and continue to be, prosecuted and incarcerated disproportionately for status offenses).

<sup>102</sup> See Chesney-Lind, *supra* note 66, at 106; Meda Chesney-Lind, *Jailing “Bad” Girls: Girls’ Violence and Trends in Female Incarceration*, in *FIGHTING FOR GIRLS* 57, 60 (Meda Chesney-Lind & Nikki Jones eds., 2010) [hereinafter Chesney-Lind, *Jailing “Bad” Girls*] (discussing the over criminalization and disproportionate detention of girls, in particular for status offenses and other non-serious cases).

<sup>103</sup> See Chesney-Lind, *supra* note 66, at 105; See MEDA CHESNEY-LIND & RANDALL G. SHELDEN, *GIRLS, DELINQUENCY, AND JUVENILE JUSTICE* 175 (3d ed. 2004) (quoting Hunter Hurst, Director of the National Center of Juvenile Justice, as saying in 1975, “we have had a strong heritage of being protective toward females in this country,” and “[i]t offends our sensibility and values to have a fourteen-year-old girl engage in sexually promiscuous activity; it’s not the way we like to think about females in this country”).

<sup>104</sup> Chesney-Lind, *Jailing “Bad” Girls*, *supra* note 102, at 63.

<sup>105</sup> See, e.g., HOLMAN & ZIEDENBERG, *supra* note 19, at 2 (documenting the myriad problems that arise from incarcerating youth).

<sup>106</sup> Stephen Pimpo, *Youth Court Judge Says Juvenile Detention Center Is Helping with Starkville’s Violent Crime*, NAACP Leader Says It Does More Harm, WCBI (Aug. 17, 2022), <https://www.wcbi.com/juvenile-crime-debate/> [<https://perma.cc/9CAJ-C8NV>] (A juvenile court judge in Mississippi, for example, justified sending adolescents to detention facilities because, she said, “A lot of these kids are truants and at least they’re going to school in detention . . . . They also get a psychological analysis. And in that assessment, if there are

Consider, for example, the reasoning of a Washington, DC prosecutor who became frustrated with a juvenile respondent's poor performance on probation.<sup>107</sup> Out of frustration, the prosecutor stated that

she thought the juvenile needed to be incarcerated for his own good. . . [despite the fact that the prosecutor] had a background in educational advocacy and knew that involvement in the justice system was not likely to help the minor. She understood the body of evidence showing that a minor's involvement in the juvenile justice system was correlated with negative life outcomes, including a greater likelihood of school suspension or expulsion, and recidivism.<sup>108</sup>

In sum, the protectionist philosophy of juvenile courts has historically, and continues to be used, to justify punitive policies directed towards young people.<sup>109</sup> Interventions justified by this rhetoric have historically, and continue, to treat immigrants, Black youth, ethnic minorities, and girls more harshly than their white male counterparts.<sup>110</sup> The regular use of incarceration and punishment in this so-called benevolent system, and the Court's recognition that due process protections were needed to protect against governmental intrusions into young people's liberty, reveals that the second foundational theoretical strand of juvenile justice policy—that young people are threats that deserve punishment—has been present throughout the history of juvenile justice in the United States. The construction of young people as blameworthy threats who need to be controlled and punished then became the dominant theory driving juvenile justice policy in the 1990s.<sup>111</sup>

### B. *The Superpredator Approach*

Although the term superpredator did not emerge until the 1990s, the construct of juvenile delinquents as a threat has been present throughout the history

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some specific needs that can be handled by Community Counseling (Services) and things like that, they're given those referrals.”).

<sup>107</sup> Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.L. SCH. L. REV. 69, 78 (2019–2020).

<sup>108</sup> *Id.* at 78–79.

<sup>109</sup> Jeffrey Fagan, *The Contradictions of Juvenile Crime & Punishment*, 139 AM. ACAD. ARTS & SCI. DAEDALUS 43, 43 (2010) (Although courts often refer to juvenile detention as helpful, it is punitive in nature. The purpose is “mainly to control its residents and restrict their personal freedoms. Movement and association are intensively regulated; outside contact with family, friends, and intimate partners is attenuated and used as an incentive for good behavior. . . . Most important, at either end of the continuum of institutional climate, the options of solitary confinement, physical restraint, or other forms of extreme deprivation exist to control the defiant and unruly or to punish wrongdoing.”).

<sup>110</sup> See BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 265 (1999) (discussing the origins of the juvenile court and the Progressives' deliberate “discriminat[ion] between white middle-class children like their own and the children of poor and immigrant parents, those ‘other people's children,’ ” and the corresponding disparate racial impacts).

<sup>111</sup> See Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 LOY. L.A. L. REV. 747, 747–54 (2001) (describing how the widespread demonization of youth, and in particular Black and Latino youth, drove harsh juvenile justice reforms in the 1990s and early 2000s).

of juvenile justice in the United States. According to Barry Krisberg's history of juvenile justice, "[f]rom the 'dangerous classes' of the nineteenth century to the superpredators of the late 20th century, government responses to juvenile crime have been dominated by fear of the young, anxiety about immigrants or racial minorities, and hatred of the poor."<sup>112</sup>

Young people of color have routinely been characterized as threats even when white teenagers were seen as deserving of protection.<sup>113</sup> Even in the early 1900s, Progressive Reformers who championed the creation of juvenile courts were motivated by a concern that if left to their own devices, "vagrant youths . . . would mature into a dangerous or dependent class of criminals or paupers . . . who threatened the middle classes."<sup>114</sup>

The theoretical construction of young people as threats took center stage in the development of juvenile justice policy in the 1990s when a highly racialized public fear of an impending crime wave committed by young "superpredators" spurred the passage of harsher criminal justice policies toward young offenders across the United States.<sup>115</sup> Fueled by John J. Dilulio's now debunked prediction that "hordes upon hordes of depraved teenagers resorting to unspeakable brutality" would wreak havoc on society,<sup>116</sup> almost every state in the country passed laws to make it easier to transfer juveniles into adult court.<sup>117</sup>

In 1995, John Dilulio published an influential article warning of this impending wave of violent crime committed by juvenile "superpredators" "who pack guns instead of lunches."<sup>118</sup> He then co-authored a book framing this wave of "superpredators" as "brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs,

<sup>112</sup> KRISBERG, *supra* note 39, at 1.

<sup>113</sup> See FELD, *supra* note 110, at 28.

<sup>114</sup> See *id.* at 28, 51 (discussing historical concerns about juveniles as threats in the context of the emergence of juvenile courts).

<sup>115</sup> See FELD, *supra* note 28, at 105 (referring to this era as the "get tough" era of juvenile justice policy).

<sup>116</sup> 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> [<https://perma.cc/5CXP-49Z4>].

<sup>117</sup> Throughout the 1980s and 1990s "legislatures in nearly every state expanded transfer laws that allowed or required the prosecution of juveniles in adult criminal courts." PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUST., TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING (2011) <https://www.ncjrs.gov/pdffiles1/ojdp/232434.pdf> [<https://perma.cc/6GWH-RL22>]; KRISBERG, *supra* note 39, at 3 (describing changes in forty-seven states informed by the superpredator myth, including giving prosecutors more power to file juvenile cases in adult court, adding punishment as a purpose of juvenile courts, allowing juvenile convictions to be used to enhance sentences in adult court, among other policies).

<sup>118</sup> John Dilulio, *The Coming of the Super-Predators*, WASH. EXAM'R (Nov. 27, 1995, 12:00 AM), <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators>.

join gun-toting gangs and create serious communal disorders.”<sup>119</sup> Black youth in particular were flagged.<sup>120</sup> Dilulio “wrote all that’s left of the black community in some pockets of urban America is deviant, delinquent and criminal adults surrounded by severely abused and neglected children, virtually all of whom were born out of wedlock.”<sup>121</sup>

The media disseminated this myth, tapping into the public’s racialized stereotypes and associating youth of color with a projected wave of crime that never materialized.<sup>122</sup> This fear escalated and developed into a moral panic that fueled a wave of punitive changes to juvenile justice laws across the United States.<sup>123</sup> The hostility and fear directed towards young people focused on young people of color, in particular those who have grown up in poverty.<sup>124</sup>

Framing young people as threats shifted the dominant juvenile justice policy approach in a punitive direction.<sup>125</sup> States across the country enacted juvenile justice reforms making it easier to transfer juveniles to adult court by reducing the age at which a young person could be sent to adult court, relaxing and in some cases eliminating the process for transferring cases out of juvenile

<sup>119</sup> WILLIAM J. BENNETT ET AL., *BODY COUNT: MORAL POVERTY—AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* 27 (1996).

<sup>120</sup> See VINCENT SCHIRALDI, *CAN WE ELIMINATE THE YOUTH PRISON? (AND WHAT SHOULD WE REPLACE IT WITH?)* 9, 19 (2020), <https://squareonejustice.org/wp-content/uploads/2020/08/CJLJ8431-Square-One-Youth-Prisons-Paper-200828-2-WEB.pdf> [<https://perma.cc/28KX-R6FZ>] (“The racial animus behind this assault on the more benign youth justice system was thinly-veiled, or sometimes not veiled at all”).

<sup>121</sup> *Id.* at 9 (internal citation omitted).

<sup>122</sup> See Beth Caldwell & Ellen C. Caldwell, “*Superpredators*” and “*Animals*”—*Images and California’s “Get Tough on Crime” Initiatives*, *J. INST. JUST. & INT’L STUD.*, 61, 66–67 (2011) (discussing the influence of media representations of young people of color on the punitive juvenile justice policy of the 1990s).

<sup>123</sup> See FELD, *supra* note 28, at 106 (discussing the superpredator myth as a moral manic).

<sup>124</sup> See FELD, *supra* note 110, at 337 (describing the disconnect between how politicians and parents separate their views of “their own children” from those of “other people’s children,” often along racial lines).

<sup>125</sup> See FELD, *supra* note 28, at 99, 105 (According to Barry Feld’s history of the evolution of the juvenile courts, in the 1990s, people bought into “a stereotype of dangerous superpredators—cold-eyed young killers suffering from moral poverty—rather than traditional images of disadvantaged youths who needed help.”); Redding et al., *supra* note 31, at 6 (Consider Georgia Governor Zell Miller’s quote in the *New York Times*: these “are not the Cleaver kids soaping up some windows. These are middle school kids conspiring to hurt their teachers, teenagers shooting people and committing rapes, young thugs running gangs and terrorizing neighborhoods, and showing no remorse when they get caught.” (quoting Michael Welch et al., *Primary Definitions of Crime and Moral Panic: A Content Analysis of Experts’ Quotes in Feature Newspaper Articles on Crime*, 34 *J. RSCH. CRIME & DELINQ.* 474, 484 (1997)); see also Carter, *supra* note 23, at 1147 (“When the fear of super-predators inspired an era of reactive, fear-based policies, Georgia embraced the tough-on-crime direction. Georgia adopted laws providing for automatic filing, prosecutorial discretion, and judicial waiver, all of which function to subject children as young as thirteen to prosecution and sentencing by the adult criminal justice system for certain crimes.”); SCHIRALDI, *supra* note 120, at 8 (discussing the superpredator myth’s influence on juvenile justice policy in the 1990s).

court, and vesting the power regarding transfer decisions in the hands of prosecutors.<sup>126</sup> Rather than investing in programs that had been demonstrated to be effective at reducing delinquency, the United States continually chose to enact policies that had been demonstrated to increase crime and delinquency, driven by fear and politics over the research about “what works.”<sup>127</sup>

### C. *The Common Focus on the Individual*

The common thread between the protectionist and superpredator approaches to juvenile justice lies in their focus on the individual or family as opposed to broader social conditions. Whether young people are framed as people deserving of protection or as threats, focusing on the individual obscures the social and economic conditions that actually drive the problem.<sup>128</sup>

In the protectionist approach, the parents are identified as the source of the child’s delinquency in that they have failed to properly care for the child. The solution is therefore to remove the child from the parent’s custody, and for the state to take over raising the child under the doctrine of *parens patriae*.<sup>129</sup> Conditions of poverty, such as long work hours, lack of access to childcare, and low wages, are left in place because they are not identified as the problem. Rather, the parent is constructed as the problem.<sup>130</sup>

In the superpredator approach, the young person is viewed as the problem. They are constructed as dangerous threats that need to be removed from society and rehabilitated.<sup>131</sup> The solution is therefore to incarcerate the young person in order to protect the rest of society.<sup>132</sup> Rather than focus on the social conditions that drive criminality among youth, such as under-resourced social institutions, poverty, racial segregation in schools and housing, policing practices, and exposure to trauma, the solution focuses on the individual acts and shortcomings of the young person who has broken the law.<sup>133</sup>

<sup>126</sup> See Zimring, *supra* note 22, at 44–45 (discussing the shift of transfer decisions from juvenile court judges to prosecutors in the 1980s and 1990s as a significant change in the structure of the juvenile court); see also FELD, *supra* note 28, at 110–12, 114–16 (discussing policy changes of the 1990s, including making it easier to transfer youth to adult court by lowering the age, allowing direct file, changing waiver criteria, and blended sentencing).

<sup>127</sup> PETER GREENWOOD, EVIDENCE-BASED PRACTICE IN JUVENILE JUSTICE: PROGRESS, CHALLENGES, AND OPPORTUNITIES 1, 2 (2014).

<sup>128</sup> The forces that drive juvenile delinquency are multilayered and complex. Consider, for example, James Diego Vigil’s multiple marginality theory of gang involvement, which incorporates “ecological, economic, sociocultural, and psychological factors that underlie street gangs and youths’ participation in them” at the micro, mezzo, and macro levels. See James Diego Vigil, *Street Gangs: A Multiple Marginality Perspective*, OXFORD RSCH. ENCYCLOPEDIAS: CRIMINOLOGY & CRIM. JUST. (May 23, 2019) <https://doi.org/10.1093/acrefore/9780190264079.013.425> [<https://perma.cc/ZAL3-2R87>].

<sup>129</sup> FELD, *supra* note 28, at 24.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 87.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 89.

Thus, the dominant paradigm for thinking about juvenile justice leaves in place many of the social conditions that social science research has clearly demonstrated drive juvenile crime and delinquency. As a result, the systemic, structural causes of delinquency remain in place while we “focus our attention yet again on correcting the impulsive and otherwise unacceptable behavior of the delinquents and ‘help’ those with psychological symptoms to adjust to the realities of American society, which includes segregation, economic inequality, and both subjective and institutionalized forms of prejudice.”<sup>134</sup> And for every young person whose life is redirected, there are more who are being propelled into delinquency by these conditions that are left to flourish.

The juvenile justice system’s focus on individual culpability or responsibility was set in place by the spirit of American individualism that animated the philosophy surrounding the creation of the first juvenile courts. Although some Progressive Reformers focused on improving community structures and paid attention to the “common good,” the dominant perspective “focus[ed] on the individual . . . by attacking the environment that limited individual opportunity.”<sup>135</sup> Overall, the Progressive movement sought to protect “the fundamental structures of social power and property.”<sup>136</sup> This “[a]id the foundation for twentieth-century liberals’ inability to see the world around them in class terms or conceive of social remedies that altered the social structure of class power.”<sup>137</sup>

This individualistic ideology is consistent with the neoliberal approach to the economy, which similarly seeks to explain human behavior on the basis of “logical, individualistic, and selfish goals” of individuals.<sup>138</sup> From the neoliberal perspective, “unemployment, inequality, and poverty have [become] increasingly blamed on individuals rather than on structural constraints.”<sup>139</sup> As Beth Ritchie explains:

The neoliberal assumptions are that on the one hand, the state should not be obligated to take care of people, while on the other hand, the state should be obligated to control, correct, and punish people. So the neoliberal project is to pull back from state obligations for care and replace it with a state obligation or an imperative to control.<sup>140</sup>

<sup>134</sup> BERNARD & KURLYCHEK, *supra* note 1, at 201.

<sup>135</sup> SHELTON STROMQUIST, *REINVENTING ‘THE PEOPLE’: THE PROGRESSIVE MOVEMENT, THE CLASS PROBLEM, AND THE ORIGINS OF MODERN LIBERALISM* 4 (2006); *see, e.g.*, Candace Smith, *A Brief Examination of Neoliberalism and Its Consequences in Sociology*, SOCIO. LENS, <http://www.sociologylens.net/topics/political-economic-sociology/neoliberalism-consequences/10869> [<https://perma.cc/ZPP5-K2BK>] (Apr. 22, 2017).

<sup>136</sup> STROMQUIST, *supra* note 135, at 4.

<sup>137</sup> *Id.*

<sup>138</sup> Smith, *supra* note 135.

<sup>139</sup> *Id.*

<sup>140</sup> Beth E. Ritchie, *Keynote—Reimagining the Movement to End Gender Violence: Anti-Racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 257, 261 (2015).



This “decidedly ‘individualistic’” orientation interferes with efforts to fundamentally address inequality.<sup>141</sup> Constructs such as “[t]he undeserving poor, the culture of poverty, and the underclass” have been used to classify those who live in poverty in the United States in a way that places the responsibility for poverty on their shoulders, erasing the contributions of social structures and systems in creating poverty.<sup>142</sup> As Michael B. Katz argues, this “belief that poverty results from personal inadequacy assumes that poverty is a problem of persons” and not systems, and dates back to the dominant ideologies of the United States in the nineteenth century.<sup>143</sup>

Interestingly, the same people have shaped both the myth that poor people are to blame for their own poverty—the construct of the “undeserving poor”—and the myth that young people are superpredators.<sup>144</sup> James Q. Wilson, a professor at Harvard, championed the idea of the undeserving poor and then in 2010 predicted there would soon be “30,000 more juvenile ‘muggers, killers, and thieves.’”<sup>145</sup> John Dilulio, who then promulgated the superpredator myth in the 1990s, had been Wilson’s student and relied upon Wilson’s projection techniques in developing his theory.<sup>146</sup>

The current paradigm of juvenile justice was so heavily influenced by the perspective of its founders, and the theoretical understanding of juvenile crime they set forth in the early 1900s has become so entrenched, that the same rationales continue to be used over a century later. These rationales have contributed to a juvenile justice system that tolerates horrific abuse, that treats Black youth, girls, and ethnic minorities more harshly than white males, and that routinely selects interventions that have been proven to be ineffective while rejecting those that have been proven to work.<sup>147</sup>

Many of the failures of the current juvenile justice system can be traced back to decisions made at the inception of the juvenile court—decisions to focus on blaming and reforming individuals rather than on addressing structural forces that drive delinquency.<sup>148</sup>

<sup>141</sup> Lawrence Bobo, *Social Responsibility, Individualism, and Redistributive Policies*, 6 SOCIO. F. 71, 71–72 (1991).

<sup>142</sup> MICHAEL B. KATZ, *THE UNDESERVING POOR: AMERICA’S ENDURING CONFRONTATION WITH POVERTY 2* (2d ed. 2013).

<sup>143</sup> *Id.* at 2–3.

<sup>144</sup> See *infra* notes 145–46 and accompanying text.

<sup>145</sup> KRISBERG, *supra* note 39, at 2.

<sup>146</sup> Franklin E. Zimring & David S. Tanenhaus, *On Strategy and Tactics for Contemporary Reforms*, in *CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE* 216, 226 (Franklin E. Zimring & David S. Tanenhaus eds., 2014).

<sup>147</sup> See GREENWOOD, *supra* note 127, at 2.

<sup>148</sup> FELD, *supra* note 28, at 30. In the words of Barry Feld, “Progressive reformers had to choose between fundamental reforms to alter conditions that caused crime—poverty, inequality, and discrimination—or to apply Band-Aids to children effected [sic] by them. Impelled by class and ethnic antagonisms, they avoided broad structural changes and chose to save children. A century later, we face the same choices and continue to evade our responsibilities to other peoples’ children.” *Id.* at 274.

## II. A JUVENILE JUSTICE REVOLUTION?

There is widespread consensus that the juvenile justice system in the United States is broken.<sup>149</sup> We detain our youth at a higher rate than any other country in the world.<sup>150</sup> Racial disparities at all levels of the system seem intractable.<sup>151</sup> Programs that have been consistently proven to be effective at reducing delinquency are underfunded while punitive policies that have been consistently demonstrated to be ineffective continue to be expanded.<sup>152</sup> Recidivism rates range between 40 percent and 80 percent.<sup>153</sup> And young people are regularly detained in facilities that cause harm where “widespread abuse and inhumane treatment” are the norm, often for very minor transgressions.<sup>154</sup>

But there are signs that this troubling situation may be changing. Since 2005, US juvenile justice policy has experienced a wave of major reforms.<sup>155</sup> Some scholars have argued that the reforms are so significant that they mark a juvenile justice “revolution.”<sup>156</sup>

<sup>149</sup> See Bell, *supra* note 55, at 24 (writing that the juvenile justice system “has failed youth and failed society”); Karl A. Racine & Elizabeth Wilkins, *Toward a Just System for Juveniles*, 22 UDC/DCSL L. REV. 1, 1–2 (2020) (discussing the dysfunctionality of the current system and acknowledging that “most of what we are doing is not working”).

<sup>150</sup> See MANFRED NOWAK, UNITED NATIONS, *THE UNITED NATIONS GLOBAL STUDY ON CHILDREN DEPRIVED OF LIBERTY* 262 (2019) (finding that the United States has the highest rate of child incarceration in the world at a rate of around 60 per 100,000 children); see also PATRICK MCCARTHY ET AL., NAT’L INST. OF JUST., *THE FUTURE OF YOUTH JUSTICE: A COMMUNITY-BASED ALTERNATIVE TO THE YOUTH PRISON MODEL* 15 (2016) (reporting that “rates of youth incarceration in the U.S. far exceed those of other countries,” and “the U.S. incarcerates youth at more than twice the rate of the next highest incarcerating country (Cyprus) and nearly six times the rate of the Russian Federation”).

<sup>151</sup> Addie C. Rolnick, *Native Youth & Juvenile Injustice in South Dakota*, 62 S.D. L. REV. 705, 705 (2017).

<sup>152</sup> See GREENWOOD, *supra* note 127, at 2.

<sup>153</sup> See Racine & Wilkins, *supra* note 149, at 2 (citing a recidivism rate of “upwards of forty percent” for juveniles in Washington, DC); see also SCHIRALDI, *supra* note 120, at 17 (reporting that “70 to 80 percent of youth returning to the community from incarceration are re-arrested within two to three years.”).

<sup>154</sup> SCHIRALDI, *supra* note 120, at 23 (“I have worked within and outside the youth justice system and have seen firsthand how systems intended to protect and support youth have instead engaged in widespread abuse and inhumane treatment of the young people in their care.”).

<sup>155</sup> See SAWYER, *supra* note 9 (reporting that youth confinement has fallen 60 percent since 2000 and attributing this change primarily to state and federal legislative changes that juvenile justice advocates pushed for).

<sup>156</sup> See generally Drinan, *supra* note 1. See also Carter, *supra* note 23, at 1136 (discussing “a concerted attempt to move away from ‘tough-on-crime’ strategies to an approach that better reflects available evidence about effective interventions and youth development”); Josh Gupta-Kagan, *Beyond “Children Are Different”: The Revolution in Juvenile Intake and Sentencing*, 96 WASH. L. REV. 425 (2021) (framing juvenile intake and sentencing reforms as revolutionary). See also SCHIRALDI, *supra* note 120, at 4–5 (discussing the “remarkable turnaround in youth justice policy” of this century and a “remarkable decline in youth incarceration”).

At the same time, while the changes that are occurring are important and notable, they may not be revolutionary; the current wave of reforms are more of a return to the philosophy the juvenile court was founded upon than a revolution. The current era of juvenile justice policy focuses on adolescent development research that demonstrates that young people are different from adults, and has propelled laws and policies based on the recognition that because they are different, young people should be treated differently from adults.<sup>157</sup> Some refer to the present era as the “Kids Are Different” or “children are different” era.<sup>158</sup> However, this recognition that children are different from adults is not new.<sup>159</sup> Not long after the juvenile court was founded, Judge Julian Mack, writing in the *Harvard Law Review*, argued that recognizing the important differences between juveniles and adults by establishing a separate delinquency court for youth who violate criminal laws “marks a revolution.”<sup>160</sup> Viewed from a historical perspective, this modern recognition that young people should be treated differently from adults is hardly revolutionary.

According to criminologists Thomas J. Bernard and Megan C. Kurlychek, juvenile justice policy in the United States has followed a predictable cycle over time, oscillating between lenient and harsh responses to juvenile criminality.<sup>161</sup> Bernard and Kurlychek trace this pattern in their book *The Cycle of Juvenile Justice*, arguing that future policies can be predicted based upon where current policy falls along this cycle.<sup>162</sup> When there are harsh punishments, but few lenient treatments available, “many minor offenders are let off scot-free because lenient treatments are not available and because justice officials believe that harsh punishments will make the minor offenders worse.”<sup>163</sup> Then, juvenile justice reforms are enacted to create lenient treatments as an alternative to harsh treatments or to doing nothing.<sup>164</sup> Once these lenient options have been fully utilized, people then tend to blame these lenient treatments for juvenile crime, and in turn return to creating harsher punishments to replace the lenient treat-

<sup>157</sup> In *Roper v. Simmons*, where the Supreme Court abolished the juvenile death penalty, the Court based its decision on three primary differences between adolescents and adults, including a lack of maturity, a susceptibility to negative influences, and the transitory nature of youth criminality. *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005). The Court reasoned, “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult” and pronounced that applying the death penalty to juveniles violated the Eighth Amendment. *Id.* at 570, 578.

<sup>158</sup> See FELD, *supra* note 28, at 1.

<sup>159</sup> *Id.* (highlighting that emerging research in the field of neuroscience and adolescent brain development has contributed to a better understanding of these differences, but the concept is not new).

<sup>160</sup> Mack, *supra* note 76, at 104; Sutton, *supra* note 73, at 107–08 (describing how Judge Julian Mack “portrayed the new court as a revolutionary improvement over the old reformatory system and as the first attempt to provide diagnosis and training to delinquents”).

<sup>161</sup> See BERNARD & KURLYCHEK, *supra* note 1, at 197.

<sup>162</sup> *See id.*

<sup>163</sup> *Id.* at 3.

<sup>164</sup> *Id.*

ment options. And so the cycle continues, alternating between a more lenient, rehabilitative approach and a harsher, more punitive approach to juvenile delinquency.<sup>165</sup>

In 2010, Bernard and Kurlychek argued that the United States was at a turning point in this cycle.<sup>166</sup> After scaling up harsher and harsher punishments in the 1990s, the United States seemed to be moving in the direction of leniency. They cited several examples of this turn in the tides, beginning with the United States Supreme Court's incorporation of adolescent development research into the 2005 *Roper v. Simmons* decision that eliminated the death penalty for juveniles.<sup>167</sup> Discussing policy changes such as states raising the maximum age of juvenile court jurisdiction, states creating mechanisms for "reverse waiver[s]" returning juveniles from adult to juvenile court, prosecutorial discretion being exercised to keep juveniles in juvenile court, and police departments declining to refer some juvenile cases to court, they argue that we were in a phase of "forced choice" and the beginning of the creation of more lenient policies.<sup>168</sup>

The changes that have taken hold in the legislative, judicial, and prosecutorial realms since 2010 demonstrate that their prediction was accurate. Juvenile justice policy has swung in the direction of leniency. This Part explores the changes in juvenile justice policy in the past decade, acknowledging the remarkable shift away from the punitive focus of the 1990s and toward policies that prioritize the best interest of young people much more than in the past decades. These changes have occurred in three primary areas, each of which I discuss: (1) the courts, (2) legislation, and (3) prosecuting agencies. After discussing this move towards leniency, I discuss some of the limitations of these changes, raising questions about whether the current wave of reforms can lead to long-term change or whether it is merely another stop in this repeating cycle of juvenile justice policy.

#### A. *The Move Towards Leniency*

The United States Supreme Court's jurisprudence in the area of juvenile justice has shaped this move towards leniency based on the renewed recognition of the fundamental differences between adolescents and adults. This, in turn, has shaped both lower court decisions and state-level legislation. This Part traces the judicial and legislative changes of the past decade, explaining why many in the field view the major policy shift as revolutionary, particularly in contrast to the draconian policies of the 1990s.

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<sup>165</sup> *Id.* at 4.

<sup>166</sup> *Id.* at 188 ("Finally, we believe that the *Simmons* decision comes at a time when the cycle of juvenile justice, as described in this book, has taken another turn. . . . This is when we, as a society, are ready for the large structural changes that mark a return to lenient treatments.").

<sup>167</sup> *Id.* at 187.

<sup>168</sup> *Id.* at 189–91.

In addition to changes to the law, changes to prosecutorial decision-making are contributing to major changes in juvenile justice policy across the country. The emergence of “progressive prosecutors” who use their prosecutorial discretion to keep young people in juvenile court, to divert cases out of the court system entirely, and to use alternatives to incarceration is a new phenomenon that warrants attention. I discuss the progressive prosecution movement here, focusing on prosecutors’ roles in reforming juvenile justice policy.

### 1. Courts

Scholars trace the origin of what some refer to as “juvenile justice revolution” to the Supreme Court’s 2005 decision in *Roper v. Simmons*.<sup>169</sup> In *Roper*, the Court held that imposing the death penalty amounts to cruel and unusual punishment for a juvenile offender.<sup>170</sup> The case rested on adolescent brain development research that highlighted significant differences between juveniles and adults.<sup>171</sup> The Court has carried its findings about the diminished culpability of juvenile offenders into cases limiting life without parole sentences for youth, emphasizing that “[f]rom a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”<sup>172</sup> In *Graham v. Florida*, the Court barred the sentence of life without the possibility of parole for juveniles who have not committed homicide.<sup>173</sup> Then, in 2012, the Court barred mandatory life without parole sentences for all juveniles, requiring that courts engage in an individualized determination about whether life without parole is an appropriate sentence while taking into account the “hallmark features” of youth.<sup>174</sup>

The Supreme Court’s juvenile justice jurisprudence rests on adolescent development research that has found that the prefrontal cortex of the brain, which is responsible for impulse control and decision making, continues to develop until the age of twenty-five.<sup>175</sup> The Court has acknowledged that adolescents are more easily influenced by their peers and are more prone to engage in risk-

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<sup>169</sup> Drinan, *supra* note 1, at 1788 (“A juvenile justice revolution in America is underway. After decades of increasingly punitive treatment of juveniles in our criminal justice system, the tide is turning.”).

<sup>170</sup> See *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>171</sup> See *id.* at 570.

<sup>172</sup> *Graham v. Florida*, 560 U.S. 48, 68 (2010) (quoting *Roper*, 543 U.S. at 570); see also *J.D.B. v. North Carolina*, 564 U.S. 261, 281 (2011) (The Supreme Court also applied its findings about the key differences between juveniles and adults to a case addressing criminal procedure, concluding that courts must consider age when determining whether an interrogation is “custodial”).

<sup>173</sup> See *Graham*, 560 U.S. at 82.

<sup>174</sup> See *Miller v. Alabama*, 567 U.S. 460, 477 (2012).

<sup>175</sup> ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 44–49 (2008) (describing the development of the prefrontal cortex of the brain during adolescence and into young adulthood).

taking activities because their brains have not yet been fully developed.<sup>176</sup> Adolescents are also very likely to grow out of this risk-taking behavior as they mature.<sup>177</sup> According to the Supreme Court, “the case for retribution is not as strong with a minor as an adult” even when the motivation for the sentence is “an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim.”<sup>178</sup>

State courts have incorporated these principles about the distinguishing characteristics of youth to limit extreme sentences other than life without parole. For example, the Iowa Supreme Court found that mandatory minimum sentences applied to youth are unconstitutional under the state constitution.<sup>179</sup>

## 2. State-Level Legislative Reforms

State-level legislation has played an important role in bringing about juvenile justice reforms. Since 2007, forty states have passed approximately one hundred bills reducing juvenile sentences and limiting the prosecution of juveniles in adult court.<sup>180</sup> Legislative reforms have been expansive, but progress in three key areas demonstrates the movement in the direction of leniency: (1) creating mechanisms for release for people sentenced to life when they were juveniles, (2) limiting the transfer of juvenile cases to adult criminal courts, and (3) reducing incarceration in juvenile facilities.

The Supreme Court’s decisions limiting life without parole sentences required states to create policies to provide “meaningful opportunity to obtain release” for people serving life without parole sentences based on crimes they committed as juveniles.<sup>181</sup> States have approached this dictate in different ways, some creating specialized parole procedures and others creating resentencing provisions to return to court.<sup>182</sup>

<sup>176</sup> See *Graham*, 560 U.S. at 68 (reasoning, based on briefs submitted by the American Medical Association and the American Psychological Association, that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds” and that “parts of the brain involved in behavior control continue to mature through late adolescence”).

<sup>177</sup> See *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (“The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”).

<sup>178</sup> *Id.* at 571.

<sup>179</sup> Drinan, *supra* note 1, at 1817; *State v. Lyle*, 854 N.W.2d 378, 381 (Iowa 2014) (describing that the state of Iowa exempted juveniles in adult court from the state’s mandatory sentencing schemes); see also Drinan, *supra* note 1, at 1817 n.189 (citing W. VA. CODE §§ 61-11-23(C)(1-15) that requires the parole board to consider “the diminished culpability of juveniles as compared to that of adults”).

<sup>180</sup> See SCHIRALDI, *supra* note 120, at 10.

<sup>181</sup> The Court deliberately left it to the states to determine how to provide the meaningful opportunity for release it required for nonhomicide offenders in *Graham v. Florida*. See *Graham*, 560 U.S. at 75.

<sup>182</sup> See Caldwell, *supra* note 7, at 251–62.

Many state-level reforms have made it more difficult to prosecute juveniles in adult courts. Whereas the movement in the 1990s was toward treating juveniles like adults, it is now widely recognized that juveniles are unique and should be treated differently from their adult counterparts.<sup>183</sup> In 2010—the year the Supreme Court held in *Graham v. Florida* that life sentences without the possibility of parole amounts to cruel and unusual punishment for juveniles who have not committed homicide—juvenile justice expert Neelum Arya argued that the case supported a move toward “eliminating the ability to prosecute youth as adults” entirely.<sup>184</sup> The national trend is moving in this direction; states across the country have passed legislation to roll back some of the expansions to juvenile transfer laws that existed in the 1990s, making it more difficult to process juveniles in adult court.<sup>185</sup> According to the Campaign for Youth Justice, since 2005 “36 states and Washington, D.C. have passed 70 pieces of legislation to move youth out of the adult criminal justice system.”<sup>186</sup> Many states have also raised the minimum age of transfer to adult court.<sup>187</sup> For example, in 2016, California passed legislation prohibiting the transfer of anyone under the age of sixteen to adult court.<sup>188</sup> Collectively, these changes have had a major impact. Seventy percent fewer juveniles are prosecuted in adult court now than in 2000.<sup>189</sup>

States have also passed legislative limits on incarcerating youth in juvenile facilities, resulting in a national reduction of nearly 60 percent in our rate of youth incarceration since 2000,<sup>190</sup> and the closure of one-third of juvenile facili-

<sup>183</sup> See *Roper*, 543 U.S. at 578–79 (eliminating the death penalty for juveniles); see also *Graham*, 560 U.S. at 82 (eliminating life without parole for juveniles who have not committed homicide); see also *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (eliminating mandatory life without parole sentences for juveniles). But see Emily Buss, *Kids Are Not so Different: The Path from Juvenile Exceptionalism to Prison Abolition*, 89 U. CHI. L. REV. 843, 843 (2022) (arguing “the ‘kids are different’ approach is built upon two flaws in the Court’s developmental analysis” and that the reasoning the Court has applied in juvenile cases should be extended to adult cases).

<sup>184</sup> Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 100 (2010).

<sup>185</sup> See JEREE THOMAS, RAISING THE BAR: STATE TRENDS IN KEEPING YOUTH OUT OF ADULT COURT (2015-2017) 29–34 (2017), [http://www.campaignforyouthjustice.org/images/StateTrends\\_Report\\_FINAL.pdf](http://www.campaignforyouthjustice.org/images/StateTrends_Report_FINAL.pdf) [<https://perma.cc/GK35-QFEB>]; see also Jared Hoskins, *Chalk Talks—Continued Reform of Kentucky Juvenile Justice Following Senate Bill 200*, 48 J.L. & EDUC. 125, 126 (2019) (discussing Kentucky Senate Bill 200 and its “overhaul” of the state’s juvenile justice system).

<sup>186</sup> Marcy Mistrett, *Letter from Marcy Mistrett*, in JEREE THOMAS, RAISING THE BAR: STATE TRENDS IN KEEPING YOUTH OUT OF ADULT COURT (2015-2017) 3, 3 (2017), [http://www.campaignforyouthjustice.org/images/StateTrends\\_Report\\_FINAL.pdf](http://www.campaignforyouthjustice.org/images/StateTrends_Report_FINAL.pdf) [<https://perma.cc/GK35-QFEB>].

<sup>187</sup> See Cara H. Drinan, *The Miller Trilogy and the Persistence of Extreme Juvenile Sentences*, 58 AM. CRIM. L. REV. 1659, 1666 (2021).

<sup>188</sup> Public Safety and Rehabilitation Act, LEGIS. SERV. PROP. 57 (Cal. 2016).

<sup>189</sup> See MISTRETT & ESPINOZA, *supra* note 6, at 7.

<sup>190</sup> SAWYER, *supra* note 9.

ties.<sup>191</sup> In California, the state shut down its famously abusive Department of Juvenile Justice youth prison system in its entirety.<sup>192</sup> In 2013, Georgia passed legislation that limited the length of incarceration judges could impose for specific offenses and barred incarceration for young people who have been convicted of minor offenses.<sup>193</sup> Unless a young person has been previously convicted of four offenses, they cannot be incarcerated for a misdemeanor offense under Georgia's reformed law.<sup>194</sup> After these reforms, three youth detention facilities closed because they were no longer needed given that the number of incarcerated youth dropped by over 57 percent.<sup>195</sup> Georgia's legislation also expanded mental health services and expanded diversion opportunities.<sup>196</sup> Seven other states have followed Georgia's lead in limiting the length of incarceration that judges can impose for specific offenses, including Utah, which has set six months as the maximum length of incarceration for most juvenile offenses.<sup>197</sup>

Reducing juvenile incarceration makes sense.<sup>198</sup> According to a report published by the Annie E. Casey Foundation, research clearly shows that juvenile incarceration is "(1) dangerous, (2) ineffective, (3) unnecessary, (4) obsolete, (5) wasteful, and (6) inadequate," and it is bad for public safety.<sup>199</sup> According to this report, limiting the lengths of incarceration that judges are allowed to

<sup>191</sup> JOSHUA ROVNER, THE SENT'G PROJECT, DECLINES IN YOUTH COMMITMENTS AND FACILITIES IN THE 21ST CENTURY (2015), <https://www.sentencingproject.org/app/uploads/2022/08/Youth-Commitments-and-Facilities.pdf> [<https://perma.cc/RAV4-ELL3>].

<sup>192</sup> See Maureen Washburn, *Decades of Abuse at California's DJJ Will End in 2021*, *CTR. ON JUV. & CRIM. JUST.* (Feb. 16, 2021), <http://www.cjcj.org/news/13081> [<https://perma.cc/G4QY-VRZT>] (reporting that California will close the Division of Juvenile Justice, which "has subjected youth to inhumane conditions, rampant violence, and appalling abuses" for eighty years).

<sup>193</sup> Gupta-Kagan, *supra* note 156, at 451 (citing GA. CODE ANN. § 15-11-601 (2016)).

<sup>194</sup> *Id.*

<sup>195</sup> Steven Teske, *Juvenile Justice Reform in Georgia: A Collective Decisionmaking Approach to De-Politicize Crime and Punishment*, 54 GA. L. REV. 1169, 1199 (2020).

<sup>196</sup> See *id.*

<sup>197</sup> See Gupta-Kagan, *supra* note 156, at 456 (noting that Utah's six-month limit does not apply if the child re-offends within the six-month time period, if more time is needed to complete a treatment program, or if the conviction is for a more serious crime such as murder, kidnapping, or a crime involving the use of a weapon).

<sup>198</sup> Fagan & Kupchik, *supra* note 23, at 30 (Although it is more harmful for juveniles to be housed in adult facilities, even detention in juvenile facilities causes harm. One recent empirical study "suggest[s] that although juvenile facilities are less harmful for juveniles than are adult facilities, youth in juvenile facilities are still exposed to harsh conditions likely to exacerbate social, academic, and emotional deficiencies, and thus any incarceration ought to be used only as a last resort sentencing option.").

<sup>199</sup> See RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 4 (2011); Fagan & Kupchik, *supra* note 23, at 58 (concluding that juvenile incarceration "has had harmful consequences on many youth through unnecessary incarceration, and thus needless exposure to fear and trauma" and exposure "to weak socialization and poor opportunities for human capital development, as well as both victimization and further offending").



impose for specific offenses is “[t]he most direct strategy for reducing the populations of juvenile correctional facilities.”<sup>200</sup>

State-level legislation has also focused on improving access to services and improving the conditions of confinement in juvenile institutions.<sup>201</sup>

### 3. *Progressive Prosecution Policies*

In recent years, a new contributor to juvenile justice reform has emerged: the so-called progressive prosecutor.<sup>202</sup> Over the past several years, a wave of “progressive prosecutors” have been elected across the country.<sup>203</sup> Some of these prosecutors are playing an important role in bringing about needed changes to the US criminal justice system.<sup>204</sup>

Juvenile justice policy has been a major focus of many in the progressive prosecution movement.<sup>205</sup> For example, the Office of the Attorney General for

<sup>200</sup> MENDEL, *supra* note 199, at 28.

<sup>201</sup> See Hoskins, *supra* note 185, at 125 (discussing Kentucky Senate Bill 200 and its overhaul of the state’s juvenile justice system).

<sup>202</sup> See *infra* text accompanying notes 203–05.

<sup>203</sup> Jeremy Loudonback, *Prosecutors Push Back on Enduring “Superpredator” Label*, THE IMPRINT (Aug. 18, 2021, 9:31 PM), <https://imprintnews.org/justice/juvenile-justice-2/prosecutors-push-back-on-enduring-superpredator-label/58009> [<https://perma.cc/XT6W-T9Z6>]. For a history of the rise of the progressive prosecutor movement, see Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 195, 197–99 (2021) [hereinafter Covert, *Transforming the Progressive Prosecutor Movements*] (describing the election of progressive prosecutors in counties in twenty-four states across the United States and marking 2015 as the beginning of the progressive prosecution movement); see also Darcy Covert, *The False Hope of the Progressive-Prosecutor Movement*, THE ATLANTIC (June 14, 2021) [hereinafter Covert, *The False Hope of the Progressive-Prosecutor Movement*], <https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141/> [<https://perma.cc/P8K8-LF7W>]. In Philadelphia, for example, District Attorney Larry Krasner, a civil rights attorney and former defense attorney, adopted policies requiring diversion, lower sentences, and specified that certain crimes should not be prosecuted. Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES, (Oct. 30, 2018) <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [<https://perma.cc/E3UM-T4EM>]. It is worth noting that there is a debate in the literature about what should qualify as a progressive prosecutor, and some challenge whether those who label themselves as such really qualify. See, e.g., Benjamin Levin, Essay, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1415–17 (2021) (considering the question of “[w]hat exactly is a ‘progressive prosecutor’?” in discussing Kamala Harris’s track record); see also Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 738, 740 (2020) (discussing the election of progressive prosecutors since 2019 and acknowledging that “[t]here is not complete agreement on what distinguishes progressive prosecutors from their mainstream contemporaries”).

<sup>204</sup> See Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 8, 12 (2018) (arguing that “[t]he election of progressive prosecutors willing to use their power and discretion to effect change is essential to bringing fairness and racial equity to our criminal justice system, and that will only happen if good people become prosecutors”).

<sup>205</sup> See, e.g., *Juvenile and Young Adult Issues*, FAIR & JUST PROSECUTION, <https://fairandjust>

the District of Columbia asserts that it “seeks to radically change how it approaches juvenile justice” by using “evidence and innovation to focus on what truly reduces recidivism.”<sup>206</sup> Some of this office’s strategies involve diverting young people out of the system and reducing detention and incarceration.<sup>207</sup> In Prince George’s County in Maryland, lead prosecutor Aisha Braveboy advocated for a bill allowing young people convicted of serious crimes as juveniles to be resentenced after they have served twenty years in prison.<sup>208</sup> In Cook County, Illinois, Kim Foxx is reducing juvenile transfers to adult court.<sup>209</sup>

In Los Angeles, District Attorney George Gascón has adopted far more progressive juvenile justice policies than many other “progressive prosecutors,” including *completely barring* the transfer of all juveniles to adult court.<sup>210</sup> On his first day in office, Gascón released a Special Directive, announcing various policy changes to juvenile justice filing decisions.<sup>211</sup> The Directive demonstrated a commitment to rehabilitation and, referencing the Supreme Court’s jurisprudence in this area, highlighted the “diminished culpability” of youth and their “potential for rehabilitation.”<sup>212</sup> Gascón’s juvenile justice policies include a directive not to file any misdemeanor charges against juveniles, not to transfer any juveniles to adult court, and not to file any charges that could qualify as strikes under California’s Three Strikes Law unless the charges involved forcible rape or murder.<sup>213</sup> The Office has also established diversion programs and favors alternatives to incarceration.<sup>214</sup> These changes are remarkable.

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prosecution.org/issues/juvenile-and-young-adult-issues/ [https://perma.cc/WZW7-S4CN] (discussing juvenile diversion, alternatives to incarceration, ending life sentences, and trauma-informed justice). According to its website, Fair and Just Prosecution (FJP) is an organization that “brings together elected local prosecutors as part of a network of leaders committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility.” *Id.*

<sup>206</sup> Racine & Wilkins, *supra* note 149, at 2.

<sup>207</sup> *See id.* at 5.

<sup>208</sup> Loudenback, *supra* note 203.

<sup>209</sup> *Id.* Foxx was troubled by the ease with which a young person could change from being seen as deserving of protection to being blamed and punished. *See id.* According to Foxx, “There was a level of care that we were saying that we were giving to these children on the child protection side, and then the moment that they engaged in behavior that went afoul of our criminal code, we disregarded everything that we knew about them.” *Id.*

<sup>210</sup> Special Directive 20-09 from George Gascón, L.A. Cnty. Dist. Att’y, at 3 (Dec. 7, 2020), <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-09.pdf> [https://perma.cc/K8Z4-MDHS].

<sup>211</sup> *See id.* at 2–6.

<sup>212</sup> *Id.* at 1.

<sup>213</sup> *Id.* at 2–3. This decision not to file strikes is significant not only in reducing the likelihood that the young person will later be sentenced to life for a third strike offense, but also because charging strikes skews the plea-bargaining process, as I have discussed at length elsewhere. *See generally* Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. REV. 581 (2012).

<sup>214</sup> James Queally, *Gascón Launches Juvenile Diversion Program Amid Claims It Goes Too Far*, L.A. TIMES (Dec. 21, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-12-21/gascon-launches-juvenile-diversion-program-amid-claims-it-goes-too-far> [https://per

However, Gascón has also been highly criticized by some, including members of his own office, for adopting these policies.<sup>215</sup> He is the subject of a recall campaign.<sup>216</sup> And political pressure may be pushing him to take a less progressive stance. For example, he recently announced that he is reconsidering the blanket bar on transferring juveniles to adult court.<sup>217</sup>

Gascón's story demonstrates both the potential of progressive prosecutors to transform juvenile justice policy at the local level, as well as the limitations of this approach to reform. In terms of the transformative potential, prosecutors have a tremendous amount of power over charging decisions, dispositions of cases, and sentencing. Given this power, having a decision-maker who is committed to decarceration, or to diversion, in charge of these decisions can dramatically change juvenile justice systems.

Although prosecutors played a minor role, if any, in the juvenile court process when the court was first founded, over time they have taken on more and more power in the juvenile court system.<sup>218</sup> When the "due process" reforms came about through the US Supreme Court decisions of the sixties, prosecutors took on a more pronounced role as the juvenile delinquency system began to resemble the adversarial model of adult criminal courts more closely.<sup>219</sup>

Then, in the "get tough" era of the 1990s, prosecutors took on even more power in the juvenile court process.<sup>220</sup> In fact, Franklin Zimring has argued that the driving force behind the expansion of juvenile transfer laws in the 1990s was "an attempt to expand prosecutorial power in juvenile justice" by vesting the decision-making power regarding whether a juvenile should be prosecuted in adult court in the hands of prosecutors.<sup>221</sup> This occurred through two sets of policies: (1) granting original jurisdiction to criminal courts rather than delinquency courts for certain charges, and certain ages; and (2) giving prosecutors

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ma.cc/4B35-7GSU] (describing a diversion program open to young people accused of serious crimes including arson and sexual battery, which requires the acceptance of responsibility and restorative justice conferences).

<sup>215</sup> See, e.g., Kathy Cady, *Op-ed: Injustice in the Juvenile "Justice" System*, ANTELOPE VALLEY TIMES (Sept. 22, 2021), <https://theavtimes.com/2021/09/22/op-ed-injustice-in-the-juvenile-justice-system/> [https://perma.cc/VF7H-B3AL].

<sup>216</sup> See Nathan Solis, *Los Angeles County Registrar Approves Recall Petition for Dist. Atty. George Gascón*, L.A. TIMES (Jan. 28, 2022), <https://www.latimes.com/california/story/2022-01-28/los-angeles-county-registrar-approves-recall-petition-for-district-attorney-george-gasc-on> [https://perma.cc/6BXQ-RUZP].

<sup>217</sup> Frank Stoltze, *LA DA Gascón Reverses Course, Now Open to Charging Some Juveniles as Adults*, LAIST (Feb. 16, 2022, 3:34 PM), <https://laist.com/news/criminal-justice/la-da-gascon-reverses-course-now-open-to-charging-some-juveniles-as-adults> [https://perma.cc/H2HY-CCEQ].

<sup>218</sup> See M. MARVIN FINKELSTEIN ET AL., U.S. DEP'T OF JUST., PROSECUTION IN THE JUVENILE COURTS: GUIDELINES FOR THE FUTURE viii (1973).

<sup>219</sup> See *id.* at viii–x.

<sup>220</sup> See Zimring, *supra* note 22, at 40–45.

<sup>221</sup> *Id.* at 40.

the discretion to decide whether to file a case in adult or juvenile court.<sup>222</sup> As Zimring writes,

[p]roviding discretion to prosecutors to file in either juvenile or criminal courts is an obvious and direct shift of power from juvenile court judges to prosecutors. Providing exclusive jurisdiction for some charges in criminal court is a less obvious grant of power to prosecutors but no less direct, because it is the prosecutor who determines what charges to file.<sup>223</sup>

The power of prosecutors in juvenile court proceedings is now firmly cemented. Prosecutors are entirely in charge of whether to charge an individual with a crime and, if so, which crime to charge. Given the penalties and minimum sentences that attach to certain charges, the prosecutor's power to determine which charges to file shapes the plea bargaining process tremendously. Further, by exercising their discretion to decline to prosecute, or to keep youth in juvenile court, prosecutors have the power to bring about tremendous change, as with George Gascón's policies in Los Angeles.

A 1973 Department of Justice report addressing the role of prosecutors in juvenile court sets forth a vision of juvenile court prosecutors that is consistent with the approach of many progressive prosecutors of today.<sup>224</sup> According to the DOJ report, juvenile court prosecutors should "balance considerations of community protection with an equal duty to promote the best interests of juveniles" where the responsibility to prosecute the case "must be tempered by his role as *parens patriae* and by a commitment to the child welfare concerns of the juvenile court."<sup>225</sup> Thus, "the prosecutor must assume a major role in protecting the legal rights of juveniles by proceeding only on legally sufficient petitions or complaints, by insisting that police field practices are consistent with legal requirements, and by encouraging fair and lawful procedures in the court."<sup>226</sup> The report goes on to argue that prosecutors should divert all appropriate cases and seek the least restrictive alternatives possible.<sup>227</sup>

The modern wave of progressive prosecutors who wield their discretion to divert cases out of the system, to keep juveniles in juvenile court, and to avoid juvenile incarceration has played a significant role in the changes that have occurred in the field of juvenile justice in recent years.

#### 4. *Limits of Progressive Prosecution Movement*

At the same time, there are reasons to be cynical about how much lasting change is likely to come out of the progressive prosecution movement.<sup>228</sup> First,

<sup>222</sup> *Id.* at 42.

<sup>223</sup> *Id.* at 45.

<sup>224</sup> FINKELSTEIN ET AL., *supra* note 218, at viii.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> See, e.g., Covert, *Transforming the Progressive Prosecutor Movement*, *supra* note 203, at 192–93 (raising serious concerns about focusing too much on the potential of progressive

prosecutors serve at the will of “the people,” and many who have run on progressive agendas are facing fierce criticism and backlash.<sup>229</sup> They could be replaced in a subsequent election cycle by a more punitive prosecutor, who would have the power to roll back any changes that had been put in place, as in the case of San Francisco District Attorney Chelsea Boudin, who was recalled in a special election.<sup>230</sup> The changes an individual prosecutor chooses to make are transient rather than permanent.

The culture of prosecution agencies presents another obstacle to transformation flowing through prosecuting agencies. Progressive prosecutors have faced criticism, push back, and defiance from some prosecutors within their own agencies.<sup>231</sup> In addition, there are structural problems endemic to the juvenile and criminal court systems that make transformational change unlikely through these avenues. Seema Gajwani and Max G. Lesser examine this problem in a 2019 article, arguing that electing or hiring progressive prosecutors will probably not change the trajectory of mass incarceration, nor will it change the culture of the criminal justice system.<sup>232</sup> Gajwani and Lesser’s insights are quite important given that they work for a prosecuting agency and have been responsible for attempting to change the organizational culture. Rather than fo-

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prosecution and arguing that people who are serious about criminal justice reform should not be “too easily satisfied with [the] current agenda” of the progressive prosecution movement because we may “squander[] this moment when criminal justice reform tops the national agenda to implement meaningful, transformative change”).

<sup>229</sup> See Wendy N. Davis, *Progressive Prosecutors Are Encountering Pushback*, A.B.A. J.: NAT’L PULSE (July 21, 2022, 3:50 PM), <https://www.abajournal.com/web/article/progressive-prosecutor-pushback> [https://perma.cc/7FHE-6PRY]; Laura J. Nelson et al., *San Francisco Voters Recall Progressive D.A. Boudin. Crime and Homelessness at Issue*, L.A. TIMES, <https://www.latimes.com/california/story/2022-06-07/2022-san-francisco-district-attorney-chesa-boudin-recall-election-results> [https://perma.cc/CTA5-SFNR] (June 8, 2022, 10:22 AM), (reporting that San Francisco voters recalled progressive prosecutor Chelsea Boudin); Jeremy B. White, *LA District Attorney Recall Fails to Qualify for Ballot*, POLITICO, <https://www.politico.com/news/2022/08/15/george-gascon-los-angeles-ballot-00051978> [https://perma.cc/5MYH-CPNY] (Aug. 17, 2022, 8:33 PM) (reporting that “[r]ising violent crime and a series of brazen offenses have soured the public mood as law enforcement rallied against Gascón and conservative media portrayed him as the embodiment of liberal lawlessness”); Jamiles Lartey, *How Conservatives Are Trying to Shut Down the Progressive Prosecutor Movement*, MARSHALL PROJECT (Aug. 20, 2022), <https://www.themarshallproject.org/2022/08/20/desantis-warren-progressive-prosecutors> [https://perma.cc/NJ5C-Y75J] (describing how Florida Governor Ron DeSantis suspended the State Attorney Andrew Warren and installed a replacement who “has already begun to roll back some of Warren’s more progressive policies”).

<sup>230</sup> See Nelson et al., *supra* note 229.

<sup>231</sup> See Jeremy B. White, *California Prosecutors Revolt Against Los Angeles DA’s Social Justice Changes*, POLITICO (Jan. 25, 2021, 4:30 AM), <https://www.politico.com/news/2021/01/25/george-gascon-california-social-justice-461667> [https://perma.cc/39J9-UB4L] (reporting that “[r]ank-and-file Los Angeles prosecutors have revolted and sought to block their new boss in court”).

<sup>232</sup> See Gajwani & Lesser, *supra* note 107, at 71–72.

cus on progressive prosecutors, they suggest shifting to a restorative justice framework as a path to more lasting structural change.<sup>233</sup>

In addition, not all “progressive prosecutors” are created equally. There are real questions about whether the progressive prosecution policies that have been most widely adopted are as transformational as they have been touted to be. For example, people have questioned whether Manhattan’s chief prosecutor Cyrus Vance Jr. was really progressive, arguing that the changes he imposed were quite minimal.<sup>234</sup> According to one critic, Vance’s “tenure demonstrates why the progressive-prosecutor platform is unlikely to accomplish meaningful reform: There is a striking mismatch between the movement’s important goals and the inadequate means it employs to achieve them.”<sup>235</sup> Similar criticisms have been levied against other prosecutors who have campaigned as progressive prosecutors.<sup>236</sup> In his book *Usual Cruelty*, Alec Karakatsanis highlights how little progressive prosecutors as a unit have done to fundamentally alter the criminal justice system, highlighting relatively modest reductions in prosecutions and a failure to redistribute resources away from prosecution and investigations, among other things.<sup>237</sup> Notably, Karakatsanis reports that none of these prosecutors have stopped prosecuting children as adults, none have sought to eliminate fines and fees for those who cannot pay, and none have adequately addressed the complicity of their own offices, and of police and jails, in perpetuating racism and harm.<sup>238</sup> This may be changing, as more progressive prosecutors like George Gascón, who did in fact stop transferring juveniles to adult court, take the reins.

Moreover, some of the policies of progressive prosecutors, such as diversion or non-prosecution for less serious offenses, run the risk of falling short of their rehabilitative goals if appropriate supportive services are not put into place for the young people involved. Speaking about Baltimore City State’s Attorney Marilyn Mosby’s policy of refusing to prosecute a list of low-level offenses, criminologist Jeffrey Ian Ross argues, “It’s well intentioned, however if

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<sup>233</sup> *Id.* at 72.

<sup>234</sup> See Covert, *The False Hope of the Progressive-Prosecutor Movement*, *supra* note 203 (“For example, his office stopped prosecuting most marijuana possession offenses in 2018. But those cases constituted only 5 percent of the misdemeanors his office pursued that year, and he continues to contribute to mass incarceration by sending a disproportionate number of people, compared with other New York City boroughs, to the main city jail complex, Rikers Island.”).

<sup>235</sup> *Id.*; see also Davis, *supra* note 204, at 12 (“Diversion programs that only include low-level misdemeanors will not get us there, but bold directives like those implemented by District Attorney Larry Krasner are an important start, and we have to start somewhere.”).

<sup>236</sup> See ALEC KARAKATSANIS, *USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL JUSTICE SYSTEM* 86–87 (2019) (describing various ways in which prosecutors including Kim Ogg, Larry Krasner, Kim Foxx, Cyrus Vance, and George Gascón, among others, have failed to advance policies that would truly transform the patterns of incarceration and punishment in the criminal justice system).

<sup>237</sup> *Id.* at 86.

<sup>238</sup> *Id.* at 87.

there is no stopgap measure and or a strategy to deal with juveniles who are engaging disruptive activity, if that's not put into place this whole experiment is going to fail."<sup>239</sup> According to Ross, "The pendulum will swing back to a more conservative law and order approach to juveniles hanging out on corners, dealing drugs and that sort of thing. The city better be prepared for that."<sup>240</sup>

Thus, the risk is that the progressive prosecution movement may fit into the "leniency" portion of the cycle of juvenile justice policy, where little to no intervention is taken when a young person breaks the law because the available punishments are too harsh.<sup>241</sup> Historically, after a period of leniency, the pendulum shifts back to a punitive approach because the lenient interventions are perceived as being ineffective.<sup>242</sup> This need not be the case. There are a number of programs that have been proven time and time again to be quite effective at reducing juvenile delinquency.<sup>243</sup> However, if these evidenced-based programs do not accompany the more lenient prosecution policies, punitive policies may follow.

### B. *Breaking the Cycle*

These judicial, legislative, and prosecutorial reforms are making important headway to counteract some of the harmful policies that have been enacted to respond to juvenile crime. There is no way to quantify the importance of creating paths for release for people who have been incarcerated since their teenage years, nor the impact of keeping young people out of detention when they break the law. It is not an exaggeration to say that the lives of tens of thousands of young people are being saved each year by these policy changes.<sup>244</sup> The import to these individuals, as well as to their families and our society, cannot be overstated.

At the same time, these changes do not fundamentally challenge the original framework of the juvenile court, which focuses on the individual, or the family, as the problem.<sup>245</sup> As such, there is a grave risk that the changes of the past decade will be short-lived, and that the juvenile justice system will continue to function as it always has—in ways that treat youth of color and girls more harshly than white young men, and in ways that perpetuate trauma and abuse.

<sup>239</sup> Shelley Orman, *How Will Progressive Prosecution Impact Juvenile Justice System?*, FOX BALTIMORE (Mar. 31, 2021), <https://foxbaltimore.com/news/local/how-will-progressive-prosecution-impact-juvenile-justice-system> [https://perma.cc/4W6P-U6L7].

<sup>240</sup> *Id.*

<sup>241</sup> BERNARD & KURLYCHEK, *supra* note 1, at 3.

<sup>242</sup> *Id.* at 3–4.

<sup>243</sup> See generally GREENWOOD, *supra* note 127.

<sup>244</sup> For example, the number of youth incarcerated each year in the United States has dropped from 108,802 per year in 1997 to 43,580 per year in 2017. SAWYER, *supra* note 9.

<sup>245</sup> For example, Melissa Carter frames the current wave of reforms as "reorienting to an individualized approach that responds to children's behavior from a developmental perspective." Carter, *supra* note 23, at 1146.

One indication of the limits of the current wave of reforms is that despite significant declines in juvenile incarceration in recent years, the United States continues to incarcerate youth at a higher rate than any other country in the world, at a rate of three hundred per one hundred thousand youth.<sup>246</sup>

Writing in 2011 juvenile justice expert Tamar Birckhead warned that although the recent “legal victories” in *Roper v. Simmons* and *Graham v. Florida* were “worthy of being labeled ‘landmark,’ ” there was a risk that they would not lead to the kind of transformational change that many juvenile justice advocates hoped for.<sup>247</sup> She argued that “[s]ustainable policy reform often requires departing from the status quo, creating new models rather than merely dismantling old ones, and making short-term investments in order to reap long-term benefits.”<sup>248</sup>

Given that the Supreme Court’s juvenile justice decisions of the early 2000s are widely credited with sparking the sea change that has followed in juvenile justice policy, the Supreme Court’s 2021 decision in *Jones v. Mississippi* warrants attention.<sup>249</sup> In *Jones*, the Court narrowed the scope of the requirements for sentencing juveniles who have committed homicide to life without parole, concluding that a life without parole sentence is allowed as long as a judge has discretion to impose a lesser sentence.<sup>250</sup> The Court ruled that the sentencing judge did not need to conclude that a young person was permanently incorrigible in order to impose a sentence of life without parole, although the dissent argued that this was clearly required by prior case law.<sup>251</sup> This case is significant because it signals that the current Supreme Court—whose composition has changed significantly since *Roper*, *Graham*, and *Miller*—may reverse course and take a more punitive stance on juvenile justice issues that appear before it. If *Roper* signaled the beginning of the recent wave of changes towards a more lenient and rehabilitative approach, there is a possibility that *Jones* could signal the beginning of the pendulum swinging in the other direction.

Despite the significance of the reforms this Article has discussed, most responses to juvenile crime continue to follow the individualistic framework that has characterized the juvenile justice system since the 1800s.<sup>252</sup> Judicial and

<sup>246</sup> Peter E. Leone, *Doing Things Differently: Education as a Vehicle for Youth Transformation and Finland as a Model for Juvenile Justice Reform*, in A NEW JUVENILE JUSTICE SYSTEM 86, 87 (Nancy E. Dowd ed., 2015).

<sup>247</sup> See Tamar R. Birckhead, *Juvenile Justice Reform 2.0*, 20 J.L. & POL’Y 15, at 61 (2011).

<sup>248</sup> *Id.*

<sup>249</sup> See *Jones v. Mississippi*, 141 S. Ct. 1307, 1311 (2021) (upholding the life without parole sentence of a fifteen-year-old when the sentencing court did not explain, on the record, why the sentence was appropriate based on a conclusion that the youth was “permanently incorrigible”).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 1328 (Sotomayor, J., dissenting).

<sup>252</sup> For example, the Supreme Court’s jurisprudence has limited life without parole sentences for juveniles, but has left similar sentences in place, such as life with the possibility of parole. See, e.g., *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016) (holding that the *Miller*



legislative changes based on the concept that youth should be treated differently from adults impose lesser sentences or more lenient consequences for the commission of a crime, but the law remains focused on punishing or rehabilitating an individual for an act of wrongdoing.<sup>253</sup> The problem and social response emphasize the individual's transgression as the focus for intervention, and the systems and structures that led the young person to engage in the crime largely go unaddressed.<sup>254</sup> Young people are subject to treatment or incarceration in the hopes of changing them individually, with the goal of protecting society from continuing transgressions in the future.<sup>255</sup> Prosecutorial discretion reforms similarly focus on the individual, making different decisions than in the past but generally conceptualizing juvenile crime as a problem of a young person acting in a blameworthy manner, or of their family failing to properly control them.<sup>256</sup> Thus, as radical as some of these reforms seem, for the most part they exist within the confines of the same framework that has existed since the court's inception.<sup>257</sup> As such, the historical patterns that have been identified in the cycle of juvenile justice are likely to continue to replicate, and the pendulum is likely to swing back to the punitive side in the not-too-distant future.

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v. *Alabama* prohibition against mandatory life without parole sentences for juveniles applies retroactively, but that it “does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole” as long as the state provides a mechanism for considering release, such as a parole hearing).

<sup>253</sup> For example, as the state of California moves to close down its youth prison system, the Division of Juvenile Justice, there is community concern “that going from DJJ to the local juvenile hall or some of the previously closed probation camps is no real improvement at all.” James Rainey, *California Plans to Close Troubled Youth Prisons After 80 Years. But What Comes Next?*, L.A. TIMES (Feb. 15, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-02-15/california-youth-prisons-closing-criminal-justice-reform> [<https://perma.cc/ZRQ8-LMH9>].

<sup>254</sup> This is similar to the approach in the progressive era, where “one possible response to the new problem of juvenile delinquency was to change those social conditions, but the reformers of the time ignored that possibility and focused instead on changing the behavior of juvenile delinquents and their parents.” BERNARD & KURLYCHEK, *supra* note 1, at 233.

<sup>255</sup> For example, in an article discussing the return to rehabilitation in juvenile justice and the future possibilities for change, the authors frame the “forward-looking approach” as an “approach to legal accountability that aims systematically at the individual prevention of criminal behavior and the promotion of public safety in the least restrictive and most cost-effective manner.” Mark R. Fondacaro et al., *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N.U. L. REV. 697, 698–99 (2015).

<sup>256</sup> For example, common changes implemented by progressive prosecutors include prosecuting crimes that could be felonies as misdemeanors, reforming bail decisions, and diverting low-level offenses. *See* Davis, *supra* note 229.

<sup>257</sup> There are notable exceptions, such as efforts to embrace restorative justice responses to juvenile delinquency. *See* Elizabeth Thompson, *Restorative Justice Solutions for Youth are Growing Abroad, Can they Become Part of the Mix in the U.S.*, N.C. HEALTH NEWS (Mar. 24, 2022), <https://www.northcarolinahealthnews.org/2022/03/24/restorative-justice-solutions-for-youth-are-growing-abroad-can-they-become-part-of-the-mix-in-the-u-s/> [<https://perma.cc/VH2Q-6H9T>] (describing the emergence of restorative justice responses to juvenile delinquency in different states).

Why should we be concerned about the possibility? The way that the United States has treated its young people through the juvenile justice system is deeply troubling.<sup>258</sup> Our country has routinely chosen to send teenagers into adult prisons, where we know they are more likely to kill themselves or to be attacked than if they were to be incarcerated with other juveniles.<sup>259</sup> Staff in juvenile justice facilities routinely physically, sexually, and emotionally abuse the young people they are responsible for taking care of.<sup>260</sup> The United States regularly invests in juvenile justice interventions such as incarceration that we know cause harm, and that we know increase future criminality,<sup>261</sup> instead of investing in less harmful interventions that have been proven to be more effective and less costly.<sup>262</sup>

And these decisions are driven by both explicit and implicit racial, gender, and ethnic bias. This should not be a surprise given that the juvenile justice system was created based on these biases. The harms of the US juvenile justice

<sup>258</sup> There is no question that the harsh punishments enacted throughout the 1990s have resulted in tremendous harm to young people and their families and have also fostered conditions that exacerbate rather than reduce criminality.

<sup>259</sup> They are more likely to experience physical and sexual abuse, and are more likely to experience mental health symptoms and psychological trauma, compared to youth detained in juvenile facilities. Fagan & Kupchik, *supra* note 23, at 37. One study found that youth in adult facilities experience higher rates of Post-Traumatic Stress Disorder, as well as higher levels of depression, anxiety, and phobic anxiety, than their counterparts in juvenile facilities. *Id.* at 54.

<sup>260</sup> For an in-depth exploration of the extensive abuse that has been documented in juvenile detention facilities across the country, see Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001 (2005); see also Jamiles Lartey, *Confronting America's 'Cruel and Unusual' Juvenile Detention Crisis*, MARSHALL PROJECT (Aug. 13, 2022), <https://www.themarshallproject.org/2022/08/13/confronting-america-s-cruel-and-unusual-juvenile-detention-crisis> [<https://perma.cc/234X-VCKM>] (describing horrendous conditions in juvenile detention facilities in Texas and Louisiana, including youth “having to use water bottles as makeshift toilets on the weekends” and isolation policies that drive young people to harm themselves); Richard Winton, *70 Girls Sexually Assaulted in Juvenile Camps by Probation Employees, Lawsuits Allege*, L.A. TIMES (Aug. 19, 2022, 6:00 AM), <https://www.latimes.com/california/story/2022-08-19/70-girls-sexually-assaulted-in-juvenile-camps-suits-allege> [<https://perma.cc/MV5V-A8PR>] (documenting multiple rapes and sexual assaults by probation employees towards detained girls). Reporters with The Marshall Project identified twelve people on death row who had previously been incarcerated in juvenile facilities, many of which were “plagued by abuse for decades.” Keri Blakinger & Maurice Chammah, *They Went to Prison as Kids. Now They're on Death Row.*, MARSHALL PROJECT (Feb. 1, 2022), <https://www.themarshallproject.org/2022/02/01/they-went-to-prison-as-kids-now-they-re-on-death-row> [<https://perma.cc/LNS4-JLEH>].

<sup>261</sup> Incarceration can create more crime. See generally Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges*, 130 Q.J. ECON. 759 (2015).

<sup>262</sup> “Attempts to scale ineffective or harmful innovations are a waste of time, money, and opportunity. Yet, investing in strategies that do not work is the norm and not the exception as well-meaning legislators and leaders press for quick solutions in human service systems.” Dean L. Fixsen et al., *Scaling Effective Innovations*, 16 CRIMINOLOGY & PUB. POL’Y 487, 494 (2017).

system have been well-documented over time. It is time to turn to a new paradigm for thinking about juvenile justice—one that focuses on the systemic forces that drive poverty, racial inequalities, and delinquency—and that leaves behind the moral blame that has characterized the juvenile court since its inception.

### III. BREAKING THE CYCLE BY SHIFTING THE PARADIGM

In order to break the cycle of juvenile justice policy in the United States that swings back and forth between lenient and punitive approaches, all the while imposing similar harms albeit at different scales, we need to change the way we frame the issue of juvenile justice. It is crucial to move away from framing the issue of juvenile justice as one of individual blameworthiness and shortcomings and to look honestly at the structural forces that social science research has clearly documented fuel youth crime and delinquency. US society has conceptualized juvenile crime through the lens of individual responsibility and blameworthiness for over a century, but we are not required to continue to do so.

Norwegian criminologist Nils Christie instructs that “[c]rime is a concept free for use. The challenge is to understand its use within various systems, and through this understanding be able to evaluate its use and its users.”<sup>263</sup> He asks, “[U]nder what material, social, cultural and political conditions will crime and criminals appear as the dominant metaphors, the dominant way of seeing unwanted acts and actors?”<sup>264</sup>

The modern framing of the issue of delinquency as crime “committed by lower-class youth, appeared in Western Europe and America about two hundred years ago, when the modern, urban industrialized society was born.”<sup>265</sup> During the nineteenth and early twentieth centuries, the end of slavery and the arrival of poor Irish and Eastern European immigrants combined with the shift to an industrialized economy, giving rise to the progressive movement that framed young immigrants, Black youth, and girls who did not comply with the dominant moral code as threats to the social order.<sup>266</sup> The solution that emerged was to incarcerate them under the guise of criminality.<sup>267</sup> This framework has continued through the present day.<sup>268</sup>

In his history of race and the juvenile court, Barry Feld examines the “material, social, cultural and political conditions”<sup>269</sup> that have shaped juvenile justice in the United States:

<sup>263</sup> NILS CHRISTIE, *A SUITABLE AMOUNT OF CRIME* x (2004).

<sup>264</sup> *Id.* at 11–12.

<sup>265</sup> BERNARD & KURLYCHEK, *supra* note 1, at 232.

<sup>266</sup> *See supra* Section I.A.1

<sup>267</sup> *See supra* notes 105–09 and accompanying text.

<sup>268</sup> *See supra* Sections I.A.3, I.A.4.

<sup>269</sup> CHRISTIE, *supra* note 263, at 12.

Progressive reformers had to choose between fundamental reforms to alter conditions that caused crime—poverty, inequality, and discrimination—or to apply Band-Aids to children effected [sic] by them. Impelled by class and ethnic antagonism, they avoided broad structural changes and chose to save children. A century later, we face the same choices and continue to evade our responsibility to other peoples' children.<sup>270</sup>

Christie also discusses the social phenomenon of what he refers to as “a sort of institutional imperialism where the one institution gains complete domination, where all is determined from this institution, and/or where important parts of most or all other institutions become colonized.”<sup>271</sup> In the United States, that institution is the prison. Accordingly, institutions that incarcerate young people have dominated the construction of the juvenile justice system, from the Houses of Refuge and reform schools the court was designed to justify through the present. The prison has so dominated US juvenile justice policy that as of 2015, the country incarcerated five times more juveniles than South Africa, seven times more than England, thirteen times more than Australia, and eighteen times more than France.<sup>272</sup> Driven by its commitment to juvenile incarceration, the United States has chosen to be the only country in the world that has failed to ratify the United Nations Convention on the Rights of the Child, the most widely accepted treaty in the world.<sup>273</sup> The holdout has been a prohibition on incarcerating juveniles for life.

Returning to Christie's idea that “crime is a concept free for use,” we are free to conceptualize the issue of juvenile justice differently—in a way that is not shaped by the institutional imperialism of the prison, and in a way that rejects the biased framework for social control that the current system was founded upon.<sup>274</sup> This means a call for abolishing the juvenile justice system as it currently stands.

#### A. *Why Abolition Rather than Reform?*

At the core of the concept of prison abolition is the recognition that we must eliminate the old way of doing things in order to create a new paradigm.

<sup>270</sup> FELD, *supra* note 28, at 274.

<sup>271</sup> CHRISTIE, *supra* note 263, at 14.

<sup>272</sup> See Robert Laird, Comment, *Regional International Juvenile Incarceration Models as a Blueprint for Rehabilitative Reform of Juvenile Criminal Justice Systems in the United States*, 111 J. CRIM. L. & CRIMINOLOGY 571, 595–96 (2021) (citing Jacqueline L. Bullard & Kimberly E. Dvorchak, *Juvenile Appeals: A Promising Legal Strategy to Reduce Youth Incarceration*, 8 J. MARSHALL L.J. 403, 406–07 (2015)).

<sup>273</sup> *Frequently Asked Questions on the Convention on the Rights of the Child*, UNICEF, <https://www.unicef.org/child-rights-convention/frequently-asked-questions> [<https://perma.cc/U4CD-M56L>] (“The Convention on the Rights of the Child is the most rapidly ratified human rights treaty in history. More countries have ratified the Convention than any other human rights treaty in history—196 countries have become State Parties to the Convention as of October 2015. Only the United States of America has not ratified the Convention.”).

<sup>274</sup> CHRISTIE, *supra* note 263, at x.

There are two primary reasons why abolition of the current juvenile justice system—rather than reform—is warranted. First, the system as it is currently constructed seems incapable of existing without widespread abuse directed towards the youth it purportedly protects. This is a foundational problem that reform efforts have not been able to adequately address. Second, disparate treatment based on race, ethnicity, gender, and sexual orientation similarly appear to be impossible to eliminate within the current framework. Even at this time of tremendous reform, where juvenile incarceration rates and transfers to adult court have dropped dramatically, racial, ethnic, and gender disparities have gotten worse, not better.

Based on ethnographic research conducted with young people incarcerated at Riker’s Island, Alexandra E. Cox concludes that the juvenile justice system is designed for young people to fail.<sup>275</sup> She argues, “Shaped by the forces of racism, classism, and sexism, the system demands responsibility of teenagers in the absence of social structures and supports that would allow them to meet those demands.”<sup>276</sup> A system designed in this way cannot be reformed—it must be set aside so that a new and radically different approach can emerge.<sup>277</sup>

### 1. *Chronic Abuse*

The abusive conditions of the juvenile justice system are endemic, not exceptional. Consider the powerful observations of Vincent Schiraldi:

In my 40 years as a juvenile facility staff member, foster parent, researcher, advocate, and department-head, it has always struck me that the general public experiences such atrocities as episodic, rather than endemic. This leads to investigations and critiques of this or that staff member, superintendent, administrator, Mayor, or Governor. But, until recently, there have not been widespread calls for a system-wide, critical examination and elimination of the youth prison model. This, despite the fact that shortly after youth prisons sprang up in the U.S. in the 1800s, they were riddled with the same deplorable conditions that plague them to this day.<sup>278</sup>

The problem is so endemic that decades of civil rights lawsuits and consent decrees have failed to eliminate widespread abuse and the systematic denial of

<sup>275</sup> See ALEXANDRA COX, TRAPPED IN A VICE: THE CONSEQUENCES OF CONFINEMENT FOR YOUNG PEOPLE 3 (2018).

<sup>276</sup> *Id.*

<sup>277</sup> See NELL BERNSTEIN, BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON 309 (2014) (“We know what works, we know what doesn’t, and we know that *persisting* with what doesn’t wastes millions of dollars and destroys thousands of lives. We are clearly not getting what we say we are seeking: improved public safety and better outcomes for children. Instead, we are inflicting untold harm on the thousands of young people who pass through our juvenile prisons each year. Yet we persevere, through cycle after cycle of scandal, reform, relapse, and repetition.”).

<sup>278</sup> SCHIRALDI, *supra* note 120, at 27.

access to rehabilitative services.<sup>279</sup> In a recent report about a federal investigation of Texas Juvenile Justice Department, a civil rights lawyer explains, “The reasons the feds are investigating the Texas Juvenile Justice Department right now are the same reasons people were trying to make changes in the 1800s, and the 1940s, and 15 years ago. The institutions themselves can’t be reformed.”<sup>280</sup>

When he was the head of Massachusetts’ Department of Youth Services in the 1970s, Jerome Miller reached a similar conclusion.<sup>281</sup> Concerned with what he observed to be excessive punishments and inadequate rehabilitative services, he attempted to improve the conditions of confinement in the state.<sup>282</sup> However, “when he attempted to improve these conditions, he found the organizational inertia protecting them too strong to allow substantial change,” and he concluded that the only way to solve the problem was to close all juvenile facilities in the state, which he did between 1970 and 1972.<sup>283</sup>

Recent calls for abolishing juvenile incarceration have emerged, likely emboldened by the spirit of reform that seems to be animating the nation.<sup>284</sup> But reducing incarceration would not be enough, as the arms of the juvenile justice system reach beyond locked facilities and into communities through probation and the courts. A community-based provider who was interviewed by the Youth Justice Reimagined Working Group in Los Angeles explained,

Probably 10 years ago in my career, I thought reform was possible, but I do not believe it at all any more. I do not believe that it’s possible to create a Probation Department that does not have a problematic power dynamic in the community.

<sup>279</sup> See generally Abrams, *supra* note 260 (reviewing disturbing patterns of abuse in many states); Sylvia Moreno, *In Texas, Scandals Rock Juvenile Justice System; Hundreds to Be Released as State Looks at Abuse Allegations and Sentencing Policies*, WASH. POST (Apr. 5, 2007) (describing a Texas lawsuit alleging abusive conditions and denial of necessary rehabilitative services, resulting in the release of over 500 young people); Gary Hunter, *Scandal Rocks Texas Youth Commission; Youths Molested by School Supervisors*, PRISON LEGAL NEWS (Feb. 15, 2008), <https://www.prisonlegalnews.org/news/2008/feb/15/scandal-rocks-texas-youth-commission-youths-molested-by-school-supervisors/> [<https://perma.cc/ULD7-4ER5>] (describing widespread abuse in Texas juvenile detention facilities); Farrell v. Allen, No. RG 03079344, 2004 Cal. Super. LEXIS 2978 (Cal. Super. Ct. 2004) (California lawsuit resulting in consent decree); Joint Motion to Enter Settlement Agreement, United States v. New York, No. 1:10-cv-00858 (N.D.N.Y. July 14, 2010) (In New York, the state entered into an agreement for federal oversight of four juvenile facilities after an investigation by the Department of Justice uncovered the use of illegal physical restraints, beatings, lengthy periods of solitary confinement, and a pattern of abuse and neglect and the denial of mental health services.).

<sup>280</sup> Blakinger & Chammah, *supra* note 260.

<sup>281</sup> Fagan, *supra* note 109, at 50 (discussing Miller’s account in the book LAST ONE OVER THE WALL).

<sup>282</sup> *Id.*

<sup>283</sup> Fagan & Kupchik, *supra* note 23, at 40.

<sup>284</sup> See generally BERNSTEIN, *supra* note 277 (arguing that the only just reform is for state-run detention centers to be abolished). See also SCHIRALDI, *supra* note 120, at 10 (arguing that in addition to being ineffective, juvenile incarceration is increasingly costly given recent declines in the number of young people incarcerated, and comparing the 2011 price tag of incarcerating one youth in Santa Clara County to the cost in 2018.).

And I don't think it should be replaced with youth programs that are full of social workers either. We can't over-professionalize youth support and we can't over-pathologize our youth either. So it's more about creating a front-end investment and ensuring the proper opportunities and support for youth and families.<sup>285</sup>

Thus, the argument for abolition goes beyond juvenile incarceration facilities and encompasses other aspects of the system that collectively contribute to the web of social control so powerfully exercised by the *system*—the courts, the probation officers, the school resource officers, the social workers, the judges, and the attorneys.

## 2. *Intractable Disparate Treatment*

The juvenile court has always treated Black youth worse than white youth.<sup>286</sup> It has always treated girls more harshly than boys, and this pattern has negatively affected young women of color much more than white young women.<sup>287</sup> The system has always treated immigrants and the children of immigrants worse than children whose families have been in the United States for longer, with the exception of Native Americans, who also face harsher treatment than their white counterparts.<sup>288</sup>

These disparate outcomes are well-documented, and many efforts have been made—unsuccessfully—to disrupt these patterns.<sup>289</sup> Most notably, in the face of troubling evidence about racial disparities in juvenile justice systems across the United States, Congress has twice enacted legislation requiring states to address disproportionate minority confinement<sup>290</sup> and disproportionate contact of youth of color within the system more broadly—not just in detention.<sup>291</sup> Yet “[d]espite federal attention to race and ethnic disparities since the late

<sup>285</sup> W. HAYWOOD BURNS INST., LOS ANGELES COUNTY: YOUTH JUSTICE REIMAGINED 28 (2020).

<sup>286</sup> Bell, *supra* note 55, at 25–28 (Bell describes the history of racial and ethnic disparities dating back to the nineteenth century and continuing to the present. He further explains that Black youth are arrested, detained, and prosecuted as adults at far higher rates than white youth. “While only 16% of the African American youth population is of sufficient age for detention, they represent 28% of juvenile arrests, 37% of detained youth, and 58% of youth admitted to state adult prisons.” A similar pattern exists for Latino youth as well). For an in-depth analysis of the over criminalization of Black youth, see generally KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* (2021).

<sup>287</sup> Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. Rev. 1502, 1505 (2012).

<sup>288</sup> See generally MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004) (tracing the history of negative treatment of immigrants in the United States and the simultaneous negative treatment of Native Americans).

<sup>289</sup> See Bell, *supra* note 55, at 26 (referring to racial and ethnic disparities in juvenile justice as “one of the most intransigent and disturbing issues facing youth justice in the United States”).

<sup>290</sup> *Id.* at 29 (citing the 1988 amendment to the JJDPA).

<sup>291</sup> *Id.* (citing a 2002 amendment to the JJDPA).

1980s, the problem persists, raising real questions about the effectiveness of federal leadership.”<sup>292</sup>

Despite reductions in incarceration rates of juveniles, racial and ethnic disparities are getting worse. Whereas youth of color constituted 38 percent of the population that could be detained, youth of color represented 70 percent of the incarcerated juvenile population.<sup>293</sup> As of 2017, Black youth were detained at a rate 5.8 times higher than white youth, Native youth were detained at a rate 2.5 higher than white youth, and Latino youth were detained at a rate 1.7 times higher than white youth.<sup>294</sup> In Hawaii, where decarceration efforts have resulted in no girls being detained as of the summer of 2022, and a dramatic reduction in the number of boys incarcerated, racial disparities persist, and native Hawaiians are overrepresented in the detained population.<sup>295</sup>

The disparities that are evident in the current system are a direct result of the system’s design—it was established with these disparities in place and has continued to replicate them. As Steven Bowman argues, it is not likely “that the carceral juvenile system can remove the racism, sexism, classism, inconsistency, and inequality upon which the system itself is built.”<sup>296</sup>

### 3. *The Need for a New Vision*

Institutional culture is a powerful force that makes reforming a system as broken as the US juvenile justice system difficult if not impossible. Dan Macal-lair of the Center on Juvenile and Criminal Justice told journalist Nell Bernstein, “old practices and policies tend to reemerge after a very short period of time. So, sadly, I despair of the idea that you can reform these institutions to any great degree. The experience is that you can’t. You have to tear down and start again.”<sup>297</sup>

Assuming that we are a country that wishes to stop the widespread abuse of the children in our custody and that we are committed to ameliorating these disparities and injustices, we need to break free from the way in which our country has conceived of, and then has responded to, crime for over a century. This means leaving behind the individualistic focus of the current system given that the neoliberal focus on blaming individuals for poverty, for crime, or for juvenile delinquency does not lead to social change.

In thinking about reimagining how to end gender violence, Beth E. Richie argues that reframing the conversation, and focusing on prison abolition rather than reform, is the only way to escape the neoliberal construction of crime that focuses on “individual responsibility” and that “blame[s] people for their suf-

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<sup>292</sup> *Id.* at 30.

<sup>293</sup> *Id.* at 26.

<sup>294</sup> SCHIRALDI, *supra* note 120, at 19.

<sup>295</sup> Lartey, *supra* note 260.

<sup>296</sup> Bowman, *supra* note 21, at 401.

<sup>297</sup> BERNSTEIN, *supra* note 277, at 314.



fering,” as if “[w]hatever is wrong with them it is their fault.”<sup>298</sup> The same philosophy should apply to thinking about a new paradigm for juvenile justice.

### B. *A New Paradigm*

Paradigms inform our world view and the way in which we understand problems; they help us to construct reality.<sup>299</sup> And paradigms can change over time. Europeans used to believe that the earth was flat and that it was the center of the universe.<sup>300</sup> And then, a new paradigm took hold, challenging and uprooting the old. Paradigms tend to shift in times of crises, when new approaches are desperately needed to respond to pressing problems.<sup>301</sup> This may be a time where such a shift is possible.

In 2020, people in the United States who had never paid much attention to the gross racial disparities that plague the nation, and to the role of policing and criminal justice in perpetuating these disparities, became more conscious of the tremendous injustices facing people of color and Black people in particular.<sup>302</sup> The graphic images of former police officer Derek Chauvin kneeling on the neck of George Floyd as he begged for help before ultimately dying pierced the widespread denial that had previously permeated the dominant narrative about racism in the US.<sup>303</sup> The problem of racism in policing was not new, but a broader swath of US society started to pay more attention to racial injustice and to demand change.<sup>304</sup> In response, policies started to change.<sup>305</sup> It remains to be seen how long lasting the changes will be—or how foundational they could become—but this may be a moment where shifting to an entirely new paradigm is possible. For example, politicians who would have never previously considered “defunding police” as a viable possibility have recently considered the possibility and, in some cases, approved measures to move in this direction.<sup>306</sup>

<sup>298</sup> Ritchie, *supra* note 140, at 268–69.

<sup>299</sup> HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 86–87 (1990).

<sup>300</sup> *Id.* at 90.

<sup>301</sup> *Id.* at 124.

<sup>302</sup> See Olin, *supra* note 11 (finding “a striking uptick among white and Hispanic residents [of Houston] in their acknowledgement of racial injustice and the discrimination that Black Americans face” after the murder of George Floyd).

<sup>303</sup> See Burch et al., *supra* note 12.

<sup>304</sup> Olin, *supra* note 11.

<sup>305</sup> For example, “nearly 170 Confederate symbols were renamed or removed from public spaces.” Burch et al., *supra* note 12. In addition, “cities and counties have begun restructuring how local budgets and law enforcement are deployed in [the] service of public safety,” cutting police budgets and reallocating resources to fund supportive community programs. Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd’s Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> [<https://perma.cc/ZD6L-KB5B>].

<sup>306</sup> See Sam Levin, *These US Cities Defunded Police: ‘We’re Transferring Money to the Community’*, THE GUARDIAN (Mar. 11, 2021, 11:03 AM), <https://www.theguardian.com/us-news/2021/mar/07/us-cities-defund-police-transferring-money-community> [<https://perma.cc/ZT2T-X5DA>].

In order to break the historical cycle of juvenile justice policy, a transformative shift in the paradigm that shapes how we perceive the problem of juvenile justice is needed—away from the focus on the shortcomings of individuals and toward a framework that fully recognizes the roles of social systems and structures in creating the phenomenon of juvenile crime. The authors of *The Cycle of Juvenile Justice* argue that “the only way to solve the problem” of juvenile delinquency is to change the social “conditions that give birth to the problem of delinquency” that those who designed our current system decided to leave in place.<sup>307</sup> Thus, a new paradigm for juvenile justice requires broad structural changes that would address social conditions that drive crime. First and foremost, poverty. A broad redistribution of wealth or, at the very least, robust resources for those in need would go a long way. And while this may seem too broad for a paradigm focused on the issue of juvenile justice, Angela Davis teaches that in pursuing an abolitionist strategy, it is important to think broadly about “a constellation of alternative strategies and institutions” to prisons rather than “focus[ing] myopically on the existing system.”<sup>308</sup> Prison abolition could mean “a continuum of alternatives to imprisonment—demilitarization of schools, revitalization of education at all levels, a health system that provides free physical and mental health care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance.”<sup>309</sup>

### 1. *Re-Envisioning and Redistributing*

In order to build a new paradigm, we need to engage in a collective process of re-envisioning, where incarceration and social control are not the primary response to crime and where fundamental power structures can shift.<sup>310</sup> And the best way to design a system that is set up for people to succeed is to involve those most affected in the design process.

When I worked with young people in Los Angeles, I had the privilege of collaborating with members of the Youth Justice Coalition, a youth-led movement of people whose lives have been directly affected by the juvenile and criminal justice systems. As a participant observer, I spent many hours in workshops where young people imagined the kinds of resources that would respond to their needs. Their visions were sweeping—they imagined community centers with food pantries, access to healthcare, dental and vision services, schools and tutoring, outlets for creative expression, job training and placement, childcare, and access to needed resources like transportation, clothing, and housing. They imagined peacemakers—former gang members who were trained in media-

<sup>307</sup> BERNARD & KURLYCHEK, *supra* note 1, at 233.

<sup>308</sup> DAVIS, *supra* note 18, at 106–07.

<sup>309</sup> *Id.* at 107.

<sup>310</sup> See Marc Lamont Hill, *A World Without Prisons: Teaching Confinement Literature and the Promise of Prison Abolition*, 102 ENG. J. 19, 19 (2013) (discussing prison abolition theory as a belief in a world without prisons that would require addressing the root causes of crime, such as poverty, access to education, and mental health).

tion—who could respond to deescalate conflicts and to broker truces. They discussed the possibility of community-based teams comprised of parents, gang intervention workers, community members, and mental health professionals who could respond to 911 calls involving family conflicts, arguments, drugs, and mental health issues. They drew pictures about their visions for a radically different social structure and talked excitedly and insightfully about their visions.

Their visions were echoed in the words of a young person from a community-based organization in South Los Angeles who told members of the Reimagine Youth Justice Working Group, “What if we had a big center that had resources for food, housing, and mental health? Like a hub of opportunities. Like a mall for resources for youth and families.”<sup>311</sup>

The young people I listened to envisioned a world where 1 percent of Los Angeles County’s law enforcement budget could be reallocated to fund the kinds of resources they envisioned. And every year, young people marched one hundred miles across Los Angeles County to raise awareness about this campaign, stopping along the way for press conferences, meetings with politicians, and conversations with community members. Although this was aspirational at the time, with the rise of the Black Lives Matter movement, the Los Angeles City Council adopted the recommendation in 2020.<sup>312</sup>

The key to transforming youth justice is to think about reallocating wealth and social resources so that young people from *all* communities have access to what they need to thrive. This would require a deliberate choice to shift resources away from law enforcement and incarceration and instead pour those resources into low-income communities, as young people in Los Angeles have demanded for years.

Criminologist Nils Christie explains that large prison populations thwart normal development and opportunities. The alternative is “to give these populations an ordinary share of ordinary society—education, work, and political and cultural participation.”<sup>313</sup> This is exactly what the young people were envisioning—a radical redistribution of resources that would give them access to the resources they should be entitled to.<sup>314</sup>

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<sup>311</sup> W. HAYWOOD BURNS INST., *supra* note 285, at 42.

<sup>312</sup> See David Zahniser et al., *Los Angeles Cuts LAPD Spending, Taking Police Staffing to Its Lowest Level in 12 Years*, L.A. TIMES (July 1, 2020, 11:42 AM), <https://www.latimes.com/california/story/2020-07-01/lapd-budget-cuts-protesters-police-brutality> [<https://perma.cc/N4PV-CMQA>].

<sup>313</sup> CHRISTIE, *supra* note 263, at 105.

<sup>314</sup> In the introduction to an edited volume about juvenile justice reform, Nancy Dowd articulates a different theoretical approach: “Our goal for all youth should be support, opportunity, and success. Their well-being is our well-being. The welfare of all is essential to who we are as a society, as a nation.” Nancy E. Dowd, *Introduction: Re-visioning Youth Justice*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 1, 2 (Nancy E. Dowd ed., 2015).

The framework these ideas rest upon is one of governmental and community responsibility consistent with the framework articulated by James Bell: “We must use humanity, restoration, and equity as an orientation of the spirit to change the conversation toward child well-being, allowing us to achieve equity and excellence as the preferred strategy for true public safety.”<sup>315</sup> This would require “well-functioning systems of mental health, health care, and education, as well as a juvenile justice system structured to serve children’s needs and to support rehabilitation.”<sup>316</sup>

## 2. Restorative Justice

In addition to redistributing wealth and expanding resources, a new paradigm would need to incorporate some kind of social response to juvenile crime or wrongdoing—or to intervene when help is needed. Restorative justice models are the best fit.<sup>317</sup> At bottom, restorative justice looks through the lens of community and relationships rather than individuals.<sup>318</sup> Restorative approaches offer “an opportunity to establish . . . just relationship[s] among victims, offenders, and communities,” rooting the responsibility for responding to crime in the hands of community members, without whom “the relational web broken by crime cannot be fully repaired and the needs of victims and offenders cannot be fully satisfied.”<sup>319</sup> Thus, restorative justice offers “an alternative paradigm to build community, address violence, and repair harm that is rooted in community solutions and relationships.”<sup>320</sup> And the restorative justice paradigm “understand[s] that violence is simultaneously interpersonal and structural *all of the time*.”<sup>321</sup>

Howard Zehr, an influential thinker in the field of restorative justice, defines restorative justice as follows: “Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim,

<sup>315</sup> Bell, *supra* note 55, at 23.

<sup>316</sup> *Id.* at 25.

<sup>317</sup> See ZEHR, *supra* note 299, at 180 (acknowledging the need for a paradigm shift in criminal justice and highlighting that even if we are not yet ready as a society for a paradigm change, a shift in vision or changing the lens through which we view the problem of crime would be a good first step).

<sup>318</sup> See AMY LEVAD, RESTORATIVE JUSTICE: THEORIES AND PRACTICES OF MORAL IMAGINATION 138 (2012) (“This vision of the role of community in restorative justice practices departs from the rehabilitative and retributive practices in which the community is confounded with the state based on either a welfare-state or liberal-individualist model of government.”).

<sup>319</sup> *Id.* at 125, 138.

<sup>320</sup> See Carl Stauffer & Sonya Shah, *Restorative Justice: Taking the Pulse of a Movement*, in LISTENING TO THE MOVEMENT: ESSAYS ON NEW GROWTH AND NEW CHALLENGES IN RESTORATIVE JUSTICE xv, xvi (Ted Lewis & Carl Stauffer eds., 2021)

<sup>321</sup> *Id.*

the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.”<sup>322</sup>

Rather than think about “juvenile crime” or “juvenile delinquency,” we might think about “problematic situations.”<sup>323</sup> These problematic situations can be viewed through the lens of the harm that has been done and the relationships that need repair<sup>324</sup> This may be the relationship between the victim and offender, but may extend beyond that, to family members who have been harmed and to the broader community.

There are many different models of restorative justice, but there are some key features. They require that the individual who has caused the harm accept responsibility for that harm, although there can be work that goes into helping them to get to the place where they can acknowledge this.<sup>325</sup> They focus on the needs of the victim and how the harm can be repaired. And they bring in family, friends, community members, and other stakeholders to think collectively about ways to respond to the problem.<sup>326</sup>

Restorative justice has deep historical roots. Many indigenous cultures have employed restorative justice models for responding to crime or wrongdoing that are rooted in community, in repairing the harm that has been done, and in thinking creatively and collectively about how to address the factors that contributed to the harm.<sup>327</sup> There is a focus on community and collectivity in many indigenous cultures’ responses to crime or wrongdoing.<sup>328</sup>

<sup>322</sup> ZEHR, *supra* note 299, at 183.

<sup>323</sup> *Id.* at 186.

<sup>324</sup> See MARIAN LIEBMANN, RESTORATIVE JUSTICE: HOW IT WORKS 25 (2007) (explaining, “Restorative justice aims to restore the well-being of victims, offenders and communities damaged by crime, and to prevent further offending. . . . [A]n approach can only be deemed restorative if it includes attempts to put things right for the actual victims of crime.”).

<sup>325</sup> See HOWARD ZEHR & ALI GOHAR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 25 (2003) (“Before face-to-face meeting, pre-meetings and preparation are essential.”).

<sup>326</sup> See *id.* at 16 (describing the role of community members in restorative justice processes and the importance of the engagement of key stakeholders).

<sup>327</sup> See generally JUSTICE AS HEALING: INDIGENOUS WAYS (Wanda D. McCaslin ed., 2005) (compiling essays about indigenous restorative justice practices from across the globe); KIM WORKMAN, JOURNEY TOWARDS JUSTICE (2018) (describing how restorative justice practices in New Zealand are modeled after customary Māori practices). See also Laura Mirsky, *Restorative Justice Practices of Native American, First Nation, and Other Indigenous People of North America: Part One*, INT’L INST. FOR RESTORATIVE PRACS. (Apr. 27, 2004), <https://www.iirp.edu/news/restorative-justice-practices-of-native-american-first-nation-and-other-indigenous-people-of-north-america-part-one> [https://perma.cc/9JN9-LMEZ] (“In Native American and First Nation justice philosophy and practice, healing, along with reintegrating individuals into their community, is more important than punishment. The Native peacemaking process involves bringing together victims, offenders and their supporters to get to the bottom of a problem.”).

<sup>328</sup> See RUPERT ROSS, RETURNING TO THE TEACHINGS: EXPLORING ABORIGINAL JUSTICE 171 (1996) (quoting from a position paper developed by the Hollow Water First Nations community in Canada, which read, “People who offend against another . . . are to be viewed and related to as people who are out of balance—with themselves, their family, their community

And until relatively recently, many Western societies treated crime as an interpersonal issue and resolved the issue outside the context of courts.<sup>329</sup> Religious and community leaders often served a mediating role, helping people to reach agreements.<sup>330</sup> Thus, the justice process took place in the context of community, and “[w]rongs were often viewed collectively” as a harm to the family and community as well as the individual.<sup>331</sup>

Restorative justice models incorporate community members, causing a broader segment of the community to view the otherwise invisible cruelty of criminal justice.<sup>332</sup> Professionals in the criminal justice system become numb to the cruelty of the system, often becoming a part of the cruelty.<sup>333</sup> Making the process more visible may be an important transformative practice. Angela Davis argues that even among communities most affected by prisons, “there is [a] reluctance to face the realities hidden within” prisons.<sup>334</sup> This disassociation makes it easier to “think about imprisonment as a fate reserved for others”—for criminals, bad people, undesirables.<sup>335</sup> According to Nils Christie, “Social distance is one of the conditions for heavy use of the penal system.”<sup>336</sup> Thus bringing a broader segment of society in closer proximity to the juvenile justice system and its processes may be a key to lasting transformation.

I have been intrigued by the possibility of a dramatic shift in juvenile justice for two decades now. In 2009, I traveled to Oaxaca, Mexico to observe how the state had responded to the national requirement that each state in the country of Mexico develop a juvenile justice system.<sup>337</sup> I was interested in learning more about how leaders in the state went about creating a system from scratch, free from the confines of the paradigm that has shaped US juvenile justice policy since the 1800s. I have written at length about my observations elsewhere, but suffice to say that Oaxaca’s juvenile justice system was built on a model of restorative justice.<sup>338</sup> The primary mechanism for resolving problematic situations involving youth was restorative justice conferences or mediations.<sup>339</sup>

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and their Creator. A return to balance can best be accomplished through a process of accountability that includes support from the community through teaching and healing.”).

<sup>329</sup> ZEHR, *supra* note 299, at 103.

<sup>330</sup> *Id.* at 104.

<sup>331</sup> *Id.* at 101.

<sup>332</sup> See ZEHR & GOHAR, *supra* note 325, at 16, 25.

<sup>333</sup> See generally KARAKATSANIS, *supra* note 236.

<sup>334</sup> DAVIS, *supra* note 18, at 15.

<sup>335</sup> *Id.* at 16.

<sup>336</sup> CHRISTIE, *supra* note 263, at 55.

<sup>337</sup> Beth Caldwell, *Punishment v. Restoration: A Comparative Analysis of Juvenile Delinquency Law in the United States and Mexico*, 20 CARDOZO J. OF INT’L & COMPAR. L. 105, 107–08 (2011).

<sup>338</sup> *Id.* at 112.

<sup>339</sup> *Id.*

New Zealand has a long track record with employing restorative justice as its primary response to juvenile crime.<sup>340</sup> New Zealand's model is particularly important to consider in the context of the United States because it “represent[s] [a] way[] of implementing principles from indigenous cultures within Western legal frameworks.”<sup>341</sup> In the 1980s, the indigenous Maori people of New Zealand argued that the juvenile justice system “was antithetical to their traditions” in that it focused on “punishment rather than solutions, was imposed rather than negotiated, and left family and community out of the process.”<sup>342</sup> The country adopted a model based on Family Group Conferences, where a meeting is convened including the victim, offender, family members, friends, prosecutors, defense attorneys, and social service providers.<sup>343</sup> The group meets to discuss the problems and to develop—by consensus—a recommendation for the outcome of the case.<sup>344</sup> This framework allows for a holistic approach to problem-solving that takes into account the multidimensional layers that typically contribute to the situation surrounding a young person who breaks the law, and that prioritizes being culturally appropriate and empowering families.<sup>345</sup>

It is not possible to fully articulate what a paradigm shift to restorative justice would look like, but that is not the goal here.<sup>346</sup> The goal is to plant seeds about future possibilities to encourage the movement in this direction.

#### CONCLUSION

It is past time to reconsider the framework for our collective social response when young people act out or break the law. The juvenile justice system remains rooted in an approach to understanding juvenile criminality that was fixed in the 1800s, with the explicit goal of exercising social control over poor, marginalized youth—particularly girls and young men of color. Rather than continue to interpret juvenile criminality through the lens of individual wrongdoing, a new paradigm would take a more holistic approach to understanding

<sup>340</sup> See Sarah Mikva Pfander, *Evaluating New Zealand's Restorative Promise: The Impact of Legislative Design on the Practice of Restorative Justice*, 15 KOTUITUI: N.Z.J. SOC. SCIS. ONLINE 170, 170, 175, 179 (2020) (tracing the history of restorative justice in New Zealand and the 2003 legal reform that institutionalized Family Group Conferences that bring together victims, offenders, and key stakeholders to develop responses to crime as the primary framework for New Zealand's juvenile justice system).

<sup>341</sup> ZEHR, *supra* note 299, at 257.

<sup>342</sup> *Id.*

<sup>343</sup> See Pfander, *supra* note 340, at 175; ALLAN MACRAE & HOWARD ZEHR, *THE LITTLE BOOK OF FAMILY GROUP CONFERENCES: NEW ZEALAND STYLE* 11–12 (2004).

<sup>344</sup> ZEHR, *supra* note 299, at 258.

<sup>345</sup> MACRAE & ZEHR, *supra* note 343 at 13.

<sup>346</sup> See Stauffer & Shah, *supra* note 320, at xv (explaining that people who attend restorative justice workshops they facilitate often want a “sound bite” defining restorative justice, but that the only way to truly communicate the concept is through “a gradual unfolding of what is learned . . . that . . . happens best when people *see it* in a restorative process”).

the problem, acknowledging the role of poverty, unequal access to resources, systemic racism, and gender bias in creating juvenile crime. A new paradigm would require a process of radical redistribution of wealth and a dramatic shift away from a system based on individual blame and punishment and toward a community-focused approach to responding to problems rooted in a restorative justice model.