De/Reconstructing Delinquency

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Hundreds of thousands of children are brought under the jurisdiction of delinquency courts every year in the United States. Despite the reality that most children engage in delinquent behavior during their adolescence, poor children, children of color, children with disabilities, and children who identify as LGBTQIA+ comprise a disproportionate number of those who become delinquency system-involved. These disparities exist by design. Their origins can be traced back to the flawed first principles upon which the juvenile court was built and, specifically, to the unduly expansive legal definition of delinquency that has undergirded the jurisdiction and power of the juvenile court since its founding.

This Article focuses on deconstructing and reconstructing the legal definition of delinquency. Part I of this Article deconstructs the legal definition of delinquency, exposing its three essential components: (1) the explicit statutory definition of delinquency; (2) the necessary detection of such delinquency; and (3) the embedded discretion to exercise or decline court jurisdiction. Part I then explores the derivative, overbroad, and incomplete nature of the statutory definition of delinquency and examines how the three essential components of delinquency together have led to the criminalization of adolescence, environment, and otherness. This exercise of deconstructing delinquency reveals how the existing legal construct not only undermines the goals of the juvenile court, but also affirmatively targets and harms youth from historically under-resourced and marginalized communities.

Part II of this Article reconstructs the legal definition of delinquency to address the current definition's inherent flaws and mitigate the resulting deficiencies and harms that have existed since the court's founding. First, the Article suggests changes to make the definition of delinquency more developmentally appropriate and focus the court's jurisdiction on serious youth misbehavior. Second, the Article recommends eliminating

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the "pre-crime" justification for court action to further narrow the role of the court and decriminalize behavioral manifestations of poverty, trauma, and disability. Finally, the Article proposes eliminating existing exceptions to juvenile court jurisdiction baked into the definition of delinquency to combat the adultification of youth of color and make the juvenile court truly diversionary for all youth. Reconstructing delinquency in this manner should lead to a significantly smaller, more effective, and more just court, while laying the necessary foundation for realigning resources toward direct investment in youth and families prior to, and during, court involvement.

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INTRODUCTION

While the delinquency court has changed in some significant ways since its creation in 1899, the foundational principles of the court remain relatively unchanged.[1] The first juvenile court was created by legislation developed and promoted by child advocates from the Hull House and members of the Chicago Bar Association.[2] The Chicago juvenile court quickly became a model for the

1. *See* Eduardo R. Ferrer, *Razing & Rebuilding Delinquency Courts: Demolishing the Flawed Philosophical Foundation of* Parens Patriae, 54 LOY. U. CHI. L.J. 885, 887, 890 (2023) [hereinafter The Flawed Philosophical Foundation of *Parens Patriae*]. Delinquency courts are state-level creations shaped by the statutes and stakeholders in a particular jurisdiction but built upon common foundational principles and design features. *See id.* at 891. When I refer to "the juvenile court" or "the delinquency court" in my Article, I am referring to this core set of principles and features shared by most, if not all, modern delinquency courts across the country. *See infra* notes 2–7, 48–116 and accompanying text. This Article interrogates and proposes significant changes to one of the common foundational principles upon which delinquency courts are built.

2. DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 4–5, 11–22 (2004) (describing the development of the first juvenile court). The Hull House was a famous Chicago social settlement founded by Jane Addams where Progressive Era female social reformers congregated to discuss social challenges and create solutions to address crime, poverty, and inequality. Two reformers in particular—Julia Lathrop, a Hull House social worker, and Lucy Flower, a local philanthropist who was dubbed "the mother of the juvenile court"—are credited with leading the movement to create the first juvenile court. *See id.* at 4–5; Quinn Myers, *How Chicago Women Created the World's First Juvenile Justice System*, WBEZ CHI. (May 11, 2019, 11:00 PM), https://www.wbez.org/curious-city/2019/05/11/how-chicago-women-created-the-worlds-first-juvenile-justice-system [https://perma.cc/NXN6-K52Q]. When I refer to "the architects" of the juvenile court throughout this Article, I am referring to the social reformers

development of juvenile courts across the country and across the world.[3] Designed with the twin goals of diverting youth from the adult criminal justice system and building productive, democratic citizens, the architects grounded the overall design of the juvenile court in three foundational principles.[4] The first foundational principle—*parens patriae*—supplied the philosophical foundation for the juvenile court.[5] The second foundational principle—the legally constructed definition of delinquency—established the contours of the juvenile court's jurisdiction.[6] The third foundational principle—the penological aim of rehabilitation—purportedly provided the end to which the court was to exercise its jurisdiction.[7] The flaws inherent in these first principles fundamentally compromise the design of juvenile court and explain its continued failure to meaningfully achieve either of its twin goals.[8]

Grounded in the false belief that the juvenile court could treat children under its jurisdiction as a wise parent would treat their own, the architects of the juvenile court defined delinquency broadly in order to empower the state with the expansive discretion to bring virtually any child within the jurisdiction and control of the court.[9] To that end, the architects of the juvenile court developed a statutory definition of delinquency that included not only alleged criminal conduct, but also a wide variety of noncriminal behaviors that the architects believed put children on the path to future criminal conduct.[10] Yet, despite this expansive jurisdiction and the fact that nearly every child engages in behavior that fits the architects' definition of delinquency at some point during their childhood,[11] fewer than five percent of youth

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from the Hull House and their allies who designed, launched, promoted, and continued to revise juvenile court theory and practice during the first quarter of the twentieth century.

3. *See* TANENHAUS, *supra* note 2, at 4; *see also* HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 86 (1999), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/nationalreport99/chapter4.pdf [https://perma.cc/Q4DN-6B33] (recognizing that thirty-two states had established juvenile courts, probation services, or both, by 1910 and all but two states had done so by 1925).

4. *See* The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 889–91.

5. *See id.* Broadly speaking, *parens patriae*—which translates to "parent of his or her country"—is the legal doctrine justifying the state's intervention in the lives of persons who the state determines cannot protect themselves. *Id.* at 892–93.

6. *See id.* at 898–901.

7. *See id.* at 890.

8. *See* JANE M. SPINAK, THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES 257 (2023) ("The family court has been 'reformed'—or, more honestly, reinvented and readjusted—repeatedly since its birth as the juvenile court. Yet those adjustments have failed to improve either the processes or the outcomes for most of the litigants and have instead caused significant harm.").

9. *See* The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 890 (arguing that the philosophy of *parens patriae* that underpins the juvenile court is chiefly responsible for the court's perpetual prioritization of controlling youth, rather than meaningfully caring for them, and that the definition of delinquency was designed to further this philosophy).

10. *See infra* notes 35–47 and accompanying text.

11. PAUL W. TAPPAN, JUVENILE DELINQUENCY 32 (1949) ("It is reasonable to believe that all, or at least a vast majority of, normal children sometimes indulge in forms of behavior that might come within the purview of the juvenile court."); *see also* PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST.,

are formally brought before juvenile courts each year in the United States.[12]

The discrepancy between who *could be* and who actually *is* brought within the jurisdiction of the delinquency court exists by design and causes significant harm. By cloaking itself in the philosophy of *parens patriae* that seeks to "rehabilitate"—not punish—children, the juvenile court framed itself as an institution that could benevolently wield unconstrained power.[13] The legal definition of delinquency[14] was thus constructed in a way to give the court the broadest jurisdiction possible.[15] However, the juvenile court was not created to police all children equally. Rather, the court was designed to police children deemed a threat to the dominant caste—typically poor children or children who were seen as "other."[16] Thus, the architects created a legal construct of delinquency that grants the state broad power that it can target precisely against specific classes of youth in order to protect and perpetuate the political, economic, and social status quo,[17] all at the further expense of those subjected to the court's jurisdiction.[18]

This Article is the first to explore in detail why the legal definition of delinquency itself is central to the court's flawed design and to propose a new definition that would significantly limit the power and size of the juvenile court.

The Article builds upon the explicit and urgent calls for abolition of the juvenile court by scholars such as Professors Jane Spinak,[19] Dorothy Roberts,[20] and

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THE CHALLENGE OF CRIME IN A FREE SOCIETY 55 (1967) (acknowledging that "self-report studies reveal that perhaps 90 percent of all young people have committed at least one act for which they could have been brought to juvenile court").

12. Juvenile courts formally processed approximately 13.5 delinquency cases per 1,000 youth and 1.6 status offenses cases per 1,000 youth in 2021. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., JUVENILE COURT STATISTICS 2021, at 8, 65 (2024), https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2021.pdf [https://perma.cc/G5WM-ZJ4M]. These numbers have fallen significantly since 2005, when the delinquency case rate was 51.2 youth per 1,000 and the status offense case rate was 6.0 youth per 1,000. *Id.* at 8, 65.

13. *See* The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 941–42; *see also* SPINAK, *supra* note 8, at 257 ("The family court's belief in its ability to do good has salved its conscience and prevented it from confronting the harm that even well-intentioned do-gooding has caused.").

14. The contours of the legal definition—or the legal construct—of delinquency will be discussed in detail below. *See infra* notes 29–47.

15. *See* The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 913–17.

16. *See id.* at 939.

17. *See id.* at 891 n.19, 923–24. As Professor Cashin notes: "All caste systems depend for their endurance not merely on the social distinctions that come naturally to individuals but also the structural protections of majoritarian politics, itself a purveyor of cultural norms, and of law." Sheryll Cashin, Brown v. Board of Education*: Enduring Caste and American Betrayal*, 4 AM. J.L. & EQUAL. 141, 143 (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4895253 [https://perma.cc/SD3F-525V].

18. SPINAK, *supra* note 8, at 3 ("One hundred and twenty years later, we are still sending children and families into a court that thinks it is doing good and the consequence is that, by trying to do good, it fails to do justice and often does great harm.").

19. *Id.* at 259 ("[I]t is not possible to replace the court with a new, better version. Instead, we must use a radical imagination first to shrink and then to abolish the court."). *See generally id.* at 265–74 (providing various recommendations for shrinking the delinquency court).

20. *See* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 281–92 (2022) (calling for direct investment in families while shrinking the child welfare system until it ceases to exist).

Kristin Henning,[21] as well as the calls for significant reform by youth advocates that have existed since the launch of the juvenile court.[22] In particular, this Article seeks to further justify and operationalize the abolition of the delinquency court *as it was designed and as we know it today*.[23] Importantly, abolition does not mean absence. Abolition is a creative project that involves both tearing down and replacing with something new.[24] As such, the Article is not a call to entirely eliminate the use of a confidential, adversarial court to resolve delinquency matters. To entirely eliminate the delinquency court risks either recreating the pre-*Gault* "kangaroo court" where youth were punished without process [25] or amplifying the adultification of youth through direct file, transfer, and statutory exclusion. The delinquency court's aim of diverting youth accused of serious criminal conduct[26] from adult court is a valuable one. Moreover, youth need a forum where they can meaningfully contest allegations of criminal activity and shape, through argument, the court's response to validated allegations. Here, the abolitionist goal is to pave the way for a structural realignment of philosophy, practices, and resources to make a new delinquency system the intervention of last resort for the smallest number of youth possible.[27]

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21. *See* KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 302–43 (2021) (calling for directly investing in Black children while radically reducing the footprint of policing in their lives).

22. *See, e.g.*, SPINAK, *supra* note 8, at 66.

23. The Article also builds upon my prior scholarship seeking to revisit and replace the foundational principles underlying the design of the juvenile court, including excising the damage the philosophy of *parens patriae* has had on the court. *See* The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 952. Deconstructing and reconstructing delinquency in the manner proposed in this Article is necessary to excise the lasting influence of *parens patriae* on the design of the delinquency court and to better situate the delinquency court in our societal approach to youth development. *Id.*

24. *See, e.g.*, Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015) (conceptualizing abolition as "a transformative goal of gradual decarceration and positive regulatory substitution wherein penal regulation is recognized as morally unsustainable" that involves, among other things, "meaningful justice reinvestment to strengthen the social arm of the state and improve human welfare [and] decriminalizing less serious infractions").

25. *In re Gault*, 387 U.S. 1, 28 (1967) ("Under our Constitution, the condition of being a boy does not justify a kangaroo court."). The Supreme Court's decision in *In re Gault* marked a significant inflection point in the history of the juvenile court by recognizing that youth charged in delinquency proceedings were entitled to due process protections. *See id.* at 2.

26. A new delinquency court would focus primarily on diverting the cases of youth considered among the "dangerous few" from adult criminal court. *See* McLeod, *supra* note 24, at 1171 (defining the "dangerous few" as "those who are intent on perpetrating acts of vicious harm against others such that they are an imminent threat to all those around them regardless of their circumstances").

27. *See* Máximo Langer, *Penal Abolition and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 44–45, 73 (2020) ("For criminal law minimalism, the penal system still has a role to play in society, but a radically reduced, reimagined, and redesigned role relative to the one it has played in the United States."); Vincent M. Southerland, *Public Defense and an Abolitionist Ethic*, 99 N.Y.U. L. REV. 1635, 1692–703 (2024) (describing an abolitionist ethic as "advocating to reduce the footprint of the criminal system" and "work[ing] to build . . . the constellation of institutions that foster a healthy democratic body politic"). Put another way, this approach to abolishing the delinquency court acts at both the micro and macro level. At the micro level, this approach seeks to raze the delinquency court as it exists today and replace it with a new approach to adjudicating individual cases of alleged delinquency that is unmoored from the court's original first principles. At the macro level, this approach fundamentally alters the role of the delinquency court in the lives of children and families. This differs

In furtherance of this goal, this Article focuses on laying a theoretical and practical foundation for significantly narrowing the jurisdiction of the delinquency court to pave the way for its replacement.[28] Part I of this Article deconstructs the legal construct of delinquency into its three essential components: (1) the explicit statutory definition of delinquency; (2) the necessary detection of such delinquency; and (3) the implicit discretion to exercise or decline court jurisdiction. Part I then explores the manner in which the derivative, overbroad, and incomplete nature of this construct has led to the criminalization of adolescence, environment, and otherness. Part II of this Article reconstructs the legal definition of delinquency to address the current construct's identified flaws. In particular, Part II suggests changes to the legal construct of delinquency to make it more developmentally appropriate, less paternalistic, and truly diversionary. Deconstructing and reconstructing the definition of delinquency in this manner will decenter the role of the delinquency court in the ecosystem of positive youth development, while shifting attention and resources to public health interventions that directly invest in youth, families, and communities.

I. DECONSTRUCTING DELINQUENCY

To understand delinquency as defined by American society, it is critical to first understand delinquency as both a social and legal construct. The social construction of delinquency is a broad concept that describes childhood misbehavior generally, irrespective of its lawfulness.[29] As a result, delinquency as a social construct is behavior that adults have determined may undermine the youth's individual development or the current social order, or behavior that runs counter to the values of the dominant social class.[30] Importantly, however, the social

from past calls for abolition of the delinquency court, which would have returned the adjudication of individual cases to criminal court jurisdiction with proposed limitations on the sentences that judges could order for youth. *See, e.g.*, Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1132 (1991) (proposing retaining contemporary sentencing and correctional ideology for some youth); Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 50 (1990) (proposing a rights-centered juvenile court with an emphasis on community safety and crime-related proportionate sentencing); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 723–24 (1991) (proposing an adult criminal court administering justice for young offenders); *see also* Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 398 (1996) (proposing an adequate social welfare system); David Yellen, *What Juvenile Court Abolitionists Can Learn from the Failures of Sentencing Reform*, 1996 WIS. L. REV. 577, 602 (1996) (proposing improving the quality of justice in the juvenile system from within).

28. In future scholarship, I hope to elaborate on how we should respond to youth misbehavior outside of the jurisdiction of a new delinquency court constrained by the recommendations proposed in this Article.

29. The Merriam-Webster Dictionary defines "delinquency" as "conduct that is out of accord with accepted behavior or the law." *Delinquency*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/delinquency [https://perma.cc/J2DB-WU83] (last visited Mar. 11, 2025).

30. TAPPAN, *supra* note 11, at 4, 6, 30 (discussing the difference between legal delinquency and socially-determined delinquent behavior generally).

construct of delinquency is not the same as deviancy from the norm.[31] What adults consider "delinquent" behavior often includes behavior that they themselves engaged in while still in their youth or that is otherwise common or prevalent among adolescents.[32] Thus, while there is overlap between the social construct of delinquency and behavior that deviates from normative adolescent behavior,[33] the social construct of delinquency also includes a significant amount of behavior that is typical of adolescence[34] and serves primarily a descriptive or labeling function.

In contrast, the legal construct of delinquency is both narrower and more concrete than the social construct and functions to answer a specific question: When should the state use its police powers to respond to the behavior of a young person?[35] In answering this question, the legal construction of delinquency includes both substantive and procedural dimensions.

From a substantive standpoint, the legal construct of delinquency is limited to the statutorily proscribed behavior that falls under the jurisdiction of the juvenile courts.[36] At the inception of juvenile court, this meant that the legal construct of delinquency was limited substantively to a smaller, discrete subset of behaviors that would have been a crime if committed by an adult. Specifically, the architects of the first juvenile court defined a "delinquent child" as "any child under the age of 16 years old who violates any law of this State or any city or village ordinance."[37] The goal of this substantive definition was to divert criminal cases for youth under sixteen years of age to juvenile court, not to intervene with all "delinquent behavior" as socially constructed.[38]

However, given the juvenile court architects' preoccupation with "citizen building,"[39] the architects very quickly broadened the definition of delinquency

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31. *See id*. at 22–23, 32.

32. *See id*. at 32.

33. The use of the term "normative" is not meant to imply a value judgement. Rather, the term "normative" aligns with the literature regarding adolescent development research and is used to describe behavior that "align[s] with typical developmental trajectories and milestones shared by youth of diverse backgrounds." NAT'L ACADS. PRESS, PROMOTING POSITIVE ADOLESCENT HEALTH BEHAVIORS AND OUTCOMES: THRIVING IN THE 21ST CENTURY 29 (2020), https://nap.nationalacademies.org/read/25552/chapter/4#29 [https://perma.cc/LG8M-JG55].

34. *See* TAPPAN, *supra* note 11, at 32; *see also* NAT'L ACADS. PRESS, *supra* note 33, at 29.

35. *See* TAPPAN, *supra* note 11, at 4 ("Official delinquency usually implies involvement with the police, detention, court handling, damaging associations, semipunitive correctional treatment, and a role and stigma that are ineradicably injurious–not withstanding all the idyllic euphemisms to the contrary that embellish the literature on 'rehabilitative therapy.' One must decide to whom these measures need to be applied and also who, in the name of justice, should be exempt from them."); SPINAK, *supra* note 8, at 141 ("[O]ur values, attitudes, and approaches to youthful behavior define what we mean by 'delinquency.' Defining youth behavior remains a political choice with political solutions.").

36. *See* TAPPAN, *supra* note 11, at 30 (defining the "juvenile delinquent" as "a person who has been adjudicated as such by a court of proper jurisdiction") (emphasis omitted).

37. Juvenile Court Act, 1899 Ill. Laws 131, § 1. This founding definition of delinquency forms the basis for the statutory definition of a "delinquent act" in juvenile court statutes to this day. *See, e.g.*, D.C. CODE § 16-2301(7).

38. *See* BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE 3 (Franklin E. Zimring & David S. Tanenhaus eds., 2019).

39. *See id*. at 24.

beyond criminal offenses to include youth who were "incorrigible," "who knowingly associate[d] with thieves, vicious or immoral persons," "who [were] growing up in idleness or crime," "who knowingly frequent[ed] a house of ill fame," or "who knowingly patronize[d] any policy shop or place where any gaming device is or shall be operated."[40] Practically speaking, this broadened legal construct gave juvenile courts significantly more jurisdiction over the behavior of youth and enabled the courts not just to intervene when the youth committed a traditional crime, but also when the court generally believed the youth to be in need of care or control by the state as a result of their noncriminal behavior.[41]

While this revised definition of delinquency broadened the substantive dimension of the legal construct significantly to more closely resemble the social construction of delinquency at the time, the two procedural dimensions of the legal construct of delinquency—detection and discretion—narrowed the scope of the overall legal construct in application.[42] For instance, juvenile courts do not assert jurisdiction over every action that fits into the substantive statutory definition of a delinquent act. Indeed, if they did, they would be unbelievably overwhelmed.[43] Instead, cases in juvenile court are initiated by "petition" after the allegedly delinquent behavior is discovered and referred to the court for intake.[44] In other words, discretion is used to determine not just whether the detected behavior meets the definition of a crime or status offense, but also whether the particular alleged behavior or individual youth merits being brought before the court.[45] As a result, if an arrest never occurs or charges are never filed, then the youth's alleged behavior is never brought within the fold of the legal construct—even though the alleged behavior fits the socially constructed definition of delinquent behavior. Thus, the legal construct of delinquency has three elements in practice: (1) definition, (2) detection, and (3) discretion.

While this legal construct of delinquency has been and continues to be shaped by the social construct of delinquency as well as societal and political priorities, juvenile courts are the physical and practical manifestation of the legal construct.[46] As a result, when I deconstruct the *definition* of delinquency in this Article, I am

40. Juvenile Court Act, 1901 Ill. Laws 142, § 1. Over time, these noncriminal offenses (that is, "status offenses") have remained a basis for juvenile court jurisdiction taking the form of "child[ren] in need of supervision" cases. *See, e.g.*, D.C. CODE § 16-2301(8). "Child[ren] in need of supervision" are youth who have allegedly committed "status offenses." Status offenses are actions that are deemed by statute to be unlawful only when committed by youth, such as truancy, habitually running away from home, and ungovernability. *See, e.g.*, D.C. Code § 16-2301(8)(A)(i)–(iii).

41. TAPPAN, *supra* note 11, at 30.

42. *See* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 7–9 (3d ed. 2009); TAPPAN, *supra* note 11, at 37.

43. *See* HOCKENBERRY & PUZZANCHERA, *supra* note 12 and accompanying text.

44. *See id.* at 2 (defining petition). Most cases are referred to the juvenile court by law enforcement after arrest. *Id.* at 31 ("Between 2005 and 2021, law enforcement agencies were the primary source of delinquency referrals for each year.").

45. *See* Juvenile Court Act, 1899 Ill. Laws 132, § 4; *see also* Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 82 (2012) (explaining that many delinquency statutes require not just that a crime be committed, but that the child itself be in need of court intervention); *see, e.g.*, D.C. CODE § 16-2301(6) (definition of delinquent child).

46. This Article focuses primarily on the delinquency and status offenses systems.

critiquing primarily the legal construct of delinquency created by the architects and the impact it continues to have today.[47] It is this legal construction of delinquency that supplies the court with an overly broad jurisdiction that results in the criminalization of adolescence, environment, and otherness.

A. THE CRIMINALIZATION OF ADOLESCENCE

Despite recognizing that children are different than adults, the architects of the original juvenile court used the violation of existing criminal code offenses to define delinquency without accommodating the developmental differences between youth and adults that purportedly justified the creation of the new court. It further compounded this error by borrowing the practices of the adult criminal court—judges, probation, and incarceration—to respond to delinquent behavior. Thus, while technically serving the architects' diversionary intention to a degree, these errors led to the juvenile courts being a derivative of the criminal courts and resulted in the *increased* criminalization[48] of adolescence.

1. The Derivative Definition of Delinquency

In adopting criminal code offenses as the basis for the definition of delinquency without any modification, the architects of the first juvenile courts chose a legal definition of delinquency that led to the criminalization of a significant amount of normative adolescent behavior.

To understand how the legal definition of delinquency criminalized normative adolescent behavior, it is helpful to strip down criminal conduct to its basic elements at common law—a guilty act (*actus reus*) and a guilty mind (*mens rea*).[49] *Actus reus* are the actions that a person takes that qualify such behavior as criminal under the statute[50] while *mens rea* is the intent required by statute to qualify the actions as criminal.[51]

Prior to the founding of the juvenile court, youth accused of crimes were tried in criminal court where the local and state statutes provided the elements that the government needed to prove—i.e., the *actus reus* and the *mens rea*. However, at common law, youth had the benefit of the infancy defense. Generally, the infancy

47. In contrast, when I use the term "misbehavior," I am referring to the broader, more abstract social construction of delinquency.

48. I define "criminalize" as follows: to subject to the same core processes, conditions, and sanctions available to judges in the adult criminal justice system including restraints on or the loss of liberty or property. Essentially, my use of the word is consistent with the meaning "to treat as criminal." *Criminalize*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/criminalize [https://perma.cc/UC2J-L6JP] (last visited Mar. 11, 2025).

49. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 12 (J.W. Jones trans., 2005).

50. "Actus reus refers to the act or omission that comprise the physical elements of a crime as required by statute." *Actus Reus*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/actus_reus [https://perma.cc/DQ7K-9YNK] (last visited Mar. 13, 2025); *see also* MODEL PENAL CODE § 2.01.

51. A *mens rea* refers to "the state of mind statutorily required in order to convict a particular defendant of a particular crime." *Mens Rea*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/mens_rea [https://perma.cc/59L8-DHSC] (last visited Mar. 13, 2025); *see also* MODEL PENAL CODE § 2.02.

defense recognized that while the particular behavior of adults and youth subject to criminal sanction—the *actus reus*—might be the same, developmental differences between the two populations meant that the intent behind such action—the *mens rea*—may be different. The infancy doctrine traditionally set a minimum age of prosecution at seven years old and presumptively precluded the prosecution of those seven to fourteen years old unless the government could prove that the child had the capacity to form the necessary "criminal intent" as well.[52] As such, the infancy defense effectively added an additional element to the legal definition of a crime when a child within the proscribed age range was accused of violating the law.[53] Put another way, before the creation of juvenile court, to find a youth guilty of a crime, the government had to prove that: (1) the child committed the act; (2) the child intended to commit the act; and (3) and the child had a *criminal* motive behind his actions (that is, that he intended to commit the act with an understanding of the act's nature and that the act was illegal).[54]

The statutes authorizing the first juvenile courts changed this framework in a significant way. For example, the first juvenile court statute defined a delinquent child as "any child under the age of 16 years who violates any law of this State or any city or village ordinance."[55] In doing so, delinquent conduct by youth was statutorily defined in exactly the same way that the criminal conduct of adults was defined—the same statutorily proscribed *actus reus* and *mens rea*. However, the creation of juvenile court eliminated the infancy defense,[56] which removed the existing responsibility placed on the court to account for the developmental differences between adult and youth in the determination of liability itself. As a result, after the creation of juvenile court, to find a youth guilty of a delinquent act, the government had to prove that (1) the child committed the act; and (2) the child intended to commit the act. The way the youth's developmental immaturity impacted their actual understanding and the motive behind their actions no longer mattered.[57]

This new framework created an expansive legal definition of delinquency that normed the jurisdiction of the juvenile court on adult standards and criminalized youth behavior that would have previously been beyond the scope of the criminal court's purview. As a result, while the creation of the juvenile court did serve a

52. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 509–11 (1984). The defense itself and specific ages were statutorily prescribed in certain jurisdictions. *See, e.g.*, 1856 Tex. Crim. Stat. 36 (1857).

53. Walkover, *supra* note 52, at 509–11.

54. *See id*. at 509–13.

55. Juvenile Court Act, 1899 Ill. Laws 131, § 1.

56. *See* Barbara Kaban & James Orlando, *Revitalizing the Infancy Defense in the Contemporary Juvenile Court*, 60 RUTGERS L. REV. 33, 39–40, 52–57 (2007) ("Questions of adjudicative competence had little relevance in juvenile courts pre-*Gault*."); Walkover, *supra* note 52, at 506 ("The common law infancy defense met its demise when legislatures created the juvenile court as an entity separate from the criminal court.").

57. From a psychological perspective, this change in framework removed a required examination of both the youth's cognitive and psychosocial development in determining liability. *See* Kaban & Orlando, *supra* note 56, at 50.

limited diversionary purpose—i.e., moving possible jurisdiction over the youth from criminal court to juvenile court[58]—the juvenile court model did not advance the broader diversionary purpose of ensuring fewer youth became system-involved in the first place. To the contrary, the juvenile court model eliminated constraints on the power of the state that had previously protected youth. Given that this new legal definition of delinquency gave juvenile courts broad discretion over behaviors in which nearly all youth engage during adolescence,[59] this new legal definition subjected nearly all youth to the perils of possible juvenile court jurisdiction, thereby criminalizing significant amounts of normative adolescent behavior.[60]

The original juvenile courts' legal definition of delinquency remains the underpinning of the jurisdiction of juvenile court today. Other than raising the age of original jurisdiction, juvenile codes today define delinquency in this same broad derivative manner—i.e., in relation to the same behavior that forms the basis for criminal jurisdiction over adults, without any developmentally-responsive restraints.[61]

2. The Derivative Design of the Delinquency Court

Second, the architects of the juvenile court compounded this error by borrowing the *design* of the juvenile court from the criminal court. Rather than design a new way of responding to youthful misbehavior from the ground up, the architects used the criminal legal system as a platform from which to build their "new" juvenile court.[62] However, there was little about the juvenile court that was not

58. *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109–11 (1909).

59. *See* Austin L. Porterfield, *Delinquency and Its Outcome in Court and College*, 49 AM. J. SOCIO. 199, 200 (1943) (finding that 100% of a sample of college students from three colleges in North Texas had engaged in at least one of the fifty-five offenses for which youth had been charged in the preceding year in the Fort Worth, Texas area); James S. Wallerstein & Clement J. Wyle, *Our Law-Abiding Law-Breakers*, 25 PROBATION 107, 109–10, 111–12 (1947) (reporting the result of a self-report study revealing that almost all of the nearly 1,700 respondents reported committing at least one delinquent act prior to their sixteenth birthday, with 64% of male respondents and 29% of female respondents reporting that they had committed at least one of the fourteen felonies included on the provided forty-nine-item checklist); James F. Short, Jr. & F. Ivan Nye, *Extent of Unrecorded Juvenile Delinquency: Tentative Conclusions*, 49 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 296, 301 (1958) (finding few statistically significant differences between the prevalence of delinquency among socioeconomically different groups); DELBERT S. ELLIOT ET AL., BEHAV. RSCH. INST., THE PREVALENCE AND INCIDENCE OF DELINQUENT BEHAVIOR, 1976–1980: NATIONAL ESTIMATES OF DELINQUENT BEHAVIOR BY SEX, RACE, SOCIAL CLASS, AND OTHER SELECTED VARIABLES 52 (1983) (finding that approximately two-thirds of surveyed youth acknowledged committing one or more of the delinquent offenses listed in a twenty-four-item survey and finding that approximately 80% of surveyed youth acknowledged committing one or more of the delinquent offenses listed in a more comprehensive thirty-five-item survey of delinquency); *see also In re Gault*, 387 U.S. 1, 20 n.26 (1967) (recognizing that "most juvenile crime apparently goes undetected or not formally punished").

60. The creation of the juvenile court also led to the elimination of the infancy defense in criminal court such that today, youth tried as adults have neither the benefit of the delinquency system nor access to the infancy defense.

61. *See, e.g.*, D.C. CODE § 16-2301(7).

62. TANENHAUS, *supra* note 2, at 17 (recognizing that "[t]he juvenile court would not be a new court, but rather a branch of the circuit court that had 'original jurisdiction' in children's cases"); Mack, *supra*

derivative of the criminal court. Judges, probation officers, and reformatories were all being used by the adult criminal justice system when juvenile court was founded. The most significant design departure from the criminal court was the exclusion of defense attorneys. As a result, the first juvenile courts were equipped with all of the control apparatus of the existing criminal courts, but none of the potential checks on that power.[63] The consequence was the creation of a parallel criminal legal system for youth in which the loss of liberty without due process was commonplace.

a. The Court's Architecture of Control

Despite espousing a "medical model" approach,[64] the architects of the juvenile court started from the premise that a court of law was the correct place to respond to the misbehavior of youth.[65] This led to a similar staffing structure to that of the criminal court with a judge as fact-finder and decision-maker.[66] In the juvenile court model, the judge, despite often having no training in psychology or child development, was also expected to play the role of "doctor," diagnosing and healing the root causes of the behavior that brought the child before the court and facilitating interventions to prevent the child from spiraling into a life of depravity.[67]

However, the juvenile court legislation provided judges with little authority and few tools to facilitate their diagnostic and curative work.[68] Instead, in the original juvenile court model adopted by the states, judges were provided with a limited set of options that mirrored the options available in criminal court.[69] Specifically, the judge could allow the child to stay home under the supervision of a probation officer or place the child outside their home.[70] While judges

note 58, at 115 (citing House of Commons Children's Bill taking for granted that "courts should be agencies for the rescue as well as the punishment of children") (quoting 183 Hans. Parl. Deb., 4th series, 1434); *see also* Jonathan Simon, *Power without Parents: Juvenile Justice in a Postmodern Society*, 16 CARDOZO L. REV. 1363, 1384 (1995) ("Historians have debated how innovative the juvenile court was.").

63. While defense attorneys are often thought to play the role of checking the power of the court by representing the expressed interest of the defendant, prosecutors also play a check on the court's power in the criminal justice system as a result of their gatekeeping function.

64. FELD, *supra* note 38, at 34–35 ("Juvenile courts' child-welfare theory likened delinquency proceedings to a visit to a doctor rather than a court trial."). However, youth did not seek the assistance of the court on their own accord as they might in a true "medical model," but rather were compelled to appear before the court by police officer or summons. Juvenile Court Act, 1899 Ill. Laws 131, § 10; 1903 Colo. Sess. Laws. 180, §§ 3, 6-7.

65. TANENHAUS, *supra* note 2, at 3, 17.

66. *See id*. at 17; FELD, *supra* note 38, at 34–35.

67. *See* Simon, *supra* note 62, at 1391 (recognizing that early juvenile court judges "took on the aura of healers").

68. *See* FELD, *supra* note 38, at 28–35; TANENHAUS, *supra* note 2, at 24–25, 34–39, 47–49; Mack, *supra* note 58, at 118–19.

69. *See* The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 916.

70. *See, e.g.*, Juvenile Court Act, 1899 Ill. Laws 131, § 9; 1903 Colo. Sess. Laws 178, § 9. Placement options included another community-based placement, a boarding house, a training or industrial school, a state reformatory, or any other state institution that cares for delinquent children. *See, e.g.*, Juvenile Court Act, 1899 Ill. Laws 131, § 9; 1903 Colo. Sess. Laws 178, § 9. These options reflected a choice to limit the judge's power over only the individual brought before the court, as in the criminal court, rather

encouraged cooperation between the courts and community-based organizations like social services agencies, schools, and employers, judges did not have the power to require cooperation from such non-court organizations.

Probation officers were appointed to conduct investigation on behalf of the court, provide the court with information as required by the judge, and take charge of the child before and after trial as directed by the court.[71] Probation officers were considered "the representative of the court"[72] while also, in lieu of defense attorneys, representing the interests of the child.[73] While an influential proponent of the juvenile court believed probation to be the "keynote of juvenile-court legislation," he acknowledged that probation officers were not "radically new" and had been used in criminal courts prior to juvenile courts.[74]

Moreover, just as criminal courts relied on placement in jails and prisons, the original juvenile courts relied heavily on the "out-placement" of youth in facilities whose design and approach were heavily influenced by theories of penal control.[75] Practically, given the evolution of penological practices in the United States, this resulted in the placement of youth in reformatories.[76]

The reformatory system, which predated the creation of the juvenile court,[77] was supposed to be a marked departure from the traditional penitentiaries relied upon in the United States and around the world.[78] Known for having "a policy of indeterminate sentencing, the 'mark' system, and 'organized persuasion' rather than 'coercive restraint,'" the goal was the "reformation of the criminal."[79] Overall, the

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than empower the judge to compel others like schools, employers, or other government agencies to affirmatively act to support the child.

71. *See, e.g.*, Juvenile Court Act, 1899 Ill. Laws 131, § 6; 1903 Colo. Sess. Laws 178, § 8.

72. Mack, *supra* note 58, at 116.

73. *See, e.g.*, Juvenile Court Act, 1899 Ill. Laws 131, § 6; 1903 Colo. Sess. Laws 178, § 8.

74. Mack, *supra* note 58, at 116 ("Probation is, in fact, the keynote of juvenile-court legislation. But even in this there is nothing radically new.").

75. Feld, *supra* note 27, at 715 ("Since their inception, the reality of custodial institutions has contradicted the juvenile court's rhetorical commitment to rehabilitation. Historical studies of Progressive juvenile correctional programs provide dismal accounts of training schools and institutions that were scarcely distinguishable from their adult penal counterparts."); ROBERT PICKETT, HOUSE OF REFUGE: ORIGINS OF JUVENILE REFORM IN NEW YORK STATE, 1815–1857, at 58, 68, 125–27 (1969) (describing how reformatories implemented penological theories to exercise control over youth, including indeterminate sentences, indenture, punishment, and the work of European reformers).

76. Reformatory was the name given to correctional institutions for youth. Alexander W. Pisciotta, *Saving the Children: The Promise and Practice of* Parens Patriae*, 1838–98*, 28 CRIME & DELINQ. 410, 410 (1982) ("[N]ineteenth century judges . . . committed minors to reformatories for noncriminal acts on the premise that juvenile institutions would have a benevolent effect upon their charges. In theory, reformatories were 'schools' which provided parental discipline, meaningful labor, religious instruction, education, and a beneficial apprenticeship to their charges.").

77. The juvenile reformatory system has been referred to as the first wave of juvenile legal system innovation. *See* Simon, *supra* note 62, at 1364 (describing the juvenile court as part of the "second wave" of juvenile legal system innovation); *see also* The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 899–908, 913–17.

78. PLATT, *supra* note 42, at 46–47.

79. *See id.*

juvenile reformatory was widely framed as "not a prison, but a school[,] [w]here reformation, and not punishment, [was] the end."[80]

However, like the use of judges and probation officers, reformatories were not a novel invention of the juvenile court but a pre-existing practice that the juvenile court borrowed from the criminal system.[81] Rather than juvenile court influencing the design and practices of reformatories, to the contrary, the principles around which reformatories were designed heavily influenced the design and practices of the juvenile court.[82]

For instance, influenced by the reformatory movement and its grounding in *parens patriae*, the juvenile court deviated from the criminal court model and adopted the use of indeterminate sentences.[83] Coupled with the elimination of due process, the use of indeterminate sentences provided the juvenile court with unbridled discretion to control the lives of the youth under its jurisdiction.[84] This unrestrained power not only resulted in the same potential outcomes—probation or loss of liberty—but also exposed youth to longer sentences than in the adult system for all but the most serious offenses.[85] This resulted in the increased criminalization of youth in many circumstances.[86]

b. Design Flaws Lead to Immediate Failings in the Court's Architecture

Cracks in the foundation of the juvenile court's architecture immediately emerged, and the proponents of the juvenile court quickly recognized ways in which the court was not up to its intended task of diagnosing and effectively intervening in the root causes of the youth's behavior. Indeed, the process of reforming the juvenile court model began as soon as the juvenile court was launched.

From the beginning, many judges assigned to juvenile court (or those hearing juvenile cases) did not have the time or training to effectively execute the medical

80. *Ex Parte Crouse*, 4 Whart. 9, 11 (Pa. 1839).

81. PLATT, *supra* note 42, at 46 (recognizing that the reformatory system, which predated the juvenile court, was built as "a special form of prison discipline for adolescents and young adults"); Mack, *supra* note 58, at 106 ("[R]eformatories supplanted the penitentiary" prior to the founding of juvenile courts.).

82. *See* The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 899–908, 913–17.

83. Juvenile Court Act, 1899 Ill. Laws 131, § 9.

84. *See* FELD, *supra* note 38, at 35; James C. Weissman, *Toward an Integrated Theory of Delinquency Responsibility*, 60 DENV. L.J. 485, 486 (1983) ("Relaxed procedural requirements structured to promote rehabilitation of the minor became a normative feature of the delinquency system. As the juvenile court matured, however, critics increasingly cited due process deficiencies as a cause of juvenile injustice.").

85. *See* Barry C. Feld, *Criminalizing the American Juvenile Court*, 17 CRIME & JUST. 197, 244–45 (1993) ("[J]uveniles currently may serve longer sentences than their adult counterparts convicted of the same offense because they purportedly receive treatment rather than punishment.").

86. *See, e.g.*, Commonwealth v. Fisher, 62 A. 198, 199 (Pa. 1905) ("Other [juvenile delinquency] acts forbid the employment of minors under 12 years of age in mills; . . . in anthracite coal mines; . . . in and about elevators; . . . [and] in bituminous coal mines. Others . . . forbid the admission of any minor into certain places of amusement.").

model approach envisioned by the architects.[87] For instance, Judge Mack[88] criticized the "very important jurisdictions" who engaged in the "vicious practice" of assigning a different judge to cover juvenile court cases every month or every quarter, noting that "[i]t is impossible for these judges to gain the necessary experience or to devote the necessary time to the study of new problems."[89] Instead, Judge Mack recommended that juvenile court judges be appointed full-time to juvenile court for at least a year, but preferably for longer.[90] Even assuming this ideal, however, Judge Mack recognized that it would be difficult for a judge alone to effectively accomplish the aims of the juvenile court. In highlighting the work of Judge Lindsey[91] in Denver, who managed to execute the duties of both judge and probation officer, Judge Mack recognized that, while such an approach might be ideal, "lack of time" would prevent a judge in a larger jurisdiction from effectively executing all of these duties even assuming that the "necessary combination of elements [could be found] in one man."[92] As such, Judge Mack endorsed relying on probation officers to assist with the task of preventing recidivism.[93]

However, both the probation model and child study departments[94] also immediately struggled to effectively carry out their roles. Like the judges appointed to family court, early juvenile court probation officers also struggled with a lack of time and training.[95] These problems stemmed from the design of probation itself. Prior to the launch of the first juvenile court, the probation model depended primarily upon unpaid volunteers to serve as probation officers.[96] In drafting the first juvenile court legislation, the Illinois legislature rejected calls to provide salaries to the court's probation officers.[97] Instead, the legislature left it to the local women's clubs to raise the funds necessary to pay probation officers.[98] Moreover, even

87. *See* FELD, *supra* note 38, at 29–35; Mack, *supra* note 58, at 118–19; TANENHAUS, *supra* note 2, at 34–39, 47–49.

88. Judge Julian Mack presided over the Chicago juvenile court beginning in 1904 and became one of the juvenile court's most ardent supporters. *See* TANENHAUS, *supra* note 2, at 40.

89. Mack, *supra* note 58, at 119.

90. *See id.* at 118–19.

91. Judge Benjamin Lindsey established the first juvenile court in Denver, Colorado, and presided over the court from 1907 to 1927. *Judge Benjamin Barr Lindsey (1869–1943)*, DENV. PUB. LIBR.: SPECIAL COLLECTIONS & ARCHIVES, https://history.denverlibrary.org/colorado-biographies/judge-benjamin-barr-lindsey-1869-1943 [https://perma.cc/E2N2-YMS2] (last visited Mar. 14, 2025).

92. *See* Mack, *supra* note 58, at 119.

93. *See id.* at 116–17. Mack also highlighted the use of the appointment of "masters in chancery, designated as masters of discipline" by juvenile court judges to act under their direction. *Id.* at 118. Judge Mack hypothesized that such outsourcing "may prove to be the best solution of a difficult problem, combining as it does the possibility of a quick disposition of the simpler cases in many sections of a large city or county, with a unity of administration through the supervisory power of a single judge." *Id.*

94. Child study departments were created shortly after the launch of the juvenile court to help the court diagnose and treat the root causes of delinquency in an individual case. *See* E.E. Irvine, *The Juvenile Court and the Child Guidance Clinic*, 4 PROB. 109, 109–10 (1945).

95. *See* TANENHAUS, *supra* note 2, at 34–39, 47.

96. *See id.*, at 17, 31–35.

97. *See id.*

98. Anne Meis Knupfer, *Professionalizing Probation Work in Chicago, 1900–1935*, 73 SOC. SERV. REV. 478, 479 (1999).

when Cook County agreed to begin providing salaries for paid probation officers in 1905, the county only provided the funds to pay for three probation officers while the women's clubs had provided the funds to pay for twenty-two.[99] These twenty-five probation officers were not enough to keep up with the rising numbers of cases and expanding bureaucracy of juvenile court, causing the court to rely on great numbers of volunteers and undermining the attempts to professionalize the administration of probation.[100] Indeed, the lack of pay, the overreliance on volunteers of dubious backgrounds, and the lack of formal training programs contributed to "fairly unstandardized" training of probation officers in juvenile court.[101] The overall result was heavy caseloads—an average of sixty-seven cases per worker, seventeen above the recommended amount at the time—and shallow work product, which undercut the first juvenile court's ability to reduce recidivism.[102]

Additionally, despite the good intentions, hype, and "pride" espoused by supporters of the reformatory movement,[103] in reality, juvenile reformatories failed to fulfill their rehabilitative mission as well.[104] Indeed, calls to reform the reformatories predated even the founding of the juvenile court, as the facilities were associated with exploitative, unsafe, and abusive conditions.[105] In addition to using youth as cheap labor for the profit of the administrators of the institutions,[106] youth were victimized physically by their peers and the administrators of the facilities.[107] For example, mid-nineteenth-century investigations into the practices of various reformatories revealed that the administrators often used harsh physical punishment that, in essence, amounted to state-sanctioned and imposed child abuse.[108] Such abuse included

99. *See id.* at 483.

100. *See id.* at 483–85. By 1913, the Chicago juvenile court had nearly 900 volunteers. *See id.* at 485.

101. *See id.* at 483–85. While various efforts were made to provide some training to probation officer beginning in 1908, the attempts were "sporadic and conceptually inconsistent." *See id.* at 484.

102. *See id.* at 489. A 1925 study of probation found that at least 55% of girls did not meet with their probation officer until two to three weeks after appointment despite the recommendation that probation officers visit their probationers within a week of appointment. *Id.* In addition, the study found that the average length of time between appointment and the initial visit was over twenty-five days and that some probation officers had submitted investigative reports to the court without ever having visited the home of the child. *Id.*

103. PLATT, *supra* note 42, at 53 ("America has little reason today to be proud of her prisons; but she can justly take pride in her juvenile reformatories: from the very beginning of their work fifty years ago until now.").

104. NELL BERNSTEIN, BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON 47 (2014) ("From the very beginning . . . the implementation and practice of juvenile justice fell far short of its lofty ideals. The courts relied heavily on 'reformatories,' later known as training schools, where conditions were often more severe and discipline far harsher than their rehabilitative mission implied."); FELD, *supra* note 38, at 36 ("Despite Progressives' rehabilitative rhetoric, juvenile institutions and reformatories were essentially custodial, punitive, and ineffective.").

105. *See* Pisciotta, *supra* note 76, at 413–24.

106. *See id.* at 416–17.

107. *See id.* at 417.

108. *Id.* at 413 ("[T]he techniques of subjection applied in many reformatories could not, by any reasonable standard, be described as 'parental' in nature.").

"[f]logging with the 'cat,'"[109] "whipping, simulated drowning, choking, prolonged use of a sweatbox, hanging youth by their thumbs, being hosed down with ice cold water, placement in a straightjacket, and physical beatings, among other things, that would not have been tolerated if committed by the biological parent of the youth."[110]

Similar concerns were raised regarding the deficiencies and inefficacy of the reformatories in Illinois.[111] In fact, the architects of the Illinois juvenile court themselves did not envision juvenile reformatories as an integral part of the juvenile court model.[112] Rather, reformatories were only included in the legislation put forth before the Illinois legislature after the reformatory lobby threatened to kill the juvenile court legislation unless the reformatories were explicitly included as a potential placement for court-involved youth.[113] Moreover, a few years into the juvenile court experiment, Judge Mack himself recognized the continuing criticisms of the reformatories.[114] Without conceding that criticisms of the court were well-founded, Judge Mack made clear that youth who were removed from their homes had to be placed in "a real school, not a prison in disguise."[115] He advocated for a move away from the traditional reformatory design to the cottage plan, echoing the calls to close the large, inhumane, city-based prisons in which youth were often warehoused and abused and instead open smaller, more home-like placements in the country to support and educate youth.[116]

c. Design Flaws in the Court's Architecture Resulted in the Criminalization of Youth

Despite attempted reforms, like the cottage plan and the spread of child guidance clinics,[117] criticisms of the juvenile court continued into the 1930s. In 1934,

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109. See *id.* at 413–14 ("[I]nmates were punished with rattans and a 'cat' with six twelve-inch leather thongs attached to a wooden handle—for recalcitrant children, the wooden handle was used as a whipping surface.").

110. The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 908. Physical discipline of youth by the administrators of the reformatories was so common that an 1881 investigation into the New York House of Refuge found that "corporal punishment is, and always has been, a conspicuous feature of the discipline of the House; and it is manifest that a main reliance is placed upon it for the accomplishment of the reformatory work proposed." Pisciotta, *supra* note 76, at 415 (quoting N.Y. STATE BD. OF CHARITIES, REPORT OF THE COMMITTEE OF THE STATE BOARD OF CHARITIES APPOINTED TO INVESTIGATE THE CHARGES AGAINST THE SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS 27–28 (1881)); *see also* Simon, *supra* note 62, at 1392 ("From the start, the practice of these institutions rapidly outstripped their administrative innovations and more traditional forms of judgment came to predominate.").

111. TANENHAUS, *supra* note 2, at 14–22.

112. *See id.*

113. *See id.*

114. Mack, *supra* note 58, at 114; *see also Hart Resigns as Head of State Boys' School*, CHI. EXAM'R, Jan. 10, 1909, at 3, http://digital.chipublib.org/digital/collection/examiner/id/225/ [https://perma.cc/3LHS-3Z6Z].

115. Mack, *supra* note 58, at 114.

116. *See id.*

117. In 1909, the Hull House provided a grant to Dr. William Healy to establish the Chicago Juvenile Psychopathic Institute (JPI), the first child guidance clinic in the United States. Jon Snodgrass, *William Healy (1869-1963): Pioneer Child Psychiatrist and Criminologist*, 20 J. HIST. BEHAV. SCIS. 332, 335

Eleanor Glueck and her husband, Dr. Sheldon Glueck, published their investigation into the outcomes of a sample of 1,000 youth who had been under the supervision of the Boston Juvenile Court and its associated juvenile clinic.[118] The Gluecks found that approximately 88% of the boys studied continued to engage in criminal conduct and over 70% were convicted of serious offenses.[119] While the Gluecks did not go so far as to call for the abolition of the juvenile court given its inefficacy,[120] they emphasized, among other things, the need to invest directly and early in the families and communities from which system-involved youth came.[121] Their critique mirrored those of the Children's Bureau,[122] which "had become so disenchanted with the ineffectiveness of probation officers as well as the other court personnel [by 1930] that it recommended a more decentralized, community approach to solving delinquency . . . rather than a cumbersome and lengthy court process."[123]

In the 1960s, the Supreme Court weighed in on the failings of the juvenile court system and found that system-involved youth were entitled to due process rights under the Constitution.[124] In *Kent v. United States*, the Supreme Court found that:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[125]

(1984). The JPI served as a diagnostic center, a limited treatment center, and a research institute for the Chicago juvenile court. *Id.* at 335–36. The child guidance clinics that were opened in most major American cities throughout the 1920's and 30's modeled themselves after the JPI. *Id.* at 338. Interestingly, purportedly disappointed with the lack of treatment resources in Chicago, Dr. Healy left the JPI in 1917 to launch the first child guidance clinic in Boston. *Id.* at 336.

118. *See generally* SHELDON GLUECK & ELEANOR T. GLUECK, ONE THOUSAND JUVENILE DELINQUENTS: THEIR TREATMENT BY COURT AND CLINIC (3d ed. 1939).

119. *See id.* at 151–52.

120. *See id.* at 233 ("The major conclusion is inescapable, then, that, *the treatment carried out by Clinic, Court, and associated community facilities had very little effect in preventing recidivism*.").

121. *See id.* at 279–81.

122. Created in 1912, the United States Children's Bureau is "the first federal agency within the U.S. Government—and in fact, the world—to focus exclusively on improving the lives of children and families." *See* Children's Bureau, U.S. DEP'T OF HEALTH & HUM. SERVS.: ADMIN. FOR CHILDREN & FAMILIES (June 28, 2024), https://www.acf.hhs.gov/cb/about [https://perma.cc/4R8W-TRZV]. Julia Lathrop served as the first chief of the Children's Bureau. TANENHAUS, *supra* note 2, at 11.

123. Knupfer, *supra* note 98, at 489–90 (footnote omitted).

124. *See generally* Kent v. United States, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967).

125. *Kent*, 383 U.S. at 555–56 (footnote omitted).

The Supreme Court in *In re Gault*, citing favorably its remarks in *Kent*, similarly recognized that the results of the juvenile court "have not been entirely satisfactory" and highlighted the high recidivism rates of system-involved youth at the time.[126] Finally, while the court emphasized that there are "aspects of the juvenile system relating to offenders which are valuable," the juvenile court still criminalized the youth under its jurisdiction and, thus, required the provision of certain due process protections.[127]

Unfortunately, the provision of due process has not stemmed the failings of the juvenile court model or calls for continued reform. Courts dragged their feet in the provision of due process protections or actively sought to undermine them.[128] Probation itself moved away from its purported social services-based moorings toward a compliance-driven law enforcement model in many instances.[129] And the abuses experienced by youth in facilities continue today.[130] As such, there is ample evidence that, despite over a century of supposed promise and reform, the juvenile court model has mostly failed in both its rehabilitative and diversionary purposes. Instead, the lasting legacy of the juvenile court has been the continuous criminalization of youth, albeit in a different forum.

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126. *In re Gault*, 387 U.S. at 17–22 (highlighting the report of the Stanford Research Institute for the President's Commission on Crime in the District of Columbia, which found that "[i]In fiscal 1966 approximately 66 percent of the 16- and 17-year-old juveniles referred to the court by the Youth Aid Division had been before the court previously. In 1965, 56 percent of those in the Receiving Home were repeaters. The SRI study revealed that 61 percent of the sample Juvenile Court referrals in 1965 had been previously referred at least once and that 42 percent had been referred at least twice before. (citation omitted)).

127. *See id.* at 22, 29 (finding that "[t]he essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case"); *see also id.* at 23–24 (noting that the term "delinquent" had "come to involve only slightly less stigma than the term 'criminal' applied to adults").

128. The Gault Center has completed twenty-nine assessments of juvenile legal systems in states across the country as well as the District of Columbia. *See State Assessments*, THE GAULT CTR., https://www.defendyouthrights.org/initiatives/state-assessments/#:~:text=States%20Examined,youth%20defense%20across%20the%20country [https://perma.cc/NS32-522E] (last visited Mar. 11, 2025). *See generally*, WILLIAM ECENBARGER, KIDS FOR CASH: TWO JUDGES, THOUSANDS OF CHILDREN, AND A $2.8 MILLION KICKBACK SCHEME (2012).

129. RICHARD MENDEL, ANNIE E. CASEY FOUND., TRANSFORMING JUVENILE PROBATION: A VISION FOR GETTING IT RIGHT 9 (2018), https://assets.aecf.org/m/resourcedoc/aecf-transformingjuvenileprobation-2018.pdf [https://perma.cc/7JV5-S2DW].

130. Holly Ramer, *Former Residents of New Hampshire's Youth Center Demand Federal Investigation Into Abuse Claims*, AP NEWS (Aug. 25, 2023, 8:28 PM), https://apnews.com/article/new-hampshire-youth-center-sex-abuse-rally-637c589f66f73594c38aeb1f21bee973 [https://perma.cc/K68X-N3WE]; Rocio De La Fe & Dorian Hargrove, *"Hunting Ground for Child Predators": Guards at San Diego's Juvenile Detention Centers Face Claims of Rampant Sexual Abuse*, CBS8 (May 23, 2023), https://www.cbs8.com/article/news/investigations/hunting-ground-for-child-predators-guards-at-san-diegos-juvenile-detention-centers-face-rampant-sexual-abuse-claims/509-ca5cffae-a744-437f-83c2-f737286114b4 [https://perma.cc/6MVB-CTWT]; Megan Shutzer & Rachel Lauren Mueller, *'Dying Inside': Chaos and Cruelty in Louisiana Juvenile Detention*, N.Y. TIMES (Oct. 30, 2022), https://www.nytimes.com/interactive/2022/10/29/us/juvenile-detention-abuses-louisiana.html; *see also* The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 948 n.383.

B. THE CRIMINALIZATION OF ENVIRONMENT

The expansion of the legal definition of delinquency to include status offenses—i.e., behavior that is only unlawful when committed by a child—was largely done to remove the barriers to the juvenile court intervening in the lives of poor children and families posed by the requirement that a child first have committed a criminal offense for the court to have jurisdiction.[131] Having identified poverty as a primary cause of delinquency and criminality, child savers believed that extending the jurisdiction of the court to allegedly "pre-crime" behavior would enable the court to prevent delinquency before it happened.[132] However, by intentionally extending the jurisdiction of the juvenile court in this manner, the child savers designed a system that criminalized childhood poverty and perpetuated the direct and collateral impacts of poverty on children rather than alleviate them. The manifestations of this approach are represented by the various "pipelines-to-prison" that we have now clearly identified and named in our society today.

1. Criminalizing Noncriminal Behavior

The architects of the juvenile court erred by creating a definition of delinquency that not only encompassed violation of the traditional criminal code but also included a host of new offenses for which only young people could be held accountable. These "status" offenses, as they came to be known, included specific behavior like truancy, running away from home, drinking, and smoking, as well as vague behavior like incorrigibility or ungovernability. This expansive legal definition of delinquency significantly enlarged the jurisdiction that the state, acting through the juvenile legal system, could exercise over youth.

For example, two years after the first juvenile court was created by statute in Illinois, the legislature updated the definition of delinquency to include not just the violation of state or local ordinance, but also any child "who is incorrigible, or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly frequents a house of ill fame; or who knowingly patronizes any policy shop or place where a gaming device shall be operated."[133]

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131. *See* TIMOTHY D. HURLEY, ORIGIN OF THE ILLINOIS JUVENILE COURT LAW: JUVENILE COURTS AND WHAT THEY HAVE ACCOMPLISHED 60 (3d ed. 1907) ("In fact, the entire thought of those who framed the law was to banish all idea of crime and punishment and to overcome entirely the positive evil of a jail commitment and a former trial . . . . It was intended by the framers of the Juvenile Court law that the court, in administering the law, should go much deeper into the study of child-life than a mere attempt at punishment for any small, specific depredation would permit. It was intended that the court should search out and remove the primary cause of the deflection from the paths of rectitude.").

132. *See* TANENHAUS, *supra* note 2, at 5 (Chicago juvenile court was "a local manifestation of a transatlantic social movement in the 1880s and 1890s to solve the problems of crime and poverty, which were often conceived of and discussed in similar terms.").

133. 1901 Ill. Laws 142, § 1; *see also* Mack, *supra* note 58, at 107 (justifying state intervention not just for the child "who has broken a law or an ordinance" but also for "the child who has begun to go wrong, who is incorrigible").

Some states took the concept outlined in the "model" Illinois statute even further. For instance, Tennessee's enacting juvenile court statute defined a delinquent child, in part, as any child who was in danger of being brought up to lead an idle or immoral life,[134] suggesting that the court could exercise jurisdiction not only if the child had actually committed a status offense, but also if the child was merely at-risk of committing such an offense. An "Abstract of Juvenile Court Laws" from 1912 examining the evolution of the legal definition of delinquency by various states opined that "[b]etter laws make the definition much more inclusive so that the court will be unable, because of any technical lack of jurisdiction, to place a child under the care of the court and its officers, if that seems to be for the best interest of the child."[135] The expanded definition of delinquency effectively gave the first juvenile courts "pre-crime jurisdiction" over youth.[136] No longer did the youth have to do something criminal in order to be brought before the court; now, the court could intervene when it was worried that the youth *might* do something criminal in the future given the environment in which the youth was situated.

This expansion of jurisdiction to allegedly pre-crime behavior was perceived as the next logical "innovation."[137] The expansion aligned with the juvenile court proponents' belief that children who had broken the law were the victims of external forces beyond a child's control. It also furthered their diversionary and citizen-building goals for the court. Having successfully cast the court as a parent, unmoored the court from due process, and reframed the court's tools of control from punitive to benevolent,[138] there was nothing from a policy or procedural standpoint stopping this expansion of jurisdiction to noncriminal behavior.

The juvenile court took full advantage of this new, expanded jurisdiction. For instance, in the earliest years of the first juvenile court in Chicago, the majority of youth brought before the court were charged with status offenses, not criminal code violations.[139] Moreover, given the structure of the juvenile court statute, there was no legal or practical distinction made between delinquent acts and status offenses—as many juvenile court statutes do today.[140] Rather, youth who committed status offenses were considered and treated the same as "delinquent" youth, including

134. *See* 1911 Tenn. Pub. Acts 112. The Tennessee statute actually went so far as to erase any distinction between dependent and delinquent children. *See id.* at 113.

135. SOPHONISBA P. BRECKENRIDGE & EDITH ABBOTT, THE DELINQUENT CHILD AND THE HOME 251 (1912).

136. Mack, *supra* note 58, at 106 ("It is particularly in dealing with those children who have broken the law or who are leading the kind of life which will inevitably result in such breach, that the new and distinctive features of the juvenile court legislation appear.").

137. BRECKENRIDGE & ABBOTT, *supra* note 135, at 251.

138. *See* The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 903–08, 913–17; *see also* Mack, *supra* note 58, at 107 (asking "Why is not the duty of the state . . . if it learns that [the child] is treading the path that leads to criminality, to 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.").

139. Solomon Greene, *Vicious Streets: The Crisis of the Industrial City and the Invention of Juvenile Justice*, 15 YALE J.L. & HUMANS. 135, 144–45 (2003).

140. *See Id.* at 144–45; Juvenile Court Act, 1901 Ill. Laws 142 (including status offenses, such as "associat[ion] with thieves" and patronizing shops where gaming devices are operated, in the statutory definition of "delinquent child").

being detained and imprisoned in the same juvenile reformatories as those youth who allegedly had committed crimes.[141] As a result, youth who never would have been charged in criminal court were now facing the same criminal court interventions and practices, albeit in juvenile court.

This expansion of juvenile court jurisdiction was significant, particularly for girls. In the first ten years of the Chicago juvenile court, which launched in 1899, at least 25% of boys and at least 75% of girls brought before the juvenile court for delinquency were charged with status offenses, including incorrigibility, immorality, or vagrancy.[142] Between 1915 and 1919, at least 18% of boys and at least 85% of girls were charged with status offenses.[143] This phenomenon was not unique to the Chicago Juvenile Court. A review of 1927 data from forty-two juvenile courts across fifteen states revealed similar numbers, with approximately 25% of boys and at least 85% of girls appearing before the juvenile court as a result of being charged with status offenses.[144]

Moreover, because status offenders were treated as delinquent youth, they were often committed to reformatories and other institutions. In fact, early data analysis revealed that judges committed youth charged with status offenses more frequently than those charged with violations of the criminal code. For instance, in the first ten years of the Chicago Juvenile Court, over half of girls charged with delinquency—the vast majority of whom were charged with status offenses—were committed to institutions compared to only approximately 21% of boys.[145] Additionally, a 1927 analysis of juvenile court data across multiple jurisdictions reported that boys were committed more frequently in cases involving truancy (18%), running away (22%), and ungovernability (26%) than in cases involving stealing (18%), assaultive behavior (5%), or acts of carelessness or mischief (3%).[146] The analysis similarly found that girls were committed more frequently in cases involving running away (21%), ungovernability (27%), and sexual

141. 1901 Ill. Laws 141–42 (showing an absence of any creation of commingling statutes); Greene, *supra* note 139, at 144–45. Even today, commingling statutes typically only prohibit commingling of delinquent or "PERSONS IN NEED OF SUPERVISION" (PINS) youth with dependent youth or commingling of pre-disposition and post-disposition delinquent and PINS youth. As a result, status offenders and delinquent youth are still treated similarly in many states. D.C. only statutorily limited the ability of judges to order secure detention in 2017. *See* Comprehensive Youth Justice Amendment Act of 2016, D.C. Law 21-0238, 63 D.C. Reg. 15312 (Apr. 4, 2017).

142. BRECKENRIDGE & ABBOTT, *supra* note 135, at 27–40.

143. HELEN RANKIN JETER, CHILDREN'S BUREAU, U.S. DEP'T OF LAB., THE CHICAGO JUVENILE COURT 20 tbl. III (1922). "Immorality" referred to "questions of sex experience." *Id.* at 21. The author noted that the categories were a little fluid and encompass behaviors of varying severity. *See id.* at 20. In addition, many girls were charged with incorrigibility to avoid a charge of immorality or because the petitioner "suspected immorality or the danger of its development." *See id.* at 21.

144. CHILDREN'S BUREAU, U.S. DEP'T OF LAB., JUVENILE COURT STATISTICS 1927, at 14–18 tbls. 6 & 7 (1927).

145. BRECKENRIDGE & ABBOTT, *supra* note 135, at 40 tbl. 9.

146. CHILDREN'S BUREAU, *supra* note 144, at 14–25 tbls. 10 & 11 (1927). Overall, 15% of youth charged in juvenile court were committed to an institution for being delinquent children. As such, the commitment rate for both boys and girls for the various categories of status offenses is higher than the average commitment rate for all offenses. *See id.*

immorality (37%) than in cases involving stealing (12%), assaultive behavior (1%), or acts of carelessness or mischief (1%).[147]

While the detention of youth charged with status offenses has decreased since the passage of the federal Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA),[148] politics and the fear of the mythological super-predator led to an increase in the number of status offense cases petitioned through the eighties, nineties, and the first two years of the twenty-first century. Indeed, between 1986 and the peak in 2002, petitioned status offense cases more than doubled (from 82,600 to over 200,000) before falling to approximately 51,500 cases in 2021.[149] These status offense petitions represented approximately 10% of all cases—delinquency or status offense—petitioned in juvenile court in 2021.[150] As such, in a very practical sense, the expansion of the legal definition of delinquency to include status offenses led to a substantial increase in the size of the juvenile court and the detention of substantially more youth—particularly girls.

2. Criminalizing Childhood Poverty

The criminalization of childhood poverty was not a mistake or unintended consequence of how the juvenile court model was implemented.[151] Rather, the juvenile court and its antecedent juvenile reformatories were intentionally designed to target the perceived problem of poverty.[152] Indeed, both the juvenile reformatory and the juvenile court movements grew out of early nineteenth-century efforts to prevent and ameliorate poverty, particularly among newly immigrated, impoverished families living in growing, industrializing cities.[153]

Early nineteenth-century reformers were afraid of the rapid change that was taking place around them and the perceived threat that such change posed to the political, economic, and social order in emerging American cities.[154] Deeming

147. *Id.*

148. David J. Steinhart, *Status Offenses*, 6 FUTURE CHILD. 86, 90 (1996). The JJDPA encouraged states to "deinstitutionalize" status offenders in favor of treating them in the community. The result was a 95% reduction in the number of youth detained for status offenses. LOWELL DODGE, U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-91-65, NONCRIMINAL JUVENILES: DETENTIONS HAVE BEEN REDUCED BUT BETTER MONITORING IS NEEDED 4 (1991). Specifically, states reported detaining over 185,000 youth for status offenses in their base reporting year, compared with fewer than 10,000 in 1988. *See id.* The detention of youth charged with status offenses fell further to 6,622 in 1993. Steinhart, *supra* note 148, at 89 tbl. 2.

149. *Compare* MELISSA SICKMUND ET AL., NAT'L CTR. FOR JUV. JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILE COURT STATISTICS 1995, at 33 (1998) (reporting a total of 82,600 petitioned status offense cases in 1986), *with* HOCKENBERRY & PUZZANCHERA, *supra* note 12, at 64 (reporting approximately 51,500 petitioned status offense cases in 2021). Almost 45% of the youth petitioned for status offenses in 2021 were identified as girls. *See* HOCKENBERRY & PUZZANCHERA, *supra* note 12, at 69.

150. HOCKENBERRY & PUZZANCHERA, *supra* note 12, at 6, 64 (finding 51,500 status offense cases filed out of approximately 489,000 total delinquency and status offense petitions).

151. *See* PLATT, *supra* note 42, at 134–36, 176–81 ("The 'invention' of delinquency consolidated the inferior social status and dependency of lower-class youth.").

152. *See* Birckhead, *supra* note 45, at 67–68 ("From this perspective, the juvenile court was—from the outset—an instrument of 'social coercion' designed to dominate the urban poor, perpetuate existing class structures, and routinize state control over children's behavior.").

153. *See id.* at 62, 67–68.

154. PICKETT, *supra* note 75, at 15.

poverty and crime at the core of such threat, social reformers in New York founded the Society for the Prevention of Pauperism in 1815 to investigate the causes and potential solutions to the poverty and crime in their city.[155] The Society's first report opined that "the greatest contributors to the phenomena of poverty and crime were ignorance, idleness, and intemperance[,] . . . wastefulness, early and hasty marriages, lotteries, pawnbrokers, houses of ill-fame, indiscriminate alms-giving, and, in certain periods, war."[156] The Society's second report added to their list of perceived root causes, including the lack of educational attainment, a rise in alcohol consumption, an influx of foreign immigrants, a decrease in religious fervor, and the existing conditions in penal institutions, especially the placement of children in such facilities.[157]

It was this last "cause"—the placement of children in penal institutions and almshouses—that appears to have most galvanized the members of the Society. For years, many Society members had criticized the placement of youth in institutions with adults, arguing that the prisons and almshouses corrupted young people rather than rehabilitating them, and had proposed separate institutions for youth as the remedy.[158] Moreover, given reformers' focus on how environmental factors shaped criminality,[159] the report highlighted not only the impact that the penitentiary was having on youth ordered to reside there but also on the impoverished environments that were leading youth to penitentiaries in the first place.[160]

After the publication of this second report, the Society "move[d] away from total efforts to abolish poverty and crime and toward an attempt to eliminate juvenile delinquency."[161] To do so, the Society resolved to recommend that New York open a juvenile reformatory or "a House of Refuge, for vagrant and depraved young people" and changed its name to the Society for the Reformation of Juvenile Delinquents.[162] Importantly, the narrowing of focus to delinquency was not a repudiation of the intent to address poverty; rather, it reflected a choice to utilize the juvenile reformatory as the state's primary tool for intervening with childhood poverty.[163] The goal for these reformers was no longer to prevent childhood poverty in the first place, but to "rehabilitate" the children subjected to it.[164] This approach reflected reformers' reluctance to confront the systemic

155. *See id*. at 26, 30.
156. *See id*. at 30.
157. *Id*. at 36–37.
158. *See id*. at 36–40.
159. Birckhead, *supra* note 45, at 64.
160. The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 935–37.
161. PICKETT, *supra* note 75, at 40.
162. *See id*. at 49.
163. *See id*. at 40 (finding that "[t]he publication of the [second] report marked the beginning of the end of the Society for the Prevention of Pauperism. It was clear that the broad-scale goals of the group were being eliminated in favor of a specific reform").
164. *See* FELD, *supra* note 38, at 38 ("Although social structural features—urbanization, economic inequality, and political processes—create criminogenic conditions, Progressives focused on individual deficiencies rather than those structural factors.").

drivers of poverty, but rather to seek to reactively address the impacts of poverty on an individual-by-individual level.[165]

Like the creators of the juvenile reformatory movement before them, the designers of the juvenile court intended to use their "innovation" to target the poverty they perceived to be at the root of crime.[166] In explaining the development of the first juvenile court, Timothy Hurley[167] explained:

> The helpless wail of a poverty-stricken, sin-environed child is maddening to one interested in that branch of sociology which deals with the saving of the child. It forces him to go deeper and deeper into the causes which produce such pitiful and shameful conditions, in the hope of finding, if possible, some remedy for them. Potentially, the Juvenile Court law, as adopted by the Legislature of the State of Illinois, provides the solution of the entire economic problem—the problem of ignorance, poverty and crime.[168]

This focus on poverty drove the design and function of the juvenile court generally and, specifically, the development of a broad definition of delinquency that enabled the court to intervene with a poor child at-will.[169]

Critiques of the early court reveal that the court was policing childhood poverty just as the court's architects intended. For instance, probation officers and female volunteers of the early juvenile court quickly developed a reputation for trolling poor and immigrant neighborhoods, picking up "wayward" children, and referring them to the juvenile court. These practices appear to have been so pervasive that they attracted the attention of the Chicago press, who began publicly

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165. *See id*. at 38–39 ("Although family, economic, and social influences contributed to delinquency, Progressives opted to minister to affected individuals rather than to alter the conditions that caused their misbehavior. Changing individuals and reforming their character was a less radical agenda than understanding crime as consequence of social inequality and reducing it."(footnote omitted)); PLATT, *supra* note 42, at 97 ("Although Jane Addams wrote perceptively of the numerous ways in which children were being objectified by modern industrialism, she always avoided unconventional political solutions and resisted the logical consequences of her arguments which pointed to an indictment of capitalism.").

166. Birckhead, *supra* note 45, at 64 ("[The first juvenile court act] represented the merging of concerns about poverty and child welfare with those regarding crime control and high recidivism rates.").

167. Timothy Hurley served as a member of the committee that drafted the first juvenile court legislation in Illinois and as the juvenile court's first Chief Probation Officer. HURLEY, *supra* note 131, at 9, 15–48.

168. HURLEY, *supra* note 131, at 55.

169. *See id*. at 63 ("To sum up, then, the foundation of the idea of the Juvenile Court law in providing for the care of the dependent or delinquent child is not an idea of punishment for crime or for mendicancy . . . . The work of the court is to inquire into the causes of the dependency or delinquency, to find why the child went wrong in the first place, to remove the cause of the fall from grace, and to start the little one the right road."); *see also* Birckhead, *supra* note 45, at 81 ("Because of the traditional philosophy of the juvenile court, the potential for class status to impact decision-making within the system has always been great. The first juvenile codes provided court officials with enormous discretionary authority." (footnote omitted)).

criticizing the juvenile court and referring to its agents as "child-snatchers" rather than "child savers."[170]

Moreover, a comprehensive study of the Chicago Juvenile Court published less than fifteen years after the court's creation detailed the extent of the early court's intentional focus on children living in poverty.[171] The authors reviewed a sample of children brought before the court in 1903–04 and found that nearly 80% of children came from families categorized as "very poor" or "poor."[172] In contrast, fewer than 2% of the children came from "homes that were quite comfortable" and zero came from "wealthy" families.[173] Importantly, in defining poverty and wealth, the study's authors highlighted the importance of environment and emphasized the role that detection plays in the legal definition of delinquency. "Very poor" families were defined as those without a father present—typically because of death or abandonment—and, therefore, deemed not "normally self-sustaining" as the family could not survive on the limited income earned by the mother.[174] "Poor" families were "normally self-sustaining," but struggled "to make both ends meet" and lived in neighborhoods "offering temptation . . . and almost certainly without suitable places for recreation."[175]

In comparison, the children of "families in comfortable circumstances" had access to "opportunities for education and varied recreation" and received "much care and attention."[176] Moreover, the authors recognized that the offenses of children from comfortable families were "easily concealed from the neighbors and the public authorities, and [that the children were] disciplined in the home instead of through the court."[177] Thus, despite recognizing that delinquency was common behavior across socioeconomic class, the authors affirmed that the court focused primarily on intentionally investigating and intervening with the behavior of poor children.[178]

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170. Greene, *supra* note 139, at 149. This press coverage led to an investigation by the Board of Commissioners of Cook County, which resulted in changes to the way probation officers were chosen and appointed to cases. *See id.*

171. *See generally* BRECKENRIDGE & ABBOTT, *supra* note 135.

172. BRECKENRIDGE & ABBOTT, *supra* note 135, at 70–74 tbl.16; *see also* Mack, *supra* note 58, at 116 (recognizing that "[m]ost of the children who come before the court are, naturally, the children of the poor"). Note that 90% of the girls, and 75% of the boys came from "very poor" or "poor" homes. *See* BRECKENRIDGE & ABBOTT, *supra* note 135, at 70–74.

173. *See id.* at 70 (explaining that the authors "did not find any families that [they] could call 'wealthy'" while conducting their review). Approximately 18% of youth came from "fairly comfortable" families that received "good wages" and lived in "better" neighborhoods. *Id.* at 72.

174. *See id.* at 71.

175. *See id.* at 71–72.

176. *Id.* at 72.

177. *Id.*

178. *See id.* at 70. The authors found:

Children who do wrong may be found in homes of every economic and social grade. We are dealing here, however, only with those children who become wards of the court, and our inquiry is concerned, therefore, with the families that may be said to form the court's constituency. Children in families of great wealth may be guilty of much more serious offenses than are the children of the poor; but the offenses of the latter bring them more quickly within the reach of the law. *Id.*

This use of poverty as a guiding metric for the exercise of detection and discretion by the delinquency court continues to this day.[179] While most delinquency courts do not formally track the socioeconomic status of the children who appear before the court, the disproportionate prevalence of poor children in the delinquency system likely mirrors the experience of the early Chicago juvenile court.[180] Professor Tamar Birckhead refers to this continued criminalization of childhood poverty as "needs-based delinquency."[181] Fundamentally, "needs-based delinquency" describes how the perceived needs and means of children shape how juvenile court stakeholders exercise their discretion to determine the nature and extent of court intervention and details how children are penalized at every stage of the process for being poor.[182]

First and foremost, the perceived needs and limited means of the child often impact whether the child's allegedly delinquent behavior is detected by the court in the first place.[183] Overall, very little delinquent behavior is actually detected by the juvenile legal system.[184] However, the delinquent behavior of poor youth is detected by the court more frequently for a host of reasons relating to the fact that poor children tend to be over-policed and under-resourced.[185] For example, poor youth are more likely to attend schools with a higher presence of police officers and a lower presence of social workers.[186] As a result, the behavior of poor children is more closely watched and perceived and responded to differently by the present adults.[187] More specifically, the behavior of poor children is more likely to be considered "criminal" and less likely to be handled within the home or school setting due to a perceived lack of resources.[188] Thus, the perceived needs and lack of means of the child often dictate whether the court even becomes aware of the behavior.

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179. *See* Birckhead, *supra* note 45, at 70–91 (concluding that "[t]hese characteristics of the original delinquency system continue to be reflected in the laws and policies of the twenty-first century juvenile court" and explaining various ways that the allegedly delinquent behavior of poor youth is detected and describing the role that poverty plays in determining the state interventions that subsequently result from such detection).

180. *See id.* at 58–59 (noting that jurisdictions that do track income data report that nearly 80% of youth's families were on public assistance or had incomes of less than $30,000 at the time of court involvement); *see also* ERIC PARTIN, CRIM. JUST. COORDINATING COUNCIL, A STUDY OF FACTORS THAT AFFECT THE LIKELIHOOD OF JUVENILE JUSTICE SYSTEM INVOLVEMENT 11 (2022), https://cjcc.dc.gov/sites/default/files/dc/sites/cjcc/CJCC%20-%20A%20Study%20of%20Factors%20that%20Affect%20the%20Likelihood%20of%20Juvenile%20Justice%20System%20Involvement%20%28October%202022%29.pdf [https://perma.cc/4FW4-SAEN] (finding that nearly 75% of youth with delinquency system involvement were enrolled in Medicaid).

181. *See* Birckhead, *supra* note 45, at 81–91.

182. *See id.*

183. *See id.* at 70–81 (explaining various ways that poor children enter the delinquency system).

184. *See* TAPPAN, *supra* note 11, at 33 ("Much of delinquent conduct, even that of more serious varieties, remains undiscovered.").

185. *See* Birckhead, *supra* note 45, at 70–81.

186. *See id.* at 74–76.

187. *See id.*

188. *See id.*

Second, even if the allegedly delinquent behavior is detected *and* referred to the juvenile court, the perceived needs and limited means of a child often dictate whether that case is formally brought before the court.[189] State delinquency codes typically provide the court and state agencies with broad discretion to determine whether formal charges should be brought against a child referred to the court.[190] For example, in the District of Columbia, the delinquency code requires that complaints of delinquency be sent to the Court Social Services Division to "conduct a preliminary inquiry to determine whether the best interests of the child or the public require that a petition be filed" and make a recommendation as to whether a petition should be filed.[191] Intake criteria established by the court direct that the Court Social Services Division consider, among other factors, "[w]hether the alleged delinquent act was committed under mitigating circumstances *or other conditions rendering judicial action inappropriate*."[192] The rule further clarifies that "the intake unit may proceed with discretion, . . . giving particular weight to the existence and availability of non-judicial community services which might serve the respondent's needs without the filing of a petition."[193] Additionally, as in many states, the code makes clear that a child should not be formally charged unless "the child appears to be in need of care or rehabilitation."[194] Practically speaking, this means that petitions should primarily be filed where the youth is alleged to have committed a crime *and* does not have the means to address the needs identified by the intake officer.[195] As Professor Birckhead points out:

> In these systems, there are two explicit tracks: one for middle- and upper-class families who are able to secure private services for their children . . . and the other for low-income (often minority and single-parent) families who can only access these resources through a court order following a juvenile delinquency adjudication. In this way, the family's ability to obtain services is a critical factor in the determination of whether a child will face formal delinquency charges.[196]

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189. *See, e.g.*, HEATHER HUNT & GENE NICHOL, N.C. POVERTY RSCH. FUND, THE PRICE OF POVERTY IN NORTH CAROLINA'S JUVENILE JUSTICE SYSTEM 15 (2021), https://law.unc.edu/wp-content/uploads/2021/04/juvenilejustice-povertyreport2021.pdf [https://perma.cc/CS8S-MH2J] (discussing potential obstacles to successful completion of pre-court diversion programs, including transportation burdens and lack of parental involvement).

190. *See* Birckhead, *supra* note 45, at 82 (noting that state juvenile codes often broadly require with little guidance that intake officers determine "whether the facts alleged are 'sufficiently serious' to warrant court action").

191. D.C. CODE § 16-2305(a). The statute does not include intake criteria for delinquency cases but rather delegates the creation of such criteria to the Superior Court of the District of Columbia, of which the Court Social Services Division is a part. *See id.*

192. D.C. Super. Ct. Juv. R. 103(a)(3) (emphasis added).

193. *Id.*

194. D.C. CODE § 16-2305(d); *see* D.C. CODE § 16-2301(6) (defining delinquent child as a child who has both committed a crime and is in need of care and rehabilitation); *see also* Birckhead, *supra* note 45, at 82 ("Some codes require that the juvenile delinquency petition not only establish reasonable cause to believe that the juvenile committed the crimes alleged but also include a statement that the juvenile 'requires supervision, treatment, or confinement.'").

195. *See* Birckhead, *supra* note 45, at 82 ("In other words, only the complaints against children who *need* the services of the probation department may be filed as delinquency petitions.").

196. *See id.* at 82–83 (footnote omitted).

Just as the architects of the juvenile court intended, the perceived needs and lack of means of the child play a significant role in determining whether the delinquency court chooses to formally intervene in the child's life.[197] In other words, even when the state detects a child's delinquent behavior, the state still chooses whether the child should be subject to the delinquency court's jurisdiction.

In sum, the juvenile legal system was designed specifically and intentionally to target and intervene in the lives of poor children in hopes of solving "the entire economic problem."[198] Since its inception, the court appears to have been successful in its mission of targeting poor youth. Unfortunately, rather than ameliorate childhood poverty as the architects had hoped, they created a system that criminalizes it still to this day.

3. Criminalizing Trauma and Disability

The juvenile court's criminalization of environment extended beyond poverty to the criminalization of childhood trauma and disability. Just as the juvenile court was designed to react to childhood poverty rather than prevent it, the juvenile court was designed to react to the impacts of trauma and disability on development rather than intervene before any delinquency system involvement. As a result, many of the pipelines-to-prison in operation today are rooted in the original design and execution of the early juvenile court.

Again, a study of the experience of the early Chicago Juvenile Court[199] reveals the high rates of complex trauma experienced by youth subject to the court's jurisdiction.[200] Data collected from the first ten years of the Chicago Juvenile court reveal that at least 34% of court-involved youth had lost one or both of their parents as a result of death (27.8%), abandonment (3.8%), divorce (1.9%), or placement in a prison (0.2%) or behavioral health institution (0.3%).[201] Given the high poverty rates among court-involved youth, losing a parent often intensified exploitation, abuse, or family conflict they experienced upon being forced to work.[202]

197. Once the child comes under the jurisdiction of the juvenile court, the perceived needs and limited means of a child also often negatively impacts both whether the child is detained prior to court and the disposition that a child receives. *See id.* at 64, 91 ("[C]hildren of limited means are negatively impacted by the laws and policies that prevail at disposition and during probation."); HUNT & NICHOL, *supra* note 189, at 15.

198. HURLEY, *supra* note 131, at 55.

199. *See generally* BRECKENRIDGE & ABBOTT, *supra* note 135 (providing an early study of juvenile court data and the factors contributing to juvenile delinquency in Chicago).

200. Eduardo Ferrer, *Transformation Through Accommodation: Reforming Juvenile Justice by Recognizing and Responding to Trauma*, 53 AM. CRIM. L. REV. 549, 593 (2016).

201. BRECKENRIDGE & ABBOTT, *supra* note 135, at 90–92, 91 tbl. 19. It is important to note two additional findings regarding this data. First, court-involved girls reported the loss of one or more parents more frequently (47%) than boys (31%). *Id.* at 92. Second, the data is likely a conservative estimate. A review of the family schedules of a smaller sample of 741 youth involved with the court between 1903–04 reported that just over 50% of court-involved youth had lost one or both parent (77% of girls and 43% of boys). *Id.* at 92–93. That smaller review of cases also revealed that there were seventy-five homeless boys who were not included in the sample of 741 because they "had no families to be visited." *Id.* at 93.

202. *See id.* at 74–89.

Moreover, quantitative and anecdotal data from early court records also detail the extent to which youth came from homes where they experienced abuse and neglect or witnessed either parental alcohol abuse or criminality.[203] For example, a review of 14,183 cases conservatively[204] places the number of "crossed-over" youth, i.e., children who had documented dependency court involvement prior to delinquency court involvement, at approximately 2.6%.[205] Additionally, interviews conducted with girls committed to the Illinois State Training School in Geneva reveal that approximately 30% of the girls interviewed experienced sexual abuse by a family member prior to delinquency system involvement;[206] and a review of court records also found that over 20% of girls charged with "immorality" involved cases where "the mother or woman guardian . . . was implicated in the offense if not responsible for it."[207] A sample of 741 youth studied found that approximately 20% came from families where either the mother or father "obviously" abused alcohol while an unspecified number of others were said to come from parents who were "immoral, vicious, or criminal."[208]

Breckenridge and Abbott's study of the early juvenile court data also provided insight into the way that the Court criminalized disability generally and learning disabilities specifically. For instance, in discussing the impacts of poverty, Breckenridge and Abbott opined that "one of the less direct influences of poverty on delinquency [is] that children in poor families are frequently handicapped physically and mentally."[209] While the authors do not provide data on the types or frequency of disabilities,[210] their exploration of the literacy level and educational attainment of court-involved youth provides insight into the prevalence of unaddressed learning disabilities among youth in the delinquency system.[211] Data

203. *See id.* at 105–14.

204. The authors of the report themselves note that "these totals represent an understatement and that all statistics for this group are necessarily incomplete" and highlight a number of limitations inherent to the analysis that explain why it is a conservative estimate. *Id.* at 111.

205. *See id.* at 111 tbl. 21 (reporting that 201 boys and 169 girls were "brought to court as dependent and later returned as delinquent"). However, the authors estimated that closer to 291 boys and 259 girls had delinquency cases that were "in some measure connected with the fact of dependency." *See id.* at 112. While this represents approximately 4% of all delinquency cases, "crossed-over youth" cases represent approximately 9.4% of all delinquency cases involving girls. *See id.* at 113.

206. *See id.* at 106 (Forty-seven of the 157 girls interviewed reported being sexually abused by a member of her family). A review of court records found another seventy-eight girls that reported being sexually abused by a family member prior to delinquency system involvement. *See id.* at 106–07.

207. *Id.* at 107. Between July 1, 1899 and June 30, 1909, there were 871 cases where girls were charged with "immorality." *Id.* at 36 tbl. 7. In 189 of those cases, female guardians were found to be involved in the offense. *Id.* at 107.

208. *See id.* at 105–06, 286–300 (providing the social histories of youth with "drunken parents," "severe, cruel, or brutal parents," and "degraded or immoral parents").

209. *See id.* at 88.

210. The authors appear to define disability to include at least nervous system disorders and "boys described as mentally deficient, or weak-minded[,] . . . 'not very bright' or 'dull and slow.'" *See id.* at 142.

211. *See id.* at 126 ("It was not possible to obtain the data for a thorough examination of the school status of the children brought to court as delinquent, but such material as was collected is believed to be both interesting and important.").

regarding a small sample of court-involved boys revealed that 73% left school by age fourteen or younger[212] and that 72% were behind grade-level at the time they left school.[213] A separate sample of court-involved girls committed to a state industrial school found that approximately 90% were not on grade level.[214] The authors attributed the overall lack of educational attainment and literacy to two primary possible causes—truancy or disability—without recognizing or discussing the possible interplay between the two.[215]

The authors concluded their study with a recognition of the reactive role of the court and the need for a larger societal commitment to prevention:

> And finally it may be said that the most important lesson to be learned from any study of the juvenile court in its relation to the delinquent child is that the only way of curing delinquency is to prevent it. The juvenile court cannot work miracles unaided.[216]

Yet despite such calls from child advocates to address the root causes of delinquency court involvement during the court's early years,[217] the criminalization of environment—particularly trauma and disability—continues to this day.

Indeed, the various "pipelines-to-prison" observed today trace their roots to the criminalization of environment, which was enabled by the broad definition of delinquency created for the early juvenile courts. For example, the trauma-to-prison pipeline reflects the continued criminalization of developmentally appropriate reactions to childhood grief, neglect, abuse, and other potentially traumatic experiences (PTEs);[218] while the school-to-prison pipeline reflects the criminalization

212. *Id.* at 129. The compulsory age of education at the time was fourteen years old. *See id.*

213. *See id.* at 130.

214. *See id.* at 144.

215. *See id.* at 139–42, 145–46.

216. *Id.* at 177.

217. Edward T. Devine, The Dominant Note of Modern Philanthropy, President's Address to the National Conference of Charities and Correction (May 1906), *in* PROC. OF THE NAT'L CONF. OF CHARITIES & CORR.: XXXIII SESSION (Alexander Johnson ed., 1906), at 8.

218. *See* Sujeeta Elizabeth Menon & Juan J. Barthelemy, *Disrupting the Trauma-to-Prison Pipeline for Justice-Involved Young Women Victimized by Violence*, 16 J. CHILD & ADOLESCENT TRAUMA 209, 211 (2022); Laura Sinko et al., *Recognizing the Role of Health Care Providers in Dismantling the Trauma-to-Prison Pipeline*, 147 PEDIATRICS 1, 1–2 (2021); Sydney L. Goetz, *From Removal to Incarceration: How the Modern Child Welfare System and Its Unintended Consequences Catalyzed the Foster Care-to-Prison Pipeline*, 20 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 289, 295 (2020) (finding that "children who experience foster care are 244 percent more likely to 'demonstrat[e] a pattern of continued chronic offending between adolescence and adulthood'" (alteration in original) (quoting Jennifer Yang et al., *Foster Care Beyond Placement: Offending Outcomes in Emerging Adulthood*, 53 J. CRIM. JUST. 46, 52 (2017))); DeAnna Baumle, *Creating the Trauma-to-Prison Pipeline: How the U.S. Justice System Criminalizes Structural and Interpersonal Trauma Experienced by Girls of Color*, 56 FAM. CT. REV. 695, 696 (2018); Jeremy Thompson & Chanelle Artiles, *Dismantling the Sexual Abuse-to-Prison Pipeline: Texas's Approach*, 41 T. MARSHALL L. REV. 239, 246 (2016); *see also* KATE LOWENSTEIN, CITIZENS FOR JUV. JUST., SHUTTING DOWN THE TRAUMA TO PRISON PIPELINE: EARLY, APPROPRIATE CARE FOR CHILD-WELFARE INVOLVED YOUTH 3 (2018), https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5b4761732b6a28f6ea5e94c1/1531404665230/FINAL+TraumaToPrisonReport.pdf [https://perma.cc/M3UR-XHGT]; Ferrer, *supra* note 200, at 551.

of poverty, race, disability, and behavioral health needs.[219] Unfortunately, these pipelines are robust. Studies demonstrate that the experience of childhood trauma is the norm rather than the exception for youth involved in the delinquency system, particularly for girls and LGBTQIA+ youth,[220] and that youth with disabilities and behavioral health needs are disproportionately represented in the delinquency system.[221]

Child savers correctly identified how poverty—and its nature and the attendant environment it creates—can amplify the incidence of delinquency.[222] But as a result of fundamental attribution bias and the culture of the time, the child savers determined that the antecedent cause of poverty was immorality; rather than a

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219. *See* JESSICA SNYDMAN, NAT'L CTR. FOR LEARNING, UNLOCKING FUTURES: YOUTH WITH LEARNING DISABILITIES AND THE JUVENILE JUSTICE SYSTEM, DISABILITIES 3 (2022) https://ncld.org/wp-content/uploads/2023/08/NCLD-Unlocking-Futures-Final-7th-Dec-Updated-.pdf [https://perma.cc/V9NQ-URR4]; Haley Walker, *School-to-Prison Pipeline*, 22 MARQ. BENEFITS & SOC. WELFARE L. REV. 147, 148 (2021) (recognizing that about two-thirds of youth in the juvenile justice system have at least one diagnosable mental health problem); Christopher A. Mallett, *The "Learning Disabilities to Juvenile Detention" Pipeline: A Case Study*, 36 NAT'L ASS'N SOC. WORKERS 147, 147 (2014) (finding that that system-involved youth with learning disabilities were more likely than system-involved youth without identified disability to be suspended from school, adjudicated delinquent at younger ages, and more frequently detained.); *see also* Nicole Tuchinda, *The Imperative for Trauma-Responsive Special Education*, 95 N.Y.U. L. REV. 766, 770 (2020).

220. YASMIN VAFA & REBECCA EPSTEIN, CRIMINALIZED SURVIVORS: TODAY'S ABUSE TO PRISON PIPELINE FOR GIRLS 6 (2023), https://rights4girls.org/wp-content/uploads/2023/04/Criminalized-Survivors_Todays-Abuse-to-Prison-Pipeline.pdf [https://perma.cc/K4UQ-L7Q6]; Jacquelynn F. Duron et al., *Trauma Exposure and Mental Health Needs Among Adolescents Involved with the Juvenile Justice System*, 37 J. INTERPERSONAL VIOLENCE NP15700, NP15701 (2022) (finding in one study that over 90% of adolescents surveyed reported experiencing at least one trauma exposure, and in another that over 93% reported experiencing four or more types of trauma exposures); ANDREA HOFFMAN ET AL., UNDERSTANDING THE ROLE OF TRAUMA AND VIOLENCE EXPOSURE ON JUSTICE-INVOLVED LGBTQA AND GNC YOUTH IN HENNEPIN COUNTY, MN 21 (2019) https://www.hennepin.us/-/media/hennepinus/your-government/research-data/doccr-reports/full-report-ojjdp-trauma-feb-2019.pdf [https://perma.cc/T953-PHMW] (finding that system-involved LGBTQA and GNC youth reported experiencing, on average, nearly twice as many Adverse Childhood Experiences as heterosexual/gender conforming youth); *see also* ERICA J. ADAMS, HEALING INVISIBLE WOUNDS: WHY INVESTING IN TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE 1 (2010) https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/10-07_rep_healinginvisiblewounds_jj-ps.pdf [https://perma.cc/5GYM-LKMM] (finding that "[r]esearch shows that while up to 34 percent of children in the United States have experienced at least one traumatic event, between 75 and 93 percent of youth entering the juvenile justice system annually in this country are estimated to have experienced some degree of trauma").

221. SNYDMAN, *supra* note 219, at 2 (recognizing that approximately 65-70% of youth in the delinquency system have a disability); Gina M. Vincent et al., *Sex and Race Differences in Mental Health Symptoms in Juvenile Justice: The MAYSI-2 National Meta-Analysis*, 47 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 282, 283 (2008) (finding that as many as 70% of youth in the delinquency system have diagnosable behavioral health needs).

222. Roderik Rekker et al., *Moving in and out of Poverty: The Within-Individual Association Between Socioeconomic Status and Juvenile Delinquency*, 10 PLOS ONE 1, 8 (2015) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4648521/[https://perma.cc/Q6ZA-NX22] (finding that "[w]ithin individuals, SES revealed a negative effect on moderate and serious delinquency, but not on minor delinquency. As hypothesized (H1), youths were more likely to commit moderate and serious delinquency during years in which their parents' SES was lower than during years in which their parents' SES was higher.").

lack of money resulting from systemic inequality, exploitation, and forces larger than any one individual or individual family.[223] Despite justifying their approach on the belief that youth were a product of their circumstances rather than "natural" criminals, the proponents of the juvenile court chose to intervene in a manner that criminalized individual youth rather than seek to change the distribution of political, economic, and social power that created the environment in which system-involved youth were living.[224] As a result, the child savers designed a system to coercively fix the alleged moral defects of children and their families (i.e., rehabilitate), rather than find a way to change the broader social context to alleviate the stress and struggles associated with poverty.

C. THE CRIMINALIZATION OF OTHERNESS

While the legal definition of delinquency created by the juvenile court was incredibly broad, the requirement of affirmatively exercising jurisdiction meant that the actual individual youth subject to court jurisdiction was a matter of detection and discretion. The approach taken to both detection and discretion has resulted in "other people's children"—primarily Native, immigrant, Black, and LGBTQIA+ youth—coming under the control of the juvenile court.[225] Indeed, while the legal definition of delinquency is facially-neutral, those who designed the system did not expect that such laws would be applied equally.[226] Rather, delinquency was designed to be selectively applied to those deemed outside of and a threat to the status quo.[227] While this phenomenon has been extensively discussed by others,[228] it is critical to briefly highlight the ways in which certain youth have been denied access to the delinquency system's twin goals because of their identity.

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223. The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 935–38.

224. PLATT, *supra* note 42, at 97 ("Although Jane Addams wrote perceptively of the numerous ways in which children were being objectified by modern industrialism, she always avoided unconventional political solutions and resisted the logical consequences of her arguments which pointed to an indictment of capitalism."); *id.* at 100 ("The child savers defined delinquency as a problem of social rather than political policy, calling for 'therapeutic' remedies rather than a redistribution of power.").

225. *See* The Flawed Philosophical Foundation of *Parens Patriae, supra* note 1, at 935–41; *see also* Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1460–61 (2003) ("Despite their benevolent rhetoric, Progressive reformers intended the juvenile court to discriminate. They deliberately designed it to control the poor and immigrant children and to distinguish between 'our children' and 'other people's children.'").

226. *See* Feld, *supra* note 225, at 1460–61.

227. *See id.*; *see also* FELD, *supra* note 38, at 30.

228. *See, e.g.*, SPINAK, *supra* note 8, at 57–79; HENNING, *supra* note 21, at 57–79; Feld, *supra* note 225 at 1460–61. *See generally* Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649 (2017) (discussing racial bias in the criminal legal system); Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379 (2017) (discussing racial bias and the shifting paradigms of the criminal legal system); Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335 (2013) (shedding light on the role of Blackness in the juvenile criminal legal system's creation and the Black community's response to its creation); GEOFF K. WARD, THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY & JUVENILE JUSTICE (2012) (discussing racial democracy and juvenile justice).

First and foremost, the broad definition of delinquency, coupled with the discretion granted to the state to exercise delinquency court jurisdiction, enabled the delinquency court to selectively target youth that the state determined to be a threat to the status quo but worthy of assimilation.[229] In the court's early years, this meant exercising juvenile court jurisdiction over European immigrant youth and their families while excluding privileged youth almost entirely.[230] Black youth were by-and-large excluded as well, albeit for different reasons. Given the belief that Black youth were not worthy of the court's citizen-building efforts, Black youth were either excluded whole cloth from the protections of the juvenile court or, at the very least, from its supposedly supportive services.[231]

While European immigrants are no longer the primary target of the delinquency system, the exclusion of Black youth has taken on several forms throughout the history of the delinquency court. In the wake of integration, as delinquency facilities and supports were ordered to be integrated, those in power began to turn away from the citizen-building purpose of the court.[232] This resulted in Black youth being increasingly excluded from emerging diversion opportunities, supportive services, and the delinquency system as a whole as a result of expanded efforts to push youth into adult court.[233] The result is that Black youth are now disproportionately represented at all stages of the delinquency system, including arrest, charging, detention, incarceration, and adult transfer.[234] And while Black youth disproportionately bear the brunt of the harms of the juvenile and criminal legal systems, similar disproportionality exists among other youth considered to be a threat to the status quo.[235]

II. RECONSTRUCTING DELINQUENCY

Abolishing the delinquency court requires significantly limiting the court's power and jurisdiction over youth while redistributing that power and corresponding resources directly to youth and families.[236] Given that the flawed

229. *See* The Flawed Philosophical Foundation of *Parens Patriae, supra* note 1, at 935–41.

230. FELD, *supra* note 38, at 29–39; *see also* Mack, *supra* note 58, at 116–17.

231. *See* WARD, *supra* note 228, at 47–124 ("Ultimately, this new institution of racialized social control, the white-dominated parental state, was organized to underdevelop black citizens deemed delinquent and black civil society generally and, thus, to maintain the boundaries of a white democracy."); *see also* Butler, *supra* note 228.

232. *See* Greene, *supra* note 139, at 161 ("By the end of the 1970s, the rehabilitative ideal was replaced with 'neo-retributionism,' which translated into 'a world in which the juveniles are to be held strictly accountable for their crimes' through harsh 'just desserts' sentencing practices.").

233. *See* WARD, *supra* note 228, at 47–120.

234. *See* The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 940–41.

235. *See* NCAI POL'Y RSCH. CTR., AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN THE JUVENILE JUSTICE SYSTEM: A GUIDE TO THE DATA (Jan. 2020), https://archive.ncai.org/policy-research-center/research-data/prc-publications/NCAI_Policy_Research_Center_AIAN_Juvenile_Justice_Data_FINAL_1_2020.pdf [https://perma.cc/YUX5-J77R]; Bianca D.M. Wilson et al., *Disproportionality and Disparities among Sexual Minority Youth in Custody*, 46 J. YOUTH & ADOLESCENCE 1547, 1547 (2017).

236. *See* SPINAK, *supra* note 8, at 256–74; *see also* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L. J. 2497, 2538 (2023) (noting that "[t]hrough decades of campaigns against carceral infrastructure, prison-abolitionists have demarcated an approach that focuses on reducing the scale and power of the carceral state.").

definition of delinquency created by the architects of the juvenile court still forms the foundation for the legal construct of delinquency and the immense power of the modern juvenile legal system to intervene in the lives of youth, narrowing this definition is a critical steppingstone to abolishing the delinquency court itself.[237]

This Part offers recommendations for reconstructing the legal definition of delinquency that aim to significantly shrink the juvenile legal system and make our societal response to youth misbehavior more developmentally responsive. In particular, this Part offers various proposals to change the definition of delinquency to categorically limit the types of behaviors and children that fall under the jurisdiction of the delinquency court. Importantly, reconstructing the legal definition of delinquency in this manner will have a cascading effect that will significantly narrow the overall legal construct of delinquency. Put another way, restricting the substantive dimension of the legal construct (i.e., the definition) also functions to restrict the procedural dimensions (i.e., the detection of delinquency and the discretion to bring the child into court), thereby decreasing the power of courts, police, and prosecutors to intervene in the lives of youth.[238]

Given that this Article supports the existence of a delinquency court as a response of last resort, various recommendations in this Part are also geared towards improving the way the new delinquency court responds to youth both procedurally and substantively. Specifically, this Part includes recommendations aimed at ensuring that a narrower definition of delinquency is applied in a more developmentally responsive manner in individual cases.

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237. Some may question whether narrowing the legal construct of delinquency while supporting the existence of a delinquency court amounts to a reformist reform or a non-reformist reform. First, I view the distinction between reformist reforms and non-reformist reforms not as dichotomous approaches to change but as opposing ends of a spectrum upon which reforms can be evaluated, especially when such actions are evaluated over time and in the context of a broader theory of change. *See* Daniel S. Harawa, *In the Shadows of Suffering*, 101 WASH. U. L. REV. 1847, 1858–61 (2024) (discussing the value that reform, minimalism, and abolition can add in "work[ing] towards alleviating the suffering the U.S. penal system exacts"); Akbar, *supra* note 236, at 2518–31 (comparing and contrasting reformist reforms and non-reformist reforms); Langer, *supra* note 27, at 45–46 (recognizing "the spectrum of positions" that comprise the notion of "prison abolitionism"). Second, while this Article calls for a fundamental reimagination of the legal construct of delinquency and not the absence of a delinquency court itself, the proposals advance an abolitionist ethos and provide a necessary step in the roadmap for shifting power from policing and carceral systems to historically under-resourced and marginalized youth, families, and communities. *See* Akbar, *supra* note 236, at 2568 (finding that non-reformist reforms "seek to shift the balance of power toward the working class and away from the capitalist class, or toward race-and-class subjugated communities away from the carceral state."). Given this end goal, the proposals in this Article aspire to fall closer to the non-reformist reform end of the spectrum of change.

238. This cascading effect helps demonstrate the non-reformist nature of the Article's recommendations. Reformist reforms would include seeking to educate police officers to better recognize normative adolescent development (detection) or imploring prosecutors to be more judicious in deciding which cases to petition (discretion). *See* Akbar, *supra* note 236, at 2538 ("Mainstay reforms like training or the purchasing of technology like body cameras or Tasers are reformist for how they legitimize and expand policing."). In contrast, narrowing the definition of delinquency is non-reformist because it restricts the entire construct—definition, detection, and discretion—and thus shrinks police, prosecutorial, and judicial power.

In sum, reconstructing the definition of delinquency in the manner proposed will significantly reduce the number of children in the delinquency system while freeing up resources that can instead be invested directly in kids, families, and communities before a young person ever becomes system involved. Ultimately, realigning our approach to youth misbehavior to center community-based, voluntary, and supportive interventions rather than the delinquency court will reduce the harm to youth from system involvement, empower youth and families, and improve public safety.

A. DECRIMINALIZE NORMATIVE ADOLESCENT BEHAVIOR BY NARROWING THE LEGAL DEFINITION OF DELINQUENCY

Fundamentally, the legal definition of delinquency judges youth by adult standards of behavior.[239] Given its derivative nature, the legal construct of delinquency presupposes that children have the same faculties, knowledge, experience, and control over their circumstances as a reasonable adult. However, we know that is not the case. The result is that far too much normative adolescent behavior is criminalized, subjecting far too many children to state control that is developmentally inappropriate, harmful, and counter-productive to public safety. The remedy is to wholly reconstruct the legal definition of delinquency in a manner that significantly restricts the scope of youth misbehavior to which the court responds and expands the scope to which our communities and governmental public health systems respond.[240]

There are a number of potential ways to reconstruct the legal definition of delinquency to achieve these proposed goals—each with various advantages and disadvantages.[241] First, courts or legislatures could recognize or create a modern infancy defense. Such a defense would outright prevent the prosecution of youth under a certain age while also providing children with the ability to demonstrate in individual cases that they did not act with the criminal intent required to trigger further court intervention. Second, legislatures could define delinquency as only those acts that would be classified as a felony if committed by an adult.[242] Defining delinquency in this manner would completely remove a category of offenses most associated with normative adolescent development from juvenile court jurisdiction. Third, legislatures could create the equivalent of a penal code for youth that makes intentional choices about what types of adolescent behavior, knowledge, and intent should lead to delinquency court involvement. Such an approach would more fully decouple the definition of a delinquent act committed by a child from the definition of a crime committed by an adult—and would do so in a more nuanced manner. All three approaches would narrow the legal definition of delinquency significantly, thereby shrinking the jurisdiction and power of the juvenile legal system.

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239. As discussed in detail *supra*, the delinquency court as designed is derivative of criminal court. *See supra* notes 48–61 and accompanying text.

240. *See* SPINAK, *supra* note 8, at 259.

241. I discuss the various proposals in a good, better, best order.

242. Even better would be to both create a modern infancy defense and eliminate delinquency court jurisdiction over acts that would be classified as a misdemeanor.

1. Update the Infancy Defense to Account for the Impact of Adolescence on *Mens Rea*

States should enact legislation updating Blackstone's formulation of the infancy defense to both establish a minimum age of juvenile court jurisdiction and establish an "adolescent intent" defense. In his famous *Commentaries on the Laws of England*, Blackstone distills the elements of the commission of a crime to "a vicious will" (*mens rea*) and "an unlawful act consequent upon a vicious will" (*actus reus*).[243] In evaluating the concept of "vicious will," Blackstone recognized three categories of cases where an individual's act may not be reflective of his will: (1) a defect in understanding; (2) understanding but not at the time of the incident; and (3) compelled action (i.e., "action is constrained by some outward force and violence").[244] In evaluating the unlawful acts of youth within this framework, Blackstone viewed age as potentially causing a defect in understanding and essentially created three categories: (1) infants under seven, who could never form the vicious will necessary to be held criminally liable; (2) minors over fourteen, who received no special protections and were treated similarly to adults; and (3) a grey zone between seven and fourteen in which culpability was driven by the maxim "malice is equivalent to the age."[245] Within this grey zone, Blackstone believed "the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment."[246] As a result, Blackstone proposed that the question for the courts when confronted with the unlawful actions of a youth under fourteen years old was to determine whether the youth generally had the capacity to understand right from wrong at the time of the alleged unlawful act.[247] This formulation of the analysis laid the foundation for the infancy defense that existed before the creation of the juvenile court but was eliminated with the court's inception.[248]

While Blackstone was correct that age implicated the intellectual capacity of the child to understand right from wrong, his formulation is incomplete from a developmental standpoint and suffers from fundamental attribution bias error. In effect, Blackstone's formulation rests on the child being a fully rational actor who makes a calculated decision in the moment to act with "vicious will" (i.e., who acts despite intellectually understanding that the actions are unlawful). In

243. BLACKSTONE, *supra note* 49, at 12 Commentaries on the Laws of England 12 (J.W. Jones trans., 2005), https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-402/ [https://perma.cc/JUV4-F3BQ]. This framing also connects with Blackstone's conceptualization of crime as a "want or defect of will." *Id.*

244. *Id.*

245. *Id.* at 12–14. Interestingly, Blackstone recognizes that by Saxon law, youth under 12 could not be held to have the intent necessary for criminal guilt, while youth between 12 and 14 could be found to have the necessary will based on their capacity. *Id.* at 13.

246. *Id.* at 13.

247. *Id.*

248. *See* MODEL PENAL CODE AND COMMENTARIES § 4.10 at 273 (AM. L. INST., Official Draft and Revised Comments 1985); Walkover, *supra* note 52, at 506; James C. Weissman, *Toward an Integrated Theory of Delinquency Responsibility*, 60 DENV. L.J. 485, 496 (1983) (recognizing that "most courts" adopted the conclusion that "the *per se* exclusion of juveniles from criminal courts eliminates the rationale for an infancy doctrine in juvenile justice").

other words, according to Blackstone, once the child has the capacity to discern right from wrong, the child makes decisions just like an adult does.

However, as the Supreme Court has repeatedly recognized, both scientific research and common sense teach us that there are significant developmental differences between youth and adults that impact how youth make decisions and mitigate their culpability.[249] Specifically, research in the areas of psychology and neurology has demonstrated that, while youth tend to develop the intellectual capacity of an adult by approximately age sixteen, youth do not develop comparable psychosocial functioning until around their mid-twenties.[250] "This 'imbalance' in adolescent brain development is captured in a dual-systems model which specifies different developmental trajectories of these systems, with an early maturing, limbic, affective-motivational system and a relatively late developing, cortical, control-system."[251]

As a result, practically speaking, a youth as young as sixteen can likely make decisions in a manner similar to adults when the situation is low-stress, is free from peer pressure, and allows time for deliberation and consultation with an individual regarding the costs and benefits of a particular decision.[252] This is called cold cognition.[253] In contrast, when a youth under eighteen—the maximum age of original juvenile court jurisdiction—needs to make a decision on their own and quickly, particularly under stress or peer pressure, they are likely to display

249. *See* Miller v. Alabama, 567 U.S. 460, 471–72 (2012) (discussing generally the differences between juvenile and adult minds as it pertains to behavior control); J.D.B. v. North Carolina, 564 U.S. 261, 280–81 (2011) (discussing the importance of considering age in a culpability analysis); Graham v. Florida, 560 U.S. 48, 89 (2010) (Roberts, J., concurring in judgment) (discussing the lack of maturity and the underdeveloped sense of responsibility possessed by juveniles); Roper v. Simmons, 543 U.S. 551, 578 (2005) (discussing the instability and emotional imbalance of juveniles).

250. *See* Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop*," 64 AM. PSYCH. 583, 592 (2009) (concluding that "[b]y age 16, adolescents' general cognitive abilities are essentially indistinguishable from those of adults, but adolescents' psychosocial functioning, even at the age of 18, is significantly less mature than that of individuals in their mid-20s"); *see also* Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 35–38 (2009); Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCH. 1764, 1770–74 (2008); Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEV. PSYCH. 1531, 1538–41 (2007); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCH. 625, 632 (2005); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1011–14. (2003); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 BEHAV. SCIS. & L. 741, 741–45 (2000).

251. A.C.K. van Duijvenvoorde et al., *Testing a Dual-Systems Model of Adolescent Brain Development Using Resting-State Connectivity Analyses*, 124 NEUROIMAGE 409, 409 (2016).

252. *See* Grace Icenogle et al., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample*, 43 L. HUM. BEHAV. 69, 71, 76–83 (2019).

253. *Id*. at 71.

less mature decisionmaking abilities than adults.[254] This is referred to as hot cognition.[255] As a result, the developmental research regarding the differential timing of development across cognitive and psychosocial domains makes clear that the context of a situation, not just the capacity of a youth, matters when it comes to youth decisionmaking.[256]

Thus, in order to make the legal definition of delinquency developmentally responsive and grounded in the research, states should incorporate an updated version of the infancy defense that includes elements that reflect both capacity and context.[257] In practice, updating the infancy defense would involve two separate elements: a minimum age of jurisdiction and an "adolescent *mens rea*" defense.

a. Establish a Minimum Age of Jurisdiction

To address the capacity question originally posed by Blackstone's formulation of the infancy defense, states should set a bright line rule based on developmental norms. In line with international consensus and the research regarding the adjudicative competence of youth, this bright line minimum age of jurisdiction should be statutorily set at fourteen years old (i.e., thirteen years old and under are excluded from juvenile court jurisdiction). Such a rule will negate the impact that fundamental attribution and implicit racial biases would have on youth of color if the decision regarding capacity were made on a case-by-case basis.[258]

In the United States, as of October 2022, twenty-six states had a minimum age of jurisdiction for juvenile court.[259] In the twenty-six states, the minimum ages ranged from seven years old (with carve outs) in Florida to thirteen years old (with carve outs) in Maryland, with fifteen states setting a minimum age of jurisdiction at ten years old (three with carve outs).[260] In contrast, the United Nations Convention on the Rights of the Child, adopted by all member countries except the United States, recommends that all member countries establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law."[261] Moreover, after originally recommending that member states

254. *See id.* at 71, 76–83.

255. *Id.* at 71.

256. *See id.* at 76–83.

257. *See* Kaban & Orlando, *supra* note 56, at 38–41 (discussing the difference between adjudicative competency and *mens rea*).

258. *See* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 528–32 (2014); Kristin N. Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1538–41 (2018) (summarizing the case law); REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 9–12 (2017), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf [https://perma.cc/86L4-GW3Y]; *see also* NAT'L YOUTH JUST. NETWORK, RAISING THE MINIMUM AGE, NAT'L YOUTH JUST. NETWORK 2 (2020), https://nyjn.org/publications/raise-the-minimum-age-for-trying-children-in-juvenile-court/ [https://perma.cc/TC4M-VUWC].

259. *Raising the Minimum Age of Prosecuting Children*, NAT'L YOUTH JUST. NETWORK, https://nyjn.org/raising-the-minimum-age/ [https://perma.cc/ES8Q-2BH9] (last visited Mar. 19, 2025).

260. *See id.*

261. United Nations Convention on the Rights of the Child, art. 40(2)(b)(vii)(a), Nov. 20, 1989, 1577 U.N.T.S. 3, 28.

adopt a minimum age of jurisdiction of twelve years old, in 2019, the United Nations Committee on the Rights of the Child updated its recommended minimum age of jurisdiction to fourteen years old.[262] Thus, setting the minimum age of jurisdiction at fourteen would comply with recommendations from the UNCRC.[263]

A minimum age of jurisdiction of fourteen years old is consistent with the research regarding adjudicative competency—the ability to meaningfully understand and participate in legal proceedings, including the relation between the court processes and their alleged prior actions. For instance, research evaluating the relative adjudicative competencies of youth and adults found that youth fifteen years old and younger did more poorly than young adults on the assessment instruments, "with a greater proportion [of youth fifteen and under] manifesting a level of impairment consistent with that of persons found incompetent to stand trial."[264] Additionally, youth more frequently made decisions that "reflected compliance with authority, as well as influences of psychosocial immaturity."[265] While this research may suggest an even higher age of minimum jurisdiction than fourteen, practically speaking, setting the minimum age of prosecution at fourteen years old would account for this research on adjudicative competency while excluding most elementary and middle school students from being subject to court jurisdiction. As a result, setting the lower age of jurisdiction at fourteen is a conservative limit reflective of broader societal milestones that already exist in relation to adolescence.

b. Establish an Adolescent Mens Rea Defense

In order to address the context question relating to criminal intent ignored by Blackstone's original formulation, states should recognize an adolescent *mens rea* defense in all cases that acknowledges not only the diminished culpability of youth at the sentencing or disposition phase, but also at the adjudicatory phase.[266]

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262. Comm. on the Rts. of the Child, Gen. Comment No. 24 (2019) on Child.'s Rts in the Child Just. Sys. on the United Nations Convention on the Rights of the Child, U.N. Doc CRC/C/GC/24, at 6 (Sept. 18, 2019).

263. Practically speaking, nationwide implementation of a minimum age of jurisdiction would require each state and the federal government to adopt minimum age statutes.

264. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 333 (2003) [hereinafter Grisso et al., *Juveniles' Competence to Stand Trial*]; *see also* Jodi L. Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29 L. & HUM. BEHAV. 723, 724 (2005); Thomas Grisso, *Juveniles' Capacity to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1157 (1980) ("These findings indicate that juveniles younger than fifteen manifest significantly poorer comprehension than adults of comparable intelligence. In contrast, the class of sixteen-year-olds, the highest age in the juvenile sample, do not manifest poorer comprehension than young adults of comparable intelligence. These findings . . . indicate that juveniles under the age of fifteen do not meet an adult level of understanding, while sixteen-year-olds generally do.").

265. Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 264, at 333.

266. *See* Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 541 (2016) (arguing that "the mens rea standard as applied to juveniles should be recalibrated to account for what is now known about adolescent development").

The Model Penal Code (MPC) provides a useful backdrop upon which to explain this proposal, as it affirms and elaborates on the traditional requirements for criminal culpability while making the same mistakes *vis a vis* youth.[267] First and foremost, the MPC affirms the fundamental predicates of *actus reus* and *mens rea* before criminal liability can be found in a manner that parallels Blackstone's formulation described above.[268] The MPC defines the *actus reus* as "conduct that includes a voluntary act or the omission to perform an act of which he is physically capable."[269] With respect to *mens rea*, the MPC recognizes that there are varying levels of intentionality of action that may be required to constitute a guilty mind and thus be held criminally liable under the law.[270] Each of these varying levels of culpability—purposely, knowingly, recklessly, and negligently—are defined in such a way that implicates the relative immaturity of the executive functioning and psychosocial skills of youth.[271] Yet, in defining and explaining each of these levels of culpability, the MPC implicitly norms the definitions of a "person" with the maturity, capacity, and faculties of an adult and fails to explicitly account for (or discuss at all) how the normative developmental characteristics of childhood impact culpability.[272]

Moreover, the MPC ignores youth as a basis for excluding criminal responsibility in a particular case, focusing instead on mental disease or defect as the primary basis for such exclusion.[273] However, the rationale provided for excluding criminal responsibility based on mental defect or disease supports also accommodating youth in the same manner. In the Commentaries to the MPC, it recognizes:

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267. The MPC provides a useful backdrop because of the significant influence it has had in shaping the criminal codes of most states and courts' interpretations of existing criminal statutes. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320, 326–27 (2007) (describing the Model Penal Code as "the closest thing to being an American criminal code"). This is particularly true of the criminal law parts of the MPC—i.e., the sections defining general principles of liability and specific criminal offenses. *Id.* at 326. Given that delinquent acts are violations of criminal statutes, the MPC similarly influences the way delinquency is defined at a systemic level and applied in an individual case. *See id.* at 327 (recognizing that "[t]housands of court opinions have cited the Model Penal Code as persuasive authority for the interpretation of an existing statute or in the exercise of a court's occasional power to formulate a criminal law doctrine").

268. *See* MODEL PENAL CODE §§ 2.01, 2.02 (AM. L. INST., Proposed Official Draft 1962); BLACKSTONE, *supra* note 49, at 12.

269. MODEL PENAL CODE § 2.01 (AM. L. INST., Proposed Official Draft 1962).

270. *See* MODEL PENAL CODE § 2.02 (AM. L. INST., Proposed Official Draft 1962). These levels of culpability relate to Blackstone's concept of the individual's understanding at the time of the incident. *See* MODEL PENAL CODE AND COMMENTARIES § 2.02 at 229 (AM. L. INST., Official Draft and Revised Comments 1985); BLACKSTONE, *supra* note 49, at 12.

271. *See* MODEL PENAL CODE § 2.02 (AM. L. INST., Proposed Official Draft 1962).

272. *See id.*

273. *See* MODEL PENAL CODE § 4.01 (AM. L. INST., Proposed Official Draft 1962). It does so despite recognizing that youth, mental disease or defect, or intoxication can vitiate the capacity to consent to conduct charged as an offense. *See* MODEL PENAL CODE § 2.11(3)(b) (AM. L. INST., Proposed Official Draft 1962).

> To be held irresponsible, the individual must, as a result of a mental disease or defect, either lack substantial capacity to appreciate the criminality [wrongfulness] of his conduct or lack substantial capacity to conform his conduct to legal requirements. The standard does not require a total lack of capacity, only that capacity be insubstantial. An individual's failure to appreciate the criminality of his conduct may consist in a lack of awareness of what he is doing or a misapprehension of material circumstances, or a failure to apprehend the significance of his actions in some deeper sense . . . . An individual is also not responsible if a mental disease or defect causes him to lack substantial capacity to conform his conduct to the requirements of the law. This part of the standard explicitly reaches volitional incapacities.[274]

Put another way, the Commentaries to the Model Penal Code make clear that culpability requires more than just the capacity to appreciate that "the community regards the behavior as 'wrongful'" and not "otherwise morally justified" in that instance; culpability requires the capacity to "grasp[] the concepts of governmental prohibition and officially imposed sanctions [] implicit in the notion of criminality" and the capacity "of conforming his conduct to its requirements."[275] Importantly, the Commentaries emphasize that this lack of capacity is critical to *the determination of guilt* in the first instance and not just to *the degree of guilt* at the mitigation stage.[276]

Yet the MPC ignores this admonition in its approach to youth. Rather than grapple with how developmental immaturity might impact the capacity to appreciate the criminality of one's behavior and conform it to the requirements of the law, the MPC drafters frame youth as a matter of jurisdiction, not criminal culpability.[277] In doing so, they effectively prioritize the allegedly mitigatory approach of the juvenile court over the question of whether government intervention should occur in the first instance. Furthermore, the drafters of the MPC repeat the mistake made by Blackstone—focusing solely on capacity and not context—when it

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274. MODEL PENAL CODE AND COMMENTARIES § 4.01 at 164 (AM. L. INST., Official Draft and Revised Comments 1985). This parallels Blackstone's formulation of culpability as well—understanding generally and understanding in the moment. *See* BLACKSTONE, *supra* note 49, at 12.

275. MODEL PENAL CODE AND COMMENTARIES § 4.01 at 169–70 (AM. L. INST., Official Draft and Revised Comments 1985) (emphasizing that "[t]he use of 'appreciate' rather than 'know' conveys a broader sense of understanding than simple cognition").

276. MODEL PENAL CODE AND COMMENTARIES § 4.01 at 168 (AM. L. INST., Official Draft and Revised Comments 1985) ("The Model Code formulation is based on the view that a sense of understanding broader than mere cognition, and a reference to volitional incapacity should be achieved directly in the formulation of the defense, rather than left to mitigation . . . ."); *see also* Carroll, *supra* note 266, at 546–49 (concluding that "the concept of mens rea renders an act of disobedience an active one, a decision *not* to comply in a world where the norm is compliance. Mens rea transforms the decision to break the law into an act of citizen defiance differentiated by the level of culpability the actor's thought processes reflect." (emphasis in the original)).

277. MODEL PENAL CODE § 4.10 (AM. L. INST., Proposed Official Draft 1962); MODEL PENAL CODE AND Commentaries § 4.10 at 275 (AM. L. INST., Official Draft and Revised Comments 1985) ("In barring criminal proceedings against offenders who are under 16 at the time of the conduct charged to constitute an offense, Section 4.10 renders moot the legal issue of criminal capacity of juveniles. Under this section, an individual under the age of 16 is accountable only in the juvenile court, where the traditional concept of incapacity has no application.").

comes to youth despite affirming that both clearly matter with respect to adult culpability.[278] The result is that youth are subject to government-imposed sanctions under the same liability statutes as adults without the benefit of the same exceptions, effectively holding youth to a higher standard of behavior despite being less capable of appreciating the rules and conforming their behavior accordingly.

An example based on a real case is illustrative. A youth, hypothetically named Jane, is charged in juvenile court with felony threats. The basis for the petition is an allegation that Jane, who was located by police after running away from home, threatened to kill her father as he was picking her up from police custody and was attempting to return her home. The reason Jane ran away, and did not want to return home, was because she was being sexually abused by another family member in the home. Jane's actions technically meet the elements of the alleged delinquent act as laid out in the jury instructions.[279] Self-defense theoretically could be raised as a bar to liability but faces a significant challenge to success due to the requirement that a threat to bodily harm be imminent at the time of the defensive action.[280] Nor do cases like *Elonis*[281] and *Counterman*,[282] which require the government to prove that the individual intended to utter the words as a threat and "had some subjective understanding of the threatening nature of [their] statements," offer sufficient protection.[283] These cases merely require a level of culpability higher than negligence[284] that can likely be met given the allegations and because such higher levels of culpability are normed on adult thought processes, not adolescent ones.

Specifically, Jane would likely be found to have acted "with the purpose to threaten or with knowledge that [her] words would be perceived as a threat."[285] Moreover, Jane would very likely be found to have possessed the capacity to understand that threatening people is wrong. However, Jane's understanding in the moment was not that she was acting with the intent to break the law (i.e., an appreciation that her actions were in fact a crime and that she was choosing to behave in this matter despite knowing she was breaking the law), but in search of a way to communicate her significant fear and displeasure with being returned home.[286] Put another way, when viewed through the

278. *See* Model Penal Code, *supra* note 254; BLACKSTONE, *supra* note 49, at 12–14.

279. Criminal Jury Instructions for the District of Columbia, No. 4.130.

280. Criminal Jury Instructions for the District of Columbia, No. 9.500.

281. Elonis v. United States, 575 U.S. 723 (2015).

282. Counterman v. Colorado, 600 U.S. 66 (2023).

283. *Id.* at 69.

284. *Id.* at 69; *Elonis*, 575 U.S. at 725.

285. Carrell v. United States, 165 A.3d 314, 317.

286. *See* MODEL PENAL CODE AND Commentaries § 2.02 at 233, n.6 (AM. L. INST., Official Draft and Revised Comments 1985) (defining intentionality); *see also* Carroll, *supra* note 266, at 590 ("As an element, mens rea distinguishes behavior and assigns culpability. To accomplish this goal, mens rea must contemplate the actor's state of mind at the time of her act—not in the abstract but in actuality. It must consider what the defendant thought or understood her actions to mean.").

frame of adolescence,[287] a court should interpret her behavior as purposeful but not purposefully unlawful.[288] Her choice of behavior can and should be attributed more to normative adolescent immaturity than to criminality, and as such, should be excluded from criminal responsibility whether in juvenile or adult court.[289]

Should the government intervene in the above-mentioned situation? Yes.[290] Should the government intervene through the juvenile court system by criminalizing the behavior of the child? No. Given the low-risk—albeit high-needs—nature of Jane, delinquency court intervention risks causing harm while serving little to no penological purpose.[291] Indeed, just as the MPC recognizes the importance of creating a "decent working line between the areas assigned to the authorities responsible for public health and those responsible for the correction of offenders"[292] when it comes to adults, so should the MPC recognize and affirm the importance of drawing such a line for youth.

The MPC (and the law overall) can accomplish this by explicitly accounting for the developmental differences of youth in substantive jurisprudence relating to both culpability (MPC Article 2) and responsibility (MPC Article 4).[293]

Specifically, with respect to culpability, there are a number of concepts used to distinguish the levels of culpability identified in the MPC that implicate the normative developmental immaturity of youth. As such, they require further clarification and guidance in the Commentaries to Article 2 as to how these levels of culpability relate to youth.

For instance, the levels of negligence and recklessness both require the fact finder to appraise the substantiality and justifiability of the risk resulting from the particular action taken, either from the perspective of a reasonable person

287. *See* Eduardo R. Ferrer & Kristin N. Henning, *Critical Clinical Frames: Centering Adolescence, Race, Trauma, and Gender in Practice-Based Pedagogy*, 30 CLINICAL L. REV. 113, 124–27 (2023).

288. This distinction also implicates the concept of intention captured by the purposeful and knowing levels of culpability. *See* MODEL PENAL CODE AND COMMENTARIES § 2.02 at 233 (AM. L. INST., Official Draft and Revised Comments 1985) ("[A]ction is not purposive with respect to the nature or result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result."). Thus, even a recklessness standard as required in *Counterman*—especially if such a standard is normed on adults—would insufficiently account for adolescent immaturity in this instance. *See Counterman*, 600 U.S. 66.

289. *See* Ferrer & Henning, *supra* note 287, at 140–41. This is especially true when viewed through the overlapping frames of adolescence, race, gender, and trauma. *See id.*

290. As Professor Spinak argues, the manner of intervention should resemble radical non-intervention. *See* SPINAK, *supra* note 8, at 141–43. Indeed, as Professor Spinak recognizes: "A proposal that the state *not* intervene when children misbehave challenges the basic premise of *parens patriae* intervention as an overall good." *Id.* at 144 .

291. *See* MODEL PENAL CODE AND COMMENTARIES § 4.01 at 168–69, n.12 (AM. L. INST., Official Draft and Revised Comments 1985).

292. *See* MODEL PENAL CODE AND COMMENTARIES § 4.01 at 165 (AM. L. INST., Official Draft and Revised Comments 1985).

293. The need for such accommodations has already been recognized by the Supreme Court in *Roper* and its progeny with respect to sentencing jurisprudence and *J.D.B. v. North Carolina* with respect to substantive jurisprudence. Roper v. Simmons, 543 U.S. 551, 578 (2005); Graham v. Florida, 560 U.S. 48, 89 (2010); J.D.B. v. North Carolina, 564 U.S. 261, 281 (2011).

(negligence) or from the subjective view of the individual (recklessness).[294] In evaluating whether a youth acts recklessly or negligently, it is critical that the fact finder account for how adolescence impacts both their "heightened vulnerability to heightened risk taking"[295] and their ability to anticipate consequences.[296] In the case of negligence, this can be accomplished by evaluating whether the behavior was a "gross deviation from the care"[297] that a reasonable *child*, as opposed to a reasonable adult, would have exercised in that situation.[298] For recklessness, it requires evaluating the substantiality and justifiability of the risk associated with the behavior from the subjective standpoint of the *child* actor whose executive functioning and psychosocial capacities have not yet full matured.

Similarly, the knowledge and purpose levels of culpability require that the individual act with some level of intention—either "aware[ness] that his conduct is of the required nature or that the prohibited result is practically certain to follow from his conduct."[299] Such intentionality is premised on a rational level of thought typified by normative adult maturity, i.e., the individual's engagement of the cognitive control system of their brain makes them aware that their conduct is illegal or that their actions will result in a violation of the law. However, due to the normative physiological immaturity of the adolescent brain, youth decisionmaking is driven more by the socio-emotional control system of the brain, particularly in "hot cognitive" contexts,[300] resulting in more impulsive and less rational action. Thus, the evaluation of intentionality in determining culpability should explicitly explain these differences in decisionmaking capacity in the Commentaries to Article 2 and explicitly recognize the way these differences can diminish the level of culpability such that the act may not meet the elements of the statutory offense.

Additionally, with respect to responsibility, the MPC should add "youth" to Section 4.01(1) in order to specifically recognize an affirmative adolescence defense analogous to the affirmative defense of mental disease or defect already recognized in that section.[301] The commentaries to this section should be expanded accordingly

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294. MODEL PENAL CODE AND COMMENTARIES § 2.02 at 241 (AM. L. INST., Official Draft and Revised Comments 1985).

295. Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity*, *supra* note 250, at 1764.

296. Steinberg et al., *Age Differences in Future Orientation*, *supra* note 250, at 39.

297. MODEL PENAL CODE AND COMMENTARIES § 2.02 at 241 (AM. L. INST., Official Draft and Revised Comments 1985).

298. *See* Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in* J.D.B. v. North Carolina *for Purposes of The Miranda Custody Analysis*, 47 HARV. C.R.-C.L. L. REV. 501, 520 (2012) (developing the reasonable child standard).

299. MODEL PENAL CODE AND COMMENTARIES § 2.01 at 233 (AM. L. INST., Official Draft and Revised Comments 1985).

300. *See, e.g.*, Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 DEV. SCI. F1, F2 (2010).

301. The new Section 4.01(1) would read: "A person is not responsible for criminal conduct if at the time of such conduct as a result of youth or mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." This language parallels the language that already exists in MODEL PENAL CODE § 2.11, which recognizes that youth, mental disease, and mental defects are all bases for declaring ineffective the consent of a victim to an alleged offense. MODEL PENAL CODE AND COMMENTARIES § 2.11 at 393 (AM. L. INST., Official Draft and Revised Comments 1985).

as well to explain how youth are neurologically and psychosocially less mature than adults and the impact this relative immaturity can have both on their ability to appreciate the criminality of their actions and on their decision-making.

Such amendments to the MPC (and subsequent incorporation into state law) better reflect the reality that the legal culpability and responsibility of youth are influenced significantly not just by overall capacity, but also by the context in which the behavior occurs.[302] These amendments do not seek to address the issues of general capacity to understand right from wrong or general adjudicative competence. In large part, evaluations of these concepts test the "cold cognitive" capabilities of youth.[303] These notions of general capacity are what the original infancy defense sought to address, which were then supposedly resolved by the creation of the juvenile court. The amendments proposed in this article are necessary to address the fact that, for youth, given their developmental characteristics, context can heavily influence capacity. These amendments, thus, incorporate the concept of "hot cognition" in the law, better reflecting the realities of youth decision-making.

2. Eliminate Misdemeanors from the Legal Definition of Delinquency

Another approach is that states could narrow their statutory definitions of delinquency to any offense that would be classified as a felony if committed by an adult. While a potentially imperfect or inelegant solution, short of having a separate developmentally responsive "criminal code" for youth, limiting the statutory definition in this bright-line manner would exclude a host of non-violent and normative adolescent behaviors from juvenile court jurisdiction. It would also focus the juvenile legal system's time, attention, and financial resources on more serious misbehavior that deviates from adolescent norms that youth typically outgrow.

For instance, the definition of a delinquent act in the District of Columbia is "an act designated as an offense under the law of the District of Columbia, or of a State if the act occurred in a State, or under Federal law. Traffic offenses shall not be deemed delinquent acts unless committed by an individual who is under the age of sixteen."[304] Under this proposal, the legislature would narrow the definition of delinquent act to "an act designated as a felony offense under the law of the District of Columbia, or of a State if the act occurred in a State, or under Federal law." Generally speaking, the juvenile court in the District of Columbia would maintain jurisdiction over offenses such as murder, carjacking, robbery, burglary, thefts of items above a threshold value, assaults with significant or serious injuries, most weapons possession offenses, drug distribution, and joyriding. However, behaviors such as disorderly conduct, shoplifting, trespassing, threats, and assaults involving no or minor injury would be excluded entirely from court jurisdiction.

While this may sound like a dramatic change in the abstract, this proposed change is consistent with our continuously deepening understanding of adolescence and the

302. *See* Icenogle, *supra* note 252, at 82–83.
303. *See id*. at 71.
304. D.C. Code § 16–2301(7).

harms of over-intervention by the courts, as well as recent trends and practices in juvenile court.[305] Indeed, research in the field supports such an approach on multiple levels. For instance, removing misdemeanors from the definition of delinquency is consistent with the research indicating that most youth, even serious offenders, desist with age as the developing brain approaches maturity.[306] Additionally, research regarding effectively intervening with delinquent behavior makes clear that differentiating responses according to risk is critical to reducing recidivism. This body of research demonstrates that over-intervening with low- and medium-risk youth makes it more likely that the youth will reoffend.[307] Taken together, these strands of research require the juvenile court to take much more seriously the principle of *primum non nocere*— "first, do no harm."[308] Narrowing the definition of delinquency to exclude misdemeanor offenses weaves this principle into the design of the juvenile court itself.

Moreover, while significant from a design perspective, from a practical perspective, recent national trends in juvenile case processing appear to indicate that this "do no harm" approach has begun to take root. For instance, between 2005 and 2021, the number of cases referred to juvenile court decreased from over 1.6 million cases a year to under 450,000, a 73% decline, with the bulk of that decline—56%—happening between 2005 and 2019.[309] Referrals involving property and public order offenses decreased 78% each, while referrals involving offenses against persons decreased 62%.[310] Moreover, between 2012 and 2021, some of the greatest decreases by percentage and volume were driven by sub-categories of offenses likely made up mostly or entirely of misdemeanors offenses,

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305. MARK W. LIPSEY ET AL., CTR. FOR JUV. JUST. REFORM, IMPROVING THE EFFECTIVENESS OF JUVENILE JUSTICE PROGRAMS: A NEW PERSPECTIVE ON EVIDENCE-BASED PRACTICE 23–25 (2010) (finding that "programs with a therapeutic philosophy were notably more effective than those with a control philosophy.").

306. *See* Edward P. Mulvey, *Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders* 1, OFF. JUV. JUST. DELINQ. PREVENTION (March 2011).

307. *See* Jay P. Singh et al., *From Risk Assessment to Risk Management: Matching Interventions to Adolescent Offenders' Strengths and Vulnerabilities*, 47 CHILD. & YOUTH SERVS. REV. 1, 2 (2014) (recognizing that "[r]esearch suggests that over-intervening can increase the likelihood of adverse outcomes by inadvertently increasing risk factors and reducing protective factors") (citing Christopher T. Lowenkamp et al., *The Risk Principle in Action: What Have we Learned from 13,676 Offenders and 97 Correctional Programs?*, 52 CRIME & DELINQ. 77 (2006)); *see also* Anne McGlynn-Wright et al., *The Usual, Racialized, Suspects: The Consequence of Police Contacts with Black and White Youth on Adult Arrest*, 69 SOC PROBS. 299, 310 (2020) (finding that "Black individuals with police contact during early adolescence or childhood are more likely than those without contact to experience arrest six years later").

308. *Primum Non Nocere*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/primum [https://perma.cc/A2BA-RR34] (last visited Mar. 20, 2025); *see also* FELD, *supra* note 38, at 150 ("Like the Hippocratic oath, the first priority of juvenile court intercession should be harm reduction—to avoid or minimize practices that leave youths worse off.").

309. HOCKENBERRY & PUZZANCHERA, *supra* note 12, at 6. The pandemic further accelerated this downward trend in referrals. *See* SARAH HOCKENBERRY & CHARLES PUZZANCHERA, THE IMPACT OF COVID-19 ON THE NATION'S JUVENILE COURT CASELOAD 1 (June 2024) https://ojjdp.ojp.gov/publications/impact-of-covid-on-juvenile-court-caseload.pdf [https://perma.cc/5QJ9-3ELN].

310. HOCKENBERRY & PUZZANCHERA, *supra* note 12, at 6.

such as simple assault (−50%), other person offenses (−34%), larceny-theft (−79%), vandalism (−54%), trespassing (−66%), disorderly conduct (−73%), and liquor law violations (−75%).[311] These sample offense sub-categories further had among the lowest likelihood of being petitioned[312] and adjudicated.[313] In sum, since 2009, the overall number of cases referred to juvenile court has decreased, while the mix of referrals, petitions, and adjudications also has become more heavily weighted towards more serious offenses.[314] While there are likely a number of reasons for this marked fall, the decline has likely been driven, in part, by a shift in enforcement approach that has moved away from arresting and charging youth for less serious normative adolescent behavior.[315] Importantly, both violent crime and property crime decreased substantially during this same time period.[316]

This phenomenon of not using the state to intervene with less serious (and sometimes very serious) "delinquent" behavior has been the rule—not the exception—for middle- and upper- class white families since at least the founding of juvenile court.[317] Remember that the juvenile court case processing data reflected above very likely represents merely a fraction of the misbehavior in which youth engage. The delta between the reported case processing data and the actual incidence of delinquency represents the difference between the legal construction of delinquency and the social construction—a difference that is likely to be quite large.

For example, in 1943, researcher Austin Porterfield set out to estimate the size of the difference and better understand what drives the delta.[318] To do so, after cataloguing all the behavior that led to petitions in the Fort Worth, Texas juvenile court, Porterfield surveyed a sample of primarily middle- and upper-class college students from three North Texas colleges to gauge whether they had engaged in similar behavior prior to turning eighteen.[319] 100% of the sample, which included both men and women, reported that they had participated in at least one of the fifty-five offenses for which youth had been charged in the juvenile court in the

311. *Id*. at 7.

312. *See id*. at 36.

313. *See id*. at 42.

314. *See id*. at 36 (finding that "[t]he overall likelihood of formal handling was greater for more serious offenses within the same general offense category.").

315. It is important to note that this significant decline has likely been politically feasible, at least in part, by the fact that it has disproportionately benefited white youth. During the decline, referrals involving white youth dropped from 48% to 44% despite white youth making up 53% of the youth population overall. During the same period, referrals involving Black youth increased from 33% to 35% of the juvenile court despite Black youth making up 15% of the youth population overall. *See id*. at 21. Thus, it is possible that racial and ethnic disparities will continue to further increase with such a policy change. However, the per capita rates of all youth should decline significantly, thereby still reducing the overall number of Black youths who encounter delinquency court.

316. *U.S. Crime Rates and Trends—Analysis of FBI Crime Statistics*, Brennan Center for Justice (Oct. 16, 2023), https://www.brennancenter.org/our-work/research-reports/us-crime-rates-and-trends-analysis-fbi-crime-statistics [https://perma.cc/699S-AUBZ] (reporting that violent crime and property crime decreased approximately 23% and 48%, respectively, between 2005 and 2021).

317. The Flawed Philosophical Foundation of *Parens Patriae*, *supra* note 1, at 935–41.

318. Porterfield, *supra* note 59, at 199–208.

319. *See id*. at 199.

preceding year.[320] On average, pre-college men reported engaging in 17.6 of the offenses surveyed while college men reported engaging in 11.2 of the offenses surveyed.[321] Indeed, the study highlights the examples of a "well-adjusted ministerial student" and "successful pastor" who reported engaging in 27 and 28 of the 55 offenses, respectively.[322] The study further notes that "[t]he offenses of the college students were apparently as serious, though probably not as frequent, as those of youth in court . . . ."[323] Yet, very few of the students had any contact with juvenile court during their adolescence[324] and were by virtue of attending college, at least superficially, on the path to successfully transitioning to productive, "crime-free" adulthood. The study concluded that despite "great similarities" in the behavior of the college students and the behavior petitioned in juvenile court, there was a "wide difference in the extent to which the two groups are brought to court for the same offenses."[325] Porterfield hypothesized that a lack of access to economic and social capital drove the different levels of court intervention between the college students and youth charged in delinquency court.[326]

A recent study by researchers at the University of Washington underscores this disparate approach to intervention *and* the long-term harm that the system disproportionately causes Black youth. Researchers used longitudinal survey data from over 300 Black and white Seattle Public School District eighth graders to examine two questions: (1) whether police encounters with youth predict the likelihood of arrest in young adulthood; and (2) if such effect exists, is the effect the same for Black and white individuals.[327] Their analysis revealed three key findings. First, despite reporting similar rates of illegal behavior, Black respondents were more likely to have had police contact by eighth grade. Second, despite white respondents reporting significantly more illegal behavior in young adulthood, Black respondents reported a higher rate of arrest. Third, Black respondents who experienced contact with the police by the eighth grade had nearly 11 times greater odds of being arrested by 20 years old than Black respondents without police contact. However, the relationship between police contact by eighth grade and later arrest in young adulthood was not significant for white respondents. Thus, the researchers surmised that "[f]or Black respondents, there appears to be an institutional response to prior contact, while [w]hite respondents are not subject to these same responses . . . Not only are Black children subject to more stops in their youth than their [w]hite peers, but these stops are consequential for future arrests."[328]

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320. *See id*. at 200.
321. *See id*.
322. *See id*. at 199–200.
323. *See id*. at 200.
324. *See id*. at 201–03. Even then nearly the entirety of court contact for the students was limited to traffic violations. *See id*.
325. *See id*. at 204.
326. *See id*. at 204–08.
327. McGlynn-Wright et al., *supra* note 307 at 300.
328. *Id*. at 307–310.

To be clear, the conclusion to be drawn is not that the state should intervene more in the misbehavior of middle- and upper-class white youth, but rather that all youth should benefit from the same developmentally responsive approach that middle- and upper-class white youth have received since the juvenile court's inception.[329] Narrowing the legal construction of delinquency—and thus the front door to the system—supports a system that better mirrors that approach.[330]

Excluding misdemeanors from the legal construct of delinquency should significantly shrink the juvenile legal system[331] while improving public safety in the short and long term. First, by limiting the scope of behavior over which the juvenile court has jurisdiction, it will reduce the number of cases referred to the court each year, and thus the overall size of the juvenile court itself. For example, the effect of excluding just the offense sub-categories that have already seen the greatest declines in referrals and already are among those least likely to be petitioned would cut the size of the juvenile court *nearly in half* (from approximately 437,000 referrals to approximately 218,000).[332] Perhaps more importantly for many youth, in addition to shrinking the juvenile court, narrowing the legal definition of delinquency will also limit police power over youth, thereby reducing the number of encounters and stops of young people by police. While this number is much harder to quantify given the lack of federal reporting requirements pertaining to police encounters and stops of youth, removing law enforcement from the "policing" of misdemeanors should significantly reduce law enforcement jurisdiction in schools and sharply reduce the ability of police to pretextually seize youth for minor misbehavior such as disorderly conduct, loitering, etc. This smaller system will approximate more closely the experience of white middle- and upper-class youth who are referred to court far less often and experience far less policing in their everyday lives.[333]

Second, the research indicates that effective interventions use a therapeutic approach and that system involvement itself is often criminogenic (particularly for low-risk youth).[334] For instance, research indicates that therapeutic interventions are most effective at reducing recidivism, while discipline or deterrent focused interventions increase recidivism.[335] Additionally, a meta-analysis of diversion programs

329. *See* SPINAK, *supra* note 8, at 259–64.

330. *Id.*

331. One potential unintended consequence of excluding misdemeanors from juvenile court jurisdiction is that prosecutors will over-charge for the court to be able to exert jurisdiction. Another potential unintended consequence is that it will negatively impact plea bargaining as there will no longer be a factual basis to plead to misdemeanor offenses given the courts lack of jurisdiction. Both potential consequences can be solved by eliminating the concept of felonies, which was also borrowed from the criminal legal system, for youth. This would involve eliminating the collateral consequences of felony convictions for youth, including the sentencing implications in adult court for juvenile felony offenses.

332. HOCKENBERRY & PUZZANCHERA, *supra* note 12, at 6–7.

333. *See, e.g.*, McGlynn-Wright et al., *supra* note 307 at 310.

334. *See generally*, Mark W. Lipsey, The Primary Factors that Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview, 4 Victims & Offenders 124 (2009).

335. *See id.* at 128. Therapeutic interventions are those "that attempt to engage the youth in a supportive, constructive process of change" and "emphasize[] cognitive-behavioral, social learning, and

"indicate[s] that diversion programs, both caution and intervention, are significantly more effective in reducing recidivism than the traditional justice system."[336] Other research highlights the criminogenic effects that system involvement itself has on youth of color.[337] Finally, research evaluating the impact of reducing misdemeanor prosecutions in the adult criminal legal system found that "for the marginal defendant, nonprosecution of a nonviolent misdemeanor offense leads to [large] reduction [s] in the likelihood of a new criminal complaint . . . over the next two years."[338] Thus, the true diversion of misdemeanor offenses from the juvenile legal system should improve public safety.

Critically, excluding misdemeanors from the *legal* definition of delinquency is not an argument in favor of anarchy or against teaching youth to admit and repair harm when they cause it. It is an argument against the juvenile legal system being the proper forum for teaching such skills for approximately 50% of the cases currently referred to the delinquency court. This begs the question of what to do with all the misdemeanor cases previously referred to court? The answer at a high level is to respond in the same way that resourced communities do—support the youth in the community without the full weight of the state coercing the intervention.[339] I have no illusions that this will be easy to accomplish, but this is where the bulk of the energy for the next wave of "reform" should be focused—on significantly shrinking the juvenile legal system itself while providing inviting, effective community-based supports for youth and families in need.

3. Create a Model Delinquency Code

There are benefits and drawbacks to changing the definition of delinquency by categorically excluding certain youth and cases from the existing definition of delinquency as proposed in Sections II.A.1 and 2 above. For example, establishing such bright-line exclusions would shrink the system significantly, reduce the opportunity for bias to creep into individual decisionmaking and make available significant resources that could be spent on supporting youth in more effective ways.

(more generally) skill building interventions." *Id.* at 128, 144 (alteration in original). Examples of therapeutic interventions include restorative practices, counseling, skill-building, and case management services. *See id.* at 140–43.

336. Holly A. Wilson & Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review*, 40 CRIM. JUST. & BEHAV., 497, 509–10 (2012) (alteration in original). Caution programs divert youth from the system with nothing more than a warning. *See id.* at 498. In contrast, intervention programs—or formal diversion programs—are those that condition diversion on a youth's admission of guilt, participation in services, or compliance with surveillance. *See id.*

337. *See generally* McGlynn-Wright, et al., *supra* note 307 (highlighting that Black adolescents are more likely than white adolescents to be stopped and arrested by law enforcement, and as a result, are even more likely to be arrested in the future); Juan Del Toro et al., *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PNAS, 8261 (2019) (finding that Black and Latino boys in ninth and tenth grades "stopped by police report more frequent engagement in delinquent behavior 6, 12, and 18 months later, independent of prior delinquency").

338. Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28600, 2021), https://www.nber.org/papers/w28600 [https://perma.cc/9W3Y-254C].

339. *See* SPINAK, *supra* note 8, at 287–92; HENNING, *supra* note 21, at 303–06; ROBERTS, *supra* note 20 at 298–99.

Moreover, a minimum age of jurisdiction and the categorical exclusion of misdemeanors are good proxies for excepting both youth who lack adjudicative competence and normative adolescent behaviors from the existing derivative definition of delinquency.[340]

However, while age and misdemeanors are good proxies, they are still proxies, and, thus, unnuanced instruments.[341] For instance, such proxies do not necessarily always reflect normative behavior or the level of harm that is caused.[342] These shortcomings can be attributed to the fact that these proposals seek to amend a definition of delinquency that is still derivative of the adult penal code. The ideal solution thus requires the creation of a new legal definition of delinquency that furthers the goals of the aforementioned proposals but that is more nuanced and more fully decoupled from the definitions of crimes committed by adults.[343] This can be accomplished through the development of a Model Delinquency Code (MDC) that comprehensively reconstructs a definition of delinquency that is developmentally responsive and tailored to children—not derivative of our approach to adults.

The creation of an MDC should be guided by three intertwined, overarching principles that build upon the rationales for my earlier proposals but are combined and applied in a more nuanced and detailed manner.[344] These principles focus on the need to construct developmentally responsive definitions of responsibility and liability, new definitions of individual offenses, and new tools of intervention. Ideally, these principles should be implemented in unison—not à la carte—as they address different flaws found in the existing legal construct of delinquency.[345] If the political and societal will existed to wholly rebuild the delinquency court from the ground up with these principles in mind, the development of an MDC would likely be the most effective approach to achieving that goal.

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340. *See supra* notes 309–16 and 331–33 and accompanying text. Indeed, national data seems to indicate that delinquency systems have been heading in this direction already in an effort to become more developmentally responsive. *Id.*; *see also* HOCKENBERRY & PUZZANCHERA, *supra* note 12, at 10–11 (describing age related trends in delinquency case counts).

341. In contrast, developing a new adolescent *mens rea* defense as described *supra* Section II.A promotes a more nuanced approach. However, such an approach would not achieve the type of systemic reform necessary to realign resources and would still allow for bias to impact decisionmaking.

342. Examples to consider and address include an 11-year-old who kills another individual, a child who commits a sexual assault that qualifies as a misdemeanor, and a child who engages in repeated or serial shoplifting or assaultive behavior.

343. An ideal solution would also achieve a separate but important goal of further separating the delinquency and child welfare components of the juvenile court.

344. While fully and specifically developing a Model Delinquency Code is beyond the scope of this Article, I lay out broad principles below that should guide such an exercise. I plan to more fully explore these ideas in future scholarship.

345. The MDC should also be implemented alongside the changes suggested below to eliminate status offenses and the ability to charge youth in adult criminal courts.

a. Construct Developmentally Responsive Definitions of Responsibility and Liability

Reconstructing the definition of delinquency in a manner that reflects the ways that children are fundamentally different than adults requires starting with a blank page when it comes to issues like responsibility and liability.[346] To this end, an MDC must begin with the recognition that the legal system is not the appropriate forum for holding younger youth responsible for their misbehavior due to the lack of adjudicative competence that results from their developmental immaturity.[347] This could take the form of reinstating the infancy defense, creating a minimum age of jurisdiction as proposed above, or combining the two approaches by creating a minimum age of jurisdiction of eleven years old and a rebuttable presumption of incompetence for children eleven through thirteen years of age.[348]

An MDC must also create a developmentally responsive approach to the idea of intent—i.e., when a child should be held liable for their actions by a court system. Such a developmentally responsive approach should consider a few different elements relating to the idea of *mens rea*. First, an MDC should reconsider whether the levels of *mens rea* commonly ascribed to criminal offenses—purpose, knowledge, recklessness, and negligence—sufficiently account for the developmental immaturity of youth.[349] In particular, given the psychosocial immaturity of youth, an MDC should consider whether youth should only be found guilty for behavior that is purposeful or knowledgeable not behavior that is reckless or negligent. An MDC should also seek to define any levels of *mens rea* chosen in ways that better reflect the diminished decisionmaking capacities of youth relative to adults.[350] Additionally, an MDC should reexamine common theories of liability as applied to youth. For example, given the research regarding adolescents' susceptibility to peer pressure, short-term time orientation, and immature executive function, theories such as duress, self-defense, and felony murder are ripe for review and modification or elimination.[351]

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346. Importantly, while an MDC may be informed by and may parallel the organization and structure of the Model Penal Code in many ways, it is critical that an MDC avoid the temptation to mimic the substance of the Model Penal Code without a developmentally grounded justification.

347. *See* Sharron E. Dawes et al., *Adjudicative Competence*, 21 CURRENT OP. PSYCHIATRY 490, 490 (2008), https://pmc.ncbi.nlm.nih.gov/articles/PMC2570182/pdf/nihms-58982.pdf [https://perma.cc/H92C-L3J8] (defining adjudicative competence as "[t]he notion that a defendant should be mentally able to participate in the court proceedings has been present in the Western law in some form since the 14th century C.E., at which time the English law required that the defendant be able to plead guilty or not guilty."); Thomas Grisso, *The Restatement of Law on Juveniles' Adjudicative Competence and Rights in Interrogation: Evidence of Progress*, 91 U. CHI. L. REV. 315, 319 (2024) ("The fact that juveniles have less mature cognitive and decision-making capacities on average than adults has required fundamental differences in the application of legal competence in juvenile court compared to criminal court.").

348. *See* Grisso, *supra* note 347, at 321 ("The Guide offers for consideration, based on research findings, a nonrebuttable presumption of incompetence for youth 10 and younger, and a rebuttable presumption for ages 11–13.").

349. *See* Carroll, *supra* note 266, at 541–44, 590–98; Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 162–67 (2003).

350. *See supra* notes 293–300 and accompanying text.

351. *See* Levick & Tierney, *supra* note 298, at 517–26; Beth Caldwell, *The Twice Diminished Culpability of Juvenile Accomplices to Felony Murder*, 11 U.C. IRVINE L. REV. 905, 911, 923–33 (2021).

Finally, as youth do not have the same right to participate in the creation of the law as adults and do not share their same knowledge or experience, an MDC should reconsider whether ignorance or mistake of law should provide youth with protections not currently available to adults.

b. Construct Developmentally Responsive Individual Offense Definitions

In reconstructing the legal definition of delinquency, an MDC should redraw the line between public health and delinquency court jurisdiction in favor of nonintervention or the provision of *voluntary*, community-based services and supports.[352] Eliminating misdemeanors from the definition of delinquency as proposed above is one way to accomplish this goal. However, this approach remains tethered to the definition of criminal offenses normed on adults. Rather, an MDC could start afresh and make intentional, nuanced judgements about what youth behaviors should be categorically included and excluded from court jurisdiction moving forward and how such included unlawful behaviors are defined. In creating new developmentally responsive definitions of specific offenses, an MDC should evaluate a variety of dimensions of harm—including, but not limited to, the degree of personal injury, the value of property damaged or taken, and the frequency of the youth's behavior—alongside the normative diminished decisionmaking capacities of adolescence.

Consider the crime of assault[353] as an example. Over the course of my career, I have represented numerous youths arrested and charged with assault for alleged behavior that included altercations with siblings and schoolmates that resulted in no physical injury, fist fights that resulted in bloody noses or cuts, and throwing an egg at someone on Halloween. All these behaviors run afoul of the definition of assault, which typically includes *attempting to cause* or causing bodily injury as well as merely using one's actions to put someone in fear of bodily harm.[354] There may be good reasons for the breadth of this definition when it comes to adults. However, while physical fighting during childhood is behavior we want to discourage, it is relatively common among youth and not necessarily behavior that requires or justifies court intervention.[355]

The task of an MDC would be to reconstruct the definition of assault in a manner that reflects the developmental immaturity of youth. There are a variety of

352. It is critical that such services be voluntary in order to avoid effectively recreating the pre-*Gault* juvenile court where youth were compelled to participate in services without legal representation or due process.

353. *See* MODEL PENAL CODE § 211.1 (AM. L. INST., Proposed Official Draft 1962).

354. *See* MODEL PENAL CODE § 211.1 (AM. L. INST., Proposed Official Draft 1962). The breadth of this definition is perhaps best exemplified by the fact that the definition of bodily injury is "physical pain, illness, or any impairment of any physical condition . . . ." MODEL PENAL CODE § 210.0(2) (AM. L. INST., Proposed Official Draft 1962).

355. While the prevalence physical fighting among high school aged youth has decreased over the past thirty years, in 2023, approximately 1 in 5 high school students (19.2%) still reported having been involved in a fight over the last 12 months. *See High School Students Who Were in a Physical Fight*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://yrbs-explorer.services.cdc.gov/#/graphs?questionCode=H16&topicCode=C01&location=XX&year=2023 [https://perma.cc/L8SD-KUPJ] (last visited Mar. 20, 2025).

ways that this could be accomplished. For example, the definition of assault could require some level of significant[356] or serious bodily injury[357] rather than requiring merely *de minimis* injury, the attempt to cause injury, or actions that threaten injury. Another way to potentially distinguish between assaultive behavior that should or should not fall under the jurisdiction of the juvenile could be its frequency, regardless of the level of injury caused. In other words, one fistfight that does not result in significant or serious bodily injury would not be defined as an assault under the eyes of the law, but multiple fistfights within a specified period could form the basis for delinquency court intervention. An MDC thus could create a rule that a single impulsive act that does not result in more than *de minimis* harm should not form the basis for court intervention. The MDC could also create a corollary to that rule that habitual behavior could justify court intervention regardless of the harm that resulted from each individual act.[358]

c. Construct New Tools of Intervention

An MDC should encourage the delinquency court to move away from many of the tools and practices borrowed from the criminal court. This requires exploring, among other things, ending the delinquency court's reliance on control approaches and eliminating the collateral consequences that can attach to delinquency adjudications. Specifically, an MDC should explore ways to prohibit or significantly limit youth incarceration and propose a new model to replace the current probation function of the delinquency court. These incapacitation and supervision approaches, borrowed from the adult criminal court, could be replaced with more therapeutic approaches grounded in research and evidence. An MDC also should reevaluate the value and harms of collateral consequences as they relate specifically to youth. In particular, an MDC could explore the various ways that a delinquency adjudication continues to affect a youth well past the closure of their case, including, but not limited to, the impact on adult sentencing; disqualifications from education, employment, and housing; and sexual offender registries. An MDC could also propose best practices for both the confidentiality of records and proceedings as well as the meaningful sealing and expungement of records.

B. DECRIMINALIZE ENVIRONMENT BY ELIMINATING THE JUVENILE COURT'S JURISDICTION OVER NONCRIMINAL BEHAVIOR

The decriminalization of environment requires the elimination of the court's jurisdiction over noncriminal adolescent behavior. Specifically, this requires

356. *See, e.g.*, D.C. CODE § 22-404(a)(3) (defining significant bodily injury to include, among other specific examples, "[a]n injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or medical treatment beyond what a layperson can personally administer").

357. *See, e.g.*, MODEL PENAL CODE § 210.0 (AM. L. INST., Proposed Official Draft 1962) (defining serious bodily injury as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ").

358. A similar approach could also be taken to reconstructing the offense of theft. *See* MODEL PENAL CODE §§ 223.1, 223.2 (AM. L. INST., Proposed Official Draft 1962).

removing status offenses from the court jurisdiction altogether. Altering the court power in this manner will reduce the manner in which the court criminalizes the environment in which youth find themselves and further the realignment of state resources to developing non-court-based interventions that provide direct, meaningful support to youth and families.

For the last half-century, our societal approach to status offenses has swung between a desire to move to more evidence-based, community-based approaches and a regression to more punitive, court-centered approaches.[359] The manifestation of this debate in policy has largely centered on two questions. First, to what extent should the juvenile court exercise jurisdiction over status offenses?[360] Second, to what extent should youth charged with or adjudicated of status offenses be institutionalized?[361] Given short shrift in the policy debate for far too long has been the meaningful consideration of the question of whether the juvenile court should have jurisdiction over status offenses in the first place.[362] It should not.[363]

As discussed *supra* Part I, the statutory definition of delinquency was changed shortly after the launch of the Chicago Juvenile Court to expand the jurisdiction of the court to include behavior considered to be a precursor to criminal behavior.[364] For most of the history of the juvenile court, status offenses were criminalized under the definition of delinquency. Beginning in the 1960s, numerous reformist reforms[365] were implemented that have undoubtedly benefited individual youth. These reforms include the creation of status offenses as a category of court jurisdiction separate from delinquency,[366] a significant reduction in status offense petitions,[367] and the adoption

359. COAL. FOR JUV. JUST., DEINSTITUTIONALIZATION OF STATUS OFFENDERS (DSO): FACTS AND RESOURCES 2 (Jan. 2014 rev. ed.), https://www.juvjustice.org/sites/default/files/resource-files/DSO%20Fact%20Sheet%20Revised.pdf [https://perma.cc/4BDV-H2DL].

360. ANNIE SALSICH & JENNIFER TRONE, FROM COURTS TO COMMUNITIES: THE RIGHT RESPONSE TO TRUANCY, RUNNING AWAY, AND OTHER STATUS OFFENSES 2 (2013), https://www.vera.org/downloads/publications/from-courts-to-communities-response-to-status-offenses-v2.pdf [https://perma.cc/V5YU-6WXN] (discussing the "[r]ise and [f]all" in the number of status offense cases that were petitioned between 1995 and 2010); OFF. JUV. JUST. & DELINQ. PREVENTION, STATISTICAL BRIEFING BOOK: ESTIMATED NUMBER OF PETITIONED STATUS OFFENSE CASES (Dec. 20, 2023), https://www.ojjdp.gov/ojstatbb/court/qa06601.asp [https://perma.cc/5RBQ-Q5B2] (reporting that the number of status offense cases fell 50% percent between 2013 and 2022).

361. Beginning with the passage of the Juvenile Justice and Delinquency Prevention Act in 1974, the federal government tried to incentivize states to limit the detention and incarceration of status offenders. *See* COAL. FOR JUV. JUST., *supra* note 356, at 2–3.

362. *See* SPINAK, *supra* note 8, at 127–62 (describing the history of status offense policy and practice in the United States since the launch of the first juvenile court).

363. *See id.* at 159 (discussing the movement to eliminate status offenses from family court jurisdiction); Mae C. Quinn et al., *A More Grown-Up Response to Ordinary Adolescent Behaviors: Repealing PINS Laws to Protect and Empower D.C. Youth*, 25 U.D.C. L. REV. 1, 2 (2022).

364. *See* SPINAK, *supra* note 8, at 128 ("The idea was that the state would help a parent keep a young person on the straight and narrow before she could get into real criminal trouble.").

365. Reformist reforms are those that seek to mitigate the harms caused by a system without challenging the system itself and why it is causing harm in the first place. *See supra* notes 236–37 and accompanying text.

366. *See* SPINAK, *supra* note 8, at 128–29.

367. *See* SALSICH & TRONE, *supra* note 360, at 2–3; OFF. JUV. JUST. & DELINQ. PREVENTION, *supra* note 360.

of restrictions on the use of outplacement.[368] However, despite evidence that court involvement does not help and often harms youth charged with status offenses, family courts still have jurisdiction over the noncriminal misbehavior of youth. Moreover, youth charged with status offenses are still, by and large, subject to the same technology as youth charged with delinquency.[369]

Responding to noncriminal misbehavior through arrest, court supervision, and institutionalization epitomizes the criminalization of environment.[370] Take the example of one of my former clients, Hope.[371] Hope was kind, smart, hardworking, and popular. She was on the honor roll and engaged in extracurricular activities. Upon graduating high school, Hope wanted to go to college and then to law school so that she could protect and help others. Like too many youths who come into contact with the family court, Hope had experienced more trauma by her sixteenth birthday than many folks experience in a lifetime. Both her parents struggled with behavioral health issues and substance abuse, making her home life often chaotic. When Hope was around eight years old, she was removed from her home and spent three years in foster care before being reunified with her parents. Hope was removed again in her teenage years because of new allegations of abuse and neglect.

When I was appointed to represent Hope in a case involving allegations of truancy, Hope was still connected to the child welfare system. Indeed, her child welfare social worker referred the case to the family court. Moreover, the days Hope was alleged to have missed school occurred while she was living in a foster placement under the care and supervision of the child welfare agency. During the school year in which the alleged truancy occurred, Hope lost her father, was diagnosed with Major Depressive Disorder and Post-Traumatic Stress Disorder (PTSD), was psychiatrically hospitalized, and had to transfer schools due to safety issues. Many of the days she was alleged to have missed were connected to meetings with the child welfare agency and medical appointments, but the agency never provided the required documentation to her schools to excuse the absences. The agency also failed to connect her to meaningful community-based behavioral

368. *See* Robert W. Sweet Jr., *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389, 404–11 (1991) (discussing the creation and implementation of the deinstitutionalization of status offenders requirement in the Juvenile Justice and Delinquency Prevention Act of 1974).

369. *See* SPINAK, *supra* note 8, at 133 ("[S]tates have not yet eliminated the ultimate availability of the court to hear the complaints of parents, schools, and law enforcement officers when they believe there is no other effective alternative . . . And while the court's power to lock up a youth in a status offense case has been curtailed, it remains available in many states among the dispositions at the court's disposal, which also include probation, treatment, rules of behavior, and placement outside the home."); *see also* OFF. JUV. JUST. & DELINQ. PREVENTION, STATUS OFFENDERS 1–2 (2015) https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/status_offenders.pdf [https://perma.cc/8D6W-EYN2]; SALSICH & TRONE, *supra* note 367, at 2–4.

370. *See* SPINAK, *supra* note 8, at 127 ("Status offense jurisdiction is also the clearest example of the tenacity of family court to sustain its discretionary authority to fix children and mend families even in the face of overwhelming evidence that the court's prescriptions have failed.").

371. Again, my client's name and some identifying details have been changed to protect her confidentiality.

health services and to seek accommodations for her in school for her depression and PTSD. Although the government ultimately dismissed the case when this evidence came to light, it had unsuccessfully sought to detain Hope during the pendency of the proceedings.

Again, should the state intervene in the above-mentioned situation? Yes. Should the government intervene through the juvenile court system? No, especially not when its own failures are, at least in part, responsible for a youth's struggles. While the child welfare system itself as exemplified in Hope's case is by no means a panacea,[372] a more human-services centered agency is far better situated than the status offense court to address Hope's needs and ameliorate the root causes of her truancy. Indeed, at best, the only additional tool the status offense court may have that is not available to a human-services or child welfare agency is secure detention. However, as has been well-documented, secure detention would remove Hope further from school while exacerbating the root causes of Hope's nonattendance.[373]

Hope's case is not an aberration but rather reflects the state's failure to provide adequate and effective prevention and intervention services to youth and families in the community.[374] This kind of systemic failure is far too common. Washington State's experiment with decriminalizing status offenses provides a telling example. Informed by the work of the American Bar Association, Washington eliminated juvenile court jurisdiction over status offenses in the late 1970s.[375] The reduction in the footprint of the family court anticipated that the state would provide robust social services to youth and families in place of family court involvement.[376] However, no such continuum was ever built. Rather, due to budget cuts during the 1980s, children and families were either ignored or referred to the child welfare system.[377] In the wake of a small number of incredibly tragic incidents in the 1990s, Washington reversed course and returned jurisdiction over status offenses to the court without having built the planned continuum of supportive services.[378]

The District of Columbia provides another example. In 2020, the District's Juvenile Justice Advisory Group published a report recommending that D.C.'s

372. *See generally* SPINAK, *supra* note 8 (highlighting that if the state and local child welfare systems make incorrect choices, the court should protect the child and family affected, not condone the choices); ROBERTS, *supra* note 20 (outlining the ways in which the child welfare system harms Black families).

373. *See* RICHARD MENDEL, THE SENT'G PROJECT, WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE 12–17 (2022), https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/ [https://perma.cc/99WV-GS5F] (discussing how incarceration impedes young people's success in education, exacerbates underlying issues such as trauma, and often increases recidivism by disrupting psychosocial development and educational attainment).

374. In my fifteen years as a youth defender and advocate, one of the most common complaints I hear from parents is that they made countless efforts to seek out community-based services before their child became system-involved only to be told that such services did not exist or would not be provided until the child became system-involved.

375. *See* Thomas Neville, *Washington's Juvenile Status Offense Laws*, 2 U. PUGET SOUND L. REV. 170, 170–71 (1978); SPINAK, *supra* note 8, at 149–50, 160–62.

376. *See* SPINAK, *supra* note 8, at 150.

377. *See id.*

378. *See id.* at 160–62.

criminalization of status offenses be replaced by a continuum of voluntary, community-based services designed to support youth and families.[379] The recommendations were never meaningfully considered or implemented.[380] Instead, the District's mayor announced a curfew enforcement pilot led by the Metropolitan Police Department and the agency that supervises and incarcerates youth committed to the District by the delinquency and PINS courts.[381]

It is past time to decriminalize adolescent noncriminal misbehavior and to remove status offenses from court jurisdiction entirely and permanently. The research and lived experience of youth charged with status offenses have demonstrated time and time again that responding to noncriminal misbehavior with court intervention is both ineffective and harmful.[382] Removing court jurisdiction over status offenders is a key element of correcting the flaws in the legal construct of delinquency at the foundation of the juvenile court.

C. DECRIMINALIZE OTHERNESS BY ENSURING THE DEFINITION OF DELINQUENCY TREATS ALL CHILDREN AS CHILDREN

To become truly developmentally responsive and reverse the historical exclusion of Black and "othered" youth from the substantive protections of the juvenile court, the legal definition of delinquency must change to become fully inclusive. Practically speaking, this means eliminating any exceptions to delinquency court jurisdiction on the basis of age, charge, prior history, or a supposed determination that the youth is not amenable to rehabilitation. Specifically, eliminating such exceptions requires three policy solutions. First and foremost, efforts to repeal "Raise the Age" statutes—like those currently underway in Louisiana—must be rejected.[383] Second, all statutory exclusion provisions should be repealed.[384] And

379. *See* D.C. JUV. JUST. ADVISORY GRP., CREATE NEW OPPORTUNITIES FOR "PERSONS IN NEED OF SUPERVISION" (PINS) TO SUCCEED WITHOUT LEGAL SYSTEM INTERVENTION (Feb. 21, 2020), https://ovsjg.dc.gov/sites/default/files/dc/sites/ovsjg/service_content/attachments/JJAG%20PINS%20Alternatives%20Report%20February%202020.pdf [https://perma.cc/9GZS-3JBE].

380. *See* Quinn et al., *supra* note 363, at 3 ("At present, however, there is no uniform, coordinated, non-punitive approach across communities or agencies for so-called PINS matters. Status offenses remain 'on the books' as part of the D.C. Code. JJAG's call to have these youthful behaviors entirely decriminalized has yet to be realized.").

381. *See* Peter Hermann, *D.C. Officials Say They Will Enforce Youth Curfew in Certain Areas*, WASH. POST (Aug. 17, 2023, 5:53 PM), https://www.washingtonpost.com/dc-md-va/2023/08/17/dc-youth-curfew-violence/.

382. *See* SPINAK, *supra* note 8, at 127–62.

383. *See* MARCY MISTRETT & MARIANA ESPINOZA, THE SENT'G PROJECT, YOUTH IN ADULT COURTS, JAILS, AND PRISONS 5–7, https://www.sentencingproject.org/app/uploads/2022/09/Youth-in-Adult-Courts-Jails-and-Prisons.pdf [https://perma.cc/9CJH-3RKM]; Mark Ballard, *Senate Panel Votes to Repeal 'Raise the Age' Law, Send 17-year-olds to Adult Prison*, ADVOCATE (Apr. 26, 2022), https://www.theadvocate.com/baton_rouge/news/politics/legislature/senate-panel-votes-to-repeal-raise-the-age-law-send-17-year-olds-to-adult/article_2a448746-c597-11ec-959b-db8a3bb3be1d.html [https://perma.cc/59JQ-29W3] (discussing efforts in Louisiana to repeal the raising of the age of delinquency court jurisdiction to include 17-year-olds). In June 2023, Governor Bel Edwards vetoed the repeal. *See* Letter from John Bel Edwards, Governor, to Patrick Page Cortez, Senate President (June 28, 2023), https://gov.louisiana.gov/assets/2023Vetoes/SB159.pdf [https://perma.cc/LZX7-C5ES].

384. *See* MISTRETT & ESPINOZA, *supra* note 383, at 7 (describing statutory exclusion provisions as "unnecessarily broad and arbitrary.").

finally, statutory provisions that allow youth to be directly filed in adult court by a prosecutor or transferred to adult court by a judge should be repealed.[385] In sum, all cases involving an alleged delinquent act committed before the age of 18 should fall within the jurisdiction of the delinquency court.[386]

What about the cases involving the most serious harm (e.g., cases involving the loss of life, very serious injury, rape, and burglary or robbery while armed with a gun)? The answer is not blended sentencing, which provides various avenues through which the criminal court can still take jurisdiction over a young person for delinquent behavior that occurred while they were a minor.[387] Rather, the answer is to construct a definition of delinquency that includes an extended age of jurisdiction of the delinquency court to age twenty-five for these most serious offenses.[388] Such an approach would provide the delinquency court with sufficient time to sanction and support the overwhelming majority of youth charged in adult court.[389] Moreover, retaining such youth in the delinquency system is also likely to reduce recidivism and improve public safety.[390] Thus, the answer, even in the most serious cases, is reconstructing the definition of delinquency to be truly developmentally responsive and provide the delinquency court with original jurisdiction over *all* youth under the age of 18.

CONCLUSION

Forming the theoretical and practical basis of the jurisdiction of the delinquency court, the legal construct of delinquency is a foundational first principle in the design of the juvenile court and plays a significant role in implementing the

385. *See id.*

386. Importantly, while such a change would result in an increase in the number of youth charged in delinquency court, such a change would wholly abolish the harmful practice of charging youth as adults. *See id.* at 2-5 (describing the harms caused by trying youth in adult court).

387. *See* Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts, in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 145, 146 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (recognizing that blended sentencing is appealing as "it combines rehabilitation in the juvenile justice system with the possibility of sanctions in the criminal justice system"). Under blended sentencing schemes, delinquency courts can: "(1) impose a juvenile or an adult sentence; (2) impose both a juvenile and adult sentence, with the adult sentence suspended under conditions; or (3) impose a sentence past the normal limit of juvenile court jurisdiction; typically a hearing is held when the juvenile reaches eighteen to twenty-one to determine if an adult sentence will be imposed."). *Id.*

388. The maximum age of original jurisdiction is the oldest age under which prosecution must commence in delinquency court. The maximum age of extended jurisdiction is the oldest age at which the delinquency court maintains the power to provide sanctions or services to an individual. For example, a state with a maximum age of original jurisdiction of seventeen and extended age of jurisdiction of twenty-five can charge an individual in delinquency court for an act they committed before turning eighteen and maintain power over that individual until their 26th birthday.

389. *See* Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, OFF. JUV. JUST. & DELINQ. PREVENTION, June 2010, at 1–2, https://www.ojp.gov/pdffiles1/ojjdp/220595.pdf [https://perma.cc/YWR3-DPVM] ("Seventy-eight percent were released from prison before their 21st birthday, and 95 percent were released before their 25th birthday, with an average of 2 years, 8 months of time served on their sentences." (citation omitted)).

390. *See id.* at 5–8 (discussing studies showing that transferring juveniles to adult court increases recidivism rates and undermines public safety).

court's philosophical approach of *parens patriae*. As a result, it is also chiefly responsible for the delinquency court's failure to live up to either its diversionary or citizen-building goals. To the contrary, rather than support the court's attempt to serve as a wise parent, the derivative, overbroad, and incomplete essence of the legal construct of delinquency led to the criminalization of adolescence, environment, and "otherness." Accordingly, the legal construct of delinquency must be fundamentally reimagined to be more developmentally appropriate, less paternalistic, and truly diversionary. Reconstructing the legal definition of delinquency—and thus the jurisdiction of the delinquency court—in this manner will help make the juvenile court smaller, more effective, and more just.