

2017

## Decriminalizing Childhood

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### Recommended Citation

Andrea L. Dennis, *Decriminalizing Childhood*, 45 Fordham Urb. L.J. 1 (2017).  
Available at: <https://ir.lawnet.fordham.edu/ulj/vol45/iss1/1>

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# DECRIMINALIZING CHILDHOOD

*Andrea L. Dennis\**

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## INTRODUCTION

Juvenile arrest rates have decreased significantly over the last decade.<sup>1</sup> In 2014, law enforcement nationwide arrested

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\* Professor, University of Georgia School of Law. Thank you to the editorial board for inviting me to contribute to this edition. Valuable feedback on earlier drafts was provided by the Mid-Atlantic Criminal Law Research Collective and Jean Goetz Mangan. Madison Hahn contributed helpful research assistance. All errors or omissions are my own. Thanks for everything, Plum.

approximately one million youth under eighteen years of age.<sup>2</sup> This figure represents a significant drop from the almost two million youth arrested in 2005.<sup>3</sup> The number of delinquency cases has also declined over this timeframe.<sup>4</sup> From 2005 to 2014 the number of delinquency cases processed by juvenile courts decreased by 42%.<sup>5</sup> In 2005 juvenile courts handled more than 1.6 million juvenile delinquency cases.<sup>6</sup> The number of cases dropped to about 975,000 in 2014.<sup>7</sup> Despite these substantial decreases over a ten-year period, the number of delinquency cases handled was still quite large.

Most delinquency cases involve non-violent offenses. Generally speaking, juvenile delinquency court cases can be grouped into four categories of offenses. Most of the cases processed involved property offenses (34%), followed by victim-based crimes (27%), public order offenses (26%), and drug offenses (13%).<sup>8</sup>

Once a youth is referred to juvenile court, his or her case is likely to remain in juvenile court. Petitions, or complaints, were filed in about 56% of delinquency cases referred to court, leading the cases to be formally handled by the juvenile court.<sup>9</sup> Slightly more than 50% of petitioned cases resulted in youth being adjudicated delinquent in juvenile court.<sup>10</sup> Judges imposed probation in approximately 63% of these cases, with the remainder resulting in placement in a state residential facility (26%) or another sanction such as a financial or

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1. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2014, 7 (2017), <http://www.ncjj.org/pdf/jcsreports/jcs2014.pdf> [<https://perma.cc/TB5W-DX87>]. In April 2017, the U.S. Department of Justice issued the most detailed available justice data, which is from 2014. *Id.* at 4.

2. Office of Juvenile Justice & Delinquency Prevention, *Statistical Briefing Book* (2017), <https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qaDate=2014&text=yes> [<https://perma.cc/7U8F-LTDD>].

3. *Id.*

4. HOCKENBERRY & PUZZANCHERA, *supra* note 1, at 8. In this case analysis report, juvenile includes those age ten years or older, with the upper age for juvenile court jurisdiction determined by the laws of each jurisdiction. *Id.*

5. *Id.* at 6. The process begins at intake, meaning screening. *Id.* at 2.

6. *Id.* at 6.

7. *Id.*

8. *Id.*

9. *Id.* at 38.

10. *Id.* at 44.

community service obligation (11%).<sup>11</sup> In 2013 approximately 35,000 youth were confined in juvenile corrections facilities.<sup>12</sup>

Some petitioned cases will be waived to adult criminal court, though the numbers have decreased in the last ten years. The number of petitioned delinquency cases that juvenile court judges then transferred to adult criminal court for prosecution declined from 7200 in 2006 to about 4000 in 2014.<sup>13</sup> In 2014, over 4500 youth were in adult jails and prisons.<sup>14</sup> Thus, despite this decline, there is still a significant number of juvenile offenders in adult jails across the county.

The declines in numbers of juveniles arrested, tried, and detained are positive steps for many children's advocates and policymakers, not to mention youth and their families. However, the number of delinquency cases is still quite large as is the number of children being supervised by probation officials or living in state facilities for youth and adults.

Additionally, these positive gains are not evenly experienced by all youth, particularly youth living in urban areas. In 2011–2012, almost 85% of children lived in urban areas.<sup>15</sup> Government surveillance is deployed in many urban jurisdictions; hence, misbehavior by a juvenile who lives in an urban area is likely to be detected.<sup>16</sup> Youth who live in urban areas are more likely to have their cases formally processed in the juvenile justice system rather than informally

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11. *Id.* at 52, 54.

12. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 6 (2017), [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf) [<https://perma.cc/2QBC-35YF>].

13. HOCKENBERRY & PUZZANCHERA, *supra* note 1, at 40.

14. THE SENTENCING PROJECT, *supra* note 12, at 6.

15. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD HEALTH USA 2014, at 10 (2015), <https://mchb.hrsa.gov/chusa14/dl/chusa14.pdf> [<https://perma.cc/6BT5-9B3S>]. "Urban areas include metropolitan areas and surrounding towns with populations of 50,000 and above." *Id.* Similarly, "[t]he [U.S.] Census Bureau identifies two types of urban areas: 'urbanized areas' of 50,000 or more people and 'urban clusters' of at least 2,500 and less than 50,000 people. There are 486 urbanized areas and 3,087 urban clusters nationwide." Press Release, U.S. Census Bureau, Growth in Urban Population Outpaces Rest of Nation, Census Bureau Reports (Mar. 6, 2012), [https://www.census.gov/newsroom/releases/archives/2010\\_census/cb12-50.html](https://www.census.gov/newsroom/releases/archives/2010_census/cb12-50.html) [<https://perma.cc/KM49-S33N>].

16. *See generally* NANCY G. LA VIGNE ET AL., URBAN INST., JUSTICE POLICY CTR., EVALUATING THE USE OF PUBLIC SURVEILLANCE CAMERAS FOR CRIME CONTROL AND PREVENTION (Urban Inst. ed., 2011), <https://www.urban.org/sites/default/files/publication/27556/412403-evaluating-the-use-of-public-surveillance-cameras-for-crime-control-and-prevention.pdf> [<https://perma.cc/GP9R-DR8F>].

resolved.<sup>17</sup> Moreover, urban jurisdictions operate complex court systems that administer large dockets of juvenile cases with greater formality and severity than non-urban jurisdictions.<sup>18</sup>

The reach of the justice system has a particularly disparate effect on minority youth. Minority youth tend to live in heavily-policed urban areas, and consequently, they are disproportionately involved in the juvenile justice system.<sup>19</sup> Approximately 15% of U.S. children ages zero to seventeen years old are black.<sup>20</sup> Yet, in 2014, black youth constituted 36% of the overall number of delinquency cases processed by juvenile courts.<sup>21</sup> Black youth made up 42% of those detained<sup>22</sup> and constituted 15% of youth under juvenile court jurisdiction.<sup>23</sup> Moreover, 62% of cases involving black youth were petitioned, in comparison to 52% for white youth.<sup>24</sup> In 2013, black youth comprised approximately 40% of children committed to residential placement facilities for delinquency or status offenses.<sup>25</sup>

Over its more than 100-year history, the juvenile justice system has dramatically transformed. The original concept of the juvenile justice system consisted of a singular, informal juvenile court focused on rehabilitating youthful offenders engaged in criminal and noncriminal

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17. NAT'L RESEARCH COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 242 (Joan McCord et al. eds., 2001) [hereinafter JUVENILE CRIME, JUVENILE JUSTICE]. See generally BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT (Michael Tonry & Norval Morris eds., 1999); Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 158 (1991) [hereinafter Feld, *Justice by Geography*].

18. Feld, *Justice by Geography*, *supra* note 17, at 206–08.

19. JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 17, at 90–91, 244.

20. Fed. Interagency Forum on Child & Family Statistics, *POP3 Race and Hispanic Origin Composition: Percentage of U.S. Children Ages 0–17 by Race and Hispanic Origin, 1980–2016 and Projected 2017–2050*, <https://www.childstats.gov/americaschildren/tables/pop3.asp> [<https://perma.cc/KR4B-S8EM>].

21. HOCKENBERRY & PUZZANCHERA, *supra* note 1, at 35. Delinquency offenses are offenses by juveniles that could result in criminal prosecution if committed by an adult. *Id.* at 5.

22. *Id.* Detention means court-ordered placement in a secure state facility while the case is pending, that is, between intake and disposition. *Id.* at 99.

23. *Id.* at 21. Juvenile court jurisdiction broadly includes delinquency offenses, dependency cases, and status offenses. See *infra* Section B.I. These statistics are drawn from an analysis of delinquency cases and status offense cases nationwide. HOCKENBERRY & PUZZANCHERA, *supra* note 1, at vii. Status offenses are offenses that are illegal only when committed by a person of juvenile status. *Id.* at 67. Status offenses include truancy and underage liquor law violations. *Id.*

24. *Id.* at 39.

25. THE SENTENCING PROJECT, *supra* note 12, at 6.

conduct to help them become productive citizens.<sup>26</sup> The original system has been replaced by a network of juvenile, criminal, and specialty courts, any one of which may adjudicate a child's court case.<sup>27</sup> Once juveniles enter this complex system, many negative legal impacts can occur, including lengthy periods of community supervision or incarceration and substantial fines and fees.<sup>28</sup> Additionally, once involved in the justice system, children may be negatively psycho-socially affected by the experience.<sup>29</sup> Court-involved youth are more likely to reoffend, experience physical or mental health problems, have poor educational outcomes, and have difficulty in the job market.<sup>30</sup> Even after a case is resolved, youth will face collateral or indirect consequences that follow them into adulthood.<sup>31</sup> Generally, these consequences can impair access to higher education, employment, housing, voting, military, and citizenship opportunities.<sup>32</sup> Prosecutors may use juvenile cases to enhance individuals' future criminal sentences.<sup>33</sup> Thus, from the moment of arrest, juveniles can be damaged in the near-term and the long-term by the juvenile justice system.

This Article considers legislative decriminalization of juvenile misconduct, an underutilized method for juvenile justice reform.<sup>34</sup> Decriminalization can prevent youth from entering the juvenile

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26. Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 388–91 (2013).

27. See discussion *infra* Section I.B.; NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 77–82 (Richard J. Bonnie et al. eds., 2013) [hereinafter REFORMING JUVENILE JUSTICE]; see also Simon I. Singer, *Criminal and Teen Courts as Loosely Coupled Systems of Juvenile Justice*, 33 WAKE FOREST L. REV. 509, 509 (1998) (arguing that juvenile courts are no longer a unitary system, but rather a complex of sub-systems to which children are diverted).

28. See discussion *infra* Section I.C.

29. *Id.*

30. *Id.*

31. Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1111 (2006). The American Bar Association ("ABA") created a searchable online database of the collateral consequences that may be imposed on juveniles. See *Collateral Consequences of Conviction Project*, AM. BAR ASS'N (2017) [hereinafter ABA *Collateral Consequences*], [https://www.americanbar.org/groups/criminal\\_justice/niccc.html](https://www.americanbar.org/groups/criminal_justice/niccc.html) [https://perma.cc/X5QK-3F9Y].

32. Pinard, *supra* note 31, at 1111. The ABA Criminal Justice Committee created a searchable online database of the collateral consequences that may be imposed on juveniles. See ABA *Collateral Consequences*, *supra* note 31.

33. Pinard, *supra* note 31, at 1115.

34. See discussion *infra* Part I.

justice system and the problems that stem from system contact.<sup>35</sup> This topic has received little attention in the scholarly literature, though in the last several years, a few jurisdictions scattered across the nation have decriminalized, or attempted to decriminalize, youthful behavior.<sup>36</sup> This Article endeavors to begin a conversation among youth scholars, advocates, and policymakers about decriminalization as a mechanism for reforming the juvenile justice systems in the United States.

Scholars and policymakers have well-documented the continuing, disproportionate flow of urban and black youth into the juvenile justice system, the long-lasting harms that flow from arrest and court-involvement, and science indicating that juvenile misbehavior is often developmentally normal.<sup>37</sup> These points will not be rehashed in detail. This Article also does not attempt to add to the important efforts by scholars and policymakers to propose and implement multifaceted reforms to the juvenile justice process to improve outcomes. Instead, this Article seeks to help youth avoid the juvenile justice complex altogether by using decriminalization—a legal tool—to narrow the means of entry.<sup>38</sup>

This Article proceeds in three parts. Part I paints a picture of the contemporary juvenile justice system and its damaging impact on youth. Part I begins by describing two factors—over-criminalization and the school-to-prison pipeline—that contribute to the breadth of laws allowing referral of juveniles to the court system for serious and relatively innocuous conduct.<sup>39</sup> Once a child is referred to the court system, the case may be adjudicated in any of a number of courts: generalist juvenile courts, adult criminal courts, or youth problem-solving courts.<sup>40</sup> Part I next outlines the features and practices of those courts.<sup>41</sup> Upon entry into any one of these court systems, children can experience negative physical, emotional, and social

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35. *Id.*

36. *See* discussion *infra* Part II.

37. *E.g.*, REFORMING JUVENILE JUSTICE, *supra* note 27, at 89–100 (summarizing youth development research); Henning, *supra* note 26, at 388–91 (summarizing youth development research).

38. Preventing children from offending through the implementation of early intervention programs is the best solution. REFORMING JUVENILE JUSTICE, *supra* note 27, at 21–22. This Article will not address the many programmatic efforts aimed at preventing juvenile wrongdoing that have been offered and implemented. For a discussion of those programs, see *id.* at 108–53.

39. *See* discussion *infra* Part I.

40. *Id.*

41. *Id.*

effects.<sup>42</sup> Part I closes by describing these effects, which disrupt positive youth development and transition into adulthood.<sup>43</sup>

Part II presents decriminalization, an under-utilized juvenile justice reform measure that can prevent children from entering the system and experiencing its damaging effects. Part II opens by setting forth the basics of decriminalization as discussed in the adult criminal justice context.<sup>44</sup> Part II then provides examples of lawmakers decriminalizing a few minor offenses, such as school absence, underage possession of alcohol, and fare evasion, when committed by youth.<sup>45</sup> These decriminalization efforts are few, scattered across the nation, and limited in scope. Part II concludes with a contrasting example, the unsuccessful effort in the 2017 Florida legislative session to decriminalize a range of non-serious juvenile conduct.<sup>46</sup>

Part III considers barriers to the implementation of decriminalization measures and how those might be addressed in future legislation. Part III analyzes concerns that decriminalization will diminish the public's ability to hold a juvenile accountable for misbehaving.<sup>47</sup> Part III also posits several unintended consequences of juvenile decriminalization that could pose harm to juveniles and their families.<sup>48</sup> These consequences include overcharging, long-term debt creation, and increased parental liability. Part III then offers recommendations for future proposals to decriminalize youthful behavior.<sup>49</sup>

The Article briefly concludes that decriminalization offers a promising solution that should be undertaken to advance public interest goals, and to protect youth from the negative effects of the juvenile justice system.<sup>50</sup>

## I. THE MODERN JUVENILE JUSTICE SYSTEM

Part I describes the modern juvenile justice complex, a group of interrelated courts that regulate a wide array of juvenile misbehavior and have a significant impact on youth development. Section I.A summarizes over-criminalization and the school-to-prison pipeline,

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42. *Id.*

43. *Id.*

44. *See* discussion *infra* Part II.

45. *Id.*

46. *See infra* Section II.C.

47. *See infra* Section III.A.

48. *See infra* Section III.B.

49. *See infra* Section III.C.

50. *See infra* Conclusion.



two phenomena broadly criminalizing youth behavior and providing means for referring youth to court for serious and non-serious conduct. Section I.B outlines the judicial regime that is tasked with adjudicating juvenile cases, including generalist juvenile courts, adult criminal courts, and youth specialty courts. Section I.C identifies the ways in which contact with the juvenile justice complex interferes with positive youth development.

### A. Over-Criminalizing Youth Behavior

Youth today have many pathways into the juvenile or adult criminal justice systems; their conduct is closely regulated. First, juveniles can be arrested and charged with any criminal offense that could be committed by an adult,<sup>51</sup> and there are many. The last half-century has seen the frenzied enactment of criminal laws, leading commentators to deem this the era of over-criminalization.<sup>52</sup> Both scholars<sup>53</sup> and interest groups<sup>54</sup> have offered critiques of the over-criminalization trend<sup>55</sup> and in recent years, the United States Supreme Court overturned two convictions stemming from this trend.<sup>56</sup> Second, some laws penalize behaviors only when committed

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51. REFORMING JUVENILE JUSTICE, *supra* note 27, at 51.

52. For a history of the over-criminalization trend, see generally Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL’Y 597 (2011). For enactment numbers of federal crimes since 1790, see Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 11–16 (2012).

53. See generally, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997); Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529 (2012); Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1578 (2010); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2012); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

54. See generally, e.g., BRYAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND., *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* (2010), [www.nacdl.org/report/withoutintent/PDF](http://www.nacdl.org/report/withoutintent/PDF) [<https://perma.cc/3Q5X-VVDJ>]; Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law*, 1998 A.B.A. CRIM. JUST. SEC. 1 (1998).

55. *But see* Klein & Grobey, *supra* note 52, at 11–16.

56. *Bond v. United States*, 134 S. Ct. 2077, 2086–94 (2014) (holding the prohibited possession or use of “chemical weapons” does not reach a wife’s conviction for simple assault for spreading chemicals on, among other things, the doorknob of her husband’s mistress, causing only a minor burn that was easily treated with water); *Yates v. United States*, 135 S. Ct. 1074, 1078, 1088–89 (2015) (holding that a “tangible object” is one used to record or preserve information under 18 U.S.C. § 1519

by youth, such as truancy, running away, disobeying parents, curfew violations, and consensual sexual activity.<sup>57</sup> Third, given the breadth of criminalization, police and prosecutors facilitate the court-involvement of youth when they exercise their discretionary authority.<sup>58</sup> More specifically, children can be referred to the juvenile and criminal justice systems for behavior that, while arguably satisfying criminal prohibitions, in the past would not have been considered worthy of court involvement.<sup>59</sup> For example, two fourteen-year-old boys were charged with assault with a dangerous weapon for, out of boredom, throwing pebbles across the train tracks at another boy.<sup>60</sup> In another example, a prosecutor charged a fifteen-year-old boy with resisting a police officer after the boy refused the officer's order to remove the hooded sweatshirt he was wearing in violation of a city ordinance prohibiting such.<sup>61</sup>

Finally, schools, where children spend much of their time, also contribute to the criminalization of youth and youth court-involvement. To improve school safety and student discipline, modern school systems have enacted comprehensive and rigid sets of disciplinary policies and practices.<sup>62</sup> The enactment of these policies and practices is attributable to continued concerns about youth misconduct generally and to concerns surrounding mass school

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imposing criminal liability on anyone who “knowingly . . . destroys . . . any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States”).

57. REFORMING JUVENILE JUSTICE, *supra* note 27, at 52.

58. Henning, *supra* note 26, at 426–27.

59. *Id.* at 428–29.

60. *Id.* at 427.

61. *Id.*

62. NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS (2013), <https://www.fas.org/sgp/crs/misc/R43126.pdf> [<https://perma.cc/4DQQ-4XCU>]; DANIEL J. LOSEN & RUSSELL J. SKIBA, SUSPENDED EDUCATION URBAN MIDDLE SCHOOLS IN CRISIS 2 (2010), [http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/suspended-education-urban-middle-schools-in-crisis/Suspended-Education\\_FINAL-2.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/suspended-education-urban-middle-schools-in-crisis/Suspended-Education_FINAL-2.pdf) [<https://perma.cc/5PNW-HT3J>]; TEX. APPLESEED, SUSPENDED CHILDHOOD (2015) [hereinafter TEX. APPLESEED, SUSPENDED CHILDHOOD], <https://spark.adobe.com/page/6dvQB/> [<https://perma.cc/S7GD-5C2N>]; THE COUNCIL OF STATE GOV'TS JUSTICE CTR., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT (2011), [https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf) [<https://perma.cc/S26F-J22H>]; U.S. Dep't of Justice & U.S. Dep't of Educ., Joint “Dear Colleague” Letter: Nondiscriminatory Administration of School Discipline (2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> [<https://perma.cc/5JKD-LDZG>].

shootings by students and others.<sup>63</sup> However, these school disciplinary regimes directly and indirectly push students out of school settings and into the juvenile and criminal justice systems, creating what is known as the school-to-prison pipeline.<sup>64</sup>

These modern disciplinary schemes apply not only to serious conduct (such as drug and violent crime) but also to minor conduct (such as disobedience and rough-housing) that in the past would not have warranted harsh treatment.<sup>65</sup> Anecdotes abound in which children have been referred to court for minor behavior that previously would have been handled within the school.<sup>66</sup> For example, a high school student who received free school lunches was charged with disorderly conduct and petty theft after he cut the lunch line to grab a carton of milk that he had forgotten to get when he initially went through the line and then disobeyed an officer who challenged him.<sup>67</sup>

School systems have adopted a number of consequences for misbehaving, including immediate suspension and exclusion from school for certain behaviors.<sup>68</sup> Schools also have embraced police

63. Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 778–80 (2017); Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Department of Justice Awards Hiring Grants for Law Enforcement & School Safety Officers (Sept. 27, 2013), <http://www.justice.gov/opa/pr/departments-justice-awards-hiring-grants-law-enforcement-and-school-safety-officers> [<https://perma.cc/9RTD-2NRA>].

64. NAT’L EDUC. ASS’N, POLICY STATEMENT ON DISCIPLINE AND THE SCHOOL-TO-PRISON PIPELINE (2016), <https://ra.nea.org/delegate-resources/policy-statement-on-discipline/> [<https://perma.cc/68Y4-NHTB>]; Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y. L. SCH. L. REV. 867, 868 (2009).

65. Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y. L. SCH. L. REV. 977, 978 (2009).

66. See, e.g., Rhonda Brownstein, *Pushed Out*, TEACHING TOLERANCE (Aug. 24, 2009), <https://www.tolerance.org/magazine/fall-2009/pushed-out/> [<https://perma.cc/Y9KQ-VQYN>] (providing multiple examples); Perry Chiaramonte, *High School Senior Jailed, Kicked Out of School and May Lose Army Dream Because of Pocket Knife in Car*, FOX NEWS (Mar. 18, 2014), <http://www.foxnews.com/us/2014/03/18/high-school-senior-jailed-kicked-out-school-and-may-lose-army-dream-because.html> [<https://perma.cc/YQC5-N2TQ>]; Mychal Denzel Smith, *On the Routine Criminalization of America’s Black and Brown Youth*, THE NATION (Jan. 31 2013), <https://www.thenation.com/article/routine-criminalization-americas-black-and-brown-youth/> [<https://perma.cc/6KWS-QFPU>] (seven-year-old arrested and handcuffed for playground scuffle over five dollars).

67. Nina Golgowski, *Teen Charged with Stealing 65-Cent Milk Carton to Go to Trial*, HUFFINGTON POST (Oct. 6, 2016), [http://www.huffingtonpost.com/entry/teen-charged-with-stealing-free-milk\\_us\\_57f3b69ce4b01b16aaafef68d](http://www.huffingtonpost.com/entry/teen-charged-with-stealing-free-milk_us_57f3b69ce4b01b16aaafef68d) [<https://perma.cc/WU X6-F9RH>].

68. NAT’L EDUC. ASS’N, *supra* note 64.

surveillance on school grounds.<sup>69</sup> Adopted tactics include physically searching students' bags before they enter school premises, scanning students with metal detectors and hand-held wands, deploying drug-sniffing dogs for students and lockers, and installing surveillance cameras campus-wide.<sup>70</sup> Many large school districts—especially those in urban settings—maintain police forces that operate on campus, whether as independent entities or as a unit of the local police force.<sup>71</sup> These officers issue tickets to students, investigate alleged misconduct, arrest students, and refer matters to the juvenile and adult criminal justice systems for prosecution.<sup>72</sup> As is the case in the criminal and juvenile justice contexts, data indicates that black youth are more likely to be subject to school discipline policies.<sup>73</sup>

## B. Dispensing (In)Justice

At present, jurisdictions utilize multiple courts to address criminalized juvenile conduct, including general juvenile courts, adult criminal courts, and specialty youth courts. Critics have raised concerns about the operations of each of these adjudicatory settings.

### 1. General Juvenile Courts

Until the late 1800s, criminal courts adjudicated offenses committed by children.<sup>74</sup> This practice changed in 1899 when the Illinois legislature established the nation's first juvenile court in Chicago, Illinois.<sup>75</sup> The juvenile court was fashioned as a non-adversarial court in which judges and probation officers were primarily concerned with rehabilitating and supporting the “wayward” child.<sup>76</sup> Jurisdiction was limited to those under the age of sixteen years.<sup>77</sup> Judges had authority to transfer juveniles to adult

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69. See Nance, *supra* note 63, at 780; see also NAT'L EDUC. ASS'N, *supra* note 64.

70. See Nance, *supra* note 63, at 768–70; see also NAT'L EDUC. ASS'N, *supra* note 64.

71. Thureau & Wald, *supra* note 65, at 978–79.

72. *Id.* at 991–95.

73. LOSEN & SKIBA, *supra* note 62, at 2; TEX. APPLESEED, SUSPENDED CHILDHOOD, *supra* note 62; U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., *supra* note 62.

74. See David S. Tanenhaus, *First Things First: Juvenile Justice Reform in Historical Context*, 46 TEX. TECH L. REV. 281, 282 (2013).

75. See *id.*

76. *Commonwealth v. Fisher*, 62 A. 198, 200 (Pa. 1905); Martin Guggenheim, *Barry Feld: An Intellectual History of a Juvenile Court Reformer*, 17 NEV. L.J. 371, 372 (2017); Tanenhaus, *supra* note 74, at 282–84.

77. JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 17, at 157.

criminal court.<sup>78</sup> Children were not charged with specific offenses; rather they could be brought before the court for committing a crime, being abused or neglected, or lacking adequate supervision.<sup>79</sup> Cases were confidential,<sup>80</sup> juveniles were unrepresented by counsel,<sup>81</sup> and judges acted without procedural restraints or accountability during investigation, adjudication, and disposition.<sup>82</sup>

By 1925, every state except Wyoming and Maine had established at least one juvenile court and every state now provides separate courts for juvenile cases.<sup>83</sup> Although the characteristics of modern juvenile courts vary widely across jurisdictions, as state law determines the scope of jurisdiction and structure of each locale's courts system,<sup>84</sup> general observations can be made.<sup>85</sup> Today, most juvenile courts have jurisdiction over delinquency, dependency, and status offenses.<sup>86</sup> Delinquency cases involve behavior committed by a youth that would be deemed criminal if committed by an adult.<sup>87</sup> Dependency cases are those in which the child's caretaker has failed to properly care for the child by being abusive or neglectful.<sup>88</sup> Status offenses are those behaviors that would not be unlawful for an adult, but that juveniles may not undertake, such as running away, disobedience, truancy, and violating curfew.<sup>89</sup>

Juvenile court jurisdiction is partially determined by the age of the court-involved youth, with youth of a certain age being ineligible to have their case heard in juvenile court.<sup>90</sup> This maximum age has varied over time, jurisdiction, and with the offending behavior and other factors.<sup>91</sup> As of 2016, in most states the upper age for

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78. See Tanenhaus, *supra* note 74, at 284.

79. JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 17, at 157. Lack of supervision included running away, skipping school, consuming alcohol, and engaging in sexual behaviors, what today we term "status offenses." *Id.* at 54.

80. *Id.* at 157.

81. Guggenheim, *supra* note 76, at 372.

82. *Id.*

83. JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 17, at 155, 157.

84. *Id.* at 162.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Dependency Court*, BLACK'S LAW DICTIONARY (10th ed. 2014).

89. JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 17, at 23.

90. ANGEL ZANG, JUVENILE JUSTICE GPS, U.S. AGE BOUNDARIES OF DELINQUENCY 2016, at 1 (2017), [http://www.ncjj.org/pdf/JJGPS%20StateScan/JJGPS\\_U.S.\\_age\\_boundaries\\_of\\_delinquency\\_2016.pdf](http://www.ncjj.org/pdf/JJGPS%20StateScan/JJGPS_U.S._age_boundaries_of_delinquency_2016.pdf) [https://perma.cc/VB6W-NBA5].

91. *Id.*

adjudication in juvenile court is seventeen years.<sup>92</sup> Only nine states currently set the upper age at fifteen or sixteen years.<sup>93</sup> Four of those nine states have enacted legislation to raise the age in coming years to seventeen years.<sup>94</sup> Advocates in the remaining five states that exclude seventeen-year-olds from juvenile court presently are advancing raise the age campaigns, with limited success.<sup>95</sup>

The juvenile court systems in some of the largest urban settings serve as examples of the size and complexity of modern juvenile court adjudication for urban youth. For example, Chicago's juvenile courts are a subdivision of the Circuit Court of Cook County, grouped under the heading, "Juvenile Justice and Child Protection Department."<sup>96</sup> The Juvenile Justice Division of the court consists of one presiding judge, nine circuit judges, and six associate judges.<sup>97</sup> This division presides over delinquency, substance abuse, and unruly children cases for children under eighteen years of age.<sup>98</sup> The Child Protection Division, which handles dependency cases, consists of one presiding judge, seven circuit judges, and seven associate judges.<sup>99</sup>

The Juvenile Division of the Los Angeles Superior Court consists of two types of courts: delinquency and dependency.<sup>100</sup> There are two dependency courts in Los Angeles County, though neither of these courthouses is actually in the city of Los Angeles.<sup>101</sup> One court

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92. *Id.* at 2.

93. *Id.*

94. *Id.* New York and North Carolina are the only two states where sixteen- and seventeen-year olds may not be considered juveniles, but both states recently passed laws to raise the age of criminal responsibility. *Id.*

95. Marcy Mistrett & Marc Schindler, *Is It Now Inevitable that All States Will Raise the Age?*, RAISE THE AGE MI (Sept. 1, 2017), <https://www.raisetheagemi.org/single-post/2017/09/01/Is-it-now-inevitable-that-all-states-will-raise-the-age> [<https://perma.cc/4UX5-VGJ2>].

96. *Juvenile Justice and Child Protection*, STATE OF ILL., CIRCUIT COURT OF COOK CTY., <http://www.cookcountycourt.org/ABOUTTHECOURT/JuvenileJusticeChildProtection.aspx> [<https://perma.cc/F52P-3WR4>].

97. *Judges Information*, STATE OF ILL., CIRCUIT COURT OF COOK CTY., <http://www.cookcountycourt.org/ABOUTTHECOURT/JuvenileJusticeChildProtection/JuvenileJustice/JudgesInformation.aspx> [<https://perma.cc/9ZDJ-3C9Z>].

98. *Juvenile Justice and Child Protection*, *supra* note 96.

99. *Child Protection Division Judges*, STATE OF ILL., CIRCUIT COURT OF COOK CTY., <http://www.cookcountycourt.org/ABOUTTHECOURT/JuvenileJusticeChildProtection/ChildProtection/JudgesInformation.aspx> [<https://perma.cc/KBJ7-TFZM>].

100. *Juvenile*, SUPERIOR COURT OF CAL., CTY. OF L.A. [hereinafter Cal. Juvenile], <http://www.lacourt.org/division/juvenile/juvenile.aspx> [<https://perma.cc/L5CE-Z99C>].

101. *Juvenile Dependency Courts*, SUPERIOR COURT OF CAL., CTY. OF L.A., <http://www.lacourt.org/courthouse/mode/division/juveniledep> [<https://perma.cc/DC5D-S5JW>].

consists of two judges<sup>102</sup> and the other consists of eighteen judges.<sup>103</sup> These judges hear neglect, abuse, and child abandonment cases.<sup>104</sup> Los Angeles County has eight delinquency courts, one of which is in the city of Los Angeles.<sup>105</sup> This in-city court consists of one judge who processes criminal and truancy cases, as well as cases involving unruly behavior.<sup>106</sup> Los Angeles also operates a Juvenile Mental Health Services program in its Juvenile Court.<sup>107</sup>

Houston is in Harris County, Texas.<sup>108</sup> Harris County employs three juvenile court judges, three associate judges and a juvenile referee.<sup>109</sup> The juvenile courts are part of Harris County District Courts.<sup>110</sup> These juvenile courts hear delinquency and child in need of supervision cases.<sup>111</sup> Truancy, minor assault, and tobacco or alcohol abuse cases are heard in one of Houston's five municipal courts.<sup>112</sup>

Lastly, the Fulton County Juvenile Court in Atlanta, Georgia, is the largest juvenile court in the state, consisting of three presiding judges and four associate judges.<sup>113</sup> The court has jurisdiction over delinquency, unruly conduct, and traffic cases for children less than

102. *Alfred J. McCourtney Juvenile Justice Center Judicial Officers*, SUPERIOR COURT OF CAL., CTY. OF L.A., <http://www.lacourt.org/courthouse/judicialofficers/lan> [https://perma.cc/BG36-5A2Z].

103. *Edmund D. Edelman Children's Court Judicial Officers*, SUPERIOR COURT OF CAL., CTY. OF L.A., <http://www.lacourt.org/courthouse/judicialofficers/ccj> [https://perma.cc/4XMZ-VE4K].

104. Cal. Juvenile, *supra* note 100.

105. *Juvenile Delinquency Courthouses*, SUPERIOR COURT OF CAL., CTY. OF L.A., [http://www.lacourt.org/courthouse/mode/division/juveniledel](http://www.lacourt.org/courthouse/mode/division/juvenile/juveniledel) [https://perma.cc/7BA3-R5ZE].

106. Cal. Juvenile, *supra* note 100.

107. *Mental Health Services*, SUPERIOR COURT OF CAL., CTY. OF L.A., <http://www.lacourt.org/division/juvenile/JV0032.aspx> [https://perma.cc/K8JQ-DUHV].

108. *About Houston, Facts and Figures*, CITY OF HOUS., <http://www.houstontx.gov/abouthouston/houstonfacts.html> [https://perma.cc/449Q-93FZ].

109. *District Juvenile Courts*, HARRIS CTY. ONLINE DIRECTORY, [http://www.harriscountytexas.gov/hc\\_phone\\_dir/courtinfo.asp?DropDown=8](http://www.harriscountytexas.gov/hc_phone_dir/courtinfo.asp?DropDown=8) [https://perma.cc/G8GS-EBDP].

110. *Juvenile Court Judges*, HARRIS CTY. DIST. COURTS, <https://www.justex.net/courts/Juvenile/JuvenileCourts.aspx> [https://perma.cc/CR53-LQZ7].

111. TEX. ATT'Y GEN., 2016 JUVENILE JUSTICE HANDBOOK, at 5 (2016), [https://www.texasattorneygeneral.gov/files/cj/juvenile\\_justice.pdf](https://www.texasattorneygeneral.gov/files/cj/juvenile_justice.pdf) [https://perma.cc/6J95-MXB8].

112. *Id.* at 4.

113. *Juvenile Court Judges*, FULTON CTY. JUVENILE COURT, <http://www.fultonjuvenilecourt.org/?q=judges> [https://perma.cc/8ZR7-BR86].

seventeen years of age as well as dependency cases for children under the age of eighteen.<sup>114</sup>

The original juvenile court of the early 1900s offered youth virtually no legal protections.<sup>115</sup> However, the Supreme Court's 1967 decision in *In re Gault*<sup>116</sup> ushered in a new era. Law enforcement officers took fifteen-year-old Gerald Gault into custody without parental notice for allegedly making obscene phone calls.<sup>117</sup> After a series of informal proceedings before a juvenile court judge in which Gault was unrepresented by counsel, the court adjudicated him delinquent.<sup>118</sup> The court placed him in state custody until the age of twenty-one years, which resulted in a far longer term of supervision than if he had been an adult.<sup>119</sup> The Supreme Court reviewed his case and held that the Due Process Clause applied to juvenile court proceedings.<sup>120</sup> To satisfy due process, the Court required the provision of adequate notice of charges, parental and juvenile notification of the juvenile's right to counsel, opportunity for confrontation and cross-examination at hearings, and adequate safeguards against self-incrimination.<sup>121</sup>

Though *Gault* is the iconic and seminal juvenile rights case, a year earlier in 1966, the Supreme Court decided the case of *Kent v. United States*.<sup>122</sup> Law enforcement officers arrested and interrogated sixteen-year-old Morris Kent in connection with robbery and rape allegations.<sup>123</sup> During the investigation, Kent admitted some involvement, leading the juvenile court to waive its jurisdiction and transfer his case to adult criminal court, without explanation.<sup>124</sup> Kent challenged the decision because the juvenile court did not conduct a "full investigation," as required by statute before transferring his case.<sup>125</sup> His appeals were denied.<sup>126</sup> Ultimately, a jury convicted

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114. FULTON CTY. JUVENILE COURT, <http://www.fultonjuvenilecourt.org> [<https://perma.cc/47MZ-MRC3>].

115. *See supra* Section I.A.

116. 387 U.S. 1 (1967).

117. *Id.* at 4–5.

118. *Id.* at 5–7.

119. *Id.* at 7–8, 29. The maximum possible penalty for an adult charged with the offense was incarceration for two months, a fifty-dollar fine, or both. *Id.* at 8–9.

120. *Id.* at 4.

121. *Id.* at 31–58.

122. 383 U.S. 541 (1966).

123. *Id.* at 543–44.

124. *Id.* at 543–46.

125. *Id.* at 548.

126. *Id.*



Kent and sentenced him to confinement in a mental institution and 30–99 years of incarceration.<sup>127</sup> Upon review, the Supreme Court deemed the waiver invalid because Kent had not been provided a hearing, access to counsel, or access to his file before the case was transferred.<sup>128</sup>

Almost twenty years after *Gault*, the Supreme Court in *Schall v. Martin*,<sup>129</sup> held that pretrial detention of a juvenile does not violate procedural due process where, before ordering detention, the government provides notice, a hearing, and a statement of facts, as well as the possibility of a probable cause hearing.<sup>130</sup> Though the Court did affirm the practice of detaining youth pretrial if there is a “serious risk” that the juvenile will commit a crime,<sup>131</sup> the required procedural safeguards are important protections.

In the modern era, many jurisdictions continue to process juvenile cases while denying youth the right to counsel.<sup>132</sup> Though many urban jurisdictions, such as Boston, Chicago, the District of Columbia, Los Angeles, New York, and Philadelphia have large juvenile defender bars, in many other jurisdictions children are too often unrepresented.<sup>133</sup> Some courts persuade youth and families to waive counsel.<sup>134</sup> Others set a high standard for indigence so that children and parents are often ineligible for appointed counsel.<sup>135</sup> Even when counsel is appointed, counsel does not always zealously represent the child, but rather advocates for what the lawyer believes is in the child’s best interest.<sup>136</sup> Thus, many youth—especially those who are under-resourced—experience a juvenile court process virtually devoid of protections and that results in punishment rather than rehabilitation.

Due to concerns about the administration of justice in juvenile courts, scholars have, for decades, advanced the idea of abolishing, rather than tinkering with, juvenile court.<sup>137</sup> In the absence of

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127. *Id.* at 550.

128. *Id.* at 561–63.

129. 467 U.S. 253 (1984).

130. *Id.* at 277, 281.

131. *Id.* at 255–57.

132. Guggenheim, *supra* note 76, at 377–78.

133. *Id.* at 378.

134. *Id.* at 377–78.

135. *Id.*

136. *Id.*

137. See Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1118–32 (1991) (calling for abolition of the juvenile courts and urging criminal courts

juvenile court, youth would have their cases adjudicated in adult criminal court and their age would be a specific factor accounted for in sentencing.<sup>138</sup> This is a provocative idea that scholars have critiqued because it exposes all children to the problems attending prosecution in adult criminal court and too readily abandons the juvenile court goal of rehabilitation.<sup>139</sup>

## 2. *Adult Criminal Courts*

The traditional juvenile court system was designed to shunt youth out of the adult criminal justice system; thus, most cases involving youth were handled in juvenile court.<sup>140</sup> The original juvenile courts processed cases involving youth under the age of sixteen years and could maintain jurisdiction until children reached the age of twenty-one years.<sup>141</sup> Juvenile court judges were vested with sole authority to determine whether to transfer a child to adult criminal court.<sup>142</sup>

Beginning in the late 1970s, however, virtually every state expanded the use of adult criminal courts for youth, through a variety of means. After *Gault* in 1967, legislatures began to reduce the age of individuals eligible for juvenile court jurisdiction.<sup>143</sup> Whether *Gault* triggered the changes is unclear.<sup>144</sup> In any event, leading the way in 1978, New York reduced its maximum age for juvenile court jurisdiction, permitting thirteen-year-olds to be prosecuted in adult criminal court for murder and fourteen-year-olds for other violent crimes.<sup>145</sup> Other jurisdictions shifted transfer decisions from judges and probation officers to prosecutors.<sup>146</sup> For example, in the early

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to treat youth as a mitigating factor at sentencing); Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 25 (1990); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 69 (1997).

138. See Ainsworth, *supra* note 137, at 1118–32; Feld, *supra* note 137, at 69.

139. See generally, e.g., Gary L. Crippen, *The Juvenile Court's Next Century—Getting Past the Ill-Founded Talk of Abolition*, 2 U. PA. J. CONST. L. 195 (1999); Claude Noriega, *Stick a Fork in It: Is Juvenile Justice Done?*, 16 N.Y.L. SCH. J. HUM. RTS. 669 (2000) (criticizing abolition of juvenile court and proposing creation of adolescent courts).

140. See discussion *supra* Section I.A.

141. JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 17, at 157; Guggenheim, *supra* note 76, at 372.

142. Tanenhaus, *supra* note 74, at 284.

143. Guggenheim, *supra* note 76, at 380.

144. *Id.*

145. *Id.*; Tanenhaus, *supra* note 74, at 286.

146. Guggenheim, *supra* note 76, at 380; Tanenhaus, *supra* note 74, at 288.

1980s, Florida authorized prosecutors to direct file juvenile cases in adult criminal court, meaning that juvenile judges were divested of primary decision-making control over transfer decisions.<sup>147</sup> Data suggests that in the 1990s, Florida prosecutors direct filed in adult criminal court more cases involving youth than juvenile court judges nationwide transferred.<sup>148</sup>

In the 1990s, supporters of prosecuting youth in adult court pointed to public safety as a rationale.<sup>149</sup> Notably, in 1996, Princeton Professor John DiIulio predicted a serious criminal justice problem was coming in the form of the juvenile “super-predator[s],” violent, irrational, impulsive black male teenagers who would engage in serious violent crime and terrorize communities.<sup>150</sup> His prediction led him to advocate for increased penalties for, and incarceration of, youth.<sup>151</sup> Jurisdictions took DiIulio’s prediction seriously and followed his recommendations.<sup>152</sup>

By the end of the 1990s, prosecutors nationwide possessed authority to bypass juvenile court and directly charge juveniles in adult criminal court.<sup>153</sup> And by 2005, a quarter of a million children yearly were prosecuted in adult criminal court.<sup>154</sup>

Juveniles prosecuted in adult criminal court are treated just as adults, receiving the same procedural protections. Juveniles are also subjected to the same penalties as adults, with the exception of sentences of death and life without parole. In *Roper v. Simmons*,<sup>155</sup> the Supreme Court struck down laws permitting the death penalty for those under the age of eighteen years.<sup>156</sup> In the subsequent cases of *Graham v. Florida*<sup>157</sup> and *Miller v. Alabama*,<sup>158</sup> the Supreme Court

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147. Tanenhaus, *supra* note 74, at 287.

148. *Id.*

149. *Id.* at 286.

150. WILLIAM J. BENNETT, JOHN J. DI IULIO, JR. & JOHN P. WALTERS, *BODY COUNT* 26–29 (1996).

151. *See generally id.*

152. *See* Brief for Jeffrey Fagan et al. as Amici Curiae Supporting Petitioners, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646), <https://eji.org/sites/default/files/miller-amicus-jeffrey-fagan.pdf> [<https://perma.cc/9XEP-EC4J>]; Clyde Haberman, *When Youth Violence Spurred ‘Superpredator’ Fear*, N.Y. TIMES (Apr. 6, 2014), [http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html?\\_r=1](http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html?_r=1) [<https://nyti.ms/2k1jqTu>]. It is worth noting that this super-predator prediction did not come to be and DiIulio has since acknowledged his error.

153. Guggenheim, *supra* note 76, at 382.

154. *Id.*

155. 543 U.S. 551 (2006).

156. *Id.* at 569–75 (holding that juveniles are ineligible for the death penalty).

157. 560 U.S. 48 (2010).

extended the reasoning in *Roper* to mandatory life without parole sentences.<sup>159</sup>

Treating juveniles as adults does not necessarily increase public safety. According to the small body of available research, adjudicating youth in adult criminal courts does not appear to reduce the level of juvenile offending.<sup>160</sup> Rather, it may increase recidivism.<sup>161</sup> For example, a study of transfer and recidivism in Florida concluded that transfer did not deter youth and did not improve public safety through incapacitation.<sup>162</sup> Additionally, youth whose cases were transferred to adult criminal court reoffended at a higher rate and more quickly than those whose cases were not transferred.<sup>163</sup>

### 3. Specialty Youth Courts

In the mid-1990s, juvenile court judges and policymakers embraced a new legal strategy that had emerged in the adult criminal justice system.<sup>164</sup> This new strategy was the establishment of problem-solving, or specialty, courts.<sup>165</sup> Multiple factors have been offered to explain the proliferation of specialty courts in general, including a

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158. 567 U.S. 460 (2012).

159. *Id.* at 465 (prohibiting mandatory life without parole sentences for individuals who commit crimes before the age of eighteen years); *Graham*, 560 U.S. at 82 (prohibiting states from sentencing juveniles to life without parole for non-homicide crimes).

160. See generally Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96 (1994); Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW & SOC'Y REV. 521 (1988).

161. See generally Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171 (1996); Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POL'Y 77 (1996); Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism over the Long Term*, 43 CRIME & DELINQ. 548 (1997).

162. Bishop et al., *supra* note 161, at 183.

163. *Id.*

164. Arguably, juvenile court is the original problem-solving court designed to address the particular needs of children who come into contact with the justice system. Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1056 (2003). Additionally, family courts that handle abuse and neglect cases are considered specialty courts. *Id.* at 1058.

165. Tamar M. Meekins, "Specialized Justice": *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 2-3 (2006).

desire to address the underlying causes of criminal offending, or improve court efficiency, or reduce incarceration.<sup>166</sup>

Problem-solving courts focus on remediating the underlying causes of crime or meeting the needs of a particular population in order to prevent recidivism.<sup>167</sup> Rather than focusing on litigating disputes, these courts employ “therapeutic justice,” which emphasizes the use of psychological methods to change behavior and minimizes punishment.<sup>168</sup> Judges continue to control the process,<sup>169</sup> but the process is more collaborative than in traditional courts.<sup>170</sup> Interdisciplinary teams of professionals, such as educators, therapists, and social workers, assist individuals to help minimize the risk of recidivism.<sup>171</sup>

Whether civil or criminal in nature, these court systems often have the authority to impose criminal consequences and punishments for violations of, and non-compliance with, treatment programs offered as alternatives to traditional criminal punishment.<sup>172</sup> For example, individuals can be placed on community supervision or sentenced to incarceration for failure to follow the conditions of a court-ordered treatment program.<sup>173</sup> Additionally, judges may publicly shame participants who do not meet court-ordered expectations, such as by chastising them in open court for failing to meet conditions or requiring them to reveal personal information in open court.<sup>174</sup>

In 1989 Miami-Dade County, Florida, established an adult drug court, which has been deemed the first problem-solving court in the nation.<sup>175</sup> Almost twenty-five years later, a 2012 United States Department of Justice (“DOJ”) survey identified 3052 specialty

166. *Id.* at 14–15.

167. Winick, *supra* note 164, at 1055–56; *see also* U.S. DEP’T OF JUSTICE, CENSUS OF PROBLEM-SOLVING COURTS, 2012, at 2 (2016) [hereinafter CENSUS OF PROBLEM-SOLVING], <https://www.bjs.gov/content/pub/pdf/cpsc12.pdf> [<https://perma.cc/MUM2-3RH6>].

168. Winick, *supra* note 164, at 1062; *see also* CENSUS OF PROBLEM-SOLVING, *supra* note 167, at 2.

169. Winick, *supra* note 164, at 1060.

170. *Id.* at 1067–68.

171. *Id.* at 1064.

172. Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1487 (2004) (punitive nature of drug courts); *see also* Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 792 (2008) (drug court sentences can be longer than traditional sentences).

173. Meekins, *supra* note 165, at 18–19.

174. *Id.*

175. *Drug Courts*, FLA. COURTS, <http://www.flcourts.org/resources-and-services/court-improvement/problem-solving-courts/drug-courts/> [<https://perma.cc/KSD9-38V2>]; *see also* Winick, *supra* note 164, at 1055–56.

courts nationwide.<sup>176</sup> More than half of these courts were created between 2001 and 2010.<sup>177</sup> Common examples of specialty courts included community courts, drug courts, mental health courts, fathering courts, peer courts, reentry courts, and courts for the homeless or veterans.<sup>178</sup> Less common variations included gun courts, elder abuse courts, and gambling courts.<sup>179</sup>

While the vast majority of problem-solving courts focused on adults, the DOJ survey revealed that a subset targeted juveniles and particular issues that resulted in juvenile court involvement.<sup>180</sup> Of the more than 3000 problem-solving courts, 244 self-identified as youth specialty courts.<sup>181</sup> Geographically, juvenile accountability courts existed nationwide; however, most youth specialty courts were located in jurisdictions with populations between 100,001 and 500,000.<sup>182</sup>

Included in the category of youth specialty courts were youth/teen courts, truancy courts, and “[s]even courts that specifically served youth ages [sixteen] and [seventeen] who were charged in adult criminal courts . . . .”<sup>183</sup> In addition to the category of “youth specialty courts,” other specialty courts exclusively served juveniles. For example, 349 out of 1330 drug courts served juveniles and 36 out

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176. CENSUS OF PROBLEM-SOLVING, *supra* note 167, at 1.

177. *Id.*

178. *Problem-Solving Courts Guide*, NAT’L CTR. FOR STATE COURTS, <http://www.ncsc.org/Topics/Alternative-Dockets/Problem-Solving-Courts/Home.aspx> [<https://perma.cc/DA7G-G5D7>].

179. CENSUS OF PROBLEM-SOLVING, *supra* note 167, at 3.

180. *Id.*

181. *Id.* Some of these courts likely work exclusively with female populations, although the census did not so indicate. In response to criticism that juvenile justice policymakers have focused primarily on boys and ignored the growing number of girls caught up in the system and the particular needs of female offenders, several jurisdictions have established girls’ courts. *E.g.*, *Juvenile*, ALAMEDA CTY. PUB. DEFENDER, <http://www.co.alameda.ca.us/defender/services/juvenile.htm> [<https://perma.cc/4YVG-KR9A>]; HAWAII GIRLS COURT, <http://www.girlscourt.org/> [<https://perma.cc/S2FX-LUMG>]; *see also* Wendy S. Heipt, *Girls’ Court: A Gender Responsive Juvenile Court Alternative*, 13 SEATTLE J. FOR SOC. JUST. 803, 833 (2015); Patricia Leigh Brown, *A Court’s All-Hands Approach Aids Girls Most at Risk*, N.Y. TIMES (Jan. 28, 2014), <https://www.nytimes.com/2014/01/29/us/a-courts-all-hands-approach-aids-girls-most-at-risk.html> [<https://nyti.ms/2kqbcV7>]; Sarah Klein, *Girls in the Juvenile Justice System: The Case for Girls’ Courts*, AM. BAR ASS’N (Jan. 5, 2012), <https://www.americanbar.org/publications/litigation-committees/childrens-rights/articles/2012/girls-juvenile-justice-system-case-for-girls-courts.html> [<https://perma.cc/H2SZ-LLC7>].

182. CENSUS OF PROBLEM-SOLVING, *supra* note 167, at 5 tbl.3.

183. *Id.* at 2 & n.3.

of 337 mental health courts worked with juveniles.<sup>184</sup> Additionally, two domestic violence courts were identified as “youth domestic violence courts.”<sup>185</sup>

Although policymakers advocate the expanded use of specialty courts as a way to address juvenile misbehaving,<sup>186</sup> scholars have been critical of the problem-solving court movement. They have raised questions about the lack of constitutional protections and the creation of ethical problems for defense attorneys.<sup>187</sup> Another criticism has been that implementing problem-solving courts fails to deal with poverty, over-criminalization, and discriminatory policing.<sup>188</sup> Finally, there are indications that problem-solving courts are promoted primarily because they are resource efficient and revenue generating rather than effective.<sup>189</sup>

Whether these types of courts are particularly effective at ameliorating juvenile misconduct is undetermined. With the exception of juvenile drug courts, empirical study of youth problem-solving courts is relatively limited.<sup>190</sup> And the results of studies of juvenile drug courts are unclear.<sup>191</sup> Recent data, however, suggests juvenile drug courts may be counterproductive.<sup>192</sup> In a 2015 study

184. *Id.* at 10 fig.3.

185. *Id.* at 3 n.4.

186. *See, e.g.*, GREG BERMAN ET AL., GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 52–58 (2005); Karen Tokarz & Sam Stragand, *Community Justice Courts Can Be an Innovative Reform*, ST. LOUIS POST-DISPATCH (May 5, 2015), [http://www.stltoday.com/news/opinion/community-justice-courts-can-be-an-innovative-reform/article\\_96a59f74-f1cd-5aff-802e-014955831e69.html](http://www.stltoday.com/news/opinion/community-justice-courts-can-be-an-innovative-reform/article_96a59f74-f1cd-5aff-802e-014955831e69.html) [https://perma.cc/9STB-M4M7].

187. *See, e.g.*, Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL’Y 57, 64 (2009); Jane M. Spinak, *Reforming Family Court: Getting It Right Between Rhetoric and Reality*, 31 WASH. U. J.L. & POL’Y 11, 17–18 (2009); Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL’Y 63, 78–79, 81 (2002); *see also* Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 85 n.42 (2007); Miller, *supra* note 172, at 1510 n.171, 1565.

188. *See* Meekins, *supra* note 165, at 49; Mae C. Quinn, “Post-Ferguson” Social Engineering: Problem-Solving or Just Posturing?, 59 HOW. L.J. 739, 759 (2016).

189. *See* Meekins, *supra* note 165, at 27 n.127; Quinn, *supra* note 188, at 760, 760 n.94.

190. Dominic Madell et al., *A Systematic Review of Literature Relating to Problem-Solving Youth Courts*, 20 PSYCHIATRY PSYCHOL. & L. 412, 420 (2013).

191. *See id.* at 419.

192. LESLI BLAIR ET AL., U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE DRUG COURTS: A PROCESS, OUTCOME, AND IMPACT EVALUATION 1 (2015), <http://www.ojjdp.gov/pubs/248406.pdf> [https://perma.cc/K6F7-BB6G].

conducted by the DOJ, researchers concluded that recidivism rates were higher for youth who participated in drug court in comparison to those on traditional probation.<sup>193</sup> One explanation offered for the finding was that the studied drug courts may not have followed best practices.<sup>194</sup>

### C. Disrupting Positive Youth Development

Developmental research indicates that misbehavior peaks during adolescence and normally decreases into young adulthood.<sup>195</sup> As the Supreme Court recognized in *Roper v. Simmons*,<sup>196</sup> juveniles possess immature decision-making capacity, limited life experience, low risk aversion, increased impulsivity, and an emphasis on short term gains rather than a balancing of long and short term behavioral consequences.<sup>197</sup> For these reasons, much juvenile offending, both serious and non-serious, is to be expected. Juveniles will naturally grow out of this developmental phase and offending conduct on their own.<sup>198</sup> Yet interference by the juvenile and criminal justice systems can generate negative physical, social, and emotional impacts during childhood and into adulthood.

From the moment a child enters the juvenile justice system, the odds of successfully transitioning to adulthood decrease. Parental support is vital for positive youth development.<sup>199</sup> Parents should be positive, authoritative, and involved.<sup>200</sup> To transition into adulthood, children must acquire basic education and vocational skills to be employable, develop social skills for intimacy and collaboration, and learn to set goals and make choices without external monitoring.<sup>201</sup> Failure to meet these goals impedes growth.<sup>202</sup> When a child's daily life is interrupted and when a child is disconnected from present and

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193. *Id.* at 8.

194. *Id.*

195. REFORMING JUVENILE JUSTICE, *supra* note 27, at 90, 92 fig.4-1; Henning, *supra* note 26, at 397–401.

196. 543 U.S. 551 (2005).

197. *Id.* at 569–75 (holding that juveniles are ineligible for the death penalty); REFORMING JUVENILE JUSTICE, *supra* note 27, at 91–96.

198. REFORMING JUVENILE JUSTICE, *supra* note 27, at 90; BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 6–7 (2006), [http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers\\_of\\_detention.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf) [<https://perma.cc/F58U-7EPC>]; Henning, *supra* note 26, at 397–401.

199. REFORMING JUVENILE JUSTICE, *supra* note 27, at 101–04.

200. *Id.* at 101.

201. *Id.* at 102.

202. *Id.*



future social supports, it will be difficult for the child to learn to manage life's challenges.<sup>203</sup> Simply being arrested may trigger immediate negative outcomes, including removal from school or public housing and loss of employment opportunities.<sup>204</sup> If the case becomes public because the jurisdiction has reduced or eliminated confidentiality protections,<sup>205</sup> the child may feel stigmatized.<sup>206</sup>

Court involvement disrupts parent-child relations, thereby impeding positive youth development. For parents whose children are under the jurisdiction of the court or state, their abilities to make child-rearing decisions are restricted by the state, which imposes expectations and requirements upon the child that the family must adhere to in order to help the child through the court process.<sup>207</sup> Moreover, while parents cannot complete most requirements for their children, they may assume a child's financial liabilities, thus creating negative consequences for parents and families, particularly financially-strapped parents who may have to choose between helping their children and helping their family.<sup>208</sup>

Children who are detained in facilities experience many significant physical, emotional, and psychological harms.<sup>209</sup> First, they are separated (physically and emotionally) from their families and communities. Second, facilities are understaffed and overcrowded,

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203. *See generally id.*

204. *See, e.g.,* Chiramonte, *supra* note 66; *see also* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 521, 528 (2004) [hereinafter *Eroding Confidentiality*].

205. RIYA SAHA SHAH ET AL., JUVENILE LAW CTR., JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT 12–19 (2014), <http://juvenilerecords.jlc.org/juvenile-records/documents/publications/national-review.pdf> [https://perma.cc/TVJ4-DX97] (identifying seven states that permit the public complete access to juvenile records and nine states that completely protect juvenile records from public access).

206. *Eroding Confidentiality*, *supra* note 204, at 526–30.

207. *See* Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 842–44 (2006).

208. JESSICA FEIERMAN ET AL., JUVENILE LAW CTR., DEBTORS' PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 6–7 (2016), <http://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf> [https://perma.cc/7AZB-VHRQ]; Maureen Washburn, *Juvenile Justice System Promises Rehabilitation, Delivers Crippling Debt to California Youth*, JUV. JUST. INFO. EXCHANGE (Aug. 21, 2017), <http://jjie.org/2017/08/21/juvenile-justice-system-promises-rehabilitation-delivers-crippling-debt/comment-page-1/> [https://perma.cc/7ZL5-ME4T].

209. HOLMAN & ZIEDENBERG, *supra* note 198, at 2.

leading to poor conditions.<sup>210</sup> As a result, children in custody may suffer neglect and violence at the hands of others detainees as well as corrections officers.<sup>211</sup> Third, incarceration has been shown to lead to mental health problems, such as depression, self-harm, and suicide.<sup>212</sup> In the extreme, children who are placed in solitary confinement experience physical, social, and emotional harms.<sup>213</sup> Fourth, juveniles' deviant behavior might not improve, and may even worsen, because they may mimic the deviant behavior of those with whom they are incarcerated.<sup>214</sup>

Even after children leave detention, they continue to experience negative impacts. Upon exiting custody, they face challenges reintegrating into school.<sup>215</sup> Aside from creating educational difficulties, detention negatively affects juveniles' employment prospects in the short- and long-term.<sup>216</sup> Quite ironically, evidence suggests that incarceration contributes to re-offending.<sup>217</sup>

Finally, court-involvement may encourage youth to perceive the justice system as unfair. If they do not experience the procedures as fair and they believe the consequences are disproportionate to their conduct, they perceive that they are being unjustly treated.<sup>218</sup> Minority youth are especially likely to see the justice system as discriminatory and unfair.<sup>219</sup> Those who perceive the system as unjust are less likely to adhere to the law and accept responsibility for their conduct.<sup>220</sup>

In sum, while the original juvenile justice system consisted of juvenile courts aimed at rehabilitating youth who lacked appropriate caregivers to guide them, today's juvenile justice system is more complex than its origins. Youth are subject to the criminal laws that

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210. SUE BURRELL, ANNIE E. CASEY FOUND., IMPROVING CONDITIONS OF CONFINEMENT IN SECURE JUVENILE DETENTION CENTERS 11–12 (1999), <http://www.aecf.org/resources/improving-conditions-of-confinement-in-secure-juvenile-detention-centers/> [<https://perma.cc/Z5NW-K9Q3>].

211. *Id.* at 6, 11.

212. HOLMAN & ZIEDENBERG, *supra* note 198, at 2, 8–9.

213. See HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 22 (2012), <https://www.aclu.org/files/assets/us1012webwcover.pdf> [<https://perma.cc/UV7V-6C6U>].

214. REFORMING JUVENILE JUSTICE, *supra* note 27, at 106.

215. HOLMAN & ZIEDENBERG, *supra* note 198, at 9.

216. *Id.* at 9–10.

217. *Id.* at 4–5.

218. See REFORMING JUVENILE JUSTICE, *supra* note 27, at 130.

219. *Id.* at 113–15, 130.

220. *Id.* at 130.

apply to all individuals as well as laws that specifically regulate all manner of juvenile “misconduct,” from low-level to serious. Most juvenile misconduct is processed in juvenile court, but serious cases involving juveniles may be transferred to adult criminal court. Moreover, to regulate juvenile behavior, many jurisdictions today employ specialty juvenile courts. The net effect of the breadth of criminalization and variety of adjudication settings means that urban youth can readily find themselves caught in the juvenile justice maze and facing serious short- and long-term negative consequences.

## II. DECRIMINALIZATION AS JUVENILE JUSTICE REFORM

Part II reviews recent and somewhat rare efforts by lawmakers to decriminalize youthful misbehavior, thereby minimizing the chances a juvenile will become court-involved. Section II.A opens with a description of the concept of decriminalization and its operation in the adult criminal justice setting. Section II.B identifies instances in which lawmakers have extended the practice to the juvenile justice context, providing examples of lawmakers successfully decriminalizing a few minor offenses when committed by youth and identifying their reasons for doing so. Section II.C concludes by summarizing a failed effort in Florida to decriminalize a wide array of juvenile conduct.

### A. Decriminalization Basics

Decriminalization is a term of art taking many forms.<sup>221</sup> Decriminalization is not synonymous with legalization, meaning a legislature’s complete elimination of state authority to impose consequences—whether criminal or civil—for particular behaviors.<sup>222</sup> Commonly, decriminalization means legislative conversion of criminal misdemeanors to civil infractions, or reduction of criminal penalties from incarceration to fines, probation, or other non-custodial sentences.<sup>223</sup> There are other variants, including limiting decriminalization to first-time offenders or creating wobbler offenses, that is, those that may be charged either as misdemeanors or as infractions.<sup>224</sup>

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221. Darryl K. Brown, *Decriminalization, Regulation, Privatization: A Response to Professor Natapoff*, 69 VAND. L. REV. EN BANC 1, 4 (2016) [hereinafter *Decriminalization, Regulation*]; Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1067–69 (2015).

222. Natapoff, *supra* note 221, at 1065–67.

223. *Id.* at 1067–69.

224. *Id.*

Examples of decriminalized behaviors include traffic offenses, possession of small amounts of marijuana, and minor instances of disturbing the peace.<sup>225</sup> Society already views these offenses as minor or less serious offenses, categorizing them as criminal misdemeanors or infractions.<sup>226</sup> Varied reasons explain why these behaviors are being decriminalized, such as, they do not impose significant harm to society, punishment for the behavior seems disproportionate or unwarranted, society no longer stigmatizes the behavior, or the behaviors are already otherwise regulated by the civil system.<sup>227</sup>

Proponents claim that decriminalization will offer a number of systemic, individual, and societal benefits.<sup>228</sup> For example, reducing the caseloads overwhelming some court systems will decrease government expenditures.<sup>229</sup> Individuals will potentially avoid the direct consequence of incarceration, and may improve their employment prospects if they do not accumulate permanent criminal records for relatively innocuous behavior.<sup>230</sup> Public safety will improve as government is able to devote greater resources to more serious offenses.<sup>231</sup> Systemic legitimacy will improve by aligning criminal justice and societal norms regarding wrongful behavior and remediating racial disproportionality in criminal justice enforcement.<sup>232</sup>

Legal scholarship has focused on, and policymakers have embraced, decriminalization in the adult criminal justice context.<sup>233</sup> Recent attempts to extend decriminalization to the juvenile context have met varying results.

## B. Recent Examples of Juvenile Decriminalization

In the last handful of years, lawmakers nationwide have voted to decriminalize certain minor behaviors when committed by youth.<sup>234</sup>

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225. *Id.* at 1069–71.

226. *See id.* at 1070–72.

227. *See id.* at 1071–77.

228. *Id.* at 1058.

229. *Id.* at 1072–73.

230. *Id.* at 1071–72.

231. *See id.* at 1073.

232. *See id.* at 1074–76.

233. *See* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 233–45 (2007) (discussing history of decriminalization and legalization in American criminal law); Natapoff, *supra* note 221, at 1069–70; Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 676 (2015). *See generally* *Decriminalization, Regulation*, *supra* note 221, at 4.

234. *See* Natapoff, *supra* note 221, at 1076.

These behaviors include school absence, alcohol possession, and fare evasion.<sup>235</sup> Though few in number, these decriminalization efforts may signal an emerging trend.<sup>236</sup> The explanations offered for decriminalization center on protecting youth and protecting public resources.<sup>237</sup> A commonly voiced concern was that youth were becoming court-involved for relatively minor conduct which could have long-term, negative consequences.<sup>238</sup> By changing the laws, government officials sought to prevent the imposition of disproportionate and collateral consequences on young persons.<sup>239</sup> Preventing children from being labeled or stigmatized as criminal also motivated some officials.<sup>240</sup>

### 1. School Absence

In 1852, Massachusetts became the first state to mandate school attendance for children.<sup>241</sup> To date, every state has enacted compulsory school attendance laws.<sup>242</sup> Most commonly, school administrators refer children who repeatedly fail to attend school for civil proceedings in juvenile or truancy court, and parents who fail to ensure their children regularly attend school face civil or criminal

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235. See *infra* Section II.B. for a discussion of these examples.

236. This Article does not address legalization or decriminalization of peer-to-peer juvenile consensual sexual contact, juvenile sexting, and prostituted children, which some jurisdictions have addressed in recent years. *E.g.*, S. B. 1322, 2015–2016 Reg. Sess. (Cal. 2016); Assoc. Press, *New Law Decriminalizes Some Teen Sex in Indiana*, FOX NEWS (July 8, 2007), <http://www.foxnews.com/story/2007/07/08/new-law-decriminalizes-some-teen-sex-in-indiana.html> [<https://perma.cc/5CT7-JRHM>]; Mike Celizic, *Vermont Moves to Reduce Teen Sexting Charges*, TODAY (Apr. 15, 2009), <https://www.today.com/parents/vermont-moves-reduce-teen-sexting-charges-wbna30224261> [<https://perma.cc/W35U-L6YY>]; Patricia Mazzei & Katie Sanders, *Effort to Decriminalize Sexting as First Offense Advances*, TAMPA BAY TIMES (Mar. 28, 2011), <http://www.tampabay.com/news/education/k12/effort-to-decriminalize-sexting-as-a-first-offense-advances/1160267> [<https://perma.cc/CSN3-V89T>]. For scholarly discussions of these issues, see generally Tamar R. Birckhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055 (2011); Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173 (2017); Joanna Lampe, *A Victimless Crime: The Case for Decriminalizing Consensual Teen Sexting*, 46 U. MICH. J. L. REFORM 703 (2013).

237. See *infra* Section II.B.

238. See *id.*

239. See *id.*

240. See *id.*

241. Lisa M. Lukasik, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913, 1918 (1996).

242. *Id.* at 1919.

liability.<sup>243</sup> However, some jurisdictions, such as Texas and Ohio, imposed more serious consequences.

Until 2015, Texas law permitted officials to charge allegedly truant children in adult criminal court with the criminal offense of failure to attend school, a Class C misdemeanor.<sup>244</sup> Officials charged children as young as twelve years of age.<sup>245</sup> Children were not appointed counsel, making it difficult for them to defend their cases and prevent against harsh sanctions.<sup>246</sup> Subsequent failure to comply with court orders or pay fines and court costs resulted in children being incarcerated.<sup>247</sup>

In 2003, Dallas County—which includes the city of Dallas as well as others—created specialized truancy courts to fast-track truancy prosecutions.<sup>248</sup> According to news reports, case processing time was reduced from seventy-five days in criminal court to two or three weeks in truancy court.<sup>249</sup> In 2012, Dallas County prosecuted the highest number of students in the state, surpassing Harris County which includes Houston, the largest school district in the state.<sup>250</sup> During the school day, uniformed Texas police officers arrested and detained students who missed truancy court in Dallas.<sup>251</sup> Officials charged a fifty-dollar fee for execution of the arrest warrant.<sup>252</sup>

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243. *Id.*

244. *See* S.B. 1432, 77th Leg., Reg. Sess. (Tex. 2001) (repealed 2015). In addition to the criminal offense of failure to attend school, officials also had authority to charge allegedly truant children with the juvenile offense of child in need of supervision. Letter Complaint from Texas Appleseed et al. to Dep't of Justice Civil Rights Div., Educ. Opportunities Section (June 12, 2013) [hereinafter *Tex. Appleseed Complaint*], [https://texasappleseed.org/sites/default/files/145-STPP-DOJ Complaint.pdf](https://texasappleseed.org/sites/default/files/145-STPP-DOJ%20Complaint.pdf) [<https://perma.cc/4MQH-BDUW>] (alleging that the practice by certain school districts in Dallas County of funneling students into the truancy court system violates students' constitutional rights).

245. *Tex. Appleseed Complaint*, *supra* note 244, at 2.

246. *Id.* at 10.

247. *Id.* at 2.

248. *Id.* at 6.

249. Eric Nicholson, *Big Changes Are Coming to Dallas County's Godawful Truancy Courts*, DALLAS OBSERVER (Aug. 17, 2015), <http://www.dallasobserver.com/news/big-changes-are-coming-to-dallas-countys-godawful-truancy-courts-7490001> [<https://perma.cc/6NUX-LHRG>].

250. *Tex. Appleseed Complaint*, *supra* note 244, at 7.

251. *Id.* at 9, 38; Brandon Formby & Eva-Marie Ayala, *Justice Department Scrutinizes Dallas County Truancy Courts*, DALLAS MORNING NEWS (Mar. 31, 2015), <https://www.dallasnews.com/news/education/2015/03/31/justice-department-scrutinizes-dallas-county-truancy-courts> [<https://perma.cc/GJE5-VJYR>].

252. *Tex. Appleseed Complaint*, *supra* note 244, at 3.

In fiscal year 2015, the Texas legislature decriminalized truancy.<sup>253</sup> The law went into effect on September 1, 2015.<sup>254</sup> The stated purpose of the legislation is “to encourage school attendance by creating simple civil judicial procedures through which children are held accountable for excessive school absences.”<sup>255</sup> The new law made truancy a civil offense, renaming it “truant conduct.”<sup>256</sup> Under the new law, school officials may only refer to truancy court a student who is truant ten times in a six-month period, and officials have discretion not to refer the student if preventive measures are working.<sup>257</sup> A student may not be referred if the reason for absence is homelessness, being in foster care, or acting as the family’s primary income earner.<sup>258</sup> Fines may not be imposed for violations, but students who are able to pay or whose parents are able to pay may be ordered to pay fifty dollars in court costs.<sup>259</sup> Courts may also order students to participate in tutoring or counseling.<sup>260</sup>

Despite the change in laws, parents and guardians remain responsible for their child’s school attendance. Before the enactment, parents and guardians could be charged with the offense of parent contributing to nonattendance, a Class C misdemeanor with a maximum possible punishment of a \$500 fine.<sup>261</sup> Now, the offense continues to be a Class C misdemeanor but the fine range has changed. A first offense is punishable by a maximum possible fine of \$100.<sup>262</sup> Penalties may increase by \$100 for each subsequent offense up to a maximum of \$500.<sup>263</sup>

Until quite recently, Ohio school officials referred truancy cases to juvenile court for delinquency proceedings. In 2016, Ohio legislators enacted a law preventing administrators from suspending students from school due to absence and mandating intervention rather than immediate referral to juvenile court.<sup>264</sup> Under the new law, effective

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253. TEX. FAM. CODE ANN. § 65.003 (West 2015).

254. *Id.*

255. *Id.* § 65.001.

256. *Id.*; LEGIS. BUDGET BD., OVERVIEW OF THE EFFECTS OF CHANGES TO TEXAS TRUANCY LAWS 1 (2017) [hereinafter OVERVIEW TEX. LAW], [http://www.lbb.state.tx.us/Documents/Publications/Policy\\_Report/3012\\_Changes\\_to\\_Texas\\_Truancy\\_Laws.pdf](http://www.lbb.state.tx.us/Documents/Publications/Policy_Report/3012_Changes_to_Texas_Truancy_Laws.pdf) [<https://perma.cc/6KV9-U9NK>].

257. OVERVIEW TEX. LAW, *supra* note 256, at 2.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. OHIO REV. CODE ANN. § 3321.191(F) (West 2017).

April 6, 2017, when a school determines a student has been habitually truant, an intervention program aimed at keeping the child in school must be put in place.<sup>265</sup> If, after two months, progress has not been made, then school officials must refer the matter to juvenile court.<sup>266</sup> Supporters of Ohio decriminalizing school absence, including legislators, judges, and school officials, cited the need to keep children in school rather than label children as criminals and refer them to delinquency court.<sup>267</sup> Notably, school administrators and teachers in Ohio's eight urban school districts backed the legislation.<sup>268</sup>

## 2. *Underage Alcohol Possession*

All states prohibit alcohol possession by those under the age of twenty-one, subject at times to limited exceptions relating to employment, religious activities, or parental consent.<sup>269</sup> Many jurisdictions treat the offense as a misdemeanor, while others treat it as an infraction.<sup>270</sup> Recently, lawmakers in Massachusetts, Michigan, and Idaho have decriminalized underage possession of alcohol.

In March 2016, Duxbury, Massachusetts, decriminalized underage alcohol possession and consumption.<sup>271</sup> Local law enforcement sponsored the bylaw.<sup>272</sup> In doing so, they expressed a desire to prevent the entry of adolescents into the criminal justice system for minor misconduct and the creation of permanent criminal records for

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265. *Id.* § 3321.19.

266. *See id.* § 3321.16. Other jurisdictions previously adopted the approach of judicial proceedings as a last resort. *E.g.*, COLO. REV. STAT. ANN. § 22-33-108 (West 2013). Juveniles are entitled to representation in juvenile court. OHIO REV. CODE ANN. § 2151.352 (West 2017).

267. Patrick O'Donnell, *Ohio Will "Decriminalize" Truancy Under New Law*, CLEVELAND PLAIN DEALER (Dec. 19, 2016), [http://www.cleveland.com/metro/index.ssf/2016/12/ohio\\_will\\_decriminalize\\_truanc.html](http://www.cleveland.com/metro/index.ssf/2016/12/ohio_will_decriminalize_truanc.html) [<https://perma.cc/TVR4-CG9Y>].

268. O'Donnell, *supra* note 267. The Ohio 8 Coalition is "a strategic alliance composed of the superintendents and teacher union presidents from Ohio's eight urban school districts." *See Who We Are*, THE OHIO 8 COAL., <http://ohio8coalition.org/about/who-we-are-2/> [<https://perma.cc/QG3Z-TLS8>].

269. *See* Mary Pat Treuthart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 303, 307-12 (2006); *see also* FED. TRADE COMM'N, CONSUMER INFO., ALCOHOL LAWS BY STATE, <https://www.consumer.ftc.gov/articles/0388-alcohol-laws-state> [<https://perma.cc/NRY4-FLAH>].

270. The District of Columbia adopts a hybrid approach. A minor in possession charge constitutes a misdemeanor offense but each offense is subject only to a fine. D.C. CODE ANN. § 25-1002 (West 2017).

271. Reenat Sinay, *Duxbury Decriminalizes Underage Drinking*, BOS. GLOBE (Mar. 13, 2016), <https://www.bostonglobe.com/metro/2016/03/13/duxbury-decriminalizes-underage-drinking/edehaB0rK27VpMabkLNUFL/story.html> [<https://perma.cc/N974-YQP5>].

272. *Id.*



such adolescents.<sup>273</sup> Under the prior law, police had the authority to arrest youth found in possession of alcohol and charge them with underage possession of alcohol, a criminal offense.<sup>274</sup> Under the new law, underage possession of alcohol is an infraction subject in all circumstances to only a fine.<sup>275</sup> Duxbury was not alone in adopting a non-criminal approach to minors in possession of alcohol. Other jurisdictions near Duxbury, in the Cape Cod area, had already decriminalized alcohol possession by minors, some more than ten years prior.<sup>276</sup>

Also in 2016, Michigan and Idaho decriminalized underage alcohol possession for first-time offenders. Under prior Michigan law, a first offense was a misdemeanor punishable by a \$100 fine and up to thirty days in jail if certain factors were satisfied.<sup>277</sup> Effective January 1, 2018, a first offense will be reduced to a civil infraction warranting a \$100 fine.<sup>278</sup> A subsequent offense will be a misdemeanor punishable by a \$200 fine and in some circumstances up to thirty days in jail, and a third offense is a misdemeanor punishable by a \$500 fine and up to sixty days in jail if certain conditions are met.<sup>279</sup>

Supporters of changing Michigan's minor in possession law were concerned about creating permanent criminal records that affected a juvenile's ability to receive college admission and financial aid, as well as future employment prospects.<sup>280</sup> Additionally, in an era of fiscal consciousness, advocates sought to prevent the waste of public

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273. Lane Lambert, *Duxbury 'Soul Searching' Leads to Proposed Fine for Teen Drinking*, PATRIOT LEDGER (Mar. 7, 2016), <http://www.patriotledger.com/news/20160307/duxbury-soul-searching-leads-to-proposed-fine-for-teen-drinking> [<https://perma.cc/4EXJ-AVPD>].

274. Sinay, *supra* note 271.

275. TOWN OF DUXBURY GENERAL BY-LAWS, § 7.5 (June 30, 2017) [hereinafter DUXBURY BY-LAWS], [http://www.town.duxbury.ma.us/sites/duxburyma/files/uploads/general\\_bylaws-updated\\_through\\_6-30-2017\\_final.pdf](http://www.town.duxbury.ma.us/sites/duxburyma/files/uploads/general_bylaws-updated_through_6-30-2017_final.pdf) [<https://perma.cc/JN76-AZD9>]; Sinay, *supra* note 271.

276. Melissa Hanson, *Local Police Weigh in on Decriminalizing Underage Drinking*, LOWELL SUN (Mar. 21, 2016), [http://www.lowellsun.com/todayshdlines/ci\\_29665483/local-police-weigh-decriminalizing-underage-drinking](http://www.lowellsun.com/todayshdlines/ci_29665483/local-police-weigh-decriminalizing-underage-drinking) [<https://perma.cc/25E9-QEW9>]; Sinay, *supra* note 271.

277. MICH. COMP. LAWS ANN. § 436.1703(1) (West 2012).

278. S.B. 332, 98th Leg., 2016 Reg. Sess. (Mich. 2016).

279. *Id.* Conditions include the minor violating a probation order, failing to successfully complete court-ordered treatment, screening, or community service, or failing to pay any fine.

280. See Jonathan Oosting, *'Minor in Possession' Would Go from Misdemeanor Crime to Civil Fine Under Michigan Alcohol Bill*, MLIVE (May 19, 2015), [http://www.mlive.com/lansing-news/index.ssf/2015/05/minor\\_in\\_possession\\_would\\_move.html](http://www.mlive.com/lansing-news/index.ssf/2015/05/minor_in_possession_would_move.html) [<https://perma.cc/QP9Y-B9FT>].

resources.<sup>281</sup> Evidence indicated that Michigan juveniles, aware of the collateral consequences of a conviction for possession of alcohol, were challenging their cases and “clogging up” criminal court.<sup>282</sup>

Under prior Idaho law, all minor in possession charges constituted misdemeanors.<sup>283</sup> Under the new law, effective July 1, 2016, a first offense is an infraction subject to a fine of \$300.<sup>284</sup> Subsequent offenses continue to be categorized as misdemeanors.<sup>285</sup> The former Boise Chief of Police supported the new alcohol possession law, citing the negative impact of criminal convictions on the future education and job prospects of youth.<sup>286</sup>

### 3. Fare Evasion

In urban settings, youth may rely on public transportation to get to school, work, and medical appointments. Fare evasion is a crime of varying severity depending on the jurisdiction. In 2016, the State of California enacted a law treating fare evasion by juveniles as an administrative violation rather than a criminal infraction or misdemeanor permitting arrest.<sup>287</sup> Thus, juveniles are subject only to fines in the form of parking tickets for fare evasion.<sup>288</sup> The sponsor of this law, State Senator Robert Hertzberg, proposed it out of concern for the effect it would have on students’ education and future.<sup>289</sup> Hertzberg cited to evidence indicating that children required to appear in court during school hours are more likely to be pushed out of school.<sup>290</sup> Thus, students who are excluded from school or detained as a consequence of absence miss out on more school, which can hamper their educational prospects and development.<sup>291</sup> Hertzberg also indicated his desire to prevent youth from being

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281. *See id.*

282. *See id.*

283. H.R. 768, 54th Leg. 2d Reg. Sess. (Idaho 1998).

284. IDAHO CODE § 18-1502 (2017).

285. *Id.* §§ 18-502, 23-604.

286. *See* Jacquelyn Powell, *Former BPD Chief Wants State to Decriminalize Underage Drinking*, IDAHO NEWS (Feb. 9, 2015), <http://idahonews.com/news/local/former-bpd-chief-wants-state-to-decriminalize-underage-drinking> [https://perma.cc/4JTL-T2A5].

287. CAL. PENAL CODE § 640(c)(1-3), (g) (Deering 2017).

288. *Id.*

289. Press Release, Robert Hertzberg, Cal. Senate, Senate Passes Legislation to Decriminalize Transit Fare Evasion Citations for Youth (June 2, 2016), <http://sd18.senate.ca.gov/news/622016-senate-passes-legislation-decriminalize-transit-fare-evasion-citations-youths> [https://perma.cc/3WJB-2LWC].

290. *Id.*

291. *Id.*

charged with a crime and entering the criminal justice process due to inability to pay a transit fare.<sup>292</sup> Finally, Hertzberg suggested that decriminalizing youth fare evasion in California would likely reduce public safety costs and court costs.<sup>293</sup>

Similarly, in 2015, the city council of King County, Washington,<sup>294</sup> voted to make bus fare evasion an infraction for youth.<sup>295</sup> Supporters of the law were concerned that, under prior law, fare evasion could be charged as a misdemeanor.<sup>296</sup> After the change in law, youth will only be subject to a civil infraction, that is, fine, for bus fare non-payment.<sup>297</sup>

### C. A Stalled Effort to Broadly Decriminalize Youthful Misconduct

In 2017, the Florida Legislature considered proposals that would partially decriminalize a wide range of youthful behaviors, rather than decriminalizing a singular offense as did legislation in other jurisdictions.<sup>298</sup> However, these efforts were unsuccessful.

The proposed Senate Bill 196 mandated that law enforcement officers issue citations to first-time juvenile offenders who admitted committing certain enumerated non-serious offenses, including underage possession of alcohol, battery (excluding domestic

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292. *Id.*

293. *Id.*

294. King County is the largest metropolitan county in Washington based on population and includes Seattle. KING COUNTY, STATISTICAL PROFILE ON: KING COUNTY (2015), <http://www.kingcounty.gov/~media/depts/executive/performance-strategy-budget/regional-planning/Demographics/KC-profile2016.ashx?la=en> [<https://perma.cc/APK6-UDUU>].

295. Bryan Cohen, *King County Decriminalizes Evading Youth Bus Fares*, CAPITOL HILL SEATTLE BLOG (Oct. 30, 2015, 7:00 AM), <http://www.capitolhillseattle.com/2015/10/king-county-decriminalizes-evading-youth-bus-fares-moves-towards-repealing-the-shoreline-rule/> [<https://perma.cc/W8WC-4BBH>]; *County Votes to Make Major Changes to Metro's Fare Enforcement Policy*, METROPOLITAN KING COUNTY COUNCIL NEWS (Oct. 26, 2015) [hereinafter *County Votes*], <http://www.kingcounty.gov/council/news/2015/October/10-26-DU-fareenforcement.aspx> [<https://perma.cc/LN7W-FRVA>].

296. Cohen, *supra* note 295; *County Votes*, *supra* note 295.

297. Cohen, *supra* note 295; *County Votes*, *supra* note 295.

298. *See, e.g.*, S.B. 196, 2017 Leg. (Fl. 2017); CARUTHERS INST., STEPPING UP: FLORIDA'S TOP JUVENILE CITATION EFFORTS 16 (2016) [hereinafter CARUTHERS INST., STEPPING UP], <http://caruthers.institute/wp-content/uploads/2016/11/FL-Top-Juvenile-Civil-Citation-Efforts-Study-FINAL-9-7-16-2.pdf> [<https://perma.cc/N3AT-6T4U>]; Press Release, Caruthers Inst., Requiring Juvenile Citations in Florida (Feb. 16, 2017) [hereinafter Caruthers Press Release], <http://caruthers.institute/report-demonstrates-proposed-legislation-requiring-juvenile-citations-for-minor-offenses-would-benefit-public-safety-youth-and-taxpayers/> [<https://perma.cc/M39P-G6DZ>].

violence), criminal mischief, trespass, petty theft, loitering, fights without injury, disorderly conduct, possession of small amounts of marijuana, possession of drug paraphernalia, and resisting an officer without violence.<sup>299</sup> The legislation would make the issuance of a citation the presumptive norm and arrest the exception for some youthful offenders.<sup>300</sup> Under the proposed law, police retain discretionary authority to issue a citation when a juvenile (1) commits multiple enumerated offenses on the same occasion, (2) commits an un-enumerated misdemeanor, and (3) is a recidivist.<sup>301</sup>

Under the existing law, police have absolute discretionary authority to issue a citation, refer the juvenile to a pre-arrest diversionary program, or make an arrest.<sup>302</sup> Data indicates, however, that officers underutilized their discretion, and frequently arrested youth and referred them to juvenile court.<sup>303</sup>

Senate lawmakers in support of the bill expressed their desire to not stigmatize juveniles for youthful mistakes and to avoid negatively affecting juveniles' future education and employment opportunities.<sup>304</sup> Their aim was to help youth learn from their mistakes without harshly penalizing them.<sup>305</sup> Arrests for minor youthful misbehaving can have significant long-term consequences for juveniles, including denial of admission to higher education institutions, denial of financial aid, rejection from housing, loss of employment and military enlistment opportunities, and loan refusal.<sup>306</sup> These consequences were viewed as disproportionate punishment for the misbehavior.<sup>307</sup>

Analytics suggested that increasing Florida's rate of juvenile civil citations in lieu of arrests would reduce juvenile offending and free-

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299. S.B. 196 § 3(b)(1), 2017 Leg. (Fla. 2017).

300. CARUTHERS INST., STEPPING UP, *supra* note 298, at 16; Caruthers Press Release, *supra* note 298.

301. Fla. S.B. 196 § 3(b)(2-5).

302. FLA. STAT. ANN. § 985.12(1) (West 2015).

303. CARUTHERS INST., REQUIRING JUVENILE CITATIONS IN FLORIDA 10 (2017) [hereinafter CARUTHERS INST., REQUIRING JUVENILE CITATIONS], <http://caruthers.institute/wp-content/uploads/2017/02/Feb.-2017-Requiring-civil-citations-FINAL36292.pdf> [<https://perma.cc/67JJ-LF9S>].

304. *Legislation to Reduce Criminalization of Adolescence Passes Final Committee*, CAPITAL SOUP (Apr. 13, 2017), <http://capitalsoup.com/2017/04/13/legislation-reduce-criminalization-adolescence-passes-final-committee/> [<https://perma.cc/3ZMD-Y7WK>].

305. *Id.*

306. CARUTHERS INST., REQUIRING JUVENILE CITATIONS, *supra* note 303, at 5; CARUTHERS INST., STEPPING UP, *supra* note 298, at 15.

307. CARUTHERS INST., REQUIRING JUVENILE CITATIONS, *supra* note 303, at 5.

up public resources.<sup>308</sup> For example, analysis of data in 2016 compared recidivism rates for those issued juvenile civil citations to recidivism rates for those participating in post-arrest diversion programs for civil citation-eligible offenses.<sup>309</sup> The results revealed that the overall recidivism rate for those issued citations was 5% and for those in diversion programs was 9%.<sup>310</sup> When comparisons were made by offense, the disparity was often more stark sometimes by a factor of two or three.<sup>311</sup> With respect to public resources, if the targeted goal of 75% statewide utilization of citations was reached, an estimated \$19 million to \$62 million would become available for other public needs.<sup>312</sup>

Related House Bill 205 initially tracked the Senate Bill 196 but later took a different path from the Senate version.<sup>313</sup> The juvenile citation portion was removed from the House proposal, and instead, language making it easier to expunge juvenile misdemeanor arrest records after completion of diversion programs was added.<sup>314</sup> Ultimately, both bills stalled and neither passed before the legislative session ended.<sup>315</sup> Although several legislatures have successfully decriminalized particular behaviors by juveniles, Florida's legislative attempt to broadly decriminalize eleven non-serious offenses was unsuccessful.

### III. THE REFINEMENT OF JUVENILE DECRIMINALIZATION

Part III explores how policymakers can advance efforts to broadly decriminalize certain behaviors committed by juveniles. Sections III.A and III.B consider opposition to and unintended consequences of juvenile decriminalization. Drawing on these insights as well as the earlier discussions herein, Section III.C offers recommendations aimed at policymakers seeking to propose decriminalization as an aspect of juvenile justice reform.

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308. *See generally id.*

309. CARUTHERS INST., STEPPING UP, *supra* note 298, at 1.

310. *Id.* at 11.

311. *Id.* at 14.

312. *Id.* at 6.

313. *See* H.B. 205, 2017 Leg. (Fla. 2017); Tia Mitchell, *House Bill Backs Off Juvenile Civil Citations Requirement, Senate Forges Ahead*, JACKSONVILLE.COM (Mar. 8, 2017), <http://jacksonville.com/news/florida/2017-03-08/house-committee-backs-juvenile-civil-citations-requirement-senate-forges> [<https://perma.cc/NE8J-3YQW>].

314. *See* Mitchell, *supra* note 313 (discussing differences between the Florida House and Senate proposals); *see also* Fla. H.B. 205.

315. *See generally* S.B. 196 § 3(b)(1), 2017 Leg. (Fla. 2017); Fla. H.B. 205.

### A. Preserving Youth Accountability

A concern voiced by opponents of decriminalization is that children will not be held accountable for their actions, which will lead to increased juvenile offending.<sup>316</sup> In some instances, opponents promote expungement as the ideal reform solution that will both demand youth accountability and reward positive youth behavior.<sup>317</sup> These positions fail to recognize the varieties of approaches to decriminalization that promote accountability, overstate the need for criminalization, and overestimate the protections afforded by expungement.

It should first be noted that enacting juvenile citation laws need not result in the complete elimination of accountability. Sometimes—as in the case of Florida’s proposal—the fine is coupled with an education or community service component to promote rehabilitation.<sup>318</sup> Another approach to decriminalization that maintains accountability is to decriminalize behavior only for first offenders and those without a criminal history.<sup>319</sup> A final avenue provides for graduated sanction schemes.<sup>320</sup> After the first offense, juveniles face the possibility of incarceration.<sup>321</sup> Even when the behavior is decriminalized for subsequent offenses, increasingly steep fines can be imposed.<sup>322</sup>

It is also important to recognize that criminal justice punishment is not vital to holding youth accountable. Fears about the removal of accountability are reminiscent of the “get tough on crime” and “super-predator”-driven eras of legislation wherein the notion was that society needs strong government control over, and intervention

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316. For example, opponents of Texas decriminalizing school absence were concerned that the number of truant youth would increase after the new law went into effect. See Terri Langford, *Schools, Courts Worry About New Truancy Law*, TEX. TRIBUNE (July 12, 2015), <https://www.texastribune.org/2015/07/12/schools-courts-worry-about-truancy-law/> [<https://perma.cc/PTQ2-RU87>].

317. See, e.g., Fla. H.B. 205; Mitchell, *supra* note 313; see also NAT’L RESEARCH COUNCIL, NAT’L ACADS., IMPLEMENTING JUVENILE JUSTICE REFORM: THE FEDERAL ROLE 19 (2014) [hereinafter NAT’L RESEARCH COUNCIL] (describing the concept of “Accountability without Criminalization,” which endorses sealing juvenile criminal records to avoid collateral consequences of court involvement).

318. See *generally* S.B. 196, 2017 Leg. (Fla. 2017) (“A juvenile who elects to participate in a civil citation or similar diversion program shall complete up to 50 community service hours and participate in intervention services . . .”).

319. See, e.g., S.B. 332, 98th Leg., 2016 Reg. Sess. (Mich. 2016).

320. See, e.g., *id.*

321. See, e.g., *id.*

322. See, e.g., DUXBURY BY-LAWS, *supra* note 275, § 7.5.

in, the lives of juveniles in order to protect the public.<sup>323</sup> However, the data has not necessarily supported these types of arguments and conclusions. For instance, serious offenders represent a relatively small portion of those referred to juvenile court.<sup>324</sup> And there are very few chronic violent offenders.<sup>325</sup> Even considering less serious offenses or offenders, the small amount of available data dispels the fear that eliminating criminal penalties increases offending.<sup>326</sup> Lastly, as previously mentioned, most youth age out of offending on their own.<sup>327</sup> Thus, strong mechanisms for external, governmental oversight and control of youth are generally unnecessary because most youth do not chronically offend, do not commit serious offenses, and will on their own, over time develop self-control. Instead, intervention programs can be helpful to assist youthful offenders to learn discipline, accountability, and adherence to the law. Data suggest that specific youth-centric programs of accountability that do not rely on criminal justice means can be designed and are effective at promoting prosocial behavior and adherence to the law.<sup>328</sup>

To those who would advocate providing for expanding expungement options rather than decriminalization, providing for the possibility of expungement is not an equivalent solution to preventing children from entering into, and being harmed by, the juvenile justice process. The numbers of youth who successfully expunge an arrest or case are low.<sup>329</sup> A child's eligibility can be limited based on age, offense, or other factors such as criminal history.<sup>330</sup> The

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323. See discussion *supra* Section I.B.2.

324. REFORMING JUVENILE JUSTICE, *supra* note 27, at 23.

325. *Id.*

326. After Texas decriminalized truancy, statewide data for 2015–2016 indicated attendance rates remained virtually unchanged, though truancy court filings dropped by 90%. STATE OF TEX. JUDICIAL BRANCH, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY, FISCAL YEAR 2016, at Statewide-18 (2016), <http://www.txcourts.gov/media/1436989/annual-statistical-report-for-the-texas-judiciary-fy-2016.pdf> [<https://perma.cc/N6WY-XPY2>]; OVERVIEW TEX. LAW, *supra* note 256, at 3–4.

327. See discussion *supra* Section I.C.

328. See REFORMING JUVENILE JUSTICE, *supra* note 27, at 205–10; NAT'L RESEARCH COUNCIL, *supra* note 317, at 19.

329. See, e.g., ILL. JUVENILE JUSTICE COMM'N, BURDENED FOR LIFE: THE MYTH OF JUVENILE RECORD CONFIDENTIALITY AND EXPUNGEMENT IN ILLINOIS 51–55 (2016), <http://www.law.northwestern.edu/legalclinic/cfjc/documents/Commission-Report-4-27-16-web.pdf> [<https://perma.cc/JM63-8B5Z>]; see also Alexia Elejalde-Ruiz, *Just 3 in 1,000 Juvenile Arrest Records Expunged in Illinois, Report Says*, CHI. TRIB. (Apr. 28, 2016), <http://www.chicagotribune.com/business/ct-juvenile-records-expunged-0429-biz-20160428-story.html> [<https://perma.cc/CCM3-AANK>].

330. CARUTHERS INST., STEPPING UP, *supra* note 298, at 30; SHAH ET AL., *supra* note 205, at 32–34.

expungement process may not be automatic and can often be a multi-step process.<sup>331</sup> It may require the payment of fees.<sup>332</sup> The types of records (e.g., law enforcement, juvenile court, criminal court, fingerprint) subject to expungement differ by jurisdiction.<sup>333</sup> Many states do not actually destroy records.<sup>334</sup> Expunged records may still be maintained and used by law enforcement agencies.<sup>335</sup> Moreover, in today's digital era, even sealed or expunged records may be discovered by unauthorized persons resulting in negative consequences.<sup>336</sup> Thus, notwithstanding claims to the contrary, expungement does not guarantee elimination of documentation of a criminal case or the negative treatment that can follow from use of the criminal history information.

### B. Acknowledging Unwanted Side Effects

While decriminalization aims to divert youth from a potentially dangerous judicial system, it may also generate negative, unintended consequences for youth. In the literature focused on adult criminal justice, these negative consequences have been called the “dark side” of decriminalization.<sup>337</sup> Those downsides merit consideration in this context, but three concerns are particularly salient to youth: (1) overcharging; (2) imposition of long-term financial debt; and (3) increased parental liability.

First, decriminalization may contribute to police and prosecutors overcharging youth. Police and prosecutors possess charging discretion regarding alleged juvenile offending.<sup>338</sup> Because of the proliferation of criminal offenses, the nature of allegedly criminal activity, and generous charging rules, prosecutors often file multiple or heightened charges against juveniles for nonviolent offenses.<sup>339</sup>

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331. SHAH ET AL., *supra* note 205, at 36–43. *See generally* CARUTHERS INST., STEPPING UP, *supra* note 298, at 30 (“Even with private outside counsel . . . juvenile record expunction is more complicated than commonly thought and may not be successful.”).

332. SHAH ET AL., *supra* note 205, at 44–45.

333. *Id.* at 26–27. *See generally* Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES (Oct. 17, 2006), <http://www.nytimes.com/2006/10/17/us/17expunge.html> [https://nyti.ms/2jIfzuT].

334. SHAH ET AL., *supra* note 205, at 24–26. *See generally* Liptak, *supra* note 333.

335. *See* SHAH ET AL., *supra* note 205, at 25. *See generally* Liptak, *supra* note 333.

336. Liptak, *supra* note 333.

337. Natapoff, *supra* note 221, at 1077.

338. *See* Allison Boyce, *Choosing the Forum: Prosecutorial Discretion and Walker v. State*, 46 ARK. L. REV. 985, 996–97 (1994); Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 662–64 (2013).

339. *See* Boyce, *supra* note 338, at 996–1000.



Further, even when a child's conduct warrants a ticket for a non-criminal offense, there is no guarantee that an official will not charge the youth with a more serious offense and still draw the child into the juvenile or criminal justice process.<sup>340</sup> Thus, law enforcers can undermine legislative decriminalization.

Admittedly, however, overcharging is not uniquely related to decriminalization, and future empirical studies may indicate that police and prosecutors will not exercise discretion in this manner when it comes to juvenile offenders. A decriminalization law that mandates the collection of data regarding the use of juvenile citations would assist in determining whether overcharging is occurring.<sup>341</sup> Enforcement officials could be asked to identify instances in which they issue a citation alongside other more serious charges or choose to charge more serious crimes when a citation option was available.

Second, decriminalization may create long-lasting financial debt for juveniles, who are especially unlikely to be able to satisfy financial consequences.<sup>342</sup> While decriminalized offenses may no longer result in criminal penalties such as incarceration or community supervision, they may still require juveniles to pay a fine or a fee to participate in a mandatory educational or community service program.<sup>343</sup> Amounts can accrue into thousands of dollars.<sup>344</sup> Some youth may be too young to legally work, while others cannot find suitable employment allowing them to satisfy their debts.<sup>345</sup> Those who cannot afford their fines may face additional fines and pecuniary penalties, which may be converted to a debt in the long run, in effect punishing the child for being poor.<sup>346</sup> A court may waive financial consequences for inability to pay.<sup>347</sup> Alternatively, in its discretion, a court may order

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340. CARUTHERS INST., REQUIRING JUVENILE CITATIONS, *supra* note 303, at 9; Lane Lambert, *Duxbury May Decriminalize Teen Drinking*, WCVB (Mar. 9, 2016), <http://www.wcvb.com/article/duxbury-may-decriminalize-teen-drinking/8232509> [<https://perma.cc/Y5VM-QFPU>] (“Clancy said his officers would still have the option to criminally charge underage drinkers for more serious actions, such as disorderly conduct . . .”).

341. *See, e.g.*, S.B. 196, 2017 Leg. (Fla. 2017) (requiring the annual collection and reporting of statewide data on juvenile citations and outcomes).

342. *See* FEIERMAN ET AL., *supra* note 208, at 6; Washburn, *supra* note 208; Kate Weisburd, *High Cost, Young Age: Sentencing Youth to a Life of Debt*, HUFFINGTON POST (Apr. 9, 2014, 3:49 PM), [http://www.huffingtonpost.com/kate-weisburd/youth-juvenile-debt\\_b\\_5118950.html](http://www.huffingtonpost.com/kate-weisburd/youth-juvenile-debt_b_5118950.html) [<https://perma.cc/8TY4-AH89>].

343. *See* FEIERMAN ET AL., *supra* note 208, at 5.

344. Washburn, *supra* note 208.

345. FEIERMAN ET AL., *supra* note 208, at 7.

346. *Id.* at 23–24; *see also* Weisburd, *supra* note 342.

347. *See* FEIERMAN ET AL., *supra* note 208, at 10–22; Weisburd, *supra* note 342; *see also* Washburn, *supra* note 208.

participation in fee-free services or allow a payment plan. Should none of these situations occur, a near-term, judicially-imposed financial obligation may be converted to long-term debt, which will follow and burden the child into adulthood.<sup>348</sup> Additionally, data suggest that financial penalties increase the likelihood of recidivism within two years.<sup>349</sup>

To protect against this concern, lawmakers should consider mandating that penalties and interest may not be added to fine-only juvenile citations, and related fees, under any circumstances. Thus, unpaid fines could follow a child into adulthood, but penalties and interest would not accrue and become disproportionate or overly taxing.

Third, decriminalization may increase parental responsibility and liability for their children's conduct.<sup>350</sup> Even if the child cannot be held criminally responsible due to decriminalization, criminal laws still may allow parents to be formally held liable for their child's behavior. For example, parents face misdemeanor charges if they fail to send their children to school.<sup>351</sup> Also, a parent may be charged with providing alcohol to a minor child.<sup>352</sup> Finally, parents may be accused of contributing to the delinquency of a minor, which governs a broad range of conduct.<sup>353</sup> Informally, parents may assume responsibility if they endeavor to pay the fines and costs imposed upon their children, though they are not legally obligated to do so.<sup>354</sup> While it is plausible that holding parents legally liable for their children's conduct can motivate youth adherence to the law, existing data indicate that promoting positive parental involvement is vital to children's healthy development, including compliance with the law.<sup>355</sup> Thus, rather than seeking to shift criminal liability to parents, the aim should be to support parents in positive child-rearing.

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348. Weisburd, *supra* note 342.

349. Alex R. Piquero & Wesley G. Jennings, *Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 *YOUTH VIOLENCE & JUV. JUST.* 325, 334 (2017).

350. *E.g.*, Terri Langford, *New Truancy Law Poised to Put More Pressure on Schools, Parents*, *TEX. TRIB.* (Aug. 8, 2015), <https://www.texastribune.org/2015/08/08/new-truancy-law-puts-pressure-schools/> [<https://perma.cc/E5C5-L7Y6>].

351. *E.g.*, OHIO REV. CODE ANN. § 3321.38 (West 2017).

352. *E.g.*, MICH. COMP. LAWS ANN. § 436.1701 (West 2017).

353. *E.g.*, OHIO REV. CODE ANN. § 2919.24 (West 2017).

354. FEIERMAN ET AL., *supra* note 208, at 6–7.

355. REFORMING JUVENILE JUSTICE, *supra* note 27, at 102–04.

### C. Expanding Eligibility

Decriminalization is a juvenile justice reform strategy that aims to prevent entry into the system (especially when due to court-referrals by police and education officials for generally childish misbehavior) and the problems that stem from system contact.<sup>356</sup> State-wide legislation mandating decriminalization—such as that proposed in Florida—is preferable to locally-adopted laws.<sup>357</sup> State-wide reform can help promote geographic uniformity in utilization so that youth are not potentially disadvantaged based on where they live.<sup>358</sup> Legislative decriminalization, rather than reliance on pre-referral diversion, acknowledges that determining what behavior is—or is not—worthy of criminal justice control is the exclusive function of the legislature. Lastly, charging disparities can be minimized if policies mandate decriminalization rather than allow police and prosecutors discretion whether to issue a citation or to formally charge.

Recognizing that much youthful offending is the product of a developing mind, that it will be naturally outgrown over time, and that court-based consequences can be disproportionate to the behavior, future decriminalization laws should decriminalize as much youth behavior as possible. At the extreme, this could mean decriminalizing all behavior committed by youth under the age of eighteen years. Setting this upper-age limit for decriminalizing all youthful misconduct would recognize that youth continue to develop into their early twenties.<sup>359</sup> Nonetheless, enacting this age cap irrespective of offense is likely politically infeasible because of its breadth; presumably most legislators would be unlikely to support expansive decriminalization for fear of being labeled “soft on crime.” A more likely option to be adopted is: all youth age thirteen years and younger would be subject only to juvenile citations, while those juveniles age fourteen years and older could face more serious consequences.<sup>360</sup> However, this graduated approach does not

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356. See discussion *supra* Part II. Undoubtedly, legalization is the ideal, but it is unlikely that there is political will for this level of reform.

357. The recommendations that have been offered to improve decriminalization laws in the adult criminal justice context are worthy of consideration with respect to juvenile decriminalization. See CARUTHERS INST., *REQUIRING JUVENILE CITATIONS*, *supra* note 303, at 5; CARUTHERS INST., *STEPPING UP*, *supra* note 298, at 15.

358. See, e.g., CARUTHERS INST., *REQUIRING JUVENILE CITATIONS*, *supra* note 303, at 5; CARUTHERS INST., *STEPPING UP*, *supra* note 298, at 15.

359. See discussion *supra* Section I.C.

360. See, e.g., CARUTHERS INST., *REQUIRING JUVENILE CITATIONS*, *supra* note 303, at 2.

sufficiently recognize that youth continue to develop into their early twenties.

An alternative approach to the above scenarios is to decriminalize a broad range of non-serious conduct for all youth under the age of eighteen years. The examples of decriminalization discussed in this Article reflect such an offense-based approach to determining eligibility.<sup>361</sup> One set of examples revealed laws decriminalizing specific crimes, particularly school absence, underage alcohol possession, and fare evasion.<sup>362</sup> The contrasting example from Florida described an effort to broadly decriminalize juvenile conduct.<sup>363</sup> The Florida Senate bill itemized eleven non-serious offenses requiring the issuance of a citation, including underage possession of alcohol, battery (excluding domestic violence), criminal mischief, trespass, petty theft, loitering, fights without injury, disorderly conduct, possession of small amounts of marijuana, possession of drug paraphernalia, and resisting an officer without violence.<sup>364</sup> To reasonably expand the pool of diverted youth, jurisdictions may consider enlarging Florida's list of eligible offenses to include other non-serious offenses. For example, truancy and transit fare evasion seem to be offenses that have attracted the attention of lawmakers interested in decriminalization.<sup>365</sup> Similar offenses which might also merit mandatory decriminalization include disturbing the peace, littering, vandalism, curfew violations, jaywalking, fleeing the police without violence, and saggy pants or indecent exposure. Lastly, policymakers are urged to follow Florida's approach allowing law enforcement to retain discretion whether to issue citations for un-enumerated offenses.<sup>366</sup>

### CONCLUSION

The modern juvenile justice system consists of multiple courts that regulate a wide range of serious and non-serious behavior. Today, juvenile behavior may be adjudicated in juvenile courts, specialty youth courts, or adult criminal courts. The range of behavior that can lead to court involvement is expansive. Serious conduct such as homicide, robbery, and rape can lead to charges. So too can many behaviors that do not pose significant harm or that society would have

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361. See discussion *supra* Part II.

362. See discussion *supra* Section II.B.

363. See discussion *supra* Section II.C.

364. S.B. 196, 2017 Leg. (Fla. 2017).

365. See discussion *supra* Section II.B.

366. See discussion *supra* Section II.C.

once labeled as youthful indiscretions, such as roughhousing, consumption of minor amounts of intoxicants, loitering, and skipping school. At-risk youth who become involved with this juvenile justice complex, particularly those who live in urban settings, rarely emerge unscathed. Decriminalization presents a promising solution to protect youth from the negative effects of the juvenile justice complex while also advancing public interests. While decriminalization may not resolve every problem of juvenile justice and may create unintended consequences, it presently stands as an ideal reform measure, because its benefits outweigh the detriments it may cause. Moreover, those detriments can be mitigated. Government officials seeking to reform juvenile justice should enact measures that broadly decriminalize minor behavior by youth.