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## Beyond “Children Are Different”: The Revolution in Juvenile Intake and Sentencing

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# BEYOND “CHILDREN ARE DIFFERENT”: THE REVOLUTION IN JUVENILE INTAKE AND SENTENCING

Josh Gupta-Kagan\*

*Abstract:* For more than 120 years, juvenile justice law has not substantively defined the core questions in most delinquency cases—when should the state prosecute children rather than divert them from the court system (the intake decision), and what should the state do with children once they are convicted (the sentencing decision)? Instead, the law has granted certain legal actors wide discretion over these decisions, namely prosecutors at intake and judges at sentencing. This Article identifies and analyzes an essential reform trend changing that reality: legislation, enacted in at least eight states in the 2010s, to limit when children can be prosecuted rather than diverted, and when and for how long they may be incarcerated or kept on probation based on the specific offense alleged or adjudicated.

These reforms are a sharp turn for juvenile law. Contrary to the field’s long emphasis on discretionary decisions not legally tethered to specific offenses, the reforms depend on the charges alleged or proven against a child, and limit judges’ authority at disposition and prosecutors’ at intake.

This Article fills a gap in the academic literature, which has previously focused on recent reforms to criminal, not juvenile, court sentencing of children. Recent juvenile court reforms prevent prosecutors and judges from using wide discretion to incarcerate children for petty offenses, follow social science research demonstrating how overly punitive actions undermine rehabilitative goals, and provide important checks and balances on what are often the most important decisions in individual cases. These juvenile court reforms also enhance the importance of plea bargaining, and thus risk creating the same harms as have been documented with plea bargaining in the criminal justice system. This Article argues that risk is mitigated by limitations on prosecutors’ leverage and that future reforms should include further checks on that leverage.

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## INTRODUCTION

The juvenile justice system has worked to rehabilitate children who commit crimes since the first juvenile court was established in 1899.<sup>1</sup> Through a series of policy reform eras, juvenile justice law has addressed procedures for determining whether a child is guilty as charged, when children should be tried in juvenile court versus criminal court, and which legal actor ought to have control over essential decisions. But legislatures have largely avoided substantively defining the core questions in most juvenile delinquency cases—when and for what should children be prosecuted rather than diverted from the court system (the intake decision) and what should the state do with children once they are convicted (the sentencing decision)? Instead, the law has granted certain legal actors wide discretion over these decisions—prosecutors over intake decisions and judges over sentencing decisions.<sup>2</sup>

We are now in the midst of a new reform era—the “children are different” era, named for a set of United States Supreme Court Eighth

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1. *See infra* section I.A.

2. *See infra* notes 51–63 and accompanying text.

Amendment cases protecting children from the most severe criminal court sentences<sup>3</sup>—in which juvenile justice law has finally begun to answer those central questions for juvenile court cases. Public and scholarly attention has largely missed this trend, focusing instead on reforms related to sentencing children convicted of serious offenses in criminal court. This Article identifies and analyzes an essential and underappreciated element to the current reform era—dramatic reforms to juvenile court intake (the decision whether to prosecute, divert,<sup>4</sup> or dismiss charges against a child) and sentencing.<sup>5</sup> These reforms, enacted in at least eight states in the 2010s, limit when children can be prosecuted in juvenile court, how long they may be kept on juvenile probation, and when they may be incarcerated. These limits depend on the offense for which a child is charged or convicted, contrary to the juvenile justice system’s historic de-emphasis of such details. Thus, these reforms impose significant limits on the previously largely unchecked authority of juvenile prosecutors at intake and juvenile court judges at sentencing.

These reforms sharply turn away from juvenile justice law’s historic and (in most states) continuing emphasis on discretionary, offender-based (not offense-based) sentencing. Originally, authorities considered a child’s specific offense less important than whatever underlying problem led to the offense. The juvenile court judge’s task was to identify that underlying problem and order a sentence to address that problem, and

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3. The phrase “children are different” (and a variation, “children are constitutionally different”) appears repeatedly in the Supreme Court’s decision prohibiting mandatory life without sentences for children. *Miller v. Alabama*, 567 U.S. 460, 471, 480–81 (2012). Juvenile justice scholars use the phrase to name the present era of juvenile justice law and policy, dating it to 2005, when the Supreme Court decided *Roper v. Simmons*, 543 U.S. 551, 578 (2005), which prohibited capital punishment for crimes committed under the age of eighteen. *E.g.*, Barry C. Feld, *Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts*, 102 MINN. L. REV. 473, 474 (2017).

4. The federal government defines diversion programs as “alternatives to initial or continued formal processing of youth in the juvenile delinquency system.” *Diversion Programs*, YOUTH.GOV, <https://youth.gov/youth-topics/juvenile-justice/diversion-programs> [<https://perma.cc/76TH-4XH7>]; *see also* OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP’T OF JUSTICE, LITERATURE REVIEW: DIVERSION FROM FORMAL JUVENILE COURT PROCESSING (2017), [https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/diversion\\_programs.pdf](https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/diversion_programs.pdf) [<https://perma.cc/FK9R-ETX8>]. Because diversion generally avoids formal court processing, children whose cases are diverted do not usually get convicted of a crime or face the direct consequences of conviction (such as the risk of incarceration) or collateral consequences of such a conviction. *Id.*

5. By “sentencing,” I refer to the court-ordered consequence following a child’s conviction for committing an act of delinquency, typically defined as an act that would be a crime if the child were an adult. Most juvenile justice codes use different terminology for a range of procedural actions with close parallels in criminal court—in particular for this Article, “disposition” in place of “sentencing.” *E.g.*, S.C. CODE ANN. § 63-19-1410 (2021). This Article will use the term “sentencing” for its broader understanding beyond those familiar with juvenile justice jargon, because that term reflects the element of punishment inherently present in this stage of a delinquency case, and because that is one feature of the reforms discussed in this Article.

legislation granted juvenile court judges wide discretion to do exactly that.<sup>6</sup> Focusing on the offender rather than the offense was a pillar of juvenile justice that distinguished it from criminal justice and facilitated a rehabilitative approach.

The turn away from this founding vision seeks to prevent actions which run counter to social science evidence regarding effective rehabilitation, especially research highlighting how overly punitive actions lead to high recidivism rates.<sup>7</sup> Prosecuting children often leads to higher recidivism rates than diversion.<sup>8</sup> Longer probation periods lack support in our expanding knowledge of adolescent development.<sup>9</sup> Incarceration can increase recidivism in at least two ways: it can traumatize children, and it can expose children who have not committed particularly severe offenses to other children who have.<sup>10</sup> Once children are incarcerated, holding them for relatively longer periods does not lead to less recidivism.<sup>11</sup> All of these findings support offense-based limits on juvenile court intake and sentencing decisions as a tool to further rehabilitative goals.

Procedurally, these reforms impose significant limits on the authority of judges at disposition and prosecutors at intake. Historically, juvenile justice statutes entrusted judges with wide discretion to impose whatever sentence they believed to be in a child's best interest, and that wide discretion coincided with informal procedures that lacked basic due process protections.<sup>12</sup> Judges could and did place children in state custody following convictions for the most minor of offenses, most (in)famously for a prank phone call.<sup>13</sup> Even when the United States Supreme Court engaged in a "constitutional domestication" effort regarding these juvenile court procedures<sup>14</sup> and explicitly recognized problems in

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6. See *infra* section I.A.

7. See *infra* notes 163–165, 200–202, 226–232, 249–262 and accompanying text.

8. See *infra* notes 249–262 and accompanying text.

9. See *infra* notes 226–232 and accompanying text.

10. See *infra* notes 163–165 and accompanying text.

11. See *infra* notes 200–202 and accompanying text.

12. See *infra* section I.B.

13. See *In re Gault*, 387 U.S. 1, 4, 7–8 (1967) (describing commitment of a fifteen-year-old boy to a "State Industrial School" for an indeterminate period of time not to exceed his twenty-first birthday after conviction for making a phone call to a neighbor "in which the caller or callers made lewd or indecent remarks . . . of the irritatingly offensive, adolescent, sex variety").

14. *Id.* at 22. The Court "domesticat[ed]" juvenile procedure by requiring that juvenile courts begin following certain due process requirements, including providing children accused of crimes with the right to notice of the charges against them, the right to confront and cross-examine witnesses against them, the right against compelled self-incrimination, and the right to counsel. *Id.* at 33–34, 42, 55–56.

discretionary sentencing,<sup>15</sup> it left this wide sentencing discretion untouched.<sup>16</sup> And it has remained largely untouched until recently. By adding offense-based limits to who can be incarcerated, recent reforms represent the most significant limit on juvenile court judges’ authority in the institution’s history.

The present reform wave’s regulation of intake decisions could represent a dramatic set of limits on juvenile court prosecutors’ authority over those decisions. Authority over intake decisions originally rested with juvenile court judges and their staff but gradually shifted to prosecutors as an indirect effect of the Supreme Court’s constitutional domestication cases.<sup>17</sup> Once prosecutors acquired this intake power, juvenile court judges maintained some ability to dismiss cases that prosecutors chose to prosecute. But standards for doing so remained vague, and prosecutors maintained wide discretion to make essential decisions about which children would face prosecution and which could enter a diversion program. Recent reforms put stronger and more specific limits on this authority, both limiting which cases can be prosecuted (again, with a focus on the specific offenses charged) and clarifying how judges can review prosecutors’ intake decisions.

These reforms have thus far received less analysis than the Supreme Court’s “children are different” cases regarding criminal court sentencing of children. Ongoing efforts to extend those rulings have focused on applying “children are different” analysis to either *criminal court* sentencing (to address long sentences that are the equivalent of life in prison<sup>18</sup> or mandatory minimum sentences)<sup>19</sup> or police investigation (such

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15. See *infra* notes 80–81 and accompanying text.

16. See *infra* notes 82–85 and accompanying text.

17. See Josh Gupta-Kagan, *Rethinking Family-Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. 743, 770–82 (2018).

18. See, e.g., *State v. Zuber*, 152 A.3d 197, 201–03 (N.J. 2017) (applying *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), “to sentences that are the practical equivalent of life without parole,” including a sentence of fifty-five years before the defendant was parole-eligible); *Bear Cloud v. State*, 2014 WY 113, ¶ 34–35, 334 P.3d 132, 142–43 (Wyo. 2014) (“As a practical matter, a juvenile offender sentenced to a lengthy term-of-years sentence will not have a ‘meaningful opportunity for release.’”); *People v. Caballero*, 282 P.3d 291, 293, 295 (Cal. 2012) (consecutive sentence of 110 years imposed on a juvenile for a non-homicide offense was unconstitutional). *But see* *Bunch v. Smith*, 685 F.3d 546, 547 (6th Cir. 2012) (holding *Graham* “does not clearly establish that consecutive, fixed-term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole”).

19. The Iowa Supreme Court has declared any mandatory sentencing scheme applied to a child to violate the Iowa Constitution. *State v. Lyle*, 854 N.W.2d 378, 380 (Iowa 2014) (“[W]e hold a statute mandating a sentence of incarceration in a prison for juvenile offenders with no opportunity for parole

as an appreciation of how children's development should impact the law of police interrogation and determinations of the admissibility of young suspects' statements).<sup>20</sup> *Juvenile court* intake and sentencing reforms are equally, if not more dramatic and deserve close analysis because of the changes to juvenile justice law and practice that they represent, and because they may augur similar reforms across the country. Yet scholars have not studied them in the same manner. This Article seeks to fill that void by analyzing these state legislative reforms, which represent a significant extension of the present reform era beyond criminal court sentencing.

Analysis of recent juvenile court intake and sentencing reforms must examine the superficial similarity between recent offense-specific reforms and more punitive tough-on-crime reforms of the 1980s and 1990s. Those reforms also expanded offense-specific rules for when children would be exposed to adult criminal sentences or some severe juvenile sentences.<sup>21</sup> Like those older reforms, "children are different" era reforms undermine the juvenile court's historic focus on offender-based dispositions. Crucially, however, recent reforms do so in a way that is less punitive and more rehabilitative. In the tough-on-crime era "[d]oubts about juvenile courts' ability to treat young offenders or protect public safety bolstered get tough policies."<sup>22</sup> The present era features similar doubts about the efficacy of juvenile court interventions, but those doubts lead to a different direction—limiting juvenile court power and discretion as a means of limiting the harms of juvenile court intervention. While the tough-on-crime era's offense-based reforms led some scholars to question whether a separate juvenile justice system is valuable—arguing that if children are exposed to punitive, offense-based sentences, the law should at least give them the full procedural protections of the criminal system—

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until a minimum period of time has been served is unconstitutional . . ."). The Washington State Supreme Court has granted judges discretion to sentence children to terms below statutory minima. *See State v. Houston-Sconiers*, 188 Wash. 2d 1, 21, 391 P.3d 409, 420 (2017). Most other courts to address the question have declined to apply a similar rule in other states. *See, e.g., Burrell v. State*, 207 A.3d 137, 141–45 (Del. 2019) (upholding a statute imposing a mandatory minimum sentence); *State v. Smith*, 836 S.E.2d 348, 350 (S.C. 2019) (approving mandatory minimum sentence applied to juveniles along with "the overwhelming majority of jurisdictions" to consider the issue, and collecting cases). The Virginia legislature has enacted a statute prohibiting mandatory minimum sentences for children. VA. CODE ANN. § 16.1-272(A)(3) (2021).

20. *See, e.g., Dassey v. Dittmann*, 877 F.3d 297, 312, 318 (7th Cir. 2017) (en banc) (acknowledging in federal habeas case that "[a] number of relevant factors . . . tend to support Dassey's claims" that his confession was involuntary, but holding that state court decision deciding otherwise did not unreasonably apply Supreme Court precedent).

21. *See infra* notes 96–97.

22. BARRY C. FELD, *THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE* 107 (2017).

the current reform trend reinforces the need for a separate system to impose offense-based consequences designed around children-specific rehabilitative ends.

These recent trends, starting with reforms in Georgia in 2013, apply ideas first raised in a set of American Bar Association proposals in the 1970s and 1980s which endorsed offense-based upper limits on juvenile court sentences.<sup>23</sup> While the ideas behind these reforms were present for decades, most focus on reform efforts from the early 2010s emphasized programmatic shifts, not legal shifts.<sup>24</sup> Offense-based limits have become a growing statutory trend as reforms expanded from Georgia to at least seven other states in the years since 2013.<sup>25</sup>

This trend has much to recommend it. It prevents historically wide discretion in the juvenile justice system from leading to incarcerating children for petty offenses and the harms that flow from such incarceration. It recognizes that no judge or prosecutor should wield such unchecked power, and imposes important limits on the most invasive actions that can be taken—decisions to prosecute a child at intake and to incarcerate a child at sentencing. It follows empirical research about what actions best serve the system’s rehabilitative goals, and limits the well-established harms that come from unnecessary prosecution and incarceration. Its offense-specific focus helps children understand decisions made by the system as directly connected to their conduct rather than the whims of authority figures.

Moreover, while empirical evidence is limited, offense-based limits on discretion could reduce the wide racial disparities in the juvenile justice system by limiting the implicit bias which can creep into discretionary decisions.<sup>26</sup> The juvenile justice field has long correlated discretionary decisions with large racial disparities,<sup>27</sup> so limiting discretion could reasonably be theorized to reduce those disparities. Empirical data is limited on this point and existing data do not show reductions in racial disparities,<sup>28</sup> but continued focus on this question is warranted.

These reforms also come with a significant risk: enhancing the importance of the specific offense for which a child is convicted makes plea bargaining more important. That, in turn, risks some of the same

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23. See *infra* notes 153–159 and accompanying text.

24. See NAT’L RSCH. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 33, 41–45 (Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers & Julie A. Schuck eds., 2013) [hereinafter REFORMING JUVENILE JUSTICE].

25. See *infra* sections II.A–C.

26. See *infra* notes 364–365 and accompanying text.

27. See *infra* notes 364–365 and accompanying text.

28. See *infra* notes 366–370 and accompanying text.



harms that rampant plea bargaining has caused for the criminal justice system: diminishment of the fact-finding function of trials, and prosecutors' threat of punishment under top charges pressuring defendants to accept plea bargains regardless of their guilt or the state's ability to prove their guilt beyond a reasonable doubt. These risks are exacerbated by widespread deficits in public juvenile defense systems, but mitigated by the imposition of offense-based maximum limits on sentences—limiting the leverage gained by prosecutors filing more severe charges—and by intake reforms imposing some checks on prosecutors' charging authority. Further checks on state power—procedures to challenge intake decisions to prosecute children, limits on pre-trial detention, and reconsideration of jury trial rights—will form important elements of continuing reform efforts to further mitigate these risks.<sup>29</sup>

Part I of this Article outlines the juvenile justice system's historic commitment to discretionary, offender-based decision-making at intake and sentencing. It reviews due process reforms to the trial and adjudication stage of delinquency cases—and how those reforms left the wide discretion at intake and sentencing intact. It surveys offense-based reforms from the tough-on-crime era and how those undermined both juvenile justice law's historic commitment to offender-based decisions and its rehabilitative focus.

Part II describes the essential offense-based intake and sentencing reforms of the present reform era, the empirical research which supports those reforms, and the conditions which suggest that this reform trend can continue to grow.

Part III evaluates those reforms, explaining how they differ from tough-on-crime era offense-based reforms and go beyond reforms directly triggered by the Supreme Court's line of Eighth Amendment juvenile sentencing cases. Part III explains how these reforms could also address persistent and glaring racial disparities in juvenile justice case processing, although empirical data remains unclear. Part III will also explore how these offense-based reforms elevate the importance of plea bargaining and its attendant risks, and how the juvenile justice system balances those risks through the somewhat different role of prosecutors in those cases.

Part IV offers several suggestions for future reforms, including expanding offense-based reforms to pre-trial detention statutes, and how to more strongly ensure checks and balances on charging decisions given their increased importance under offense-based intake and sentencing statutes.

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29. *See infra* Part IV.

## I. HISTORICALLY WIDE DISCRETION AND OFFENDER-BASED INTAKE AND SENTENCING

The juvenile court was designed to give judges wide discretion to consider the most important things about children to determine what intervention was in their best interest.<sup>30</sup> The actual offense a child committed was not expected to be among those most important things.<sup>31</sup> As flaws in juvenile court practice became increasingly apparent, the Supreme Court, starting with the landmark juvenile justice case *In re Gault*,<sup>32</sup> induced a set of due process reforms focused on the adjudicative phase of juvenile courts.<sup>33</sup> These reforms explicitly left the wide discretion and offender-based orientation intact at intake and sentencing, even with the flaws of that system apparent in *Gault*.<sup>34</sup>

The first significant limit on this discretion and offender-based orientation came in the tough-on-crime era reforms of the 1980s and 1990s.<sup>35</sup> Prosecutors obtained greater power to determine whether to prosecute or divert children, and the proportion of cases prosecuted increased.<sup>36</sup> Legislatures limited judges’ discretion by creating and expanding offense-based rules for when children would be prosecuted in criminal court and what sentences judges could impose. Such limits on judicial discretion and sentencing reforms were widely understood to impose a more punitive orientation on all aspects of juvenile justice law and practice, and raised existential questions about the juvenile court’s future.

### A. *Founding Vision*

From its origins, the juvenile court featured wide discretion granted to judges, who were expected to impose offender-based, not offense-based dispositions, identifying the root causes of a child’s delinquency through whatever order would serve the individual offender. According to one early proponent, writing in 1909, a juvenile court judge’s task is less about identifying “a specific wrong,” but determining instead about a child: “What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a

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30. See *infra* notes 37–39 and accompanying text.

31. See *infra* notes 37–39 and accompanying text.

32. 387 U.S. 1 (1967).

33. *Id.* at 21, 24–25, 27–31.

34. See *infra* section I.B.1.

35. See *infra* notes 98–107 and accompanying text.

36. See *infra* notes 103–104 and accompanying text.

downward career.”<sup>37</sup>

Scholars and practitioners have consistently described the juvenile court’s dispositional discretion similarly. Consider this illustrative description from leading juvenile justice scholar Barry Feld writing in 2017: “Traditionally, juvenile courts imposed indeterminate nonproportional dispositions. If delinquency was only a symptom of a child’s needs, then what she did had little bearing on what she might need to change.”<sup>38</sup> Other leading authorities have written similarly.<sup>39</sup>

Simultaneously, the juvenile court was intended to divert children from the more punitive criminal justice system—and thus ensure that children received less punitive responses. The juvenile system existed “[t]o get away from the notion that the child is to be dealt with as a criminal,”<sup>40</sup> following the notion that the criminal courts would be overly punitive to children and lead to more recidivism over time.<sup>41</sup> As one recent publication put it, the juvenile justice system sought “to ensure that youths were not treated the same as adults” and could avoid the “most restrictive placements” associated with the criminal system.<sup>42</sup>

Implementing this vision required granting juvenile court judges remarkably wide discretion. The first statute creating modern juvenile courts—Illinois’s 1899 Juvenile Court Act—gave judges wide discretion to leave children at home, order them “to be placed in a suitable family home,” or send them to juvenile prisons (euphemistically called a “training school,” “industrial school,” or “State reformatory”) for an indeterminate period of time.<sup>43</sup> Crucially, the statute included no provision limiting the court’s discretion regarding which disposition to impose; it provided that “[i]n the case of a delinquent child, the court may” order any of the listed options.<sup>44</sup> The only limits on the court’s authority was that it could not incarcerate children in adult facilities, and not past a

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37. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909).

38. FELD, *supra* note 22, at 136.

39. See, e.g., REFORMING JUVENILE JUSTICE, *supra* note 24, at 183 (writing that “[t]he founding model of the juvenile court dispensed with offense-related considerations altogether in deciding what should be done with the delinquent youth,” focusing instead on whatever a judge determined would best rehabilitate the child).

40. Mack, *supra* note 37, at 109.

41. See *id.* at 106–07 (criticizing the common law’s failure to distinguish the need to punish adults and children equally and asserting that criminal court punishments “criminalized [children] by the very methods that it used in dealing with them”).

42. CHRISTOPHER J. SULLIVAN, TAKING JUVENILE JUSTICE SERIOUSLY: DEVELOPMENTAL INSIGHTS AND SYSTEM CHALLENGES 49 (2019).

43. Illinois Juvenile Court Act of 1899 § 9, *reprinted in* JUV. & FAM. CT. J., Fall 1998, at 3.

44. *Id.*

certain age.<sup>45</sup> When courts committed children to the custody of a juvenile prison, discretion over when they would be released shifted to those institutions, which would determine if the child would go home relatively quickly or remain incarcerated until turning the maximum age.<sup>46</sup>

Juvenile court judges’ wide discretion at disposition persists in most states. The Illinois statute has been substantially rewritten since its 1899 enactment, but maintains judges’ sentencing discretion:

At the sentencing hearing, the court shall determine whether it is in the best interests of the minor or the public that he or she be made a ward of the court, and, if [so], the court shall determine the proper disposition best serving the interests of the minor and the public.<sup>47</sup>

The judge should consider a wide range of information—“[a]ll evidence helpful in determining these questions,” continuing offender-based sentencing.<sup>48</sup> Other states typically have similar statutes.<sup>49</sup>

This wide discretion de-emphasizes the specific charge under which a child is convicted; the judge’s dispositional authority is the same whether the child is convicted of, for instance, misdemeanor simple assault or felony assault in the first degree. For adults in criminal court in South Carolina, the former triggers a maximum sentence of thirty days in jail while the latter triggers a maximum sentence of up to ten years.<sup>50</sup>

By separating the court’s dispositional authority from the specific adjudicated charge, statutes granting wide discretion to judges lessen the importance of plea bargaining in juvenile practice. In adult criminal court, offense-specific sentencing differences incentivize plea bargaining—the threat of ten years imprisonment for a charge of assault in the first degree is the leverage the state uses to induce a plea to assault in the second or third degree.<sup>51</sup> Writing in 2019, a juvenile defense manual emphasizes that

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45. *See id.*

46. *See id.*

47. ILL. COMP. STAT. § 405/5-705(1) (2020).

48. *Id.*

49. *See, e.g.*, N.Y. FAM. CT. ACT § 352.2(2)(a) (Consol. 2020) (empowering, with exceptions for the most serious offenses, judges to enter “an appropriate order” based on considering the “best interests of the respondent as well as the need for protection of the community”); S.C. CODE ANN. § 63-19-1410(A) (2020) (permitting judges to decide between any listed option ranging from terminating jurisdiction to committing the child to a state agency).

50. S.C. CODE ANN. § 16-3-600(C)(2), (E)(2) (2021).

51. The “greatest single incentive for guilty pleas” is typically that by pleading guilty to some lesser charge than what is alleged, a defendant can ensure that he will not face the greater punishment authorized by the more severe charge which is alleged against him. RANDY HERTZ, MARTIN GUGGENHEIM & ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES 395 (2019), <https://njdc.info/trial-manual-for-defense-attorneys-in-jvenile->

the benefit of reduced sentences is not available “in the vast majority of jurisdictions” that have dispositions entirely untethered from adjudicated offenses.<sup>52</sup> A separate juvenile defense manual makes clear that the specific charge adjudicated—felony as charged or misdemeanor as pled—would drive potential sentences for adults, but “mattered little” in juvenile court, because the judge can impose the same disposition regardless of the charge.<sup>53</sup> Even when elements of certain charges defined as aggravating factors in criminal law were dropped as part of a plea bargain, juvenile court judges would often hear those alleged (and unproven and unadjudicated) facts at disposition.<sup>54</sup>

One consequence of the wide discretion granted to judges as part of offender-specific sentencing has been the inconsistent handling of similar cases from one local jurisdiction to another.<sup>55</sup> A child’s specific offense surely matters in practice; violent offenses are consistently more likely to lead to incarceration than more minor offenses, for instance.<sup>56</sup> But the wide discretion permits some minor offenses to lead to placements in juvenile institutions and some serious offenses not to,<sup>57</sup> with individual judges holding wide power to determine the outcome in individual cases.

Wide discretion over both intake and sentencing decisions has also correlated with significant racial disparities.<sup>58</sup> Across all categories of offenses, Black children are less likely to be diverted and more likely to be incarcerated than White children.<sup>59</sup> This correlation suggests the hypothesis that implicit or explicit bias may infect these decisions, with the discretion provided prosecutors at intake and judges at disposition effectively limiting the legal system’s ability to review these decisions.

In addition to their discretion at disposition, juvenile courts historically could determine which children would be prosecuted. Originally, “[a]ny reputable person” could file a petition to initiate a delinquency case, which

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delinquency-cases-by-randy-hertz-martin-guggenheim-anthony-g-amsterdam/  
[<https://perma.cc/E8BZ-V3P9>] (choose “Chapter 14—Guilty Pleas”).

52. *Id.* at 406.

53. MARTIN LARRY SCHWIMMER, JUVENILE COURT FOR DEFENSE ATTORNEYS REVISED 136 (2019).

54. *See, e.g., id.* at 177 (describing one such ruling by a juvenile court judge).

55. *See* REFORMING JUVENILE JUSTICE, *supra* note 24, at 50 (“Young people charged with committing similar acts of delinquency may be handled quite differently, depending on the state or county in which they live . . .”).

56. *See id.* at 75 (providing placement rates for a variety of offenses and offense categories).

57. *See id.*

58. *See infra* notes 364–365.

59. *Statistical Briefing Book: Racial and Ethnic Fairness*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP’T OF JUST. (Mar. 31, 2020), [https://www.ojjdp.gov/ojstatbb/special\\_topics/qa11603.asp?qaDate=2018](https://www.ojjdp.gov/ojstatbb/special_topics/qa11603.asp?qaDate=2018) [<https://perma.cc/TK76-E4CM>].

would trigger a summons and a hearing.<sup>60</sup> Relatively quickly, the number of complaints became large enough that some kind of triage became necessary to determine which cases to prosecute, which to dismiss, and which to divert.<sup>61</sup> By the 1920s, court probation officers began exercising this prosecutorial discretion.<sup>62</sup> In the modern era, this discretion shifted from court staff to prosecutors, often with some role for state juvenile justice agencies.<sup>63</sup> While *who* exercised this discretion changed, the scope of this intake discretion remained.

Juvenile justice authorities have long recognized the importance of sound intake decisions and frequent use of diversion rather than prosecution. In the 1920s, authorities recommended that family-court probation officers not pursue formal charges and instead seek diversion—then called informal adjustment—“whenever feasible.”<sup>64</sup> As a 1967 federal commission wrote, hearing delinquency cases in a separate court from criminal cases depended on a more rehabilitative emphasis at intake: “If there is a defensible philosophy for the juvenile court it is one of judicious nonintervention.”<sup>65</sup>

This emphasis on diversion faded somewhat as prosecutors became a tool of tough-on-crime reforms in the 1980s and 1990s and took authority over intake decisions from judicial staff.<sup>66</sup> As that shift occurred, the frequency of diversion began to fall.<sup>67</sup> The percentage of cases dismissed or diverted fell—and the percentage of cases prosecuted rose from roughly 43% in 1985<sup>68</sup> to 55% in 1998 and 1999,<sup>69</sup> and has remained fairly

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60. Illinois Juvenile Court Act of 1899 §§ 4–5, *reprinted in* JUV. & FAM. CT. J., Fall 1998, at 2. Similar procedures existed in other jurisdictions.

61. *See* H. Ted Rubin, *The Emerging Prosecutor Dominance of the Juvenile Court Intake Process*, 26 CRIME & DELINQ. 299, 301 (1980).

62. *See id.*

63. *See id.* at 299; *see also* Gupta-Kagan, *supra* note 17, at 770–82 (describing shift in intake authority).

64. HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 224 (1927). Legislative reforms calling for “informal adjustments” noted their “great[ ] significance” to improved intake decisions. Noah Weinstein, *The Juvenile Court Concept in Missouri: Its Historical Development—The Need for New Legislation*, 1957 WASH. U. L.Q. 17, 38.

65. Edwin M. Lemert, *The Juvenile Court—Quest and Realities*, in TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 91, 96 (1967).

66. *See* Rubin, *supra* note 61, at 299.

67. *See* Gupta-Kagan, *supra* note 17, at 776–80.

68. *Statistical Briefing Book: Delinquency Cases*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP’T OF JUST. (Mar. 31, 2020), <https://www.ojjdp.gov/ojstatBB/court/qa06401.asp> [<https://perma.cc/W6EE-9TVQ>] (reflecting that the juvenile justice authorities formally handled 530,300 cases out of 1,159,400 cases in 1985). This website links to data that provide specific numbers for each year. *Id.*

69. *Id.* (memorializing the 3,538,600 cases total in 1998 and 1999, with 2,027,900 formally pursued).

steady since.<sup>70</sup>

## B. *Juvenile Court Failures and Reforms*

The juvenile court did not live up to the ideals of its founding, eventually leading to “constitutional domestication” by the Supreme Court in *In re Gault*.<sup>71</sup> *Gault* marked the beginning of the due process reform era, the first major era of juvenile justice reform. That era focused on procedural regularity at adjudication, but not intake or disposition.

### 1. *In re Gault and Reforms of Adjudicative—Not Dispositional or Intake—Procedures*

The facts of the United States Supreme Court’s leading juvenile justice reform cases illustrated the problem of unchecked discretion at disposition, as previous commentators have noted,<sup>72</sup> but the Court’s decisions did nothing to limit that discretion.

*In re Gault*—the 1967 case which imposed basic due process protections for child defendants in delinquency cases—featured a child convicted of a minor offense and incarcerated for far more time than would have been possible if he were an adult.<sup>73</sup> An Arizona juvenile court convicted fifteen-year-old Gerald Gault of making a lewd phone call to a neighbor.<sup>74</sup> For an adult violating this law, the Arizona legislature imposed a maximum punishment of imprisonment up to two months or a fine of \$5 to \$50,<sup>75</sup> but the juvenile court imposed a much more severe sentence on Gerald—an indeterminate commitment to the state training school up to his twenty-first birthday, which would have meant nearly six years in state custody.<sup>76</sup> Gerald served almost three years, and was

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70. For instance, in 2018, the Office of Juvenile Justice and Delinquency Prevention reported 322,400 cases handled informally (43.3% of the total) and 422,100 handled formally (56.7% of the total).

71. *In re Gault*, 387 U.S. 1, 22 (1967). The Court imposed certain basic due process protections on the adjudication phase of a juvenile delinquency proceeding. See *supra* note 14.

72. STANDARDS RELATING TO JUV. DELINQ. & SANCTIONS 37 (INST. OF JUD. ADMIN. & AM. BAR ASS’N 1977) [hereinafter JUVENILE JUSTICE STANDARDS] (“That the juvenile court’s customarily broad discretionary power to commit juveniles to confinement is more than theoretical is demonstrated by the case of Gerald Gault . . .”) (tentative draft).

73. See *Gault*, 387 U.S. at 7–8.

74. See *id.* at 8. In the language of the statute, it was a misdemeanor to “use[] vulgar, abusive or obscene language” when “in the presence or hearing of any woman or child.” *Id.* The alleged call at issue was made with another boy—the precise role of and words spoken by Gerald were unclear—to a female neighbor identified by the Court as “Mrs. Cook.” *Id.* at 4.

75. *Id.* at 8–9.

76. See *id.* at 7–8. A similar, but less dramatic disparity was evident in a later case, *In re Winship*,

released only upon the Supreme Court’s reversal of his conviction.<sup>77</sup> This sentence raised concerns about how indeterminate, offender-based sentencing could undermine rather than promote the system’s rehabilitative goals. Gault himself later said his incarceration left him “mean, angry, and ready to fight,”<sup>78</sup> a description consistent with subsequent research showing the harms to children and society of unnecessary incarceration.<sup>79</sup>

Beyond the stark reality that children faced longer periods of incarceration than adults convicted of the same offenses, the Supreme Court also expressed concern about how juvenile court judges exercised their wide discretion. *Gault* explicitly raised concerns why the juvenile court placed Gerald Gault in state custody for up to six years given the relatively minor nature of his alleged offense and his family situation: “Under traditional notions, one would assume . . . the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home,” an inquiry the Court suggested was lacking.<sup>80</sup> More broadly, the Court raised concerns about the absence of “careful, compassionate, individualized treatment”—the very things wide discretion at disposition hearings was supposed to facilitate.<sup>81</sup>

Nonetheless, the Court made clear that it would issue no ruling regarding “the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor . . . the post-adjudicative or dispositional process.”<sup>82</sup> *Gault* made clear that the Supreme Court was not going to regulate the wide discretion that defined juvenile justice intake

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though to a much less severe degree. 397 U.S. 358, 359–60 (1970) (holding that the state must prove its case in juvenile court beyond a reasonable doubt). Samuel Winship, a twelve-year-old boy, was charged with having “entered a locker and stole[] \$112 from a woman’s pocketbook.” *Id.* at 360. Samuel was subject to a sentence of up to six years in state custody; he was placed in a “training school” for eighteen months, subject to annual extensions until his eighteenth birthday. *Id.* In contrast, an adult convicted of the same offense could get a maximum of five years in prison, a point Samuel’s lawyer emphasized at oral argument. Oral Argument at 1:08, *Winship*, 397 U.S. 358 (No. 778), <https://www.oyez.org/cases/1969/778> [<https://perma.cc/7BMR-KPDH>].

77. Just. Talking, *Juvenile Justice 40 Years After In re Gault*, NAT’L PUB. RADIO (Dec. 24, 2007), [https://web.archive.org/web/20080918190645/http://www.justicetalking.org/transcripts/071224\\_Gault\\_transcript.pdf](https://web.archive.org/web/20080918190645/http://www.justicetalking.org/transcripts/071224_Gault_transcript.pdf) (last visited Apr. 24, 2021).

78. *Id.*

79. See *infra* notes 162–170 and accompanying text.

80. *Gault*, 387 U.S. at 28.

81. *Id.* at 18.

82. *Id.* at 13; see also *id.* at 31 n.48 (“The problems of pre-adjudication treatment of juveniles, and of post-adjudication disposition, are unique to the juvenile process; hence what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process.”).



or disposition; it “ignored entirely the *substance*” of juvenile law—the “unique sentencing or dispositional powers accorded to [juvenile court] judges.”<sup>83</sup>

The *Gault* Court’s avoidance of any decision that might remedy the severe flaws it identified in Gerald Gault’s disposition reflected the debate in that case whether due process protections were incompatible with the juvenile justice system’s rehabilitative goals.<sup>84</sup> The dissenting opinion in *Gault* worried that imposing more procedural requirements on juvenile court proceedings would undermine their rehabilitative purposes and “convert a juvenile proceeding into a criminal prosecution.”<sup>85</sup> Aware of this argument in support of the status quo, Gault’s lawyer, Norman Dorsen, emphasized at oral argument that imposing due process on the adjudicative phase of juvenile cases would leave “the best part” of juvenile court in place—dispositions.<sup>86</sup> Dorsen knew well that disposition practices left much to be desired,<sup>87</sup> and this statement was “entirely strategic.”<sup>88</sup>

The strategy worked, granting Gault and Dorsen a resounding victory and the imposition of fundamental due process protections before juvenile courts could declare a child guilty.<sup>89</sup> But this victory was limited to adjudication procedures that did not regulate the intake and disposition phases of juvenile court where the rehabilitative approach most directly applied.<sup>90</sup> Thus, even with revolutionary due process reforms, wide charging and sentencing discretion continued.

*Gault*’s limited focus on adjudicative procedures has led commentators to describe it as “merely the first step in the cleansing of [juvenile courts’] flaws,”<sup>91</sup> and criticize it as a “missed opportunity” to make intake and sentencing procedures “more true to the juvenile justice vision.”<sup>92</sup> A

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83. Martin Guggenheim, *The Due Process Revolution in Juvenile Court—New York and the Early Years After Gault*, in *RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM* 79, 79 (Kristin Henning, Laura Cohen & Ellen Marrus eds., 2018) (emphasis in original).

84. *See Gault*, 387 U.S. at 22.

85. *Id.* at 79 (Stewart, J., dissenting).

86. Norman Dorsen, *Foreword* to DOUGLAS J. BESHAROV, *JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE COURT*, at xvii (1974).

87. *See id.*

88. Guggenheim, *supra* note 83, at 80.

89. *See Gault*, 387 U.S. at 30–31.

90. *See id.* at 31 n.48.

91. Zawadi Baharanyi & Randy Hertz, *The Many Stories of In re Gault*, in *RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM* 3, 10 (Kristin Henning, Laura Cohen & Ellen Marrus eds., 2018).

92. Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39, 42–43 (2003).

second step of “cleansing” intake and disposition law did not occur until the most recent reform trend discussed in Part II.

## 2. *Later Challenges to Juvenile Court Disposition Authority Fail*

Children’s defenders did not give up their efforts to limit juvenile court sentences, especially when, as in *Gault*, a juvenile court ordered a child to serve a longer sentence than an adult guilty of the same offense could.<sup>93</sup> When children’s defense attorneys raised equal protection challenges, courts overwhelmingly rejected them, reasoning that the rehabilitative purposes of juvenile court dispositions made children dissimilarly situated from adults in criminal court.<sup>94</sup> Longer juvenile court dispositions were rationally related to those purposes, so the discretion to impose longer sentences on a child than would be possible on adults remained—and, in most states, remain.<sup>95</sup>

### C. *Tough-on-Crime Era Reforms, and Calls to Abolish the Juvenile Court*

One era of juvenile court reform did change juvenile court sentences, but in a more punitive direction—the tough-on-crime era of the 1980s and 1990s. Facing an increase in crime, including juvenile crime, and skepticism that juvenile courts and juvenile justice agencies could fulfill their rehabilitative mission, state legislatures enacted a range of changes.

Those reforms marked a shift towards offense-based sentencing *and* more punitive juvenile court sentences for many specific offenses. Facing crime rates which peaked in the early 1990s, and inaccurate and racialized fears of “super-predator[.]” youth, state legislatures enacted a range of “tough-on-crime” reforms.<sup>96</sup> The highest profile set of changes featured more offense-based limits on family court jurisdiction, especially expanded waiver or transfer of children’s cases to criminal court, leading to more criminal court sentences for more severe offenses.<sup>97</sup> In addition, many states adopted more offense-based sentencing practices in juvenile court, including offense-specific parole release guidelines,<sup>98</sup> and

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93. See *supra* notes 75–76 and accompanying text.

94. E.g., *In re A.M.H.*, 447 N.W.2d 40, 43–45 (Neb. 1989); *In re Eric J.*, 601 P.2d 549, 553–54 (Cal. 1979); *J.K. v. State.*, 228 N.W.2d 713, 715–16 (Wis. 1975); *Smith v. State.*, 444 S.W.2d 941, 945, 948 (Tex. Ct. App. 1969); see also *A.M.H.*, 447 N.W.2d at 45 (collecting cases).

95. See *supra* notes 47–50.

96. See FELD, *supra* note 22, at chs.3 & 4.

97. See Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 494–99 (1987).

98. See FELD, *supra* note 22, at 137.

minimum offense-specific juvenile court sentences.<sup>99</sup> Multiple states amended the purpose clauses of juvenile justice statutes to place greater emphasis on punishing children.<sup>100</sup> Collectively, these reforms were understood as dramatic steps away from the rehabilitative ideal towards criminal court sentencing focused on punishment and deterrence.<sup>101</sup> In the tough-on-crime era, this shift was accompanied by a skepticism that child offenders were much different from adult offenders.<sup>102</sup> In addition, the shift towards more prosecutorial control over intake decisions and prosecuting (rather than diverting or dismissing) a greater proportion of cases,<sup>103</sup> occurred in this era.

These reforms and this more punitive orientation led juvenile court prosecutors, probation officers, and judges to prosecute children more frequently and place children in state custody with greater frequency. The proportion of cases prosecuted rather than dismissed or diverted increased about 10%.<sup>104</sup> In the aggregate, dispositions were tied to offenses.<sup>105</sup> But the National Research Council (NRC) documented how, from 1985–2008, authorities used their discretion to incarcerate children more frequently; the percentage of a wide variety of relatively minor charges leading to juvenile “placement” in the state’s legal custody and in a state facility increased sharply.<sup>106</sup> Placements increased from 3.5% of all vandalism cases to 6.4%, accounting for almost 4,000 more children.<sup>107</sup> Placements for “other public order” offenses doubled from 2.5% to 5.1%.<sup>108</sup> Placements increased from 10.3% to 16.4% of stolen property offenses, and 2.7% to 3.6% of disorderly conduct offenses.<sup>109</sup> The number of children placed for simple assault cases increased by 13,700.<sup>110</sup>

Viewing this shift towards more punitive sentencing in juvenile court, some scholars began calling for its abolition. If juvenile courts would impose more severe sanctions than historically intended, but without the

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99. See Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 83 (1997).

100. *Id.*

101. See FELD, *supra* note 22, at 137; NAT’L RSCH. COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 210 (Joan McCord, Cathy Spatz Widom & Nancy A. Crowell eds., 2001) [hereinafter JUVENILE CRIME].

102. REFORMING JUVENILE JUSTICE, *supra* note 24, at 32.

103. See *supra* notes 63, 67–70 and accompanying text.

104. See *supra* notes 69–70.

105. See Feld, *supra* note 99, at 83–84.

106. See REFORMING JUVENILE JUSTICE, *supra* note 24, at 74.

107. See *id.* at 74–76.

108. See *id.* at 74.

109. *Id.* at 75.

110. *Id.*

full due process rights granted to adult criminal defendants,<sup>111</sup> then they were simply a “deficient criminal court,” as Professor Barry Feld argued in 1997.<sup>112</sup> Some critics reviewed juvenile court sentences and described its historic promise of individualized sentences as “a cruel hoax.”<sup>113</sup> Feld argued that children would be better served with the full procedural protections of criminal court coupled with criminal sentencing laws that would treat youth as a mitigating factor.<sup>114</sup> Feld advocated for a “youth discount” at sentencing—a sliding scale, percentage discount in possible sentence lengths based on the age of the child.<sup>115</sup> He suggested, for instance, that a fourteen-year-old be limited to 25–33% of an adult penalty, and a sixteen-year-old 50–60%.<sup>116</sup>

This proposal would have transformed juvenile sentencing entirely into an offense-based enterprise, offering little means for individualized consideration. Moreover, through the proposal’s focus on children’s relatively lower level of culpability,<sup>117</sup> Feld implicitly conceded that retribution for crime rather than rehabilitation of young offenders would be the primary motivation for sentences. It was, Feld wrote in 2017, a reflection of his “despair over the punitiveness of delinquency sanctions” and an effort to reduce those sanctions in the context of that punitive shift.<sup>118</sup> Even some defenses of the juvenile court argued not that it provided a rehabilitative model, but it nonetheless “shields at least some younger offenders from the draconian penalties of the criminal justice system.”<sup>119</sup>

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111. Through a series of cases, the United States Supreme Court granted juvenile defendants protection against self-incrimination, the right to counsel, to confrontation against witnesses, and to notice of charges against them, and required states to prove children guilty beyond a reasonable doubt. *In re Gault*, 387 U.S. 1, 55 (1967); *In re Winship*, 397 U.S. 358, 385–86 (1970). But the Court also held that children in juvenile court were not entitled to trials by jury, *McKeiver v. Pennsylvania*, 403 U.S. 528, 528 (1971), and could be arrested and detained for longer than adult defendants could be before being granted a hearing, *Schall v. Martin*, 467 U.S. 253, 268 (1984).

112. Feld, *supra* note 99, at 69; *see also id.* at 90 (describing tough-on-crime era reforms as “hav[ing] transformed the juvenile court from its original model as a social service agency into a deficient second-rate criminal court that provides young people with neither positive treatment nor criminal procedural justice”).

113. Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 928 (1995).

114. Feld, *supra* note 99, at 69.

115. *Id.* at 118–21; *see also* Ainsworth, *supra* note 113, at 936 (“Given the increased procedural formality and punitive sanctioning of the current juvenile court system, the traditional distinctions between the juvenile and criminal justice systems no longer hold.”).

116. Feld, *supra* note 99, at 118.

117. *Id.* at 116–21.

118. Barry C. Feld, *My Life in Crime: An Intellectual History of the Juvenile Court*, 17 NEV. L.J. 299, 319 (2017).

119. Ainsworth, *supra* note 113, at 929.

Following tough-on-crime era reforms, academics and advocates sought to reduce the juvenile justice system's use of incarceration without challenging the juvenile court's existence or its discretion. The National Research Council Institute of Medicine, for instance, called on states to "reduce the use of secure detention and secure confinement, by developing community-based alternatives"—that is, incarcerate children less frequently not by limiting discretion but by exercising it differently.<sup>120</sup> While a small number of states did enact some limits on incarceration,<sup>121</sup> more dramatic restrictions on that discretion and reforms to juvenile court intake and disposition would not come until a new reform era began.

## II. STATE LEGISLATIVE REFORMS SINCE 2013

We are now in the midst of a new era of juvenile justice reform which has begun to achieve long-standing calls to "us[e] sanction policies that keep kids in communities and minimiz[e] secure confinement," while returning to the rehabilitative goals that were de-emphasized in the tough-on-crime era.<sup>122</sup> This is the "children are different" era, named for a phrase from a line of Supreme Court Eighth Amendment cases requiring consideration of youth as mitigation in sentencing,<sup>123</sup> prohibiting capital punishment,<sup>124</sup> and sharply limiting life without the possibility of parole sentences for children committing the most severe offenses.<sup>125</sup> States have also reversed some tough-on-crime era reforms, most prominently by raising the age of juvenile court jurisdiction and limiting waivers to criminal court.<sup>126</sup> These changes increased the proportion of cases subject

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120. JUVENILE CRIME, *supra* note 101, at 224.

121. *See infra* notes 133–144 and accompanying text.

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

123. *Miller v. Alabama*, 567 U.S. 460, 480 (2012).

124. *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

125. *Graham v. Florida*, 560 U.S. 48, 74–75 (2010).

126. The upper age limit of juvenile court jurisdiction is now seventeen in nearly every state. The upper limit had been fifteen or sixteen in thirteen states in 1997, but that number has declined to four. *Jurisdictional Boundaries*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT., <http://www.jjgps.org/jurisdictional-boundaries> [<https://perma.cc/A4FB-K22C>] (showing changes from 1997–2018); *2019 Legislative Reforms After Raise the Age*, CAMPAIGN FOR YOUTH JUST. (May 20, 2019), <http://www.campaignforyouthjustice.org/2019/item/2019-legislative-reforms-after-raise-the-age> [<https://perma.cc/2Y3E-MWRN>] (noting several states which raised the age of juvenile court jurisdiction and counting four states yet to do so). The Campaign for Youth Justice separately discussed the trend of states making waiver—the process of a juvenile court waiving its jurisdiction so the state may try and sentence a child in adult criminal court—more difficult. Marcy Mistrett, *15 Years of Impact: How We Won*, CAMPAIGN FOR YOUTH JUST., <http://www.campaignforyouthjustice.org/15-years-of-impact-how-we-won> [<https://perma.cc/9E8G-3TDF>].

to juvenile court rather than criminal court sentences. This era’s reforms rest heavily on expanded neurological and psychological research which, as the Supreme Court found, “reinforces the conventional wisdom that adolescents *are* different from adults in ways that affect their criminal conduct.”<sup>127</sup> The Supreme Court has now repeatedly found that children under eighteen are categorically less culpable than adults who commit the same crimes because children are less mature, more impulsive, more susceptible to negative familial and peer pressure, and more amenable to rehabilitation.<sup>128</sup>

The reforms described in this Part build on a separate body of empirical research that examines the impact of different juvenile justice legal system interventions. That research includes a range of powerful findings that call into question many juvenile justice system interventions. Much research focuses on incarcerating children—the most dramatic intervention—finding that incarceration often leads to more recidivism than community-based alternatives,<sup>129</sup> and that when judges do order incarceration, longer periods of incarceration do not correlate with fewer repeat offenses.<sup>130</sup> Research has also established harms from less invasive and more common interventions. Probation, the most common outcome for children convicted of a crime in juvenile court, is increasingly criticized for failing to facilitate rehabilitation, especially when courts subject children to long probationary sentences.<sup>131</sup> Prosecuting children for relatively minor offenses often leads to higher recidivism rates and other harms.<sup>132</sup> Taken together, these findings support efforts to reduce the use of incarceration and its length, limit the length of probation sentences, and divert rather than prosecute a greater proportion of cases. These efforts are the central features of recent legislative reforms.

The reforms described in this Part build on more modest reforms from earlier years. In 1994, Virginia limited commitments to the state juvenile justice agency to children who were convicted of felonies or a second or subsequent “[c]lass 1 misdemeanor.”<sup>133</sup> But two class one misdemeanors could lead to an indeterminate commitment, and that category included common offenses such as simple assault and petit larceny.<sup>134</sup> Moreover,

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127. REFORMING JUVENILE JUSTICE, *supra* note 24, at 32 (emphasis in original).

128. *Miller*, 567 U.S. at 471.

129. *See infra* notes 162–170 and accompanying text.

130. *See infra* notes 200–202 and accompanying text.

131. *See infra* notes 224–232 and accompanying text.

132. *See infra* notes 249–258 and accompanying text.

133. VA. CODE ANN. § 16.1-278.8(A)(14) (2021).

134. *Id.* § 18.2-57(A) (simple assault); *id.* § 18.2-96(2) (petit larceny). Commitments, even for

Virginia simultaneously expanded the range of cases covered by its serious offender statute, and thus made it easier to incarcerate children.<sup>135</sup> In 1998, North Carolina established a three-by-three grid of sentencing options based on the severity of a child's offense and the child's offense history.<sup>136</sup> However, eight of the nine grid boxes permitted judges to send children to some kind of state facility.<sup>137</sup> Only children convicted of minor offenses with "low" offense histories were spared incarceration.<sup>138</sup> A conviction of certain misdemeanors or multiple minor offenses would create a higher offense history score<sup>139</sup> and render the child eligible for placement in a state facility.<sup>140</sup> In 2007, California limited commitments to state facilities to children convicted of certain specified offenses.<sup>141</sup> But judges could still commit these children to county-run facilities,<sup>142</sup> and this modest foray into offense-based sentencing was part of a broader realignment from a state to a county-run system.<sup>143</sup> Also in 2007, Texas prohibited commitment of children to the state juvenile justice agency unless they were convicted of a felony, although judges maintained the ability to order children placed in "a suitable public or private [institution or agency]," or other secure facilities.<sup>144</sup>

The results of these earlier and relatively modest reforms were, with one exception, smaller in comparison to the results of 2010s reforms. In Texas, while the number of children committed to state facilities declined dramatically,<sup>145</sup> the proportion of cases leading to some kind of

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those misdemeanors, can last indefinitely up to three years, *id.* § 16.1-285, and up to seven years if convicted of certain more serious offenses, *id.* § 16.1-285.1(C).

135. JOINT LEGIS. AUDIT & REV. COMM'N OF THE VA. GEN. ASSEMBLY, THE OPERATION AND IMPACT OF JUVENILE CORRECTIONS SERVICES IN VIRGINIA, S. DOC. NO. 19, GEN. ASSEMB., at 21 (1997), <http://jlarc.virginia.gov/pdfs/reports/Rpt195.pdf> [<https://perma.cc/HK86-FVG7>].

136. N.C. GEN. STAT. § 7B-2508(f) (2019).

137. Children categorized in "level 3" could be committed to a training school. *Id.* § 7B-2508(e). Children categorized in "level 2" could be placed in a "wilderness program." *Id.* §§ 7B-2508(d), 7B-2506(13)–(23).

138. *Id.* § 7B-2507(b)–(c).

139. *Id.*

140. *Id.* § 7B-2508(f).

141. CAL. WELF. & INST. CODE § 731(a)(4) (West 2021).

142. *Id.* §§ 731(a), 730(a).

143. CAL. LITTLE HOOVER COMM'N, JUVENILE JUSTICE REFORM: REALIGNING RESPONSIBILITIES, at i–ii (2008), [https://www.njjn.org/uploads/digital-library/resource\\_784.pdf](https://www.njjn.org/uploads/digital-library/resource_784.pdf) [<https://perma.cc/LYK5-7AWZ>].

144. TEX. FAM. CODE ANN. § 54.04(d)(1)(B)(ii)–(iii), (d)(2) (West 2021).

145. PEW CHARITABLE TRS., BENDING THE CURVE: JUVENILE CORRECTIONS REFORM IN TEXAS I (2013) [hereinafter BENDING THE CURVE], [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2013/psppbendingthecurvejuvenilecorrectionsreformintexaspdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2013/psppbendingthecurvejuvenilecorrectionsreformintexaspdf.pdf) [<https://perma.cc/557W-7HAD>].

out-of-home placement increased, driven largely by an increase in the proportion of cases leading to county placements.<sup>146</sup> In fact, the drop in state-level commitments was roughly made up by the increase in county-level commitments, which also increased in duration.<sup>147</sup> Similarly in California, while a longer-term decline in state commitments occurred, county placements increased, as did the number of children on probation.<sup>148</sup> Virginia’s package of reforms actually increased juvenile prison populations due to longer length of stays for more serious offenders.<sup>149</sup> The most dramatic impact occurred in North Carolina, where the commitment rate of children declined by more than half from 1998 to 2001.<sup>150</sup>

Since 2010, both the pace and scope of reform has increased. At least eight states—Georgia, Hawaii, Kansas, Kentucky, South Dakota, Tennessee, Utah, and West Virginia—have enacted wide-ranging juvenile justice reforms which revolutionized juvenile court sentencing by imposing offense-based limits on prosecutors’ power to prosecute cases

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146. JENNIFER CARREON, ELIZABETH A. HENNEKE & JOHN J. KREAGER, TEX. CRIM. JUST. COAL., UNFINISHED BUSINESS: DEEPENING THE GAINS IN TEXAS JUVENILE JUSTICE REFORM 3 (2015), <https://www.texascjc.org/system/files/publications/TCJC%20Unfinished%20Business%20Policy%20Paper%202015.pdf> [https://perma.cc/49C5-RBJK]. Texas saw a 68.6% decline in state commitments in the five years following its 2007 reforms attributed by researchers to the 2007 reforms, and not simply the ongoing decline in crime rates in that period or other factors. JOHN POSEY, TEX. LEGIS. BUDGET BD., CHARACTERISTICS OF JUVENILES IN TEXAS JUVENILE JUSTICE DEPARTMENT STATE CORRECTIONAL FACILITIES BEFORE AND AFTER THE 2007 REFORMS 1 (2013), [https://www.lbb.state.tx.us/Documents/Publications/Issue\\_Briefs/604\\_Juveniles\\_in\\_TJJD\\_Facilities\\_Before\\_Reforms.pdf](https://www.lbb.state.tx.us/Documents/Publications/Issue_Briefs/604_Juveniles_in_TJJD_Facilities_Before_Reforms.pdf) [https://perma.cc/NE9J-H5QP]; TONY FABELO, NANCY ARRIGONA, MICHAEL D. THOMPSON, AUSTIN CLEMENS & MINER P. MARCHBANKS III, COUNCIL OF STATE GOV'TS & PUB. POL'Y RSCH. INST., CLOSER TO HOME: AN ANALYSIS OF THE STATE AND LOCAL IMPACT OF THE TEXAS JUVENILE JUSTICE REFORMS 30, 35 (2015), <https://csjusticecenter.org/wp-content/uploads/2020/01/texas-JJ-reform-closer-to-home.pdf> [https://perma.cc/TU2Z-MUUV]. But a detailed empirical analysis of these reforms found that while state commitments declined significantly, an increasing percentage of cases led to “county-based secure and non-secure residential placements.” FABELO ET AL., *supra*, at 39.

147. FABELO ET AL., *supra* note 146, at 40–42. This reform was still impactful—county-level commitments were still significantly shorter than state commitments, and other important benefits from being housed locally than in a state institution possibly far from home, like facilitating greater family visits while incarcerated and easing reintegration to the community upon release. *Id.* at 40.

148. BARRY KRISBERG, LINH VUONG, CHRISTOPHER HARTNEY & SUSAN MARCHIONNA, BERKELEY CTR. FOR CRIM. JUST., A NEW ERA IN CALIFORNIA JUVENILE JUSTICE: DOWNSIZING THE STATE YOUTH CORRECTIONS SYSTEM 6–7, 9–10 (2010), [https://www.law.berkeley.edu/files/bccj/New\\_Era.pdf](https://www.law.berkeley.edu/files/bccj/New_Era.pdf) [https://perma.cc/U645-3A7D]. Other analysts note that even when the rate of children incarcerated at the county level declined, it did so at a lower rate than the juvenile felony arrest rate, suggesting county facilities took an increasing share of incarcerated children. SONYA TAFOYA & JOSEPH HAYES, PUB. POL'Y INST. OF CAL., JUST THE FACTS: JUVENILE JUSTICE IN CALIFORNIA (2014), <https://www.ppic.org/publication/juvenile-justice-in-california/> [https://perma.cc/6ZB6-GTNF].

149. JOINT LEGIS. AUDIT & REV. COMM'N OF THE VA. GEN. ASSEMBLY, *supra* note 135, at 26.

150. N.C. DEP'T OF JUV. JUST. & DELINQ. PREVENTION, 2009 ANNUAL REPORT 6 (2010).



and judges' power to impose relatively severe punishments.<sup>151</sup> These reforms reflect several common features. They limit prosecutors' authority to prosecute (rather than divert) some cases and judges' authority to incarcerate children at disposition following certain offenses. They are informed by social science research showing relative harms to the juvenile court's rehabilitative mission based from these (now limited) more punitive actions.<sup>152</sup> The success of reforms so far, coupled with that supporting research, and engagement from large foundations working to facilitate reforms suggest that these reforms will continue to spread around the nation.

A. *Offense-Based Limits on Commitments/Incarceration*

As of this writing, eight states have enacted offense-based limits on when or for how long judges can incarcerate children. These reforms represent a dramatic break with juvenile justice law's historic disposition policies, both for putting offense-based upper limits on sentences and constraining discretion held by judges.

These reforms evoke earlier failed reform proposals—the Institute of Justice and American Bar Association's (IJA-ABA) 1980 recommendations for “proportionate but lenient” offense-specific juvenile justice sanctions.<sup>153</sup> The IJA-ABA Commission sought to codify “the principle of limited intervention,” following the notion that the less restrictively the state intervenes, the better off the child and society.<sup>154</sup> Reforming juvenile courts' “relatively unlimited sanctioning authority” was essential to ensure over-intervention did not occur.<sup>155</sup> In that IJA-ABA proposal, all offenses would be placed into categories from most to least severe; the most severe offenses could lead to no more than thirty-six months of incarceration or probation.<sup>156</sup> The lowest level felony category could lead to no more than six months' incarceration or eighteen months' probation, and the two misdemeanor categories either prohibited incarceration outright or limited it to more severe misdemeanors committed by children with certain prior records.<sup>157</sup> Those

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151. See *infra* sections II.A–C.

152. See *infra* notes 162–170, 200–202, 224–232, 249–258 and accompanying text.

153. REFORMING JUVENILE JUSTICE, *supra* note 24, at 37.

154. JUVENILE JUSTICE STANDARDS, *supra* note 72, at 40.

155. *Id.*

156. *Id.* at 41–42.

157. *Id.* The IJA and ABA reaffirmed this recommendation in a 1996 publication. INST. OF JUST. ADMIN. & AM. BAR ASS'N, JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH 152–53 (Robert E. Shepherd, Jr. ed., 1996).

recommendations are offense-based—the adjudicated offense and prior record are the primary criteria—but the severity of offense would direct the upper limit of possible sanctions for both commitments to state custody and probation.<sup>158</sup> The proposal would thus limit the harshness of any subsequent punishment, rather than use the severity of an offense to transfer a child to criminal court or otherwise impose more punitive punishments on them. The IJA-ABA thus sought to impose a child-specific form of proportionality—one that took specific offenses into account, but still emphasized “lenience and a concern for the needs of young offenders.”<sup>159</sup>

This approach—creating maximum, not minimum, sentences—contrasted with tough-on-crime reforms enacted in the years after the ABA’s recommendations and is discussed in section I.C.<sup>160</sup> It also contrasts with more punitive proposals from that era. For instance, the American Legislative Exchange Council proposed a model juvenile justice code that would impose strong presumptions in favor of commitments to state custody whenever a child was convicted of a felony.<sup>161</sup> That proposal illustrates what a more punitive offense-specific juvenile court sentencing reform would look like—mandatory minima rather than maxima proposed by the ABA.

### 1. *Prohibitions on Incarcerating Children for Minor Offenses*

A range of evidence demonstrates that incarcerating children leads to worse outcomes than treating them in the community, especially for less serious offenders.<sup>162</sup> One leading study found that children who were incarcerated had significantly less high school graduation rates and significantly more incarceration rates for adult crimes than similar children who were not.<sup>163</sup> The researchers theorized that incarceration

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158. JUVENILE JUSTICE STANDARDS, *supra* note 72, at 37, 42.

159. REFORMING JUVENILE JUSTICE, *supra* note 24, at 37.

160. *See* sources cited *supra* notes 98–99. In addition to some mandatory minimum sentences in juvenile court, expanded waiver statutes from the same era exposed more children to mandatory minimum sentences in criminal court. *See* Feld, *supra* note 97, at 500–19 (describing expanded waiver statutes from that era).

161. RALPH A. ROSSUM, BENEDICT J. KOLLER & CHRISTOPHER P. MANFREDI, JUVENILE JUSTICE REFORM: A MODEL FOR THE STATES 45, 49 (1987), <https://www.ncjrs.gov/pdffiles1/Digitization/107460NCJRS.pdf> [<https://perma.cc/3Q98-GQWL>].

162. *See* Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1403–04 (2020) (summarizing research showing harms of incarceration on central and how “modern justice system regulators increasingly have embraced the lessons offered by this research”).

163. Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital, and Future Crime:*

disrupts normal adolescent development and human capital accumulation, leading to more crime over time.<sup>164</sup> As other scholars have well documented, multiple other studies provide evidence that incarceration undermines the goal of crime prevention.<sup>165</sup> In 2013, the NRC evaluated several years of research into adolescent development and the juvenile justice system and suggested a “developmental approach” to juvenile justice policy questions.<sup>166</sup> It described a “reevaluation of incarceration-based correctional [approaches]” based on the high cost of secure confinement and research showing high recidivism among children upon release from incarceration, coupled with evidence showing that leaving children at home with probation supervision and community-based services can work effectively.<sup>167</sup> It noted that limiting the rate at which children reoffend can depend on the child’s “social setting,” especially considering the particular impact peers have on children.<sup>168</sup> The social setting of institutional placements is often harmful, especially for less severe offenders.<sup>169</sup> The NRC also observed that community-based interventions can help rehabilitate children, and “are in a better position to promote contact with prosocial peers.”<sup>170</sup> That is, community-based interventions can prevent exposing children who commit minor offenses to more serious offenders when states incarcerate children.

This research supports one of the most common reforms, present in six states: statutory prohibitions on incarceration following conviction of certain relatively minor offenses. Such reforms seek to prevent the harms of unnecessary incarceration delineated in that research and what happened in *In re Gault*—the incarceration of a child convicted only of a low-level offense—a problem the Supreme Court did nothing about.<sup>171</sup>

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*Evidence from Randomly Assigned Judges*, 130 Q.J. ECON. 759, 763 (2015). The study examined children on the margins of a decision to incarcerate—that is, children who some judges would incarcerate but others would not. *Id.* at 762–63.

164. *Id.* at 800. The researchers measured human capital—intangible development of skills and habits which contribute to quantifiable earnings—by school completion and adult recidivism. *Id.* at 760.

165. See, e.g., SULLIVAN, *supra* note 42, at 172 (describing sum total of research); FELD, *supra* note 22, at 149 (summarizing research findings regarding juvenile residential facilities). I do not attempt to provide a comprehensive review of this research, as that task has already been undertaken by, among others, the National Research Council’s thorough review of it. REFORMING JUVENILE JUSTICE, *supra* note 24, at 3–4. Rather, I seek to summarize the central findings of that research to show what existing reforms have relied on and what future reforms could similarly rely on.

166. REFORMING JUVENILE JUSTICE, *supra* note 24, at 321–31.

167. *Id.* at 41–42.

168. *Id.* at 124.

169. *Id.* at 124, 126.

170. *Id.* at 125–26, 153.

171. See *supra* notes 74–83 and accompanying text.

Georgia began the trend towards offense-based limits on incarceration when it enacted a comprehensive juvenile justice reform bill in 2013, including prohibitions on judges incarcerating children who had only been convicted of relatively minor offenses.<sup>172</sup> The new disposition statute only permits judges to send children to any kind of placement if they have been convicted of a felony or a misdemeanor following at least four other prior convictions, one of which was for a felony.<sup>173</sup> That is, for most children convicted of only misdemeanors, this reform prohibits judges from incarcerating them.

Hawaii continued the trend in 2014, amending its disposition statute to permit commitment to a state “youth correctional facility” only for children convicted of felonies or probation violations.<sup>174</sup> Less secure placements in local or private agencies remain possible, but the most severe sanction is now limited to those more serious offenders.

Kentucky, in 2014, enacted a similar prohibition on incarcerating children convicted of the least severe offenses. Kentucky’s disposition statute describes two forms of incarceration—short-term “secure detention” of up to forty-five days (for fourteen- to fifteen-year-olds) or ninety days (for sixteen- to seventeen-year-olds), or longer-term commitments to the custody of the state Department of Juvenile Justice.<sup>175</sup> The 2014 reforms prohibited either kind of incarceration for children convicted of violations (the lowest level offense).<sup>176</sup> And they prohibited the second, more severe, form of incarceration for children convicted of misdemeanors, or lower level felonies (class D in Kentucky’s parlance), unless the child had three or more prior convictions or four or more probation violation findings, or a weapons or sex offense.<sup>177</sup>

South Dakota, in 2015, similarly prohibited committing children to state custody for more than ninety days unless the child was convicted of a relatively serious offense or other evidence established that the child “presents a significant risk of physical harm to another person.”<sup>178</sup> The

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172. See GA. CODE ANN. § 15-11-601 (2016).

173. *Id.* § 15-11-601(a)(10)–(11), (b). The statute prohibits placements in facilities “for delinquent children”; foster care or mental health placements are not prohibited. *Id.*

174. HAW. REV. STAT. § 571-48(1)(B)(i) (2020). Exceptions also exist for children sent to youth correctional facilities from juvenile drug court or girls’ court. In all cases, judges had to specify in writing what makes the child a “public safety risk warranting placement in the correctional facility.” *Id.*

175. KY. REV. STAT. ANN. § 635.060(3)(a) (West 2021). The reforms also limited those lengths of time based on the offense for which a child was convicted. See *infra* note 203 and accompanying text.

176. KY. REV. STAT. ANN. § 635.060(3).

177. *Id.* § 635.060(4).

178. S.D. CODIFIED LAWS § 26-8C-7(10)(b)(i) (2020). A separate provision permits family courts

juvenile court also has to find that no viable alternative to incarceration exists and that incarceration is the “least restrictive alternative” available.<sup>179</sup>

Also in 2015, West Virginia enacted reforms which presumptively prohibit judges from committing children following a first conviction for nonviolent misdemeanors.<sup>180</sup>

In 2017, Utah enacted comprehensive juvenile justice reform which featured significant offense-based limits on when judges could commit children to the custody of the state juvenile justice agency.<sup>181</sup> The reform law prohibited any such commitments when children were convicted of only minor offenses such as contempt of court or probation violations, status offenses,<sup>182</sup> or offenses deemed “infraction[s].”<sup>183</sup> More broadly, the reform law prohibited such commitments for children convicted of only misdemeanors unless the offense involved a weapon or the child had at least five prior convictions.<sup>184</sup>

In 2018, Tennessee enacted a set of reforms which presumptively barred incarceration unless the child was convicted of a felony, or was convicted of a misdemeanor and had at least two prior convictions from separate incidents.<sup>185</sup> Tennessee’s reforms provide juvenile court judges with some discretion to incarcerate children beyond those categories if the court found “by clear and convincing evidence that the child is in imminent risk of danger to the child’s health or safety *and* needs specific treatment . . . available only if the child is placed in [state] custody.”<sup>186</sup> And, in such cases, the child may presumptively be incarcerated for only six months.<sup>187</sup> The previous statute had followed the wide discretion of the original juvenile court by permitting juvenile court judges to impose

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to incarcerate any child—regardless of the offense for which they were convicted—for up to nine days. *Id.* § 26-8C-7(6).

179. *Id.* § 26-8C-7(10)(a)–(b).

180. W. VA. CODE § 49-4-714(b)(6) (2020). The presumption may be rebutted by “clear and convincing evidence that there is a significant and likely risk of harm, as determined by a needs assessment, to the juvenile, a family member or the public and that continued placement in the home is contrary to the best interest of the juvenile. . . .” *Id.*

181. H.B. 239, 62d Leg., 2017 Gen. Sess. § 65 (Utah 2017).

182. Status offenses are not crimes, and are only offenses when done by a child. They include truancy and allegations that a child is “ungovernable, habitually disobedient and beyond the control of his parents.” State *ex rel.* Harris v. Calendine, 233 S.E.2d 318, 325 (W. Va. 1977).

183. UTAH CODE ANN. § 78A-6-117(2)(d)(i) (West 2020).

184. *Id.* § 78A-6-117(2)(c)(ii). The court must also find that “nonresidential treatment options have been exhausted or nonresidential treatment options are not appropriate.” *Id.* § 78A-6-117(2)(c)(i).

185. TENN. CODE ANN. § 37-1-131(a)(4)(B) (2021).

186. *Id.* § 37-1-131(a)(4)(B)(iii)(a) (emphasis added).

187. *Id.* § 37-1-131(a)(4)(B)(iii)(b). A six-month commitment may be extended for one additional six-month term if the child continues to need treatment available only in custody. *Id.*

whatever sentence they deemed “best suited to the child’s treatment, rehabilitation and welfare.”<sup>188</sup> While the exceptions in Tennessee’s reform legislation maintain more judicial discretion at sentencing than in other states,<sup>189</sup> they still represent a significant step towards offense-based limits and limits on judicial discretion.

Juvenile justice agency leaders in states which enacted these reforms cited concerns about incarcerating children for relatively minor offenses.<sup>190</sup> This justification implies that these reforms seek to reverse the increase in incarceration rates for minor offenses that emerged in the tough-on-crime era,<sup>191</sup> and apply the lessons of research showing harms of incarceration.<sup>192</sup> For instance, South Dakota’s juvenile justice agency director reported that “one of the most compelling reasons we identified for pursuing reform was that 7 in 10 kids in Department of Corrections custody were there for probation violations, low-level misdemeanors, or status offenses.”<sup>193</sup> Hawaii’s juvenile justice agency director cited the “large proportion of youth coming into the system on low-level offenses.”<sup>194</sup> Tennessee’s governor lobbied for reform to “[r]eserve detention and out-of-home placement for youth who have committed serious crimes or pose a public safety risk.”<sup>195</sup> Other states which enacted these reforms expressed concern about large numbers of children incarcerated for relatively minor offenses prior to those reforms. In Kentucky in 2012, 55% of incarcerated children had been incarcerated for

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188. *Id.* § 37-1-131(a).

189. Media reports attributed those exceptions to arguments raised by judges in defense of their discretion, and noted advocates’ consternation about those exceptions. *See, e.g.*, Julie Warren, *Tennessee’s Juvenile Justice Reform Act of 2018 Sets the Stage for Sweeping Reform in the Future*, RIGHT ON CRIME (May 7, 2018), <https://www.rightoncrime.com/2018/05/tennessees-juvenile-justice-reform-act-of-2018-sets-te-stae-for-sweeping-reform-in-the-future/> [https://perma.cc/LQ3F-MPJU]; Adam Tamburin, *Advocates Once Praised Bill Haslam’s Juvenile Justice Bill. Now They Say It’s Watered Down*, TENNESSEAN (Apr. 17, 2018), <https://www.tennessean.com/story/news/2018/04/17/tennessee-juvenile-justice-bill-haslam/520421002/> [https://perma.cc/TS4Q-5NRB].

190. Interviewing several of these leaders, the Pew Charitable Trust reported that “these leaders all said reform was necessary because their states were sending high numbers of low-level, low-risk youth to expensive out-of-home facilities and getting poor returns on those investments.” DANA SHOENBERG, PEW CHARITABLE TRS., *HOW STATE REFORM EFFORTS ARE TRANSFORMING JUVENILE JUSTICE* (Nov. 26, 2019), <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/11/26/how-state-reform-efforts-are-transforming-juvenile-justice> [https://perma.cc/EUG7-4ESV].

191. *See supra* note 107 and accompanying text.

192. *See supra* notes 162–170 and accompanying text.

193. SHOENBERG, *supra* note 190.

194. *Id.*

195. *Reforming Tennessee’s Juvenile Justice System: Juvenile Justice Reform Act of 2018*, TENN. OFF. OF THE GOVERNOR (2018), [https://www.tn.gov/former-governor-haslam/2018-legislative-priorities/j\\_ustice.html](https://www.tn.gov/former-governor-haslam/2018-legislative-priorities/j_ustice.html) [https://perma.cc/S8FK-LG4E].

misdemeanor offenses, probation violations—an increase since 2002.<sup>196</sup> The high numbers of children incarcerated only for relatively minor offenses was a direct result of the highly discretionary sentences permitted since the juvenile court’s origins, which is the feature of juvenile law directly targeted by these reforms.

Such concerns have also been voiced in at least one state that are considering similar reforms. After the emergence of the COVID-19 pandemic in March 2020, the South Carolina juvenile justice agency director wrote to judges, prosecutors, and law enforcement “seeking cooperation from you as a partner in the juvenile justice system to strongly consider only detaining and committing youth who are a current, serious risk to public safety.”<sup>197</sup> While immediately focused on reducing the spread of the disease in juvenile jails and group homes, the request reflects a concern about authorities incarcerating children who are *not* “current, serious risk[s] to public safety.”<sup>198</sup> Perhaps not coincidentally, legislation to impose offense-based limits on intake, pre-trial detention, and disposition authority was endorsed by a South Carolina Senate Select Committee and was pending before the State Senate Judiciary Committee when the coronavirus suspended most legislative action.<sup>199</sup>

## 2. *Limits on the Length of Incarceration*

Research also demonstrates that incarcerating children—even those who have committed more serious offenses—for more than a small number of months serves no significant public safety benefit.<sup>200</sup> The

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196. PEW CHARITABLE TRS., KENTUCKY’S 2014 JUVENILE JUSTICE REFORM 3–4 (2014), <https://www.pewtrusts.org/~media/assets/2014/07/psppkyjuvenilejusticereformbriefjuly2014.pdf> [<https://perma.cc/TV3R-N7V7>].

197. Letter from Freddie B. Pough, Exec. Dir., S.C. Dep’t of Juv. Just., to S.C. Fam. Ct. Js., S.C. Sheriffs & Chiefs of Police, S.C. Solics. & S.C. Pub. Defs. (Mar. 17, 2020) (on file with author); *see also* Letter from Freddie B. Pough, Exec. Dir., S.C. Dep’t of Juv. Just., to S.C. Fam. Ct. Js., S.C. Sheriffs & Chiefs of Police, S.C. Solics. & S.C. Pub. Defs. (July 20, 2020) [hereinafter July 20, 2020 Letter from Freddie B. Pough to S.C. Fam. Ct. Js.] (on file with author) (noting youth detained for “non-violent, misdemeanor, and status level offenses”). It is difficult to analyze what impact this request had; public data for 2020 has not yet been released and any analysis would have to distinguish the impact of the pandemic from the director’s request.

198. July 20, 2020 Letter from Freddie B. Pough to S.C. Fam. Ct. Js., *supra* note 197.

199. S. 1018, 2019–2020 Gen. Assemb., 123d Sess. (S.C. 2020); S.C. SENATE SELECT COMM., SOUTH CAROLINA SENATE SELECT COMMITTEE ON RAISE THE AGE REPORT TO THE SENATE 11–42 (2020), <https://www.scstatehouse.gov/CommitteeInfo/RaiseTheAgeSelectCommittee/S.C.%20Senate%20Select%20Committee%20on%20Raise%20the%20Age%20Report%20to%20the%20Senate.pdf> [<https://perma.cc/95QK-NQRZ>]. The bill was introduced and, as of this writing, remains pending in the 2021–2022 legislative session. S. 53, 2020–2021 Gen. Assemb., 124th Sess. (S.C. 2021).

200. Thomas A. Loughran, Edward P. Mulvey, Carol A. Schubert, Jeffrey Fagan, Alex R. Piquero & Sandra H. Losoya, *Estimating a Dose-Response Relationship Between Length of Stay and Future*

“Pathways to Desistance” study, a longitudinal analysis of more than 1,300 children sentenced in two large metropolitan areas, examined the impact of different lengths of incarceration of serious juvenile offenders on future rates of recidivism.<sup>201</sup> Crucially, once a child had been incarcerated for three months, the researchers could detect “no marginal benefit” to public safety for keeping children “in institutional care for longer periods of time.”<sup>202</sup> Applying this research assumes a rehabilitative goal; incarceration should be limited in time because it serves no further purpose in helping children avoid future offenses, while a more punitive orientation would justify longer incarceration on retributive grounds.

Consistent with that research and a rehabilitative goal, three states’ 2010s reforms imposed upper limits on the length of time a child can be incarcerated under a juvenile court sentence based on the specific offense or offenses for which a child is convicted. These limits look quite similar to the 1980 IJA-ABA proposal; if anything, the enacted time limits on incarceration are shorter than those proposed by the ABA four decades ago.

Kentucky’s 2014 reform imposed upper limits on the lengths of commitments to the state Department of Juvenile Justice: for misdemeanors (which could only lead to commitments if the child had multiple convictions, multiple probation violations, or a weapons or sex offense conviction), commitments could not exceed twelve months; and for low level felonies, commitments could not exceed eighteen months.<sup>203</sup>

Kansas’s 2017 juvenile justice reform limited the maximum length of time children could be incarcerated through a different mechanism. Kansas calculates minimum and maximum juvenile sentencing ranges based on the severity of offenses, which its statute places into several categories.<sup>204</sup> That state’s 2017 reforms shifted some offenses to less severe categories and reducing the maximum lengths for most categories.

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*Recidivism in Serious Juvenile Offenders*, 47 CRIMINOLOGY 699, 720 (2009). Foundations supporting reforms trumpeted this finding. *E.g.*, PEW CHARITABLE TRS., UTAH’S 2017 JUVENILE JUSTICE REFORM SHOWS EARLY PROMISE 9 (2019), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/05/utahs-2017-juvenile-justice-reform-shows-early-promise> [<https://perma.cc/6AB6-MAYS>].

201. Loughran et al., *supra* note 200, at 707.

202. *Id.* at 726. The researchers identified “somewhat of an effect for staying longer than 3 months,” but noted that the sample size of such short stays was “too small to provide adequate statistical power with which to draw sound inferences.” *Id.* That small sample size itself illustrates how longer sentences were the norm for children committed to custody. The study also found a slight (though not statistically significant) increase in recidivism rates for children deemed serious offenders who were incarcerated compared with those placed on probation. *Id.* at 722–23.

203. 2014 Ky. Acts Ch.132 § 47(codified at KY. REV. STAT. ANN. § 635.060(4)(b)(1)–(2) (West 2021)).

204. KAN. STAT. ANN. § 38-2369 (2021).



“Serious offender II” level offenses shifted from eighteen to thirty-six month sentencing ranges to nine to eighteen months, and “serious offender III” shifted from nine to eighteen months to six to twelve.<sup>205</sup>

Utah’s 2017 reform imposes perhaps the most dramatic limits on the length of time children can be incarcerated, creating limits significantly shorter than the IJA-ABA limits proposed in 1980. Utah’s legislature created a presumptive maximum of six months, unless the child re-offends in that time or more time is necessary to complete a specific treatment program.<sup>206</sup> This limit is based on the offense for which a child is convicted—that six-month limit only applies to children convicted of relatively low or moderate severity offenses, while convictions like murder, aggravated sexual assault, aggravated kidnapping, and felonies involving the use of a weapon are not subject to that limit.<sup>207</sup>

### 3. *Results: Reduced Number of Incarcerated Children*

Throughout the “children are different” reform era, the total number of children convicted in juvenile court and then sent to an out-of-home placement has declined nationally, from about 150,800 in 2005 to 62,100 in 2018, a 59% decrease.<sup>208</sup> The percentage of adjudicated cases leading to out-of-home placement, however, has remained very stable over those years, hovering between 26% and 28%.<sup>209</sup> That stability suggests that the reduced numbers of incarcerated children results from reduced numbers of cases reaching disposition, rather than reductions in the proportion of cases in which judges order children incarcerated.

The states<sup>210</sup> engaging in these reforms saw dramatic impacts in the years after enacting this reform legislation with more dramatic results than more modest reform legislation from earlier years had caused. In Kansas, the number of children in any kind of residential confinement declined 63% in four years, from 2015 (when it adopted its reforms) through 2018.<sup>211</sup> Hawaii’s number of children incarcerated in a secure facility

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205. 2016 Kan. Sess. Laws Ch. 46 § 46 (codified at KAN. STAT. ANN. § 38-2369(a)(2)).

206. UTAH CODE ANN. § 62A-7-404(3) (West 2017).

207. *Id.* § 62A-7-404(5).

208. OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP’T OF JUST., JUVENILE COURT STATISTICS 2018, 46 (2020) [hereinafter JUVENILE COURT STATISTICS 2018], <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/juvenile-court-statistics-2018.pdf> [<https://perma.cc/LDH9-B95C>].

209. *Id.*

210. Tennessee’s reforms took effect July 1, 2019. TENN. CODE ANN. § 37-1-101(a) (2021). I omit Tennessee from this paragraph’s summary of reform legislation’s impact due to the relatively short time it has been in effect and the relative lack of data to examine.

211. SHOENBERG, *supra* note 190.

declined 66% from 2013 to 2018.<sup>212</sup> Kentucky’s number of children sentenced to a juvenile justice agency facility declined by about one-third from the three years before its reform to the five years following,<sup>213</sup> compared with a more modest national decline in those years.<sup>214</sup> In particular, the proportion of Kentucky children committed to agency custody based on misdemeanors, probation violations, or status offenses rather than felony convictions declined from 53 to 24%—showing the effect of the offense-specific sentencing reforms.<sup>215</sup> In Georgia, from 2012 to 2017, the number of children committed to “regional youth detention centers” dropped 58%, with a 21% drop occurring between 2013 (when its reforms were enacted) and 2014.<sup>216</sup> The number of Georgia children housed at “youth development campuses” declined by 35%, with most of that drop occurring after 2014.<sup>217</sup> South Dakota’s number of juvenile commitments declined 51% from 2014 (the year before its reforms) to 2016 (the year after)<sup>218</sup> and the total number of children in state custody declined by 54% by 2017.<sup>219</sup> In Utah, the average daily population of children in “secure care” facilities declined 22% from 2015 to 2019,<sup>220</sup>

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212. *Id.*

213. Sarah Vidal, Ben Adams, Megan Foster, LaShana Harris & Rachel Bingham, Presentation on Juvenile Justice Reforms in Kentucky: Evaluation Findings and Lessons Learned 36–37 (Sept. 24, 2020) (on file with author); *see also* Jake Horowitz & Casey Pheiffer, *Juvenile Justice Reforms Yield Major Advances in Kentucky*, PEW CHARITABLE TRS. (May 3, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/05/03/juvenile-justice-reforms-yield-major-advances-in-kentucky> [<https://perma.cc/2HXL-VU5N>] (reporting trend from 2014–2017); KY. DEP’T JUV. JUST., ANNUAL REPORT 2018, 11 (2019), <https://djv.ky.gov/Annual%20Reports/Annual%20Report%202018.pdf> [<https://perma.cc/PJA9-Q3Y4>] (same).

214. JUVENILE COURT STATISTICS 2018, *supra* note 208, at 46.

215. Horowitz & Pheiffer, *supra* note 213.

216. Data is calculated from two sources. GA. DEP’T OF JUV. JUST., 2016 ANNUAL REPORT 10, 13 (2017), <http://online.pubhtml5.com/howr/sakl/#p=1> [<https://perma.cc/LU8Q-LM2S>]; GA. DEP’T OF JUV. JUST., 2017 ANNUAL REPORT 12 (2018) [hereinafter 2017 ANNUAL REPORT], <http://online.pubhtml5.com/howr/ghqy/#p=1> [<https://perma.cc/R9Y5-BSFN>].

217. 2017 ANNUAL REPORT, *supra* note 216, at 16.

218. S.D. JUV. JUST. REINVESTMENT INITIATIVE OVERSIGHT COUNCIL, JUVENILE JUSTICE PUBLIC SAFETY IMPROVEMENT ACT: 2016 ANNUAL REPORT 13 (2017) [hereinafter 2016 ANNUAL REPORT], <https://boardsandcommissions.sd.gov/bcuploads/PublicDocs/JJPSIA%202016%20Annual%20Report.pdf> [<https://perma.cc/ZCZ5-4UVA>].

219. Katelyn Tye-Skowronski, *More Support, Better Outcomes: South Dakota, Kansas Have Revamped Their Juvenile Justice Systems in Recent Years, and Some Early Results Are Promising*, COUNCIL OF STATE GOV’TS: KNOWLEDGE CTR. (Mar. 26, 2018, 12:00 AM), <https://knowledgecenter.csg.org/kc/content/more-support-better-outcomes-south-dakota-kansas-have-revamped-their-juvenile-justice> [<https://perma.cc/VZ4P-WKV5>].

220. JUV. JUST. OVERSIGHT COMM., UTAH COMM’N ON CRIM. & JUV. JUST., *Secure Care*, in ANNUAL REPORT 2019, [https://justice.utah.gov/wp-content/uploads/FY\\_2019\\_HB\\_239\\_Annual\\_Report.html#secure-care](https://justice.utah.gov/wp-content/uploads/FY_2019_HB_239_Annual_Report.html#secure-care) [<https://perma.cc/CYF8-EE9B>].

and less secure “community placements” declined 54%.<sup>221</sup> West Virginia also recorded a decrease in admissions to secure facilities and an increase in the proportion of cases referred to “non-residential programs,” although the effect appears more modest than in other states.<sup>222</sup> These declines were large enough that four of these states were able to close at least one secure juvenile facility.<sup>223</sup>

### B. *Offense-Based Limits on Probation Lengths*

Probation is the most common<sup>224</sup>—and increasingly criticized—outcome for children found guilty in juvenile court. Foundations and advocates do not mince words in describing probation as currently practiced: the Annie E. Casey Foundation, a large foundation with a focus on juvenile justice reform,<sup>225</sup> writes that juvenile “probation . . . remains deeply flawed both in concept and execution.”<sup>226</sup> More specifically, probation in practice seeks to enforce compliance with a set of conditions, which becomes an exercise in bureaucratic box-checking for children who succeed on probation, and a gateway to confinement for children who do not comply with probation conditions yet do not pose a significant public safety risk. One leading foundation compiled various studies showing that probation supervision does not successfully prevent re-offending, especially when compared to diversion programs.<sup>227</sup> The National Council of Juvenile and Family Court Judges adopted a resolution in 2017 calling for dramatic changes to probation practice to make probation practice “conform to the latest knowledge of adolescent development and

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221. JUV. JUST. OVERSIGHT COMM., UTAH COMM’N ON CRIM. & JUV. JUST., *Community Placement*, in ANNUAL REPORT 2019, [https://justice.utah.gov/wp-content/uploads/FY\\_2019\\_HB\\_239\\_Annual\\_Report.html#community-placement](https://justice.utah.gov/wp-content/uploads/FY_2019_HB_239_Annual_Report.html#community-placement) [<https://perma.cc/TW3S-GVUW>]. This placement decline is measured in the rate per 1000 youths, which declined from 2.6 to 1.2. *Id.* That decline began prior to the enactment of reform in Utah, but also had a particularly large drop from 2017 to 2018, after reform took effect. *Id.*

222. CRIME & JUST. INST., CMTY. RES. FOR JUST., IMPLEMENTING JUVENILE JUSTICE SYSTEM CHANGE IN WEST VIRGINIA 3–4 (2019), <http://www.crj.org/assets/2019/03/WV-2019-Implementing-JJ-System-Change-FINAL.pdf> [<https://perma.cc/43C9-YRR9>].

223. JULIA DURNAN, ROBIN OLSEN & SAMANTHA HARVELL, URB. INST., STATE-LED JUVENILE JUSTICE SYSTEMS IMPROVEMENT: IMPLEMENTATION PROGRESS AND EARLY OUTCOMES 9 (2018), [https://www.urban.org/sites/default/files/publication/98321/state-led\\_juvenile\\_justice\\_systems\\_improvement\\_3.pdf](https://www.urban.org/sites/default/files/publication/98321/state-led_juvenile_justice_systems_improvement_3.pdf) [<https://perma.cc/E8UZ-FQW9>].

224. JUVENILE COURT STATISTICS 2018, *supra* note 208, at 60.

225. *See Juvenile Justice*, ANNIE E. CASEY FOUND., <https://www.aecf.org/work/juvenile-justice/> [<https://perma.cc/BYB8-SETM>] (describing the Annie E. Casey Foundation’s juvenile justice work).

226. THE ANNIE E. CASEY FOUND., TRANSFORMING JUVENILE PROBATION: A VISION FOR GETTING IT RIGHT 3 (2018), <https://www.aecf.org/resources/transforming-juvenile-probation/> [<https://perma.cc/4MZG-WVJK>].

227. *Id.* at 6, 8.

adolescent brain science.”<sup>228</sup> These included the development of individualized case plans between families and probation or juvenile justice departments (terminology varies by state) rather than imposition of probation conditions by judges.<sup>229</sup>

The latest social science knowledge shows why traditional probation—in which children are required to abide by a set of conditions and face sanctions if they fail to do so—often does not work.

Given their still-developing executive functioning skills, youth can face tremendous difficulty engaging in the logical decision making required to consistently adhere to probation conditions, foregoing impulses for immediate gratification on a daily basis over a long time period, and making consistently rational decisions, particularly when faced with social or emotional situations that may feel overwhelming . . . .<sup>230</sup>

Coupled with adolescents’ reduced ability to consider long-term future consequences, and increased susceptibility to peer influences, violations of any lengthy list of conditions should be expected.<sup>231</sup> Children engaged in common adolescent misbehavior are exposed to incarceration when probation conditions prohibit a single unexcused absence or disciplinary referral at school or a single failed drug test.<sup>232</sup>

Overly long probation periods exacerbate all of these concerns. The longer a child remains on probation, the more opportunities for relatively minor violations to turn into major legal issues. The Annie E. Casey Foundation recommended against “unnecessarily long periods of probation supervision,” and pointed to probation lengths measured in years as too long.<sup>233</sup> The National Council of Juvenile and Family Court Judges called for probation to focus on “*short-term*, positive outcomes for probation compliant behaviors.”<sup>234</sup>

Following these criticisms, at least three states have also enacted offense-based limits on the length of time juvenile courts can keep

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228. NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, RESOLUTION REGARDING JUVENILE PROBATION AND ADOLESCENT DEVELOPMENT 2 (2017), <https://www.ncjfcj.org/wp-content/uploads/2019/08/regarding-juvenile-probation-and-adolescent-development.pdf> [<https://perma.cc/W4XE-FSTU>].

229. *Id.*

230. Naomi E. S. Goldstein, Elizabeth Gale-Bentz, Jeanne McPhee, Amanda NeMoyer, Sarah Walker, Steve Bishop, Mark Soler, Jason Szanyi & Robert G. Schwartz, *Applying the National Council of Juvenile and Family Court Judges’ Resolution to Juvenile Probation Reform*, 5 TRANSLATIONAL ISSUES PSYCH. SCI. 170, 173 (2019).

231. See THE ANNIE E. CASEY FOUND., *supra* note 226, at 3.

232. *Id.* at 9.

233. *Id.* at 17.

234. NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, *supra* note 228, at 2 (emphasis added).

children on probation.<sup>235</sup> In 2014, Kentucky legislation provided that courts could impose up to thirty days probation for violations, six months for misdemeanors (with certain exceptions for weapons or sex offenses), twelve months for class D felonies, and any length up to age eighteen for more serious felonies.<sup>236</sup> For the two less serious categories, courts could order longer probation only if more time is necessary to complete a specific treatment program, and still subject to offense-specific limits (three months and twelve months, respectively).<sup>237</sup>

In 2015, South Dakota imposed presumptive limits on the length of probation—four months for most cases, and eight months if placed in “the intensive juvenile probation program.”<sup>238</sup> The South Dakota legislature has since relaxed these limits somewhat—probation is now capped at six months in most cases, and twelve months in “intensive” cases.<sup>239</sup> Probation could be extended only if necessary to complete some evidence-based treatment or complete some other treatment program approved by the court, and may not exceed eighteen months except in rare cases.<sup>240</sup> These maximum limits represent a sharp departure from pre-legislation practice. The Pew Charitable Trusts reported that two years before the reforms, in 2013, probation lasted an average of 22.2 months.<sup>241</sup> Moreover, probation lengths had “wide variation across” the state.<sup>242</sup> South Dakota juvenile justice system leaders noted this justice-by-geography problem as one reason for that state’s probation reforms, suggesting more uniform standards for determining probation lengths could reduce geographic disparities and provide a more equal system across the state.<sup>243</sup>

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235. A more dramatic proposal in California would presumptively limit any juvenile probationary period to six months, regardless of offense. Assemb. B. 503, 2021 Assemb., Reg. Sess. (Cal. 2021), [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220AB503](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB503) [https://perma.cc/FR7K-MPQM]; Jeremy Loudenback, *California Weighs Plan to Shrink Probation Supervision Terms for Youth*, IMPRINT (Apr. 6, 2021, 7:00 PM), <https://imprintnews.org/justice/juvenile-justice-2/california-weighs-plan-to-shrink-probation-supervision-terms-for-youth/53197> [https://perma.cc/EZG8-JYEY].

236. KY. REV. STAT. ANN. § 635.060(2)(c)(1)–(4) (West 2021).

237. *Id.* § 635.060(2)(c)(1)–(2).

238. S.B. 73, 2015 Leg., 90th Sess. (S.D. 2015).

239. S.D. CODIFIED LAWS § 26-8C-14 (2020).

240. *Id.*

241. PEW CHARITABLE TRS., SOUTH DAKOTA’S 2015 JUVENILE JUSTICE REFORM 6 (2016), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/01/south-dakotas-2015-juvenile-justice-reform> [https://perma.cc/TK54-MBBP].

242. *Id.*

243. In particular, South Dakota’s juvenile justice agency director raised the concern that the availability of diversion programs and alternatives to incarceration depended on program availability

Kansas enacted similar reforms in 2017, creating presumptive maxima for the length of probation, based on the severity of a child’s offense and a risk assessment. Those limits range from six months for children convicted of misdemeanors and deemed low or moderate risk and felonies but deemed low risk, to twelve months for children convicted of felonies and deemed high risk, with total court supervision time capped at twelve to eighteen months (depending on severity of the offense and risk assessment scores).<sup>244</sup> As in South Dakota, probation extensions are permitted in only limited circumstances, and subject to hard caps of one, three, or six months (depending on a child’s risk assessment).<sup>245</sup> A fourth state, Tennessee, imposed time limits on probation in 2018,<sup>246</sup> but without tying the limits to specific offense; probation could be imposed for only six months, subject to extensions in six-month increments.<sup>247</sup>

The impact of these reforms is not yet clear. Agencies have lacked adequate data to evaluate how probation caseloads or duration has changed.<sup>248</sup> Understanding the impact of reforms to probationary statutes on the length of probation sentences is challenging. The average length of probation is not an adequate measure because other elements of reform change the composition of probation dockets. A state that diverts more children facing low-level charges will leave a collection of children with somewhat more severe charges or offense histories facing prosecution and ending up on probation. Similarly, a state that, post-reform, places children on probation who previously would have been incarcerated has also changed the pool of children on probation. Accordingly, analyzing the impact of reforms to the length of probation requires sophisticated statistical analysis to compare probation lengths in similar cases before and after reforms. I have been unable to find any such studies in the relevant states. This is an area in which further empirical research could be particularly useful.

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in certain areas. The director also cites limits on probation lengths as “address[ing] the inconsistencies we had in our supervision terms across the state.” SHOENBERG, *supra* note 190, at 3.

244. KAN. STAT. ANN. § 38-2391(b), (g) (2021). The most severe offenses are exempted from these time limits. *Id.* § 38-2391(c). When a child is convicted of multiple offense, the most severe offense governs probation length and multiple probation orders may not run concurrently. *Id.* § 38-2391(d).

245. *Id.* § 38-2391(f), (g)(2).

246. TENN. CODE ANN. § 37-1-131(a)(4)(B) (2020).

247. *Id.* § 37-1-131(a)(2)(A)(ii)(a).

248. *E.g.*, KAN. LEGIS. DIV. OF POST AUDIT, JUVENILE JUSTICE REFORMS: EVALUATING THE EFFECTS OF SENATE BILL 367, at 4 (2020), [https://www.kslpa.org/wp-content/uploads/2020/01/B01.02-Final-Report-PDF\\_A.pdf](https://www.kslpa.org/wp-content/uploads/2020/01/B01.02-Final-Report-PDF_A.pdf) [<https://perma.cc/NGD4-7JTR>].

C. *Offense-Specific Reforms Limiting Discretion to Prosecute*

A body of empirical scholarship concludes that children's involvement in the juvenile justice system leads to more crime, creating a strong policy incentive to keep such involvement to a minimum by prosecuting children less frequently. Professors Tom Tyler and Rick Trinkner argue that "the best solution for most juvenile offenders is to divert them out of the juvenile justice system and focus upon rehabilitation, not criminalization, and punishment."<sup>249</sup> Most children will simply age out of offending, and justice system involvement, especially its most severe forms, can disrupt normal maturation processes.<sup>250</sup> A 2009 study concluded that greater juvenile justice system involvement dramatically increased the likelihood of children obtaining adult criminal records, with more intense interventions leading to worse outcomes.<sup>251</sup> The National Research Council of the National Academies and Committee on Assessing Juvenile Justice Reform more cautiously noted a "small" benefit of diverting rather than prosecuting children.<sup>252</sup> A 2013 meta-analysis found that diversion was "significantly more effective than [prosecution in] the criminal justice system in reducing recidivism."<sup>253</sup> Though the scope of results varied based on the specific diversion program, results showed empirical support for diversion programs generally.<sup>254</sup>

Other studies have yielded similar results. A longitudinal review of children in South Carolina's juvenile justice system found that unless a child was diagnosed with an aggression-related mental health condition, prosecuting (rather than dismissing or diverting) a child's case increased the likelihood of recidivism for all children, especially first-time offenders

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249. TOM R. TYLER & RICK TRINKNER, WHY CHILDREN FOLLOW RULES: LEGAL SOCIALIZATION AND THE DEVELOPMENT OF LEGITIMACY 121 (2018).

250. *Id.* at 121, 185 ("[C]ontact with the system has counterdevelopmental consequences and interferes with a natural maturation process that overwhelmingly yields desirable outcomes.").

251. Uberto Gatti, Richard E. Tremblay & Frank Vitaro, *Iatrogenic Effect of Juvenile Justice*, 50 J. CHILD PSYCH. & PSYCHIATRY 991, 996 (2009). While the authors could not statistically prove causation, they concluded "that intervention by the justice system during adolescence has an overall iatrogenic effect on youth." *Id.*

252. REFORMING JUVENILE JUSTICE, *supra* note 24, at 150; *see also id.* at 169 (noting several diversion programs that "have benefits that substantially exceed costs").

253. Holly A. Wilson & Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review*, 40 CRIM. JUST. & BEHAV. 497, 512 (2013).

254. *Id.* For instance, diversion programs were found generally more effective for children considered to be at medium or high risk of reoffending (perhaps because greater room for impact exists for this population). *Id.* at 511–12. Some studies have suggested that "skill-building interventions" such as cognitive-behavioral therapy and some academic interventions were "more effective in a diversion setting than when offered through probation/parole or in custody." *Id.* at 512. The authors called for future evaluations of diversion programs to consider the specific types of services provided in more detail than past studies available for their meta-analysis. *Id.* at 513.

and less serious offenses.<sup>255</sup> A 2019 study found that children offered diversion accessed more mental health services than children prosecuted and placed on probation who had similar levels of mental health needs,<sup>256</sup> a finding which may help explain how diversion leads to more rehabilitation.

The harms associated with overly punitive responses extend beyond the criminal and juvenile justice systems. Various studies have demonstrated that prosecuting rather than diverting or dismissing cases leads to reduced high school completion rates and poorer educational outcomes in youth.<sup>257</sup> These harms have cascading effects over a child’s transition to adulthood and can lead to greater involvement in the adult justice system. The collateral consequences associated with juvenile prosecution, such as stigmatizing legal records, increase a child’s risk for negative social outcomes broadly.<sup>258</sup>

This research is consistent with a body of sociological observations about the justice system’s operation regarding individuals accused of low-level offenses. Describing the misdemeanor dockets of adult criminal systems, where courts impose probationary sentences on most defendants, two generations of scholars have concluded that “the process itself is the punishment.”<sup>259</sup> Applied to juvenile courts, research showing the relative harms of prosecution over diversion demonstrate that the punishment of bringing a child through the juvenile court process—even if the ultimate court-imposed disposition will likely not include incarceration—is punitive and often runs contrary to the juvenile justice system’s rehabilitative goals.

Foundations that work closely with state agencies have relied on this body of work to advocate for an expansion of diversion programs. The Annie E. Casey Foundation describes the tough-on-crime era decrease in the rate of cases diverted as “a conspicuous current-day failure of our nation’s juvenile justice systems.”<sup>260</sup> The Foundation recommends that

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255. David E. Barrett & Antonis Katsiyannis, *The Clemson Juvenile Delinquency Project: Major Findings from a Multi-Agency Study*, 26 J. CHILD & FAM. STUD. 2050, 2051–52 (2017).

256. Elizabeth Janopaul-Naylor, Samantha L. Morin, Brian Mullin, Esther Lee & James G. Barrett, *Promising Approaches to Police–Mental Health Partnerships to Improve Service Utilization for At-Risk Youth*, 5 TRANSLATIONAL ISSUES PSYCH. SCI. 206, 206, 212 (2019).

257. David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOCIO. EDUC. 36, 54–55 (2013); Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 477 (2006).

258. Kirk & Sampson, *supra* note 257, at 54.

259. ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS* POLICING 65 (2018) (quoting MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 30 (1979)).

260. THE ANNIE E. CASEY FOUND., *supra* note 226, at 23.



about 60% of all cases be diverted (compared to 43% in recent data),<sup>261</sup> that authorities define categories of cases in which children should be “[a]lways diverted,” and set factors for determining when less clear cases should be diverted.<sup>262</sup> Reforms limiting prosecutors’ ability to prosecute certain charges are consistent with this practice, establishing sets of cases which always or presumptively must be diverted.

Following this body of research and advocacy, at least four states (Utah, South Dakota, West Virginia, and Kentucky) have imposed offense-based reforms limiting the authority of prosecutors to prosecute low-level offenses. These reforms either presumptively favor or require options other than prosecuting children for some misdemeanors, many minor school-based offenses, and status offenses. These options are typically referred to as diversion—a path that avoids court processing (and thus prosecution and commitment) so long as the child agrees to participate in some kind of program intended to prevent re-offending. While the details of these programs vary, they frequently include some kind of educational, mental health, family, or substance abuse intervention intended to help the child avoid re-offending.<sup>263</sup>

In 2017, Utah struck statutory language which granted authorities wide discretion to determine if “the interests of the public or of the minor require” prosecution.<sup>264</sup> Utah replaced that language with a requirement that they divert children accused only of misdemeanors or status offenses unless the child has three prior convictions, has had “no more than three prior unsuccessful nonjudicial adjustment attempts,”<sup>265</sup> was deemed to be of elevated risk on a risk assessment, or if the child faced certain relatively serious charges or had a more serious record.<sup>266</sup> This reform is notable both for providing for diversion in a relatively wide range of cases and in making diversion mandatory—the state “*shall* offer the minor one nonjudicial adjustment”<sup>267</sup>—and for making diversion in eligible cases mandatory. Prosecutors’ discretion is limited to cases which do not meet criteria for mandatory diversion.<sup>268</sup> The Utah legislation went further, striking mechanisms to bring certain children before juvenile court at all

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261. *Id.* at 13, 20.

262. *Id.* at 25.

263. *Diversion Programs*, *supra* note 4.

264. H.B. 239, 2017 Leg., Gen. Sess., 2017 Utah Laws Ch. 330 (striking portions of UTAH CODE ANN. § 78A-6-602 (West 2020)).

265. UTAH CODE ANN. § 78A-6-602(7)(a)(iii) (West 2021).

266. *Id.* § 78A-6-602(7).

267. *Id.* § 78A-6-602(4) (emphasis added).

268. *Id.* § 78A-6-602(b)(i).

when accused of only minor offenses, including truancy<sup>269</sup> and any infraction or low-level misdemeanor (in Utah’s categorization) which allegedly occurred at school.<sup>270</sup>

South Dakota enacted a more modest offense-based intake statute in 2015, establishing a presumption of diversion for children who have no prior convictions, have no diversions within the last twelve months, and only face charges of a non-violent misdemeanor.<sup>271</sup> Discretion to prosecute remains: prosecutors who have “good cause to believe that [diversion] is insufficient to meet the purposes of this chapter” may still charge children so long as they provide notice as to why they did so.<sup>272</sup> A child defendant may challenge such a decision to prosecute, requiring a judge to rule on whether the child should be prosecuted.<sup>273</sup>

West Virginia, also acting in 2015, made diversion mandatory for all status offenses<sup>274</sup> unless children had prior adjudications or posed “a significant and likely risk of harm” to themselves or others.<sup>275</sup> West Virginia also added a provision requiring prosecutors to determine if nonviolent misdemeanor charges could be diverted—maintaining prosecutors’ discretion over those charges, but nudging them to consider diversion.<sup>276</sup> West Virginia removed prosecutors’ discretion to determine whether to prosecute children who failed to comply with all elements of a diversion agreement, shifting that authority to a multidisciplinary team.<sup>277</sup>

Finally, Kentucky prohibited prosecutors from filing a petition for first-time misdemeanor charges.<sup>278</sup> In addition, Kentucky explicitly permitted

269. H.B. 239, 2017 Leg., Gen. Sess., 2017 Utah Laws Ch. 330, § 7 (striking portions of truancy code, UTAH CODE ANN. § 53A-11-101.7, related to “habitual truants”). The Utah statute has been subsequently renumbered, and the current statute reads as amended in 2017. UTAH CODE ANN. § 53G-6-203.

270. *Id.* § 53G-8-211(3)(a).

271. S.D. CODIFIED LAWS § 26-7A-11.1 (2020).

272. *Id.*

273. *Id.* As of May 18, 2020, a Westlaw search reported no cases citing the statute.

274. Status offenses are not crimes, and are only offenses when done by a child. They include truancy and allegations that a child is “ungovernable, habitually disobedient and beyond the control of his parents.” State *ex rel.* Harris v. Calendine, 233 S.E.2d 318, 325 (W. Va. 1977).

275. Act of May 17, 2015, ch. 150, 2015 W. Va. Acts 1620 (codified as amended at W. VA. CODE § 49-4-702(b)(3)(B) (2020)).

276. W. VA. CODE § 49-4-702(c).

277. *Id.* § 49-4-702(e)–(f). Multidisciplinary team members can include caseworkers, a service provider, a school staff member, and a family member. *Id.* § 49-4-702(f)(2).

278. Act of Apr. 25, 2014, ch. 132, § 45(4), 2014 Ky. Acts 860 (codified as amended at KY. REV. STAT. ANN. § 635.010(4) (West 2021)). In addition, Kentucky enacted a range of other provisions not tied to specific offenses to expand diversion. In particular, Kentucky created an “enhanced pre-court diversion process.” PEW CHARITABLE TRS., *supra* note 196, at 7; Act of Apr. 25, 2014, ch. 132, § 26(1), 2014 Ky. Acts 845 (codified as amended at KY. REV. STAT. ANN. § 635.035) (describing “family accountability, intervention, and response team[s]”).

any party to file a motion in any case, regardless of charge, asking a judge to order a diversion program in place of prosecution.<sup>279</sup>

These reforms have led to dramatic increases in the proportion of cases diverted rather than prosecuted.<sup>280</sup> In Utah, diverted cases increased from roughly one quarter of pre-reform cases to more than one-half in 2018, the first full year after legislation was in effect.<sup>281</sup> In South Dakota, the number of reported diversion cases has increased by about one-third from 2016 to 2019.<sup>282</sup> In Kentucky, the proportion of cases leading to diversion increased from 40% pre-reform to 60% post,<sup>283</sup> and this coincided with reduced likelihood that children would be charged with a subsequent offense.<sup>284</sup>

#### D. *The Beginning of a Wave?*

The reforms described in sections II.A–II.C are important in their own right, but also because they may indicate a growing wave of reforms across the nation and the intellectual underpinnings of those reforms. Indeed, the geographic, demographic, and political diversity of the states surveyed above suggests the possibility that these reforms could spread further around the country.

Another feature of these reforms which may help them spread to other states is the role of a range of foundations in advocating for these reforms. That role reflects a consensus among an influential set of foundations, think tanks, and researchers of the value of these offense-based prosecution and sentencing limitations. It also reflects a growing consensus about related reform topics—such as limiting pre-trial

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279. Act of Apr. 25, 2014, ch. 132, § 33, 2014 Ky. Acts 850 (codified as amended at KY. REV. STAT. ANN. § 610.105).

280. I have been unable to obtain data from West Virginia. This paragraph discusses data from other states enacting reforms limiting intake authority.

281. Diversions accounted for 28%, 17%, and 22% of all cases in the three years immediately preceding reforms, then increased to 55% in the year immediately after reforms took effect. PEW CHARITABLE TRS., *supra* note 200, at 15–16.

282. A 2019 report counts 1,930 diversion cases compared to 1,415 in 2016, a 36% increase. S.D. JUV. JUST. PUB. SAFETY IMPROVEMENT ACT OVERSIGHT COUNCIL, FY 19 APPENDICES 3 (2019) [hereinafter FY 2019 APPENDICES], <https://boardsandcommissions.sd.gov/bcuploads/PublicDocs/Appendix%202019%20Final.pdf> [<https://perma.cc/S79F-3HK3>]. South Dakota data does not include every county, and the counties reporting vary from one year to another, making precise comparisons difficult. *Compare id.* at 2, with 2016 ANNUAL REPORT, *supra* note 218, at 22–23. The counties present in one year but not in another report relatively small numbers of diversion cases that would not impact the overall trend lines. The largest county—Pennington (Rapid City)—reported an increase from 595 diversion cases in 2016 to 991 in 2019, accounting for most of the statewide change. *Compare* 2016 ANNUAL REPORT, *supra* note 218, at 23, with FY 19 APPENDICES, *supra*, at 2.

283. Vidal et al., *supra* note 213, at 33–34.

284. *Id.* at 35–36.

detention<sup>285</sup>—which could play a role in any future reform efforts in these or other states. The most prominent player has been the Pew Charitable Trusts, whose website touts its work in most of the states discussed above.<sup>286</sup> Consulting work from other foundations, such as the Annie E. Casey Foundation, also contributed to some of those reforms.<sup>287</sup> Pew’s reports frequently cite the empirical research discussed in this section, pointing, for instance to “a growing body of research showing that costly, extended out-of-home placements often fail to produce better outcomes than alternative approaches.”<sup>288</sup>

The MacArthur Foundation also played a role. This foundation is recognized for its role in funding and promoting adolescent brain development research which informed the Supreme Court’s line of cases limiting the most severe punishments for children tried in criminal court.<sup>289</sup> Its Research Network on Adolescent Development and Juvenile

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285. Limiting pre-trial detention has empirical support analogous to that supporting other reforms discussed in this Article. *E.g.*, *infra* notes 419–420 and accompanying text. Foundations have similarly worked for limiting use of pre-trial detention. *E.g.*, *Juvenile Detention Alternatives Initiative (JDAI)*, ANNIE E. CASEY FOUND., <https://www.aecf.org/work/juvenile-justice/jdai/> [<https://perma.cc/3MFN-3W63>].

286. *See State Juvenile Justice Work*, PEW CHARITABLE TRS. (Feb. 29, 2016), <https://www.pewtrusts.org/en/research-and-analysis/articles/2016/02/juvenile-justice-work> [<https://perma.cc/Z7WF-JJR4>] (listing its work in Georgia, Hawaii, Kansas, Kentucky, South Dakota, and West Virginia). Pew has published reports on juvenile justice reforms in most of the states discussed in sections II.A to II.C. PEW CHARITABLE TRS., *GEORGIA’S 2013 JUVENILE JUSTICE REFORM* (2013) [hereinafter *GEORGIA’S JUVENILE JUSTICE REFORM*], [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs/content-level\\_pages/reports/georgia20201320juvenile20justice20reform20summary20briefjuly2013pdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs/content-level_pages/reports/georgia20201320juvenile20justice20reform20summary20briefjuly2013pdf.pdf) [<https://perma.cc/EPY6-PDSA>]; PEW CHARITABLE TRS., *HAWAII’S 2014 JUVENILE JUSTICE REFORM: NEW LAW WILL STRENGTHEN COMMUNITY SUPERVISION AND REDUCE SECURE CONFINEMENT* (2014), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2014/07/hawaiiis-2014-juvenile-justice-reform> [<https://perma.cc/Q72J-CB3M>]; PEW CHARITABLE TRS., *KANSAS’ 2016 JUVENILE JUSTICE REFORM* (2017), <https://pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/eorgi-2016-juvenile-justice-reform> [<https://perma.cc/JKE3-T88H?type=image>]; PEW CHARITABLE TRS., *supra* note 241; PEW CHARITABLE TRS., *supra* note 196; *BENDING THE CURVE*, *supra* note 145 (Texas); PEW CHARITABLE TRS., *supra* note 200; PEW CHARITABLE TRS., *WEST VIRGINIA’S 2015 JUVENILE JUSTICE REFORM* (2016), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/05/west-virginias-2015-juvenile-justice-reform> [<https://perma.cc/9ZEJ-2BH6>]. Pew Charitable Trusts notes its own “technical assistance” to reform-focused commissions in those states. *E.g.*, *GEORGIA’S JUVENILE JUSTICE REFORM*, *supra*, at 1.

287. *See, e.g.*, *GEORGIA’S JUVENILE JUSTICE REFORM*, *supra* note 286, at 1 (noting involvement of Pew Charitable Trust, Annie E. Casey Foundation, and Crime & Justice Institute in developing Georgia’s reforms).

288. SHOENBERG, *supra* note 190, at 1.

289. Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy*; Roper, Graham, Miller/Jackson, and the Youth Discount, 31 *LAW & INEQ.* 263, 282 (2013); David S. Tanenhaus, *The Fierce Urgency of Now and Then*, 44 *LAW & SOC. INQUIRY* 771, 774 (2019).

Justice led to the Pathways to Desistance Study,<sup>290</sup> which contributed to research showing reduced value of longer-term incarceration of children.<sup>291</sup> That research, in turn, was cited by the Pew Charitable Trusts in its reports supporting reforms in the states described above.<sup>292</sup>

Other foundations and think tanks have offered similar reform prescriptions to Pew and to the states surveyed in this section. Prior to states enacting reforms discussed in this section, the Annie E. Casey Foundation published a white paper whose title set a clear reform agenda: *No Place for Kids: The Case for Reducing Juvenile Incarceration*.<sup>293</sup> The foundation condensed a set of research to show that juvenile incarceration is “dangerous, ineffective, unnecessary, obsolete, wasteful, and inadequate,” and tying reduced juvenile incarceration rates with improved public safety.<sup>294</sup> It described offense-based limits on when judges can incarcerate children as “[t]he most direct strategy for reducing the populations of juvenile correctional facilities.”<sup>295</sup> The Justice Policy Institute has also endorsed diverting more cases, prohibiting incarceration of children for relatively minor offenses, and shortening the length of stay for children who are incarcerated.<sup>296</sup>

### III. EVALUATING JUVENILE COURT INTAKE AND SENTENCING REFORMS

Given the juvenile court’s historical commitment to highly discretionary offender intake and sentencing decisions, and the tough-on-crime era use of offense-specific reforms to further punitive reforms, a close evaluation of the reforms described in Part II is in order. This Part argues, first, that these recent reforms are a significant break from both of those historical precedents. Second, this Part argues that while these reforms are offense-specific like tough-on-crime era reforms, a range of

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290. *Pathways to Desistance: A Study of Serious Adolescent Offenders as They Transition to Adulthood and Out of Crime: Context*, CTR. FOR RSCH. ON HEALTH CARE DATA CTR., <https://www.pathwaysstudy.pitt.edu/context.html> [<https://perma.cc/64LR-HE9R>].

291. For instance, one leading study showing that longer incarceration does not lead to lower recidivism used the Pathways to Desistance study data. Loughran et al., *supra* note 200, at 700–01.

292. SHOENBERG, *supra* note 190, at 1 (citing “a growing body of research showing that costly, extended out-of-home placements often fail to produce better outcomes than alternative approaches”).

293. THE ANNIE E. CASEY FOUND., *NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION* (2011), <https://www.aecf.org/resources/no-place-for-kids-full-report/> [<https://perma.cc/453D-3U5D>].

294. *Id.* at 5.

295. *Id.* at 28.

296. JUST. POL’Y INST., *RAISE THE AGE: SHIFTING TO A SAFER AND MORE EFFECTIVE JUVENILE JUSTICE SYSTEM* 17–19, 34 (2017), <http://www.justicepolicy.org/research/11239> [<https://perma.cc/9RXC-ZVWH>].

important differences create clear demarcations from them. Moreover, this Part argues that these reforms go significantly beyond the criminal court sentencing reforms triggered by the “children are different” line of U.S. Supreme Court Eighth Amendment cases.

Not only are these reforms different from previous reform eras, they represent a long overdue substantive regulation of juvenile court intake and sentencing decisions. If *Gault* was the “first step” of “cleansing” juvenile court of concerning practices,<sup>297</sup> these reforms of intake and sentencing power represent an essential second step. The juvenile justice field has long focused on procedural questions rather than substantive limits on how the justice system should respond to children who commit crimes.<sup>298</sup> These recent reforms take on that task, placing rehabilitative goals and developmental evidence at the center of the reform project. Relatedly, these reforms hold the potential to improve longstanding problems of racial injustice in the juvenile justice system—although the empirical outcomes thus far are inconclusive.<sup>299</sup>

Finally, this Part addresses one of the most important developments caused by offense-specific intake and sentencing statutes in practice—the increased importance of plea bargaining, and the risks that flow from it. Emphasizing the specific offense for which a child is adjudicated makes the process for identifying that offense more important. As in criminal court, usually that process begins with prosecutors exercising charging discretion and ends with plea bargaining. That process comes with a large share of critics in criminal court,<sup>300</sup> and this Part will analyze how those criticisms could play out—and are somewhat mitigated—in juvenile court under recent reform regimes.

#### A. *A Dramatic Shift from Juvenile Court Origins and Tough-on-Crime Reforms*

The focus of recent reforms on specific offenses is a significant shift away from the juvenile justice system’s historical and theoretical commitment to individualized offender-based decisions. These reforms move away from the discretionary, offender-based dispositional structure that remains the norm in most states today.<sup>301</sup>

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297. Baharanyi & Hertz, *supra* note 91, at 10.

298. Tanenhaus, *supra* note 289, at 771.

299. *See infra* notes 366–370 and accompanying text.

300. *See infra* notes 376–383 and accompanying text.

301. *Cf.* SULLIVAN, *supra* note 42, at 157 (describing offense-based disposition—at least when coupled with an explicit endorsement of punishment as a purpose, “is often anathema in the juvenile justice system”).

The more involved question is whether and how these reforms differ from offense-based statutes adopted during the tough-on-crime era, and, relatedly, whether recent reforms might provide the foundation for more punitive reforms in some future era. Several factors render this reform trend significantly different from the offense-based sentencing reforms of the tough-on-crime era.

First, the context of reforms significantly differs. The tough-on-crime era featured reduction of juvenile court jurisdiction and expansion of criminal court jurisdiction over children, with the express purpose of imposing more adult sentences on children.<sup>302</sup> The present era features the exact opposite—state legislatures are expanding juvenile court jurisdiction for the express purpose of imposing more developmentally appropriate and rehabilitative sentences on children. Eleven states have done this primarily by raising the age of juvenile court jurisdiction; where seventeen-year-olds (or, in some states, sixteen-year-olds) were formerly charged in criminal court, they are now presumptively charged in juvenile court, dramatically reducing the number of children tried in criminal court and expanding the number of children in juvenile court.<sup>303</sup> One additional state has enacted similar legislation which is set to take effect in October 2021.<sup>304</sup> In addition, multiple states have reformed their waiver laws to either limit the cases in which children may be waived,<sup>305</sup> or change the procedure to do so by limiting legislative or prosecutorial waiver.<sup>306</sup>

Second, recent reforms impose limits on severe consequences, especially for more minor offenses, rather than authorizing or requiring more severe consequences for more severe offenses. They are thus the inverse of tough-on-crime era reforms. Where tough-on-crime era reforms

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302. See *supra* notes 96–110 and accompanying text.

303. JEREE THOMAS, CAMPAIGN FOR YOUTH JUST., *RAISING THE BAR: STATE TRENDS IN KEEPING YOUTH OUT OF ADULT COURTS (2015–2017)*, at 10 (2018), [http://www.campaignforyouthjustice.org/images/StateTrends\\_Report\\_FINAL.pdf](http://www.campaignforyouthjustice.org/images/StateTrends_Report_FINAL.pdf) [<https://perma.cc/JM2N-6RTQ>] (listing ten such states). The eleventh state, Missouri, enacted a law defining children as anyone under eighteen, with an effective date of January 1, 2021. MO. REV. STAT. § 211.021(2) (2021) (defining “child”); *id.* § 211.439. That law also included a funding contingency. *Id.* § 211.438. Some prosecutors are challenging whether that contingency has been met. *Missouri Law Raising Adult Age for Crimes to 18 Not Used*, ASSOCIATED PRESS (Jan. 19, 2021), <https://apnews.com/article/legislature-michael-brown-st-louis-kansas-crime-4369997d5a814c80bd2b68294a2c7ab8> (last visited Apr. 7, 2021).

304. Act of Oct. 31, 2019, ch. 4 § 1, 2019 Mich. Pub. Acts 1–2. Michigan’s statute will define a child as anyone under eighteen. *Id.* § 27.

305. See, e.g., CAL. WELF. & INST. CODE § 707(a)(1) (West 2019) (prohibiting waiver of children under sixteen); S.C. CODE ANN. §§ 63-19-20(1), 63-19-1210(4) (2019) (raising from sixteen to seventeen statutory exclusion from the definition of “child” when facing certain felony charges and the minimum age for judicial waiver for certain offenses).

306. The Public Safety and Rehabilitation Act of 2016 § 4, 2016 Cal. Stat. 1 (codified as amended at CAL. WELF. & INST. CODE § 602) (striking offense-based exclusions from juvenile court jurisdiction).

imposed mandatory minimum consequences, “children are different” era reforms create limits on maximum consequences. Tough-on-crime reforms thus prohibited offender-specific considerations from leading to more lenient punishments, while children-are-different era reforms ensure those considerations cannot lead to overly harsh punishments.

Third, the present reform project applies social science research, a hallmark of the “children are different” line of cases and related reforms.<sup>307</sup> But it uses a different body of research—not only adolescent psychology, but research evaluating intake and sentencing decisions based on how effectively they help children avoid reoffending. A variety of social science evidence challenging the wisdom of tough-on-crime era reforms “fell short” of convincing courts to change laws or practice when courts elect to defer to legislative judgments, so present juvenile court sentencing reform efforts target legislatures, which may be showing more institutional openness to such evidence.<sup>308</sup>

This social science evidence of the potential harms of too much intervention in children’s lives<sup>309</sup> adds support for what the IJA-ABA proposed in 1980. That proposal called for offense-specific maximum limits on juvenile court sentences, which it justified, in part, “by the logic of the principle of limited intervention.”<sup>310</sup> Rather than a conviction opening the door for whatever intervention a juvenile court judge thinks best, a “limited intervention” recognizes that unchecked interventions can unnecessarily curtail children’s liberty and result in severe harm. Armed with research showing, for instance, that longer periods of incarceration do not aid rehabilitation and can harm children,<sup>311</sup> calls for more limited interventions carried even more force in the 2010s than in the 1980s.

Relatedly, such research underscores a consensus that the juvenile justice system’s primary purpose is to rehabilitate children who have committed crimes.<sup>312</sup> Advocacy for reforms limiting the length of

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307. The Supreme Court emphasized developmental science in each of its recent line of juvenile sentencing Eighth Amendment cases. *Roper v. Simmons*, 543 U.S. 551, 569–70, 573 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller v. Alabama*, 567 U.S. 460, 471–73 (2012).

308. Terry A. Maroney, *The Once and Future Juvenile Brain*, in *CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE* 189, 198–99 (Franklin E. Zimring & David S. Tanenhaus eds., 2014) (describing judicial deference to legislatively enacted waiver schemes regardless of developmental evidence).

309. See *supra* notes 162–170, 200–202, 224–232, 249–258 and accompanying text.

310. JUVENILE JUSTICE STANDARDS, *supra* note 72, at 40.

311. Loughran et al., *supra* note 200, at 722, 726; Goldstein et al., *supra* note 230, at 172.

312. State statutes evidence the rehabilitative purpose of the juvenile justice system. See, e.g., *Comparative & Multi-Jurisdictional Data: Juvenile Justice Purpose Clauses—Multi-Jurisdiction Survey*, NAT’L JUV. DEF. CTR. (Jan. 2014), <https://njdc.info/practice-policy-resources/state-profiles/multi-jurisdiction-data/> [<https://perma.cc/4NVA-2ADL>] (click “Juvenile Justice Purpose



incarceration, for instance, emphasize the impact of incarceration length on future offending.<sup>313</sup> The finding that longer sentences do not reduce recidivism makes the policy choice obvious. Following those goals, it is far wiser to spend limited resources on services in the community which can reduce recidivism rather than on expensive secure facilities. Notably, this line of thinking deemphasizes retribution as a purpose of juvenile court sentences, contrasting significantly with tough-on-crime era reforms.<sup>314</sup>

Fourth, the reforms do not simply require offense-based considerations. They use such considerations to limit the power of the actors who had the most discretion at different stages—prosecutors at intake and judges at disposition. In the tough-on-crime era, reforms diminished family court judges’ authority and enhanced prosecutors’. The current reform trend, taken as a whole, imposes limits on individual actors’ discretion at each stage. Prosecutors and defense attorneys have a greater ability to control dispositions by negotiating particular plea bargains where the admitted offense can control possible disposition outcomes. But the reforms also expand juvenile court judges’ authority over intake by providing more opportunities for defense attorneys to raise objections to prosecutors’ decisions to deny diversion and prosecute a child, and thus represent a limitation on prosecutors’ authority at that stage.<sup>315</sup>

*B. Beyond “Children Are Different” and Towards a “Developmental Approach”<sup>316</sup> to Juvenile Justice Law*

Recent juvenile court intake and sentencing reforms go significantly beyond the Supreme Court’s “children are different” juvenile sentencing quartet, decided between 2005 and 2016.<sup>317</sup> Those cases set Eighth Amendment limits on criminal court sentences imposed on children based

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Clauses—Multi-Jurisdiction Survey” from the list) (analyzing and compiling state statutes’ juvenile justice purpose clauses). Only six state statutes “emphasize punishment,” and the remainder emphasize rehabilitation or a balance between rehabilitation, accountability, and public safety. *Id.* at 1.

313. See *supra* notes 163–165, 200–202 and accompanying text.

314. E.g., Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 696 (1991).

315. Family courts in some jurisdictions have long had some such authority. See D.C. SUPER. CT. JUV. R. 47-I(d) (2020); N.H. REV. STAT. ANN. § 169-B:10 (2021) (authorizing the family court to, sua sponte or on a party’s motion, refer children to diversion programs); N.Y. FAM. CT. ACT § 315.2 (McKinney 2021) (permitting family court to dismiss in furtherance of justice); S.C. CODE ANN. § 63-19-1410(A)(7) (2019) (permitting family court to dismiss a case at any time).

316. REFORMING JUVENILE JUSTICE, *supra* note 24, at 45, 184.

317. *Montgomery v. Louisiana*, 577 U.S. 190 (2016); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

on children’s lesser culpability compared to adults.<sup>318</sup> Collectively, those cases have prohibited the juvenile death penalty in all cases, and juvenile life without parole sentences in all but the most severe homicide cases, with ongoing questions focused on standards and procedures before courts impose juvenile life sentences.<sup>319</sup> More broadly, the Court’s insistence that “children are different,”<sup>320</sup> coupled with the Court’s endorsement of scientific evidence explaining those differences,<sup>321</sup> has inspired a range of important reforms regarding children in criminal courts,<sup>322</sup> and in parole and re-sentencing decisions for adults serving long sentences for crimes committed as children.<sup>323</sup>

But, like the Supreme Court’s due process era cases,<sup>324</sup> this string of cases says nothing about *juvenile* court intake or dispositions. Its mandate is for *criminal* courts to consider youth as mitigation at sentencing and

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318. See *supra* notes 123–125 and accompanying text.

319. For instance, the Court held that sentencing courts must consider the features of a defendant’s youth but need not find the child is “permanently incorrigible” before imposing a sentence of life without parole. *Jones v. Mississippi*, 593 U.S. \_\_\_, 141 S. Ct. 1307, 1311, (2021). Although serious questions exist whether this ruling is consistent with *Miller* and *Montgomery*, see *id.* at 1328 (Sotomayor, J., dissenting) (describing *Jones* as “[c]ontrary to explicit holdings” in *Miller* and *Montgomery*), the majority reaffirmed both cases, *id.* at 1321–22 (majority opinion). *Jones* addressed neither less severe criminal court sentences nor any sentences in juvenile court. Both *Jones*’s holding rejecting an Eighth Amendment challenge to a juvenile life without parole sentence, and its language noting states’ various responses to the Court’s sentencing holdings, *id.* at 1323, suggest that future changes will occur in the states, not the Supreme Court.

320. The *Miller* Court used several variations of this phrase. It described the *Roper* line of cases’ core as “establish[ing] that children are constitutionally different from adults for sentencing purposes.” *Miller*, 567 U.S. at 461. *Miller* described its particular holding as requiring criminal courts “to take into account how children are different” before imposing a life without parole sentence. *Id.* at 480. In support of applying Eighth Amendment protections to life without parole sentences and not only death penalty sentences, it observed that while, as previous death penalty decisions held, “‘death is different,’ children are different too. Indeed it is the odd legal rule that does *not* have some form of exception for children.” *Id.* at 481 (emphasis in original).

321. See *id.* at 471–72 (describing social science relied upon by the *Roper* line of cases).

322. For instance, the Sentencing Project counted thirty-two state legislative reforms to laws governing sentencing of children convicted of homicide in criminal court since 2012, with many banning life without parole sentences. JOSH ROVNER, THE SENT’G PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 3 (2021), <https://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf> [<https://perma.cc/A6VS-QH65>].

323. See, e.g., Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions*, 54 HARV. C.R.-C.L. L. REV. 455, 461–68 (2019) (describing the connection between Supreme Court’s juvenile life without parole cases and parole decisions for those serving sentences for crimes committed as children); *In re Domingo-Cornelio*, 196 Wash. 2d 255, 266, 474 P.3d 524, 530 (2020) (holding retroactive decision requiring criminal courts to consider children’s youthfulness as mitigation at sentencing, thus permitting many children serving criminal court sentences to seek resentencing).

324. See *supra* notes 82–85 and accompanying text.

especially when a life sentence is an option.<sup>325</sup> That command requires at least some amount of offender-specific considerations (especially including an offender's youth) in criminal court sentencing. But that offender-specific push is limited to children tried as adults in criminal courts and generally subject to adult criminal sentences, and, in particular, those tried and sentenced as adults for the most severe offenses—a relatively small group compared to children tried in juvenile courts.<sup>326</sup> This mandate is supported by our improved understanding of how adolescents are less blameworthy and less susceptible to the deterrent effects of punishment.<sup>327</sup>

That mandate does not necessarily translate to any reforms in juvenile court because being in juvenile court is the result of the state recognizing children's differences from adults. Juvenile court judges were already supposed to use their discretion to consider the child's youth and capacity for rehabilitation in determining a dispositional order.<sup>328</sup> In juvenile court, retribution and deterrence were supposed to be secondary concerns to rehabilitation.<sup>329</sup> Nothing in the children-are-different line of cases says anything about juvenile court sentencing. In a narrow sense then, the children-are-different line of cases may reaffirm how children are different and thus why having separate juvenile courts is wise, but it does not change what actually happens in those courts.

Similarly, most commentary summarizing “children are different” era reforms do not identify an impact on juvenile court sentencing. For instance, a leading juvenile justice scholar's book devotes a long section to the “children are different” era and its reforms, a chapter to children's reduced culpability and related pressures for relatively less severe criminal court sentences, and teenagers' “competence to exercise procedural rights.”<sup>330</sup> But those sections have no discussion of sentencing reforms in juvenile court. Other discussions of the children-are-different

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325. The individual cases at issue in *Miller* both involved children tried and sentenced as adults in criminal court, and that transfer of jurisdiction opened up the children to the potential of a life without the possibility of parole sentence. *Miller*, 567 U.S. at 466, 468–69.

326. The federal government reported that in 2018, 1.5% of cases involving children sixteen or seventeen and 0.2% of cases of younger children were waived from juvenile to criminal court. OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., JUVENILE COURT STATISTICS 40 (2018), <https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2018.pdf> [<https://perma.cc/M9WE-TDCF>].

327. See *Miller*, 567 U.S. at 471–72 (describing children's lesser culpability as a foundation of *Roper* line of cases).

328. *Supra* notes 37–49 and accompanying text.

329. *Id.*

330. FELT, *supra* note 22, at 193–272.

line of cases and its impact are similar.<sup>331</sup>

The “children are different” rationale and the developmental evidence relied upon by the Supreme Court have impacted juvenile justice reform efforts beyond the Court’s specific criminal court sentencing holdings. Invoking such developmental evidence is now commonplace in reform efforts, including efforts closely related to those described in Part II, such as efforts to improve the effectiveness of juvenile probation.<sup>332</sup> But such reliance on evidence of children’s differences is not new for juvenile court; the entire point of juvenile court is that children’s development renders the adult justice system inappropriate for them.

The Supreme Court has recognized that the “children are different” concept is not new. In 2010—after deciding two of its four “children are different” sentencing cases—the Court held in *J.D.B. v. North Carolina*<sup>333</sup> that age matters in determining whether a child suspect is in custody for *Miranda*<sup>334</sup> purposes, just as it does for Eighth Amendment sentencing purposes.<sup>335</sup> But rather than echo the developmental language of the Eighth Amendment cases, Justice Sotomayor in *J.D.B. v. North Carolina* cited the “commonsense reality” that children are different.<sup>336</sup> Justice Sotomayor went on to cite an older line of Supreme Court cases for the proposition that “[a] child’s age is far ‘more than a chronological fact.’”<sup>337</sup> Even *J.D.B.*’s citations make clear that the children-are-different line of cases did not break new ground in declaring that children are different and instead built on older cases; Sotomayor cited an earlier case, then included *Roper v. Simmons*,<sup>338</sup> the first of the children-are-different line, in a string

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331. See, e.g., CARA H. DRINAN, THE WAR ON KIDS: HOW AMERICAN JUVENILE JUSTICE LOST ITS WAY 132–53 (2018) (describing reform agenda focused on sentences of children in criminal court); Maroney, *supra* note 308, at 189 (describing “children are different” era reforms as relating to limits on criminal court sentences and transferring children back from criminal to juvenile court, but not listing any juvenile court disposition reforms); Eduardo Ferrer, *A New Juvenile Jurisprudence: How Adolescent Development Research and Relentless Defense Advocacy Revolutionized Criminal Law and Jurisprudence*, in RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM 51 (Kristin Henning, Laura Cohen & Ellen Marrus eds., 2018) (describing, as its title indicates, impacts on “criminal law,” not juvenile law); ELIZABETH SCOTT, THOMAS GRISSE, MARSHA LEVICK & LAURENCE STEINBERG, THE SUPREME COURT AND THE TRANSFORMATION OF JUVENILE SENTENCING 25–29 (2015), <http://www.modelsforchange.net/publications/778> [<https://perma.cc/4ARL-5H9F>] (focusing discussion of “children are different” cases’ implications on “criminal sentencing” and related reforms).

332. E.g., Goldstein et al., *supra* note 230, at 171 (critiquing “misalignment between probation expectations and youths’ developmental decision-making capacities”).

333. 564 U.S. 261 (2011).

334. *Miranda v. Arizona*, 384 U.S. 436 (1966).

335. *J.D.B.*, 564 U.S. at 265.

336. *Id.*

337. *Id.* at 272 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

338. 543 U.S. 551 (2005).

cite of cases in “accord.”<sup>339</sup>

Justice Sotomayor suggested that one element of the analysis that was new by the time of *Roper*—the expanded scientific knowledge of psychological and neurological development through adolescence and early adulthood—was not all that important.<sup>340</sup> To Sotomayor, reliance on such scientific evidence was unnecessary because the reality that children are different is “self-evident to anyone who was a child once . . . including any police officer or judge.”<sup>341</sup> She went on to note, without support from developmental science, both that the Supreme Court repeatedly recognized those differences, citing cases as far back as 1948, and that legal authorities relied on the “assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them” since Blackstone.<sup>342</sup> Two years later, in *Miller v. Alabama*,<sup>343</sup> Justice Kagan echoed these points, noting that in addition to recent social science, the Court’s recognition of children’s differences “rested . . . on common sense,”<sup>344</sup> and that many legal rules have long recognized children’s differences.<sup>345</sup>

The key task of juvenile court intake and sentencing reforms is to take these long-standing principles and apply them in juvenile court to serve rehabilitative goals as effectively as possible. That task, undertaken in state legislatures since 2013,<sup>346</sup> requires a significant step beyond the “children are different” cases, related criminal sentencing reforms, and their underlying developmental evidence.

The legislative reforms discussed in this Article are a significant step towards such a goal. These offense-specific reforms largely comport with principles endorsed by the National Research Council’s (NRC) 2013 book (published on the eve of the most recent burst of reform activity) *Reforming Juvenile Justice: A Developmental Approach*.<sup>347</sup> The NRC book compiles and summarizes decades of research into adolescent development and juvenile justice responses to create an authoritative statement of principles for many juvenile justice policies.

An offense-specific sentencing structure likely implies to most

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339. *J.D.B.*, 564 U.S. at 272.

340. *Id.*

341. *Id.*

342. *Id.* at 273.

343. 567 U.S. 460 (2012).

344. *Id.* at 471.

345. *Id.* at 481 (citing *J.D.B.*, 564 U.S. at 274).

346. See *supra* sections II.A–C.

347. REFORMING JUVENILE JUSTICE, *supra* note 24.

adolescent defendants that the sentence is a punishment for the specific offense they committed. Crucially, however, that signal does not mean offense-specific sentencing is inherently in tension with a rehabilitative system. The NRC concluded that holding children accountable for specific law violations is healthy for their development, so long as the consequences are not overly punitive.<sup>348</sup> Such punishment underscores the wrongness of the conduct at issue in an easily-understood manner—better than a punishment imposed with the more amorphous justification that an authority figure thinks it is best for the child.<sup>349</sup> Relatedly, the NRC also focused on teenagers’ perceptions of the juvenile justice system, recognizing that “perceptions of fairness on the part of youth and families,” helps children rehabilitate.<sup>350</sup> Developmentally, teenagers are especially sensitive “to whether they and their peers have been treated fairly by adults.”<sup>351</sup> Teenagers will view the legal system as having more legitimacy if they perceive that it has treated them fairly<sup>352</sup>—but, as Tom Tyler and Rick Trinkner note, research shows that the opposite occurs.<sup>353</sup>

Those perceptions explain how proportionality between disposition and offense can enhance rehabilitation. The “fact-based quality of the decision-making process” is relevant to teens’ perceptions of fairness.<sup>354</sup> Reliance on a clear fact that teens can understand—the severity of the charge for which they are adjudicated—can thus enhance perceived fairness of the resulting disposition. Juvenile justice scholar Barry Feld recognized this element as a “silver lining” of the tough-on-crime era—a recognition that the “affirmation of responsibility” for specific offenses is a helpful corrective to the juvenile court’s historic view that adolescent misdeeds are the product purely of children’s circumstances and development.<sup>355</sup>

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348. *Id.* at 4, 21, 46, 184.

349. *Id.* at 4, 46, 184; *see also* SULLIVAN, *supra* note 42, at 157 (describing research showing that “restrained just-deserts objectives” may “foster prosocial development” in part because youth are likely to understand offense-based dispositions well). This idea is not necessarily a new one. *See, e.g.*, DAVID MATZA, DELINQUENCY AND DRIFT 133–34 (1964) (“Why should they [judges, prosecutors, and other juvenile justice professionals] insist, as they frequently do, that it is not what he did—which strikes delinquents and others as a sensible reason for legal intervention—but his underlying problems and difficulties that guide court action?”).

350. REFORMING JUVENILE JUSTICE, *supra* note 24, at 21.

351. *Id.* at 121; *see also id.* at 128 (“[A]dolescents are very sensitive to perceived injustice.”).

352. *See id.* at 130 (describing research which “suggests that juveniles may be more likely to accept responsibility for less serious offenses early in the process if they perceive delinquency proceedings to be fair and transparent and any sanctions imposed to be proportionate to their offenses”).

353. TYLER & TRINKNER, *supra* note 249, at 201.

354. REFORMING JUVENILE JUSTICE, *supra* note 24, at 193.

355. Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 390 (1999).

As importantly, the NRC concludes that juvenile sentences must not be disproportionate.<sup>356</sup> In particular, juvenile justice systems must reserve their most severe sanctions for a narrow range of cases; any “lengthy confinement” should be limited to when that is “necessary to protect society.”<sup>357</sup> But the NRC proposed no offense-based limits on juvenile court sentencing. Unnecessary incarceration or other overly punitive actions is also ineffective because they reduce the system’s legitimacy in teenagers’ minds, which undermines the system’s efforts at reducing recidivism.<sup>358</sup>

The reforms discussed in this Article put the NRC’s principles into practice. Their offense-specific nature makes clear that punishments are tied to specific acts of wrongdoing. And the limits on those punishments correct some of the disproportionately severe punishments that have been possible under discretionary sentencing since the beginning of the juvenile court,<sup>359</sup> and made more prevalent under tough-on-crime era reforms.<sup>360</sup>

### C. *Racial Justice*

Racial disparities have long plagued almost every stage of juvenile justice cases. Most relevant for this Article, Black children especially, and all children of color are more likely to be prosecuted (rather than diverted) and placed in state custody (rather than released) than White children: federal statistics show that in 2018, Black children’s cases were diverted 0.6 times as frequently as White children’s cases, and Black children were placed in state custody 1.4 times as frequently as White children.<sup>361</sup> A wide body of literature documents the juvenile justice system’s “differential processing” of children of color compared with White youth, even accounting for children’s offenses and criminal histories.<sup>362</sup> These disparities may be particularly evident at intake for misdemeanor and non-violent offenses, and in decisions to incarcerate at all levels of offense

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356. REFORMING JUVENILE JUSTICE, *supra* note 24, at 127.

357. *Id.* at 184; *see also id.* at 128 (discussing proportionality as justifying more lenient punishments in juvenile system as compared to criminal system, but not addressing proportionality within the juvenile system).

358. TYLER & TRINKNER, *supra* note 249, at 201.

359. *Supra* sections I.A–I.B.

360. *Supra* section I.C.

361. OFF. JUV. JUST. & DELINQ. PREVENTION, U.S. DEP’T OF JUST., STATISTICAL BRIEFING BOOK (2020), [https://www.ojjdp.gov/ojstatbb/special\\_topics/qa11601.asp?qaDate=2018](https://www.ojjdp.gov/ojstatbb/special_topics/qa11601.asp?qaDate=2018) [<https://perma.cc/5F5C-SF7N>].

362. REFORMING JUVENILE JUSTICE, *supra* note 24, at 228–29.

severity,<sup>363</sup> that is, at the very decision points that these reforms address.

It is possible—though far from clear—that more comprehensive offense-based sentencing reforms could reduce some of these racial disparities. The wide discretion historically exercised by judges at sentencing and prosecutors at intake are, like any other discretionary decision, subject to implicit bias.<sup>364</sup> Professor Robin Walker Sterling, for instance, argues that “children of color . . . require procedural formalities as a shield against the discriminatory impact of unfettered discretion.”<sup>365</sup>

Empirically, however, it is not yet clear if existing reforms are having this effect. An evaluation of Kentucky’s reforms found that both White and Black children benefitted from the reforms, but disparities between them did not decrease.<sup>366</sup> One study concluded that Texas’s 2007 reforms, which dramatically reduced the number of children in state facilities, found that those reforms did not impact (positively or negatively) racial disparities in state-level commitments, which were subject to offense-based limits.<sup>367</sup> In West Virginia, another study noted that while, post-reform, the juvenile justice system subjected fewer Black children to its most invasive actions, significant disparities between Black and White children remained.<sup>368</sup> Existing work has shown that reducing the overall arrest and incarceration rate for children (including doing so for all racial

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363. Barrett & Katsiyannis, *supra* note 255, at 2052–53.

364. See, e.g., Feld, *supra* note 314, at 714 (“[I]ndividualized discretion is often synonymous with racial disparities in sentencing.”); Robin Walker Sterling, *A Broken Shield: A Plea for Formality in the Juvenile Justice System*, 13 U. MD. L.J. RACE RELIGION GENDER & CLASS 237, 251–52 (2013) (collecting studies showing prevalence of implicit biases in judgments of children in the juvenile justice system).

365. Sterling, *supra* note 364, at 240; see also MICHAEL TONRY, SENTENCING MATTERS 180 (1996) (“There is, unfortunately, no way around the dilemma that sentencing is inherently discretionary and that discretion leads to disparities.”).

366. Reforms reduced the number of children, Black and White, incarcerated, but did not reduce the disparity between White and Black children; Black children were less likely overall to be incarcerated, but remained more likely than White children. WESTAT, *supra* note 283, at 39–42. Some commentators suggested that Kentucky’s reforms exacerbated disparities. CRIME & JUST. INST., CMY. RES. FOR JUST., IMPLEMENTING COMPREHENSIVE JUVENILE JUSTICE IMPROVEMENT IN KENTUCKY 6 (2017), [http://www.crj.org/assets/2017/10/KY-Brief-v9-10-25-17\\_FINAL.pdf](http://www.crj.org/assets/2017/10/KY-Brief-v9-10-25-17_FINAL.pdf) [<https://perma.cc/F6FP-HBDG>]; Kate Howard, *Kentucky Reformed Juvenile Justice, and Left Black Youth Behind*, WFPL NEWS LOUISVILLE (June 20, 2018), <https://wfpl.org/kycir-kentucky-reformed-juvenile-justice-and-left-black-youth-behind/> [<https://perma.cc/UFP2-UU4P>].

367. FABELO ET AL., *supra* note 146, at 33.

368. DOUGLAS H. SPENCE, OFF. OF RSCH. & STRATEGIC PLAN., MEASURING DISPROPORTIONATE MINORITY CONTACT IN WEST VIRGINIA’S JUVENILE JUSTICE SYSTEM 8–9 (2018), <http://djcs.wv.gov/ORSP/Documents/2018DMC%20in%20WV%20Research%20Brief.pdf> [<https://perma.cc/J2H5-H6WM>]. The report did not evaluate whether the size of those disparities changed following legislative reforms.



groups) can still expand racial disparities.<sup>369</sup> Other evaluations conclude that enough data does not yet exist to draw conclusions about the impact of legislative reforms on racial disparities.<sup>370</sup> This essential topic requires ongoing research. Reform states have reduced invasive actions like incarceration by limiting discretion for key decisions.<sup>371</sup> More research is necessary to determine whether and how that strategy affects racial disparities. If these reforms do not limit, or if they exacerbate, existing disparities, research should explore why that is. Perhaps reforms preserve enough discretion for disparities to continue, or shift discretion to prosecutors. Such research could then support further racial justice reform efforts.

Even if reforms do not reduce racial disparities in intake and incarceration decisions, they may provide some benefit to a related set of racial disparities in children's sense of procedural justice—whether they feel that the juvenile justice system has treated them fairly. Procedural justice concerns are particularly strong for Black and other children of color who may feel that they are on the receiving end of “disproportionately harsh” consequences imposed on children of color.<sup>372</sup> Indeed, some studies document that, especially for Black and Latinx children, perceived fairness of the juvenile justice system *declines* the more contact they have with it.<sup>373</sup>

#### D. *Emphasizing Plea Bargaining—and Prosecutors—More*

The offense-based nature of recent reforms comes with clear benefits to children. Historically and still in most states, a juvenile court judge could impose any sentence regardless of the crime for which a child was convicted. The judge's options were the same whether the child was

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369. JOSHUA ROVNER, THE SENT'G PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS 1 (2016), <https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/> [https://perma.cc/L7W3-CS5U]; *see also* W. HAYWOOD BURNS INST., LOS ANGELES COUNTY: YOUTH JUSTICE REIMAGINED: RECOMMENDATIONS OF THE LOS ANGELES COUNTY YOUTH JUSTICE WORK GROUP 32 (2020), <https://lacyouthjustice.org/wp-content/uploads/2020/10/Youth-Justice-Reimagined-1.pdf> [https://perma.cc/5NZG-HKD7] (illustrating how racial disparities in Los Angeles juvenile justice have expanded as the overall number of petitions has declined by nearly two-thirds).

370. SAMUEL GONZALES, KAYLA KANE, STEFANIE LOPEZ-HOWARD, HARINI DEVULAPALLI, JAINIECYA HARPER & KYLE FITTS, GA. CRIM. JUST. COORDINATING COUNCIL, DISPROPORTIONATE MINORITY CONTACT IN GEORGIA'S JUVENILE JUSTICE SYSTEM 46 (2018), <https://cjcc.georgia.gov/document/full-analysis-available-here/download> [https://perma.cc/AP39-CYHK] (“While any effect HB 242 has on DMC [disproportionate minority contact] rates was yet to be seen . . .”).

371. *Supra* notes 208–223, 280–284 and accompanying text.

372. REFORMING JUVENILE JUSTICE, *supra* note 24, at 130.

373. *Id.* at 193.

convicted of assault and battery in the first, second, or third degree,<sup>374</sup> or of one, two, or three crimes. In practice, a judge could see that the state alleged then dropped a more serious charge, assume (contrary to law) that there is some truth to the charge, and sentence children accordingly. Or a judge could conclude, as the juvenile court judge did in *Gault*, that a child’s relatively minor offense still necessitated placement in a state facility for a long period of time.<sup>375</sup> Offense-specific reforms limit such practices. Under those reforms, the specific charges adjudicated actually constrain a judge’s authority to incarcerate a child and how long the judge can keep a child on probation, and may even require authorities to divert children’s cases. And even if a judge assumes dropped charges are true or that a commitment to a state facility is needed to rehabilitate a child, the judge’s authority to impose dispositions based on them is at least somewhat limited.

The increased importance of the specific charges filed and adjudicated increases the importance of plea bargaining, which risks the same problems that have been well documented in criminal court. Prosecutors choose what charges to file and prosecute, and, following offense-based reforms, more severe charges provide prosecutors with greater discretion when to prosecute or divert cases and greater leverage over the ultimate sentence imposed.<sup>376</sup> The threat of such sentences if the case proceeds to trial provides the prosecutor with leverage to induce a guilty plea to a lesser charge based on fear of a more severe penalty.<sup>377</sup> The historic lack of plea bargaining’s connection with juvenile courts’ ultimate disposition has been a key element rendering prosecutors’ power in juvenile court weaker than that in criminal court,<sup>378</sup> and offense-based reforms remove that element.

This scenario leads to several sets of concerns. First, it vests tremendous power in prosecutors, who can effectively shape a defendant’s sentence by crafting charges. Accordingly, limiting the sentencing discretion of judges may simply shift the locus of powerful discretionary decision-making from judges to prosecutors.<sup>379</sup> Second, and relatedly,

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374. See, e.g., S.C. CODE ANN. § 16-3-600 (2021) (defining these three phrases and their connection to different degrees of assault and battery).

375. *Supra* notes 74–78 and accompanying text.

376. See William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) (noting the “menu” of options criminal law provides to prosecutors which shape plea bargains).

377. E.g., Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67 (2005).

378. Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s*, 71 LA. L. REV. 1, 8–9 (2010).

379. See *id.* at 12 (describing plea bargaining as making prosecutors more powerful than judges).

prosecutors have wide discretion to exercise this power,<sup>380</sup> which can lead to inequitable treatment of similarly situated defendants, including differential treatment of defendants by their race or social class.<sup>381</sup> Third, the threat of more severe punishment can induce innocent defendants to plead guilty, especially when offered a plea bargain with a relatively light sentence.<sup>382</sup> This concern is particularly powerful when defendants are arrested and detained pre-trial for relatively low-level offenses and pleading guilty is the fastest path to get out of jail.<sup>383</sup> These risks may be particularly acute when children are pressured to accept plea bargains before courts appoint them counsel and when public juvenile defense systems are lacking.<sup>384</sup>

Procedural differences between criminal and juvenile court may provide juvenile court prosecutors with greater leverage. The Supreme Court held in *McKeiver v. Pennsylvania*<sup>385</sup> that children do not have the right to a jury trial in juvenile court,<sup>386</sup> a case that has long been criticized, including judges' likely greater proclivity for convicting defendants than juries.<sup>387</sup> As such, prosecutors' threat to bring a child to trial on more severe charges if the child will not plead guilty to a lesser charge may come with greater force in juvenile court.

Indeed, there is reason for concern that shifting to offense-based sentencing creates incentives for juvenile court prosecutors to change

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380. *E.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2476 (2004) (describing the lack of "checks" on prosecutorial authority related to plea bargaining resulting from the lack of public trials).

381. *E.g.*, Sterling, *supra* note 364.

382. Oren Bar-Gill & Oren Gazal Ayal, *Plea Bargains Only for the Guilty*, 49 J.L. & ECON. 353 (2006).

383. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 173–75 (2014). Indeed, scholars have suggested that prosecutors would not even charge many marginal cases against defendants if prosecutors lacked confidence they could elicit a plea bargain. Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 33 REGULATION 42 (2010).

384. *See, e.g.*, NAT'L JUV. DEF. CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL 10, 25–26 (2017) (describing limited access to counsel in many juvenile courts and how forty-three states permit children to waive the right to counsel without any consultation with counsel); Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y 543 (2009) (examining barriers to accessing counsel and providing high quality counsel to poor child defendants).

385. 403 U.S. 528 (1971).

386. *Id.* at 528.

387. Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 568–69 (1998). While the *McKeiver* plurality did not discuss the relative accuracy or fairness of jury and judge fact finding, *id.* at 562, Guggenheim and Hertz engage in a detailed comparison, concluding that juries are more accurate and fair, and less likely to convict, *id.* at 562–82.

their behavior to look more like the much-criticized role of prosecutors in criminal court plea bargaining.<sup>388</sup> Some preliminary data suggests that prosecutors have, in fact, responded to offense-specific sentencing reforms by increasing the severity of charges filed.<sup>389</sup> A federally funded evaluation of the implementation of Kentucky’s reforms noted an increase in the number of felony charges filed and the “potential for increase in overcharging of youth.”<sup>390</sup> While the causes of this increase are not yet known with certainty,<sup>391</sup> that data suggests prosecutors may respond to the incentives created by offense-specific reforms by filing charges alleging more severe offenses.

Nonetheless, several differences between juvenile and criminal court structure mitigate the risk that this change in incentives will lead to the same scale of concerns that appear in criminal court. Professor Franklin Zimring’s 2010 observation—that “[w]hile prosecutors are much more powerful in juvenile courts than they were a generation ago, they are still less powerful in juvenile than in criminal courts”<sup>392</sup>—remains accurate even under offense-based reforms. It remains that while prosecutors have important powers, “they are not the sole determiners of juvenile justice sanctions.”<sup>393</sup>

First, juvenile court prosecutors face more significant checks on their prosecutorial discretion at intake than criminal court prosecutors do. Much has been written on the power of criminal prosecutors,<sup>394</sup> with a particular concern about how charging powers drive criminal adjudications, and the absence of significant limits on those powers from other branches of government.<sup>395</sup> Juvenile court prosecutors differ.

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388. *Supra* notes 376–380.

389. SUZANNE O. KAASA, SARAH VIDAL, KRISTI MEADOWS, MEGAN FOSTER & NATHAN LOWE, OFF. OF JUST. PROGRAMS, U.S. DEP’T OF JUST., KENTUCKY JUVENILE JUSTICE REFORM EVALUATION: IMPLEMENTATION EVALUATION REPORT 18 (2019), <https://www.ncjrs.gov/pdffiles1/nij/grants/254458.pdf> [<https://perma.cc/J6EU-ACZP>].

390. *Id.*

391. *See id.* at 18–19 (describing possibility of overcharging due to reform, or possible increase in school threats charges).

392. Zimring, *supra* note 378, at 9.

393. *Id.* at 12.

394. For an incomplete sampling, see Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874–87 (2009); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 127 (2017) (“Few people in the criminal justice system are as powerful, or as central to prison growth, as the prosecutor.”); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 8 n.16 (2007) (collecting sources critiquing prosecutorial power).

395. Indeed, academic proposals for regulating prosecutorial power have often focused on administrative mechanisms. *E.g.*, Barkow, *supra* note 394, at 887–906, 908; DAVIS, *supra* note 394, at 19 (premised on the conclusion that courts will not impose meaningful checks on that power).

Historically, it was the juvenile court judge who oversaw prosecutions and probation officers who determined which cases would be prosecuted or diverted,<sup>396</sup> and even when much of that power shifted to prosecutors, many courts maintained their ability to dismiss delinquency cases “for social reasons.”<sup>397</sup> This judicial oversight of intake is consistent with the juvenile court’s rehabilitative focus; recognizing that unnecessary prosecutions can undermine rehabilitation, juvenile justice authorities have long embraced the importance of “judicious nonintervention.”<sup>398</sup> Some reform packages discussed above extend oversight over prosecutorial discretion, giving judges or other entities power to determine if children will be prosecuted or diverted.<sup>399</sup>

Second, to the extent prosecutors’ leverage depends on their ability to threaten defendants with more severe punishment through filing more serious charges, juvenile court prosecutors have less leverage because juvenile court sentences are relatively shorter, especially after the reforms described in section II.A. While the absence of juries may make the likelihood of conviction on more serious charges somewhat greater than in criminal court,<sup>400</sup> the consequences of such conviction are lower, and thus the pressure on defendants to accept a plea bargain is reduced.

Not only are the possible sentences shorter than in criminal court,<sup>401</sup> juvenile court sentencing generally lacks mandatory minimum sentences. In the reform states discussed in Part II, sentencing reforms have explicitly imposed maximums, not minimums. As a result, prosecutors cannot threaten an automatic sentence triggered only by a conviction for specific offenses; judges retain discretion to determine the particular sentence imposed. The state’s and defendants’ bargaining power will depend both on the strength of the state’s evidence on specific charges, and on the strength (or weakness) of such arguments regarding the most rehabilitative sentence—not the more inflexible power that long mandatory minimum sentences create in criminal court. Moreover, departments of juvenile justice or juvenile probation can recommend

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396. See Gupta-Kagan, *supra* note 17, at 761–65.

397. D.C. SUPER. CT. JUV. R. 7-I(d) (2020).

398. Edwin M. Lemert, *The Juvenile Court—Quest and Realities*, in TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME, *supra* note 65, at 91, 96. Other scholars took this point further, arguing for “radical nonintervention,” defined by the admonition “*leave kids alone wherever possible*.” EDWIN M. SCHUR, RADICAL NONINTERVENTION: RETHINKING THE DELINQUENCY PROBLEM 155 (1973) (emphasis in original).

399. See *supra* notes 271–279 and accompanying text.

400. See *supra* notes 386–387 and accompanying text.

401. This has always been true for the most serious charges. While, as discussed in section I.A, juvenile court sentences for minor offenses could be greater than in criminal court, the reforms described in sections II.A and II.B limit those sentences as well.

particular sentences to the court, and need not follow prosecutors’ recommendation. Defense counsel may succeed in eliciting more favorable sentencing recommendations from these departments, thus blunting prosecutors’ power at sentencing.

These differences between juvenile and criminal court modestly mitigate the risk that overly punitive or aggressive prosecutors could undermine rehabilitative goals in juvenile justice systems with more offense-based sentencing schemes. But the risk remains, and future reform efforts should seek to keep prosecutorial authority in check.<sup>402</sup>

These differences between criminal and juvenile court should help empower juvenile defense attorneys to advocate for their clients in a plea bargaining setting effectively—but juvenile defense practice will need to adjust. Presently, under offender-specific indeterminate sentencing, juvenile defense manuals have emphasized that the normal benefit of plea bargaining—reduced sentences guaranteed by a guilty plea to a lesser offense—does not apply in juvenile court.<sup>403</sup> As jurisdictions enact more offense-specific sentencing reforms, that reality changes. Plea bargains can now guarantee children will not face incarceration, shape how long any potential incarceration could be, and shape how long the possible length of juvenile probation can be.

One element of juvenile defense advocacy will remain—advocacy for children at sentencing is essential.<sup>404</sup> Children will not face mechanically calculated sentences. Rather, they will face possible maximum sentences, under which judges will retain significant discretion, rendering vigorous advocacy essential.

As with the criminal system, concern about the quality of defense advocacy and how that might impact plea bargaining is fair. Assessments of state juvenile defense systems have revealed weak advocacy around the country, including even defense attorneys agreeing to state sentencing recommendations without offering alternatives.<sup>405</sup> Improving public defense systems, while necessary, is beyond the scope of this Article. For this Article’s purposes, it suffices to note that vigorous defense is essential to mitigate the risks of a plea bargaining under reformed systems, even

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402. Consistent with this focus, Franklin Zimring and David Tanenhaus list limiting prosecutorial power as the first item on a “shopping list for change” in a 2014 book. Franklin E. Zimring & David S. Tanenhaus, *On Strategy and Tactics for Contemporary Reforms*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 122, at 216.

403. See HERTZ ET AL., *supra* note 51, at 387.

404. Disposition advocacy is an emphasized part of juvenile defense practice. *E.g.*, NAT’L JUV. DEF. CTR., JUVENILE DEFENDER DISPOSITION PRACTICE TOOL (2017), <https://njdc.info/wp-content/uploads/2017/10/NJDC-Disposition-Practice-Tool.pdf> [<https://perma.cc/F84U-82NR>].

405. See REFORMING JUVENILE JUSTICE, *supra* note 24, at 203; NAT’L JUV. DEF. CTR., *supra* note 384, at 25; Majd & Puritz, *supra* note 384, at 552–58.

though the reduced penalties mitigate the risks to most defendants.

#### IV. REFORM MOVING FORWARD

Bolder reforms can have greater impacts. Intuitively, reforms limited to certain options—like commitments to state-run facilities while permitting commitments to other facilities—will reduce the number of incarcerated children less than reforms focused on any kind of out-of-home placement. Similarly, this Part posits that reforms that limit intake and disposition options across procedural stages and across a range of offenses will have the broadest impact. As the reform trend discussed in this Article has grown, reform legislation has grown more comprehensive. The scope of reforms should continue to expand. This Part outlines several suggestions for such reforms.

First, as Part II's description of legislative changes makes clear, not every element of reform is present in every state engaging in such reform. While limits on incarceration's availability and length are common elements, other pieces—especially limits on probation length and intake—feature in a smaller numbers of states' reform packages. All elements are important, including offense-based limits on incarceration, length of incarceration, length of probation, and intake decisions.

Limiting which cases are to be prosecuted is particularly important. The process of prosecuting a child can be the punishment,<sup>406</sup> and in many cases that punishment serves the juvenile justice system's rehabilitative goals less effectively than diversion.<sup>407</sup> The intake decision should entail consideration not only of what offenses may be proven but also whether prosecuting a particular child for a particular offense serves the juvenile court's rehabilitative mission, and whether diversion or dismissal serves it better. There is little reason to think prosecutors have the training or orientation necessary to make the latter set of decisions without any review, and unchecked authority allows prosecutors to use the juvenile court process as a counterproductive means of punishing children accused of low-level offenses. By creating presumptive or absolute bars to prosecuting certain offenses, legislatures can codify the importance of these decisions and ensure that they follow research showing the benefits of diversion.

Enhancing a check on unlimited prosecutorial authority over these intake decisions is also essential to the juvenile justice system. Criminal trial juries are explicitly envisioned in the criminal system as checks on

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406. See *supra* note 259 and accompanying text.

407. See *supra* notes 249–256 and accompanying text.

the power of prosecutors.<sup>408</sup> The Supreme Court has described juries as providing “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”<sup>409</sup> And when the Court denied children in juvenile court a constitutional right to a jury, it emphasized the different way juvenile court intake was supposed to protect children.<sup>410</sup> But we are left with a scenario in which prosecutors have increased power over intake decisions, and have increased the proportion of cases prosecuted rather than diverted.<sup>411</sup> Absent a jury, juvenile court judges must have oversight over intake decisions.<sup>412</sup>

That prosecutorial authority, in particular, requires a check because offense-based sentencing reforms increase the importance of plea bargaining, and with it the risks associated with overzealous prosecution. Those risks can exist even with offense-based limits on intake. Two states which in recent years have limited when prosecutors may prosecute particular cases—Utah and South Dakota—imposed offense-based limits, while maintaining wide discretion.<sup>413</sup> In Utah, that discretion exists in cases not subject to mandatory diversion obligations, and in South Dakota, that discretion exists in all cases (as it only presumptively calls for diversion in some cases).<sup>414</sup> The question remains how such discretion is to be exercised, and how it can be reviewed by juvenile court judges, and those reforms do not offer a clear answer.

I have separately argued that an agency model would lend itself to more meaningful oversight of prosecutorial intake decisions with clearer standards.<sup>415</sup> Under an agency model, juvenile justice agencies, rather than elected prosecutors’ offices, would have the power to determine whether to prosecute children in juvenile court, subject to a set of legislative and administrative standards which defense attorneys could enforce in juvenile court. Those agencies would be better equipped than prosecutors’

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408. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

409. *Id.*; see also *McKeiver v. Pennsylvania*, 403 U.S. 528, 552 (1971) (White, J., concurring) (noting that in criminal court, juries serve as “a buffer to the corrupt or overzealous prosecutor”).

410. *McKeiver*, 403 U.S. at 552 (1971) (White, J., concurring) (“To the extent that the jury is a buffer to the corrupt or overzealous prosecutor in the criminal law system, the distinctive intake policies and procedures of the juvenile court system to a great extent obviate this important function of the jury.”). The concurring opinions are particularly important because the plurality opinion attracted only four votes. *Id.* at 529.

411. See *supra* notes 69–70.

412. The IJA-ABA proposed that judges have “discretionary dismissal” power in 1980, explaining that judges should have “discretionary authority to ameliorate the harsh results that may attend strict application of the criminal law, a function informally but effectively served by the jury in adult criminal proceedings.” JUVENILE JUSTICE STANDARDS, *supra* note 72, at 12–13.

413. See *supra* notes 264–272.

414. *Id.*

415. Gupta-Kagan, *supra* note 17.



offices to consider a range of factors important to a rehabilitative system. As the agency that would have a child on its probation docket or house the child in its facilities, it would be better positioned than an elected prosecutor's office to determine the best use of its limited resources. Agencies have more multi-disciplinary staff than prosecutors' offices, which may shift their determinations regarding what interventions are needed. Agencies or legislatures could draft the standards to determine whether to prosecute individual children, and defendants could enforce those standards by challenging decisions to prosecute in front of juvenile court judges. Such a model—or any alternative method to impose procedural checks and substantive standards on each juvenile court intake decision—is particularly important as plea bargaining, and thus the initial charging decision, becomes even more impactful on juvenile delinquency cases.

Second, states should add offense-based reforms to pre-trial detention statutes to their legislative packages. In most states, children generally lack the right or practical ability to seek release based on bail or bond payments.<sup>416</sup> Instead, state laws generally render some children eligible for pre-trial and provide authorities—initially police or prosecutors, and then judges—discretion to decide whether to detain them.<sup>417</sup> Even when some offense-specific limits exist on this discretion, the discretion remains wide.<sup>418</sup> Legislatively restricting who can be detained pre-trial is important for multiple reasons. Just as unnecessary incarceration at sentencing undermines rehabilitation, so does unnecessary pre-trial detention. A 2020 study found that detaining children pre-trial was associated with a 33% increase in felony recidivism and an 11% increase in misdemeanor recidivism within one year.<sup>419</sup> That effect was particularly

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416. See, e.g., *Morris v. D'Amario*, 416 A.2d 137, 137 (R.I. 1980) (holding children have no right to bail under state constitution). The National Juvenile Defender Center has counted nineteen states that permit the use of cash bail, but that “[w]here bail is a legal ‘right,’ it is often not a reality.” NAT'L JUV. DEF. CTR., A RIGHT TO LIBERTY: REFORMING JUVENILE MONEY BAIL 3, 6–8 (2019), [https://njdc.info/wp-content/uploads/2019/NJDC\\_Right\\_to\\_Liberty.pdf](https://njdc.info/wp-content/uploads/2019/NJDC_Right_to_Liberty.pdf) [<https://perma.cc/84Q3-UYAR>].

417. Martin Guggenheim has summarized how post-*Gault* advocacy efforts to regulate this discretion ultimately failed when the Supreme Court decided *Schall v. Martin*, 467 U.S. 253 (1984), upholding a state statute permitting juvenile court judges to detain children based on their conclusion that they posed a risk of future offending. Guggenheim, *supra* note 83, at 92–95.

418. For instance, South Carolina's pre-trial detention statute makes children eligible for detention whenever they face any criminal charge (no matter how minor) and either have any other pending charge (no matter how minor) or are on probation for any charge (again, no matter how minor) and “ha[ve] no suitable alternative placement.” S.C. CODE ANN. § 63-19-820(B)(2)(a), (B)(7) (2021).

419. Sarah Cusworth Walker & Jerald R. Herting, *The Impact of Pretrial Juvenile Detention on 12-Month Recidivism: A Matched Comparison Study*, 66 CRIME & DELINQ. 1865, 1865 (2020). Felony recidivism was defined as facing any felony charges within the next twelve months, and

strong for children with no or few prior offenses, suggesting a value in using offense history as part of pre-trial detention criteria.<sup>420</sup> Relatedly, detaining children pre-trial limits their advocacy options: children lose opportunities to enter any kind of treatment programs while living at home in the community, and thus lose an argument for why they should remain in the community rather than incarcerated.<sup>421</sup>

Moreover, the increased importance of plea bargaining following the offense-based sentencing reforms makes pre-trial detention reform particularly important as a tool to prevent plea bargaining problems. Detaining a defendant pre-trial provides the state powerful leverage to induce a plea from that defendant; accepting a plea becomes a ticket out of the detention center.<sup>422</sup> I and others who have represented children in juvenile court have heard a common refrain from children locked up, even for only one or two days: “I’ll plead to anything, just get me out.” The best way to mitigate that risk is to reduce the number of children incarcerated pre-trial. I suggest a pre-trial detention rule that mirrors post-adjudication commitment procedures: as a general matter, if a child is not charged with an offense that could lead to incarceration upon conviction, the child should not be eligible for detention pre-trial.<sup>423</sup>

Third, states should include post-disposition reviews in reform packages. When children are committed to state custody for relatively long sentences (perhaps over six months and certainly over twelve) or placed on long periods of probation (longer than twelve months), these reviews can be essential tools to prevent unnecessarily long sentences. They permit child defendants to argue that they have successfully completed essential rehabilitative steps and reformed and so should be let out, even if earlier than originally intended. Such an opportunity incentivizes children to work with rehabilitative services. Facing a long sentence with no opportunity to shorten it reduces those incentives. A sentence that is not particularly long on the scale of criminal sentences say, a twenty-four- or thirty-month sentence, remains significantly long given an adolescent’s sense of time. Given a teenager’s relatively weaker

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misdemeanor recidivism was defined as facing any misdemeanor charges within the next twelve months. *Id.* at 1871.

420. *Id.* at 1876. The authors found that pre-trial detention increased the risk of felony recidivism for children who had up to four prior offenses.

421. See Guggenheim, *supra* note 83, at 92.

422. See Bibas, *supra* note 380; see also NAT’L JUV. DEF. CTR., *supra* note 416, at 16.

423. Other limits on pre-trial detention are important as well, such as a requirement that less restrictive alternatives are explored and ruled out before detaining a child.

ability to look that far into the future,<sup>424</sup> a rational response to such a sentence is to reject rehabilitative services, and even to be less concerned about misbehavior while incarcerated. Providing an opportunity to revisit such long sentences with a strong record of rehabilitation mitigates this risk. Potential review hearings also provide important oversight of juvenile justice agencies to ensure they provide the services necessary to fulfill the system's rehabilitative purpose. In addition, given the reality that most children who violate the law "will mature into adults with different values,"<sup>425</sup> a rehabilitative system should provide opportunities for children incarcerated for a long period of time to demonstrate that this maturation has occurred. For these reasons, the National Council of Juvenile and Family Court Judges has endorsed post-disposition judicial oversight of delinquency cases,<sup>426</sup> and post-disposition legal representation is recognized by the national juvenile defense bar and scholars as an essential element of defending children.<sup>427</sup>

Finally, states should revisit children's right to a jury trial. While the Supreme Court has declared that the Constitution does not require states to grant a jury trial, states are free to do so as a matter of state law, and a small number do so.<sup>428</sup> As noted above, scholars have convincingly argued that denying children the right to trial by jury skews fact-finding in favor of the state.<sup>429</sup> That increases the power of prosecutors in plea bargaining by making the threat of conviction on more severe charges at trial stronger. While other factors somewhat mitigate the risk of plea-bargaining abuses, states can further mitigate this risk by providing children with the right to trials by jury.

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424. E.g., Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1012 (2003).

425. *Id.* at 1015.

426. NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, ENHANCED JUVENILE JUSTICE GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE JUSTICE CASES ch. X (2019), [https://www.ncjfcj.org/wp-content/uploads/2019/01/NCJFCJ\\_Enhanced\\_Juvenile\\_Justice\\_Guidelines\\_Final.pdf](https://www.ncjfcj.org/wp-content/uploads/2019/01/NCJFCJ_Enhanced_Juvenile_Justice_Guidelines_Final.pdf) [<https://perma.cc/3WEA-H6ZV>]. This publication devotes two chapters to post-disposition review hearings, one for children on probation and one for children in state custody. *Id.* at ch. IX & X.

427. NAT'L JUV. DEF. CTR., NATIONAL JUVENILE DEFENSE STANDARDS (2012), <https://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf> [<https://perma.cc/B3Q5-6B6K>]; Sandra Simkins & Laura Cohen, *The Critical Role of Post-Disposition Representation in Addressing the Needs of Incarcerated Youth*, 8 J. MARSHALL L.J. 311 (2015).

428. Those states include Alaska, Kansas, Massachusetts, Michigan, Montana, New Mexico, Oklahoma, Texas, West Virginia, and Wyoming. NAT'L JUV. DEF. CTR., JUVENILE RIGHT TO JURY TRIAL CHART (2014), <https://njdc.info/wp-content/uploads/2017/03/Right-to-Jury-Trial-Chart-7-18-14.pdf> [<https://perma.cc/4WQH-3SRZ>].

429. See *supra* note 387 and accompanying text.

## CONCLUSION

Problems with juvenile court sentencing have been apparent from the court’s origins. Over 120 years, juvenile justice law’s gamble that granting well-intended judges nearly unfettered discretion to determine which children should be prosecuted versus diverted, and which incarcerated versus released has not paid off. That system led to inequitable treatment across jurisdictions and between individual children, undermining the juvenile court’s rehabilitative mission through inappropriately severe punishments and a system that teenagers could see would not treat them fairly. When *In re Gault* imposed basic due process protections on the adjudication phase of cases in, it left children to the mercies of prosecutors who determined whether to prosecute them and to judges who determined whether to incarcerate them.

More than fifty years later, an emerging legislative reform trend has begun to provide the essential change that *Gault* left open. Gerald Gault was charged, convicted, and incarcerated for a petty offense, and after *Gault*, tough-on-crime era changes only increased the frequency of such results that undermined the juvenile justice system’s rehabilitative mission. In states that lead this reform trend, future children in similar situations will have stronger likelihoods of being diverted rather than prosecuted and, if prosecuted and convicted, will have strong legal protections against incarceration. These reforms, if they continue to spread nationally, could have as dramatic an effect on juvenile justice as *Gault*.

For some, these reforms are consistent with the view that the juvenile justice system remains too punitive to succeed at its rehabilitative mission—but a strong juvenile system separate from the criminal system is nonetheless an essential tool to protect children from harsh sentences.<sup>430</sup> By limiting sanctions, these reforms ensure that the juvenile system provides a significantly less punitive response than criminal courts for offenses of varying severity.

A more optimistic view is possible as well. Not only do these reforms limit the harms that the juvenile justice system can impose through unnecessarily punitive actions, they move the system closer to its rehabilitative ideal. These reforms rest on a foundation of evidence about what serves rehabilitative goals most effectively. They thus codifies a shift of emphasis back towards rehabilitation by prohibiting actions deemed inconsistent with or likely to undermine rehabilitation. That rehabilitative emphasis mitigates the concern that an explicitly offense-

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430. That is the view of the juvenile system’s importance expressed by Barry Feld in 2017, two decades after he had advocated abolishing the juvenile court. Feld, *supra* note 118, at 329.

specific disposition regime can set the stage for future retrenchment. The central problem in tough-on-crime era reforms was not that they focused on specific offenses, but that they “ignored developmental differences between juveniles and adults”<sup>431</sup> in a manner that undermined rehabilitation. In contrast, the notion that children are different is enshrined in Eighth Amendment law, and now codified in a growing body of juvenile justice reform statutes. State legislatures should continue to act so the number of such statutes increases.

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431. REFORMING JUVENILE JUSTICE, *supra* note 24, at 38.