

YOUTH INCARCERATION AND ABOLITION

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ABSTRACT

The COVID-19 pandemic has laid bare the dangers of the juvenile legal system; this should make it harder to look away from the societal inequities that are exacerbated by youth incarceration. Indeed, the current moment, including the unprecedented nationwide protests in response to the murders of George Floyd and Breonna Taylor in summer 2020, has illuminated the power of social movements working to abolish the prison industrial complex, and, as legal scholars have argued, lawyers and law professors should engage with these movements and their calls for abolition and transformative change. Yet conversations on abolition are mainly centered on adult prisons. While appreciating and supporting the call for abolishing adult prisons, the absence of youth incarceration from abolitionist movements and discourse is concerning given the violence and disparities that are reflected in youth incarceration. Furthermore, despite earlier calls to consider abolishing the juvenile legal system, a sustained engagement with abolitionist theory and the juvenile punishment system has not featured in the legal scholarship. This Article discusses the urgent need to abolish youth incarceration in the context of a global pandemic, surveys arguments for abolition generally, and sets forth an abolitionist critique of youth incarceration using Disability Critical Race Theory (DisCrit) as a lens for analysis. Applying a DisCrit lens, we discuss how COVID-19 demonstrates the urgency of addressing the harms facing incarcerated youth, particularly Youth of Color and disabled Youth of Color.

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I. INTRODUCTION.....	472
II. YOUTH INCARCERATION IN THE TIME OF COVID-19	474
III. ABOLITION & JUVENILE “JUSTICE”	484
A. <i>Parens Patriae</i>	489
B. “Children as Different”.....	491
C. Social Control.....	495
IV. A DISCRIT APPROACH TO YOUTH INCARCERATION.....	496
A. Proposal: A DisCrit Informed Set of Considerations for Abolition	502
V. CONCLUSION	507

I. INTRODUCTION

In July 2020, ProPublica broke a story about Grace, a Black girl with ADHD, who was found “guilty on failure to submit to any schoolwork and getting up for school.”¹ This probation violation led to her being incarcerated at Children’s Village in Michigan during the height of the COVID-19 pandemic, despite Michigan Governor Whitmer’s executive order “[e]liminating any form of juvenile detention or residential facility placement for juveniles unless a determination is made that a juvenile is a substantial and immediate safety risk to others.”² After an uproar surrounding the story, including a petition that had over 25,000 signatures,³ the judge still denied a motion to release Grace and it was only after the Michigan Appeals Court stepped in that Grace was freed.⁴

In this Article, we will use Grace’s incarceration in the current context of a global pandemic to illustrate our argument that youth incarceration should be abolished and present a set of principles guided by Disability Critical Race Theory (DisCrit) to imagine what would replace juvenile incarceration. By “youth incarceration,” we mean all youth incarceration for delinquency including youth who have been detained or committed in any type of institution, including youth

1. Jodi S. Cohen, *Thousands Demand that Michigan #FreeGrace After the Teenager Was Incarcerated for Not Doing Her Schoolwork*, PROPUBLICA (July 15, 2020, 8:25 PM), <https://www.propublica.org/article/thousands-demand-that-michigan-freegrace-after-the-teenager-was-incarcerated-for-not-doing-her-schoolwork> [https://perma.cc/N76C-HPYL].

2. Mich. Exec. Order No. 2020-29 (Mar. 29, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-523422--,00.html [https://perma.cc/6U4J-FF5W].

3. *Grace Needs to Be back at Home, She Is in Juvenile Detention for Not Doing Homework*, CHANGE.ORG, <https://www.change.org/p/michigan-state-house-grace-needs-to-be-back-at-home-she-is-in-juvenile-detention-for-not-doing-homework> [https://perma.cc/2TM5-MQAQ] (last visited Apr. 8, 2021).

4. Beth Leblanc & Mike Martindale, *Oakland Co. Girl Jailed for Not Doing Homework Gets Released*, DETROIT NEWS (July 31, 2020 7:51 PM), <https://www.detroitnews.com/story/news/local/oakland-county/2020/07/31/oakland-co-girl-jailed-not-doing-homework-ordered-release/5557997002/> [https://perma.cc/KH2X-Q535].

prisons, camps, rehabilitation centers, and others.⁵ The COVID-19 pandemic has laid bare the dangers of the juvenile legal system, including isolation, missed opportunities, and abuse. This should make it harder to look away from the societal inequities that are exacerbated by youth incarceration. Indeed, the current moment has illuminated the power of social movements working to abolish the prison industrial complex, and as legal scholars have argued, lawyers and law professors should engage with these movements and their calls for abolition and transformative change.⁶ Yet, when we join conversations of abolition, we find them mainly centered on adult prisons. Though we appreciate and support the call for abolishing adult prisons, the absence of youth prisons from abolitionist movements and discourse is concerning to us given the violence and disparities that are reflected in youth incarceration. Furthermore, despite earlier calls to abolish the juvenile legal system,⁷ a sustained engagement with abolitionist theory and the juvenile punishment system has not featured in legal scholarship.

This Article sets forth an abolitionist critique of youth prisons using Disability Critical Race Theory (DisCrit) as a lens for analysis. DisCrit centers how “racism and ableism inform and rely upon each other in interdependent ways”⁸ and “emphasizes multidimensional identities rather than singular notions of identity,

5. When reviewing other literature, we will use their distinctions between detention and confinement. Other than that, we will keep our argument to abolish all forms of youth incarceration. See, e.g., *Detention, Juvenile Court Terminology*, NJDC, <https://njdc.info/juvenile-court-terminology/> [<https://perma.cc/XK4D-6236>] (last visited Apr. 8, 2021) (describing “youth in detention” as those held in juvenile facilities before their juvenile or criminal court hearings, or before decisions have been made about appropriate sanctions or placement); *id.* (describing youth subject to “commitment” as those who have been adjudicated (convicted) and legal responsibility for them has been transferred to the state for the period of their disposition (sentence)). In our article, we will use the term “youth incarceration” to refer to youth prisons, youth jails, and juvenile detention centers.

6. See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 409–10 (2018) (contrasting “the 2016 policy platform of the Movement for Black Lives, ‘A Vision for Black Lives: Policy Demands for Black Power, Freedom, and Justice’” with the U.S. Department of Justice’s Ferguson and Baltimore reports and concluding that the former is worth further exploration in legal scholarship); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 9 (2019) (suggesting that legal scholars may be able to work with activists to revive abolition constitutionalism); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1160–61 (2015) (describing the lack of legal scholarship on abolition as a “troubling absence”).

7. See *infra* note 102 and accompanying text.

8. Subini Ancy Annamma, David Connor, & Beth A. Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersection of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 1, 5 (2013).

such as dis/ability,⁹ social class, or gender.”¹⁰ Applying a DisCrit lens, we discuss how COVID-19 has demonstrated the urgency of addressing the harms facing incarcerated youth, particularly incarcerated Youth of Color¹¹ and disabled incarcerated Youth of Color. Building on scholars like Professors Kris Henning and Jyoti Nanda, we engage in intersectional analysis to illuminate the contours of abolitionist theory as applied to youth incarceration.¹²

The Article proceeds as follows. In Part II, we discuss how the COVID-19 pandemic has laid bare the urgent need to decarcerate and abolish all forms of youth incarceration. In Part III, we review the literature to offer arguments for why youth confinement of all forms should be abolished. Our arguments are grounded and contextualized in an historical assessment and awareness of the social control purpose and deleterious effects of youth incarceration, particularly as it affects multiply-marginalized youth, those at the intersections of multiple oppressions. In Part IV, we apply a DisCrit lens to support our call for abolition. Part V concludes.

II.

YOUTH INCARCERATION IN THE TIME OF COVID-19

The population is smaller, the incarcerated are younger, and the cases are fewer within, but youth prisons, like adult prisons, quickly became hotspots for the coronavirus. According to the Sentencing Project, as of March 31, 2021, there were 3,936 confirmed cases of COVID-19 diagnoses in juvenile facilities.¹³ In

9. “The term dis/ability, (spelled with the slash) is used intentionally to counter the word disability (spelled without the slash). The use of the term disability (spelled without the slash) suggests that a person is represented, or identified, by what they cannot do, rather than what they can do.” Alissa Rausch, Jaclyn Joseph, & Elizabeth Steed, *Dis/ability Critical Race Studies (DisCrit) for Inclusion in Early Childhood Education: Ethical Considerations of Implicit and Explicit Bias*, ZERO TO THREE, <https://www.zerotothree.org/resources/3094-dis-ability-critical-race-studies-discrit-for-inclusion-in-early-childhood-education-ethical-considerations-of-implicit-and-explicit-bias> [<https://perma.cc/6SJZ-ZYGK>] (last visited June 30, 2021).

10. Annamma, Connor, & Ferri, *supra* note 8, at 12.

11. The authors choose to capitalize “Youth of Color” or variations of the terms in line with Loretta Ross, who argues it is a solidarity term. See Western States Center, *The Origin of the Phrase “Women of Color,”* YOUTUBE (Feb. 15, 2011), <https://www.youtube.com/watch?v=82v134mi4Iw> [<https://perma.cc/SZD3-RBTR>] (describing the origin of the term “women of color” as a “solidarity definition[;] a commitment to work in collaboration with other oppressed women of color who have been minoritized”).

12. See *id.* (emphasizing “multidimensional identities rather than singular notions of identity” in its examination of cultural standards). See generally Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383 (2013) (arguing that “scientifically supported notions of diminished culpability of youth are not applied consistently across races” and calling for prosecutors to develop adequate alternatives to prosecuting juveniles); Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012) (providing policy recommendations addressing the treatment of girls of color in the juvenile legal system).

13. Josh Rovner, *COVID-19 in Juvenile Facilities*, SENT’G PROJECT (May 18, 2021), <https://www.sentencingproject.org/publications/covid-19-in-juvenile-facilities/> [<https://perma.cc/5MUK-HDX2>].

some prisons, over half the youth population were infected.¹⁴ Outbreaks in youth prisons¹⁵ are similar to those in adult prisons,¹⁶ creating epicenters¹⁷ of infection. In at least one facility, over half the youth population has been infected.¹⁸ Prison conditions often do not allow for COVID-19 precautions, and youth prisons are no exceptions.¹⁹ Incarcerated youth are often confined in small spaces with their peers,²⁰ so when one youth gets sick, there is limited ability to social distance. There is not always soap or running water accessible, so handwashing becomes difficult.²¹ Staff members come from outside, making it less of a secure space and more a petri dish of germs coming in without protection for those locked inside.²²

14. See, e.g., Jack Suntrup, *More Than Half of Youth at State Facility in St. Louis Infected with Coronavirus*, ST. LOUIS POST-DISPATCH (June 10, 2020), https://www.stltoday.com/news/local/metro/more-than-half-of-youth-at-state-facility-in-st-louis-infected-with-coronavirus/article_93f10fea-feb1-5349-b541-98d925503c47.html [<https://perma.cc/76CR-5PGT>] (stating 15 of 28 residents of Hogan Street Regional Youth Center have contracted COVID-19).

15. See, e.g., Laura Cassels, *COVID-19 Infects Juveniles in 30 FL Detention Centers and Youth Prisons*, FLA. PHOENIX (June 29, 2020), <https://www.floridaphoenix.com/2020/06/29/covid-19-infects-juveniles-in-30-fl-detention-centers-and-youth-prisons/> [<https://perma.cc/R72M-9EGD>] (describing a coronavirus outbreak in Florida juvenile detention centers).

16. See, e.g., Adamu Chan, *The View from Inside San Quentin State*, SLATE (July 6, 2020, 6:18 PM), <https://slate.com/human-interest/2020/07/san-quentin-coronavirus-outbreak-prison-diary.html> [<https://perma.cc/27XS-S6JW>] (describing the outbreak at San Quentin State Prison).

17. See, e.g., Justin Jouvenal, *'Mom, I Just Don't Know How to Stay Well': Inside the Nation's Worst Known Outbreak of Coronavirus at a Youth Prison*, WASH. POST (Apr. 23, 2020, 2:59 PM EDT), https://www.washingtonpost.com/local/public-safety/mom-i-just-dont-know-how-to-stay-well-inside-the-nations-worst-known-outbreak-of-covid-19-at-a-youth-prison/2020/04/23/24728f62-83e4-11ea-a3eb-e9fc93160703_story.html [<https://perma.cc/HH4A-MSZJ>] (describing one especially bad outbreak at the Bon Air Juvenile Correctional Center in Virginia as well as early outbreaks at other juvenile detention centers).

18. See Suntrup, *supra* note 14 (stating 15 of 28 residents of the Hogan Street Regional Youth Center contracted COVID-19).

19. See Erica L. Green, *'Pacing and Praying': Jailed Youths Seek Release as Virus Spreads*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/politics/coronavirus-juvenile-detention.html> [<https://perma.cc/UV4C-GJYN>] (“Like their adult counterparts, the roughly 45,000 American youths detained on any given day often sleep, eat, go to school and spend their recreational time in forced proximity. They are in contact with staff members who cycle in and out of the community. The steps recommended for the general public to protect themselves—social distancing, frequent hand-washing, limiting contact with people outside their families—are impossible.”).

20. See JOSH ROVENER, SENT’G PROJECT, *YOUTH JUSTICE UNDER THE CORONAVIRUS: LINKING PUBLIC HEALTH PROTECTIONS WITH THE MOVEMENT FOR YOUTH DECARCERATION 20* (2020), <https://www.sentencingproject.org/wp-content/uploads/2020/09/Youth-Justice-Under-the-Coronavirus.pdf> [<https://perma.cc/FJ2X-BQTM>].

21. *Responding to the Needs of Youth Involved with the Justice System During the COVID-19 Pandemic*, AM. ACAD. OF PEDIATRICS (2019), <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/responding-to-the-needs-of-youth-involved-with-the-justice-system-during-the-covid-19-pandemic/> [<https://perma.cc/5BQB-SESR>].

22. See Rachel Mipro, *As COVID-19 Surges, Louisiana Has Only Vaccinated a Quarter of Its Incarcerated Youth*, LA. ILLUMINATOR (August 13, 2021), <https://lailluminator.com/2021/08/13/as-covid-19-surges-louisiana-has-vaccinated-24-percent-of-its-incarcerated-youth/> [<https://perma.cc/952V-D5RC>] (describing the risk that staff may “pose . . . to the incarcerated children and young adults,” due in part to low vaccination rates).

Moreover, the ways facilities that incarcerate youth are trying to fight the illness are extremely punitive, even when not intended to be so. Education programs in these facilities have been shifted to distance learning and, for many youth, reduced to doing packets alone in their cells.²³ Volunteers, who run many programs in youth prisons including book clubs, religious convenings, and empowerment groups, have been barred from entering due to COVID-19,²⁴ so youth no longer have many of those groups to attend. “[N]ear solitary confinement,” which is considered psychologically damaging for kids,²⁵ has been instituted in some facilities as a cautionary measure and some children are spending 23 hours a day in their cells.²⁶ In-person visits, one of the few things that have been shown to reduce behavioral issues and increase school performance,²⁷ have been cut.²⁸ Often the only contact with the outside world is phone or video calls or texts,²⁹ which sometimes cost money and frequency is often restricted.³⁰ In many facilities, medical isolation is being used when incarcerated youth are exposed to someone with COVID-19, meaning they are locked in their cells for up to 14 days.³¹ For example, in a facility in Baltimore, medical isolation is virtually indistinguishable from solitary confinement: the only major difference is

23. See Tyler Kingkade, *Coronavirus in Juvenile Detention is a ‘Nightmare Scenario’, Doctors and Advocates Say*, NBC NEWS (Mar. 27, 2020, 2:37 PM ET), <https://www.nbcnews.com/news/us-news/coronavirus-juvenile-detention-nightmare-scenario-doctors-advocates-say-n1170256> [<https://perma.cc/9RCY-BSJG>]; Eli Hager, *Solitary, Brawls, No Teachers: Coronavirus Makes Juvenile Jails Look Like Adult Prisons*, MARSHALL PROJECT (May 12, 2020 6:00 AM), <https://www.themarshallproject.org/2020/05/12/solitary-brawls-no-teachers-coronavirus-makes-juvenile-jails-look-like-adult-prisons> [<https://perma.cc/Q238-M8A7>].

24. See Hager, *supra* note 23; see also Samantha Max, *Away from Family, How Teens in Detention Are Coping During the COVID-19 Pandemic*, WPLN (Apr. 9, 2020), <https://wpln.org/post/away-from-family-how-teens-in-detention-are-coping-during-the-covid-19-pandemic/> [<https://perma.cc/YV8W-WRMK>].

25. Tamar R. Birkhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 11 n.62 (2015).

26. Gabrielle Banks, *Reports: Children Are in 23½ Hour-a-Day Lockup at Harris County Juvenile Facility amid COVID-19*, HOUS. CHRON. (Apr. 16, 2020, 2:34 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Reports-Children-are-in-23-hour-a-day-lockup-15187249.php> [<https://perma.cc/FQ8U-G5RD>].

27. Sandra Villalobos Agudelo, *The Impact of Family Visitation on Incarcerated Youth’s Behavior and School Performance*, VERA INST. JUST. (Apr. 2013), https://www.njjn.org/uploads/digital-library/impact-of-family-visitation-on-incarcerated-youth-brief_VERA_April-2013.pdf [<https://perma.cc/H2QP-P5E8>].

28. See, e.g., Green, *supra* note 19 (describing one juvenile detention center where residents were only allowed to contact family via phone call, not visits).

29. See Max, *supra* note 24.

30. See, e.g., *Visitation*, CAL. DEP’T OF CORR. & REHAB., <https://www.cdcr.ca.gov/juvenile-justice/visiting-during-covid/> [<https://perma.cc/K3UD-82KJ>] (last visited June 21, 2021).

31. See, e.g., Rachel Baye, *At Baltimore Detention Center, Youth with COVID-19 Are Held in Isolation*, WYPR (July 22, 2020), <https://www.wypr.org/post/baltimore-detention-center-youth-covid-19-are-held-isolation> [<https://perma.cc/MX9X-82S6>] (describing how youth arriving at a Baltimore juvenile detention center are isolated for 14 days if they are suspected to have been in contact with someone infected with COVID-19).

the door is cracked open with a guard stationed outside.³² The elimination of enrichment programs, the cancellation of school, reduced contact with the outside world, and the fear and anxiety of catching COVID-19 and being forced to medically isolate all combine to create a dangerous physical and psychological situation for incarcerated youth.³³ In the early months of the pandemic, some states released hundreds if not thousands of adult prisoners.³⁴ Incarcerated youth have not been subject to the same wave of releases.³⁵

One reason for this lack of releases may be a lack of urgency.³⁶ This may be because the harms to incarcerated youth are not acknowledged or are imagined as being less severe. Euphemistic names given to youth prisons—camps, treatment centers, academies—suggest a rehabilitative and educational commitment. However, youth jails reflect many of the same features as adult incarceration: cells, locked doors, sally ports, and armed guards. Moreover, there are several examples of the extreme violence that happens in these institutions. For example, in 2015, Elord Revolte was beaten by other youth, possibly at the behest of guards, and then medical treatment was withheld, resulting in his death.³⁷ In 2016, Gynnya McMillen was put in a restraint after refusing to remove her sweatshirt.³⁸ She died later in her cell at Lincoln Village Juvenile Treatment and Detention Center in Kentucky after several bed checks were missed while she struggled to breathe.³⁹ In April 2020, 16-year-old Cornelius Fredrick was restrained after throwing a sandwich and went into cardiac arrest at Lakeside Academy in Michigan.⁴⁰ He

32. *Id.*

33. See Brief for Juvenile & Criminal Justice & Corrections Leaders as Amici Curiae Supporting Petitioners at 9, *In re J.B. v. Finian*, 468 Md. 219 (2020) (Misc. No. 19), https://fairandjustprosecution.org/wp-content/uploads/2020/04/In-re-J.B-Brief_Filed.pdf [<https://perma.cc/8EL2-3P9N>].

34. See Sarah N. Lynch, *Thousands of Low-Level U.S. Inmates Released in Pandemic Could Be Headed Back to Prison*, REUTERS, (April 11, 2021), <https://www.reuters.com/world/us/thousands-low-level-us-inmates-released-pandemic-could-be-headed-back-prison-2021-04-11/> [<https://perma.cc/65Q6-Q5W3>].

35. See Green, *supra* note 19.

36. See Kristine Phillips, *Isolated and Scared: The Plight of Juveniles Locked up During the Coronavirus Pandemic*, USA TODAY (Apr. 28, 2020, 4:00 PM), <https://www.usatoday.com/story/news/politics/2020/04/27/coronavirus-juveniles-risk-covid-19-spreads-facilities/3000637001/> [<https://perma.cc/CX6Q-C79E>] (describing that “the juvenile system has been slow to respond” in comparison to the adult carceral system).

37. See Jim DeFede, *Snacks for Attacks, Part 1: Inside a Dysfunctional Dade Juvie Detention Center*, CBS MIAMI (Oct. 6, 2015, 10:59 PM), <https://miami.cbslocal.com/2015/10/06/snacks-for-attacks-inside-miami-juvie-detention-center-part-1/> [<https://perma.cc/NL4Q-594U>].

38. See Graham Kates, *Lawsuit: Juvenile Detention Staffer Watched as Ky. Girl Took “Last Gasp,”* CBSNEWS, (Sept. 6, 2016), <https://www.cbsnews.com/news/gynnya-mcmillen-lawsuit-juvenile-detention-staffer-watched-as-kentucky-girl-died/> [<https://perma.cc/J375-HV7E>].

39. *Id.*

40. See Taylor Romine & Anna Sturla, *Three Staff Members Charged in Death of 16-Year-Old Who Went into Cardiac Arrest After Being Restrained at Facility*, CNN (June 25, 2020, 9:56 PM), <https://www.cnn.com/2020/06/25/us/teen-restraint-death-staff-charged-michigan-trnd/index.html#:~:text=Cornelius%20Fredericks%2C%2016%2C%20died%20at,cardiac%20arrest%20and%20later%20died> [<https://perma.cc/9ZKV-6TX8>].

died two days later.⁴¹ Significantly, at the hospital, Fredrick tested positive for COVID-19;⁴² his tragic death illustrates how the violence youth can be subjected to in prisons along with the coronavirus can result in a deadly combination.

Other facilities have fewer prison-like features, but research has found these youth jails still run on a pathologizing mindset: one that focuses on labeling, surveillance, and punishment⁴³ instead of rehabilitation.⁴⁴ Youth incarceration hyper-focuses on changing children's behavior without acknowledging, let alone addressing, the social context of their lives and the systemic inequities they face. Many foster care group homes and the entire system of child welfare share a similar mindset,⁴⁵ and sometimes reflect the violence of youth prisons.⁴⁶ The American Academy of Pediatrics states, “[s]imilar to the disproportionate impact of COVID-19 among historically disenfranchised communities, disparities within the juvenile legal system are rooted in inequities in the social and environmental determinants of health and the failure of public policies to adequately address them.”⁴⁷ Ultimately, we have to grapple with the fact that incarceration and contact with the juvenile legal system do not lead to better outcomes.⁴⁸

41. *Id.*

42. Lindsay Moore, *Family of Lakeside Academy Student Seek Answers About His Death*, MLIVE (June 18, 2020), <https://www.mlive.com/news/kalamazoo/2020/05/family-of-lakeside-academy-student-seek-answers-about-his-death.html> [<https://perma.cc/8NP9-6PE8>].

43. For example, as Dorothy Roberts demonstrates, Black children are labelled, surveilled, and punished in foster care. See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE 203–04* (2002). Research has shown that foster children are subjected to surveillance and reporting by their foster parents and group homes, and rather than advocate for those children who the state claims to care for and protect, the child welfare system turns them over to the juvenile legal system for punishment. *See id.* (explaining that most of the New York City foster children who enter the juvenile legal system were in the “[child welfare] agency’s care at the time of their arrest” and that “[s]ome foster parents and group homes are quick to call the police to handle misbehavior by the teens in their custody”). *See also* SUBINI ANCY ANNAMMA, *THE PEDAGOGY OF PATHOLOGIZATION: DIS/ABLED GIRLS OF COLOR IN THE SCHOOL-PRISON NEXUS 3* (2018) (describing a “step-down” program that, while giving students more freedom than the maximum-security detention center, still monitored students’ compliance with rules and could revert them to “whatever more restrictive program they were in prior”).

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

45. Brianna M. Harvey & Kenyon Lee Whitman, *From a Moment to a Movement: Envisioning a Child Welfare System We Have Yet to See*, IMPRINT (July 8, 2020, 11:45 PM), <https://chronicleofsocialchange.org/child-welfare-2/from-moment-to-movement-envisioning-child-welfare-system-we-have-yet-see/45035> [<https://perma.cc/HX2S-MEP3>]; *see also* Dorothy Roberts, *Child Protection as Surveillance of African American Families*, 36 J. Soc. Welfare & Fam. L. 426, 435 (2014) (“By attributing poor black families’ hardships to parental deficits, the child welfare system hides their systemic causes, devalues black children’s bonds with their families, and prescribes out of home care in place of social change and services.”).

46. *See* ROBERTS, *supra* note 43, at 129–30, 134–35 (describing the violence toward foster care children committed while in the state’s custody by the adults assigned to care for them).

47. *See* AM. ACAD. OF PEDIATRICS, *supra* note 21.

48. PEW CHARITABLE TRS., *RE-EXAMINING JUVENILE INCARCERATION 1–2* (2015), https://www.pewtrusts.org/-/media/assets/2015/04/reexamining_juvenile_incarceration.pdf [<https://perma.cc/4W4M-J48M>].

These unsafe prison conditions matter even more when it is considered *who* we choose to incarcerate in youth prisons and *how* we incarcerate them. Even while the youth prison population is declining overall, the disparities of which youth become incarcerated remain firmly entrenched. Since 2015, approximately 186,000 to 218,000 youth spend time each year in juvenile detention centers nationwide.⁴⁹ Youth can be held in detention for a number of reasons under state detention laws, including where a court decides that detention “is necessary to ensure the juvenile’s appearance at subsequent court hearings,” “to protect the community from the juvenile,” “to secure the juvenile’s own safety,” or “for the purpose of evaluating the juvenile.”⁵⁰ Data from the Office of Juvenile Justice and Delinquency Prevention (OJJDP) show a steep decline in the number of delinquency cases involving detention.⁵¹ Following an 80% increase in the number of cases involving detention between 1985 and 2005, the number of cases involving detention dropped significantly.⁵² In the last ten years, the total number of detention cases declined by 42%.⁵³ Since 2005, cases involving detention have declined significantly for all identified racial groups.⁵⁴

Consequently, though numbers of detained youth have dropped over the years, racial disparities continue.⁵⁵

- In 2018, youth were detained at some point between referral to court and case disposition in 32% of delinquency cases involving Hispanic youth, 30% for [B]lack youth, 26% for American Indian youth, 25% for Asian youth, and 21% for white youth.⁵⁶
- In 2018, [B]lack youth accounted for the largest proportion of delinquency cases involving detention (40%). By comparison, white youth accounted for 35%, Hispanic youth accounted for 22%, and American Indian youth and Asian/NHPI youth accounted for 2% and 1%, respectively, of delinquency cases involving detention.⁵⁷

49. *Stat. Briefing Book: Detained Delinquency Cases, 2005–2019*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <https://www.ojjdp.gov/ojstatbb/court/qa06301.asp?qaDate=2019> [<https://perma.cc/8R7M-9F5M>], (last visited Oct. 20, 2021).

50. *Id.* (showing a range of detained youth from 218,300 in 2015 to 186,600 in 2019).

51. *Id.*

52. *Id.*

53. *Id.*

54. OFF. OF JUV. JUST. & DELINQ. PREVENTION, *JUVENILE COURT STATISTICS* 9, 19–20 (2018), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/juvenile-court-statistics-2018.pdf> [<https://perma.cc/8J96-CUBA>] (last visited Oct. 20, 2021) (“Between 2005 and 2018, the relative decline in cases involving detention was greatest for white and Asian youth (down 58% each), then [B]lack youth (down 46%), followed by American Indian and Hispanic youth (down 43% and 40%, respectively”).

55. *Id.* at 19.

56. *Id.* at 34.

57. *Id.* at 33.

These disparities continue through confinement as well. According to the Annie E. Casey Foundation, “African-American youth are nearly five times as likely to be confined as their white peers. Latino and American Indian youth are between two and three times as likely to be confined.”⁵⁸

Importantly, while the youth prison population has actually dropped nationally,⁵⁹ the proportion of girls arrested increased from 1990–2010, and since then it has stayed consistent.⁶⁰ Though girls continue to be underrepresented in youth prisons overall, Girls of Color are in fact overrepresented. Indigenous girls are more than four times as likely; Black girls are three-and-a-half times as likely; and Latina girls are more than three times more likely as white girls to be incarcerated.⁶¹

Youth with disabilities are also overrepresented in youth incarceration.⁶² In public schools, the percentage of the population of youth with disabilities served under the Individuals with Disabilities Education Act (IDEA) was about 14% in 2018.⁶³ When considering incarcerated youth with disabilities, that number increases to at least 33% of youth incarcerated.⁶⁴ When combined with race, these disparities are exacerbated even further with Black youth with disabilities accounting for 50% of students with disabilities in youth prisons.⁶⁵

58. ANNIE E. CASEY FOUND., *YOUTH INCARCERATION IN THE UNITED STATES* (2013), <https://assets.aecf.org/m/resourcedoc/aecf-YouthIncarcerationInfographic-2013.pdf> [<https://perma.cc/4FKU-Q955>].

59. *Id.* (“The decline in youth confinement over the past decade has occurred in states in every region of the country. In fact, 44 states and the District of Columbia experienced a decline in the rate of young people confined since 1997, and several states cut their confinement rates in half or more.”).

60. SENT’G PROJECT, *INCARCERATED WOMEN AND GIRLS* (2020), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> [<https://perma.cc/17V2-3F68>] (“In 1990, girls comprised 20 percent of all youth arrests, a proportion that grew to 26 percent in 2000 and 30 percent in 2010. Since then, the proportion of all youth arrests by gender has been consistent.”).

61. *Id.*

62. NAT’L CTR. FOR EDUC. STAT., *STUDENTS WITH DISABILITIES* (2020), https://nces.ed.gov/programs/coe/indicator_cgg.asp [<https://perma.cc/6ZHS-EDR4>].

63. *Id.*

64. Mary Magee Quinn, Robert B. Rutherford, Peter E. Leone, David M. Osher, & Jeffrey M. Poirier, *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 *Exceptional Child* 339, 342 (2005) (“Our data indicate that the number of youth identified and receiving special education services in juvenile corrections is almost four times higher (33.4%) than in public school programs during the same time period.”). In 2018, children with disabilities made up 33% of children in “institutions for neglected or delinquent children and youth,” “attending community day programs for neglected and delinquent youth,” or “in adult correctional institutions.” *United States Fast Facts Statistics*, NAT’L TECH. ASST. CTR. FOR EDUC. OF NEGLECTED OR DELINQ. CHILD. & YOUTH, <https://neglected-delinquent.ed.gov/state-information/fast-facts/united-states> [<https://perma.cc/RC7X-3VS2>] (last visited Oct. 19, 2021).

65. Daniel Losen, Cheri Hodson, Jongyeon Ee, & Tia Martinez, *Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline*, 5 *J. APPLIED RSCH. ON CHILD.* 1, 2 (2014).

The percentage of incarcerated LGBTQ youth is more than double that of LGBTQ youth in the general population, 20%⁶⁶ versus less than 10%,⁶⁷ respectively. Moreover, placement decisions rarely take into account gender non-conforming and transgender youth gender identities, putting those youth at additional risk.⁶⁸ Again, when race and gender are considered, the disparities are even more worrisome. For example, 85–90% of incarcerated LGBTQ youth are Youth of Color,⁶⁹ while nearly 40% of incarcerated girls identify as LGB.⁷⁰

Youth from foster care and those experiencing family removal have been shown to have increased interaction with the criminal legal system, while youth that remain at home have better outcomes.⁷¹ In some studies, over half of the youth placed in foster care come into contact with the juvenile legal system.⁷² Youth with at least one group-home placement are at an increased risk for future involvement in the legal system.⁷³

Finally, incarcerated youth are more likely to be medically vulnerable and have mental health needs.⁷⁴ Legal-system-involved youth are more likely to go without healthcare for long stretches, making them more likely to have chronic

66. Angela Irvine & Aisha Canfield, *Reflections on New National Data on LGBQ/GNCT Youth in the Justice System*, LGBTQ POL. J. (Jan. 29, 2018), <https://lgbtq.hkspublications.org/2018/01/29/reflections-on-new-national-data-on-lgbq-gnct-youth-in-the-justice-system/> [<https://perma.cc/PHM5-FWWS>].

67. CTR. FOR AM. PROGRESS, MOVEMENT ADVANCEMENT PROJECT, & YOUTH FIRST, UNJUST: LGBTQ YOUTH INCARCERATED IN THE JUVENILE JUSTICE SYSTEM 3 (2017), <https://www.lgbtmap.org/file/lgbtq-incarcerated-youth.pdf> [<https://perma.cc/L9CW-QH5Z>].

68. *Id.* at 4.

69. *Id.* at 1.

70. Bianca D. M. Wilson, Sid P. Jordan, Ilan H. Meyer, Andrew R. Flores, Lara Stemple, & Jody L. Herman, *Disproportionality and Disparities Among Sexual Minority Youth in Custody*, 46 J. YOUTH & ADOLESC. 1547, 1548 (2017).

71. See generally Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1599–1602, 1604 (2007) (suggesting that children, especially older children, tend to have better outcomes, such as lower rates of delinquency and teen parenthood and higher earnings, when they remain at home).

72. Mark Courtney, Sherri Terao, & Noel Bost, *Conditions of Youth Preparing to Leave State Care*, CHAPLIN HALL U. CHI. (2004), <https://www.chapinhall.org/research/conditions-of-youth-preparing-to-leave-state-care/> [<https://perma.cc/6NGV-DRGM>]; N.Y.C. OFF. OF THE MAYOR, YOUNG ADULT OUTCOMES OF FOSTER CARE, JUSTICE, AND DUALY INVOLVED YOUTH IN NEW YORK CITY 17–19 (2015), https://www1.nyc.gov/assets/cidi/downloads/pdfs/foster_care_justice_and_dually_involved_report.pdf [<https://perma.cc/9URF-WHD8>].

73. Joseph Ryan, Jane Marie Marshall, Denise Herz, & Pedro M. Hernandez, *Juvenile Delinquency in Child Welfare: Investigating Group Home Effects*, 30 CHILD. & YOUTH SERVS. REV. 1088 (2008).

74. Matthew C. Aalsma, Valerie R. Anderson, Katherine Schwartz, Fangqian Ouyang, Wanzhu Tu, Marc B. Rosenman, & Sarah E. Wiehe, *Preventative Care Use Among Justice-Involved and Non-Justice Involved Youth*, PEDIATRICS, Nov. 2017, at 2, 5–6.

health issues.⁷⁵ A majority of youth enter custody with unmet health needs and many report those needs being unattended to while detained.⁷⁶

Given this body of research, it is clear who is being incarcerated in youth prisons. We are choosing to incarcerate our most marginalized youth: Youth of Color; youth with disabilities; LGBTQ youth; youth who have experienced abuse, neglect, and removal from home; multiply-marginalized youth; and, importantly, medically vulnerable youth. Given that incarcerated youth are more prone to future mental illness, future arrests, and worse education and employment outcomes,⁷⁷ we must ask why the United States is choosing to make some of its most vulnerable youth more susceptible to COVID-19 through incarceration. Prisons are vectors for transmitting communicable illnesses⁷⁸ and evidence is emerging that many who have had the coronavirus do not simply recover without complications, but go on to have long-term impacts including damage to the lungs even for youth that are asymptomatic.⁷⁹

The harms to incarcerated youth—harms exacerbated and made more urgent by COVID-19—and the disparities alone call for radical responses. We are experiencing such radical and necessary calls when it comes to freeing incarcerated adults.⁸⁰ Indeed, we are witnessing a groundswell of activism for ending police and prisons as we know it.⁸¹ Abolitionist calls to defund the police and abolish police and prisons are rooted in community-based activism that seeks to end use of surveillance, policing, prisons, and jails as a means for responding

75. *Id.* at 5.

76. LESLIE ACOCA, JESSICA STEPHENS, & AMANDA VAN VLEET, KAISER FAMILY FOUND., HEALTH COVERAGE AND CARE FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM: THE ROLE OF MEDICAID AND CHIP 3 (2014), <https://www.kff.org/wp-content/uploads/2014/05/8591-health-coverage-and-care-for-youth-in-the-juvenile-justice-system.pdf> [<https://perma.cc/S4LR-Z7C7>].

77. See BARRY HOLMAN & JASON ZIEDENBERG, JUST. POL'Y INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 4, 8–10 (2006), http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf [<https://perma.cc/4YUR-PA8A>].

78. Pamela Das & Richard Horton, *HIV and Related Infections in Prisoners*, LANCET, at 1:26 (July 14, 2016), <https://www.thelancet.com/series/aids-2016> [<https://perma.cc/KH4K-VG9C>] (discussing prisons as “places where there is an inadequate response to prevention and treatment so that people with these conditions [HIV and Hepatitis C] enter, their health conditions deteriorate, the environment does not have the necessary prevention and treatment modalities, and so it becomes an amplifier of disease”).

79. Veronica Marshall & Briana Harvath, *Health Officials Worry About Long-Term Effects of COVID-19 on Kids*, WINK NEWS (July 17, 2020, 6:35 PM EDT), <https://www.winknews.com/2020/07/17/health-officials-worry-about-long-term-effects-of-covid-19-on-kids/> [<https://perma.cc/T8NB-MHQK>].

80. See *Prison Abolition: A Curated Collection of Links*, MARSHALL PROJECT, <https://www.themarshallproject.org/records/4766-prison-abolition> [<https://perma.cc/S8FB-9BCC>] (last visited Oct. 20, 2021).

81. See *George Floyd Protests: A Timeline*, N.Y. TIMES, <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/487P-F3VL>] (last visited Oct. 19, 2021) (detailing the rise in abolitionist activism in the wake of George Floyd’s murder).

to social, economic, and political conflict and harm.⁸² Though we acknowledge the varied forms of abolitionist organizing,⁸³ we focus here primarily on prison industrial complex (PIC) abolition theory and organizing. The theory undergirding PIC abolitionist theory and organizing is the recognition that race-, gender-, class-, and ability-based subordination and oppression are rooted in histories and legacies of chattel slavery and Indigenous genocide, and that dispossession are foundational logics central to the operation of the American carceral state.⁸⁴ Recognizing these links to historical forms of oppression situates existing social structures not as just derivations of old systems, but as contingencies upon which the current punishment and policing systems are built. By acknowledging that the function and purpose of policing and punishment systems are to target historically multiply-marginalized groups and to regulate and address surplus labor, land, and state capacity, abolitionists recognize the carceral state as a mechanism for governance in the neoliberal age.⁸⁵

Yet, though recently calls have emerged to abolish youth incarceration,⁸⁶ such radical responses and calls for the abolition of youth incarceration have not featured prominently in existing legal scholarship. Moreover, at times, when abolition of youth incarceration is called for, there is a suggestion that other gentler locked facilities can be built as alternatives.⁸⁷ In the next section, we review the literature to situate our call for the abolition of youth incarceration within the juvenile legal system. We address and fill gaps in the literature on the juvenile legal system to better engage with abolitionist theory and the ongoing abolitionist movements.

82. See, e.g., *What is the PIC? What is Abolition?*, CRITICAL RESISTANCE, <http://criticalresistance.org/> [<https://perma.cc/E5S6-TLYB>] (last visited Oct. 20, 2021) (describing the prison industrial complex (PIC) as a term “use[d] to describe the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems.”).

83. For example, organizing by groups like Moms 4 Housing, Mijente, Sunrise Movement, and Red Nation. See *About*, MOMS 4 HOUSING, <https://moms4housing.org/aboutm4h> [<https://perma.cc/ZH9Y-USFV>] (last visited Oct. 19, 2021); *Our DNA*, MIJENTE, <https://mijente.net/our-dna/> [<https://perma.cc/ZH3F-BZCG>] (last visited Oct. 19, 2021); *About the Sunrise Movement*, SUNRISE MOVEMENT, <https://www.sunrisemovement.org/about/> [<https://perma.cc/RSX6-B9NL>] (last visited Oct. 19, 2021); *About the Red Nation*, RED NATION, <http://therednation.org/about/> [<https://perma.cc/LVQ4-5AGK>] (last visited Oct. 19, 2021).

84. See, e.g., MARIAME KABA, *WE DO THIS ‘TIL WE FREE US 3* (2021).

85. See, e.g., Akbar, *supra* note 6, at 426–28, 450–52.

86. See, e.g., Tasia Hawkins, *The Hope for our Future? Abolish Youth Incarceration*, WAGNER REVIEW (Feb. 21, 2020), <https://www.thewagnerreview.org/2020/02/the-hope-for-our-future-abolish-youth-incarceration/> [<https://perma.cc/38AZ-HDM3>].

87. See, e.g., *Joint Statement by Fair and Just Prosecution and Youth Correctional Leaders for Justice on Youth Prisons*, YOUTH CORR. LEADERS FOR JUST. (2020), <https://yclj.org/joint-statement> [<https://perma.cc/R94P-KPXG>].

III. ABOLITION & JUVENILE “JUSTICE”

In recent years, legal scholars have turned their attention to issues pertaining to law and abolition. Scholars like Amna Akbar, Allegra McLeod, and Dorothy Roberts have provided trenchant accounts of abolitionist movements that directly call for the abolition of prisons.⁸⁸ These early accounts of abolition in legal scholarship have aligned with social movements in their calls for radical approaches to law and legal change and, more fundamentally, for responses to harm and conflict that do not rely on punitive, carceral, and punishment systems.⁸⁹ Current social movements have recognized the connection between policing and punishment systems, moving beyond calls to abolish prisons to the abolition of police.⁹⁰ Legal scholars have begun to engage with the current calls for police abolition.⁹¹

That there is a lack of extensive discussion on abolition in law is perhaps unsurprising given the law’s longstanding role in upholding power relations, material and resource allocations, and subordinated status groups.⁹² However, abolition’s moment in legal scholarship has arrived.⁹³ These scholars draw heavily from critical theory and discourses in social movements, which both recognize the limits of legal reform and law’s role in excluding perspectives, strategies for change, and solutions of those who are directly impacted in favor of experts, or bureaucrats.⁹⁴ These engagements with abolition, rooted in critical theory and social movements, are a necessary and natural expansion of long-standing scholarship and law reform proposals that both recognize the limits of law as a tool for social change and the role of the law in reproducing these social hierarchies.

Despite the gains made by abolition and law scholars and the ongoing social movements to both abolish prison and policing, calls for the abolition of youth

88. See Roberts, *supra* note 6, at 5–7 (discussing modern abolitionist movements geared towards abolishing the prison industrial complex); Akbar, *supra* note 6, at 409–10 (considering the law reform project of the Movement for Black Lives); McLeod, *supra* note 6, at 1161–62 (proposing a “prison abolitionist ethic” as a way to describe a “body of abolitionist writings and nascent social movement efforts, which are committed to ending the practice of confining people in cages and eliminating the control of human beings through imminently threatened police use of violent force”).

89. See KABA, *supra* note 84, at 14–17, 63–67 (discussing abolitionist movement organizing that do not rely on police for safety or to redress harms or rely on criminal prosecution for justice for victims of police violence).

90. See *id.* at 14–17.

91. See, e.g., Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781 (2020).

92. See, e.g., Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1713–14 (1993) (“Whites have come to expect and rely on these benefits, and over time these expectations have been affirmed, legitimated, and protected by the law. . . . American law has recognized a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated.”).

93. See, e.g., sources cited *supra* note 88.

94. See *id.*

incarceration have been noticeably absent, or limited.⁹⁵ This relatively limited attention to the calls for abolition of youth incarceration seems understandable for a few reasons. First, there are growing proposals within movements and advocacy for youth that the criminal legal system should be abolished.⁹⁶ In late July 2020, prison officials and prosecutors published a letter calling for the closure of all youth prisons.⁹⁷ The letter emphasized that closing youth prisons was just the first step, and called for “greater reliance on services and support for young people caught up in the justice system,”⁹⁸ such as “small, rehabilitative, home-like facilities” for those youth who can be placed safely in their homes.⁹⁹ This abolitionist imaginary¹⁰⁰ in movements has imbued calls for change at the municipal level. In June 2019, the San Francisco Board of Supervisors voted 8–3 to close the city’s juvenile hall by 2021.¹⁰¹

Second, the lack of attention is perplexing in particular given that juvenile justice scholars have long called for the abolition of both adult court jurisdiction

95. Though there is a lack of calls for abolition of youth prison in legal scholarship, there is considerable discussion of abolition as it relates to conditions of confinement, or types of punishment, including the imposition of fees. *See, e.g.,* Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. REV. 401 (2020); Amy Fetting, *The Movement to Stop Youth Solitary Confinement: Drivers of Success & Remaining Challenges*, 62 S.D. L. REV. 776 (2017).

96. *See, e.g.,* Joseph E. Kennedy, *Juries for Juveniles*, 46 TEX. TECH L. REV. 291, 291 (2013) (“Widespread agreement exists that too many juveniles are being tried as adults. Agreement breaks down over what is to be done. Some propose abolition of adult court jurisdiction over juveniles; many others propose some combination of categorical limits on transferring juveniles to adult court. Still others propose abolishing juvenile court altogether and according juveniles special treatment within the adult system or replacing juvenile court with some sort of civil regime.”).

97. *Joint Statement by Fair and Just Prosecution and Youth Correctional Leaders for Justice on Youth Prisons*, YOUTH CORR. LEADERS FOR JUST. (2020), <https://yclj.org/joint-statement> [<https://perma.cc/R94P-KPXG>]; Michael Fitzgerald, *Dozens of Prosecutors and Youth Corrections Officials Call to Close All Youth Prisons*, IMPRINT (July 30, 2020 5:23 PM), <https://chronicleofsocialchange.org/news-2/prosecutors-corrections-close-all-youth-prisons/45685> [<https://perma.cc/K9SL-LXSN>].

98. Fitzgerald, *supra* note 97.

99. YOUTH CORR. LEADERS FOR JUST., *supra* note 97.

100. The term “imaginary” is part of abolition framework and describes what we dream of in place of harmful systems. *See, e.g.,* Interviews: Saidiya Hartman, ARTFORUM (July 14, 2020), <https://www.artforum.com/interviews/saidiya-hartman-83579> [<https://perma.cc/E9VP-53MT>] (“[W]hat does it mean to want to imagine and to experience something else? It can’t but be political—simply to want to free one’s body from its conscription to servitude, to no longer be made a servant in the reproductive project of the world—all of this is part of an abolitionist imaginary.”).

101. Ella Fassler, *San Francisco Joins National Push to Abolish Youth Prisons*, PRISON LEGAL NEWS (June 3, 2019), <https://www.prisonlegalnews.org/news/2019/jun/13/san-francisco-joins-national-push-abolish-youth-prisons/> [<https://perma.cc/YZE6-5BEL>].

over youth, and the abolition of juvenile court altogether.¹⁰² General consensus that too many youth were being tried in adult court led to “raise the age” campaigns—reforms that seek to move youth from the adult criminal legal system in jurisdictions where crimes committed under the age of 18 result in youth being automatically tried as adults.¹⁰³ However, these reformist campaigns failed to address the root of the problem: punitive responses to youth charged with crimes. Beyond the “raise the age” campaigns, some legal scholars and practitioners proposed providing categorical limits on when youth can be transferred to adult court.¹⁰⁴ Still others have proposed more radical interventions, such as advocating

102. See, e.g., Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 948–51 (1995) (arguing for the abolition of the juvenile justice system in favor of a unified criminal justice system); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing The Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1132–33 (1991) (asserting that juvenile justice system should be abolished because the original conception of childhood, which the juvenile justice system was founded on, is no longer consistent with societal views); Katherine H. Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children’s Legal Rights*, 16 J. CONTEMP. L. 23, 25 (1990) (explaining why, due to legal, political, and societal changes, the juvenile justice system should be abolished in order to afford children legal rights); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120, 1132–33 (1977) (arguing for abolition of the juvenile justice system because it has failed in accomplishing its objectives—protecting society and rehabilitation—and proposed reforms to the system are redundant of protections already granted in the criminal justice system); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997) (claiming that legal and political changes have eliminated the distinction between the juvenile and criminal justice systems and that, because of this, the juvenile justice system should be abolished and youthfulness should be recognized in criminal courts as a mitigating factor); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 692–93 (1991) (arguing for abolishing “a separate juvenile court” because legislative and judicial action have eliminated the differences between the juvenile and criminal systems and because of the procedural deficiencies of the juvenile justice system). *But see* Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 184–85 (1993) (stating that the juvenile justice system should be reformed, not abolished, because there are benefits to the juvenile justice system which the criminal justice system cannot replicate); Robert O. Dawson, *Future Trends in Criminal Procedure: The Future of Juvenile Justice: Is It Time to Abolish the System?*, 81 J. CRIM. L. & CRIMINOLOGY 136, 155 (1990) (arguing against abolishing the juvenile justice system because doing so would subject children to the bail system, cause a loss of resources, and eliminate status offenses); Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-McKeiver World*, 91 NEB. L. REV. 1, 63–71 (2012) (contending that instead of abolishing the juvenile justice system, the juvenile justice system should be reformed to include the right to a jury trial); Thomas F. Geraghty, *Justice for Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190, 217 (1997) (protesting abolishing the juvenile justice system because the criminal justice system is ill equipped to handle children and procedural deficiencies in the juvenile justice system could be solved through reform); Gary L. Crippen, *The Juvenile Court’s Next Century—Getting Past The Ill-Founded Talk of Abolition*, 2 U. PA. J. CONST. L. 195 (1999) (opposing abolishing the juvenile justice system because doing so would not protect children’s interests).

103. JUST. POL. INST., RAISING THE AGE: SHIFTING TO A SAFER AND MORE EFFECTIVE JUVENILE JUSTICE SYSTEM (2016), http://www.justicepolicy.org/uploads/justicepolicy/documents/raisetheagesummary_final_3_6_16.pdf [<https://perma.cc/926Y-EGXZ>].

104. Kennedy, *supra* note 96, at 291 (discussing proposals).

for an abolition of juvenile courts, providing youth with special status within the adult system, or replacing juvenile courts with a civil regime.¹⁰⁵

Third, the abolition of youth prisons is augmented by the abolition of the death penalty for youth who committed homicide crimes, and the end of both life without parole (LWOP) for those who committed non-homicide crimes and mandatory LWOP for homicide crimes.¹⁰⁶ This is because the Supreme Court's determination that the "characteristics of youth" characterized youth not only as less morally culpable, but also more likely to be rehabilitated.¹⁰⁷ Taken together, the Supreme Court recognizes the characteristics of youth in order to set limits on how the state may punish. Despite this recognition of children as different in the Supreme Court's Eighth Amendment jurisprudence on sentences and sentencing practices, the Supreme Court has yet to speak to how children are different with respect to the conditions of incarceration. Stated differently, and to put it as a question, are youth different for constitutional purposes with respect to a range of conditions of confinement, ranging from strip searches to solitary confinement to use of force? Whether or not children are indeed different for constitutional purposes, the extensive harms they experience are documented extensively in empirical literature, calling into question legal reforms that merely erode at the edges of the youth carceral system.¹⁰⁸ Isn't it now the time to call for the abolition of youth incarceration?

There may be reasons legal scholarship has avoided the call to abolish youth incarceration, and we do not intend to suggest that social movements have intentionally ignored or erased youth in their advocacy efforts. With respect to the former, juvenile justice advocates may reasonably conclude that abolishing youth prisons may render youth vulnerable to placement in adult prisons.¹⁰⁹ Empirical literature documents extensive violence, sexual assault, and coercion of youth in adult prisons.¹¹⁰ Social movements themselves may inadvertently regard calls for

105. *Id.*

106. *See generally* *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments); *Graham v. Florida*, 560 U.S. 48 (2011) (deciding that the Eighth Amendment's Cruel and Unusual Punishments Clause does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime); *Roper v. Simmons*, 543 U.S. 551 (2005) (concluding that execution of individuals who were under 18 at the time of their crimes is prohibited by the Eighth and Fourteenth Amendments).

107. *Miller*, 567 U.S. at 476–78.

108. *See* BARRY HOLMAN & JASON ZIENDENBERG, JUST. POL'Y INST., *THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES* 2–3 (2006), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/dangers_of_detention.pdf [<https://perma.cc/428U-GZLP>].

109. David Muhammad, *California's Closure of DJJ is Victory with Significant Challenges*, JUV. JUST. INFO. EXCH. (May 19, 2020), <https://jjie.org/2020/05/19/californias-closure-of-djj-is-victory-with-significant-challenges/> [<https://perma.cc/DQ9B-E3NS>].

110. *See* VINCENT SCHIRALDI & JASON ZEIDENBERG, CTR. ON JUV. & CRIM. JUST., *THE RISKS JUVENILES FACE WHEN THEY ARE INCARCERATED WITH ADULTS* 2–4 (1997), http://www.cjcj.org/uploads/cjcj/documents/the_risks.pdf [<https://perma.cc/5EVB-3CWU>].

abolition of adult prisons as calls for abolition of youth prisons. However, failure to explicitly name juvenile justice does function as a type of erasure of intersectional oppressions. The challenges facing youth in prison are similar to those facing adults. Like adults, youth may experience the conditions of incarceration as harsh, exploitative, and debilitating. They may struggle to obtain access to education, quality health care, and disability accommodations. They may suffer in solitary confinement, and experience physical and/or sexual violence. But the reasons for incarcerating children in carceral spaces are rooted in a different set of theoretical justifications, which, though they express to treat children differently, operate in ways that reinforce the same kinds of punitive and carceral logics.

Legal scholars and practitioners writing about the juvenile legal system have called for abolition or transformative change on similar grounds. In the Sections that follow, we discuss how these central critiques support current calls for abolition within radical movements. We contend that serious engagement with abolition theory provides a basis from which advocates can acknowledge the racialized, punitive social control model that is at the root of youth incarceration while pushing for both non-reformist reforms and transformative change.¹¹¹ Indeed, as scholars have pointed out, despite its pronouncements that it treats children differently or that it is focused on rehabilitation, the juvenile legal system functions more like a juvenile punishment system, in particular for multiply-marginalized Youth of Color like Grace, a Black girl with disabilities.¹¹² The racialized, gendered, disability- and class-based disparities are more than just outcomes; they both reflect and reveal how the juvenile legal system as a whole reproduces hierarchies based on race, gender, disability, and class. These status hierarchies are reinforced despite seemingly race-neutral rules and decision-making processes, as Professor Jyoti Nanda argues in her discussion of Girls of Color in the juvenile legal system.¹¹³ Our analysis below suggests also that these rules and decision-making processes that inform determinations, such as whether prosecutors should file delinquency petitions or whether judges should sentence youth to incarceration, are rooted in racism and ableism, reinforcing a conception

111. See Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/54JE-H6H2>] (explaining pro-abolition arguments).

112. Nanda, *supra* note 12, at 1507.

113. *Id.* at 1520–21 (“It is entirely plausible that judges differentially apply race- and gender-neutral factors like maturity. That is, given stereotypes about race and gender, a judge may view a girl of color as more mature than a White girl and thus subject her to different normative expectations. Distortions of this sort are precisely what might provide at least a partial explanation for the disparate outcomes in the juvenile justice system” (citing Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 409 (1996))).

of childhood centered in white, cisgender, male bodyminds¹¹⁴—the standard for what is normal and therefore desirable. In the next Section, we identify central operating logics that reinforce such racism and ableism and why fully recognizing these logics requires abolishing juvenile incarceration.

A. *Parens Patriae*

Parens patriae is a legal doctrine premised on the duty of the state to protect the interests and general welfare of the populace. *Parens patriae* doctrine positions the state as patriarch over youth and youth as wards of the state for purposes of “care and solicitude.”¹¹⁵ Professor Nanda discusses how *parens patriae* has also harmed children and in particular Girls of Color in the juvenile legal system through racism and patriarchy.¹¹⁶ The doctrine serves as the justification for many juvenile courts, as it extends parental authority, particularly the father’s traditional authority, over children to the state.¹¹⁷ This parental authority over children gives the state far more discretion in serving as disciplinarian over children than it does over adults.¹¹⁸ The result is a broader focus on reform and rehabilitation, and consequently the moral character of the child, and increased discretion in juvenile courts than in adult criminal courts.¹¹⁹ Professor Nanda pinpoints four institutional actors whose discretion is key in the overrepresentation of Girls of Color in the juvenile court system: “police officers, probation officers, district attorneys, and judges.”¹²⁰ Police have discretion to decide whether a matter will be processed formally or not, and the probation officer has discretion to dismiss the case for lack of evidence or to grant an informal probation.¹²¹ The district attorney may decline to prosecute, or they may decide to file criminal charges, at which point they will determine whether the case will go to juvenile or criminal court.¹²² If a juvenile court adjudicates the case, the district attorney will request that the juvenile offender become a ward of the court.¹²³ Finally, the judge has

114. “Bodyminds” is an approach characterized by viewing the body and the mind as a single integrated unit and that “resist[s] the dualism built into white Western culture.” ELI CLARE, *BRILLIANT IMPERFECTION: GRAPPLING WITH CURE* xvi (2017).

115. Nanda, *supra* note 12, at 1513 (quoting Judge Julian Mack describing the goals of the juvenile court in 1909).

116. *Id.* at 1514–16.

117. *Id.* at 1512.

118. *Id.* at 1513.

119. *Id.* at 1513–14.

120. *Id.* at 1515–16 (“For court actors, the expectation has included notions of the girls’ moral character, which in turn guides processing decisions. These decisions can include the most important one: whether to move the case into the system or whether to leave it out entirely. Moreover, and perhaps most relevant for girls, court actors rely on girls’ moral character in exercising their discretion. For girls of color in the system, discretion has been a weakness and has undoubtedly contributed to their overrepresentation in the system.”).

121. *Id.* at 1517.

122. *Id.* at 1517–18.

123. *Id.* at 1518.

sole discretion to determine the sentence.¹²⁴ This broad discretion “creates space . . . susceptible to being filled by explicit or implicit racial and gender stereotypes.”¹²⁵ Thus, the *parens patriae* doctrine, in the broad discretion it creates, leads to increased numbers of Youth of Color, particularly Girls of Color, interacting with the juvenile legal system.

The pathologies of *parens patriae* played out in Grace’s case. In a late July hearing before Oakland County Judge Mary Ellen Brennan, Grace pleaded with the judge to allow her to return to her mother.¹²⁶ “I believe that this challenge has specifically brought my mother and I finally back together,” she said.¹²⁷ Judge Brennan told Grace, “You’re exactly where you’re supposed to be. You’re blooming there, but there’s more work to be done.”¹²⁸ That Grace’s mother did not agree with this assessment and sought to have her daughter returned to their home was ignored in this moment.¹²⁹ Judge Brennan, in her assessment of Grace’s record, was positioned as the rightful parental authority. Indeed, the notion that an “extensive review” of Grace’s file could render the judge in a best position to determine where and whether Grace can best develop as a young child reveals the paternalism inherent in what is constructed as a benevolent *parens patriae* doctrine.¹³⁰

Parens patriae is framed as an extension of parental authority from the parent and to the state, but as Grace’s case shows, it can serve as a legal basis for diminishing parental control or facilitating family separation through the severing of parental bonds. Historically, and today, the state has sought to disrupt maternal bonds between Black mothers and their children through punitive forms of social control.¹³¹ What Dorothy Roberts calls the “family regulation system,”¹³² along with state-led efforts to funnel Native American children into the child welfare system whether through government-run boarding schools or the “Indian

124. *Id.* at 1518–19.

125. *Id.* at 1520.

126. *Michigan Judge Tells Girl Detained After Not Doing Homework, “You’re Exactly Where You’re Supposed to Be,”* CBS NEWS (July 22, 2020, 8:27 AM), <https://www.cbsnews.com/news/michigan-judge-mary-ellen-brennan-teen-detained-homework/> [<https://perma.cc/SGM4-NT27>].

127. *Id.*

128. *Id.*

129. Cohen, *supra* note 1.

130. *See id.*

131. *See* ROBERTS, *supra* note 43, at v–x (discussing the relationship between state supervision of Black families and disruptions of parental rights of Black parents).

132. *‘Abolition Is the Only Answer’: A Conversation with Dorothy Roberts*, RISE (Oct. 20, 2020), <https://www.risemagazine.org/2020/10/conversation-with-dorothy-roberts/> [<https://perma.cc/4Z4P-3A39>]; *see also* Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, APPEAL (Mar. 26, 2018), <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/> [<https://perma.cc/A42Z-TNXL>] (discussing the perspective of foster care abolitionists that the child welfare system is an “institutionalized disruption of Black families” and a “key aspect of the expanding carceral state”).

Adoption Project,”¹³³ collectively have served to deny the parental rights of Black and Indigenous parents. *Parens patriae* justified state intervention into Black and Indigenous homes in part because Black and Indigenous parents were pathologized as “unfit parents.”¹³⁴ Such racialized tropes have historically and continue to pit Black and Indigenous parents against the state, forcing parents to accept what judges and probation officers determine—based on a record rife with discretionary decisions that are racialized, classed, and ableist—is in the best interest of their children.

B. “Children as Different”

As discussed above, the notion that children are different lays at the roots of what was a late nineteenth century progressive era reform to save children by “recognizing that reformers intuitively understood that children were physically, mentally, and morally different from adults and that society should respond to their behavior accordingly.”¹³⁵ For these reformers, children “lacked the capacity for moral and reasoned judgment” and so were less morally culpable for their acts of misconduct or crime.¹³⁶ In addition, as Professor Hennings explains, these reformers “conclud[ed] that much of adolescent misconduct was the product of environmental factors beyond their control,” and so “advocated for the justice system to divert youth offenders from the traditional criminal legal system to

133. Ronald M. Walters, *Goodbye to Good Bird: Considering the Use of Contact Agreements to Settle Contested Adoptions Arising Under the Indian Child Welfare Act*, 6 U. ST. THOMAS L.J. 270, 278–79 (2008) (“The Indian Adoption Project, which ran between 1958 and 1967, signaled an important new era in Indian child welfare policy. The project was a collaboration between the [federal Bureau of Indian Affairs] and the Child Welfare League of America and was designed to remove Indian children from their families in an effort to integrate them into mainstream society.”); ROBERTS, *supra* note 43, at 248–49 (“[When Congress passed the Indian Child Welfare Act in 1978] federal lawmakers acknowledged a deliberate government campaign to wrongfully remove Indian children from their parents to place them in white homes and institutions. The practice was so rampant that it threatened to decimate some tribal cultures. In Senate hearings, Indians presented evidence that between one-quarter to one-third of all Indian children had been separated from their families. Official removal of Indian children from their parents dated back to 1860, when federal authorities promoted boarding schools designed to strip Indian children of their customs and assimilate them into white culture. Adoption later became a central part of federal policy to uproot Indian children from reservations.”).

134. See James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 802 (2009) (“[F]or at least the past four centuries, the state in the English-speaking world has exerted extensive *parens patriae* authority over child rearing and has endeavored to ensure that children are not raised by unfit parents.”); ROBERTS, *supra* note 43, at 249 (“The government’s reason for the wide-scale transfer of Indian children was the familiar child-saving rationale.”); see, e.g., *id.* at 250 (“In the same way agencies used to view Black kin networks as evidence of neglect, ‘many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.’”).

135. Henning, *supra* note 12, at 389; see also Nanda, *supra* note 12, at 1510 (“It may come as no surprise that the founders of the juvenile court were purportedly interested in saving potentially criminal children—or rather, poor children—from becoming criminal.”).

136. Henning, *supra* note 12, at 389.

newly established juvenile courts that would ‘rescue’ them from their negative home environments and transform them into responsible citizens.”¹³⁷ The notion that children are different is of course foundational to the formation of the juvenile legal system,¹³⁸ but its coercive and punitive aspect was not uniformly applied.¹³⁹ Our claim here is not to say that children are not different, but rather to suggest that the *narrative* of children as different belies the fact that for multiply-marginalized Youth of Color, and in particular those with disabilities, they are indeed regarded as not different at all. We find this problematic for two reasons.

First, Youth of Color and Youth of Color with disabilities are regarded as more adult-like, more threatening, and more dangerous than similarly situated white youth.¹⁴⁰ For these youth, empirical evidence suggests that they are simply not regarded as children.¹⁴¹ Indeed, as Professor Henning has argued, “contemporary narratives portraying [B]lack and Hispanic youth as dangerous and irredeemable lead prosecutors to disproportionately reject youth as a mitigating factor for their delinquent behavior.”¹⁴²

Second, the narrative of children as different within the juvenile legal system does not acknowledge the ways in which these systems *construct* multiply-marginalized Youth of Color—Black, Indigenous, and Latinx in particular—as criminal, indeed not truly children.¹⁴³ Professor Ocen argues that Black children, particularly Black girls, exist in a type of liminal childhood where they are denied the benefits of adulthood that would enable their full participation in society, such as the right to vote, but are also “excluded from the protective constructions of childhood.”¹⁴⁴ This disconnect is due, Ocen argues, to stereotypes that Black children are more mature, have more sexual agency, and are more criminally

137. *Id.*

138. Nanda, *supra* note 12, at 1514 (“As a formal matter, the juvenile justice system today is structured around two guiding principles, both of which derive from the history I set out above. The first principle is that youth have ‘diminished culpability and greater prospects for reform.’ The U.S. Supreme Court has repeatedly upheld this principle and affirmed it most recently in *Miller v. Alabama* in June 2012.” (quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012))).

139. *Id.* at 1521 (“numerous studies over the past decade have examined and documented that at every stage of the juvenile justice system Youth of Color ‘are more likely [than White youth] to be arrested, charged, detained, sentenced severely, and tried as adults’” (quoting Patricia Soung, *Social and Biological Constructions of Youth: Implications for Juvenile Justice and Racial Equity*, 6 NW. J.L. & SOC. POL’Y 428, 436 (2010))).

140. KABA, *supra* note 84, at 8–9.

141. *Id.*

142. Henning, *supra* note 12, at 383.

143. See, e.g., Priscilla A. Ocen, (*E*)*racing Childhood: Examining the Racialized Construction of “Childhood” and “Innocence” in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1613–14 (2015) (“[T]he ongoing subordination of Black girls was facilitated through these early constructs of childhood. In particular, the various forms of state violence that attended to the bodies of black girls were justified by racially and gender specific form of childhood assigned to them. Criminalization was an essential part of this liminal status, as it reinforced racial and gender stereotypes while simultaneously imposing particular forms of culpability that were generally understood to be inconsistent with childhood status occupied by Black girls.”).

144. Ocen, *supra* note 143, at 1594.

responsible than white children.¹⁴⁵ For Black girls, this issue is most apparent in antitrafficking initiatives, which fail to account for these biases and for the structural issues that make Black girls more vulnerable to exploitation.¹⁴⁶ Consequently, Black girls are often punished for prostitution rather than protected by antitrafficking laws due to an assumption that they have more agency than they have.¹⁴⁷

Children are also different for the purposes of sentencing in adult criminal courts. The Supreme Court has ruled that children are less culpable and more capable of rehabilitation and made punishments like death for homicide and non-homicide offenses and mandatory life without parole categorically impermissible under the Eighth Amendment.¹⁴⁸ While we reject binaries of guilt and innocence and reject any claim that punitive systems can be mechanisms of rehabilitation, or that rehabilitation is even a useful goal, we note how the Court's construction of youth prescribes a unique sentencing regime for children while ignoring the realities of child incarceration. The Supreme Court's construction of children as different does not necessarily apply to conditions of incarceration—harms that disproportionately impact Youth of Color and Youth of Color with disabilities.¹⁴⁹ Which is to say, constitutional law recognizes the unique status of children for the purposes of legal punishment and sentencing but says little about the unique status of children with respect to the conditions they are placed in following conviction. The failure to reckon with conditions of incarceration not only exposes children to harms stemming from imprisonment, but risks inflicting long standing physical, psychological, and emotional harms.¹⁵⁰ Again, these conditions

145. *Id.*

146. *Id.* at 1594–95.

147. *Id.* at 1594.

148. See cases cited *supra* note 106 and accompanying text.

149. See Edgar Cahn & Cynthia Robbins, *An Offer They Can't Refuse: Racial Disparity in Juvenile Justice and Deliberate Indifference Meet Alternatives that Work*, 13 D.C. L. REV 71, 77–80 (2010) (discussing the negative effects of incarceration on Youth of Color); Taryn VanderPyl, *Incarcerated DisCrit: The Intersection of Disproportionality in Race, Disability, and Juvenile Justice*, JUST. POL'Y J., Spring 2018, at 6 (discussing how students with disability receive inadequate education in the juvenile justice system); Mark Soler, Dana Schoenberg, & Marc Schindler, *Juvenile Justice: Lessons for A New Era*, 16 GEO. J. POVERTY LAW & POL'Y 483, 530–33 (2009) (examining the overrepresentation of children of color in the juvenile justice system and the disparate and harsher treatment those children receive).

150. JUV. L. CTR., ADDRESSING TRAUMA: ELIMINATING STRIP SEARCHES 2 (2017) (explaining how strip searches during adolescence can cause particularly significant consequences that may last into adulthood); BARRY HOLMAN & JASON ZIENDENBERG, JUST. POL'Y INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 9 (2013) (“[J]uvenile correctional facilities often incorporate responses to suicidal threats and behavior in ways that endanger the youth further, such as placing the youth in isolation.”); see also Press Release, Wendy Sawyer, Youth Confinement: The Whole Pie 2019 (Dec. 19, 2019), <https://www.prisonpolicy.org/reports/youth2019.html> [<https://perma.cc/Q86D-RHUY>] (discussing the large number of youths confined by the juvenile justice system, most of whom “are held in restrictive, correctional-style facilities” and are subject to restraining chairs, strait jackets, and other mechanical restraints).

disproportionately harm Youth of Color and Youth of Color with disabilities,¹⁵¹ which means that the failure to consider “children as different” for the purposes of confinement reifies existing racial disparities.

Judge Brennan ordered Grace to incarceration in the middle of a pandemic on the grounds that she violated the conditions of her probation by failing to complete her homework assignments.¹⁵² Grace’s youth rendered her vulnerable to the juvenile legal system in part because that system purports to treat youth as different and provide them with pathways to so-called rehabilitation. Constructions of juvenile legal systems as rehabilitative and therapeutic belie the actual nature of the system itself. Youth incarceration exposes youth to invasive strip searches, solitary confinement (or so-called “room confinement”), violence, and other physical and psychological harms.¹⁵³ Indeed, for Black children with disabilities like Grace, such efforts to rehabilitate have routinely failed to recognize their youth, opting instead for more punitive forms of so-called rehabilitation. Punitive rehabilitation fits comfortably with the revisionist history of the juvenile court system, though it may not fit with more traditional accounts.¹⁵⁴ However, when we consider how Judge Brennan could describe Grace as “blooming” while incarcerated, separated from her mother, and in the middle of a global pandemic,¹⁵⁵ the stark duality of punitive rehabilitation is more discernible. Further, when we consider that Grace’s inability to complete her homework assignment was likely due in part to the failures of her school to accommodate her disabilities during the current mode of online learning instruction, we can see that her violation is rooted in disability discrimination.¹⁵⁶ Had Grace been provided with an accessible learning space, it is conceivable that she may not have been violated on this ground. If children are different, what

151. See sources cited *supra* note 149.

152. CBS NEWS, *supra* note 126.

153. Soler, Schoenberg, & Schindler, *supra* note 149, at 519; see also, e.g., JUV. L. CTR., *supra* note 150, at 2 (explaining how strip searches during adolescence can cause particularly significant consequences that may last into adulthood); HOLMAN & ZIENDENBERG, *supra* note 150, at 9 (“[J]uvenile correctional facilities often incorporate responses to suicidal threats and behavior in ways that endanger the youth further, such as placing the youth in isolation.”); Press Release, Wendy Sawyer, *supra* note 150 (discussing the large number of youths confined by the juvenile justice system—most of which “are held in restrictive, correctional-style facilities,” and are subject to restraining chairs, strait jackets, and other mechanical restraints).

154. See Nanda, *supra* note 12, at 1510; Henning, *supra* note 12, at 404.

155. CBS NEWS, *supra* note 126.

156. Cohen, *supra* note 1. Title II of the ADA applies to government entities and includes public schools. *Disability Discrimination*, U.S. DEP’T OF EDUC. OFF. FOR C.R. (Apr. 4, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/disability.html> [<https://perma.cc/XEA8-EE8F>]. The failure to provide reasonable modifications (more commonly referred to as “accommodations”) to “policies, practices, and procedures,” may constitute discrimination under Title II. 28 C.F.R. § 35.130(b)(7)(i) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”).

rights do Black children with disabilities like Grace have in the juvenile legal system?

C. Social Control

As Professor Kristin Henning has argued, revisionist accounts of race, class, and adolescence in the juvenile legal system document how the system's progressive proponents were motivated in part by social control purposes, and that "reformers designed child welfare agencies and juvenile courts to protect their middle-class existence and control poor immigrants—and later people of color."¹⁵⁷ Professor Jyoti Nanda makes a similar point, noting that "from the start, the system developed with embedded notions of race and identity and the provision of discretion to system actors treating the youth."¹⁵⁸

Professor Nanda discusses how the juvenile court system, with its emphasis on judicial discretion, developed as an agent of social control. In the post-Reconstruction era, reformatories were a place of "labor intensive incarceration" for Black youth who had violated Jim Crow laws.¹⁵⁹ The trend of curtailing the behavior of Black children continues today. Perhaps due to explicit or implicit biases, girls are often punished for failing to meet gender expectations, such as acting aggressively or having unprotected sex, in a way that boys are not.¹⁶⁰ Black girls also often receive less leniency for minor offenses than similarly-situated white girls.¹⁶¹

Girls in particular enter the system most frequently through status offenses, that is, conduct that would not be criminal in an adult, such as truancy.¹⁶² Such behaviors are usually considered "evidence that the child is ungovernable or beyond the control of his or her parents" and thus in need of rehabilitation.¹⁶³ Thus, the emphasis on rehabilitation becomes a tool by which the juvenile legal system can curtail and control the behavior of children, particularly Youth of Color. But, Professor Nanda argues, such behaviors are more often "manifestations of unmet and unaddressed educational, emotional, and economic needs" than misconduct in need of reformation.¹⁶⁴ As noted, Grace's confinement for violating the terms of her probation likely is the result of a failure to address

157. Henning, *supra* note 12, at 404.

158. Nanda, *supra* note 12, at 1510.

159. *Id.* at 1511 (quoting Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, JUV. & FAM. CT. J., Fall 1998, at 17, 23).

160. *Id.* at 1529–30.

161. *Id.* at 1526–27.

162. *Id.* at 1528.

163. *Id.*

164. *Id.*

her educational needs.¹⁶⁵ In any event, the harmless and minor violation to many did not warrant imprisonment. Although Judge Brennan maintained that Grace posed a danger to her mother and that the judge's determination was made based on an extensive record,¹⁶⁶ the Michigan Court of Appeals disagreed.¹⁶⁷ The court ordered Grace released on Friday, July 31, 2020.¹⁶⁸ The Oakland County Prosecutor's Office supported the motion for release.¹⁶⁹

In the next section, we build on these arguments and propose ways for advancing the interests of multiply-marginalized Youth of Color and Youth of Color with disabilities in ways that do not further their criminalization and dehumanization in the juvenile legal system. Examining the problems of youth incarceration through a DisCrit lens amplifies arguments in support of abolition.

IV.

A DISCRIT APPROACH TO YOUTH INCARCERATION

We utilize an intersectional sibling of Critical Race Theory, DisCrit, to make the argument for the abolition of youth prisons, including youth incarceration. DisCrit provides specific affordances to understand how particular youth are labeled, surveilled, and punished, funneling them into youth prisons.

First, DisCrit recognizes that racism and ableism are interdependent and circulate in invisibilized ways.¹⁷⁰ We draw from the definition of ableism developed by T.L. Lewis with support by Dustin Gibson. Lewis describes ableism as

[a] system that places value on people's bodies and minds based on societally constructed ideas of normalcy, intelligence, excellence and productivity. These constructed ideas are deeply rooted in anti-Blackness, eugenics, colonialism and capitalism.

This form of systemic oppression leads to people and society determining who is valuable and worthy based on a person's appearance and/or their ability to satisfactorily [re]produce, excel and 'behave.' You do not have to be disabled to experience ableism.¹⁷¹

165. See Cohen, *supra* note 1 ("Grace has ADHD and an education plan that provided support from teachers and extra time to complete assignments. Birmingham Public Schools, one of the most well-regarded districts in the state, asked for patience from families and pledged to be flexible with school requirements during the school shutdown.").

166. CBS NEWS, *supra* note 126.

167. LeBlanc & Martindale, *supra* note 4.

168. *Id.*

169. *Id.*

170. Annamma, Connor, & Ferri, *supra* note 8, at 5.

171. Talila A. Lewis, *Ableism 2020: An Updated Definition*, TL'S BLOG (Jan. 25, 2020) (emphasis added), <https://www.talilalewis.com/blog/ableism-2020-an-updated-definition> [<https://perma.cc/5U92-8L7S>].

We find the last line particularly resonant in this work. Ableism is interdependent with racism as it is applied to all Black, Indigenous, and other People of Color.¹⁷² Its iterations look different across systems and individual interactions, but ableism assumes that all People of Color are *less* able in thinking, learning, and behavior and therefore *more* dangerous.

With respect to youth prisons, we understand that the statistics regarding which youth we incarcerate are not a neutral descriptor about who commits more crimes, but simply about who we choose to arrest, prosecute, and punish.¹⁷³ For example, “Disproportionate Minority Contact” is pervasive throughout the entire juvenile legal system,¹⁷⁴ yet mitigation has not worked. Recalling that Black girls are more than three times as likely as white girls to be incarcerated,¹⁷⁵ Grace’s case of having her probation violated over not doing homework is indicative of a larger issue: probation officers and others tend to discursively situate the choices of Black girls as a product of poor choices or criminality, while white girls’ behaviors are constructed as the product of peer influence and low self-esteem.¹⁷⁶

Second, DisCrit considers how those situated outside the boundaries of normal are constructed as problematic through discourse and practices.¹⁷⁷ For example, adults in youth prisons, including teachers, school administrators, social workers, and guards, used the narrative of “criminal thinking,” a type of thinking that was more manipulative and dangerous than kids on the “outs.”¹⁷⁸ Considering the disparities above, that means that most incarcerated kids are Black, Latinx, and Native,¹⁷⁹ and that children of color in youth prisons are imagined as *less able* to control themselves and *more* criminal—both of which are forms of ableism that are informed by racism.¹⁸⁰

Concurrently, there is a language of youth prisons as being a place to teach children about the consequences of their actions and provide rehabilitation, which implies therapeutic repair. In Grace’s case, upon hearing of Grace’s progress that she “met all the goals, was the ‘star resident’ one week this month and is currently

172. *Id.*

173. *See supra* Part II.

174. OFF. OF JUV. JUST. & DELINQ. PREVENTION, LITERATURE REVIEW: DISPROPORTIONATE MINORITY CONTACT (DMC) 1 (2014), http://www.ojjdp.gov/mpg/litreviews/Disproportionate_Minority_Contact.pdf [<https://perma.cc/3BVB-73LL>].

175. *See supra* note 61 and accompanying text.

176. Jody Miller, *An Examination of Disposition Decision-Making for Delinquent Girls*, in RACE, GENDER, AND CLASS IN CRIMINOLOGY: THE INTERSECTIONS 219, 236 (Martin D. Schwartz & Dragan Milovanovic ed., 1996).

177. *See* Annamma, Connor, & Ferri, *supra* note 8, at 9–10 (discussing “normal/abnormal” and “abled/disabled” boundaries exemplified through the “physical layout of K-12 schools, where special education is often relegated to separate hallways or even buildings” and challenges for authors “in special education [who] attempt to write for a ‘general education’ journal audience”).

178. Subini A. Annamma, *Undocumented and Under Surveillance: A Case Study of an Undocumented Latina with a Disability in Juvenile Justice*, 7 ASS’N OF MEX. AMER. EDUCATORS J. 32, 36 (2013).

179. *See supra* note 57 and accompanying text.

180. *Supra* notes 143–44.

at the second of five stages in the program,” Judge Mary Ellen Brennan stated, “I think you are exactly where you are supposed to be. . . . You are blooming there, but there is more work to be done.”¹⁸¹ This language disregards not only the explicitly violent acts that led to the deaths of Elord Revolte, Gynnya McMillen, and Cornelius Fredrick¹⁸² but also the less explicitly violent but pathologizing logics that situate Grace as deeply criminal and in need of incarceration in order to “bloom.” If we recognize that we are incarcerating the most vulnerable, it becomes more difficult to justify consequences and rehabilitation for only some—especially when we consider the forms of violence that all children in the juvenile legal system face. This is eugenics in practice, disappearing those who are outside the norm using racism and ableism to justify their disappearance from public view.¹⁸³

Third, DisCrit addresses how other systemic oppressions work with ableism and racism. In the case of juvenile prisons, we have shared statistics that clarify how those at the margins of the margins are even more vulnerable to incarceration.¹⁸⁴ Disabled, queer, and gender non-conforming Youth of Color are even more in danger of being incarcerated.¹⁸⁵ In Grace’s case, her disability was part of how she was pathologized; Grace was punished because of her ADHD, which made it difficult to keep track of and complete homework.¹⁸⁶ Simultaneously, none of her reasonable accommodations, *which are guaranteed by law*, were in place.¹⁸⁷ It is notable that we focus on Grace “breaking the law” when she did not get her homework done,¹⁸⁸ but ignore the ways the school was “breaking the law” by not having her accommodations in place. Apparently, we offer the school some understanding given that we are in a global pandemic, but a 15-year-old Black disabled girl is not offered the same support.

181. Jodi S. Cohen, *Judge Won’t Free Michigan Teenager Sent to Juvenile Detention After Not Doing Online Schoolwork*, PROPUBLICA (July 20, 2020 8:26 PM), <https://www.propublica.org/article/judge-wont-free-michigan-teenager-sent-to-juvenile-detention-after-not-doing-online-schoolwork> [<https://perma.cc/F688-8H2T>].

182. See *supra* notes 37–42 and accompanying text.

183. See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 16 (Open Media ed., 2003) (“The prison therefore functions ideologically as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers.”).

184. See *supra* Part II.

185. Rachel Anspach, *Disabled Youth Are More at Risk of Being Incarcerated*, TEEN VOGUE (Oct. 9, 2017), <https://www.teenvogue.com/story/why-disabled-youth-are-more-at-risk-of-being-incarcerated> [<https://perma.cc/V2NB-8NXX>]; Jerome Hunt & Aisha C. Moodie-Mills, *The Unfair Criminalization of Gay and Transgender Youth: An Overview of the Experiences of LGBT Youth in the Juvenile Justice System*, CTR. FOR AM. PROG. (Jun. 29, 2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/juvenile_justice.pdf?_ga=2.255423624.1499157339.1634672514-2106387609.1634672514 [<https://perma.cc/HLK7-72V3>].

186. Cohen, *supra* note 1 (“Grace, who has ADHD and receives special education services, struggled with the transition to online learning and fell behind.”).

187. See *supra* note 156 and accompanying text.

188. See Cohen, *supra* note 1 (describing the court’s ruling on Grace’s probation violation, which read “[f]ound guilty on failure to submit any schoolwork”).

Ultimately, Grace's story has become part of a larger pattern. It has become so clear that disabled youth are overrepresented in youth prisons that the Obama administration wrote a "Dear Colleague" letter to outline their rights in youth prisons.¹⁸⁹ Yet, in this case, no disability rights group has come forward to fight for Grace. This is true of most feminist groups and LGBTQ groups, even though Girls of Color, and queer Youth of Color, are also incarcerated at disproportionate rates. As Michele Goodwin noted, being at the intersections of multiple oppressions should mean that multiple groups are fighting for these youth, but instead these youth are forced out of the discourse or part of their story is ignored.¹⁹⁰

Fourth, DisCrit holds that race and ability are social constructions and yet those constructions are accompanied by material consequences.¹⁹¹ "In other words, while recognizing the social construction of particular identity markers, such as race and ability, DisCrit acknowledges that these categories hold profound significance in people's lives, both in the present and historically."¹⁹² While youth prisons have experienced a serious reduction in populations, dropping 60% since 2000, states continue to confine about 48,000 youth.¹⁹³ Though this falling population is good news, the impacts on those who remain incarcerated are especially negative. For the kids left in youth prisons, there is often a utilization of language of "only the most dangerous."¹⁹⁴ In other words, we are naming Youth of Color who have been underserved by all other societal structures—education, health care, family regulation—as the worst of the worst. Moreover, that language permitted the guards, teachers, and other adults to allow for more punitive and pathologizing mindsets towards these kids. When Judge Brennan denied the motion to release Grace, she stated, "(Grace) was not detained because she didn't turn her homework in. She was detained because I found her to be a threat of harm

189. Off. of Special Educ. & Rehab. Servs., U.S. Dep't of Educ., Dear Colleague Letter 1–2 (Dec. 5, 2014), <https://sites.ed.gov/idea/files/idea-letter.pdf> [<https://perma.cc/SSR2-A8GL>] ("We are writing to focus your attention on the educational needs of students with disabilities who are in correctional facilities and the requirements of Part B of the Individuals with Disabilities Education Act (IDEA or IDEA, Part B) . . . Students with disabilities represent a large portion of students in correctional facilities, and it appears that not all students with disabilities are receiving the special education and related services to which they are entitled. . . . Evidence suggests that proper identification of students with disabilities and the quality of education services offered to students in these settings is often inadequate.").

190. See Michelle Goodwin, *Gender, Race, and Mental Illness: The Case of Wanda Jean Allen*, in *CRITICAL RACE FEMINISM: A READER* 228, 233 (Adrien Wing, ed., 2d ed. 2003) (describing "Cancel Out Theory" in the case of Wanda Jean Allen, a "black, poor, lesbian, and mentally disabled" woman who was executed by the state, and who, "[g]iven her connections through race, gender, and sexual orientation, one would have expected greater public outcry through the 'national voices' that speak to the issues facing those communities and spheres").

191. Annamma, Connor, & Ferri, *supra* note 8, at 13.

192. *Id.*

193. See Press Release, Wendy Sawyer, *supra* note 150.

194. See ANNAMMA, *supra* note 43, at 65 ("[T]he rhetoric of incarcerating only the most dangerous girls due to a better system . . . meant that harsh responses to girls' actions were considered justified as their thinking was imagined as remarkably criminal.").

to her mother based on everything I knew.”¹⁹⁵ For Grace, we need to consider both what she was considered in violation of (not doing her homework and getting up late for school) and when she was considered to have violated her probation (Grace was only on probation for two weeks before her probation officer filed for violation of probation). Though she had had altercations with her mother in the past, no new issues had arisen from her probation besides not completing her homework and missing online school during a pandemic.¹⁹⁶ Those actions led the judge to describe Grace as a threat to her mother.¹⁹⁷ Black girls are often considered older and are therefore expected to be more responsible than developmentally appropriate¹⁹⁸ and their behaviors are read as more threatening¹⁹⁹—we witness each of these being activated in Grace’s case. What is more typical of a teenager than getting up late? Many students with ADHD do not finish their homework on time. And during COVID, both of these things are happening to kids across the country. Yet, for Grace, she was expected to do her online schoolwork without accommodations and get up on time for virtual school just like a little adult; she is a teenage Black girl with a disability for whom innocuous and typical behavior was read as threatening.²⁰⁰

Fifth, DisCrit acknowledges that rights and benefits are provided on the basis of whiteness and ability and are withheld from those positioned outside of those boundaries.²⁰¹ When Black girls’ behavior is read as threatening, innocence is automatically withheld. One study found that in school discipline, “referrals for third-degree assault position[ed] Black girls as less innocent, stronger, and more harmful than other girls.”²⁰² When Black girls are denied the presumption of innocence, things like fighting and stealing take on additional weight. For Grace, stealing an iPad and getting in fights with her mom where Grace bit her mom’s finger were enough to convince a judge that she simply was too dangerous to be

195. CBS NEWS, *supra* note 126.

196. See Cohen, *supra* note 181 (“At the original probation violation hearing in May, Grace’s mother testified that her daughter had not caused her any physical harm during the probation period. Grace said at Monday’s hearing that there had been no physical altercations between the two after the original assault charge in November and there is no police record of any.”).

197. *Id.* (quoting Judge Brennan saying, “She was not detained because she didn’t turn her homework in . . . She was detained because I found her to be a threat of harm to her mother based on everything I knew.”).

198. REBECCA EPSTEIN, JAMILIA J. BLAKE, & THALIA GONZÁLEZ, GEO. UNI. L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD 4 (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf> [<https://perma.cc/DC9P-4APM>].

199. Subini Ancy Annamma, Yolanda Anyon, Nicole M. Joseph, Jordan Farrar, Eldridge Greer, Barbara Downing, & John Simmons, *Black Girls and School Discipline: The Complexities of Being Overrepresented and Understudied*, 54 URB. EDUC. 212, 231 (2019).

200. See generally Treva B. Lindsey, *Ain’t Nobody Got Time for That: Anti-Black Girl Violence in the Era of #SayHerName*, 53 URB. EDUC. 162 (2018).

201. Annamma, Connor, & Ferri, *supra* note 8, at 16–17.

202. Annamma, *Black Girls and School Discipline*, *supra* note 199, at 21.

free.²⁰³ This refusal by the judge to imagine Grace as innocent allowed Grace locked up during a pandemic, exposing her to COVID-19 and the pathologizing mindsets that awaited her in prison.

“DisCrit considers legal, ideological, and historical aspects of dis/ability and race and how both have been used separately and together to deny the rights of certain citizens.”²⁰⁴ Saidiya Hartman traces the story of Mattie Jackson, a Black woman who had been accused of stealing and prostitution by the owner of the boarding house where Mattie stayed. Mattie was subsequently incarcerated and a portion of the note appended to her file sheds some light on why.²⁰⁵ “[The probation officer] considered probation quite seriously because this is the girl’s first offense, but felt that the institution would be better than probation in this case.”²⁰⁶ Mattie spent nearly three years at New York State Reformatory for Women at Bedford Hills where she experienced years of abuse,²⁰⁷ and her case was not unique.

[B]lack girls in the beginning of the twentieth century typically received sentences in Bedford Hills women’s prison in upstate New York for conduct ranging from breaking curfews to becoming pregnant out of wedlock. For white and immigrant girls, Bedford usually represented the final step in the reform continuum after all else had failed. . . . For a white girl to reach [incarceration], she had to exhibit considerable problems at the intermediary stages. A [B]lack girl simply had to be [B]lack.²⁰⁸

In 1963, during the Civil Right Movement, more than 30 Black girls ranging from ages 10 to 16 were arrested after marching to and attempting to purchase tickets from a Georgia movie theater.²⁰⁹ They were placed in the Leesburg Stockade for up to 45 days “without proper meals, water, sanitation, beds or medical treatment.”²¹⁰ Though Grace has been protected from some of the conditions that Mattie and the Leesburg Stockade girls experienced, being incarcerated means Grace attended her first court case with her wrists handcuffed and legs shackled.²¹¹ Being incarcerated during a pandemic means that she is

203. Sarah Cwiek, *Pressure Mounts to Free 15-Year-Old Black Girl Imprisoned for Not Doing Homework*, MICHIGAN RADIO (July 18, 2020, 4:30 PM), <https://www.michiganradio.org/law/2020-07-18/pressure-mounts-to-free-15-year-old-black-girl-imprisoned-for-not-doing-homework> [<https://perma.cc/DW4A-HPPD>].

204. Annamma, Connor, & Ferri, *supra* note 8, at 14.

205. SAIDIYA HARTMAN, *WAYWARD LIVES, BEAUTIFUL EXPERIMENTS: INTIMATE HISTORIES OF RIOTOUS BLACK GIRLS, TROUBLESOME WOMEN AND QUEER RADICALS* 71–72 (2019).

206. *Id.* at 71.

207. *Id.*

208. Kim Taylor-Thompson, *Girl Talk—Examining Racial and Gender Lines in Juvenile Justice*, 6 NEV. J.L. 1137, 1161 (2006).

209. Graham P. Shaffer, *The Leesburg Stockade Girls: Why Modern Legislatures Should Extend the Statute of Limitations for Specific Jim-Crow-Era Reparations Lawsuits in the Wake of Alexander vs. Oklahoma*, 37 STETSON L. REV. 941, 941–43 (2008).

210. *Id.* at 941–42.

211. Leblanc & Martindale, *supra* note 4.

subject to punitive and isolating measures should the facility she is at identify a student with a case of COVID-19.²¹² These cases happened at different points in history and reflect different underlying circumstances, but they share one thing in common: Black girls were not imagined as citizens who belong socially or legally, they were imagined as criminals who deserved severe punishment for their behaviors. Historically through the current day, there is a pattern of Black girls who were considered less innocent and who were imagined as incapable of self-control and in need of labeling, surveillance, and punishment.²¹³ Like so for many before her, Judge Brennan's decision suggested that for Grace, a disabled Black girl, her probation was "zero tolerance." A DisCrit informed set of considerations for abolition would refuse the zero tolerance approach that has been present historically and throughout the present day for Black girls and multiply-marginalized youth.

*A. Proposal: A DisCrit Informed Set of
Considerations for Abolition*

Given the explicit violence and pathologizing mindsets of youth prisons, we propose that we abolish youth incarceration. Often, when an abolitionist stance is taken, the common response is, "Ok what replaces youth prisons?" Broadly, we believe an investment in education, housing, health care, and jobs that pay a living wage are what we need. Consistent with abolitionist thinking, divesting from the costly youth carceral state and investing in housing, education, health care, and employment may eliminate the conditions that lead to youth crime. Specifically, we suggest that we engage an abolitionist imaginary²¹⁴ for what replaces youth incarceration. There is no one size fits all replacement, instead what comes next needs to be socially and contextually situated. There are multiple models of recognizing and addressing harm that conform to an abolitionist vision.

We do not propose specifically what replaces youth prisons; instead our goal is to propose a set of principles imbued by DisCrit toward an abolitionist imaginary, both in what these principles refuse and what they present. In other words, it is the abolitionist imaginary infused with DisCrit that we animate here, which allows those who recognize the need for abolishing all forms of youth incarceration to re-imagine how to address harm by youth.

Ultimately, DisCrit abolitionist imaginaries refuse the pathologizing logic that run through all carceral systems that suggest that what multiply-marginalized people need is punishment. What marginalized people need is access to power and resources so they can create systems that support them and their communities.

212. See *supra* text accompanying notes 23–35.

213. See Dorinda J. Carter Andrews, Tashal Brown, Eliana Castro, & Effat Id-Deen, *The Impossibility of Being "Perfect and White": Black Girls' Racialized and Gendered Schooling Experiences*, 56 AMER. EDUC. RSCH. J. 2531, 2535, 2538–39 (2019).

214. See *supra* text accompanying note 100.

In applying DisCrit to abolitionist imaginaries, we refuse reforming youth incarceration. Our call is not to reform the juvenile system or youth prisons because we maintain that these reforms will not lead to lasting change in the long-run. In *Last One Over the Wall*, former Massachusetts head of the Department of Youth Services Jerome Miller stated of reforming the youth prison system,

[w]henver I thought we'd made progress, something happened — a beating, a kid in an isolation cell, an offhand remark by a superintendent or cottage supervisor that told me what I envisioned would never be allowed. Reformers come and reformers go. State institutions carry on. Nothing in their history suggests that they can sustain reform, no matter what money, staff and programs are pumped into them. The same crises that have plagued them for 150 years intrude today. Though the casts may change[], the players go on producing failure.²¹⁵

We have witnessed so many reforms fail, often (re)producing the same inequities they were targeted at eliminating. For example, when reforms encourage probation instead of jail, girls may not be protected from incarceration. Girls are more likely to be found in violation of their probation than boys.²¹⁶ We have witnessed humane touches to youth prisons like colorfully painted doors and comfortable chairs be removed when a youth acts out, or colorfully painted doors that youth are relocated away from (moved to another unit or some other place where they cannot see the color door) when they get in trouble. Reforms have reduced the numbers of those incarcerated but have not significantly impacted Disproportionate Minority Contact in all steps of the juvenile legal system.²¹⁷ Kids like Grace were probably the intended beneficiaries of the COVID-19 related reforms Governor Whitmer put in place in Michigan that ordered the “[e]liminat[ion of] any form of juvenile detention . . . unless a determination is made that a juvenile is a substantial and immediate safety risk to others”;²¹⁸ but judicial discretion still allowed the determination that Grace was a threat for not doing her homework.²¹⁹ Reforms rooted in individual discretion continue to fail. We believe there is no way to reform an entrenched youth incarceration. There is no way to make a gentler and more humane system that is built on caging kids.

215. JEROME G. MILLER, *LAST ONE OVER THE WALL: THE MASSACHUSETTS EXPERIMENT IN CLOSING REFORM SCHOOLS* 18 (1998).

216. See Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 *UCLA L. REV.* 1584, 1586 (2012).

217. Caren Harp, *Op-Ed: OJJDP Is Simplifying Title II Work to Focus on DMC Reduction, Not Process*, OFF. OF JUV. JUST. & DELINQ.: BLOGS (June 29, 2018), <https://ojjdp.ojp.gov/news/blogs/Simplifying-Title-II-Work-to-Focus-on-DMC-Reduction> [<https://perma.cc/67ZA-JTLA>] (“While states continue to see good results in the deinstitutionalization of status offenders, sight and sound separation, and adult jail removal, the disproportionate involvement of minority youth in the justice system remains largely unchanged.”).

218. Mich. Exec. Order No. 2020-29 (Mar. 29, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-523422--,00.html [<https://perma.cc/6U4J-FF5W>].

219. See Cohen, *supra* note 1.

Applying DisCrit to abolitionist imaginaries, we refuse “small, rehabilitative, home-like facilities”²²⁰ as an alternative to youth incarceration run via carceral logics, focused on deficits and “fixing” the youth within. No child should go to any kind of institution that is imbued with carceral logics. To abolish youth incarceration is to not only to get rid of the buildings known as prisons or detention centers, it is to abolish the places where we dispose of children when we assume they are broken. Those carceral logics, rooted in racism and ableism, are what must be abolished, and all residential rehabilitative programs are vulnerable to such carceral logics.

Applying DisCrit to abolitionist imaginaries, we refuse carceral geographies expanding into the homes of youth, generally referred to as “e-carceration.”²²¹ Our call to abolish youth prison is not a call to extend other systems of punishment, allowing carceral geographies to stretch into youth homes and communities. E-carceration tactics pose two major concerns if the goal is to avoid carceral geographies. First, e-carceration, much like offering other types of probation, does not always avoid incarcerating youth. We have witnessed students who have cut off ankle bracelets be charged with a felony and remanded to prison.²²² Second, this pathologizing mindset is not eliminated through e-carceration. In fact, Maya Schenwar and Victoria Law argue that e-carceration holds people hostage within their own homes, limiting their connections to their families and communities.²²³ E-carceration allows for another money making venture for technology and prison companies, extending the reach of the carceral state into homes while not making communities safer.

Grace is currently subject to e-carceration,²²⁴ but she is not out of harm’s way. Grace will “remain on probation while her appeal is pending or on ‘further order’ from the Court of Appeals. She will be on home confinement with a GPS tether and will have individual and family counseling. She cannot have access to a phone unless her probation officer allows it and must obey all laws and follow her mother’s rules. She also must attend school and do schoolwork as directed,

220. See YOUTH CORR. LEADERS FOR JUST., *supra* note 97 (proposing “small, rehabilitative, home-like facilities to replace . . . youth prisons”).

221. See MEDIAJUSTICE, NO MORE SHACKLES: TEN ARGUMENTS AGAINST PRE-TRIAL ELECTRONIC MONITORING 1–2, 4 (2019) (defining “e-carceration” as electronic monitoring, most commonly through ankle shackles, as a condition of pre-trial release, because although electronic monitoring is framed as an “alternative TO incarceration,” it is “highly punitive” and in fact an “alternative FORM of incarceration”).

222. See, e.g., KAN. STAT. ANN. § 21-6322 (2012) (describing tampering with electronic monitoring equipment as a felony).

223. MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS 37 (2020) (describing how “[i]n home” is a type of incarceration” where the stigma leads to isolation from family members and mistreatment from members of the community on rare occasions in which a monitored person can leave the home).

224. Jodi S. Cohen, *Grace, Black Teen Jailed for Not Doing Her Online Coursework, Is Released*, PROPUBLICA (July 31, 2020 6:42 PM), <https://www.propublica.org/article/grace-black-teen-jailed-for-not-doing-her-online-coursework-is-released> [<https://perma.cc/2NKB-G9SM>].

though school is not currently in session.”²²⁵ The terms of Grace’s e-carceration make her susceptible to being incarcerated again, and they subject her to extraordinarily strict rules, state surveillance, and enforcement. Meanwhile, her “GPS tether” will cut her off from her community.²²⁶

DisCrit abolitionist imaginaries refuse the adultification of Black youth, girls, and Youth of Color. In other words, our goal is not to eliminate the youth prison system and simply replace it by putting youth back in adult prisons. In the 18th and early 19th centuries, youth were housed with adults, until Houses of Refuge were formed in the 1820s along the East Coast.²²⁷ These Houses of Refuge focused on supporting youth by teaching them work skills, “elementary branches of education,” and moral character.²²⁸ Significantly, Black Youth were excluded from many of these Houses of Refuge for the first decades before they added sections or separate schools for “[c]olored [c]hildren”; until then Black youth were remanded to adult prisons.²²⁹ The violence and danger youth experience in adult prisons has been clearly documented.²³⁰ Consequently, under no circumstances should our call for abolition of youth prisons be read as an acceptance that youth must be incarcerated with adults. Instead we refuse the adultification of Youth of Color, and Black girls specifically.²³¹ Black girls with disabilities should be treated like children and when their behavior directly relates to their disability, it should not be cause for criminalization. As a 15-year-old Black girl with disabilities, Grace should be able to make mistakes, not finish her homework, and sleep in because she’s a child who is learning. She should be loved through those mistakes and not be met with a pathologizing mindset.

DisCrit abolitionist imaginaries refuse any alternatives to youth incarceration that are situated in punishment and control. Some decarceration efforts have not had the impact they intended. For example, Governor Gavin Newsom in California recently proposed closing the Department of Juvenile Justice.²³² Though this was originally met with praise by some, advocates for youth in the criminal legal system have realized that this could mean both sending some youth to adult prisons and others to less-supervised and less-regulated county-run youth

225. *Id.*

226. *Id.*

227. Daniel Macallair, *The San Francisco Industrial School and the Origins of Juvenile Justice in California: A Glance at the Great Reformation*, 7 U.C. DAVIS J. JUV. L. & POL’Y 1, 4–5 (2003).

228. *Id.*

229. Cecile P. Fray, *The House of Refuge for Colored Children*, 66 J. AFR. AM. HIST. 10, 10 (1981).

230. See SCHIRALDI & ZEIDENBERG, *supra* note 110.

231. See, e.g., Epstein, Blake, & González, *supra* note 198, at 4–5 (exploring various ways in which Black youths, especially girls, are detrimentally considered older or more mature than they are, resulting in greater policing of their behavior compared to white peers of equivalent age).

232. James Rainey, *California Plans to Close Troubled Youth Prisons After 80 Years. But What Comes Next?*, LA TIMES (Feb. 15, 2021), <https://www.latimes.com/california/story/2021-02-15/california-youth-prisons-closing-criminal-justice-reform> [<https://perma.cc/6BJ8-ESZF>].

prisons.²³³ Additionally, this move comes with cuts to funding so those who absorb the youth prison population would not have additional financial support to educate and rehabilitate.²³⁴ Hence, this decarceration by the state cannot happen without decarceration at all levels of youth incarceration. Being incarcerated far away was hard for Grace, but simply moving her to a local prison would not remove her from the harm youth prisons inflict on the children incarcerated within. Grace should have never been incarcerated in the first place and the damage of those two plus months will be long-lasting.

DisCrit abolitionist imaginaries refuse to argue for decarceration for only some. Like many abolitionists, we do not distinguish between non-violent and violent crimes in our arguments for abolition of youth incarceration. That is not to say we simply ignore when harm is done. As Mariame Kaba notes, “We can build other ways of responding to harms in our society. Trained ‘community care workers’ could do mental-health checks if someone needs help. Towns could use restorative-justice models instead of throwing people in prison.”²³⁵ Thus, our argument is not simply about releasing Grace. It is a call to #FreeThemAll.

DisCrit abolitionist imaginaries demand an intersectional analysis of oppressions. That is, we must understand how racism, ableism, sexism, cis-heterosexism, and linguicism work together to target specific populations. We have been heartened to witness the media attention and advocacy campaigns’ calls to #FreeGrace,²³⁶ but much of the conversation erases her disability. Not getting up for school and missing homework completion are absolutely related to her ADHD, and excluding that from the discussion misses the importance of the role disability and ableism play in the criminalization of Black disabled girls. In fact, it ignores the fact that Black disabled girls are targeted for criminalization.

DisCrit abolitionist imaginaries demand that whatever processes are engaged to determine what takes the place of youth prisons must center the people most affected: multiply-marginalized Youth of Color, their families, and communities. The state continues to punish multiply-marginalized Youth of Color.²³⁷ Consequently, formerly incarcerated youth, their families, and communities need to be asked what they need to thrive in their specific geographic contexts. Then we must actually listen to *them* and build what *they* need;

233. Megan Diskin & Kathleen Wilson, *How Will Closure of State Youth Prisons Affect Ventura County?*, VENTURA CNTY. STAR (May 23, 2020, 7:00 AM), <https://www.vcstar.com/story/news/local/communities/camarillo/2020/05/23/california-juvenile-detention-center-closings-affect-ventura-county-youth-rehabilitation/5166284002/> [<https://perma.cc/L2YB-JRUF>].

234. *Id.* (describing concerns that cut from \$316,000 to \$125,000 per youth in the criminal legal system will be too large to provide adequate educational resources); *see also* Ray Levy-Uyeda, *To Save Money, California Will Close Its Youth Prison System*, MIC (May 15, 2020), <https://www.mic.com/p/to-save-money-california-will-close-its-youth-prison-system-22907954> [<https://perma.cc/9MDP-BBKB>] (examining abolition of California Department of Juvenile Justice).

235. Kaba, *supra* note 111.

236. *See, e.g., Grace Needs to Be back at Home*, *supra* note 3 (reflecting that over 56 thousand people have signed the petition for Grace to be released).

237. *See ANNAMMA*, *supra* note 43, at 12.

centering those who are closest to the norm often produces narrow solutions that do not address the needs of those on the margins. Said differently, solutions to inequities multiple-marginalized people face are more likely to address the inequities that more privileged marginalized people face. Therefore, the goal is not the slicing of the populations into smaller subcomponents; listening to the multiply-marginalized is bound to provide more comprehensive understandings of entrenched inequities and potential solutions.²³⁸

What if we actually asked Grace what she needed to get her homework done, to get to school on time, and to reconnect with her mother? It seems so simple, but we could not find an example of this being done.

DisCrit abolitionist imaginaries demand that we shift our understanding of crime. Who we hold accountable for breaking the law and who we provide mercy to is illustrative of our deep conflict about who deserves punishment, clearly visible in Grace's case. As we previously stated, the school likely violated the law for not providing Grace her accommodations as the transition to virtual learning happened.²³⁹ Grace was held in violation of her probation for not doing her homework. Consequently, society chose *not* to hold the adults accountable for dropping their responsibility; society chose to hold a 15-year-old Black girl accountable for dropping hers. The selective criminalization of certain activities and not others demonstrates how crime becomes a result of systems of punishment focused on disposing of multiply-marginalized Youth of Color.

DisCrit abolitionist imaginaries demand that we make significant investment across systems to replace youth prisons to shift their context so much that people's needs could be met. If this existed how much of what we think of crime could dissolve? Again, it does not mean no harm will occur, but that we consider how harm surfaces once people's needs are met means we change our relationship to harm.

V.

CONCLUSION

In 1951, at the age of 83, W.E.B. DuBois was put on trial for Communist activities. DuBois wrote of his trial,

What turns me cold in all this experience is the certainty that thousands of innocent victims are in jail today because they had neither money nor friends to help them. The eyes of the world were on our trial despite the desperate effort of press and radio to suppress the facts and cloud the real issues; the courage and money of friends and of strangers who dared stand for a principle freed me; but God only knows how many who were as innocent as I and my colleagues are today in hell. They daily stagger

238. *Id.* at 139.

239. *See supra* note 156 and accompanying text.

out of prison doors embittered, vengeful, hopeless, ruined. And of this army of the wronged, the proportion of Negroes is frightful. We protect and defend sensational cases where Negroes are involved. But the great mass of arrested or accused [B]lack folk have no defense. There is desperate need of nationwide organizations to oppose this national racket of railroading to jails and chain gangs the poor, friendless and [B]lack.²⁴⁰

DuBois' words continue to ring true through time and into youth prisons today. We are so glad that Grace's story has garnered public outrage and attention. Yet from our work with charged and adjudicated youth, we know that her story is not the exception, but the common narrative. Black disabled girls are criminalized in and out of schools.²⁴¹ We continue to incarcerate our most vulnerable youth and no amount of reform has changed that. Consequently, we call for abolition of the entire youth incarceration system. Youth should not be incarcerated; it is that simple. Our call builds on existing juvenile justice scholarship that recognizes the racialized pathologies of criminalization and social control in their call to transform the juvenile legal system. We simply take these arguments to their next logical step. We also argue for a DisCrit abolitionist imaginary when considering what should take the place of youth prisons. We must abolish not only the physical prisons but eliminate the pathologizing thinking behind them. Youth must be supported in their communities through investment and redistribution of power. When youth do commit harm, we must meet them with caring and supportive ways where they can address the harm they have caused and learn from the situation. Anything less than total abolition is not enough.

240. Angela Y. Davis, *Political Prisoners, Prison, and Black Liberation*, HIST. IS A WEAPON (May, 1971), <https://www.historyisaweapon.com/defcon1/davispoprprbli.html> [<https://perma.cc/VH3T-2CBD>].

241. See ANNAMMA, *supra* note 43, at 12 (“Schools and the legal system tend to label these [dis/abled Black girls] as disobedient, disorderly, and dis/abled while simultaneously ignoring the voices of the children themselves. This pathologization then is perpetuated through the labeling, surveillance, and punishment of unwanted students along with the silencing of their voices.”).