

JUVENILE DECARCERATION AND STRUCTURAL CULPABILITY

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INTRODUCTION: THE NEED FOR JUVENILE DECARCERATION

Our criminal system arbitrarily and automatically classifies people as adults at the age of 18.¹ Recent research involving brain scans indicates that the area of the brain responsible for critical decision-making is not fully developed until around age 25.² From self-report research, we know that “almost all adolescents” engage in criminalized behavior and that rates of both official and self-reported delinquency “decline precipitously during the late teens and 20s” as the frontal cortex develops.³ The peak age for engaging in criminalized behavior is between 15 and 19.⁴ In an amicus brief submitted in *Miller v. Alabama*, the American Psychological Association noted that “middle adolescence (roughly 14-17) should be a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature.”⁵

Consequently, the Supreme Court has relied heavily on developments in adolescent psychology and brain science to conclude that adolescents are less culpable than adults.⁶ The Supreme Court ruled in *Miller v. Alabama* that life without parole sentences are unacceptable for children⁷ *unless* the sentencing body considers and weighs the child’s youth as a mitigating factor⁸ and that these sentences

1. KAREN U. LINDELL & KATRINA L. GOODJOINT, JUV. L. CTR., RETHINKING JUSTICE FOR EMERGING ADULTS: SPOTLIGHT ON THE GREAT LAKES REGION 3 (2020) (“People do not transform from children into adults on their 18th birthdays . . . The criminal justice system, however, is only beginning to acknowledge and respond to the distinctive developmental characteristics of emerging adulthood.”).

2. RACHEL ELISE BARKOW, PRISONERS OF POLITICS 27 (2019).

3. Michael Massoglia & Christopher Uggen, *Settling Down and Aging Out: Toward an Interactionist Theory of Desistance and the Transition to Adulthood*, 116 AM. J. SOCIO. 543, 544 (2010).

4. See BARKOW, *supra* note 2, at 80.

5. Brief for the Am. Psych. Ass’n, Am. Psychiatric Ass’n, and Nat’l Ass’n of Soc. Workers as Amici Curiae Supporting Petitioners at 30, *Miller v. Alabama*, 567 U.S. 460 (2012) (No.10-9646-47) (citing Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160, 161 (2010)).

6. See e.g. *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller*, 567 U.S. at 472.

7. For purposes of this paper, “children” refers to anyone under 18 generally. “Adolescents” refers to children who are at least 13 but younger than 18.

8. *Miller*, 567 U.S. at 479.

should be restricted to “the rare juvenile offender whose crime reflects irreparable corruption.”⁹

Despite some recent, limited wins at the Supreme Court level for reformers,¹⁰ the United States continues to be a global leader in the incarceration of children and adolescents, detaining over 48,000 children every day.¹¹ The majority of incarcerated youth are held in detention centers, long-term secure facilities, or adult prisons and jails.¹² While life without parole sentences have been limited by the Supreme Court and banned by individual states,¹³ the United States continues to be the only nation on earth that sentences people to life without parole for crimes committed when they were under the age of 18.¹⁴

As with mass incarceration in the United States more broadly, the incarceration of youth disproportionately impacts Black and Brown children and children with learning disabilities.¹⁵ Estimates from the U.S. Department of Education show that a large proportion of youth who are impacted by the juvenile carceral system are children with learning disabilities.¹⁶ One study found that “over a third of juvenile offenders have special education needs and many are below their chronological age level in terms of reading, spelling, comprehension, and cognitive abilities.”¹⁷ It is generally estimated that 65-70% of youth in the juvenile carceral system have at least one “mental health disorder.”¹⁸ This has led some to suggest that youth correctional facilities are being used in lieu of mental health treatment.¹⁹ Unsurprisingly, given the high rates of co-morbidity between

9. *Id.* at 479-80 (quoting *Roper*, 543 U.S. at 573).

10. See *Roper*, 543 U.S. at 569-70; *Graham*, 560 U.S. at 68; *Miller*, 567 U.S. at 472; *Montgomery v. Louisiana*, 577 U.S. 190, 210-12 (2016).

11. Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Dec. 19, 2019), <https://www.prisonpolicy.org/reports/youth2019.html> [<https://perma.cc/ZQ7G-SLTC>].

12. See Sawyer, *supra* note 11.

13. Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENT’G PROJECT (Feb. 25, 2020), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> [<https://perma.cc/TX5Z-QSDZ>].

14. Brief for Amnesty Int’l, et al. as Amici Curiae Supporting Petitioners at 2, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647).

15. Ian Lambie & Isabel Randell, *The Impact of Incarceration on Juvenile Offenders*, 33 CLINICAL PSYCH. REV. 448, 450 (2013).

16. KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 170-71 (2021) (“Estimates from the U.S. Department of Education tell us that a high percentage of youth in the juvenile legal system have cognitive and language deficits. Although data is difficult to obtain, estimates of incarcerated youth who have a learning disability range from as low as 30 percent to as high as 85 percent. Common disabilities include emotional or behavioral disorders, intellectual disability, and attention deficit hyperactivity disorders.”).

17. *Id.*

18. Clair White, *Incarcerating Youth with Mental Health Problems: A Focus on the Intersection of Race, Ethnicity, and Mental Illness*, 14 YOUTH VIOLENCE & JUV. JUST. 426, 427 (2016).

19. *Id.* at 426; Letter from Kristen Clarke, Assistant Att’y Gen., C.R. Div., Dep’t of Just., to Aaron Frey, Att’y Gen., Off. of the Me. Att’y Gen. and Janet Mills, Governor of Me. 7 (June 22, 2022) (available at <https://www.justice.gov/opa/press-release/file/1514326/download> [<https://perma.cc/T3ZY-U3Y4>]).

substance use disorders and mental illness, particularly in adolescents,²⁰ rates of substance use are also extremely high among justice-impacted youth, “with substance abuse and dependence affecting 40-70% of youth offenders.”²¹

The juvenile carceral system arrests Black children more often than white children and sentences them differently, leading to disproportionate incarceration for Black children.²² Research shows that “Black children are no more dangerous or impulsive than their [w]hite peers.”²³ However, in 2018, Black youth were arrested at a rate 2.6 times that of white youth,²⁴ and while Black youth made up 16% of the youth population, they made up 50% of all youth arrests for violent crimes and 42% of all arrests for property crimes.²⁵ After being arrested, “Black youth are more likely to be detained, prosecuted, and punished more harshly—even when they are charged with similar offenses and have similar prior histories.”²⁶

The United States must stop incarcerating children. There is broad agreement among legal researchers that it is both necessary and desirable that we, at the very least, *reduce* the number of children who are incarcerated. Sarah Katherine Koon argues that “courts . . . should not imprison or confine juvenile criminals except as a last resort”²⁷ for a litany of practical reasons:

Incarceration is less effective at preventing recidivism. In fact, incarceration promotes juvenile reoffending. It is also more hostile for juveniles than for adults and they are more likely to respond to rehabilitative efforts. In addition, incarceration is less cost-effective by virtue of its own downfall, recidivism, which makes incapacitating juveniles more expensive over time. There is an overwhelming public support to rehabilitate minors and juveniles, suggesting that the juvenile justice system does not reflect public ideals.²⁸

20. NAT’L INST. ON DRUG ABUSE, COMMON COMORBIDITIES WITH SUBSTANCE USE DISORDERS RESEARCH REPORT 2 (2020) (“Many individuals who develop substance use disorders . . . are also diagnosed with mental disorders, and vice versa. Although there are fewer studies on comorbidity among youth, research suggests that adolescents with substance use disorders also have high rates of co-occurring mental illness; over 60 percent of adolescents in community-based substance use disorder treatment programs also meet diagnostic criteria for another mental illness.”).

21. Lambie & Randell, *supra* note 15, at 450.

22. Alex R. Piquero & Robert W. Brame, *Assessing the Race–Crime and Ethnicity–Crime Relationship in a Sample of Serious Adolescent Delinquents*, 54 CRIME & DELINQ. 1, 1 (2008).

23. HENNING, *supra* note 16, at xvi.

24. *Id.*

25. *Id.*

26. *Id.*

27. Sarah Katherine Koon, *Prosecuting the Juvenile Justice System: An Argument Against Incarceration*, 19 ADELPHI L.J. 29, 32 (2014-15).

28. *Id.* at 31.

Similarly, the Annie E. Casey Foundation, a child welfare organization, released a report reviewing “an avalanche of research” and concluding that “[w]e now have overwhelming evidence showing that wholesale incarceration of juvenile offenders is a counterproductive public policy.”²⁹ As with the criminal legal system, most research on the juvenile carceral system agrees that decarceration should be the goal,³⁰ with most disagreement focusing on the best strategies to sway resistant governments, particularly against the backdrop of a post-pandemic “crime wave” that has increased public resistance to recent decarceration efforts.³¹ Additionally, advocates argue for a reduction of the racial disparities in the court system that drive so much of youth incarceration. The Center for Children’s Law and Policy, for example, has released a Racial and Ethnic Disparities Reduction Practice Manual that aims to “provide practical, concrete strategies for jurisdictions to use to reduce racial and ethnic disparities in their juvenile justice systems.”³² These calls for reform and reduction of the juvenile carceral system recognize that the incarceration of children does not solve the structural issues it purports to solve, and that it instead descends upon our children as another form of structural violence.

In this article, I examine the brutality of child incarceration within the context of the growing social movement that demands the abolition of police and prisons. In conversation with abolitionist scholars like Mariame Kaba and Ruth Wilson-Gilmore, I argue that youth violence is a structural problem, and that rather than attempting to “reform” individual children through the courts system, we should instead reform the structures that create ideal conditions for youth violence. In Part I, I discuss the neurological reasons why children might engage in violent or

29. RICHARD A. MENDEL, ANNIE E. CASEY FOUND., *NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION* 3 (2011), <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf> [<https://perma.cc/7KKC-3G6G>].

30. *Id.*

31. See John Gramlich, *What We Know About the Increase in U.S. Murders in 2020*, PEW RSCH. CTR. (Oct. 27, 2021), <https://www.pewresearch.org/fact-tank/2021/10/27/what-we-know-about-the-increase-in-u-s-murders-in-2020> [<https://perma.cc/5SXP-HNZA>] (referencing homicide statistics published by the Centers for Disease Control and Prevention and the Federal Bureau of Investigation finding that in the year 2020, the U.S. murder rate rose by 30%); RICHARD ROSENFELD & ERNESTO LOPEZ, COUNCIL ON CRIM. JUST., *PANDEMIC, SOCIAL UNREST, AND CRIME IN U.S. CITIES: YEAR-END 2021 UPDATE* (2022), <https://counciloncj.org/crime-trends-yearend-2021-update> [<https://perma.cc/WA2U-S6S7>] (reporting that the homicide rate was 44% greater in 2021 than in 2019, but also that most property crimes have continued their decades-long decline, with the sole exception being automobile theft). See also Abené Clayton, *America’s Crime Panic: Why We Can’t Afford to Repeat Mistakes of the 90s*, GUARDIAN (Apr. 20, 2022), <https://www.theguardian.com/us-news/2022/apr/20/us-crime-policing-research-james-forman-jr> [<https://perma.cc/3MA6-9GEW>]; Jamiles Lartey, *New Orleans Battled Mass Incarceration. Then Came the Backlash over Violent Crime.*, MARSHALL PROJECT (July 6, 2022), <https://www.themarshallproject.org/2022/07/06/new-orleans-battled-mass-incarceration-then-came-the-rise-in-violent-crime> [<https://perma.cc/FVF7-UEZA>].

32. CTR. FOR CHILD.’S L & POL’Y, *RACIAL AND ETHNIC DISPARITIES REDUCTION PRACTICE MANUAL* 6 (2015).

criminalized behavior and why incarceration is not a solution to this problem. In Part II, I discuss the origins of the juvenile court system and how it continually harms the children in its care. In Part III, I argue that violence perpetrated by children has structural causes, and that an effective system would focus on addressing these structural causes rather than the “reform” of individual children. I examine two approaches that acknowledge criminalized behavior as structural: public health and transformative justice. And in Part IV, I argue that a public health approach to addressing the criminalized behavior of children requires abolishing juvenile courts and ceasing the prosecution of children. When harm is perpetrated by a child, our first response should be to hold the structures surrounding that child accountable, and not the child herself. I echo abolitionist scholars Subini Ancy Annamma and Jamelia Morgan, previously published in this journal, who courageously called for “abolition of the entire youth incarceration system.”³³ The juvenile courts system is built on a foundational misunderstanding of the behavior of children. Reform is not enough.

I.

THE FAILURE OF JUVENILE COURT

Our criminal legal system assumes that crime is the result of individual failures rather than evidence of systemic failure, and it responds by sanctioning the individual who committed the criminalized act. Other than death, incarceration is the most severe penalty that an individual can face. In theory, incarceration serves at least one of the four classic penological goals: deterrence, retributivism, rehabilitation, and incapacitation.³⁴ By removing the individual causing harm, we aim to prevent future crimes, both by removing a dangerous person from other potential victims and by deterring others who might replicate their behavior. Incarceration may also serve the purpose of rehabilitating the harmful person or responding to retributivist desires,³⁵ potentially including those of the victim who suffered harm or those of society at large. These four goals, deeply rooted in legal precedent, are centuries old. Retributivist approaches to penal law can trace their origins through Kant,³⁶ while utilitarian approaches trace their lineage through Jeremy Bentham.³⁷

Michelle Alexander’s book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* mainstreamed the idea that our adult carceral system is a contemporary manifestation of racial hierarchy, a system of apartheid comparable

33. Subini Annamma & Jamelia Morgan, *Youth Incarceration and Abolition*, 45 N.Y.U. REV. L. & SOC. CHANGE 471, 508 (2022).

34. BARKOW, *supra* note 2, at 38.

35. *Id.*

36. Immanuel Kant, *Justice and Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 104 (Gertrude Ezorsky ed., 1972).

37. See JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 181 (Hafner Publ’g Co. 1948) (1789); JEREMY BENTHAM, *Principles of Penal Law*, in THE WORKS OF JEREMY BENTHAM 396, 402 (John Bowring ed., 1843).

to slavery or Jim Crow.³⁸ Alexander traces “several generations of black men” in one man’s family who could not vote:

Cotton’s great-great-grandfather could not vote as a slave. His great-grandfather was beaten to death by the Ku Klux Klan for attempting to vote. His grandfather was prevented from voting by Klan intimidation. His father was barred from voting by poll taxes and literacy tests. Today, Jarvis Cotton cannot vote because he, like many black men in the United States, has been labeled a felon and is currently on parole.³⁹

Jarvis Cotton’s story is a microcosm of Alexander’s overall argument: that the criminal legal system’s *primary function* is not the deterrence of bad behavior, but racial control.⁴⁰ Alexander concludes that “we have witnessed an evolution in the United States from a racial caste system based entirely on exploitation (slavery), to one based largely on subordination (Jim Crow), to one defined by marginalization (mass incarceration).”⁴¹ The four established philosophical justifications for incarceration paper over the truth: that America’s criminal punishment system and the actors within it incarcerate Black and Brown people to exert social control and maintain white supremacy.

If punishment is primarily a tool of social control, that explains why the amount of punishment in a particular society does not track fluctuations in crime rates. Sociologists have recognized this reality since at least 2004, when Michael Tonry wrote, “[p]ut crisply, at a societal level crime does not cause punishment. Imprisonment rates and the severity of punishment move independently from changes in crime rates, patterns, and trends. Governments decide how much punishment they want, and these decisions are in no simple way related to crime rates.”⁴²

In theory, juvenile courts serve a different, less punitive purpose than adult courts. Juvenile courts were established in the early years of the 20th century and were originally intended as a less coercive alternative to reform schools or sending children to criminal court.⁴³ Their purpose was meant to be rehabilitative rather than punitive, as can be seen in reformer Jane Addams’ description of juvenile court:

The child was brought before the judge with no one to prosecute him and with no one to defend him—the judge and all concerned

38. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

39. *Id.* at 1.

40. *Id.*

41. *Id.* at 219.

42. MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 30 (2004).

43. See generally Robert M. Mennel, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 *CRIME & DELINQ.* 68 (1972).

were merely trying to find out what could be done on his behalf. The element of conflict was absolutely eliminated and with it, all notions of punishment as such with its curiously belated connotation.⁴⁴

The success of this rehabilitative model was called into question in 1966 in *Kent v. United States*, when Justice Fortas noted the juvenile system's "laudable purpose" but asked "whether actual performance measures well enough against theoretical purpose" to justify "the immunity of the process from . . . constitutional guaranties applicable to adults."⁴⁵ The United States' record as the world's leading incarcerator of children is evidence that these questions were well-directed, and court decisions such as *Kent* have recognized juvenile court's proximity to criminal court.⁴⁶

As suggested by Judge Fortas in *Kent*, theory may not always reflect practice. Indeed, in reality, the different evidentiary standards of juvenile court can result in nearly the same level of punishment for children as for adults while denying children the protections of due process that adults receive.⁴⁷ For instance, prior to a 1998 decision by the Supreme Court of Louisiana, upon reaching the age of seventeen, a juvenile could be transferred to an adult facility and be compelled to perform hard labor, despite never having received a jury trial or been convicted of a crime.⁴⁸ This practice was legal because of U.S. Supreme Court precedent. The 1970 Supreme Court decision *McKeiver v. Pennsylvania* held that, since juvenile delinquency proceedings were not criminal prosecutions, children undergoing delinquency proceedings were not entitled to protections guaranteed under criminal law, such as the right to a trial by jury guaranteed under the Sixth Amendment.⁴⁹

McKeiver marked a sea change in the Supreme Court's treatment of juvenile delinquency proceedings.⁵⁰ Previously, in *Kent v. United States*, the Warren Court held that juvenile court proceedings must meet standards of "due process and fair treatment,"⁵¹ and following rulings made clear that the constitutional right to "due process and fair treatment" entitled children undergoing delinquency proceedings to many of the same protections guaranteed to criminal defendants.⁵² With

44. *Id.* at 69.

45. *Kent v. United States*, 383 U.S. 541, 555 (1966).

46. See generally *Kent*, 383 U.S. 541 (entitling juveniles to a hearing and access to counsel, among other constitutional safeguards); *In re Gault*, 387 U.S. 1 (1967) (entitling juveniles to many of the same due process rights accorded to adults under the 14th Amendment, including timely notification of the charges, the right to cross-examine witnesses, the right against self-incrimination, and the right to counsel).

47. For background on how due process rights have been applied (or not applied) in juvenile court, see generally Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553 (1998).

48. See *In re C.B.*, 708 So. 2d 391, 392 (La. 1998).

49. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971).

50. Guggenheim & Hertz, *supra* note 47.

51. *Kent*, 383 U.S. at 562.

52. See *Gault*, 387 U.S. at 31-57; *In re Winship*, 397 U.S. 358, 366-68 (1970).

McKeiver, the Burger Court indicated that the *Kent* era and its expanding due process protections for children was ending, even in the case of a right so fundamental as the right to a jury trial.⁵³ The Court relied on the rationale that juvenile delinquency proceedings are not adversarial.⁵⁴ Yet even as they decided *McKeiver*, the Court noted that “the fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized.”⁵⁵

So it would seem. The non-adversarial nature of the juvenile court is considered a sufficient rationale for limiting the rights of children, yet the Court has been reluctant to indicate that the “non-adversarial” nature should place any sort of limit on the amount of punishment a child might receive.⁵⁶ The “non-adversarial” nature of juvenile court does not protect the children from being held in “restrictive, correctional-style facilities,”⁵⁷ nor does it shield them from the use of “mechanical restraints” or being isolated “in locked rooms for four hours or more.”⁵⁸ Children gain no concrete benefit from the Supreme Court’s construction of juvenile courts as “non-adversarial”; in practice, that label is only used to deny children the due process rights given to adults.

In her recent book, *The Rage of Innocence: How America Criminalizes Black Youth*, Kristin Henning draws on her experience as a juvenile defender to describe the true nature of the juvenile carceral system.⁵⁹ Henning argues that the juvenile carceral system’s primary purpose is racial control, and specifically the control of Black children.⁶⁰ In her experience, “Black youth are dehumanized, exploited, and even killed to establish the boundaries of [w]hiteness before they reach adulthood and assert their rights and independence.”⁶¹ To demonstrate that the juvenile carceral system is as motivated by racial control as adult criminal court, Henning draws on statistics and her own experience, which demonstrate that juvenile courts in the United States disproportionately incarcerate Black and Brown youth for

53. Guggenheim & Hertz, *supra* note 47, at 553–54 (“[*McKeiver*] marked the end of the Warren Court’s ‘due process revolution,’ at least in the juvenile law context . . . [it] ended the Warren Court’s practice of construing the principle of ‘fundamental fairness’ broadly to encompass the procedural protections that adult criminal defendants enjoyed.”).

54. *See McKeiver*, 403 U.S. at 550. One wonders if 48,000 detained youth would describe the system that led to their detention as “non-adversarial.” *See Sawyer*, *supra* note 11.

55. *Id.* at 543–44.

56. *See* Ian M. Kysel, *Banishing Solitary: Litigating an End to the Solitary Confinement of Children in Jails and Prisons*, 40 N.Y.U. REV. L. SOC. CHANGE 675, 685 (2016) (“No court has ruled squarely on the merits of an Eighth Amendment or a Fifth or Fourteenth Amendment conditions challenge to the solitary confinement of children in an adult jail or prison.”).

57. *See Sawyer*, *supra* note 11.

58. *Id.*

59. *See generally* HENNING, *supra* note 16.

60. *See id.* at xv (“Black youth are dehumanized, exploited, and even killed to establish the boundaries of [w]hiteness before they reach adulthood and assert their rights and independence.”).

61. *Id.*

risky behaviors common to all children.⁶² Henning's opening anecdote relates her experience representing a child arrested and prosecuted for a homemade science experiment mistaken for an explosive device.⁶³ After Henning shares her client's story at a conference, a white woman says, "My son did exactly what you described. He tried to make a Molotov cocktail and took it to school. . . . [The school] rearranged his class schedule so he could take a chemistry course."⁶⁴ The disparate treatment of white and Black children by both schools and juvenile courts is another iteration of racial inequities that exist in adult criminal courts.

Research shows that attempts to control children's behavior through the police and the juvenile court system have not only been inequitable, disparately punishing white and Black youths for the same risky behavior, but also have been ineffective as well.⁶⁵ Children who have more contact with the police in their daily lives are more likely to be arrested: schools with School Resource Officers—law enforcement officers who work inside schools—on the premises have arrest rates three and a half times higher than schools without police.⁶⁶ And more contact with law enforcement officers does not encourage better behavior. In fact, it does the opposite:

[A] 2018 survey of boys in a large southern city found that Black and Latinx boys who had experienced the acute stress associated with police stops were more likely to engage in delinquent behavior in the weeks and months after those stops. This was true even among those youth who had never engaged in delinquent activity before their first police stop. Thus, while law-abiding behaviors did not prevent Black boys from being stopped, being stopped did cause Black boys to commit crimes thereafter.⁶⁷

62. *Id.* at xvi ("Black youth were arrested at a rate 1.6 times that of [w]hite youth in 1980, 2.1 times that of [w]hite youth in 2008, and 2.6 times that of [w]hite youth in 2018. Although Black youth made up 16 percent of the youth population aged ten to seventeen in 2018, they accounted for half (50 percent) of all youth arrests for violent crimes that year, and 42 percent of arrests for property crimes. After arrest, Black youth are more likely to be detained, prosecuted, and punished more harshly—even when they are charged with similar offenses and have similar prior histories."). *Id.* at 3 ("In my twenty-five years of practice, with hundreds of clients, I have represented only four white youth.").

63. *Id.* at xii-ix.

64. *Id.*

65. *See supra* note 62.

66. *See* Henning, *supra* note 16, at 135 (citing Juan Del Toro, Tracey Lloyd, Kim S. Buchanan, Summer Joi Robins, Lucy Zhang Bencharit, Meredith Gamson Smiedt, Kavita S. Reddy, Enrique Rodriguez Pouget, Erin M. Kerrison, & Phillip Atiba Goff, *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, PROCEEDING NAT'L ACAD. SCIS. U.S.A. 8261 (2019)).

67. *Id.* at 233.

Similarly, a large body of research in criminology demonstrates that involvement in the juvenile courts system has a criminogenic effect on children.⁶⁸ One study, comprised of two longitudinal studies measuring recidivism in the juvenile courts systems in both Denver, Colorado and Bremen, Germany, found that the relative leniency of the Bremen system still produced similar results in terms of recidivism. These results suggest “a general ineffectiveness of arrest and sanctioning” regardless of the severity of the punishment.⁶⁹ Additionally, in both Bremen and Denver, involvement with the juvenile system resulted in worse job prospects in adulthood; the authors note that “it appears that it is sanctioning rather than delinquent involvement that negatively affects adult employment.”⁷⁰ While juvenile court was originally conceived as rehabilitative, children exposed to the juvenile courts suffer worse outcomes than their peers who are unaffected.

Juvenile court works under a model very similar to adult criminal court—wait for an individual child to become a “delinquent,” then focus on “reforming” that individual child through state punishment. By any applicable metric, this is a failed model. It falls apart in light of recent science about how and why people—and, in particular, children—commit crimes. In the next Part, I propose that we pivot from emphasizing *individual culpability*, focusing on determining the blameworthiness of individual children, and instead redirect our focus to *structural culpability*, examining the structural and environmental factors that resulted in the perpetration of violence or harm.

II.

INTRODUCING STRUCTURAL CULPABILITY

The dubious “remedies” available to the juvenile court system cannot address the health of a child’s community, the quality of their school, or the amount of vegetation planted in their neighborhood—all factors that contribute to a child’s likelihood of being caught in the juvenile or criminal court systems.⁷¹ I refer to these factors as *structural culpability*: they don’t necessarily indicate that an individual is at fault, but rather that there is something that ails an environment that results in a higher rate of criminalized behavior across the community. Public health and transformative justice are two approaches to addressing violence and

68. See, e.g., Lesley McAra & Susan McVie, *Youth Justice?: The Impact of System Contact on Patterns of Desistance from Offending*, EUR. J. CRIMINOLOGY 315, 318–19 (2007); Kay Hodges, Lisa A. Martin, Cynthia Smith, & Shaun Cooper, *Recidivism, Costs, and Psychosocial Outcomes for a Post-Arrest Juvenile Diversion Program*, J. OFFENDER REHAB. 447, 448 (2011); Roger C. Loeb, Marie Waung, & Megan Sheeran, *Individual and Familial Variables for Predicting Successful Completion of a Juvenile Justice Diversion Program*, J. OFFENDER REHAB. 212, 212–13 (2015).

69. DAVID HUIZINGA, KARL SCHUMANN, BEATE EHRET, & AMANDA ELLIOTT, THE EFFECT OF JUVENILE JUSTICE SYSTEM PROCESSING ON SUBSEQUENT DELINQUENT AND CRIMINAL BEHAVIOR 140 (2004).

70. *Id.* at 134.

71. See *infra* Part III.A.

harm that focus on addressing structural capability and avoid the individual culpability framework entirely.

We now know that risk factors related to the child's brain development, environment, family life, peer group, and experience of trauma can contribute to a child's propensity for engaging in criminalized behavior.⁷² For example, one 2014 study in the *Journal of Juvenile Justice* examined the prevalence of Adverse Childhood Experiences, or ACEs, in youth involved the legal system and found that "offenders report disturbingly high rates of ACEs and have higher composite scores than previously examined populations."⁷³ The extreme prevalence of ACEs in legal systems-involved children compared to non-involved children⁷⁴ indicates that criminalized behavior is not an indication of an individual's innate moral character, but of whether they grew up in a traumatizing environment.

Our legal system treats violence and harm as an individual failing rather than a structural failing. None of the classic penological goals—deterrence, retributivism, rehabilitation, and incapacitation—address the structural failures that significantly contribute to the criminalized act. In this Part, I will introduce the alternate framework of structural culpability through a discussion of two approaches that already address criminalized behavior as primarily structural: public health, an academic discipline that includes examination of the systemic causes of criminalized behavior,⁷⁵ and transformative justice, a theoretical framework informed by indigenous practices and developed by community organizers and people impacted by the criminal legal system.⁷⁶ Transformative justice is deeply tied to the movement for abolition of the prison industrial complex, whose adherents advocate for a world without prisons or police.⁷⁷

A. *The Public Health Approach and Environmental Risk Factors*

In contrast with traditional rhetoric around criminalization, the discipline of public health treats violence as a manifestation of social problems such as trauma or addiction. As one group of public health scholars explains, "[t]he criminal justice perspective classifies violence as a 'crime' and attributes the cause of violence

72. *Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 2, 2020), <https://www.cdc.gov/violenceprevention/youthviolence/riskprotectivefactors.html> [<https://perma.cc/CJ2E-NXYQ>].

73. Michael T. Baglivio, Kimberly Swartz, Mona Sayedul Huq, Amy Sheer, & Nancy S. Hardt, *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 J. JUV. JUST. 1, 1 (2014).

74. *Id.*

75. *See The Public Health Approach to Violence Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 18, 2022), <https://www.cdc.gov/violenceprevention/about/publichealthapproach.html> [<https://perma.cc/2KHP-3BKM>].

76. *See* Mia Mingus, *Transformative Justice: A Brief Description* (Jan. 11, 2019), TRANSFORMHARM.ORG, <https://transformharm.org/transformative-justice-a-brief-description/> [<https://perma.cc/JCM7-YADC>].

77. *See id.*

to the personal characteristics of the offender . . . [whereas t]he public health approach focuses on the safety and well-being of entire populations.”⁷⁸

Rather than seeking to punish or rehabilitate individual children, public health solutions focus on preventing harm. After “identifying risk factors and implementing interventions to impede risk trajectories for violence,”⁷⁹ “evidence-based primary prevention strategies have the potential to prevent youth violence from occurring in the first place[.]”⁸⁰

The potential impact of systemic public health interventions is especially substantial for crime committed by children and teenagers. In *Roper v. Simmons*, the Supreme Court recognized that young people “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and that this is related to young peoples’ lack of control over their environment.⁸¹ In its decision, the Court referenced an academic article arguing that “as legal minors, [adolescents] lack the freedom that adults have to extricate themselves from a criminogenic setting.”⁸² The Court has relied on this line of reasoning for subsequent decisions related to the culpability of a minor.⁸³

Public health research indicates that we can predict where violence is going to occur based on community features. Some features are obvious; for instance, childhood poverty at both the family and neighborhood level is linked to greater incidence of PTSD and adult arrest.⁸⁴ There is also a link between crime rates and “residential stability”; areas with a lower proportion of long-term residents are less resistant to crime.⁸⁵ Additionally, research strongly suggests that children with

78. Deborah Gorman-Smith, Lauren Feig, Franklin Cosey-Gay, & Molly Coeling, *Strengthening Families and Communities to Prevent Youth Violence: A Public Health Approach*, 34 CHILD.’S LEGAL RTS. J. 265, 267 (2014).

79. *Id.*

80. Jennifer L. Matjasko, Greta M. Massetti & Sarah Bacon, *Implementing and Evaluating Comprehensive Evidence-Based Approaches to Prevent Youth Violence: Partnering to Create Communities Where Youth Are Safe from Violence*, 37 J. PRIMARY PREVENTION 109, 110 (2016).

81. *Roper*, 543 U.S. at 569.

82. *Id.* (quoting Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2003)).

83. *See, e.g.*, Brief for the Am. Psych. Ass’n, Am. Psychiatric Ass’n, and Nat’l Ass’n of Soc. Workers as Amici Curiae Supporting Petitioners at 30, *Miller v. Alabama*, 567 U.S. 460 (2012) (No.10-9646-47).

84. *See generally* Valentina Nikulina, Cathy Spatz Widom & Sally Czaja, *The Role of Childhood Neglect and Childhood Poverty in Predicting Mental Health, Academic Achievement and Crime in Adulthood*, 48 AM. J. CMTY. PSYCH. 309 (2011); Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 LAW & INEQ. I (2015).

85. *See, e.g.*, Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918 (1997); James C. Wo & Jihye Park, *An Examination of Schools, Social Ecological Factors, and Neighborhood Crime*, 60 BRIT. J. CRIMINOLOGY 851 (2020).

elevated levels of lead in their blood are more likely to become involved in the criminal legal system.⁸⁶

Research has shown less obvious environmental features to be predictive as well. Several studies have shown that street trees have a “very strong association” with reduced crime rates in urban neighborhoods.⁸⁷ One study in Baltimore County showed that a 10% increase in tree canopy cover was associated with a 12% decrease in the density of robbery, theft, burglary, and shooting crimes, even after controlling for socio-demographic characteristics.⁸⁸ A study in Philadelphia found that street lighting, lit walk signs, clear crosswalks, and conspicuous, convenient public transportation were all significantly associated with decreased odds of homicide in the area, and the presence of a park was associated with “significantly lower odds of homicide.”⁸⁹ Features like this, which facilitate community interaction and street activity, seem to make their neighborhoods more peaceful.⁹⁰ For the same reason, tree coverage may reduce crime, as residents are more likely to come outdoors to enjoy the shade, and being outdoors “build[s] stronger neighborhood social networks, which tend[s] to” deter crime.⁹¹ In short, a large body of evidence indicates that changes in a neighborhood’s community and environment can sharply increase or decrease the probability of a crime in that neighborhood.

Harmful school policies can also effectively trap children into the criminal legal system. Children’s rights activists have coined the term “school to prison pipeline” to refer to a set of conditions, such as zero-tolerance policies and increased presence of police in schools, that disproportionately funnel

86. Paul B. Stretesky & Michael J. Lynch, *The Relationship Between Lead and Crime*, 45 J. HEALTH & SOC. BEHAV. 214, 225–26 (2004); Rick Nevin, *Understanding International Crime Trends: The Legacy of Preschool Lead Exposure*, 104 ENV’T RSCH. 315, 333 (2007); David K. Marcus, Jessica J. Fulton, & Erin J. Clarke, *Lead and Conduct Problems: A Meta-Analysis*, 39 J. CLINICAL CHILD & ADOLESCENT PSYCH. 234, 238–40 (2010); John Paul Wright, Kim N. Dietrich, M. Douglas Ris, Richard W. Hornung, Stephanie D. Wessel, Bruce P. Lanphear, Mona Ho, & Mary N. Rae, *Association of Prenatal and Childhood Blood Lead Concentrations with Criminal Arrests in Early Adulthood*, 5 PLOS MED. 0732, 0736–38 (2008).

87. Richard Conniff, *Trees Shed Bad Rap as Accessories to Crime*, YALE SCH. OF FORESTRY AND ENV’T STUD.: ENV’T YALE (2012), <https://resources.environment.yale.edu/envy/stories/trees-shed-bad-wrap-as-accessories-to-crime#gsc.tab=0> [<https://perma.cc/P8WG-UX97>].

88. Kathryn Gilstad-Hayden, Lori R. Wallace, Amy Carroll-Scott, Spencer R. Meyer, Sarah Barbo, Colleen Murphy-Dunning & Jeanette R. Ickovics, *Research Note: Greater Tree Canopy Cover Is Associated with Lower Rates of Both Violent and Property Crime in New Haven, CT*, 143 LANDSCAPE & URB. PLAN. 248, 249 (2015).

89. Alison J. Culyba, Sara F. Jacoby & Therese S. Richmond, *Modifiable Neighborhood Features Associated with Adolescent Homicide*, 170 JAMA PEDIATRICS 473, 476 (2016).

90. *Id.* at 477–78 (“[E]nvironmental features that encourage busy streets through increased pedestrian activity and community interaction and were inversely associated with adolescent homicide in our analyses.”).

91. Conniff, *supra* note 87.

predominantly Black youth from public schools into the prison system.⁹² Metrics used to measure educational outcomes can also be harmful: a 2013 study found that difficult high school exit exams had no consistent impact on graduates' employment or distribution of wages, but they did reduce graduation rates and increase incarceration rates.⁹³ As Mariame Kaba and Erica R. Meiners explain, the relationship between high-stakes testing and educational funding harms students throughout every stage of the curriculum:

The increased reliance on high-stakes testing . . . contributes to the [school to prison pipeline] by encouraging a drill-and-test culture within schools that tends to supplant art, music, and physical education. Many students, finding the curriculum increasingly irrelevant, disengage and are subsequently pushed out of school . . . In Florida, for example, schools have suspended low-performing students in order to improve their overall test results.⁹⁴

Disengagement from the curriculum and suspension contribute to a higher number of children leaving school before finishing high school.⁹⁵ Suspended children are three times more likely to drop out of high school before tenth grade than their peers who have never been suspended,⁹⁶ and young high school dropouts are more than 63 times more likely to be incarcerated or institutionalized than young four year college graduates.⁹⁷ One 2007 study found that “the average high school dropout will cost taxpayers over \$292,000 in lower tax revenues, higher cash and in-kind transfer costs, and *imposed incarceration costs* relative to an average high school graduate.”⁹⁸ Kaba and Meiners point out that between 1985 and 2005, the state of Illinois constructed twenty-five new prisons and detention facilities but did not establish any new public colleges or universities; meanwhile, funding reform initiatives for K–12 education in the state made little progress.⁹⁹ This example illustrates how governments allocate funding to the prison industrial complex instead of using that money to improve the educational system, which, unlike

92. Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, F. ON PUB. POL'Y 1, 1-2 (2009), <https://files.eric.ed.gov/fulltext/EJ870076.pdf> [<https://perma.cc/W96K-FFAC>].

93. Olesya Baker & Kevin Lang, *The Effect of High School Exit Exams on Graduation, Employment, Wages and Incarceration* (Nat'l Bureau of Econ. Rsch., Working Paper No. 19182, 2013), https://www.nber.org/system/files/working_papers/w19182/w19182.pdf [<https://perma.cc/ACX3-BGT5>].

94. Mariame Kaba & Erica R. Meiners, *Arresting the Carceral State, in WE DO THIS 'TIL WE FREE US* 76, 78 (Tamara K. Nopper ed., 2021).

95. *Id.* at 78.

96. *Id.* at 77.

97. ANDREW SUM, ISHWAR KHATIWADA, JOSEPH MCLAUGHLIN & SHEILA PALMA, CTR. FOR LAB. MKT. STUD., *THE CONSEQUENCES OF DROPPING OUT OF HIGH SCHOOL* 8 (2009), https://www.prisonpolicy.org/scans/The_Consequences_of_Dropping_Out_of_High_School.pdf [<https://perma.cc/C59C-TVW3>].

98. *Id.* at 15 (emphasis added).

99. Kaba & Meiners, *supra* note 94, at 78.

funding the prison industrial complex, has a chance of reducing violence in our communities.

Unfortunately, even in public health, “most evidence-based prevention strategies tend to focus on addressing individual- and/or relationship-level risk factors” involving individual at-risk children rather than examining “larger sociocultural, economic, and community factors.”¹⁰⁰ While these risk factors may play a role in diverting individual children from incarceration, investments in public health at the community level have potential for much greater impact. A public health approach that goes beyond individual/relationship-level risk factors and instead focuses on structural reforms does have the capacity to address structural culpability.

Our jurisprudence acknowledges that children and adolescents are deeply responsive to their environments and are therefore less criminally culpable than adults.¹⁰¹ However, at the moment, our juvenile courts are not capable of changing children’s environments beyond removing them from their family. A child’s behavior may be seen as evidence that justifies removing them from their household, but it will not be used as evidence that a child’s community, neighborhood, or school is *structurally* culpable for their misconduct. A public health approach can respond to structural culpability by addressing community and environmental factors at the root of violence and criminal behavior.

B. Abolition and Transformative Justice

In the summer of 2020, as the United States reckoned with a raging pandemic, people nevertheless took to the streets to demand an end to police violence after a Minneapolis police officer killed George Floyd by kneeling on his neck for several minutes. In the wake of these protests, unprecedented in size and scale,¹⁰² a nationwide conversation ensued: reform or defund? Can we end police violence through reforms such as the restrictive use of force policies Campaign Zero championed through #8cantwait, which included banning chokeholds and requiring that police officers warn before using deadly force?¹⁰³ Or would the only effective response to police violence be to reduce public funding spent on police departments, decreasing their size and power?

Skeptics very reasonably balk at the idea of a society without “justice,” or tools through which we can confront and combat harmful behavior. Proponents of abolition emphasize that they are *not* proposing the abolition of police and prisons without the development of other approaches to confronting violence and harm

100. *Id.* at 110-11.

101. *See supra* notes 2–9 and accompanying text.

102. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [https://perma.cc/8WRD-Y7QY].

103. Campaign Zero, #8CANTWAIT, <https://8cantwait.org> [https://perma.cc/9EFQ-5FKJ] (last visited Nov. 12, 2022).

and creating safer communities.¹⁰⁴ As Mariame Kaba, one of the most well-known abolitionist thinkers, wrote in a New York Times op-ed shortly after death of George Floyd, “We are not abandoning our communities to violence. We don’t want to just close police departments. We want to make them obsolete.”¹⁰⁵ One of the most nuanced and least understood components of the argument for abolition is captured by the movement to “invest and divest” proposed by the Movement for Black Lives.¹⁰⁶ Abolitionists do not simply advocate for *defunding* police and prisons; that strategy requires *investing* that money into social services that could prevent violence and harm—both police violence and intra-community violence. As Mariame Kaba writes:

When people, especially white people, consider a world without the police, they envision a society as violent as our current one, merely without law enforcement—and they shudder. As a society, we have been so indoctrinated with the idea that we solve problems by policing and caging people that many cannot imagine anything other than prisons and police as solutions to violence and harm. People like me who want to abolish prisons and police, however, have a vision of a different society, built on cooperation instead of individualism, on mutual aid instead of self-preservation. What would the country look like if it had billions of extra dollars to spend on housing, food and education for all? This change in society wouldn’t happen immediately, but the protests show that many people are ready to embrace a different vision of safety and justice.¹⁰⁷

Right now, the United States is spending hundreds of billions of dollars annually on security.¹⁰⁸ That money funds law enforcement and correctional facilities focused on finding and punishing individual lawbreakers rather than preventing violence. Starving this massive, harmful system, which incarcerates 48,000 youth every day,¹⁰⁹ requires imagining and building the systems we want to grow in its place.

Transformative justice practitioners offer a model that treats an act of harm holistically, not as an individual act, but rather as a network of interlocking

104. 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/TP2S-79E9>].

105. *Id.*

106. See Movement for Black Lives, *Invest-Divest*, M4BL, <https://m4bl.org/policy-platforms/invest-divest> [<https://perma.cc/377A-4MU9>] (last visited Nov. 11, 2022).

107. Kaba, *supra* note 104.

108. *Budget Justice*, VERA INST. OF JUST. <https://www.vera.org/spotlights/election-2020/budget-justice> [<https://perma.cc/TU7L-SSAM>] (last visited Nov. 12, 2022) (“In the United States, more than \$295 billion is spent annually to fund the police, courts, jails, prisons, probation, and parole.”).

109. See Sawyer, *supra* note 11.

relationships and oppressive systems that culminated in the act itself. Mariame Kaba defines transformative justice as

[A] community process developed by anti-violence activists of color, in particular, who wanted to create responses to violence that do what criminal punishment systems fail to do: build support and more safety for the person harmed, figure out how the broader context was set up for this harm to happen, and how that context can be changed so that this harm is less likely to happen again.¹¹⁰

Kaba's recent book, *We Do This 'til We Free Us*, includes a short story that illustrates this vision. She describes a transformative justice ritual responding to a murder in a fictional society. After days of mourning and centering the family that has lost a child, the community turns to addressing the act of violence:

In a series of circles, participants discuss why the violence happened, how it happened, and who was harmed. Community members are asked to stand in the shoes of the person who committed the harm, to consider the conditions that underlie their actions, and to examine their own roles in perpetuating those conditions."¹¹¹

Kaba invites us to imagine a world where we consider acts of violence as occurring within community and within context. In Kaba's imagined scenario, the individual who took a life does not escape accountability. As part of the reckoning process, "[t]hey are expected to pay a debt for the life taken for however long the harmed parties deem necessary, but they do so within the community, living as integrated members."¹¹² Like the act of killing itself, accountability for the act occurs within context, and is expressed through the relationships of people within the community.

De-emphasizing punishment does not remove accountability. Je'Kendria, executive director of Collective Action for Safe Spaces, describes the accountability practiced by transformative justice communities as "a series of steps grounded in minimizing future harm, taking power away from the harm-doer, and increasing the survivor's agency and ability to thrive. This is different from punishment because to punish someone is to dehumanize, villainize, and inflict more harm on

110. MARIAME KABA, *WE DO THIS 'TIL WE FREE US* 59 (2021).

111. *Id.* at 161–62.

112. *Id.* at 162. It bears noting that this integration is complicated by another part of Kaba's imagined system for addressing violence: in the case of a murder, the killer is tied up and placed in the ocean, and the victim's family is offered the opportunity to address the harm by allowing the perpetrator to drown. *Id.* While Kaba's story offers community-enforced revenge killing as a possible option, it is significant that the family of the victim in Kaba's story affirmatively chooses to save the life of her murderer, choosing community integration over revenge.

someone.”¹¹³ Accountability for harm in a transformative justice space is not only determined by the harmful act itself, but by the context in which that harmful act occurred and the values of the community impacted by the harm. Transformative justice is being practiced today by organizations such as Project Nia and the Bay Area Transformative Justice Collective.¹¹⁴

In contrast to public health, an academic discipline well-established within prestigious institutions, transformative justice is counter-institutional by design—it is rooted in indigenous practices,¹¹⁵ and it is popular among communities that reasonably fear law enforcement because contact with the state risks “deportation, harassment, state sanctioned violence, sexual violence . . . or inaccessibility.”¹¹⁶ As Leila Raven, organizer with Decrim NY, explains, “trans and queer people of color, especially those who are sex working, disabled, and housing insecure, have always known that we could not rely on policing for safety, and so we experiment frequently with many other strategies to keep each other safe.”¹¹⁷

We know that nearly all adolescents experiment with criminalized behavior,¹¹⁸ and we know that this behavior stems from adolescents’ inability to regulate their impulses rather than from calculated decisions.¹¹⁹ In this light, a system that waits for an individual adolescent to make a mistake and then seeks to rehabilitate that individual seems massively inefficient, even if such a system could be 100% effective. Reducing poverty, increasing homeownership, and changing the built environment in high-crime communities has the potential to stop incidents of violence before they occur.

113. Reina Sultan, *How Transformative Justice Responds to Violence Without the Carceral System*, TRANSFORMHARM.ORG, https://transformharm.org/tj_resource/how-transformative-justice-responds-to-violence-without-the-carceral-system/ [<https://perma.cc/HY7M-89TG>] (last visited Nov. 12, 2022) (“[E]xamples of consequences [could] include ‘the harm doer moving out of a housing situation, stepping down from a job, making a statement to every group they’re a part of disclosing the harm they caused, taking a break from social spaces where the survivor is present, dispersing funds to the survivor or to survivor-centered work, moving to another city,’ and ‘gathering a dedicated group of accountability partners.’”).

114. *NYC Transformative Justice Hub*, PROJECT NIA, <https://project-nia.org/nyc-transformative-justice-hub> [<https://perma.cc/Y8LB-FACX>] (last visited Nov. 12, 2022); *Building Transformative Justice Responses to Child Sexual Abuse*, BAY AREA TRANSFORMATIVE JUST. COLLECTIVE, <https://batjc.wordpress.com> [<https://perma.cc/8VAM-52ES>] (last visited Nov. 12, 2022). More examples of projects that collectively practice transformative justice can be found at ONE MILLION EXPERIMENTS, <https://millionexperiments.com/search?category=transforming-harm> [<https://perma.cc/2LZZ-5J3Y>] (last visited Sep. 7, 2023).

115. Sultan, *supra* note 113.

116. Mingus, *supra* note 76.

117. Sultan, *supra* note 113.

118. Massoglia & Uggen, *supra* note 3.

119. Brief for the Am. Psych. Ass’n, Am. Psychiatric Ass’n, and Nat’l Ass’n of Soc. Workers as Amici Curiae Supporting Petitioners at 30, *Miller v. Alabama*, 567 U.S. 460 (2012) (No.10-9646-47).

III. SEEKING SOLUTIONS

I propose that in response to juvenile criminalized behavior, we should shift focus away from intervening with individual children and focus on structural solutions at the neighborhood, school, and community levels. Rather than insisting that individual children are responsible for harm they cause, we should examine the context in which those children acted and what made violent or harmful behavior seem possible and desirable. We need a model of culpability under which our communities are collectively accountable for a child's behavior. There is a wealth of evidence in the public health field suggesting that such a shift would be more effective at crime-prevention than our current juvenile carceral system.¹²⁰

Both public health and transformative justice could help prevent or address violence without lawyers. By definition, when we remove children from courtrooms in favor of less adversarial ways to address violence and harm, lawyers become less necessary as a result. There is thus a moral imperative for juvenile defenders to work towards putting themselves out of a job. The funding that supports the prosecutors, judges, defenders, and court administrators who operate the juvenile carceral system could be rerouted, under a divest/invest model, towards public health solutions and transformative justice programs. For instance, the Centers for Disease Control and Prevention have funded programs such as Striving to Reduce Youth Violence (STRYVE) and its many Youth Violence Prevention Centers (YVPCs), which attack the problem of youth violence from outside of the juvenile carceral system.¹²¹ Juvenile defenders should also agitate for more resources for transformative justice programs that operate outside of traditional institutions that are based in and run by people from low-income communities and work directly with youth in those communities. Examples of programs successfully doing this work include the Young Women's Empowerment Project, which supports and advocates for young sex workers in Chicago,¹²² and Circles and

120. See, e.g., Nevin, *supra* note 86; Culyba, Jacoby, & Richmond, *supra* note 89; Heitzeg, *supra* note 92; Baker & Lang, *supra* note 93. See also sources cited in *supra* note 68.

121. See *STRYVE: Striving to Reduce Youth Violence Everywhere*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 25, 2021), <https://www.cdc.gov/violenceprevention/youthviolence/stryve/index.html> [<https://perma.cc/3XZR-NANU>]; *National Centers of Excellence in Youth Violence Prevention (YVPCs)*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 6, 2019), <https://www.cdc.gov/violenceprevention/youthviolence/yvpc/index.html> [<https://perma.cc/7NBZ-W7X4>].

122. *About*, YOUNG WOMEN'S EMPOWERMENT COLLECTIVE, <https://youarepriceless.org/about/> [<https://perma.cc/2F64-SAGW>] (last visited Jan. 8, 2023).

Ciphers, an organization “led by and for young people impacted by violence” that works with impacted youth through “hip-hop infused restorative justice.”¹²³

Even if the juvenile carceral system was 100% effective at its stated purpose of rehabilitating offenders, preventing violence and harm would still be preferable. But the juvenile carceral system as currently constituted is *not* rehabilitative. A literature review on incarceration’s effects on children found that “[b]etween 70% and 80% of juveniles who have been in residential correction programs are subsequently rearrested within a three-year period.”¹²⁴ Another study found that when controlling for other factors, “juvenile incarceration is estimated to decrease high school graduation by 13 percentage points and increase adult incarceration by 22 percentage points.”¹²⁵ Incarceration, it seems, prompts more criminalized behavior in place of rehabilitation.

In contrast, studies indicate that community-based supervision reduces recidivism more effectively than remaining in an institution. Researchers Ian Lambie and Isabel Randell theorize that it is difficult for children to develop coping strategies for dealing with their home environment when they mature in an extremely structured carceral settings, forcibly separated from the environment they need to learn to navigate¹²⁶—a particularly poignant theory in the light of the fact that most children, when left to their own devices, will become less likely to commit acts of violence or property damage over time.¹²⁷ Lambie and Randell note that “[i]t is only possible for a young person to reliably ‘grow out’ of deviance if he or she develops alternative, more adaptive coping resources and strategies. Such adaptive resources are not reliably or effectively taught to juvenile inmates and the acquisition of such skills is limited by the nature of the environment.”¹²⁸ They conclude that “the incarceration environment is highly limited in its rehabilitative potential.”¹²⁹ Structured carceral settings that keep children away from their

123. CIRCLES & CIPHERS, <https://circlesandciphers.org/> [<https://perma.cc/BYK8-DHFB>] (last visited Jan. 8, 2023). Restorative justice is related to, but not identical to, transformative justice. Kaba defines restorative justice as being “focused on the importance of relationships. It is focused on the importance of repair when those relationships are broken, when violations occur in our relationships.” KABA, *supra* note 110, at 148. Relatedly, but in contrast, transformative justice “takes as a starting point the idea that what happens in our interpersonal relationships is mirrored and reinforced by the larger systems.” *Id.* at 149.

124. Lambie & Randell, *supra* note 17, at 450.

125. Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges* (Nat’l Bureau of Econ. Rsch., Working Paper No. 19102, 2013), https://www.nber.org/system/files/working_papers/w19102/w19102.pdf [<https://perma.cc/X6CC-AZ4L>].

126. Lambie & Randell, *supra* note 17, at 452. (“[R]emoving youth from their community removes them from the environment in which their offending behavior occurs and the contextual factors that contribute to and maintain this behavior. As a result, incarceration limits the potential for the use of re-habilitative options that directly address these factors, and youth are less likely to receive intervention that targets their criminogenic needs.”).

127. *Id.* at 451.

128. *Id.* (citations omitted).

129. *Id.* at 456.

communities are the opposite of rehabilitative—they actively harm the natural process of maturation that will occur if a child is left in their community.

Given that incarceration is harmful to children’s development and ability to navigate their environment, it is imperative that juvenile defenders advocate for structural solutions to youth violence outside of the courtroom. The most vulnerable children, those who are already suffering, are also most likely to become victims of a system that further harms them. Juvenile defenders’ obligations are not limited to providing the best defense for individual children; there is a professional imperative to make the juvenile punishment itself as small and unobtrusive as possible, while advocating for the struggles of individual children to be viewed within the context of communities that are hurting from lack of resources, systemic racism, structural violence, and hostile infrastructure.

A. First-Level Reforms

What does this anti-carceral approach mean in practice? Firstly, advocates must critically consider when to respond to actions through juvenile court, based on the understanding that their involvement is likely to be more harmful than helpful. Juvenile judges who believe that they can convince children to change by repeatedly dragging them into the courtroom need to recognize that the power they hold over vulnerable children is the threat of incarceration, and that not only are the potential downsides of incarcerating a child very grave, but that attempts to “reform” or punish individual children fail to address structural culpability. As Kristin Henning argues:

When youth are policed in their schools and communities, they are sent to courts where prosecutors, probation officers, and judges can ‘just say no.’ At every stage of a juvenile or criminal case, key decision makers have an opportunity to decline prosecution, dismiss cases, and recommend that youth be diverted from the court system and released back to their families. Every state actor who does not take an active stance against racial inequities is at least complicit—and at worst active—in perpetuating the criminalization and over-policing of Black youth.¹³⁰

Juvenile defenders should raise the structural causes of youth violence as a defense whenever possible, as part of a long-term campaign to change the mindset of juvenile court judges. State actors at every level should refuse to prosecute or incarcerate children, as it harms the children in question and does not make our communities safer.

Secondly, Supreme Court jurisprudence recognizes that children are profoundly affected by their environment.¹³¹ This means that to truly represent and defend a child, public defenders cannot simply talk to children and present their

130. HENNING, *supra* note 16, at 336.

131. See *Roper*, 543 U.S. at 569; *Graham*, 560 U.S. at 68; *Miller*, 567 U.S. 470.

side of the story. They must be investigators, with the resources and capacity to explore the child's neighborhood and talk to neighbors, friends, family members, and teachers—people who will be able to give a multidimensional account of the environment that produced the child's harmful act. They need to visit and photograph the street corner or parking lot where the act took place. Is it surrounded by well-tended trees and crosswalks, or—as is more likely—vacant streets and derelict buildings? Why was the child in an environment devoid of street traffic or passers-by? Did the child have community members who knew where they were and what they were doing? If not, why not? If we accept, as our jurisprudence does, that children are particularly susceptible to their environment, then a child's environment should be a component of a valid defense.

It is worth noting that competent defenses require funds, to hire investigators in public defense offices and to keep caseloads manageable for attorneys. In the short term, then, this may paradoxically amount to greater spending in the criminal legal system, albeit on the defense side. Public defenders who work with children need money to hire investigators and the staff to reduce caseloads if each child receives a full investigation. Incarcerating children is not only expensive but ineffective, and it can lead to recidivism and negative effects for the incarcerated child as well. It is probably more cost-effective and certainly more compassionate to pay up front for a child's strong, holistic defense. However, the long-term solution must continue to be a reduction of the funds spent on the criminal legal system overall and a greater investment in the environments that affect children's behavior.

Practitioners who defend children in the juvenile carceral system are well-positioned to change the narrative about children and criminalized behavior. Henning's book provides an example of how juvenile defenders can use their knowledge of the juvenile carceral system to argue for the reduction and abolition of juvenile court as a vehicle for criminalizing and punishing children.

B. Invest/Divest: Turning Our Backs on the Failed Juvenile Court System

Any reform to the juvenile court system, including a robustly funded juvenile defense system, is a half-measure. There is no evidence that juvenile court, which facilitates the prosecution and punishment of individual children, creates safer communities. In fact, there is a good deal of evidence that suggests it reduces educational achievement and prompts more criminalized behavior during and after childhood.¹³² Juvenile court is a failure, and we should support abolitionists who

132. See *supra* notes 124–129.

call for the abolition of youth prisons.¹³³ As we divest from the failed juvenile courts system, we should invest in programs with a proven track record of reducing youth violence at the community-wide level, such as public health initiatives and restorative and transformative justice organizations.

CONCLUSION

The United States cannot curtail youth violence by continuing to treat violence and harm perpetrated by youth as primarily the result of those youths' individual choices. Youth violence is a public health phenomenon with structural causes, and our best hope is to solve it structurally. Youth advocates arguing for the abolition of youth prisons and the juvenile carceral system argue that we must change the narrative about juvenile criminalized behavior: it is not a result of "bad kids,"¹³⁴ but an individual manifestation of structural violence.¹³⁵ Children are more susceptible to structural violence due to their stage of neurological development.¹³⁶

Anyone who cares for children should work towards the abolition of the prosecution, detention, and incarceration of children. This struggle must occur on multiple fronts simultaneously. Within courtrooms, attorneys who represent criminalized children and young people (even and especially in adult criminal court) must feel empowered to voice the structural harms that contributed to a young person's behavior. Judges should be receptive to hearing about these structural harms, recognizing that children's developing brains make them more likely to commit crime for social and environmental reasons. Outside of the courtroom, those of us who agree that the incarceration of children is a societal ill should support and contribute to public health initiatives and transformative justice collectives, including through state-level budget advocacy, especially in place of the failed juvenile court system. Our focus should shift from rehabilitating or punishing individual offenders; rather, we should implement structural public health solutions to youth violence. We must redistribute wealth to under resourced areas, invest in infrastructure to allow communities to congregate outside and create accountability, and invest in community organizations that use transformative justice strategies to create safer environments for youth. These evidence-based strategies will be far more effective in deterring crime than the mass incarceration of children.

133. See, e.g., Subini Annamma & Jamelia Morgan, *Youth Incarceration and Abolition*, 45 N.Y.U. REV. L. & SOC. CHANGE 471, 508 (2022) ("Anything less than total abolition is not enough."); Durrell M. Washington, Toyon Harper, Alizé B. Hill, & Lester J. Kern, *Achieving Juvenile Justice Through Abolition: A Critical Review of Social Work's Role in Shaping the Juvenile Legal System and Steps Toward Achieving an Antiracist Future*, 10 SOC. SCI. (SPECIAL ISSUE: RACIAL & ETHNIC ISSUES IN CRIM. JUST. SYS.) 1, 13 (2021).

134. See *The Superpredator Myth, 25 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), <https://eji.org/news/superpredator-myth-20-years-later/> [<https://perma.cc/EUR2-2ZVJ>].

135. See *supra* Part III.

136. See *supra* Part I.