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Invisible Article III Delinquency: History, Mystery, and Concerns About "Federal Juvenile Courts"

Mae C. Quinn
University of the District of Columbia, mae.quinn@udc.edu

Levi T. Bradford
University of Florida Levin College of Law

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Mae C. Quinn* and Levi T. Bradford**

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I. Introduction

This essay is the second in a two-part series focused on our nation's invisible juvenile justice system—one that operates under the legal radar as part of the U.S. Constitution's Article III federal district court system.[1] The first publication, *Article III Adultification of Kids: History, Mystery, and Troubling Implications of Federal Youth Transfers*,[2] examined the little-known practice of prosecuting children as adults in federal courts. This paper will look at the related phenomenon of juvenile delinquency matters that are filed and pursued in our nation's federal court system.[3]

To date, most scholarship evaluating youth prosecution has focused on our country's juvenile courts—venues established and run in each of the individual states and territories.[4] The anomaly of child prosecution under federal laws in our nation's Article III courts has received far less attention—particularly over the last two decades.[5] However, recent events suggest—and policies of the current presidential administration demonstrate—federal

1. *See* NAT'L RSCH. COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE: PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT, AND CONTROL, 5–7, 155 (Joan McCord et al. eds., 2001) ("The federal government has jurisdiction over a small number of juveniles, such as those who commit crimes on Indian reservations or in national parks, and it has its own laws to govern juveniles within its system.").

2. Mae C. Quinn & Grace R. McLaughlin, *Article III Adultification of Kids: History, Mystery, and Troubling Implications of Federal Youth Transfers*, 26 WASH. & LEE J. CIV. RTS. & SOC. JUST. 523 (2020).

3. *See* 18 U.S.C. § 5032 (2018) ("If an alleged juvenile delinquent is not surrendered to the authorities of a State pursuant to this section, any proceedings against him shall be in an appropriate district court of the United States.").

4. *See* Quinn & McLaughlin, *supra* note 2, at 538 ("Although there was a wave of writing about federal prosecution of youth at the turn of this century, little scholarship or other examination of this phenomenon has happened in the last twenty years.").

5. *Id.*

apprehension and prosecution of youth is a subject worthy of greater study.[6]

This paper sheds further light on delinquency cases—matters filed in federal courts by the United Stated Department of Justice against children who allegedly engaged in wrongdoing worthy of Article III intervention.[7] Part II covers the shared common law approach to youth prosecution that existed in the early years of our country in both state and federal courts. Under the common law, children age seven and up were eligible for prosecution like adults.[8] There were no specialized courts to deal with such matters nor youth-only dispositions.[9] Instead, children convicted of criminal acts, like their adult counter parts, faced the full range of penalties—including possible execution.[10]

Part III describes the specialized juvenile court movement at the start of the 1900's that swept the United States, resulting in every state and territory—other than the federal system—creating its own child-centered court systems.[11] It further explains that for more than fifty years U.S. Supreme Court jurisprudence has focused almost exclusively on the constitutionality of state juvenile court practices, responding largely to localized developments in

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6. *See id.* ("Few realize that youth have faced prosecution, transfer, and adult sentencing in our federal court system since our nation's founding.").

7. *See* 18 U.S.C. § 5031 (2018) ("'[J]uvenile delinquency' is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult . . . .").

8. *See* Deanie C. Allen, *Trying Children As Adults*, 6 FAULKNER L. REV. 27, 29 (2002) ("Children under seven could not be held accountable for the commission of a crime and some children under fourteen could be shown deferential treatment due to a lack of maturity or lack of capacity to understand the consequences of their actions") (citations omitted).

9. *See id.* at 31 (noting the first juvenile court system in the United States was established in Illinois on July 1, 1899 by the Juvenile Court Act); *see also* Illinois Juvenile Court Act, 1899 Ill. Laws, 131, § 21 (codified as amended at 705 Ill. Comp. Stat. Ann. 405, 1–2) (citations omitted).

10. *See* Allen, *supra* note 8, at 28 ("[T]here are also reports from as early as the 1700's of children as young as twelve and fourteen being killed or mutilated for their complicity in a murder") (citations omitted).

11. *See id.* at 32 ("By 1925 all but two of the states had followed [Illinois] and passed laws establishing separate juvenile court systems") (citations omitted); *see also* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 104–22 (1909) (describing state-level juvenile court innovations and calling for a broader embrace of the Chicago juvenile court model).

child prosecution in its youth justice decisions.[12] This paper further catalogs a range of policy developments relating to child defendants and delinquency case processing, which are also largely taking place on the local and state levels.[13] It describes a modern movement that seeks to constantly improve juvenile courts, reduce overrepresentation of BIPOC youth, and implement emerging best practices.[14]

Part IV then turns to federal prosecution of children. It offers little-known insights into early federal juvenile cases, including case types and defendant populations.[15] It then examines the federal statutory and rules-based framework that was ultimately constructed to perpetuate the practice of federal prosecution of children accused of wrongdoing.[16] This section also looks at the policies and practices of the Department of Justice over time as they have related to child crime cases. Part IV offers critiques of such activities, arguing many federal delinquency practices have been out of step with emerging modern juvenile justice approaches that account for adolescent brain science, the vulnerability of youth, and the rehabilitative power of ongoing connection with families and communities.[17]

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12. *See* SHAY BILCHIK, U.S. DEP'T OF JUST. OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILE JUSTICE: A CENTURY OF CHANGE 3 (1999), https://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf (last visited Sept. 25, 2020) ("In a series of decisions beginning in the 1960's, the U.S. Supreme Court required that juvenile courts become more formal—more like criminal courts") [https://perma.cc/4FQG-YK4D]; *see also id.* at 7 (outlining a series of Supreme Court cases impacting juvenile courts).

13. *Infra* note 55.

14. *Infra* note 115.

15. *See* Quinn & McLaughlin, *supra* note 2, at 539–40 (describing approaches to federal youth prosecution prior to passage of the 1938 Federal Juvenile Delinquency Act).

16. *See* William S. Sessions & Faye M. Bracey, *A Synopsis of the Federal Juvenile Delinquency Act*, 14 ST. MARY'S L. J. 509, 509–10 (1983) (noting Congress passed the Federal Juvenile Delinquency Act in 1938).

17. *See, e.g.*, Richard Bonnie & Elizabeth Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 158, 160 (2013), https://journals.sagepub.com/doi/pdf/10.1177/0963721412471678 (last visited Sept. 25, 2020) ("In combination, behavioral and neurobiological research on adolescence have played an important role in advancing policies that recognize the immaturity of young offenders in responding to juvenile crime.") [perma.cc/CQK7-4KFA].

In Part V, we provide some areas of particular concern and further evaluation. For instance, we examine the involvement of both Native and immigrant youth in the federal delinquency system and urge heightened awareness of their plight, especially as we experience ramped up federal law enforcement presence in our local communities.[18] We also discuss the multilayered, multijurisdictional approach to youth detention and confinement.[19] This system largely escapes public attention or discussion among academics, advocates, or policy makers.[20] The COVID-19 public health crisis provides further reason to demand additional information about such settings and the numbers of youth serving time—potentially until their twenty-sixth birthday—related to federal delinquency charges.[21]

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18. *See, e.g.*, William Adams et al., *Tribal Youth in the Federal Justice System*, URBAN INST., JUST. POL'Y CTR. x–xi (2011), https://www.ncjrs.gov/pdffiles1/bjs/grants/234549.pdf (last visited Sept. 25, 2020) ("[Eighty-two percent] of entering [Indian Country] juveniles entrants had been adjudicated delinquent compared to only 38% of entering non-[Indian Country] juveniles who were adjudicated delinquent") [perma.cc/WXB2-3UTK]; *but see id.* at x (noting poorly reported data and difficulty distinguishing between children adjudicated as adults and children adjudicated as delinquents); *see also Operation Legend: Update on Federal Charges*, U.S. DEP'T OF JUST. (Sept. 3, 2020), https://www.justice.gov/opa/pr/operation-legend-update-federal-charges (last visited Oct. 24, 2020) (reporting on more than 2000 arrests by federal officials in less than a week as part of Operation Legend, a Trump-administration initiative that targets select urban areas with increased federal law agency sweeps, raids, and enforcement) [perma.cc/4BDW-X9WG].

19. Federal juvenile delinquency dispositions may also involve periods of probation or post-release supervision, which present concerns of reincarceration. *See* CHARLES DOYLE, CONG. RSCH. SERV., RL30822, JUVENILE DELINQUENTS AND FEDERAL JUVENILE LAW: THE FEDERAL JUVENILE DELINQUENCY ACT AND RELATED MATTERS 15 (2018) ("The court may later revise or revoke a juvenile's probation and order the juvenile's detention for violation of his probation conditions.").

20. NANCY RODRIGUEZ, NAT'L INST. OF JUST., A MULTILEVEL ANALYSIS OF JUVENILE COURT PROCESSES: THE IMPORTANCE OF COMMUNITY CHARACTERISTICS iii (June 30, 2008), https://www.ncjrs.gov/pdffiles1/nij/grants/223465.pdf (last visited Sept. 25, 2020) ("Unfortunately, few studies of juvenile court processes have relied on cross-jurisdictional data to examine how court context influences juvenile court decisions and only one study to date has addressed how community characteristics where juveniles reside directly and indirectly impact juvenile court outcomes.") [perma.cc/9MFW-SHE7].

21. *See* Letter from Act 4 Juvenile Justice to Mitch McConnell, Senate Majority Leader, et al. 2 (June 9, 2020), http://act4jj.org/sites/default/files/ckfinder/files/OJJDP%20Sign-on%20Letter%20June%202020%20FINAL.pdf (last visited Sept. 25, 2020) (urging Congress to address concerns posed by COVID-19 in youth detention

In the end, we urge further data collection and study to help rethink—and potentially dismantle—federal delinquency practices. Federal delinquency proceedings duplicate adjudicative systems already largely available in the states.[22] In addition, federal district courts are simply ill-equipped to deal with the special needs of children, to stay abreast of emerging best practices for youth and families, or to ensure kids are provided with the justice and support that they deserve.[23]

II. Common Law Approach to Youth Crime—Shared State and Federal History

At common law, it was generally presumed that children under seven did not possess the *mens rea* necessary to be convicted of a crime.[24] For those between the ages of seven and fourteen, that presumption was rebuttable.[25] And "children over age fourteen possessed the requisite capacities for criminal intent."[26] Thus, youth between the ages of seven and fourteen who did not successfully advance an infancy-type defense, and those age fourteen to seventeen, were subject to all of the same penalties as adults including, in some instances, execution.[27]

These rules came to the United States through the English colonies, and persisted as state legal systems, and a separate

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centers, some of which report up to 50% of inhabitants testing positive) [perma.cc/ZRL4-9N7Q].

22. *See* DOYLE, *supra* note 19, at 4 (stating juvenile violations of state law are frequently violations of federal law, as well).

23. *See* BILCHICK, *supra* note 12, at 1 ("Certainly, there are areas in the juvenile justice system that need improvement."); *but see id.* ("Still, the roots of the juvenile justice system remain strong and need to be supported by all those committed to improve the lives of our children.").

24. *See* Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 145 (2003) (outlining the common law "rule of sevens" that was traditionally applicable in the case of youth crime).

25. *Id.*

26. *Id.* (noting that in the late 18th and early 19th centuries, "courts would take age into consideration in evaluating the child's conduct . . . [i]n limited instances[.]").

27. *See id.* at 145–46 (recounting how "some children between the ages of ten and twelve were executed in early America"); *see also* Mack, *supra* note 11, at 106 ("The majesty and dignity of the state demanded vindication for infractions from both [the adult and the minor] alike.").

federal court structure, formed.[28] Thus, at the time Article III to the U.S. Constitution was ratified in 1788, and national-level trial courts were created with the First Judiciary Act of 1789,[29] youth were generally seen as proper subjects for prosecution and handled in the same courts as adults charged with crimes.[30] This thinking continued in the United States through much of the 1800s.[31]

For instance, in 1881 the South Carolina Supreme Court upheld the conviction of Lawrence Toney, described as "a well-grown boy, apparently at least over twelve years" but not yet age fourteen.[32] He and two of his brothers had been charged with malicious trespass for allegedly entering the cow pen of a neighbor by the name of D.E. Keels,[33] physically striking Keels' cow, and then allowing their dogs to attack the larger animal.[34] While Lawrence admitted that his two dogs bit at the cow, he did not direct them to do so.[35] In addition, Lawrence claimed the entire incident was an effort to return the cow to Keels after it had escaped from the pen.[36]

The Court not only rejected Lawrence Toney's argument that the jury needed to be told he possessed actual malice to be

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28. *See* Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 168–70 (2000) (describing the development of the "rule of sevens" for criminal culpability for youth, including its English common law origins and embrace by Sir Matthew Hale of the King's Bench in the seventeenth century).

29. Judith Resnik & Kevin Walsh, *Common Interpretation: Article III, Section 2*, NAT'L CONST. CTR.: INTERACTIVE CONSTITUTION, https://constitutioncenter.org/interactive-constitution/interpretation/article-iii/section/203 (last visited Aug. 29, 2020) [perma.cc/26V2-G7YZ].

30. BARBARA DANZIGER FLICKER, INST. FOR JUD. ADMIN. & A.B.A., STANDARDS FOR JUVENILE JUSTICE: SUMMARY AND ANALYSIS 29 (2d ed. 1982) ("Prior to the nineteenth century, children who committed crimes were handled by the same institutions as adults.").

31. *See* Bazelon, *supra* note 28, at 171 (reporting that in the late 1800's social reformers began to argue "it was both unjust and counterproductive to expose impressionable and inherently redeemable youngsters to the harshness of the adult criminal justice system"); *see generally* Mack, *supra* note 11, at 107–08.

32. State v. Toney, 15 S.C. 408, 410 (1881).

33. *See id.* at 410 (referring to Keels as "the prosecutor" throughout the opinion).

34. *Id.*

35. *Id.*

36. *Id.*

convicted, but held his young age did not require relief either.[37] Applying the common law rule of sevens to the case, the Court concluded no further proof or instruction was needed on the question of capacity.[38] Instead, it held, the jury likely determined Lawrence was old enough "to discern between good and evil."[39]

The federal system also automatically processed youth as adults in U.S. district courts during this period, as can be seen from the 1893 case of *Allen v. United States*.[40] In *Allen*, a fourteen-year-old from Arkansas, described as a "colored boy," was tried for shooting and killing an older teen, described as a "white boy," on the lands of the Cherokee Nation.[41] Because the killing occurred on a Native American reservation, as will be further discussed below, the U.S. District Court for the Western District of Arkansas had jurisdiction.[42] After being convicted by a federal jury at his trial, Alexander Allen was sentenced to death.[43] Like Toney, he challenged the jury instructions relating to youth, *mens rea*, and culpability.[44] The Supreme Court held that some instructions relating to youth should have been given, even though Alexander had just passed his fourteenth birthday.[45] But it did not reverse on

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37. *Id.* at 413–14.

38. *See id.* at 414 (stating "this principle, when enforced most rigidly, would not have demanded of the presiding judge in this case to have charged the jury that there was no proof before them rebutting this presumption").

39. *Id.*

40. *See* Allen v. United States, 150 U.S. 551, 559 (1893) (holding the state bore the burden of proof to show a fourteen-year-old had the capacity to form the requisite *mens rea* to commit homicide).

41. *Id.* at 552.

42. *See id.* at 551–52 (noting the shooting took place "in the Cherokee Nation, some three or four miles from Coffeyville, Kansas").

43. *Id.* at 551.

44. *Id.* at 557–58.

45. *See id.* at 559.

> [I]f the circumstances rendered that fact significant; and since in this case the presumption of the lack of accountability had obtained until within two months of the homicide, if the defendant's own statement as to his age is to be accepted, an instruction which treated him as having been under the weight of full accountability three years longer than was the fact may have tended to weaken the effect upon the minds of the jurors which his youth might have otherwise had, and to which the humanity of the law regards him as entitled.

that ground, finding a stronger argument for relief in the lower court's botched consideration of Alexander's self-defense claim.[46] Despite this remand, the Court did not preclude Alexander's continued federal prosecution or death sentence exposure.[47] In fact, after twice more returning to the Supreme Court to seek relief, in 1895 and 1896, Alexander Allen was convicted for a final time and, shockingly, executed for childhood conduct.[48]

III. Emergence of State Juvenile Courts and Supreme Court's Related Jurisprudence

The *Allen* trilogy and tragedy, in some ways, serves as a turning point. While Alexander was repeatedly appealing to the Supreme Court, around the country states were parting ways with the federal system's approach to child prosecution.[49] By the start of the last century, the U.S. juvenile justice story became one

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46. *Id.* at 560–61. *Allen* is, in fact, best known for the genesis of the term "'Allen' charge." *See* Griffith v. State, 686 S.W.2d 331, 332 n.1 (Tex. App.—Houston 1985) (describing Alexander Allen's case as "extraordinary").

47. Allen v. United States, 150 U.S. 551, 561 (1893).

48. *See* Allen v. United States, 157 U.S. 675, 681 (1895) (overturning Allen's conviction in the lower court for a second time and ordering a new trial); *see also* Allen v. United States, 164 U.S. 492, 502 (1896) (affirming Allen's third conviction in the lower court). Interestingly, in the 1895 decision, the ages of the youth involved in the incident had somehow changed. In the 1893 decision Allen's age was described "some two months older than 14 years," while his victim was reportedly 18 years old. *Allen*, 150 U.S. at 552. In 1895, the Court described Allen as "about 15 years old" and the victim "about 17 years old." *Allen*, 157 U.S. at 675. Reversing the conviction for another new trial based upon a faulty self-defense instruction, the Court referred to the incident as a "difficulty . . . between boys." *Id.* at 678. The 1896 decision did not reference Allen's age in any way. But in upholding Allen's conviction, the Court reiterated that his victim was white. *See Allen*, 478 U.S. at 493–94 ("This was a writ of error to a judgment of the circuit court of the United States for the Western district of Arkansas sentencing the plaintiff in error to death for the murder of Philip Henson, a white man, in the Cherokee Nation of the Indian Territory."). This time, his conviction was upheld. *Id.* at 502. *See also* Reginald Betts, *What Break Do Children Deserve*, 128 YALE L. F. 743, 757–58 (2019) (recounting the tragic unsuccessful efforts by Allen to be spared the death penalty for actions committed while he was a young teen).

49. *See* BILCHIK, *supra* note 12, at 2 ("As early as 1825, the Society for the Prevention of Juvenile Delinquency was advocating the separation of juvenile and adult offenders. Soon, facilities exclusively for juveniles were established in most major cities.").

focused on states and localities.[50] This was due to the emergence of localized special venues for criminal cases involving children—what we today refer to as juvenile courts.[51]

A. Juvenile Courts as Specialized Venues to Address Child Wrongdoing

Judge Julian Mack of Chicago is often credited with launching the country's first juvenile court in 1899.[52] Chicago's Juvenile Court, created by state law, had specialized features that ultimately were replicated by other jurisdictions, including special youth-centered probation staff and a focus on rehabilitation rather than punishment.[53] By 1925, every state and territory in the United States, save two, established their own juvenile court systems.[54] These courts generally had exclusive jurisdiction over youth under age eighteen charged with criminal acts[55]—from

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50. *See id.* (articulating how states began to establish their own juvenile courts in the early twentieth century).

51. *See id.* ("During the next 50 years, most juvenile courts had exclusive original jurisdiction over all youth under age 18 who were charged with violating criminal laws . . . [and] [u]nlike the criminal justice system . . . the juvenile court controlled its own intake.").

52. *See* SOL RUBIN, CRIME AND JUVENILE DELINQUENCY; A RATIONAL APPROACH TO PENAL PROBLEMS 77 (3d ed. 1970) (noting specialized youth focused courts had been operating around the country largely in the form of municipal and police courts, despite that "[i]t is generally accepted that the first juvenile court was the Chicago court, established in 1899"); *see also, e.g.*, *In re* Moses, 13 Abb. N. Cas. 189, 1883 WL 12790, at *196 (N.Y. Gen. Term. 1883) (reviewing habeas corpus application of thirteen-year-old child who was prosecuted in the New York City police court for vagrancy and remanded to the House of Refuse for the Reformation of Juvenile Delinquents). *But see In Re* Courts for Trial of Infants, 3 Pa. D. 753, 1893 WL 3154, at *2 (Pa. Ct. of Oyer and Terminer and Gen. Jail Delivery Jan. 1, 1893) (finding unconstitutional local efforts to create special confidential court setting for youth charged with crimes, in part declaring "[s]ome of the worst criminals known to the law are persons under sixteen years of age").

53. *See* FLICKER, *supra* note 30, at 31–32 (listing the contributions of the Illinois Juvenile Court Act to developing the future of juvenile court systems).

54. *See* BILCHIK, *supra* note 12, at 2 ("By 1910, 32 States had established juvenile courts and/or probation services. By 1925, all but two States had followed suit.").

55. Some states treated sixteen and seventeen-year-olds as adults and excluded them from juvenile court jurisdiction. This lower age cut off for some states remained in place until recent years when "raise the age" advocacy efforts

low-level thefts to homicides—though in some limited instances some such matters could be prosecuted in adult courts where the youth would face adult sanctions.[56]

Judge Mack described juvenile courts as different from criminal courts as they were not arenas of conflict.[57] Instead, they employed non-adversarial programs of guidance for children gone astray to "save [them] from downward career."[58] Children, he and other proponents argued, were fundamentally good and amenable to redirection and change.[59] Therefore, it was ineffective and inappropriate to incarcerate them with adults.[60]

On the other hand, due process was seen by juvenile court proponents as too strict and formal, injecting an air of criminality into proceedings that were designed to be collaborative.[61] Thus hearings in juvenile courts were considered civil rather than criminal, and children were declared "delinquent" rather than "guilty," a judgment on status rather than culpability.[62]

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succeeded. *See* Brian Evans & Jeree Thomas, *2019 Legislative Reforms After Raise the Age*, CAMPAIGN FOR YOUTH JUST. (May 20, 2019), http://www.campaignforyouthjustice.org/2019/item/2019-legislative-reforms-after-raise-the-age (last visited Sept. 25, 2020) (reporting that in the last six years five states have passed laws to raise the age youth subject to juvenile court jurisdiction to eighteen and there are only four states with lower ages of juvenile court jurisdiction) [perma.cc/8UCJ-HTNX].

56. *See* BILCHIK, *supra* note 12, at 2 ("Children as young as 7, however, could stand trial in criminal court for offenses committed and, if found guilty, could be sentenced to prison or even to death.").

57. *See* Mack, *supra* note 11, at 122 (describing juvenile courts as being "curative," and aiming "to prevent the children from reaching that condition in which they have to be dealt with in any court").

58. *Id.* at 120.

59. *See, e.g.*, *id.* (discussing feasible procedures, which could have significant resulting effects on a child's character).

60. *See id.* at 117 (pointing out the benefits of juvenile court systems).

61. *See In re* Gault, 387 U.S. 1, 15–16 (1967).

> The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.

62. *See id.* at 15 ("[S]ociety's role was not to ascertain whether the child was 'guilty' or 'innocent,' but '[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from

These features, in the service of "child saving," thus justified abandonment of constitutional safeguards in favor of flexibility and informality.[63] The courts were run by "a fatherly judge" whose job was to "touch the heart and conscience of the erring youth" through friendly conversation and "paternal advice and admonition."[64] But as will be further discussed, "childhood" and "youth" were not singularly defined by age or evaluated as a monolithic category in the juvenile court movement.[65] Some young people—usually those seen or constructed as white—were considered more "redeemable" than others.[66]

In addition, youth advocates and others began to critique the nation's juvenile courts for using the concept of *parens patriae* to take control of children brought before the court.[67] Their supposed rehabilitative interventions were also debunked for lacking basis or efficacy.[68] And youth were being sanctioned in significant ways that deprived them of liberty without being afforded the same legal

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a downward career.'" (quoting Mack, *supra* note 11, at 120)).

63. *See* BILCHIK, *supra* note 12, at 2 ("[J]uvenile courts sought to turn delinquents into productive citizens—through treatment"); *see also* Robin Sterling Walker, *Fundamental Unfairness: In re Gault and the Road not Taken*, 72 MD. L. REV. 607, 610 (2013) (describing the "child saving" mentality that drove the original juvenile courts).

64. *In re Gault*, 387 U.S. at 26.

65. *See* Walker, *supra* note 63, at 623 (explaining that Black children were often excluded to avoid "waste of resources and a debasement of whites").

66. *See id.* at 660–76 (critiquing racialized constructions of youth that have influenced policing and juvenile court practices); *see also* Mae C. Quinn, *From Turkey Trot to Twitter: Puberty, Purity, and Sex Positivity*, 38 N.Y.U. REV. L. & SOC. CHANGE 51, 57 (2014) (describing nation's historic preoccupation with protecting the "purity" of "white" girls while criminalizing Black males).

67. *See* MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 210 (Cambridge U. Press 2003) (discussing that Boys' Court judges had full jurisdiction over juvenile adults); *see also* People v. Lattimore, 199 N.E. 275, 276 (Ill. 1935) (denying juvenile court original jurisdiction in criminal cases); *see also* Susan L. Brody, *Notice to Minors under the Illinois Juvenile Court Act: An Anomaly of Due Process*, 36 DEPAUL L. REV. 343, 348 (1987) (explaining the lack of due process for juveniles under the *parens patriae* system).

68. *See* Daniel Ross, *Rethinking the Road to Gault: Limiting Social Control in the Juvenile Court, 1957–1972*, 98 VA. L. REV. 425, 437–38 (2012) (recounting concerns of various reformers during the 1950's and 1960's, such as Paul Tappan, who argued post-adjudicative rehabilitative interventions were overly intrusive and failed to deliver meaningful treatment or assistance).

protections provided to adults, including by being transferred to adult court in some instances.[69]

B. Kent*,* Gault *& Their Progeny: Balancing Paternalism with Due Process*

Although racial bias was not challenged,[70] other juvenile court concerns percolated into litigation in the 1960's.[71] This resulted in a series of cases that went to the U.S. Supreme Court to push protections for children in state and local juvenile court systems.[72] The first was *Kent v. United States*.[73]

In *Kent*, decided in 1966, the actions of the District of Columbia Juvenile Court were challenged.[74] That court

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69. *See* WILLRICH, *supra* note 67, at 210 ("'Juvenile adults,' as the sociologists called them, occupied a kind of legal limbo. They were too old for the 'wise paternalism' of the juvenile court, yet too young to assume the full rights and obligations of adult male citizens."). Beyond the scope of this paper is youth prosecution for non-criminal actions such as truancy or alleged sexual misconduct. This phenomenon is an ongoing concern. However, because there does not appear to be a federal court system analog, it will not be recounted addressed here. For more on this subject as a historical matter, *see, e.g.*, Quinn, *supra* note 66, at 74 (describing overbroad laws at the turn of the last century used to police and prosecute youth seen as "wayward"); *see also* Cheryl Hicks, TALK WITH YOU LIKE A WOMAN: AFRICAN AMERICAN WOMEN, JUSTICE, AND REFORM IN NEW YORK, 1890–1935 12–19 (2010) (recounting, among other concerns, the problem of New York courts taking custody of Black girls when their families merely sought advice and assistance to address youthful experimentation or sexual activity on the part of their daughters). For more on modern concerns relating to prosecution of status offenders, *see, e.g.*, A.B.A., REPRESENTING JUVENILE STATUS OFFENDERS (2010) (compiling a collection of essays outlining concerns regarding modern policing and prosecution practices regarding status offenses, such as truancy).

70. *See* Walker, *supra* note 63, at 622–33 (critiquing 1960's juvenile court legal challenges for failing to sufficiently account for the experiences of Black youth or raise racial justice claims, resulting in a lost opportunity).

71. *See* Tamar R. Birckhead, *Juvenile Justice Reform 2.0*, 20 BROOK. J. L. & POL'Y 15, 39–40 (2011) (describing *Kent*, *Gault*, and *In re Winship* as the trio of cases that insisted upon due process for juvenile court proceedings).

72. *See id*. at 40 ("Together these cases reflected the view that . . . juvenile courts should be concerned with what a child *does*, rather than who a child *is*.") (emphasis in original).

73. Kent v. United States, 383 U.S. 541, 561–62 (1966) (holding a young person in juvenile court is constitutionally entitled to counsel and must be afforded an opportunity for a hearing).

74. *Id.* at 551.

transferred Kent to adult court for prosecution for a series of violent crimes without first affording him a meaningful hearing at which he could challenge the evidence supporting such an application.[75] The Court agreed that a young person facing the significant consequence of rejection by the juvenile court, and possible imprisonment as an adult, needed to be afforded due process, to include notice of the proof supporting transfer and an opportunity for counsel to contest it.[76]

Juvenile court trial rights were essentially born on May 15, 1967, when the Supreme Court issued its *In re Gault* decision.[77] Gerald Gault was found delinquent and committed to an Arizona state institution for up to six years without being provided an attorney, informed of his right to remain silent, served a written factual basis for his charges, or given an opportunity to confront his accuser.[78] The Court, quoting itself from the previous year, held that a juvenile court trial must "measure up to the essentials of due process and fair treatment[,]" and that Gault's treatment in the Arizona juvenile court system fell far short.[79]

The Court, while addressing the arbitrariness that had evolved in such venues, agreed with the fundamental goals of the juvenile courts.[80] But it believed that those goals would "not be impaired by constitutional domestication."[81] Thus, pursuant to *Gault*, children in juvenile court are now constitutionally

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75. *Id.* Interestingly, given the District of Columbia's unique structure as a territory, the "adult" court in question was the U.S. District Court for the District of Columbia. *See* Quinn & McLaughlin, *supra* note 2, at 527–28 (detailing the factual background of *Kent*).

76. *Kent*, 383 U.S. at 565; *see also* Quinn & McLaughlin, *supra* note 2, at 526–30 (describing the facts and findings in *Kent*).

77. *See In re* Gault, 387 U.S. 1, 41 (1967) (declaring the rights of a child in a delinquency proceeding); *see also* WILLRICH, *supra* note 67, at 213–14 (describing the timeline and impact of juvenile due process rights cases).

78. *Gault*, 387 U.S. at 10.

79. *See id.* at 30 ("We do not mean to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment" (quoting Kent v. United States, 383 U.S. 541, 562 (1966))).

80. *See Gault*, 387 U.S. at 19 ("Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.").

81. *Id.* at 23.

guaranteed notice of charges,[82] assistance of counsel,[83] ability to confront and cross-examine accusers,[84] and privilege against self-incrimination.[85]

Over the next few years, the Court further clarified trial process rights guaranteed to youth in juvenile court. For instance, while it held that state juvenile courts need not provide youth with jury determinations in connection with findings of guilt,[86] the proof beyond a reasonable doubt standard did apply to child prosecution matters.[87] *In re Winship* involved a youth who allegedly stole a woman's purse from a locker in New York.[88] Although New York juvenile court cases, like all others around the country, are considered civil in nature rather than criminal, the Court held that the highest burden of proof available at law still applied in such cases.[89] "[F]undamental fairness" with "an emphasis on factfinding procedures" was key.[90]

C. Modern State Level Shifts, Localized Movements, and Best Practices Focus

In the wake of these decisions, the American Bar Association along with the Institute of Judicial Administration, supported the development of Juvenile Justice Standards.[91] The drafting project was hosted at New York University School of Law, beginning in 1971, and involved hundreds of juvenile judges, youth justice

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82. *Id.* at 33–34.

83. *Id.* at 41.

84. *Id.* at 57.

85. *Id.* at 55.

86. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971) ("[O]ne cannot say that in our legal system the jury is a necessary component of accurate factfinding.").

87. *See In re* Winship, 397 U.S. 358, 368 (1970) (holding that due process requires juvenile proceedings be proved beyond a reasonable doubt).

88. *Id.* at 360.

89. *Id.* at 366.

90. *Id.* at 363; *see also McKeiver*, 403 U.S. at 543 (describing the standard from *Winship* as having an "emphasis on factfinding procedures").

91. *See* FLICKER, *supra* note 30, at 15 (explaining that the Institute of Judicial Administration initiated the project in 1971 and was joined by the American Bar Association in 1973 as a co-sponsor).

scholars, advocates, and other experts.[92] The idea was to help implement a juvenile court "due process model governed by equity and fairness," as well as advance greater expertise and accountability on the part of state juvenile courts.[93] The group ultimately published a multi-volume set of materials for use by state juvenile court stakeholders.[94]

Congress also passed the Juvenile Justice and Delinquency Prevention Act in 1974 (JJDPA).[95] The law had many features, including some important provisions relating to federal cases involving youth, as will be discussed infra Section IV.[96] However, it largely focused on state juvenile courts who, under the act, were required to undertake a range of reforms in order to receive federal funding, including deinstitutionalizing status offenders—youth who commit non-crimes, like truancy or curfew violations—and removing most youth from adult facilities even when found guilty of serious criminal acts.[97] The Act also created the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP), which was tasked with serving as an organizing hub to help states develop and implement best juvenile justice practices and collect data on state and local juvenile courts.[98]

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92. *See* INST. FOR JUD. ADMIN. & A.B.A., STANDARDS FOR JUVENILE JUSTICE ANNOTATED—A BALANCED APPROACH xvi–xviii (Robert E. Sheppard, Jr. ed., 2d ed. 1982), https://www.ncjrs.gov/pdffiles1/ojjdp/166773.pdf (last visited Sept. 25, 2020) (discussing the drafting process) [perma.cc/ZH5K-KBVD].

93. *Id.* at xviii.

94. *See id.* at xxv (describing the other resources that can be used by state juvenile court stakeholders).

95. Juvenile and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended at 34 U.S.C. § 11101).

96. *See infra* Section IV.

97. *See* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 697–98 (1991) ("The Federal Juvenile Justice and Delinquency Prevention Act of 1974 required states to begin a process of removing noncriminal offenders from secure detention and correctional facilities."). Robert W. Sweet Jr., *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389, 403 (1991) (providing analysis of treatment of status offenders in the 1960s and 1970's); *see also* A.B.A., REPRESENTING JUVENILE STATUS OFFENDERS 67 (2010) (outlining concerns regarding modern policing and prosecution practices regarding status offenses).

98. *See About OJJDP*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://ojjdp.ojp.gov/about (last visited Aug 31, 2020) (explaining that the agency was created "to support local and state efforts to prevent delinquency and improve the juvenile justice system" and that it "accomplishes its mission by supporting

Many states and territories further reviewed their laws and implemented or amended their juvenile codes to comply with the due process mandates of *Kent*, *Gault*, and *Winship*.[99] These modern juvenile code revisions generally included purposes provisions, which focused on both child protection and constitutional rights.[100] Some localities also began rethinking formal charges in low level matters, creating pre-trial diversion programs to cover charges beyond status offenses.[101] However, to be sure, other state juvenile courts were resistant to change or providing greater protections for youth.[102] And some jurisdictions used the due process movement to

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states, local communities, and tribal jurisdictions in their efforts to develop and implement effective programs for juveniles") [perma.cc/TS69-BVFM]; *see also* NAT'L RSCH. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 282 (Richard Bonnie et al. eds., 2013) (noting that the creation of OJJDP in 1974 "reflected a new federal commitment to help state and localities strengthen their juvenile justice systems to make them more fair and effective").

99. *See* NAT'L RSCH. COUNCIL, *supra* note 98, at 31 (recounting that during this period law makers revisited juvenile law and practices in light of "principles of justice and dealing fairly with young offenders"); *see also Juvenile Code Revisions Clear House Committee*, QUAD CITY TIMES, Feb. 17, 1977, at 11 (reporting on progress of Iowa Juvenile Code rewrite); *see also Juvenile Code Views*, SUBURBANITE ECONOMIST, May 17, 1973, at 4 (reporting on the state of Illinois Juvenile Court Act, which went into effect in 1973 in order to bring greater uniformity to juvenile court proceedings and "protect the rights of juveniles"); *see also Future of Juvenile Justice*, ST. LOUIS POST DISPATCH, Nov. 5, 1972, at 34 (reporting on findings of Task Force calling for revisions to state's Juvenile Code).

100. *See* RICHARD LAWRENCE & CRAIG HEMMINS, JUVENILE JUSTICE: A TEXT/READER at 29–30 (Jerry Westby ed., 2008) (describing how in the late 1960's some jurisdictions began to revisit their purposes provisions in light of new guidance suggesting new juvenile law focus on care and legal rights).

101. *See* S'Lee Arthur Hinshaw II, *Juvenile Diversion: An Alternative to Juvenile Court*, 1993 J. DISP. RESOL. 305, 315 (1993) ("By the mid-1970s, hundreds of diversion programs had appeared across the country."); *see also* Malcolm W. Klein, *Deinstitutionalization and Diversion of Juvenile Offenders: A Litany of Impediments*, 1 CRIME & JUST.: ANN. REV. 145, 150 (1979) (defining diversion programs).

> Two projects report that only 42 and 43 percent of their referrals, respectively, come from the justice system; another reports 67 and 57 percent of the referrals coming from the justice system in a program in which the police officers themselves say that only a quarter of the cases were diverted from formal processing. Such data leave little doubt of the dimensions of the situation. Far too many referrals come from sources—most often the schools—that are not justice related.

102. *See* Birckhead, *supra* note 71, at 39 ("The court was run informally and few procedural protections were afforded to juveniles.").

justify harsher sanctions for youth or adopt laws that allowed more youth to be transferred to adult courts.[103]

Indeed, throughout the 1980s and some of the 1990s, in reaction to reportedly rising crime rates, many states adopted "get tough" provisions relating to youthful repeat offenders and those charged with serious crimes.[104] Under the banner of "adult crime, adult time," they moved away from the treatment that had previously defined juvenile justice and toward heavier consideration of the offense committed.[105] New laws enumerated offenses which automatically disqualified children from juvenile court and instead relegated them to adult criminal courts.[106] Additionally, judicial waiver statutes allowed judges to transfer youth to the adult system.[107] As borne out by data collected and

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103. *See id.* at 43 ("[S]anctions became increasingly punitive for young offenders . . . ."); *see also* PATRICK GRIFFIN, DIFFERENT FROM ADULTS: AN UPDATED ANALYSIS OF JUVENILE TRANSFER AND BLENDED SENTENCING LAWS, WITH RECOMMENDATIONS FOR REFORM 5 (National Center for Juvenile Justice 2008) (describing how in the 1970s some states expanded juvenile transfer practices).

104. *See* Julianne Scheffer, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment with Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 509–10 (1995) (recounting shift in juvenile code provisions exposing youth to imprisonment); *see also* Kelly Keimig Elsea, *The Juvenile Crime Debate: Rehabilitation, Punishment or Prevention,* 5 KAN. J. L. & PUB. POL'Y 135, 137–38 (1995) (noting enactment of new laws in late 1970's, into the 1980's, allowing for more youth to be treated as adults for purposes of prosecution).

105. *See* Perry Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America,* 15 J. OF GENDER, RACE & JUST. 281, 281–82 (2012) ("During the 1990s, nearly every state in the country enacted laws that made it easier to try kids as adults, expanded criminal court sentencing authority over juvenile offenders, and modified or eliminated juvenile court confidentiality laws."); *see also* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 699–718 (1991) (summarizing the changes in juvenile court).

106. *See* Moriearty & Carson, *supra* note 105, at 300 (describing the "get tough" laws which had the harshest impact on youth of color).

107. *See id.* at 298 ("Between 1992 and 1997 alone, legislatures in forty-five states enacted or enhanced waiver laws that made it easier to transfer juvenile offenders to the criminal justice system.").

maintained by OJJDP,[108] all of these actions disproportionately impacted Black and Brown youth.[109]

Heading into the twenty-first century, however, juvenile courts and culture began to shift again in several important ways. First, across the country many states and localities are seeking to stem the tide of disproportionate minority contact (DMC) with the juvenile justice system.[110] This phenomenon involves over-representation of youth of color at time of arrest, in juvenile delinquency proceedings, secure detention centers, and placed long-term outside of their homes.[111] Although the problem persists,[112] many jurisdictions have embraced a range of DMC-reduction strategies.[113] This has been in part driven by

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108. Indeed, as the JDPA was amended over time and will be further described below, OJJDP became tasked with monitoring disproportionate minority contact and confinement. *See, e.g.*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, EVALUATION OF THE DISPROPORTIONATE MINORITY CONFINEMENT INITIATIVE: FLORIDA FINAL REPORT v (1996), https://www.ncjrs.gov/pdffiles/dmc-fl.pdf (last visited Sept. 25, 2020) (noting for Florida that "major findings were that African-American youth were overrepresented at every stage of the juvenile justice process") [perma.cc/6FE9-MFES].

109. *See* Moriearty & Carson, *supra* note 105, at 300 ("These so-called 'get tough' laws of the 1990s had by far the harshest impact on youth of color . . . [and] disparities soared during the 1980s and 1990s."); *see also* Kristin Henning, *Criminalizing Ordinary Adolescent Behaviors in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 425 (2013) ("[W]hile there are no national data on the number of youth transferred to adult court on the basis of prosecutorial waivers, evidence demonstrates that youth of color are disproportionately represented in the criminal justice system.").

110. *See* JOSH ROVNER, SENTENCING PROJECT POLICY BRIEF: DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 1 (2014), https://www.sentencingproject.org/publications/disproportionate-minority-contact-in-the-juvenile-justice-system/ (last visited Sept. 25, 2020) (describing emergence of DMC reduction movement in 1980s) [perma.cc/TS9B-XDXE].

111. *See What is R.E.D?*, W. HAYWOOD BURNS INST. FOR JUST., FAIRNESS, & EQUITY, https://www.burnsinstitute.org/what-is-red/ (last visited Aug. 31, 2020) (describing phenomenon of racial and ethnic disparity in thirty one of sixty three state juvenile justice systems evaluated) [perma.cc/Z7GC-5ZEM].

112. *See* Kim Taylor-Thompson, *Girl Talk—Examining Racial and Gender Lines in Juvenile Justice*, 6 NEV. L.J. 1137, 1140 (2005–06) (describing criminalization of girls of color for many ordinary adolescent behaviors).

113. *See, e.g.*, MINNESOTA MANAGEMENT AND BUDGET, RESULTS FIRST: JUVENILE JUSTICE BENEFIT COST ANALYSIS 16–19 (2018), https://mn.gov/mmb-stat/results-first/juvenile-justice-report.pdf (last visited Sept. 25, 2020) (outlining concerns about ongoing racial disparities across domains in the Minnesota juvenile justice system and efforts to address overrepresentation) [perma.cc/83KC-AN7T].

mandates pursuant to the amended JJDPA.[114] They required the creation of juvenile justice State Advisory Groups (SAGs), data collection, and affirmative steps to reduce disparities in order to maintain federal funding for juvenile courts.[115] Working with groups like the Annie E. Casey Foundation and W. Haywood Burns Institute, many local systems have created structures to help divert youth from formal court proceedings and dispositions that remove them from their families and communities.[116] For instance, starting in 1992, the Casey Foundation funded efforts within individual local juvenile courts to track, monitor, and seek to reduce racial disparities in pre-trial detention determinations.[117] The project, known as the Juvenile Detention Alternatives Initiative (JDAI), was launched with five different demonstration sites and its lessons have since been deployed across the country to help lower the number of unnecessary pre-trial juvenile court detentions[118]—with an emphasis on racial justice and reducing racial bias in state juvenile justice proceedings.[119] More recently,

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114. *See* ROVNER, *supra* note 110, at 8 ("To be eligible for funding under the JJDPA, the law requires states to 'address' DMC . . . .").

115. *See* U.S. DEP'T OF JUST., EVALUATION OF THE DISPROPORTIONATE MINORITY CONFINEMENT INITIATIVE: FLORIDA FINAL REPORT at v (1996) ("The disproportionate minority confinement (DMC) mandate of the Juvenile Justice and Delinquency Prevention Act requires States to develop and implement strategies to address and reduce the overrepresentation of minority youth in secure facilities."); *see also* COAL. FOR JUV. JUST., BUILDING STATE ADVISORY GROUP CAPACITY: A TOOLKIT FOR EFFECTIVE JUVENILE JUSTICE LEADERSHIP (2014) (offering guidance to local stakeholders seeking to improve local juvenile justice systems by way of a written "toolkit" funded by OJJDP).

116. *See What is R.E.D?*, *supra* note 111 (offering trainings for state juvenile justice staff and other stakeholders); *see generally*, *Strategies*, ANNIE E. CASEY FOUND., https://www.aecf.org/work/ (last visited Aug. 31, 2020) (providing description of various juvenile justice projects intended to reduce the use of secure detention and incarceration) [perma.cc/EGU4-P6XT].

117. ANNIE E. CASEY FOUND., REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION 4 (Eleanor Hinton Hoytt et. al., eds. 2003).

118. *Id.* at 5–9; *see also, e.g.*, RICHARD MENDEL, BEYOND DETENTION: SYSTEM TRANSFORMATION THROUGH JUVENILE DETENTION REFORM 10 (2007) (describing the JDAI project's growth from its initial demonstration locations to "being implemented in approximately 80 jurisdictions in 20 states and the District of Columbia").

119. *See* MENDEL, *supra* note 118, at 63 (reporting that "all [JDAI] sites strive to identify and remove biases (both structural and human) that produce racial disparities in detention").

concerns about bias have expanded beyond race to ethnicity under the title of Reducing Ethnic Disparities (RED).[120]

Second, youth advocates and juvenile justice stakeholders have become more attuned to social science findings relating to behavioral psychology and adolescent brain development literature.[121] Drawing on the teachings of U.S. Supreme Court cases including *Roper v. Simmons*,[122] *Graham v. Florida*,[123] and *Miller v. Alabama*,[124] juvenile counsel and courts alike have shifted their thinking from seeing youth as simply miniature adults to recognizing their distinctly different risk-taking and decision-making processes.[125] Relatedly, many are now much more mindful of the psychological and physical trauma endured by most youth charged with crimes.[126] Those working with such young people, in many instances, seek to employ trauma-informed practices including positive behavioral supports and strength-based engagements to identify youth strengths,

120. *See* Juvenile Justice Reform Act of 2018, Pub. L. No. 115-386, 88 Stat. 1109 (codified as amended at 34 U.S.C. § 11101) (reauthorizing and amending the JJDPA of 1974 to include, among other things, provisions relating to RED); *see also What is R.E.D?*, *supra* note 111 (explaining range of problem practices that result in RED).

121. *See* Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking,* 23 PSYCH., PUB. POL'Y & L. 410, 411 (2017) (outlining ways that psychology and neurobiology have informed both U.S. Supreme Court jurisprudence relating to youth and policy decisions around the country); *see also* Richard Bonnie & Elizabeth Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22 CURRENT DIRECTIONS IN PSYCH. SCIENCE 158, 160 (2013) ("In combination, behavioral and neurobiological research on adolescence have played an important role in advancing policies that recognize the immaturity of young offenders in responding to juvenile crime.").

122. Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding the imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed to be unconstitutional).

123. Graham v. Florida, 560 U.S. 48, 82 (2010) (holding juvenile offenders may not be sentenced to life without parole for non-homicidal crimes).

124. Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding juvenile offenders may not be sentenced to life without parole for homicide offenses).

125. *See* Cara Drinan, *The Miller Revolution*, 101 IOWA L. REV. 1787, 1789 (2016) ("Many have called for a re-examination of juvenile justice practices across the board in the wake of *Miller*.").

126. *See* Elizabeth S. Scott, *Children Are Different: Constitutional Values and Justice Policy*, 11 OHIO ST. J. OF CRIM. L. 71, 103 (2013) (attributing the Supreme Court's modern line of juvenile justice cases to an increasing understanding of the role that developmental science play in adolescent offending).

acknowledge successes, and more collaboratively engage with young people and their families.[127]

For example, the National Center for Mental Health and Juvenile Justice has released a resource guide to assist juvenile court lawyers, probation officers, and judges to prevent them from retraumatizing the youth and families who find themselves within such systems.[128] And the National Council of Juvenile and Family Court Judges has not only declared that all juvenile courts should be "trauma-informed" in their practices, but provides professional peer assessments of state court judges to provide feedback on performance and encourage more youth and family centered approaches.[129]

Finally, there is greater appreciation for the special role of juvenile defenders and child-centered prosecutors. Decades after the *Gault* decision, questions and concerns remained about the right to and role of counsel for kids charged with wrongdoing.[130]

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127. *See, e.g.*, NAT'L CONF. OF STATE LEGISLATURES, TRAUMATIC BRAIN INJURY REPORT (2019) (sharing data and resources for juvenile justice stakeholders, to assist in their understanding of juvenile traumatic brain injury); *see also* Precious Skinner-Osei, Laura Mangan, Mara Liggett, Michelle Kerrigan, & Jill S. Levenson, *Justice-Involved Youth and Trauma-Informed Interventions*, 16 JUST. POL'Y J. 1, 1 (2019) ("Juvenile justice service systems should work to implement trauma-informed interventions that address the needs of youth with mental health and trauma related disorders.").

128. *See* NAT'L CTR. FOR MENTAL HEALTH & JUV. JUST., TRAUMA AMONG YOUTH IN THE JUVENILE JUSTICE SYSTEM 12 (2016), http://jjie.org/wp-content/uploads/2018/02/Trauma-Among-Youth-in-the-Juvenile-Justice-System-for-WEBSITE.pdf (last visited Sept. 25, 2020) (analyzing the benefits and challenges of a trauma-informed juvenile justice system while providing guidance from the field) [perma.cc/G8CG-XDJM].

129. *See* NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, *Trauma-Informed Courts*, https://www.ncjfcj.org/child-welfare-and-juvenile-law/trauma-informed-courts/ (last visited Aug. 29, 2020) ("All judges should appropriately engage families, professionals, organizations, and communities to support effectively child safety, permanency, well-being, victim safety, offender accountability, healthy family functioning, and community protection.") [perma.cc/D2GY-JSKT].

130. *See* A.B.A. JUV. CTR., JUV. L. CTR. & YOUTH L. CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 15–17 (Patricia Puritz et al. eds., 1995) (studying right to and role of juvenile defenders in localities across the country through funding from the federal Office of Juvenile Justice and Delinquency Prevention); *see also* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Matters*, 14 LEWIS & CLARK L. REV. 771, 787 (2010) (noting the persistence of paternalism over zeal that permeated youth representation post-*Gault*).

Only a few jurisdictions, like the District of Columbia, maintained specialized juvenile defender units in the 1980s focused on the provision of quality representation for kids in conflict with the law.[131] Thus, in the early 1990s the American Bar Association (ABA) along with the Juvenile Law Center and Youth Law Center undertook a national study to shed light on the problem of sub-standard juvenile defense practices in juvenile courts.[132]

Shortly thereafter, the National Juvenile Defender Center (NJDC) was established to lift up the importance of juvenile defense representation and offer yearly trainings to advance zealous, youth-centered advocacy in the nation's juvenile courts.[133] Today, many localities across the country have individual attorneys or entire specialized juvenile defense units providing holistic representation for youth on the state level.[134] Such child-centered advocacy may include intervention from time of first police contact to adjudication, to appeals, post-disposition, and re-entry.[135]

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131. *See* PATRICIA PURITZ & WENDY WAN LONG SHANG, OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, NCJ NO. 171151, INNOVATIVE APPROACHES TO JUVENILE INDIGENT DEFENSE, at 5 (1998) (describing early commitment of the Public Defender Service for the District of Columbia (PDS) to quality youth representation, including the launch of its Juvenile Services Program in the 1980's).

132. *See* CALL FOR JUSTICE, *supra* note 130, at 41–42 (reporting on substandard representation practices observed in the 1990's in juvenile court matters); *see also* N. Lee Cooper, Patricia Puritz, & Wendy Wan Long Shang, *Fulfilling the Promise of In Re Gault: Advancing the Role of Lawyers for Children*, 33 WAKE FOREST L. REV. 651, 667–79 (1998) (cataloging efforts to raise the bar for lawyers representing children accused of crimes).

133. *See About NJDC*, NAT'L JUV. DEF. CTR., https://njdc.info/about-njdc/ (last visited Aug. 30, 2020) (explaining that NJDC was "created in the late '90s to respond to the critical need to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system") [perma.cc/36E2-9RCF].

134. *See* NAT'L JUV. DEF. CTR., DEFEND CHILDREN: A BLUEPRINT FOR EFFECTIVE JUVENILE DEFENDER SERVICES 25 (2016) (acknowledging recent development of the Youth Advocacy Division of the Massachusetts Committee for Public Counsel Services, Miami-Dade Public Defender's Office Juvenile Defense Unit, and San Francisco Public Defender Juvenile Unit); *see also* NAT'L JUV. DEF. CTR., PROTECTING RIGHTS, PROMOTING POSITIVE OUTCOMES: POST-DISPOSITIONAL ACCESS TO COUNSEL 2–4 (2014) (listing various organizations, including the Juvenile Protection Division of the Maryland Public Defender's Office, and New York City's Legal Aid Society, as offering holistic defense representation).

135. *See* NAT'L JUV. DEF. CTR., INNOVATION BRIEF: EARLY APPOINTMENT OF COUNSEL 2 (2013) (reporting on involvement of youth counsel in delinquency

Similar youth-centered moves can be seen in many prosecutors' offices around the country, where district attorneys are stepping beyond their traditional roles.[136] Work by clinician-scholars like Kristin Henning have helped shed light on the ways in which local juvenile court prosecutors have been criminalizing normal adolescent behaviors, particularly in communities of color.[137] And policy statements and best practices guides by the National District Attorney's Association have called upon juvenile prosecutors to expand their portfolios to do more than merely react to youth wrongdoing with prosecution.[138] Rather, they are encouraged to embrace their roles as community change agents to support young people through diversion and other non-punitive programming attuned to youth needs and capacities.[139]

IV. Submerged "Federal Juvenile Court" Story

As the country's juvenile justice story has unfolded in the decades following *Allen*, developments within the U.S. District courts have been largely overlooked. And yet, even after the rise of the juvenile court movement, youth have been prosecuted in our federal system.[140] This has occurred not just in matters where it

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matters even before first appearance, such as in New Jersey juvenile courts); *see also* NAT'L JUV. DEF. CTR., APPEALS: A CRITICAL CHECK ON THE JUVENILE DELINQUENCY SYSTEM 1–2 (2014) (describing work of groups like the Juvenile Division of the Office of the Ohio Public Defender, which handles direct appeals and re-entry work for juvenile court-involved youth).

136. *See* Kristin N. Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 458 (2013) (discussing the New Orleans District Attorney Office's work with the American Bar Association to expand and improve its diversion program).

137. *See generally id.*

138. *See Juvenile Justice*, NAT'L DIST. ATT'YS' ASS'N, https://ndaa.org/programs/juvenile-justice/ (last visited Aug. 30, 2020) ("Prosecutors no longer merely react to juvenile crime . . . [the] NDAA updated the National Juvenile Prosecution Standards and the Juvenile Prosecution Policy Positions and Guidelines in consideration of th[is] balanced approach.") [perma.cc/RU7D-92NU].

139. *See id*. (noting that now prosecutors "initiate strategies to prevent [crime]").

140. *See* U.S. SENT'G COMM'N, YOUTHFUL OFFENDERS IN THE FEDERAL SYSTEM

was determined adult prosecution for federal charges would be appropriate, as was described in the earlier essay in this series.[141] Instead, for years, Article III courts have been overseeing what might be considered the equivalent of state juvenile court delinquency proceedings—somewhat invisible federal juvenile courts.[142]

A. Early Federal Juvenile Case Processes and Examples

As noted, since the formal establishment of our federal court system in 1789,[143] youth were seen as proper subjects for federal prosecution.[144] Different from what happened in state court systems at the turn of the last century, however, youth prosecutions in U.S. District Courts continued to be addressed in light of the common law for nearly fifty years more.[145] As explained by one federal district court, "Prior to the adoption of the Federal Juvenile Delinquency Act of 1938, the Federal criminal law was lacking in any comprehensive provisions on the subject of juvenile delinquency. The juvenile offender against the laws of the United States was treated and prosecuted in the same manner as an adult."[146]

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1 (2017) ("[Y]outhful offenders account for about 18 percent of all federal offenders sentenced between fiscal years 2010 and 2015 . . . .").

141. *See* Quinn & McLaughlin, *supra* note 2, at 537–38 ("Indeed, while it is not common knowledge, our federal district courts process a sizable number of young people each year.").

142. *See id.* (describing the federal juvenile criminal process as largely invisible).

143. *See* Judith Resnik & Kevin Walsh, *Article III, Section 2 By Judith Resnik and Kevin C. Walsh*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/article-iii/section/203 (last visited Aug. 30, 2020) (highlighting the Congress's role in establishing the federal judicial system in 1789) [perma.cc/2P3Q-DAAJ].

144. *See* Quinn & McLaughlin, *supra* note 2, at 539 ("[Y]outh have faced prosecution, transfer, and adult sentencing in our federal court system since our nation's founding.").

145. *See id.* at 539–40 (describing approaches to federal youth prosecution prior to passage of the 1938 Federal Juvenile Delinquency Act); *see also* BARRY FELD & DONNA BISHOP, THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 428 (2011) ("The juvenile court movement, however, remained a state phenomenon in the early twentieth century.").

146. United States v. Borders, 154 F. Supp. 214, 215 (N.D. Ala. 1957).

The Federal Children's Bureau monitored and collected data relating to juvenile justice issues, including cases prosecuted in federal court in the early 1900's.[147] As a result, some see it as a precursor to OJJDP.[148] Reports from Bureau investigator Ruth Bloodgood show that most early twentieth century federal juvenile cases involved children who had stolen mail (postal offenses), items from trains (interstate commerce offenses) or cars (Dyer Act violations).[149] At the time, data for juvenile cases was inconsistently reported.[150] A few years later, information contained in a report by the Wickersham Commission would reveal that Bloodgood's report had missed alleged immigration offenses entirely, which comprised a substantial portion of juvenile cases.[151]

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147. The Federal Children's Bureau, an arm of the U.S. Labor Department, was conceptualized during President Theodore Roosevelt's administration as part of the movement to redeem and reform the nation's wayward youth. *See* Quinn, *supra* note 66, at 58 (explaining the impetus for the creation of the Children's Bureau). But at least some of Roosevelt's "child saving" rhetoric suggested concern for white children as a means of protecting the purity of the white race and family. *Id.* (citing KRISTE LINDENMEYER, "A RIGHT TO CHILDHOOD": THE U.S. CHILDREN'S BUREAU AND CHILD WELFARE, 1912–46 at 16, 145 (1997)). Not all Children's Bureau staff—almost all women—shared such fears or understandings of a "normal life". *See id.*; *see also* Mae C. Quinn, *In Loco Juvenile Justice: Minors in Munis, Cash from Kids, and Pro Se Adolescent Advocacy*, 2015 BYU L. REV. 1247, 1254–55 (2015) (describing the efforts by Emma Lundberg of the Federal Children's Bureau to hold juvenile courts to a high standard). Author Mae Quinn is writing about the household relationship between Lundberg and the Bureau's Director, Katharine Lenroot as part of her continuing Feminist Legal Realism project.

148. *See* Bonnie, *supra* note 98, at 282 n.1 (noting the parallel between the Children's Bureau of 1912 and today's OJJDP).

149. *See generally* RUTH BLOODGOOD, FEDERAL COURTS AND THE DELINQUENT CHILD: A STUDY OF THE METHODS OF DEALING WITH CHILDREN WHO HAVE VIOLATED FEDERAL LAWS (1922) (detailing throughout her entire piece the different charges juveniles frequently faced in the early 1900s).

150. *See* NAT'L COMM'N ON L. OBSERVANCE & ENF'T, REPORT ON THE CHILD OFFENDER IN THE FEDERAL SYSTEM OF JUSTICE 34 (1931) [hereinafter NAT'L COMM'N ON L. OBSERVANCE] ("These conditions explain the face that save in a few places and under special conditions, there was no cordial, effective cooperation between these branches of the federal service.").

151. BLOODGOOD, *supra* note 149. Note that reporting practices almost certainly distorted these facts to some extent. Bloodgood acknowledges that each and every postal offense was reported by post offices, but courts did not consistently report every other juvenile offense. Her data showed many more postal offenses than other federal law violations. While mail crimes certainly put many children in federal crosshairs, its prevalence was likely overstated in her report. In 1931, the Wickersham Commission reported that postal offenses

After the passage of the Eighteenth Amendment, prohibition offenses constituted the bulk of juvenile charges in federal courts.[152] The Wickersham Commission, which tracked federal juvenile prosecutions from June to December of 1930, found that prohibition offenses comprised 44% of those prosecutions and immigration offenses comprised 21%, a ratio of about two-to-one.[153] Strikingly, more than half of juvenile prohibition offenders were released with no disposition, while 80% of juvenile immigration offenders were sentenced to imprisonment.[154]

The basic procedure for bringing a juvenile case before a federal court was identical to that of adults.[155] It began with a presentation of facts to the U.S. attorney followed by a preliminary hearing in front of a U.S. commissioner where bond was set.[156] The case was then presented to the grand jury for indictment, or via information in the case of misdemeanors.[157] The child's case would be open to the public and typically by jury.[158]

Some federal district courts appeared reluctant to handle children the same as adults, as evidenced by the fact that some

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comprised only 5% of federal law violations by children, surpassed by prohibition (44.2%), immigration (21.9%), and motor vehicle theft (a.k.a. Dyer Act violations, 17.5%). NAT'L COMM'N ON L. OBSERVANCE, *supra* note 150, at 34. *See also* DEP'T OF JUST., ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 67 (1910) (reporting on the business of the Department of Justice during the 1910 fiscal year).

152. *See* Fred R. Johnson, Commentary, *Report on the Child Offender in the Federal System of Justice*, 30 MICHIGAN L. REV. 110, 110 (1931) (summarizing the findings of the report).

153. NAT'L COMM'N ON L. OBSERVANCE, *supra* note 150, at 34.

154. *See id.* at 36–37 (explaining the attitudes held by the public regarding the National Prohibition Act). It should be noted that over half of juvenile immigration arrests were made in two relatively new federal districts in Texas. Bloodgood points out that federal judges were hesitant to send children far from their families, so there may have been a vast distance between those district courts and suitable juvenile institutions, resulting in increased incarceration in adult facilities.

155. As noted by Children's Bureau Director Grace Abbott, "little children are still proceeded against in U.S. courts by the ordinary method of arrest, detention in jail with adults pending arraignment for bail, indictment by the grand jury, and final discharge or sentence of fine or imprisonment." *See* Feld and Bishop, *supra* note 145, at 428 (quoting Abbott's letter, transmitting Bloodgood's report to the Secretary of Labor).

156. BLOODGOOD, *supra* note 149, at 4.

157. *Id.*

158. *Id.*

developed their own, sometimes informal, ways to defer children to state courts.[159] By 1922, five of the eighty or so districts were routinely referring juvenile cases to state courts for processing, and two had developed agreements with juvenile courts to take all cases where a child violated federal law.[160] Alternatively, many federal courts deferred children to state juvenile courts by dropping federal charges.[161]

As explained by Bloodgood:

> For instance, in many cases of larceny of mail[,] the charge preferred [was] simply that of larceny or 'taking the property of another.' In some cases[,] the offense may involve both a State and a Federal charge, as in larceny from a post office located in a general store, merchandise also being stolen. In such cases[,] the State charge is often preferred and the Federal charge dropped, the Federal authorities considering the State prosecution sufficient.[162]

Otherwise, children in federal courts often mingled with adults in long pre-trial detention periods since district courts essentially traveled to different places around the district and children either had to wait for court to be held in their area or, if they did not live near a meeting place, find a way to travel to one.[163] If a child was found guilty in federal court, some judges adopted the practice of sentencing children to sit in the U.S. Marshal's

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159. *Id.* at 8.

> In one district the post-office inspector handled informally postal cases involving children, reporting each case, with his decision, to the district attorney, who usually concurred in the recommendation of the inspector and did not see the child . . . . In some cases reaching the grand jury, because of the youth of the offender, a finding of 'no bill' was returned. This amounts to a dismissal of the case, since no further court action is taken. In many cases the attorney did not wish to prosecute, even though a bill of indictment was returned, and he entered a petition to nolle prosequi—also a form of dismissal without trial.

160. *See* BLOODGOOD, *supra* note 149, at 6 (describing the informal practices by district courts and prosecutors); *see also* R. WHEELER & C. HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 23–25 (3d. ed. 1989) (tracking the development of the Federal court system and the number of district courts over time).

161. BLOODGOOD, *supra* note 149, at 3.

162. *Id.*

163. *See id.* at 4 (describing the hardship of attending hearings at a district court).

office for the rest of the day.[164] Others gave rather short sentences in the local jail, or, as was the preference in at least one city, the smaller county jail located outside the city.[165]

Federal court rules did not provide children with social investigations, pre-trial detention separate from adults, or, for a long time, probation.[166] Although probation was not provided for by statute, federal judges routinely placed children on probation until 1916 when the Supreme Court declared that district courts did not possess that power.[167] In contrast, every state had already provided for probation for youth.[168]

By 1932, a decade after Bloodgood reported on children in federal courts, the Wickersham Commission noted that children continued to be treated like adults while states had already largely shifted away from such a model.[169] And at least one commentator declared the Commission's report "shows conclusively that the government has hitherto failed to keep abreast of the times in dealing with the child delinquent."[170] The report recommended that measures be taken to move children out of federal courts entirely and into state juvenile courts.[171]

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164. *Id.* at 8.

165. *Id.*

166. *Id.* at 4–5 (describing which court services and dispositions were unavailable to juvenile defendants).

167. *See Ex parte United States*, 242 U.S. 27, 28 (1916) ("[T]he courts . . . have no inherent constitutional power to mitigate or avert [Congressionally imposed] penalties by refusing to indict them in individual cases."); *see also* BLOODGOOD, *supra* note 149, at 45–63 (illustrating the widespread use of probation by comparing the sentences imposed on juvenile offenders across eight different jurisdictions).

168. BLOODGOOD, *supra* note 149, at 5.

169. Johnson, *supra* note 152, at 110.

170. *Id.* at 111; *see also* J. M. McCallie, *Review of Report on the Child Offender in the Federal System of Justice by National Commission on Law Observance and Enforcement*, 22 J. CRIM. L. & CRIMINOLOGY 930–31 (1932).

> [W]hereas the Federal law, as it relates to juvenile offenders has been static, laws enacted by the several states, relative to the same class of offenders, have changed from year to year to meet the new conception—that the child offender has rights peculiar to children, and that it is the duty of the State for its own good and for the good of the child to do everything possible to salvage him.

171. J. M. McCallie, *supra* note 170, at 931.

B. Current Statutory and Procedural Scheme

In 1938, Congress finally passed the Federal Juvenile Delinquency Act (FJDA),[172] reportedly "with the realization that persons under the age of eighteen do not have mature judgment and may not fully realize the nature or consequences of their acts."[173] With the Act, the federal system officially acknowledged state juvenile court as an appropriate alternative venue for dealing with youthful violations of law.[174]

However, unlike the laws and procedures relating to the Chicago Juvenile Court, the FJDA in its original form did not contemplate special child-focused probation staff assigned to cases, special court rooms, or overall reorientation towards treatment and rehabilitation.[175] In addition, under the original act, the federal prosecutor retained exclusive power to determine whether a child would be offered juvenile rather than adult processes in federal court.[176]

Thus as enacted, the FJDA provided that when a child was charged with offenses against the United States, "he shall be prosecuted as a juvenile delinquent if the Attorney General in his discretion so directs and the accused consents to such procedure."[177] Meaning, if the prosecutor felt the child warranted exclusion from adult process, and the defense agreed,[178] then the

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172. Federal Juvenile Delinquency Act, ch. 486, 52 Stat. 764 (1938) (current version at 18 U.S.C. § 5031–5043); *see also* Sessions & Bracey, *supra* note 16, at 509–10 (examining the act's history).

173. United States v. Webb, 112 F. Supp. 950, 951 (W.D. Okla. 1953).

174. *See* CHARLES DOYLE, CONG. RSCH. SERV., RL30822, JUVENILE DELINQUENTS AND FEDERAL JUVENILE LAW: THE FEDERAL JUVENILE DELINQUENCY ACT AND RELATED MATTERS 2 (2004) ("Congress . . . authoriz[ed] the Department of Justice to return juveniles charged with violating federal law to the juvenile authorities of their home state.").

175. *Compare* Illinois Juvenile Court Act, 1899 Ill. Laws 133 (governing the Chicago Juvenile Court system) *and* CHI. BAR ASS'N, REPORTS OF OFFICERS AND COMMITTEES OF THE CHICAGO BAR ASSOCIATION 61 (1899) ("[The Illinois Juvenile Court Act's] fundamental idea is that the State must step in and exercise guardianship under such adverse social or individual conditions as develop crime."), *with* Federal Juvenile Delinquency Act of 1938.

176. Federal Juvenile Delinquency Act, ch. 486, 52 Stat. 764 (1938) (current version at 18 U.S.C. § 5031–5043).

177. *Id.*

178. Commentators have questioned whether a youth in federal court would ever prefer prosecution as an adult rather than special juvenile delinquency

youth would "be prosecuted by information on the charge of juvenile delinquency" meaning that "no prosecution [would] be instituted for the specific offense alleged to have been committed by him."[179]

From the perspective of at least one prominent federal prosecutor at the time, such an arrangement was "progressive" and a "far-reaching advance" for youth under the age of eighteen.[180] This was in part, he argued, because such cases contemplated "informal procedures" such as prosecution of youth without indictment by the grand jury.[181] Indeed, over time it became commonly understood that the Federal Rules of Criminal Procedure did not strictly apply to such cases and that judges were free to hold "hearings in chambers" for federal juvenile delinquency matters.[182]

In 1948, the Act was amended to provide district court judges with the authority to determine whether a youth could receive federal juvenile delinquency treatment versus adult criminal processes.[183] But heading into the second half of the twentieth century, juvenile delinquency proceedings in federal court remained confused and conflicted in their elements and goals.[184]

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processes. *See* Brandon Miller, *7 Top Pros and Cons of Juveniles Being Tried As Adults*, GREEN GARAGE, (Aug. 25, 2015), https://greengarageblog.org/7-top-pros-and-cons-of-juveniles-being-tried-as-adults (last visited Aug. 31, 2020) (noting a benefit of being tried as an adult is the constitutional guarantee to a jury trial) [perma.cc/Q47Q-PH3V]. *But see* Quinn & McLaughlin, *supra* note 2, at 560 (discussing "fast track" immigration cases).

179. Federal Juvenile Delinquency Act, ch. 486, 52 Stat. 764 (1938) (current version at 18 U.S.C. § 5031–5043); *see also* Barnes v. Prescor, 68 F. Supp. 127 (W.D. Mo. 1946) (quoting FJDA in effect in 1940's and acknowledging its deference to prosecutorial determination around juvenile treatment).

180. *See* Alexander Holtzhoff, *Some Problems of Federal Criminal Procedure*, 2 F.R.D. 431, 436–37 (1942) (describing the Federal Juvenile Delinquency Act as a "a vital and far-reaching advance in the treatment of juvenile delinquents in the Federal courts").

181. *Id.*

182. *Proceedings of the Institute of the Federal Rules of Criminal Procedure*, 5 F.R.D. 88, 96 (1945).

183. *See Webb*, 112 F. Supp. at 951–52 (describing FJDA's amendment, recodification at 18 U.S.C. 5032, and transfer hearing process); *see also* United States v. Jones, 141 F. Supp. 641 (E.D. Va. 1956) (noting that in 1948 the law changed to require court determination of the question of juvenile process or adult prosecution in federal court).

184. *See* United States v. Smith, 675 F. Supp. 307, 311 (E.D.N.C. 1987)

For instance, courts talked a great deal about wanting to protect youth from the stigma of having an adult federal conviction on their criminal record.[185] However, the delinquency process was limited to cases where life sentences or the death penalty were not possible.[186] And to advance the FJDA's ends, not only did district court judges take children into chambers to remove them from public onlookers in federal courtrooms—but sometimes to directly advise them, encourage them to waive formal jury trial rights for their own good, and potentially resolve juvenile cases in a speedy manner—often without provision of counsel.[187]

Even when such matters proceeded to trial on delinquency rather than adult charges, youth were housed with adult defendants while awaiting resolution of their cases.[188] Trials were not seen as a forum for finding youth guilty of a specific crime, but merely intended as an "adjudication of a status."[189] And whatever it meant to prove such a status, prosecutors were only required to meet the burden with a preponderance of the evidence and not guilt beyond a reasonable doubt.[190]

(commenting on the lack of substantive changes made by the 1948 amendments).

185. *See Jones*, 141 F. Supp. at 644 (declaring that it was in the "best interest" of youth to accept recommendations of a commissioner who recommends proceeding under federal juvenile delinquency procedures).

186. *See Webb*, 112 F. Supp. at 951–52 (quoting prior version of 18 U.S.C. § 5032)*; see also* Federal Juvenile Delinquency Act, Pub. L. No. 75-666, 52 Stat. 764, 765 (1938) (codified as amended at 18 U.S.C. § 5032 (2018)) (limiting Act's application to "[a] juvenile alleged to have committed one or more acts in violation of a law of the United States not punishable by death or life imprisonment, and not surrendered to the authorities of a state").

187. *See* Pamplin v. United States, 221 F.2d 557, 557–58 (10th Cir. 1955) (upholding sentence in juvenile delinquency matter after federal judge advised youth off the record in chambers and allowed youth to waive right to trial without any provision of counsel); *see also Jones*, 141 F. Supp. at 644 (agreeing with federal practice of judicial engagement with youth in juvenile delinquency matter without involvement of counsel).

188. *See* Barkman v. Sanford, 162 F.2d 592, 594 (5th Cir. 1947) (explaining that youth who availed themselves of federal delinquency processes would speed up case resolution by waiving grand jury proceeding and "spared weeks and months" of being in close quarters with adult offenders).

189. *See, e.g.*, United States v. Hoston, 353 F.2d 723, 724 (7th Cir. 1965) (referring to Congressional record for the FJDA and stating "such proceeding results in the adjudication of a status rather than a conviction of a crime").

190. *See* United States v. Borders, 154 F. Supp. 214, 216 (N.D. Ala. 1957) ("To sustain an adjudication of delinquency, most of the authorities require the same amount and kind of proof as would be required in an ordinary civil action.").

Additionally, since *mens rea* as a concept seemed to be more lax in federal delinquency proceedings, the common law infancy defense was also jettisoned.[191] Thus, in the case of twelve-year-old Jural Borders, the Fifth Circuit Court of Appeals held that his incapacity due to his youth was irrelevant to a federal delinquency determination.[192] Thus, his act of flipping a brake switch at a railyard under federal jurisdiction, resulting in extensive damage to several train cars that then derailed, reportedly justified his commitment under the FJDA.[193] For Borders, that meant being sent to a reform school until age twenty one.[194]

Indeed in the 1960s if deemed a federal delinquent, children were either placed on probation by the district court or ordered into the custody of the Attorney General, who might commit the child to any number of settings for "adjustment."[195] A commitment under the act could last until the child turned twenty-one or the maximum period of incarceration permitted for the underlying offense, whichever was shorter.[196] And the Attorney General apparently was permitted to employ any number of settings for FJDA commitments—from youth reformatories to adult prisons

191. *See* Fagerstrom v. United States, 311 F.2d 717, 720–21 (8th Cir. 1963) (suggesting, while not deciding, that incompetence to stand trial based upon mental incapacity might present a viable challenge in federal juvenile delinquency proceedings even if infancy did not).

192. *See* Borders v. United States, 256 F.2d 458, 459 (5th Cir. 1958) ("A proceeding against a juvenile under the Federal Juvenile Delinquency Act is not a criminal proceeding in which the government must show criminal capacity . . . .").

193. *See id.* (affirming the district judge's commitment of child under the FJDA).

194. *See id.* (upholding District Court's determination that youthful incapacity was irrelevant and affirming order to commit youth to "reform school until he was twenty-one years of age").

195. *See, e.g.*, Sonnenberg v. Markley, 289 F.2d 126, 128 (7th Cir. 1961) (noting the statutory option of either putting juveniles on probation or committing them to the Attorney General's custody for the purpose of "custody, care, subsistence, education, and training").

196. *See id.* (quoting the applicable law, which gave the court the discretion to commit a juvenile delinquent "for a period not exceeding his minority" and added that "[s]uch commitment shall not exceed the term which might have been imposed had he been tried and convicted of the alleged violation").

many miles away.[197] Some such facilities were run by states or private entities; some were federal facilities.[198]

For instance, Douglas Eugene Kemp of Arkansas, who as a child allegedly forged his name to a $157.20 U.S. Treasury Check to use in a grocery store, was moved around to several facilities during his three-year FJDA placement across multiple states.[199] This included one stint at a federal reformatory in El Reno, Oklahoma and another at the Federal Correctional Institution of Texarkana, Texas after his original case disposition in the Western District of Arkansas.[200] The youth's *pro se* habeas corpus application complaining about his placement with and treatment by officials in Texas was dismissed as being without merit.[201]

In the early 1960s William Virgil Fagerstrom, a Native American youth with an eighth-grade education, was similarly shuttled to different jurisdictions across the country based upon a federal juvenile delinquency finding that he was in possession of a stolen car on the Red Lake Reservation in Minnesota.[202] Because no state juvenile court had jurisdiction over the case, Fagerstrom was initially placed in the Federal Correctional Institution in Englewood, Colorado.[203] From there he was sent to Springfield, Missouri—where the federal Bureau of Prisons maintained a medical facility for mental health care.[204] As will be further

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197. *See* Suarez v. Wilkinson, 133 F. Supp. 38, 40 (M.D. Pa. 1955) (quoting 18 U.S.C. § 5034 as providing that the "Attorney General may designate any public or private agency or foster home for the custody, care, subsistence, education, and training of the juvenile during the period for which he was committed").

198. *See, e.g.*, *id.* at 38–39 (explaining that petitioner was committed originally to the Federal Correction Institution in Englewood, Colorado, and then transferred to the United States Penitentiary in Lewisburg, Pennsylvania).

199. *See* United States v. Kemp, 204 F. Supp. 941, 942 (W.D. Ark. 1962) (noting Kemp's transfer from a federal facility in Oklahoma to one in Texas).

200. *See id.* ("[H]e was delivered to the Federal Reformatory at El Reno, Oklahoma. Later he was transferred from the Reformatory to the Federal Correctional Institution at Texarkana, Texas . . . .").

201. *See id.* at 943 ("[A]n order is being issued today dismissing the petition of the defendant as failing to state any grounds of relief . . . .").

202. *See* Fagerstrom v. United States, 311 F.2d 717, 719–20 (8th Cir. 1963) (outlining Fagerstrom's movement between detention facilities).

203. *See id.* at 719 ("After Fagerstrom's adjudication he was first taken to the Federal Correctional Institution at Englewood, Colorado . . . .").

204. *See id.* ("[A]pparently in December of 1961—[he] was transferred to the United States Medical Center for Federal Prisoners in Springfield, Missouri.").

discussed below, Fagerstrom is one of many Native youth taken far away from Native lands and family connections over the decades to receive "treatment" at the hands of federal officials.

When the U.S. Supreme Court took up the case of Gerald Gault in 1967, to hold that the goal of alleged treatment did not justify any and all actions—including dispensing with due process—it failed to consider the plight of African-American youth.[205] But it also failed to address the problem of American Indian children being displaced from Native lands for federal juvenile commitments.[206] Nor did it talk about the high numbers of immigrant youth in federal courts.[207] Indeed, it did not meaningfully discuss the FJDA or federal juvenile delinquency proceedings at all.[208]

Gault's only reference to federal juvenile delinquency prosecutions was a footnote citing *United States v. Morales*. [209] Without describing the federal system's juvenile delinquency process, or any of the concerns described above, it cited favorably the *Morales* District Court's determination that due process involuntariness concerns apply even in the context of youth interrogations.[210] But *Morales* represented a relative outlier amongst nearly three decades of FJDA cases in terms of its concerns for specialized protections for youth.[211] And in its critiques and prescriptions regarding juvenile courts, Gault did not

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205. *See* Walker, *supra* note 63, at 608–09 ("The *Gault* Court . . . failed to fold the realities of the treatment of system-involved black children into its calculus of the process due in juvenile delinquency proceedings.").

206. *See id*. ("*Gault's* great deficiency is that it erected a flawed prototype that allowed future courts to turn a blind eye to race disparities in juvenile delinquency proceedings.").

207. *See id.* (arguing that fixing this prototype "will create an institutional environment in which a wide range of players can work more effectively toward a wide range of cures for many of the problems.").

208. *Gault*, 387 U.S. at 10 (1967) (limiting the courts consideration to six specifically enumerated issues).

209. *See id*. at n.96 (citing *Morales*, 233 F. Supp. 160, 170 (D. Mont. 1964)).

210. *See id.* (noting, with apparent approval, the lower court's decision).

211. *See, e.g.*, United. States. *ex rel.* Reck v. Ragen, 274 F.2d 250, 251–52 (7th Cir. 1960) (upholding use of statement obtained from a minor with "dull-normal" intelligence who was questioned by law enforcement over the course of several days while in custody).

squarely take on shortcomings in the FJDA or the heartland of problematic federal juvenile delinquency practices.[212]

Nevertheless, in 1974, the FJDA was amended by way of the Juvenile Justice and Delinquency Prevention Act (JJDPA).[213] Acknowledging that the federal court system's treatment of youth was not developing in sync with states and localities, or constitutional concerns, the amendments created an express preference for state juvenile court treatment, if possible, and required a more formal "certification" to the court by federal prosecutors to demonstrate that state juvenile court prosecution was not possible or appropriate.[214]

Drafters also claimed the 1974 amendments would "provide basic procedural rights for juveniles who come under federal jurisdiction and to bring federal procedures up to the standards set by various model acts, many state codes and court decisions"[215] Thus, the new provisions provided youth with rights to a speedy trial and to counsel.[216] It expanded the reach of juvenile treatment to even capital crimes and those matters where a life sentence might otherwise be sought.[217] In addition, it made clear that only youth age sixteen or over, if eligible for federal court prosecution, could face transfer to the adult prosecution docket.[218]

Yet the "formal" certification process in most circuits did not result in judicial power to grant or deny federal court access for juvenile delinquency proceedings.[219] Rather, the vast majority held

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212. *See Gault*, 387 U.S. at 10 (failing to include federal juvenile delinquency practices among the issues considered).

213. *See* 42 U.S.C. § 5601 (1974) (recognizing the need for reform).

214. *See* United States v. Cuomo, 525 F.2d 1285, 1286–90 (5th Cir. 1976) (describing the requirements of the heightened certification and hearing process).

215. *See id.* at 1293 n.20 (quoting Senate Report that accompanied the 1938 Act).

216. *See* United States v. Smith, 675 F. Supp. 307, 311 (E.D.N.C. 1987) ("The 1974 Act conferred certain rights upon juveniles, including the right to counsel, the right to be confined in a facility near the juvenile's home, and the right to a speedy trial.").

217. *See id.* ("The 1974 Act also provided for the first time that juveniles who were alleged to have committed offenses punishable by death or life imprisonment were no longer excluded from the protections of the Act.").

218. *See id.* (cataloguing further 1974 amendments to the FJDA by the JJDPA).

219. *See* Robert Mahini, *No Place Like Home: The Availability of Judicial Review over Certification Decisions Invoking Federal Jurisdiction Under the*

the U.S. Attorney was required to file with the Court a formal statement indicating why the federal system could exercise jurisdiction.[220] But district courts did not serve as independent fact finders on the issue and could not assess whether sufficient federal interest in the matter existed to override the local juvenile justice system.[221]

In addition, even under the 1974 amendments federal district courts were permitted to hold trial "informally" behind closed doors in judicial chambers.[222] Federal juvenile delinquency matters began evading stakeholder and outside scrutiny in another way around this time—by no longer having data collected and robustly evaluated as had occurred under the watch of the Children's Bureau.[223] Much of the Children's Bureau's work seem to be shifted to OJJDP during this time.[224] And, as noted and will be further described below, OJJDP data collection and sharing focuses almost exclusively on state juvenile courts.[225]

Juvenile Justice and Delinquency Prevention Act, 53 VAND. L. REV. 1311, 1322–31 (2000) (outlining the circuit split relating to federal court juvenile certification, with the majority allowing federal prosecutors unchecked discretion relating to federal charges for children); *see also, e.g.*, United States v. Jarrett, 133 F.3d 519, 539 (7th Cir. 1998) (holding that Congress provided to the U.S. Attorney, exclusively, the discretion to seek certification).

220. *See Jarrett*, 133 F.3d at 538–39 ("[S]ection 5032 allows a district court to transfer a juvenile to adult status only after the Attorney General certifies that 'there is a substantial Federal interest in the case or the offense.'").

221. *See id.* at 539 (explaining that the Attorney General's investigation is subjective and "[t]here is no congressional invitation for the courts to make a separate assessment").

222. *See* United States v. Cuomo, 525 F.2d 1285, 1293 (5th Cir. 1976) ("The Act envisions 'an informal process of adjudication,' for s 5032 states that 'the court may be convened at any time and place within the district, in chambers or otherwise.'").

223. *See* Edward P. Mulvey & Carol A. Shubert, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*, JUV. JUST. BULL., December 2012 at 3 ("However, it is difficult to gauge the specific effects of these changes because of the lack of comprehensive and consistent data about transferred adolescent offenders.").

224. *National Juvenile Court Data Archive*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/njcda/asp/history.asp (last visited Sept. 12, 2020) (explaining that the OJJDP assumed responsibility for data collection in the 1970s) [perma.cc/9KJM-7XPD].

225. *See id.* (describing the data collection process and how it focuses primarily on state courts).

In the 1980's and 1990's, like what was seen on the state level, federal laws relating to juvenile offenders were amended in response to perceived increased youth crime.[226] New provisions under the FJDA removed discretion from federal judges on the issue of transfer for adult prosecution in certain youthful repeat offender cases.[227] And regardless of a youth's repeat offender status, judges now could transfer even young teens to face adult federal prosecution.[228] In addition, amendments to the FJDA during this "tough on crime" era allowed more youth to be certified away from state juvenile courts to be processed in the federal system.[229] These expansions targeted drug charges, gun matter, and alleged violent offenses.[230]

But as the Department of Justice's Criminal Resource Manual from this period makes clear, the term "violent" could be interpreted rather broadly, as the amended FJDA did not expressly define it.[231] In the eyes of the Department even the attempted use of physical force—not just against a person, but against property—might be enough for federal prosecutors to remove a child from state-based juvenile court processes to be charged as a federal delinquent.[232] More than this, the 1997

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226. *See* Mulvey, *supra* note 223, at 2 (explaining that a "sharp rise in violent crime" in the 1980s and 1990s "produced intense interest in the causes of juvenile crime" that resulted in amendments to juvenile delinquency law).

227. *See id.* at 2–3 ("The movement of adolescents to adult court was no longer the product of a juvenile court judge exercising his or her discretion.").

228. *See* Amy Standefer, *The Federal Juvenile Delinquency Act: A Disparate Impact on Native American Juveniles*, 84 MINN. L. REV. 473, 481–84 (1999) (describing various amendments to FJDA during the 1980s and 1990's, including provisions allowing for children as young as 13 to face federal adult sentences).

229. *See* Mahini, *supra* note 219, at 1312 ("The Comprehensive Crime Control Act of 1984 . . . authorizes federal prosecution of juveniles for certain violent crimes and serious drug offenses. Most of these juvenile offenders had previously fallen under the exclusive jurisdiction of state authorities.") (citations omitted).

230. *See* Standefer, *supra* note 228, at 479 (1999) (recounting changes that expanded federal juvenile jurisdiction).

231. *See Criminal Resource Manual* 120, U.S. DEP'T OF JUST., https://www.justice.gov/archives/jm/criminal-resource-manual-120-juvenile-delinquency-proceedings-certification (last updated Jan. 23, 2020) (last visited Aug. 27, 2020) (offering expansive definition for crime of violence under the FJDA) [perma.cc/5F2T-9VQ4].

232. *See id.* (offering expansive definition for crime of violence under the FJDA). In 2018, this language was held to be unconstitutionally vague by the U.S. Supreme Court. *See* Doyle, *supra* note 174, at 8–9 (citing to Sessions v. Dimaya,

Manual also advised Assistant U.S. Attorneys that they could prosecute juveniles in federal court even for low level federal misdemeanors or infractions when there was sufficient federal concern in the case.[233]

C. Ongoing Disconnect from State & Modern Developments

Thus, interest in expanding federal jurisdiction over juveniles did not end at the turn of the last century.[234] As state juvenile justice systems began building communities of stakeholders focused on reducing the harmful effects of court involvement upon children, efforts to sweep increased numbers of youth into federal courts seemed to increase.[235] And while the U.S. Department of Justice's OJJDP has been actively working with local juvenile courts to reduce case numbers over the last two decades, multiple legislative and other efforts have sought to expand the Department's ability to prosecute children in Article III federal courts.[236] Beyond this, improved practice initiatives being advanced on the state level are not being talked about in the same way in federal courts.[237]

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584 U.S. 138 S. Ct. 1204 (2018)).

233. *See Criminal Resource Manual*, *supra* note 231, at 122 (outlining strategic considerations around processing juveniles in federal delinquency proceedings relating to A and B level misdemeanors and federal criminal infractions).

234. *See Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. OF STATE LEGIS., https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx (last visited Sept. 12, 2020) (illustrating the ongoing expanding juvenile jurisdiction) [perma.cc/TM3S-WC5F].

235. *See* Laura Langley, *Giving Up on Youth: The Dangers of Recent Attempts to Federalize Juvenile Crime,* 25 J. JUV. L. 1, 1 (2005) ("Congressional support for the expansion of federal jurisdiction over juveniles has mounted since the late 1990s."); *see also* Juan Alberto Arteaga, *Juvenile (In)Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants*, 102 COLUM. L. REV. 1051, 1052 n.6 (2002) (cataloging a range of efforts in the late 1990's to expand the ability of federal prosecutors to hold youth accountable).

236. *See* Langley, *supra* note 235, at 12 (describing legislative initiatives such as the Consequences for Juvenile Offender Acts of 1999 and 2001, as well as the 2003 Gang Prevention and Effective Deterrence Act).

237. *See id.* at 6 ("The rehabilitative focus of states' juvenile justice system is not replicated at the federal level.").

For instance, defender and prosecutor expertise in child-centered lawyering, with a focus on adolescent development and positive supports, is considered an emerging norm and best practice in state courts.[238] Yet, there appears to be no similar movement shaping practices in federal courts.[239] Assistant U.S. Attorneys and federal defenders generally have not been part of national conversations around expanded roles that account for youth trauma, adolescent needs, or supporting teen capabilities.[240]

Indeed, reminiscent of 1990s "tough on crime" rhetoric, the current manual for federal prosecutors begins the section on juvenile delinquency matters by directing line attorneys to the Organized Crime and Gang Section of the Criminal Division for "consultation on all issues pertaining to the prosecution of juveniles, including documentation to support prosecution."[241] It also suggests an "arrest now, determine grounds for federal involvement later" approach to juvenile offender cases. Thus, the process may be used as the punishment in some matters where ultimately the case does not meet certification standards.[242]

The federal judiciary and probation departments are similarly distant from contemporary conversations regarding improved practices for juvenile justice matters.[243] For instance, on the state level juvenile court judges regularly convene trainings and share materials to enhance trauma-informed, evidence practices for

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238. *See* Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 67 (2008) (explaining that the Representation of Children Act "required child-centered representation").

239. *See* Langley, *supra* note 235, at 6 ("The rehabilitative focus of states' juvenile justice system is not replicated at the federal level.").

240. *See Trauma-Informed Legal Advocacy: A Resource for Juvenile Defense Attorneys*, NAT'L CHILD TRAUMATIC STRESS NETWORK at 1–2 (2018) (explaining the need for attorneys involved in the juvenile justice system to be trauma-informed advocates). There are, of course, notable exceptions. Individual federal defenders including Mollie Spaulding in St. Louis, Caryll Alpert in Nashville, and Leila Morgan in San Diego are well-versed in emerging youth justice considerations and leaders in the field.

241. U.S. Dep't of Just., Just. Manual § 9-8.001 (2018).

242. *See id.* at § 9-8.120 ("The Department does not interpret 18 U.S.C. § 5032 as requiring certification prior to the filing of a complaint and issuance of an arrest warrant.").

243. *See infra* notes 244–250 and accompanying text.

juvenile delinquency matters that make their way to the court.[244] More than this, they are among the stakeholders seeking to reduce juvenile court case numbers, including by supporting diversion programs that help to address DMC and now RED as required by OJJDP and the JJDPA.[245] In contrast, federal district court judges generally are not part of the discussion.[246] There is some evidence that in years past federal judges did receive training relating to youth prosecution generally and juvenile delinquency matters particularly.[247] But such guidance—as offered at a 1976 convening of the Federal Judicial Center for newly appointed federal judges—has been scant at best.[248] And comprising little more than one page of the 215 page convening manuscript,[249] it is clear juvenile delinquency matters have not received the kind of evidence-based attention in the federal system as is occurring in the states.[250]

It is also clear that federal courts are not collecting and publicly sharing the same kind of granular data for delinquency matters that states have been in recent decades.[251] Numbers of arrests, prosecutions, disposition types, and youth population statistics including race are among the details that are culled by local juvenile courts and provided to OJJDP and otherwise

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244. *See Trauma-Informed Courts,* NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, https://www.ncjfcj.org/child-welfare-and-juvenile-law/trauma-informed-courts/ (last visited Aug. 27, 2020) ("To date, the NCJFCJ has conducted more than 35 court trauma assessments in a diverse selection of juvenile and family, tribal, and state courts from around the country, representing both urban and rural locales.") [perma.cc/SQ98-XRVC].

245. *See How We Can Help You and Your Community,* NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, https://www.ncjfcj.org/about/how-we-can-help-you/ (last visited Aug. 27, 2020) (describing the assistance that NCJFCJ provides) [perma.cc/HVL2-R5PJ].

246. *See* Mahini, *supra* note 219, at 1352 ("[T]he purposes and underlying effects of JJDPA have repeatedly received inadequate judicial consideration.").

247. *See Proceedings of the Seminar for Newly Appointed United States District Court Judges*, 75 F.R.D. 89, 297–304 (1976) (advising federal judges on the sentencing of youth and juvenile offenders).

248. *See id.* (providing guidance only on the Juvenile Delinquency and Youth Corrections Acts).

249. *See id.* (spanning only from pages 297 to 299).

250. *See id.* (lacking specific evidence-based data about federal juvenile delinquency matters).

251. *See* WILLIAM ADAMS & JULIE SAMUELS ET AL., TRIBAL YOUTH IN THE FEDERAL JUSTICE SYSTEM x–xi (May 2011) (analyzing the available federal data).

provided to the public.[252] State juvenile court systems must also account for and classify the kinds of facilities might be used to house both pre-trial and post-disposition, including non-secure facilities, secure juvenile detention facilities, and secure correctional facilities where adults might also be detained.[253]

This has resulted in numerous annual reports and assessments that provide relative transparency and share strategic plans across jurisdictions.[254] Historically the federal court system has not been included in data collection under the JJDPA.[255] Thus there is no clear sense of just how many youth have been charged in federal court in recent years and determined to be delinquent, for what, where exactly they have been held pre-trial, and to what facilities they were sent and for how long as a result of either disposition or sentencing.[256] This past year the JJDPA was reauthorized, reaffirming requirements for states. It was also expanded to expressly adopt requirements around evidence-based practice which "reflects the new knowledge that has developed in the field," including information on RED.[257] But

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252. *See, e.g.*, *Spotlight on Juvenile Justice Initiatives: A State by State Survey*, FED. ADVISORY COMM. ON JUV. JUST. 10–52 (May 2017), https://www.ncjrs.gov/pdffiles1/ojjdp/251078.pdf (last visited Sept. 20, 2020) (providing compilation of data reported by state SAG groups, including use of evidence-based practices and DMC improvements) [perma.cc/63MJ-UPRY].

253. *See An Overview of the Statutory and Regulatory Requirements for Monitoring Facilities for Compliance with the Deinstitutionalization of Status Offenders, Separation, and Jail Removal Provisions of the Juvenile Justice and Delinquency Prevention Act*, OFF. OF JUV. JUST. & DELINQ. PREVENTION 5 (Sept. 2019),
https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/Compliance-Monitoring-TA-Tool.pdf (last visited Sept. 20, 2020) (describing the wide range of data collection required by states receiving federal juvenile justice funding) [perma.cc/5BZR-3CQU].

254. *See, e.g.*, *Juvenile Justice Model Data Project: Final Technical Report*, NAT'L CTR. FOR JUV. JUST. viii (Oct. 2018), https://www.ncjrs.gov/pdffiles1/ojjdp/grants/254492.pdf (last visited Sept. 20, 2020) ("[OJJDP] has invested in improving juvenile justice data and increasing consistency across states and localities through the Juvenile Justice Model Data Project") [https://perma.cc/R5UZ-TP35].

255. *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, *supra* note 253, at 20–21 (noting that core requirements under the JJDPA apply to state court decisions and not federal cases involving youth).

256. *See id*. (lacking information about federal reporting requirements).

257. *See Reauthorization of the JJDPA*, COAL. FOR JUV. JUST., http://www.juvjustice.org/juvenile-justice-and-delinquency-prevention-

it was not expanded to clearly apply to federal juvenile delinquency matters.[258]

V. Contemporary Case Studies and Further Concerns Regarding Article III Delinquency

State juvenile justice systems obviously handle many more youth prosecutions than the federal court system.[259] But as we discussed in our prior essay, which related to adult prosecution of youth in federal court, the exact number of youthful defendant cases in federal courts in recent years is illusive at best.[260] And information about federal delinquency cases, the subject of this essay, is even harder to ascertain than data about federal prosecution of youth as adults.[261] When youth are prosecuted as adults, those matters become public proceedings that may be watched or monitored by interested stakeholders.[262] Because federal delinquency cases are considered confidential cases, a member of the public cannot request such case files from a District Court clerk's office, or review dockets on Pacer.[263]

More than this, as suggested throughout this essay, careful data collection for federal delinquency cases does not appear to fall to any federal agency or group.[264] While OJJDP requires every

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act/reauthorization-jjdpa (last visited Aug. 28, 2020) (explaining the effects of the 2018 updates to the JJDPA) [perma.cc/6LCJ-KEBN].

258. *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, *supra* note 120 (regarding the 2018–19 reauthorization of the JJDPA and accompanying text).

259. *See* ADAMS, *supra* note 251, at xi (analyzing federal data).

260. *See* Quinn & McLaughlin, *supra* note 2, at 553 (pointing out the difficulty of trying to pin down the exact number of youth convicted as adults in federal court each year for wrongdoings committed before they were eighteen years old).

261. *See, e.g.*, NAT'L CTR. FOR JUV. JUST., *supra* note 254, at viii ("[OJJDP] has invested in improving juvenile justice data and increasing consistency across states and localities through the Juvenile Justice Model Data Project").

262. *See* Maria Sprague & Mark Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings*, 35 U. OF LOUISVILLE J. OF FAM. L. 239, 274 (1993) ("[C]riminal court proceeding[s] [are] typically public proceeding[s] and juvenile court matters are generally confidential.").

263. *See* Henning, *supra* note 137, at 394 ("Juvenile court proceedings in most states remain closed to the public, but states often allow public access to juvenile records that involve arrests or adjudications for serious offenses.").

264. *See Data Collection Requirements Under H. 6964*, COAL. FOR JUV. JUST., 1–3, https://www.juvjustice.org/sites/default/files/resource-

jurisdiction and SAG group to submit data for state juvenile delinquency cases, with a particular view towards monitoring impact on vulnerable groups, where youth are confined, and for how long, no similar OJJDP requirement appears to apply to federal delinquency matters.[265] The Administrative Office of the United States Courts (AOC) does collect and publicly post a wide range of information about both civil and criminal cases processed in the federal system.[266] However, the hybrid civil-criminal nature of delinquency matters may be contributing to delinquency cases being overlooked in AOC's data sets and online materials.[267]

For instance, pursuant to 28 U.S.C. § 604, AOC is required to report annually on judicial caseloads, presenting data regarding district court civil and criminal matters filed, terminated, and pending.[268] Criminal defendant data sets appear to include information for "transfers."[269] Assuming this refers to juvenile matters transferred for adult prosecution, the data does provide some information relating to child defendant cases.[270] For instance, it appears that the government commenced 464 juvenile transfers in 2009 in contrast to 2019, when it commenced only 213 transfers.[271] These tables go on to provide raw numbers for

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files/Data%20Collection%20Requirements.pdf (last visited Sept. 20, 2020) (failing to indicate which federal agency is responsible for data collection) [perma.cc/2ER9-MED3].

265. *See id.* (stating the requirements for data collection on a state level with minimal information about federal requirements).

266. *See Federal Judicial Caseload Statistics*, ADMIN. OFF. U.S. CTS., https://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics (last visited Aug. 28, 2020) (referencing criminal matters commenced, terminated or pending, including transfers, in Table D1) [https://perma.cc/WZ82-SE2H].

267. *See* FLICKER, *supra* note 30, at 5 (noting the similarities between criminal and juvenile courts).

268. *See* 28 U.S.C. § 604(a)(2) (outlining the duties of Director of the Administrative Office to examine and report statistical date about the business of the courts).

269. *See* ADMIN. OFF. U.S. CTS., *supra* note 266 (referencing criminal matters commenced, terminated or pending, including transfers, in Table D1).

270. *See id.* (citing data for criminal matters commenced, terminated or pending, including transfers, in Table D1).

271. *See Federal Judicial Caseload Statistics*, ADMIN. OFF. U.S. CTS., https://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics (last visited Aug. 28, 2020) (providing annual data for civil and criminal cases processed in U.S. District Courts from April 1 to March 31)

transfers terminated (400 in 2009 and 185 in 2019). But they do not explain what, exactly, that termination reflects.[272]

Transfer termination might include cases from the year before, not just the reporting year.[273] In addition, termination data might also capture case dismissals as well as a successful transfer followed by conviction. In this way, it is hard to know how many youths, exactly, are prosecuted as adults in federal courts each year and sentenced as such.[274] More than this, termination of transfer might also mean the case was not transferred but permitted to proceed as a federal juvenile delinquency matter.[275] But it is hard to know.[276] Indeed, the publicly available AOC data sets and tables we have reviewed do not specifically reference federal juvenile delinquency cases at all.[277]

Yet, the information publicly available does suggest that the same youth groups who predominated in federal prosecutions prior to the 1938 enactment of the FJDA—Native American and immigrant youth—still receive heightened attention by federal prosecutors when compared to other youth.[278] Potential continued

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[perma.cc/4YHZ-82AE].

272. And as we discussed in our prior work, deeply conflicting claims also have been made about federal juvenile cases. For instance, despite OCA's data indicating that more than 1500 federal transfer matters were commenced between 2010 and 2015, see Federal Judicial Caseload Statistics Tables, 2010 to 2015 (reporting a high of 433 transfer matters per year and a low of 228 during this period), the Federal Sentencing Commission has declared that a total of only fifty-two youth were sentenced as adults in federal court between 2010 and 2015. *See Youthful Offenders in the Federal System*, U.S. SENT'G COMM'N 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf (last visited Sept. 20, 2020) (offering the fifty-two-case count number as among the figures supporting a "key finding" that "[t]here were very few youthful offenders under the age of 18 sentenced in the federal system") [perma.cc/XKM2-S6BX].

273. *See id.* (describing date ranges for data sets).

274. *See id.* at vii–viii (describing current practice for transferring youths to adult status).

275. *See id.* (describing current practice for transferring youths to adult status).

276. *See Federal Judicial Caseload Statistics*, *supra* note 271 and accompanying text.

277. *See generally Federal Judicial Caseload Statistics*, *supra* note 271 (providing annual data for civil and criminal cases processed in U.S. District Courts from April 1 to March 31).

278. *See* U.S. SENT'G COMM'N, *supra* note 272, at 26 ("The second most common offense among youthful offenders was immigration offenses.").

use of the largely invisible federal juvenile justice system to address youthful actions of these marginalized groups, we believe, demands further scrutiny.[279] But we are also concerned about any youthful offender who might be detained or confined in connection with federal delinquency charges, which may be occurring in any number of settings even during the COVID-19 pandemic without meaningful check or oversight.[280]

A. Native Youth

Historically, Indigenous children[281] have suffered from over-involvement in the federal justice system due to a range of complex historical reasons, including lack of sufficient support and respect for Native communities, and complex overlapping jurisdictional possibilities.[282] The federal courts' failure to keep up with developments in juvenile justice is particularly concerning for Indigenous children.[283] Their overrepresentation in the federal system—paired with what may be a disproportionate likelihood of being charged as a child—results in fewer procedural protections

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279. *See* Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 51 (2016) (identifying "a substantial indictment of the juvenile justice system's failure as a tool of law enforcement and as a mechanism for rehabilitating and treating at-risk youth").

280. *See* U.S. DEP'T OF JUST., *OJJDP COVID–19 Guidance: State Juvenile Detention and Correctional Facilities,* 1–2 (2020) (providing non-binding guidance for managing the health risks of the COVID-19 pandemic within detention and correctional facilities).

281. We have referred to Native American children in multiple ways throughout this subsection. None precisely captures the identity of the population about whom we are concerned, and Indigenous peoples have, at times, rejected monolithic identifiers. Government documents often refer to this population as "tribal youth."

282. *See* U.S. SENT'G COMM'N, *supra* note 272, at 29 ("Specifically, the federal government has jurisdiction exclusive of the states over crimes committed in Indian Country by or against Native Americans 54 and over major felonies committed in Indian Country by a Native American against another Native American or other person.").

283. *See* William Adams et al., *Tribal Youth in the Federal Justice System*, x–xi (2011) ("82% of entering [Indian Country] juveniles entrants had been adjudicated delinquent compared to only 38% of entering non-[Indian Country] juveniles who were adjudicated delinquent"). *But see* Adams et al. *supra* note 283, at x (noting poorly reported data and difficulty distinguishing between children adjudicated as adults and children adjudicated as delinquents).

without the benefit of a range of youth-centered features that are seen as best practices in state juvenile courts.[284] Even though these children are formally treated as juveniles, they are still more likely than non-Native children to be confined in a secure facility as a result of their prosecution.[285] The most recently available data show that Indigenous children face higher rates of involvement in the federal justice system,[286] higher rates of adjudication,[287] and longer sentences than non-Native children in federal courts.[288]

The patchwork of authorities governing tribal territory—described by Professor Addie C. Rolnick as a "web"[289]—is "easily the most complicated in the nation and among the most complicated in the world."[290] Indigenous children fall into the jurisdiction of numerous overlapping, sometimes concurrent jurisdictions, including tribal, federal, state criminal, and state

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284. *See* discussion *supra* Part III(0) (describing ongoing modern disconnects between federal and state juvenile prosecutorial practices); *see also* Rolnick, *supra* note 279, at 124 (2016) ("[T]he agency-level policy is focused primarily on adult offenders, and the officials are more likely to have expertise in adult crime and adult detention.").

285. *See* Rolnick, *supra* note 279, at 105 ("Indian youth prosecuted in the federal system are more likely than other federally prosecuted youth to be placed in secure confinement, but they may be less likely to be charged as adults.").

286. *See* Adams et al., *supra* note 283, at 11 ("The conviction rate for [Indian Country] juveniles (89%) was higher than for non-[Indian Country] juveniles (80%)"). *But see* Major George Lavine, *Protect our Military Children: Congress Must Rectify Jurisdiction on Military Installations to Address Juvenile-on-Juvenile Sexual Assault*, 18 WYO. L. REV. 115, 123–24 (2018) (noting that some federal prosecutors fail to pursue juvenile prosecution matters in Indian country due to disinterest in the legal issues and a desire to focus on more complex cases).

287. *See* Rolnick, *supra* note 279, at 126 ("In the past decade, about half of the juveniles under federal jurisdiction (at any stage) were Native American, as were more than half of the juveniles in Bureau of Prisons custody.").

288. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-591, REPORT TO CONGRESSIONAL REQUESTERS, NATIVE AMERICAN YOUTH: INVOLVEMENT IN JUSTICE SYSTEMS AND INFORMATION ON GRANTS TO HELP ADDRESS JUVENILE DELINQUENCY 44 (2018) (finding that, from 2010–2016, 52% of Indigenous children were sentenced to between thirteen and thirty-six months while 62% of non-Native children were sentenced to less than twelve months).

289. *See* Rolnick, *supra* note 279, at 83–84 (arguing that "web" is a more accurate metaphor than the commonly used "maze" for describing the authorities governing criminal prosecution for crimes committed on tribal lands).

290. *See* AM. INDIAN LAW CTR. & WALTER R. MCDONALD & ASSOC., STUDY OF TRIBAL AND ALASKA NATIVE JUVENILE JUSTICE SYSTEMS, FINAL REPORT 5 (1992) (addressing the complex structure of governmental power on Indian reservations).

juvenile court.[291] Despite professing the value of tribal self-determination, the federal government has consistently used the fact that Native tribes lie within federal borders to justify hemming in tribal sovereignty.[292] A tribe's power to handle matters involving Indigenous children is limited by a number of carve-outs which give federal courts the option to exercise jurisdiction over a child.[293]

Most relevant among these carve-outs is the district court's power to prosecute Indigenous children who commit serious "person" or "property" offenses under the Major Crimes Act.[294] Indigenous children are charged in federal court with "person" offenses at about eight times the rate of non-Native children, and "property" offenses at about five times the rate.[295] These two categories cover all the offenses in the Major Crimes Act and make up close to fourth-fifths of all charges Indigenous children face in federal court. [296] Because of this, they more often find themselves targeted by federal prosecutors and dragged into a justice system with fewer procedural protections and little wherewithal to properly handle the special considerations involved in prosecuting a child.[297]

While state courts handle non-Native children who commit the "person offenses" listed in the Major Crimes Act, they lack jurisdiction over Indigenous children who offend on tribal lands.[298]

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291. *See* Rolnick, *supra* note 279, at 82–110 (laying out the complex jurisdictional web governing Indigenous children, including the mystifying concurrent—but not coextensive—federal-tribal jurisdiction).

292. *See* AM. INDIAN L. CTR. & WALTER R. MCDONALD & ASSOC., *supra* note 290, at 5 (summarizing the history of the relationship between Indigenous tribes and the federal government); *see also* Rolnick, *supra* note 279, at 60–71 (describing historical pivots in the federal government's attitude toward tribal self-determination).

293. *See* Adams et al., *supra* note 283, at 11–12 (describing the impact of The General Crimes Act of 1817, The Major Crimes Act of 1885, and Public Law 280).

294. *See* 18 U.S.C. § 1153 (defining offenses committed within Indian country).

295. *See* Adams et al., *supra* note 283, at 49–50 (analyzing prosecution data from the Executive Office for the U.S. Attorneys)

296. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 288, at 39 (displaying data about the type of offenses charged to Native American youth).

297. *See* Adams et al., *supra* note 283, at viii (stating that federal cases against trial youth face many processing challenges).

298. *See id*. at 11–12 (describing state jurisdiction in "Indian Country").

In those cases, Article III federal courts take up the case, overriding tribal jurisdiction.[299] According to Professor Rolnick, this comes from an apparent belief by the federal government that Indigenous children are not punished harshly enough by tribal courts.[300] Indeed, there have been occasions where federal prosecutors have chosen to prosecute an Indigenous child a second time after they had already been prosecuted in tribal court for the same crime, resulting in increased sentences or even conflicting dispositions.[301]

It should be noted that data concerning the fate of Indigenous children involved in any justice system are exceedingly difficult to parse.[302] Federal data collection is supposed to improve in the coming years due to the passage of the Tribal Law and Order Act.[303] However, there are, in fact, far more updated and detailed statistical reports available regarding the *procedures* for collecting data in cases involving Indigenous defendants than there are actual reports about case outcomes.[304]

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299. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 288, at 42 (stating DOJ officials believe the jurisdictional structure "*requires* the federal government to prosecute" MCA offenses when state courts cannot) (emphasis added).

300. *See* Rolnick, *supra* note 279, at 103 (describing the motivations behind the Major Crimes Act of 1885).

301. *See* Addie C. Rolnick & Neelum Arya, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems*, 5 CAMP. FOR YOUTH JUST. POL'Y BRIEF 25–26 (2008) (citing United States v. Male Juvenile, 280 F.3d 1008 (9th Cir. 2002), where a fourteen-year-old boy was sentenced by tribal court to six months for stealing electronics from two houses, and was subsequently sentenced by a federal court to twenty-four months for the same incident, resulting in placement for two-and-a-half years; and United States v. Juvenile Female, 869 F.2d 458 (9th Cir. 1989), where a seventeen-year-old girl was arrested on drunk driving charges and given probation and treatment after the tribe assumed jurisdiction in an express agreement with the FBI, and was still charged again later in federal court for the same incident).

302. *See* Adams et al., *supra* note 283, at x.

> All juvenile cases in the federal system begin as juvenile delinquency proceedings, and it is challenging to determine the proportion of juveniles that are transferred to adult status and handled as criminal cases. There is no standard method for recording when this occurs across agencies and the available data do not present a consistent view.

303. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010) (outlining the reporting requirements for crime data in tribal communities).

304. *See Indian Country Justice Statistics,* BUREAU OF JUST. STATS., https://www.bjs.gov/index.cfm?ty=tp&tid=200000 (last visited Aug. 28, 2020)

B. Latino and Immigrant Youth

The federal Children's Bureau and Wickersham Commission reported on high numbers of immigrant youth being arrested and prosecuted in federal court at the start of the last century.[305] Today immigrant children still appear prominently in federal prosecutions, with a good number apparently arrested for immigration related crimes.[306] In 2018, 64% of all federal arrests—over 125,000 cases—involved non-U.S. citizens.[307] Approximately 113,000 of those immigrant arrests—or 84% were based upon immigration-related offenses.[308]

According to the federal Marshals Service, in 2018, forty-nine children age seventeen or younger were among the federal immigration arrestees processed.[309] It is unclear if they were ultimately charged and, if so, whether they were processed as adults or in delinquency cases.[310] In addition, just as studies have shown that the official statistics regarding Native youth entering the federal court system as delinquents may not capture the entire picture,[311] we fear the same holds true for immigrant youth.[312] According to the federal Sentencing Commission, of all youthful offenders age twenty five or younger who were processed in the

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(listing only "Tribal Crime Data-Collection Activities" reports for the last decade except for the occasional Indian Country jail census report) [perma.cc/XB7J-TRA6].

305. *See supra* notes 111–115 and accompanying text.

306. *See* MARK MOTIVANS, U.S. DEP'T OF JUST., IMMIGRATION, CITIZENSHIP, AND THE FEDERAL JUSTICE SYSTEM, 1998-2018 14 (2019) (explaining that in 2018, almost 50 children under the age of 17 were arrested for immigration related crimes).

307. *See id*. at 1–11 (showing tables of federal arrests in various districts and the percentages of non-U.S. citizens that were arrested).

308. *See id*. (demonstrating, in table form, that a majority of the offenses were immigration-related).

309. *See id*. at 14–15 (setting forth, in table form, the number of federal immigration arrests by age).

310. *See id*. at 16 (explaining that the Customs and Border Patrol does not publish its number of federal criminal arrests).

311. *See* Quinn & McLaughlin, *supra* note 2, at 554 (citing to Urban Institute study, which suggests official statistics fail to fully capture the extent of federal prosecution of Native youth).

312. *See* U.S. SENT'G COMM'N, *supra* note 272, at 21 (stating that immigration offenses are of the most common committed by youthful offenders).

federal court system, nearly 60% were Hispanic.[313] This finding, along with the recent focus on arrest and fast-track prosecution in certain border states in the United States driving up immigrant case prosecution numbers, there is reason to believe that more than forty nine immigrant juveniles were prosecuted in federal court in 2018 and since.[314]

Anecdotally, as a result of the COVID-19 pandemic, some federal public defenders report lower case numbers along the border in recent months—including fewer youthful offender matters.[315] But cases processed before U.S. Magistrate judges rather than District Court judges may be worth further attention in terms of cases handled in the past and in the days ahead.[316] This is because it appears federal petty offense matters, however they are being defined, are not included as part of the data shared by the OCA when they are heard by federal magistrate judges.[317] So, for instance, even though the Ninth Circuit Court of Appeals issued a written decision upholding the certification of Mexican national, R.P., who was charged at age seventeen as a delinquent for immigration related offenses, his case may have been invisible for OCA data collection purposes if delinquency findings are

313. *See id*. at 16–17 (describing youthful offenders only as Hispanic, Black, White, or other, including Native American youth in the "other" category and questioning the Sentencing Commission data that only 9 Native American youth under the age of 18 were sentenced in federal court between 2010 and 2015—representing only 2.9% of youthful offenders).

314. *See* MOTIVANS, *supra* note 306, at 14 (providing the statistic that forty-nine immigrant juveniles were known to be prosecuted in 2018).

315. *See Federal Judicial Caseload Statistics 2019*, ADMIN. OFF. OF U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 (last visited Sept. 11, 2020) (explaining the decrease in federal public defenders' cases) [https://perma.cc/N8AA-UCEA]. Thanks to the attorneys in the nation's southern region federal public defenders' offices who shared their experiences regarding such matters in recent months.

316. *See, e.g.*, United States v. Juvenile Male, 595 F.3d 885, 906 (9th Cir. 2010) (upholding certification of juvenile charged with immigration relating offense, who case was heard before a federal magistrate rather than District Court judge).

317. *See Statistical Tables for the Federal Judiciary*, ADMIN. OFF. OF U.S. CTS. Statistics Tables, https://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary (last visited Aug. 29, 2020) (noting that annual data for criminal cases processed in U.S. District Courts in Tables D, D1, and D4 do not include petty offense cases handled by federal magistrates) [perma.cc/2SBH-CMNY].

labeled as petty matters.[318] Thus while some lament the ongoing failure of federal officials to formally process petty offenses of children living on U.S. military bases,[319] both Native and Latino youth may not be receiving the same grace on a consistent basis.

With ongoing increased federal law enforcement presence in our cities, it is even more important to monitor federal engagement with Latino and immigrant youth.[320] Even as local mayors may be urging less involvement by federal officials in city affairs,[321] in the past federal agents culled information from local gang databases to supposedly round up those immigrants believed to be undesirable.[322] But such databases have been long understood to be unreliable and filled with names—frequently Latino—that may have no connection at all to gangs.[323] Some localities maintain

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318. *See Juvenile Male*, 595 F.3d at 885 (explaining that juvenile delinquency prosecution for immigration related offense whose case was heard before a federal magistrate rather than District Court judge).

319. *See* Emily Roman, *Where There's A Will, There's a Way, Command Authority Over Juvenile Misconduct on Areas of Exclusive Federal Jurisdiction and Utilization of Juvenile Review Boards*, 2015 ARMY L. 35, 35 (2015) (recounting frustration around lack of federal prosecution of youthful transgressions on military bases, such as petty offenses like shoplifting); *see also* George Lavine, *Protect our Military Children: Congress Must Rectify Jurisdiction on Military Installations to Address Juvenile-on-Juvenile Sexual Assault*, 18 WYO. L. REV. 115, 119–21 (2018) (reporting on federal prosecutors' lack of interest in prosecuting a range of crimes relating to military youth, including sexual offenses).

320. *See, e.g.*, Kristine Phillips, *Federal Agents Head to Detroit, Cleveland, Milwaukee as Operation Legend Continues*, USA TODAY (July 29, 2020, 11:25 AM), https://www.usatoday.com/story/news/politics/2020/07/29/operation-legend-doj-to-send-officers-to-detroit-cleveland-milwaukee/5535490002/ (last updated Aug. 6, 2020, 4:21 PM) (last visited Aug. 29, 2020) (reporting that a diverse array of officers from the FBI, Drug Enforcement Agency, and other federal entities will be deployed in cities to expand the President's "federal crime initiative") [perma.cc/2LBX-XSRE].

321. *See id.* (noting that many local mayors have expressed concerns about federal intervention into their localities, fearing overreach and use of excessive force).

322. *See* Stephano Bloch, *Are You in a Gang Database?*, N.Y. TIMES (Feb. 3, 2020), https://www.nytimes.com/2020/02/03/opinion/los-angeles-gang-database.html (last visited Aug. 29, 2020) (explaining that a university professor's name was erroneously included in a gang database in the 1990's and expressing concern of increased federal use of such unreliable lists under the Trump administration) [perma.cc/3S9V-889C].

323. *See id.* ("[S]uch crimes of misidentification have been going on for years with untold consequences."); *see also* Maria Zamudio, *Federal Immigration Agents Used Chicago Gang Database Thousands of Times*, NPR ONLINE (Apr. 12, 2019),

similar methods for monitoring those believed to be engaged in #BlackLivesMatter and other protest activities.[324] Under the President's direction to federal agents to "dominate" and bring "order" to our cities, BIPOC youth may find themselves swept up in such federal crackdowns.[325]

C. Federal Detention and Confinement

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https://www.npr.org/local/309/2019/04/12/712788497/federal-immigration-agencies-used-chicago-gang-database-thousands-of-times (last visited Aug. 29, 2020) (reporting on the lawsuit by the MacArthur Justice Center, challenging Chicago's gang database practice, which resulted in false claims about local residents including Wilmer Catalan-Ramirez and their arrest by federal immigration officials) [perma.cc/UM63-79NR]; *see also* YOUTH JUSTICE COALITION REALSEARCH ACTION RESEARCH CENTER, TRACKED AND TRAPPED: YOUTH OF COLOR, GANG DATABASES, AND GANG INJUNCTIONS 4 (2012) (describing how youth of color had their names and photographs added to a California gang database without having engaged in any criminal conduct or being charged with wrongdoing).

324. *See* Kristina Libby, *How to Spot Police Surveillance Tools*, POPULAR MECHANICS (June 12, 2020), https://www.popularmechanics.com/technology/security/a32851975/police-surveillance-tools-protest-guide/ (last visited Aug. 29, 2020) (cataloging ways local police may monitor individuals in the vicinity of protest activities, including cameras, drones, cell-site simulators including stingrays and dustboxes) [perma.cc/K6J6-A5GW]; *see also* Antonia Farzan, *Memphis Police Used Fake Facebook Account to Monitor Black Lives Matter, Trial Reveals*, WASH. POST (Aug. 23, 2018, 6:32 AM), https://www.washingtonpost.com/news/morning-mix/wp/2018/08/23/memphis-police-used-fake-facebook-account-to-monitor-black-lives-matter-trial-reveals/ (last visited Aug. 29, 2020) (describing how police used social media to, among other things, collect names of individuals based upon "likes" that seemed related to the Black Lives Matter movement) [perma.cc/KJ4S-APG3].

325. *See* Caitlin Conant, *2020 Daily Trail Markers: Trump Declares, "We will dominate the streets*," CBS NEWS (June 1, 2020), https://www.cbsnews.com/news/2020-daily-trail-markers-trump-declares-we-will-dominate-the-streets/ (last visited Aug. 29, 2020) (outlining the Trump administration's aggressive response to Black Lives Matter protests) [perma.cc/U8P7-AXYA]; *see also* David Sirota, *Trump's Plan to Use the Military to "Dominate" American Cities Must Be Stopped*, JACOBIN MAG. (June 5, 2020), https://jacobinmag.com/2020/06/donald-trump-military-federal-enforcement-protests (last visited Aug. 29, 2020) (contrasting President Trump's plans to send federal agents into cities with actions during the 1950's that were intended to protect the rights of African-American youth seeking to desegregate schools) [https://perma.cc/97PW-VTFG].

Youth involved in federal delinquency matters may be detained in any number of facilities or institutions.[326] And as was the case for youth like Douglas Kemp and William Fagerstrom during the middle of the last century, such locations are often far away from the youth's family and community.[327] This adds to the challenge of family engagement and contact, and youthful offender reentry.[328] For example, youth awaiting resolution of pending federal delinquency charges are managed and housed by U.S. Marshals at a range of facilities.[329] And either the Federal Probation Department or Federal Bureau of Prisons generally becomes responsible for youth who have been adjudicated as delinquent.[330] It also appears that all three groups contract with numerous entities all around the country for purposes of detaining such children.[331]

For instance, the Federal Bureau of Prisons website says that "Federal juveniles are a special population with special designation needs."[332] It goes on to explain that each youth, therefore, is "placed in a facility that provides the appropriate level

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326. *See* THE NAT'L ACAD. PRESS, JUVENILE CRIME, JUVENILE JUSTICE 154–55 (2001) (explaining that there are different methods among different jurisdictions in the realm of policing of juveniles and their subsequent detainment).

327. *See* Fagerstrom v. United States., 311 F.2d 717, 719 (8th Cir. 1963) (explaining that after his adjudication, Fagerstrom was relocated from his home in Missouri to a Federal Correctional Institution in Colorado).

328. *See* THE NAT'L ACAD. PRESS, *supra* note 326, at 157–58 (stating that there are many different ways of handling juvenile prosecution and they often end up in different locations).

329. *See Defendant and Prisoner Custody and Detention*, U.S. MARSHALS SERV., https://www.usmarshals.gov/prisoner/detention.htm (last visited Aug. 29, 2020) ("It is the responsibility of the USMS to provide for the custody, handling, and detention of juvenile delinquents in accordance with the Federal Juvenile Justice and Delinquency Prevention Act.") [perma.cc/3AHC-CVXS].

330. *See* THE NAT'L ACAD. PRESS, *supra* note 326, at 204 (explaining the general practices for adjudicating juvenile offenders).

331. *See* REPORT AND RECOMMENDATIONS REGARDING THE USE OF RESTRICTIVE HOUSING, U.S. DEP'T OF JUST. 61 (Jan. 2016), https://www.justice.gov/archives/dag/report-and-recommendations-concerning-use-restrictive-housing (last visited Aug. 29, 2020) (noting 12 contract entities willing to hold youthful offenders in connection with federal delinquency cases, seven secure facilities and five non-secure, all mostly in the western part of the country) [perma.cc/WT96-K9EW].

332. *Juveniles*, FED. BUREAU OF PRISONS https://www.bop.gov/inmates/custody_and_care/juveniles.jsp (last visited Aug. 29, 2020) [https://perma.cc/N2ZM-U2JR].

of programming and security."[333] But other than characterizing such facilities as either "secure" or "non-secure," it does not provide a list of such facilities, their locations, or the supposed programming provided at each.[334] One recent report from the Bureau of Justice Statistics indicates that "[t]he BOP held 42 prisoners age 17 or younger in private contract facilities at year-end 2017."[335] But this information may raise more questions than it answers.[336] For instance, does the use of the term prisoner here include youth who are charged and/or adjudicated in delinquency matters, or does this relate only to youth imprisoned after being sentenced as adults? Does this figure include youth housed by BOP at facilities that are not considered prisons? And what about youthful offenders, detained in connection with federal delinquency matters, who are now over age seventeen?[337] The same holds true for AOC, the U.S. Marshals Service, and Federal Probation—no specific details containing this information can be found on their websites regarding the number of facilities in use for juvenile delinquency cases, where they are, or what programming they may or may not provide.[338] A call to the federal judicial data hotline did not provide any further clarity.[339] Instead staff there indicated the federal courts did not capture information

333. *See id.* (explaining the general protocol of juvenile detention centers).

334. *See id.* (characterizing and describing the facilities without providing a specific list of the different locations or programming).

335. *See* JENNIFER BRONSON & E. ANN CARSON, PRISONERS IN 2017 4–5 (Bureau of Justice Statistics (BJA 2019) (evaluating the populations at year-end of different age groups).

336. *See* WENDY SAWYER, YOUTH CONFINEMENT; THE WHOLE PIE 2019 1 (Prison Policy Initiative 2019) (pointing out problems with the Bureau of Prisons data regarding youthful offenders).

337. *See id*. (pointing out problems with the Bureau of Prisons data regarding youthful offenders).

338. *See, e.g.*, 2001 Intergovernmental Services Agreement Between U.S. Marshals Service and Northern Virginia Juvenile Detention Center, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/virginia/n_va_juvenile.pdf (last visited Aug. 29, 2020) (previewing an up-to-date contract with the U.S. Marshal Service) [perma.cc/3LFM-ZMEH].

339. Telephone call by Mae Quinn to the Federal Judicial Data Hotline (July 31, 2020).

about juvenile delinquency matters and that we might, instead, direct our inquiry to local juvenile courts.[340]

Review of federal juvenile cases on Westlaw provides little additional insight.[341] One outlier, a reported federal delinquency case out of Arizona, did indicate the youth was remanded to AMIKids to participate in a residential sex offender program as part of his disposition.[342] Although it is unclear which facility was used in that case, AMIKids has no facilities in Arizona but does have some in Florida, including one closed by the state just weeks ago based upon physical abuse on the part of staff.[343] Thus one may wonder about the quality of facilities being used in federal delinquency matters and whether they are being adequately monitored for trauma-informed, evidence-based practices.[344]

In addition, under the current confusing dispositional scheme for youth adjudicated delinquent in federal court, post-adjudication placements for youth may last many years.[345] For juveniles who are adjudicated prior to their eighteenth birthday, they may be held until age twenty one or for up to the maximum sentence they would have faced as an adult, whichever is shorter.[346] If by happenstance their matter is not resolved until after the juvenile turns eighteen, then the youth may be held in federal custody for a longer determinate term—in some cases until

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340. *Id*.

341. *See* Fagerstrom v. United States, 311 F.2d 717, 719 (8th Cir. 1963) (stating that Fagerstrom was moved to a multitude of different detainment facilities, but not providing details about the programming at each).

342. *See* United States v. J.D.T., 751 F. App'x 991, 993 (9th Cir. 2018) (explaining that J.D.T. had his probation violated for failing to abide by conditions of AMI's residential treatment center for sex offenders, which prohibited participants from engaging in even consensual sexual activity, as a result, the youth had a custodial sentence imposed).

343. *See* Kavitha Surana & Suran Megan Reeves, *State Suspends Operations at AMIKids Pinellas After Child Sustains a Brain Bleed*, TAMPA BAY TIMES, (Feb. 20, 2020) (explaining that AMIKids has 22 locations in Florida).

344. *See id*. (emphasizing the issues present at AMIKids nationwide).

345. *See* THE NAT'L ACAD. PRESS, *supra* note 326, at 159 (explaining a decision that sentenced a fifteen-year-old to a state reformatory for an indeterminate period).

346. *See* Doyle, *supra* note 174, at 15 (stating the typical holding periods for juveniles who are adjudicated before they are eighteen); *see also* 18 U.S.C. § 5039 (2018) (setting out the standard level of care a juvenile receives in a facility).

age twenty six.[347] And after adjudicated juveniles turn twenty one years old, they may be housed in federal prison facilities until the end of their juvenile delinquency disposition.[348]

It is well known that youth in confinement are some of the most vulnerable youth in the country in light of the risk for depression, mistreatment, and trauma.[349] These concerns are even greater now during the pandemic, where children in detention and other secure placements may fear for their lives.[350] As a result of current conditions, many around the country are advocating for the release of court-involved youth so that they may return to their families and communities during these difficult days.[351] News media and other entities have shed a light on the plight of children who remain incarcerated during this public health crisis.[352] Yet, remarkably little has been said about the circumstances of youth who are in federal custody.[353] This may be because there is just no

347. *See* 18 U.S.C. § 5032 (2018) (stating that a youth who is adjudicated will be held in federal custody); *see also* Doyle, *supra* note 174, at 15 (explaining that federal juvenile delinquency dispositions may also involve periods of probation or post-release supervision, too, which presents concerns about further incarceration based upon violations of such periods).

348. *See FBOP Program Statement—Juvenile Delinquents,* FED. BUREAU OF PRISONS (Apr. 26, 2019), https://www.bop.gov/policy/progstat/5216_006.pdf (last visited Aug. 30, 2020) (outlining possibilities for housing and placement in federal delinquency cases in the form of an official memo) [perma.cc/2L5A-QQKE].

349. *See, e.g.,* BARRY HOLMAN & JASON ZIEDENBERG, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES, JUST. POL'Y INST. (Nov. 28, 2006) (warning that youth placement in secure settings can be counter-productive and result in more negative behaviors on the part of young people); U.S. GOV'T ACCOUNTABILITY OFF., RESIDENTIAL TREATMENT PROGRAMS, CONCERNS REGARDING ABUSE AND DEATH IN CERTAIN PROGRAMS FOR TROUBLED TEENS (2017) (reporting on thousands of allegations of abuse by teens placed in residential treatment).

350. *See* JOSH ROVNER, COVID-19 IN JUVENILE FACILITIES (The Sentencing Project, Aug. 25, 2020) (shedding light on known cases of COVID-19 in juvenile detention facilities used by states and localities, and urging release to reduce youth exposure to the potentially deadly disease).

351. *See id*. (explaining that many are encouraging the release of youth in juvenile detention centers due to the COVID-19 pandemic).

352. *See* Erica L. Green, *"Pacing and Praying": Jailed Youths Seek Release as Virus Spreads,* N.Y. TIMES, Apr. 14, 2020, at a1 (reporting on actions and inactions of state juvenile justice systems relating to youth in confinement during the COVID-19 pandemic).

353. *Cf*. Joseph Neff, *Why Did it Take the Feds Weeks to Report COVID-19 Cases in Privately Run Prisons*? THE MARSHALL PROJECT, May 8, 2020 (calling the government's response to COVID-19 outbreaks in prisons into question).

clear sense of how many youthful offenders are held by federal officials on delinquency matters—or where they are.[354]

VI. Conclusion

The United States has two juvenile justice systems—one state and one federal.[355] Yet few know that Article III district courts have jurisdiction over cases where young people are charged with federal crimes.[356] Occasionally the press may cover a high-profile federal juvenile matter where the youth has been charged as an adult in connection with a serious crime.[357] Otherwise, the public hears almost nothing about cases in federal court that may involve kids accused of wrongdoing.

But federal delinquency matters present an anomaly in the juvenile justice system—one that demands greater attention.[358] As noted, judges, attorneys, and other staff in Article III courts are not deeply involved in national conversations about best legal or rehabilitative practices for court-involved kids.[359] It is also unclear exactly how many juvenile delinquency cases have been processed in recent years and how such cases have been resolved.[360] This seems to be in part because there is not one entity or agency engaged in careful record keeping and data collection for such cases.[361]

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354. *See* THE NAT'L ACAD. PRESS, *supra* note 326, at 153–55 (explaining the complexities of the 51 different juvenile justice systems in the United States).

355. *See id.* at 155 (pointing out the differences between the jurisdictions of the federal and state juvenile justice systems).

356. *See, e.g.*, United States v. Juvenile Male, 595 F.3d 885, 906 (9th Cir. 2010) (upholding certification of juvenile charged with immigration relating offense, whose case was heard before a federal magistrate rather than District Court judge).

357. *See* DEPT. OF JUST., TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 12 (2011) (explaining that there is no national data that tracks youth who have been tried as adults).

358. *See* THE NAT'L ACAD. PRESS, *supra* note 326, at 154 (emphasizing the difference between being charged with delinquencies and being "found guilty").

359. *See id.* at 154–55 (explaining the difficult balance between the best interest of the juveniles and how to punish them accordingly).

360. *See* Sawyer, *supra* note 336, at 1 (drawing attention to inconsistencies with the Bureau of Prisons data regarding youthful offenders).

361. *See id.* (pointing out the numerous agencies in charge of managing the

The information that can be gleaned suggests most federal delinquency cases involve immigrant or Native American youth.[362] In addition, youthful offenders in such cases may be held in any number of institutions or facilities while charges are pending or after they are resolved—including federal prisons once the youth age out of the federal juvenile system.[363] While many are now advocating for the release of juvenile and youthful offenders in state juvenile justice systems during the current COVID-19 pandemic, it does not appear that any investigation is underway to ascertain how many such individuals may be confined in connection with federal delinquency matters and similarly at risk.[364]

To be sure, compared to the state juvenile justice system, the federal juvenile system does not involve several thousands of cases each year.[365] It does appear that fewer youth have cases formally processed in U.S. District Court in recent years than in decades past.[366] But even a small group of youth is worthy of our concern and attention—and should receive the same oversight and advocacy as provided for kids involved in state juvenile courts.[367] In the end perhaps the history and mystery of these relatively obscure proceedings suggests that the time has finally come to simply remove all juvenile cases from Article III federal courts.

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juvenile justice systems).

362. *See id*. (explaining that Black and Native American youth are overrepresented in juvenile facilities).

363. *See* THE NAT'L ACAD. PRESS, *supra* note 326, at 154–55 (explaining that different jurisdictions detain juveniles in differing institutions and facilities).

364. *See* Neff, *supra* note 353 (pointing out the lack of governmental interference when the COVID-19 pandemic was disproportionately affecting prison populations).

365. *See* THE NAT'L ACAD. PRESS, *supra* note 326, at 155 ("[T]he federal government has jurisdiction over a small number of juveniles, such as those who commit crimes on Indian reservations or in national parks.").

366. *See* Sawyer, *supra* note 336, at 1 (drawing attention to legislative reform for juvenile incarceration).

367. *See* HOLMAN & ZIEDENBERG, *supra* note 349, at 6 (warning that detention can interrupt the natural process of "aging out of delinquency").