California Western Law Review

Volume 59 | Issue 1 Article 2

2022

For Their Own Good: Girls, Sexuality, and State Violence in the Name of Safety

Madalyn K. Wasilczuk

FOR THEIR OWN GOOD: GIRLS, SEXUALITY, AND STATE VIOLENCE IN THE NAME OF SAFETY

MADALYN K. WASILCZUK*

TABLE OF CONTENTS

* Assistant Professor of Law, University of South Carolina School of Law. Thank you to my colleagues Josh Gupta-Kagan, Aparna Polavarapu, and Etienne Toussaint for their comments and suggestions, and to the AALS Clinical Conference Works-in-Progress Session participants, particularly Eve Hanan, for their helpful feedback.

"The reformers used words like 'improvement' and 'social betterment' and 'protection,' but no one was fooled." – Saidiya Hartman[1]

INTRODUCTION

Robert Cover's famous work *Violence and the Word* begins with an unforgettable premise: "Legal interpretation takes place in a field of pain and death."[2] Within this field lies the juvenile court, which exercises status offense jurisdiction over children, including young children who are not otherwise subject to the court's power. Status offenses punish children for behavior that would be legal if they were adults. These laws remain on the books in all fifty states and the District of Columbia, holding kids liable for behavior like truancy, incorrigibility, and running away. The idea animating status offenses is that the State will act in its role as *parens patriae* as a benevolent parent correcting and disciplining its children. The role of the state as *parens patriae* is deeply engrained in the juvenile legal system, where children are treated differently than adults due to their innocence, immaturity, and capacity for change. The goal of such courts—to reform children into productive, law-abiding members of society—is said to be in children's best interests and not primarily for a retributive or punitive purpose.[3] Yet this description of the courts ignores Cover's proposition.[4]

---

1. SAIDIYA HARTMAN, WAYWARD LIVES, BEAUTIFUL EXPERIMENTS: INTIMATE HISTORIES OF RIOTOUS BLACK GIRLS, TROUBLESOME WOMEN, AND QUEER RADICALS 20 (2019).

2. Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1601 (1986).

3. *See, e.g.*, LA. CHILD. CODE ANN. art 801 (2022) ("The purpose of this Title is to accord due process to each child who is accused of having committed a delinquent act . . . and to ensure that he shall receive, preferably in his own home, the care, guidance, and control that will be conducive to his welfare and the best interests of the state and that in those instances when he is removed from the control of his parents, the court shall secure for him care as nearly as possible equivalent to that which the parents should have given him."); MONT. CODE ANN. § 41-5-102(2) (West 2022) ("[T]o prevent and reduce youth delinquency through a system that does not seek retribution . . . . "). With the due process era of juvenile justice came the watering-down of the rehabilitative ideal. *See* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 842 (1988).

4. Cover, *supra* note 2, at 1601.

Despite the imagination that courts will reform mischievous children through sanction-backed social services without the stigma of criminalization, the reality is that children charged with status offenses experience the juvenile legal system in much the same way as those charged with delinquent offenses—stop, arrest, detention, trial, probation, incarceration. This is punishment. The violence inherent in our governance of children's behavior through legal interpretation and law is obvious when viewed through children's eyes. Whatever the benevolent intentions, it is not the first time that a program framed as social progress has given way to decidedly regressive and oppressive, even violent, mechanisms for achieving those ends. The history of imprisonment of women and girls illustrates precisely this contradiction. Drawing on abolitionist theory, this Article takes the position that one must understand our current system through the histories that formed it.

In her piece *Abolition Constitutionalism*, Dorothy Roberts centers three tenets of abolition to frame her analysis: "First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained. Second, the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime. Third, we can imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems."[5]

It is now commonplace to recognize the roots of the adult carceral system in chattel slavery.[6] Yet insufficient attention has been paid to the ways that the juvenile legal system, too, can be traced back to slavery and the racial capitalist regime it relies on and sustains.[7]

---

5. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 3, 7–8 (2019) [hereinafter Roberts, *Abolition*]. I use "racial capitalism" here as Roberts describes it: "The term 'racial capitalism' indicates that capital accumulation and labor expropriation in the United States have always relied on a racial hierarchy and the deep inequalities that hierarchy produces." *Id.* at 14 n.60.

6. *See generally* Roberts, *Abolition*, *supra* note 5; MICHELLE ALEXANDER, THE NEW JIM CROW (2010); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

7. Subini Ancy Annamma & Jamelia Morgan, *Youth Incarceration and Abolition*, 45 N.Y.U. REV. L. & SOC. CHANGE 471, 473 (2022) ("[A] sustained engagement with abolitionist theory and the juvenile punishment system has not featured in

While the juvenile legal system is entwined with classist and xenophobic concerns related to immigration and industrialization, its coalescence also coincided with the period of retrenchment.[8] In Northern cities, where juvenile legal systems first emerged at the dawn of the twentieth century, a not insubstantial number of the so-called migrants were refugees from Southern terrorism that followed Emancipation.[9] At the same time, a growing panic about changing sexual mores fueled support for legislation to address the "Girl problem," the idea that girls and young women in cities were not victims but sexual delinquents who needed to be controlled and reformed.[10]

This Article argues that today's status offense system grew from raced, gendered, classed, and ableist roots.[11] To clarify this causal

---

legal scholarship."). Some scholars have pointed to the contradictory and repressive treatment of girls in the history of the juvenile legal system as foundational to today's system. *See* Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1510–14 (2012); TERA EVA AGYEPONG, THE CRIMINALIZATION OF BLACK CHILDREN: RACE, GENDER, AND DELINQUENCY IN CHICAGO'S JUVENILE JUSTICE SYSTEM, 1899-1945 2–3 (2018); ERICA R. MEINERS, FOR THE CHILDREN? PROTECTING INNOCENCE IN A CARCERAL STATE 24 (2016).

8. The very first jails and prisons built exclusively for children were established before the Civil War. *See infra* Part I. By the time the juvenile legal system coalesced, however, both the Civil War and Reconstruction had passed, and the United States was in an era marked by pronounced racial violence. The country saw the highest number of lynchings in its history in 1892, when at least 250 people were lynched. BLACKMON, *supra* note 6, at 106. Conditions of racial terror and violence did not exist only in the South during this period. Indeed, Illinois, home of the first juvenile court, saw fifty-six lynchings between 1877 and 1950. EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 44–45 (3d. ed. 2017) [hereinafter EQUAL JUSTICE INITIATIVE].

9. *See* AGYEPONG, *supra* note 7, at 1, 3; GEOFF K. WARD, THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE 24 (2012); EQUAL JUSTICE INITIATIVE, *supra* note 8, at 12.

10. *See, e.g.*, RUTH M. ALEXANDER, THE "GIRL PROBLEM": FEMALE SEXUAL DELINQUENCY IN NEW YORK, 1900-1930 (1995); SCOTT W. STERN, THE TRIALS OF NINA MCCALL: SEX SURVEILLANCE, AND THE DECADES-LONG GOVERNMENT PLAN TO IMPRISON "PROMISCUOUS" WOMEN, 52–53 (2018); HARTMAN, *supra* note 1, at 28–29.

11. A separate, but related, history of settler colonialism and attempts to whiten and assimilate Indigenous children and families plays an important role in today's drastic over-representation of Indigenous children in the juvenile legal system. Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 61–62, 78–82 (2016); Rachel Thampapillai, *The Colour-*

link, in Part I, I aim to demonstrate how the juvenile legal system controlled Black girls from its inception. In Part II, I turn to an analysis of violence in today's status offense system and how the system especially enacts violence on Black girls, despite its justification as a benevolent system acting for their good. In Part III, I argue that recognizing status offense incarceration as violent means we can and must imagine and build a society that does not rely on caging children to meet their needs and solve the social problems they have inherited from older generations. The system of status offenses cannot be salvaged from its founding ethos as a system of social control; juvenile courts must relinquish power over children's misbehavior.

When we think of the face of youth in the juvenile legal system, we often think of boys, yet girls are more represented in the ranks of prosecuted children than ever before. While the overall rate of youth imprisonment has declined, girls' incarceration increased as a proportion of youth incarceration from 1990 to 2010 and has remained steady since.[12] Girls are more likely than boys to be incarcerated for status offenses, especially for running away.[13] The reasons for this include greater punishment for violations of sexual mores and a stronger protectionist undercurrent in the juvenile legal system's

---

ful Truth: The Reality of Indigenous Overrepresentation in Juvenile Detention in Australia and the United States, 7 AM. INDIAN L.J. 230, 234–37 (2018); Addie C. Rolnick, *Assimilation, Removal, Discipline, and Confinement: Native Girls and Government Intervention*, 11 COLUM. J. RACE & L. 811, 826–47 (2021) [hereinafter Rolnick, *Government Intervention*]. Indigenous girls have experienced these harms in particularized ways, especially through sexual victimization and disappearances that go under-investigated. NATIVE HOPE, MISSING AND MURDERED INDIGENOUS WOMEN, https://www.nativehope.org/missing-and-murdered-indigenous-women-mmiw (last visited Sept. 20, 2022). The focus on Black girls in this Article permits a specificity about Black American history that would not otherwise be possible, but it is in no way meant to suggest that other minoritized groups have not experienced related forms of oppression. Nor does this article take on the complete history of the juvenile legal system, or even the subsystem of status offenses—either of which would require many more pages than I am afforded here.

12. SENT'G PROJECT, INCARCERATED WOMEN AND GIRLS 6 (2022), https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf [hereinafter SENT'G PROJECT].

13. Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1320 (2015); SENT'G PROJECT, *supra* note 12, at 5.

treatment of girls, which as I will show, goes back to the system's founding.[14]

This Article demonstrates that the status offense system inflicts state violence on Black girls and must be abolished. An analysis of the ways the status offense system affects girls, and only girls, allows the type of specificity that permits "an accounting of both the similar and distinct ways Black [. . .] girls in the early twenty-first century experience violence and unlivable living."[15] As India Thusi argues, building on the work of Devon Carbado and Cheryl Harris, girls "face . . . conditions that are empirically and normatively distinct from those facing incarcerated boys, that can only be addressed by specially considering the conditions particular to their incarceration."[16] This Article focuses not only on the conditions that make girls' empirical and normative experiences with status offenses distinct from boys' but also how girls' gendered social identities ensnare them in the status offense system in the first place. Further, a focus on both girls, in general, and Black girls, in particular, "is necessary to describe, organize against, and disrupt the group-based hierarchies" on which Black girls' marginalization in the juvenile legal system has rested.[17]

I also recognize that insofar as cisgender girls are punished more harshly for status offenses and sexual deviance, unique harms also fall on transgender girls and non-binary children. Likewise, while this Article focuses on girls to maintain the specificity described above, I recognize that lesbian, gay, bisexual, transgender, intersex, queer, asexual, and gender nonconforming children are also disproportionately subject to the control of the juvenile legal system and suffer their own forms of particularized violence, which share important parallels with the violence directed at girls.[18]

---

14. I. India Thusi, *Girls, Assaulted*, 116 NW. L. REV. 911, 921 (2022); Godsoe, *supra* note 13, at 1321.

15. TREVA B. LINDSEY, AMERICAN GODDAM: VIOLENCE, BLACK WOMEN, AND THE STRUGGLE FOR JUSTICE 14 (2022).

16. Thusi, *supra* note 14, at 921–22.

17. Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2204 (2019).

18. MALIKA SAADA SAAR ET AL., THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS' STORY 7 (2015) ("Although LGBT/GNA youth comprise only 5 to 7

Status offenses, which make up a relatively small, ostensibly non-criminal slice of the juvenile legal system, might be deemed unworthy of sustained attention. After all, far fewer children are prosecuted, placed on probation, or incarcerated for status offenses than delinquent offenses. Perhaps more problematically, focusing on status offenses could be seen as prioritizing the non, non, nons (that is the non-serious, non-violent, non-sex-related offenses) of the juvenile legal system.[19]

This Article centers status offenses not because children petitioned with other types of offenses or charged in the adult criminal punishment system are not subjected to state violence, nor because other children are somehow deserving of state violence. Rather, status offenses provide a useful lens to investigate the juvenile legal system's roots, examine what it is constituted to do, discover what problems it is meant to solve, and assess whether it accomplishes any of those things. Even more, this focus complicates the underlying justifications for state control and violence in the lives of children. This Article also sets aside the harms of arrest, diversion, and probation, which would create a more complete picture of the violence inflicted on girls, in favor of a narrow analysis of the harms specific to incarceration. Through the prism of girls' status offense incarceration, the raced, gendered, classed, and abled social control mechanisms foundational to today's juvenile legal system come into sharp relief.

I. THE TANGLED ROOTS OF STATUS OFFENSES' VIOLENCE

Like many of the institutions of criminal punishment that today fade into the background of everyday life in the United States, the juvenile legal system was founded as a reform measure that emerged out of changing conceptions of criminality and childhood.[20] Most descriptions of the juvenile legal system trace that moment of reform to

---

percent of the general population, they represent 13 to 15 percent of youth who come into contact with the juvenile justice system.").

19. MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 165 (2014).

20. BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE 19 (2017) [hereinafter FELD, EVOLUTION OF THE JUVENILE COURT]; ROBIN BERNSTEIN, RACIAL INNOCENCE: PERFORMING AMERICAN CHILDHOOD FROM SLAVERY TO CIVIL RIGHTS 4 (2011).

the Progressive Era (1897-1920).[21] However, the first modern prisons and reformatories established in the 1820s laid the system's foundations by developing the infrastructure of carcerality, the concepts of individual reformation that would justify court intervention in children's lives, and the extraction of labor from prisoners.[22]

While Chicago would not establish the first juvenile court in the United States until 1899,[23] the first state-run carceral facility for girls was established more than forty years earlier, in 1856 in Lancaster, Massachusetts—the State Industrial School for Girls.[24] The first girl incarcerated there, Maria F., was thirteen years old and had been sent there by a probate court for her "chronic disobedience," which included minor thefts for which she had not been convicted, leaving the homes to which she had been sent as a servant, and being a "potential prostitute."[25] Before the euphemistically named Industrial School opened, the legal system's options for Maria and girls like her were limited: ignore her behavior or send her to a jail with adult women.[26]

---

21. *See* AGYEPONG, *supra* note 7, at 8; FELD, EVOLUTION OF THE JUVENILE COURT, *supra* note 20, at 19.

22. Ashley T. Rubin, *The Birth of the Penal Organization: Why Prisons Were Born to Fail*, *in* THE LEGAL PROCESS AND THE PROMISE OF JUSTICE: STUDIES INSPIRED BY THE WORK OF MALCOLM FEENEY 157 (Rosann Greenspan et al., eds., 2019); *see also* WARD, *supra* note 9, at 28–29. Of course, choosing any particular starting point means another was not chosen. Here, I start with the formalization of modern prisons, but one could focus on Native children and start with their displacement from their land, or on the separation of Black children from their families during enslavement. Given space constraints and the development of the juvenile legal system, I find the early 1800s a useful starting place, while acknowledging that "genealogies should always be questioned, because there is always an unacknowledged reason for beginning at a certain moment in history as opposed to another, and it always matters which narratives of the present are marginalized or expunged." ANGELA Y. DAVIS ET AL., ABOLITION. FEMINISM. NOW. xiv (2022).

23. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42 (Margaret K. Rosenheim et al., eds., 2002). As Tanenhaus points out, many of the defining features of juvenile court, such as private hearings and confidential records, were not present at the system's founding. *Id*. at 42.

24. BARBARA M. BRENZEL, DAUGHTERS OF THE STATE: A SOCIAL PORTRAIT OF THE FIRST REFORM SCHOOL FOR GIRLS IN NORTH AMERICA, 1856–1905 1 (1983). The Massachusetts State Industrial School for Girls was the first publicly-run institution just for girls, and the first to use "family-style" housing. *Id.* at 4.

25. *Id.* at 1–2.

26. *Id.* at 3.

For Maria, a white girl, the tensions in the child-saving mission of the Industrial School were clear. While they viewed her as "deceitful, jealous, and quite corrupt in mind," they attributed such deviance to her upbringing by a single mother in a poor household, which had "diverted [her] from the path of obedience and truth, through the want of proper home cultivation."[27] To the reformers who founded the facility at Lancaster and those like it, at stake was not only Maria's virtue, but the stability of families and the fate of future generations, which could only be secured through moral mothers.[28]

Institutions like Massachusetts's State Industrial School for Girls represented an evolution in modes of incarceration, which had been proliferating since the 1820s. In the early 1800s, the U.S. East Coast experienced rapid urbanization and an influx of immigrants, as well as demographic shifts that skewed the population younger and more female.[29] In turn, public attitudes hardened against youth and the poor, and states sought institutional solutions to the perceived problems such groups caused.[30] By the 1820s, mistrust of the poor and a desire to curb benevolence, which policymakers believed would lead to idleness, resulted in policies of surveillance and institutionalization.[31]

In the first third of the nineteenth century, state-run institutions treated all so-called social deviants the same, whether indigent, convicted of crimes, living with psychiatric or physical disabilities, children, or elderly.[32] Slowly, however, attitudes about the confinement of children began to change. In 1825, New York founded the House of Refuge, which was privately run, and authorized the home to take custody of boys and girls for delinquency, morals offenses, and dependency.[33] By mid-century, social reformers believed that "[u]ndifferentiated confinement was an injustice, but specialized confinement could educate or rehabilitate."[34] Thus, in parallel with developments in the treatment of

27. *Id.*
28. *Id.* at 4.
29. *Id.* at 14–17; WARD, *supra* note 9, at 23.
30. BRENZEL, *supra* note 24, at 14–17.
31. *Id.* at 19.
32. *Id.* at 20.
33. *Id.* at 34; FELD, EVOLUTION OF THE JUVENILE COURT, *supra* note 20, at 26.
34. Chris Chapman et al., *Reconsidering Confinement: Interlocking Locations and Logics of Incarceration*, *in* DISABILITY INCARCERATED: IMPRISONMENT AND

physical and psychiatric disabilities, differentiated institutions for children emerged. Though they claimed to be familial and rehabilitative, these institutions failed to live up to anything resembling beneficial care for children.[35] The girls' training school at Geneva, for example, was known to be brutal. One of its early superintendents, Ophelia Amigh, used leather whips and chains to punish misbehaving girls.[36]

By the late 1800s, the Progressive Era had given rise to reformers who "viewed individual and societal welfare as co-extensive and saw no need to protect individuals from state benevolence."[37] To justify this benevolence—which could alternatively be characterized as interference into poor, Black, and immigrant families—reformers relied on the concept of *parens patriae*.[38] Invoking the concept of state-as-parent simultaneously placed on parents the responsibility for molding their innocent children into good American citizens while also reserving the right for the state to intervene if parents failed.[39] The super-parent rationale also justified the lack of due process and legal representation afforded children, as well as the broad and vague authority of the early juvenile courts.[40] The courts' broad discretion allowed judges to enforce their own moral and social expectations on children and their families, based on laws that gave them the power not only to prohibit specific behaviors defined as delinquent but also to forbid

---

DISABILITY IN THE UNITED STATES AND CANADA 5 (Liat Ben-Moshe et al., eds., 2014); BRENZEL, *supra* note 24, at 24.

35. *See, e.g.*, ERIN KIMMERLE, WE CARRY THEIR BONES: THE SEARCH FOR JUSTICE AT THE DOZIER SCHOOL FOR BOYS 30 (2022) ("I got the sense that while the school's founding purpose was to rehabilitate and educate boys who were arrested for serious crimes, it quickly evolved into a much-feared penal institution and work camp, many of whose inmates had been sent there for things like 'incorrigibility,' 'truancy,' or 'dependency.'") Kimmerle's book documents the brutal conditions and deaths at the Arthur G. Dozier School for Boys, which operated from 1900 to 2011.

36. AGYEPONG, *supra* note 7, at 77–78.

37. FELD, EVOLUTION OF THE JUVENILE COURT, *supra* note 20, at 23.

38. *Id.* at 24.

39. *Id.* at 24–25; WARD, *supra* note 9, at 25; *see also* Ex parte Crouse, 4 Whart. 9, 11 (Pa. 1839) ("[M]ay not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community?").

40. *See* FELD, EVOLUTION OF THE JUVENILE COURT, *supra* note 20, at 31, 43.

children from associating with "immoral people."[41] Children could be deemed delinquent or dependent based on little evidence, and the lines between dependence and delinquency were often murky, especially given the era's conflation of poverty with social deviance.[42] What would now be termed status offenses were not separated from delinquency as their own category under most states' laws.[43] Instead, they were considered "morals offenses" and treated as a category of delinquent behavior.[44]

Below, I describe in turn the effects of the socially constructed categories of race, class, gender, and disability. Yet that division is artificial. Not only might one person embody multiple categories of intersecting marginality,[45] but the embodiment of one socially constructed category might constitute another.[46] For example, disability has constituted both race and gender throughout U.S. history by pathologizing both Black people and women as intellectually inferior.[47] This insight is not meant to equate the experiences of disability, Blackness, and womanhood. Rather, I mean to demonstrate how socially constructed identities cannot be neatly separated, despite the need to sometimes discuss multiply marginalizing identities in sequence. At the same time, viewing each category in tandem helps to demonstrate how the logics of the juvenile legal system operate on all four. The view from the beginning of the reformatory movement

---

41. Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1361 (2013).

42. *See infra* Part I.C-D.

43. *See* FELD, EVOLUTION OF THE JUVENILE COURT, *supra* note 20, at 32–33.

44. *Id.*

45. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140; HOW WE GET FREE: BLACK FEMINISM AND THE COMBAHEE RIVER COLLECTIVE 4 (Keeanga-Yamahtta Taylor ed., 2017).

46. Nirmala Erevelles, *Crippin' Jim Crow: Disability, Dis-Location, and the School-to-Prison Pipeline*, *in* DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA 81, 86–87 (Liat Ben-Moshe et al., eds., 2014).

47. *Id.* at 92; DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 8–10 (1998) [hereinafter ROBERTS, KILLING THE BLACK BODY]; Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 COLUM. J. RACE & L. 265, 283–86 (2019).

through the 1920s was that people, whether wanting due to degeneracy, criminality, disability, incivility, or femininity, might reach acceptable normative standards of behavior with appropriate discipline imposed by the state.[48] In this part, I explore how these underlying logics form the roots of the current juvenile legal system's criminalization of Black girls for normal adolescent behavior.[49]

A. Race

The juvenile legal system, from its outset, is rightly understood as a constituent part of Saidiya Hartman's concept of the "afterlife of slavery."[50] Though the juvenile legal system was founded on the ideals of childhood innocence and malleability, Black children were placed outside of the child-savers' beneficence.[51] As Geoff Ward writes, even during chattel slavery, age-differentiated treatment was practiced by enslavers, but rather than have the interests of Black children at the fore, the enslavers emphasized protection of the children as assets.[52] Gendered treatment was also common: it was important to protect enslaved Black girls' child-bearing capacities.[53] Enslavers reinforced conceptions of the enslaved, whether adult or child, as childlike, immoral, and intellectually inferior.[54] Degradation justified mis-

48. Chapman et al., *supra* note 34, at 6.

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

50. Saidiya Hartman refers to the afterlife of slavery in discussing the persistence of slavery as an issue in Black political life. She writes, "This is the afterlife of slavery—skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment." SAIDIYA HARTMAN, LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE 6 (2007).

51. *See* FELD, EVOLUTION OF THE JUVENILE COURT, *supra* note 20, at 31, 37. This differential treatment was not new to the juvenile court. ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 212 (1977). Anthony Platt writes that even before the institution of the juvenile court, "criminal law recognized that children under fourteen years old were not to be held as responsible for their actions as adults. Black children apparently were not granted the same immunities as white children and it seems unlikely that Guild and Godfrey [two Black enslaved boys found guilty of murder] would have been executed if they had been white." *Id.*

52. WARD, *supra* note 9, at 35–36.

53. *Id.* at 35.

54. *Id.* at 36–37.

treatment and exclusion—which carried on long after slavery formally ended.[55]

White supremacist notions of Black children's developmental incapacities helped justify their exclusion from new institutions founded to save children from the corrupting influence of adult criminals.[56] Houses of Refuge excluded Black children, leaving them to suffer in facilities for adults, mostly jails and prisons, but also almshouses.[57] There was no place for them among institutions built to reform children who were wayward merely because of their environments: Black children were "categorically incorrigible."[58] So, too, as Ward points out, were Black children a poor fit for programs designed to mold productive and engaged citizens, as Black children would never achieve that status.[59]

As segregated facilities in the Northeast admitted Black children, their institutions often had worse conditions and higher rates of mortality.[60] In addition, though Black girls in the facilities were trained to meet gendered labor expectations, their race dictated their employment prospects.[61] Unable to be "placed out" for work, they spent longer periods in custody than white children.[62] In the South, which was slow to develop formal juvenile legal system institutions, the antebellum period saw the "apprenticeship" of free Black children if their parents were deemed "lazy, indolent, or worthless."[63] After the Civil War, communities largely looked past the delinquent behavior of

55. *Id.* at 37–38.

56. *Id.* at 40 (quoting Charles Lyell, a Scottish lawyer and scientist, who wrote, "Up to the age of fourteen, the black children advance as fast as the white, but after that age, unless there be an admixture of white blood, it becomes, in most instances, extremely difficult to carry them forward.").

57. FELD, EVOLUTION OF THE JUVENILE COURT, *supra* note 20, at 27; Cecile P. Frey, *The House of Refuge for Colored Children*, 66 J. NEGRO HIST. 10, 12–13 (1981) (describing the establishment of a House of Refuge for Black children in Philadelphia in 1850, after the first House of Refuge, opened in 1828, was closed to Black children in 1829).

58. WARD, *supra* note 9, at 41.

59. *Id.* at 42–43, 53.

60. *Id.* at 53; Frey, *supra* note 57, at 10, 17.

61. Frey, *supra* note 57, at 10, 22; WARD, *supra* note 9, at 57.

62. WARD, *supra* note 9, at 58.

63. *Id.* at 61.

white children while subjecting Black children to "court-ordered apprenticeships, jails, prisons, and the whip."[64] The post-Civil War period also saw children forced to labor until the age of majority without their parents' consent under the Black Codes, with many subjected to chain gangs and convict leasing through the criminal legal system's dragnet. [65]

Black children were immediately overrepresented in the Chicago Juvenile Court when it opened in 1899.[66] In 1900, Black children made up 5% of the children appearing in juvenile court, though only 1% of children in Chicago were Black.[67] Black children's overrepresentation accelerated rapidly and only worsened as the Great Migration dramatically changed the city's demographics. By 1912, 14% of children before the court were Black, more than double their representation in the population.[68] Nationally, Black children's incarceration rates boomed from 1904 to 1910. In 1904, Black girls represented 15% of girls incarcerated in the United States, while by 1910, they represented 39% of incarcerated girls.[69]

Despite their representation in the courts and carceral facilities, Black children were excluded from dependent facilities and home placements. Lacking such options, Black children stayed much longer in detention and were often sent to adult prisons.[70] In New York, a 1925 study found that "white youths were rarely detained for more than twenty-four hours while black youths commonly spent weeks and months in detention."[71] In Chicago, placements for Black girls were least available, and they stayed in detention longest.[72] The lack of services and placements for Black youth also meant that they were not

64. *Id.* at 62.

65. *Id.* at 63, 67.

66. LOUISE DE KOVEN BOWEN, THE COLORED PEOPLE OF CHICAGO: AN INVESTIGATION MADE FOR THE JUVENILE PROTECTIVE ASSOCIATION 253 (1913); *see also* Butler, *supra* note 41, at 1369 (finding that of the 584 delinquent boys brought before the court in its first six months of operation, forty-eight had at least one Black parent).

67. AGYEPONG, *supra* note 7, at 43.

68. *Id.*

69. WARD, *supra* note 9, at 86.

70. *Id.* at 84.

71. *Id.* at 85.

72. *Id.* at 85.

treated in accordance with their behavior, and they lacked access to what Black leaders saw as avenues to civic participation and tools for rebuilding the Black family that had been "explicitly underdeveloped" by chattel slavery.[73] Tera Eva Agyepong demonstrates that Black children, often clearly dependent under the law, were labeled delinquent or truant in order to place them in the only facilities for children that would take them—the facilities maintained for children accused of crimes.[74] Thus, the image of the delinquent was artificially "blackened" while the image of the dependent was artificially "whitened."[75]

The Progressive child-savers turned to science and eugenics to justify what they saw as the disparate criminality and undeservingness of Black children through physiological and mental testing that purported to show Black children's inferiority.[76] The differential treatment of Black and white children was also justified through the stereotypic images of Black children prevalent during the era. The most salient, perhaps, was that of the "pickaninny," which emerged in tandem with notions of white childhood.[77] Images of the pickaninny depicted Black children "portrayed with dark or jet-black skin, large eyes, an exaggerated mouth, and dirty or scant clothing."[78] The child's analog to the image of the Black brute,[79] the trope of the pickaninny was of an animalistic being, who, though subjected to extreme violence, felt neither emotional nor physical pain.[80] These pop-

73. *Id.* at 78–79.

74. AGYEPONG, *supra* note 7, at 7; *see also* Butler, *supra* note 41, at 1367 (discussing how Black children were excluded from juvenile court jurisdiction and from reform schools, thereby increasing the likelihood of Black children being sentenced to prisons rather than reformatories).

75. AGYEPONG, *supra* note 7, at 8, 20–22.

76. *Id.* at 15; Butler, *supra* note 41, at 1364; Angela Onwuachi-Willig, *A Beautiful Lie: Exploring Rhinelander v. Rhinelander as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CAL. L. REV. 2393, 2415 (2007); Mary Ziegler, *Eugenic Feminism: Mental Hygiene, the Women's Movement, and the Campaign for Eugenic Legal Reform, 1900-1935*, 31 HARV. J.L. & GENDER 211 (2008).

77. MEINERS, *supra* note 7, at 34.

78. AGYEPONG, *supra* note 7, at 14.

79. CalvinJohn Smiley & David Fakunle, *From "Brute" to "Thug": The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV'T. 350, 352–54 (2016).

80. AGYEPONG, *supra* note 7, at 14; MEINERS, *supra* note 7, at 34–35.

ular images further separated Black children from the innate innocence and vulnerability attributed to white children.

B. Gender

Status offenses in the juvenile legal system spring from a protectionist and paternalistic orientation toward children that predates the juvenile legal system.[81] As the United States industrialized and more girls and young women worked in cities outside their homes, concern grew, first about their victimization and then about their flouting of traditional social and sexual norms.[82] Even before the formation of juvenile courts, sexuality and morality were central to the institutionalization and social control of poor girls. The State Industrial School in Lancaster was founded for "the instruction, employment, and reformation of exposed, helpless, evil, disposed and vicious girls."[83] In its first year, 68% of girls were committed for morals offenses, and through the turn of the century, over three quarters of the girls were referred for those matters.[84] As reformers saw it, "vagrancy, beggary, stubbornness, deceitfulness, idle and vicious behavior, wanton and lewd conduct, and running away" put girls on the path to adult crime and, almost always, future sex work.[85] Opened before the Civil War, the girls imprisoned at the Industrial School were predominantly immigrants or children of immigrants, white, and poor.[86] In the subse-

---

81. Early U.S. law regarded children as paternal assets. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 6 (1994). Women, too, were the property of their husbands. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 18 (1975). Thus, girls lived under a legal regime in which their control transferred from their parents to their husbands upon marriage. *Id.* at 18–19.

82. ALEXANDER, *supra* note 10, at 2–3; BRENZEL, *supra* note 24, at 21; MARY E. ODEM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885-1920 3–4 (1995).

83. BRENZEL, *supra* note 24, at 81.

84. *Id.* at 81, 123.

85. *Id.* at 81.

86. *Id.* This was not an aberration for girls' carceral facilities. The Illinois State Training School for Girls at Geneva, founded in 1893, housed delinquent girls, the majority of whom "were committed for 'sex delinquency,' which was also referred to in court records as 'incorrigibility' or 'immorality.'" AGYEPONG, *supra* note 7, at 73. In the Juvenile Detention Home, Chicago's early pre-trial facility for

quent fifty years of the school's operation, Black girls comprised 6% of those incarcerated at the school—a rate much higher than their population in the state at the time.[87]

Concerns surrounding girls' sexuality was always double-edged and subject to competing views of culpability.[88] During the Progressive Era, the notion of the "girl problem" gained momentum, shifting the conception of promiscuous girls and young women from victims who needed protection to sexual delinquents.[89] The Progressive view of girls' personal culpability for sexual deviance contrasted with their protective, child-saving vision of the juvenile court, but that did not prevent the referral of girls in significant numbers.[90] In many instances, parents referred girls to the courts to impose discipline when they felt their daughters were out of control.[91] Girls were also blamed for their own victimization, labeled "sex delinquents" for rapes perpetrated against them.[92]

---

children, delinquent girls were separated from all other children because of the belief that delinquent girls spread venereal disease. *Id.* at 57.

87. BRENZEL, *supra* note 24, at 115.

88. John R. McDowall wrote the "Magdalen Report" about New York sex workers in 1831, describing them as a "threat to male society." *Id.* at 38–39. By contrast, the New York Female Reform Society, founded in 1834, saw sex work as a product of poverty and male exploitation. *Id.* at 39. This view was shared by white purity activists in the mid-1880s, who worked to reform age of consent laws to protect vulnerable girls and women by "subjecting male seducers to criminal penalties." ODEM, *supra* note 82, at 3. Yet the position had not won a definitive victory: at the Massachusetts Industrial School, girls who had sex willingly were seen as beyond reform, and even girls who had been sexually assaulted or raped were seen as "morally tainted." BRENZEL, *supra* note 24, at 48; HARTMAN, *supra* note 1, at 28–29. For a deep exploration of feminist carcerality in the United States, *see generally* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 2021.

89. AGYEPONG, *supra* note 7, at 71–72; ODEM, *supra* note 82, at 4.

90. In the first decade of Chicago's juvenile court, 80% of the 2,440 girls brought before it were there "because their virtue [was] in peril, if it has not already been lost." SOPHONISBA P. BRECKINRIDGE, THE DELINQUENT CHILD AND THE HOME: A STUDY OF THE DELINQUENT WARDS OF THE JUVENILE COURT OF CHICAGO 37–38 (1912). Girls were often turned in for engaging in premarital sex, taking rides from men, or for going to dance halls. AGYEPONG, *supra* note 7, at 45.

91. ODEM, *supra* note 82, at 5. This was true of the Massachusetts Industrial School as well, with the majority of girls referred by their parents. BRENZEL, *supra* note 24, at 80.

92. AGYEPONG, *supra* note 7, at 45.

The consequences of shifting from the conception of victim to delinquent were particularly dire for Black girls, who stood at the intersection of "the girl problem" and "the Negro problem."[93] Black girls were more overrepresented than Black boys in the juvenile courts. In Chicago in 1913, though only one-fortieth of the population was Black, one-third of incarcerated girls were Black.[94] Black girls were seen as more immoral and prone to sexual promiscuity than European immigrants or U.S.-born white girls.[95] Black women were also seen as more aggressive, both physically and sexually, than white women.[96] These stereotypes cast Black girls and women, because of their race, "outside the protected category 'woman.'"[97] Instead, they were seen as masculine and predatory, especially within custodial facilities.[98] As a result, Chicago's girls' institutions remained segregated long after boys' institutions were integrated, in an effort to protect white girls from Black girls' sexual aggression.[99] The women who ran segregated facilities argued that Black girls were responsible for same-sex interracial sexual relationships within the facilities, and that those relationships would lead white girls to pursue interracial relationships with Black men once out of custody.[100] In this way, Black girls' sexuality held not only the specter of deviant womanhood but also of race-mixing.

---

93. HARTMAN, *supra* note 1, at 20 ("Social reformers targeted interracial intimacy or even proximity; the Girl problem and the Negro problem reared their heads at the same time and found a common target in the sexual freedom of young women.").

94. LOUISE DE KOVEN BOWEN, THE COLORED PEOPLE OF CHICAGO: AN INVESTIGATION MADE FOR THE JUVENILE PROTECTIVE ASSOCIATION 3 (1913).

95. AGYEPONG, *supra* note 7, at 17.

96. Butler, *supra* note 41, at 1365.

97. SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY 3 (2019). The protective category "woman" was also a complicated one in this era. While few women were prosecuted for crimes, women who were prosecuted, especially those who were "wanton" or engaged in sex work, were seen as worse than male criminals. BRENZEL, *supra* note 24, at 29–30.

98. AGYEPONG, *supra* note 7, at 79–84.

99. *Id.* at 80.

100. *Id.* at 87–89.

C. Class and Capitalism

The juvenile legal system was stratified based on class and committed to capitalist ideals that produced outcomes along race-class hierarchies. In the early days of differentiated custody, the stark class disparities in incarceration were already clear. The girls sent to the State Industrial School in Lancaster in 1856 were overwhelmingly poor, and most of them had at least one deceased parent.[101] Their families, who received little other help from the state, often turned to the school as a way to gain financial support for their daughters' shelter, food, or medical care.[102] Twenty-one percent of the girls had either a physical illness or psychiatric disability.[103] At the time the Industrial School opened, environmentalism—the belief that poor children's bad behavior was linked to their upbringing and environment, rather than an innate condition—predominated.[104] The reformers believed the poor children, sent to a pastoral and education-oriented environment, could fix what had been "polluted" by poor parenting and city life.[105]

By the Progressive Era, theories of crime and delinquency had less optimistic views of the lower classes' abilities to conform with middle- and upper-class norms.[106] Progressive child-savers and the courts relied on science to justify class hierarchy by positing a degeneracy theory that lower classes were from inferior stock, and genetics led to moral inferiority.[107] Upper middle class families also sought to keep their children from mixing with lower class, immigrant, and Black children.[108] Anthony Platt, a critical scholar of the juvenile

---

101. BRENZEL, *supra* note 24, at 76.

102. *Id.* at 78, 82–83. This remained true over the life of the school: in most years for which Brenzel obtained records, parental complaints led to girls' incarceration more than half of the time. *Id*. at 119.

103. *Id.* at 83.

104. *Id.* at 23.

105. *Id.*

106. Some of these strains of thought were evident in the lead-up to the Progressive Era (1860s-1870s) as well. BRENZEL, *supra* note 24, at 100 (referencing an 1871 report which said girls' "inherited tendencies" precipitated their morals offenses and evidence of similar concerns among the school's staff in the 1860s).

107. *Id.* at 91–92.

108. Butler, *supra* note 41, at 1359.

court, argues that "[t]he child-saving movement was not a humanistic enterprise on behalf of the working class against the established order. On the contrary, its impetus came primarily from the middle and upper classes who were instrumental in devising new forms of social control to protect their power and privilege."[109] Indeed, the idea of using juvenile courts to mold "productive" members of society springs from capitalist and ableist conceptions of individual responsibility that discount the state's role in creating poverty and wealth.[110]

For Black child-savers, Cheryl Nelson Butler argues, the class dynamics were more complicated.[111] Though Black clubwomen engaged in the child-saving movement tended to be better off than children ensnared in the juvenile court, their recognition of the racial dynamics at play led them to engage in cross-class racial solidarity.[112] In opposition to branding that would be familiar to the youth crime panic of the superpredator era,[113] Black clubwomen spoke out against

109. PLATT, *supra* note 51, at xx.

110. The concept of ableism helps explain the intersection of race, gender, class, and disability as identities controlled through the juvenile legal system. Talila Lewis developed the following definition of ableism with Dustin Gibson and other Disabled Black and negatively racialized people. They define ableism as "[a] system of assigning value to people's bodies and minds based on societally constructed ideas of normalcy, productivity, desirability, intelligence, excellence, and fitness. These constructed ideas are deeply rooted in eugenics, anti-Blackness, misogyny, colonialism, imperialism, and capitalism. This systemic oppression leads to people and society determining people's value based on their culture, age, language, appearance, religion, birth or living place, 'health/wellness,' and/or their ability to satisfactorily re/produce, 'excel' and 'behave.' You do not have to be disabled to experience ableism." Talila Lewis, *Working Definition of Ableism – January 2022 Update*, TL'S BLOG (Jan. 1, 2022), https://www.talilalewis.com/blog/working-definition-of-ableism-january-2022-update.

111. Butler, *supra* note 41, at 1350, 1353.

112. *Id.* at 1377.

113. In the 1990s, Professor John DiIulio Jr. "incited terror among the public and policy makers, claiming that 'a new generation of street criminals is upon us—the youngest, biggest and baddest generation any society has ever known . . . America is now home to thickening ranks of juvenile 'superpredators'—radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders." KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 87–88 (2021).

the stereotype that "the colored youth is vicious."[114] Moreover, the Black women dedicated to protecting children recognized the importance of representation and influence in the institutions of the juvenile court. A 1913 *Chicago Defender* article recognized the deep problems associated with a lack of institutions caring for Black dependent children, and proposed the Black community should provide its own:

> That is a most unjust condition of public affairs which gives to a white orphan girl care . . . and then instead of caring for an orphaned [black] girl either farms her out in private homes or sends her to prison. If our girls are to be 'Jim Crowed' at all we prefer to have them sent to an institution organized, maintained and controlled by our people.[115]

The failure to provide for dependent Black girls reflected dual, interwoven theories of delinquency: (a) that Black girls could not be saved from innate, inbred inferiority, and thus no such effort should be made;[116] and (b) that Black families—Black mothers in particular—were so uncivilized and immoral that they could not raise moral children.[117] Black clubwomen's efforts challenged both ideas. They pursued formal involvement in juvenile court as probation officers, which allowed clubwomen to intercede on behalf of Black children.[118] They also believed that Black girls were valuable and reformable.[119] By serving in caregiving roles, they subverted pernicious stereotypes about Black families' and Black mothers' moral failures as the origin

---

114. Butler, *supra* note 41, at 1378. Sensationalism about youth crime and the concept that the era's youth were uniquely corrupt was not limited to Black youth. In 1853, the founder of New York's Children's Aid Society said immigrant youth were "ready for any offense or crime, however degraded or bloody," and that "we should see an explosion from this class which might leave [the cities] in ashes and blood." WARD, *supra* note 9, at 24–25.

115. AGYEPONG, *supra* note 7, at 26.

116. *Id.* at 81–82 ("[B]lack girls were beyond the purview of the stated rehabilitative purpose of the institution.").

117. Butler, *supra* note 41, at 1362; ROBERTS, KILLING THE BLACK BODY, *supra* note 47, at 8–19.

118. AGYEPONG, *supra* note 7, at 22–26, 49–50, 92; Butler, *supra* note 41, at 1380–83.

119. *Id.*

of Black children's perceived moral rot and reasserted the Black community as a site of competent caregiving.

In the South, the conditions the Black clubwomen saw were even more dire: children on chain gangs and leased out with adult prisoners.[120] M. Louise Jenkins, a Black clubwoman in Alabama, reflected elements of moral panic about youth crime but also voiced her concern that wayward Black children were not being treated on par with wayward white children.[121] She also recognized that Black women would have to fight to achieve racial uplift and "save black children from the slavery of an iniquitous justice system."[122] While the juvenile legal system prevented some children from entering the most exploitative and dangerous forms of forced labor, the system's racial capitalist dynamics manifested in child labor performed in custody.[123] Girls of all races did domestic work and were typically paroled to private homes, where they were vulnerable to the whims of the usually white families with whom they lived.[124] These families expressed preferences for younger, white, and attractive girls.[125] As a result, Black girls, who had more difficulty finding placements, were often made to work as domestic help in brothels, where they became susceptible to entering sex work.[126] These disparate conditions rein-

120. WARD, *supra* note 9, at 70.

121. *Id.* at 71 (Ms. Jenkins is quoted as saying, "It is a fact that our streets are filled with little criminals of [ten to fourteen]." She also remarked, "If such institutions are needed for white boys, who have had hundreds of years of culture behind them, how much more do we need them for our boys?").

122. *Id.* at 72.

123. KIMMERLE, *supra* note 35, at 68–71 (describing convict leasing of children in Florida). Kimmerle relates that indefinite sentences without conviction for incorrigibility were part of a scheme to procure more child labor, as the reformatory's leadership noted, "Having so few inmates makes the crop come in slow." *Id.* at 71.

124. BRENZEL, *supra* note 24, at 72 (describing that at sixteen, the girls of the State Industrial School in Lancaster, Massachusetts would be indentured to a private home to labor as a domestic worker for two years of parole).

125. WARD, *supra* note 9, at 57 (noting families' preference for white girls from nine to twelve).

126. The banishment of vice districts out of white areas of cities and into Black neighborhoods further contributed to girls' exposure to sex work. AGYEPONG, *supra* note 7, at 19. Moreover, since entire neighborhoods could be considered delinquent under Chicago's laws, moving such districts to Black neigh-

forced the existing race-class structures through the juvenile court's treatment.

D. Disability

Disability scholars argue that disability constitutes "most social differences, including race."[127] Disability's constitution of girl/womanhood and Blackness is visible in the early institutions and animating ideas of reformatories, youth jails and prisons, and the juvenile legal system writ large. For example, the National Conference on Charities and Corrections, founded in 1874, combined authorities on "pauperism, insanity, delinquency, prisons, immigration, and feebleminded-ness."[128] Moreover, by the time of the founding of juvenile courts, eugenic and hereditarist thought had led to the "structural conflation of deviant and disabled women [and girls]."[129] An official from the Massachusetts School for the Feeble-Minded, Dr. Walter Fernald, visited the State Industrial School at Lancaster in 1909, declaring "some of the most difficult girls [. . .] 'moral imbeciles' and later 'defective delinquents.'"[130] Further blurring the lines between crude formulations of psychiatric or cognitive disabilities, deviance, and criminality, Dr. Fernald asserted that sexual activity itself indicated disability.[131]

The well-known story of Carrie Buck, a poor, domestic worker who was raped, institutionalized, and declared "feebleminded" by the Supreme Court to justify her sterilization reflects a concern that poor and sexually active women not only deviated from norms of femininity and sexuality, but that their "defects" would be passed on to their

---

borhoods swept more Black children into the juvenile court's reach. Butler, *supra* note 41, at 1361–62, 1366–67.

127. Erevelles, *supra* note 46, at 85.

128. Chapman et al., *supra* note 34, at 4. Brenzel also situates industrial schools for children as part of a burgeoning "institutional network" that "would mediate between older values and the consequences of unchecked economic and technological change." BRENZEL, *supra* note 24, at 8.

129. Angela Y. Davis, *Foreword*, *in* DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA xvii (Liat Ben-Moshe et al., eds., 2014).

130. BRENZEL, *supra* note 24, at 155.

131. *Id.* ("Imbeciles of both sexes show active sexual propensities and perversions at an early age. This tendency to promiscuous sexual relations is almost always present.").

offspring.[132] Though "feeblemindedness" and "insanity" were portrayed as the problems of immigrants and women of color, medical treatment was reserved for white women.[133] Since Black people would not be admitted to medical institutions for psychiatric treatment until the 1940s, other institutions—namely jails and prisons—warehoused those deemed abnormal.[134] The incarceration of deviant women, whether for physical or psychiatric treatment or simply to "reform" their unfeminine comportment, involved doctors "laying claim to judicial power, and judges laying claim to medical power."[135]

II. REHABILITATION, PUNISHMENT, OR STATE VIOLENCE?

In 1978, Richard S. Allinson, writing as the editor of a volume on status offenses for the National Council on Crime and Delinquency ("NCCD"), wrote that the NCCD advocated for taking status offenses "out of the realm of crime and punishment."[136] The volume he was introducing intended to engage both sides of the debate on the "painful social problem" of what to do with young people charged with status offenses—behaviors that are illegal for a minor but not for an adult.[137] Common status offenses include truancy, running away, cur-

---

132. *See* ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2017); Chapman et al., *supra* note 34, at 9; Buck v. Bell, 274 U.S. 200, 207 ("Three generations of imbeciles are enough."); BRENZEL, *supra* note 24, at 136 ("[T]he Trustees of the Massachusetts School for the Feeble-Minded . . . have frequently called attention to the necessity for making provision for the protection of adult female idiots. The danger of their becoming the victims of the lust of profligate men is too apparent to require more than mere mention. Not only should the imbecile woman be protected for her own sake, but we must guard against the curse of her offspring. Idiocy and imbecility depend to a large degree upon hereditary and pre-natal causes.") Carrie Buck was not unusual in being labeled feebleminded despite a complete lack of evidence of a cognitive or psychiatric disability. Dr. Fernald described a twenty-six-year-old woman who had previously been incarcerated at Lancaster as "having 'keen sexual propensities,' and although she 'read[] well . . . and [had] good command of the language,' as having the mental capacity of 'a child of 11 or 12.'" *Id*. at 156.

133. Chapman et al., *supra* note 34, at 8.

134. *Id.*

135. *Id.* at 10.

136. Richard S. Allinson, *Preface*, *to* STATUS OFFENDERS AND THE JUVENILE JUSTICE SYSTEM: AN ANTHOLOGY iii (1978).

137. *Id.*

few violations, and ungovernability or incorrigibility.[138] Even in 1978, the writers of the volume identified that girls were disproportionately held for status offenses and that the juvenile legal system discriminated against girls.[139] Similar to the views of modern critics, the writers recognized that incarceration often "masquerad[ed] as rehabilitation," increasing the likelihood of rearrest and reincarceration and inflicting new harms of its own.[140] Yet the juvenile legal system has mostly failed to reckon with the depth of these harms, and with some improvements on the margins, continues to try to arrest and incarcerate its way to prosocial behavior.[141] This section explores the imposition of violence in the status offense system. First, I draw on the work of Robert Cover, Alice Ristroph, and Cecelia Klingele to uncover the terms juvenile courts use to conceal the same violent logics that constitute the criminal punishment system. Next, I define violence in relationship to the treatment goals of the juvenile legal system. I then turn to identifying the violence enacted on Black girls through incarceration for status offenses. I finally clarify how that violence undermines the system's stated goals.

---

138. *Status Offenders*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Sept. 2015), https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/status_offenders.pdf.

139. Senator Birch Bayh, *Foreword*, *to* STATUS OFFENDERS AND THE JUVENILE JUSTICE SYSTEM: AN ANTHOLOGY ix (1978) (noting that 70% of girls in jails were held on status offenses and that "the law views and treats girls and young women differently from boys and young men."); NAT'L COUNCIL ON CRIME AND DELINQ., *Jurisdiction Over Status Offenses Should Be Removed from the Juvenile Court: A Policy Statement*, *in* STATUS OFFENDERS AND THE JUVENILE JUSTICE SYSTEM: AN ANTHOLOGY 3 (1978) (stating that only 23% of boys held in correctional institutions were adjudicated of status offenses, while 70% of girls were) [hereinafter NAT'L COUNCIL ON CRIME AND DELINQ.].

140. Bayh, *supra* note 139, at x. *See also* Harris v. Calendine, 233 S.E.2d 318 (W. Va. 1997) ("[T]he Court finds no rational connection between the legitimate legislative purposes of enforcing family discipline, protecting children, and protecting society from uncontrolled children, and the means by which the State is permitted to accomplish these purposes, namely incarceration of children in secure, prison-like facilities. It is generally recognized that the greatest colleges for crime are prisons and reform schools."); Godsoe, *supra* note 13, at 1333.

141. *See, e.g.*, Madalyn K. Wasilczuk, *Lessons from Disaster: Assessing the COVID-19 Response in Youth Jails & Prisons*, 2 ARIZ. ST. L. J. ONLINE 221, 239-40 (2020) (describing the juridogenic harms of the juvenile legal system).

A. What's in a Status Offense?

The euphemistic language deployed to describe courts' responses to children obfuscates what courts do. The inadequacy of the language used to describe the responses to children's behavior is partially to blame. In an effort to cordon off the juvenile legal system from its adult counterpart, youth jails and prisons are called detention centers, crimes become delinquent acts, and convictions are replaced with adjudications. These word choices sometimes have legal significance.[142] For example, in Louisiana, a juvenile adjudication is not, by law, a conviction, and therefore does not carry the same collateral consequences a conviction does.[143] Likewise, words have weight.[144] Thus, it can be important that a child not carry the stigma of a conviction.[145] But to do as the Supreme Court has done and say that juvenile delinquency proceedings are not "criminal prosecutions" ignores the experience of children.[146] A child in handcuffs does not avoid the stigma of criminality simply because the court calls them a juvenile or a delinquent.[147] What's more, the prevailing "children are different" jurisprudence distinguishes the standards for children's punishment while

142. Some have argued that the terms also represent real-world differences in the treatment of children and adults. *See* Lawrence H. Martin & Phillys R. Snyder, *Jurisdiction Over Status Offenses Should Not Be Removed from the Juvenile Court*, *in* STATUS OFFENDERS AND THE JUVENILE JUSTICE SYSTEM: AN ANTHOLOGY 8 (1978) ("For example, we do not quarrel with the finding that long prison terms do not rehabilitate. But periods of residential care are not prison terms and a short stay may not be adequate to the goal when the task is to help both the youth and his family.")

143. State v. Brown, 879 So.2d 1276, 1288 (La. 2004).

144. For the effects of language in making and unmaking the criminal legal system, *see generally* Anna Roberts, *Criminal Terms*, MINN. L. REV. (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4135537.

145. NAT'L COUNCIL ON CRIME AND DELINQ., *supra* note 139, at 5 ("'Any action by the court, however benign, is likely to be the most severely and permanently labeling of all.' Once brought into the juvenile court process, these children—whether labeled status offenders or delinquents—become stigmatized.").

146. McKeiver v. Pennsylvania, 403 U.S. 528, 541-51 (1971).

147. All it takes is considering who is called a juvenile—certainly not our own children when we pick them up from school or ask them to come in for dinner—to understand that the word is not gentle or valueless.

subjecting them to trauma and often leaving them in conditions that mirror those of adult prisoners.[148]

Similar criticisms can be leveled against the distinction between status and delinquent offenses. Status offenses across jurisdictions go by many names. They are located on a spectrum of labels that describe status offenses as, at one extreme, delinquent behavior, at the other, as a child welfare or dependency issue, and in between, as a separate category of offense entirely.[149] Juvenile Justice Geography, Policy, Practice & Statistics groups this spectrum into five broad categories, from a "victim" perspective to an "offender" perspective: (1) in need of aid, assistance, or care, (2) in need of services, (3) in need of supervision, (4) unruly, and (5) status offender.[150]

Labeling status offenses as non-delinquent bolsters the formalistic and artificial distinction between criminal prosecutions and juvenile proceedings. As with other juvenile court terms, designation of a behavior as a status offense carries some legal weight. In some states, children adjudicated for status offenses can only be held in non-secure

148. Reports frequently surface that document the horrendous conditions inside youth jails and prisons, including feces on walls, shackling, solitary confinement, violence, inadequate bathroom breaks, and rampant self-harm. *See, e.g.,* Jolie McCullough, *Almost 600 Texas Youths Are Trapped in a Juvenile Prison System on the Brink of Collapse*, TEX. TRIBUNE (Aug. 2, 2022, 5:00 A.M.), https://www.texastribune.org/2022/08/02/texas-juvenile-prisons-crisis/; Haven Orecchio-Egresitz, *Children Detained in South Carolina Live With Feces on Floors, Mold on Walls, and Roaches in their Food, Suit Says*, INSIDER (May 3, 2022, 12:25 PM), https://www.insider.com/south-carolina-rights-groups-sue-over-abuse-of-juvenile-detainees-2022-4; Beth Schwartzapfel, *"No Light Inside. No Nothing." Inside Louisiana's Harshest Juvenile Lockup*, THE MARSHALL PROJECT (Mar. 10, 2022, 6:00 AM), https://www.themarshallproject.org/2022/03/10/no-light-no-nothing-inside-louisiana-s-harshest-juvenile-lockup; *see also* Annamma & Morgan, *supra* note 7, at 473.

149. For example, in Pennsylvania, ungovernability and truancy are grounds for dependency, and the child is labeled "in need of care, treatment or supervision." 42 PA. STAT. AND CONS. STAT. ANN. § 6302 (West 2022). These adjudications, therefore, are outside the delinquency system and take place under courts' dependency jurisdiction. In Louisiana, children charged with status offenses are dealt with under the Children's Code's chapter on "Families in Need of Services" ("FINS"). FINS offenses include truancy, running away, ungovernability, and cyberbullying, and are adjudicated in Juvenile Court. LA. CHILD. CODE ANN. arts. 728–30 (2022).

150. *Status Offense Issues*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT., http://www.jjgps.org/status-offense-issues (last visited Oct. 14, 2022).

facilities[151] or cannot be shackled.[152] Nevertheless these terms can hide how courts process and punish children. Even in states like Massachusetts, where the term for a status offense reflects a child welfare orientation ("child requiring assistance"), the cases still proceed against the child, warrants may still issue, and the children can be taken into custody.[153] Rarely, as in Pennsylvania, status offense cases are only heard as dependency cases.[154] Those cases, while deserving of their own critique, are set aside for purposes of this Article. In the overwhelming majority of jurisdictions, where status offense cases are brought against the child, they look much the same as delinquency cases. While the variations in language and procedure form a complicated landscape, the common ground is that all jurisdictions hold trials and impose sanctions against children for their non-criminal misbehavior. Ultimately, in a minority of jurisdictions, a child who runs away from home or is habitually absent from school can be placed in a locked cell.[155] In a majority of jurisdictions, the child can be removed from home and placed in alternative forms of confinement, like group homes and shelters.[156] To call these responses anything but punishment is to ignore the child's perspective.

---

151. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 119 § 39G(c) (West, Westlaw through 2022 2d Ann. Sess.); LA. CHILD. CODE ANN. art. 779(A)(5) (2022); D.C. CODE § 16-2320(d)(1) (through Aug. 8, 2022).

152. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 119 § 39G(c) (West 2022). Many states have restricted shackling of children charged with delinquent offenses as well. *See* Anne Teigen, *States that Limit or Prohibit Juvenile Shackling and Solitary Confinement*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 8, 2022), https://www.ncsl.org/research/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement635572628.aspx.

153. *See* MASS. GEN. LAWS. ANN. ch. 119 § 21 et seq. (West 2022).

154. *See* PA. STAT. AND CONS. STAT. ANN. § 6302 (West 2022).

155. *Status Offenders*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Sept. 2015), https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/status_offenders.pdf; *Uses of the Valid Court Order: State-by-State Comparisons*, COAL. FOR JUV. JUST. (Feb. 2020), https://www.juvjustice.org/sites/default/files/resource-files/State%20VCO%20Usage%20-%20Updated%20Version%20Feb.%202020.pdf [hereinafter Uses of Valid Court Order].

156. Uses of Valid Court Order, *supra* note 155; MASS. TRIAL CT. JUV. CT. ADMIN. OFF., HANDBOOK FOR PARENTS, LEGAL GUARDIANS, AND CUSTODIANS IN CHILD REQUIRING ASSISTANCE CASES (Dec. 3, 2012), https://www.mass.gov/doc/handbook-for-parents-legal-guardians-and-custodians-in-child-requiring-assistance-cases-0/download.

The adult and juvenile legal systems tend to resist the concept of punishment as state violence, preferring to see violence as an aberration resulting from excessive force or police shootings.[157] As Cover argues, the violence of our legal system becomes much clearer when viewed from the standpoint of the accused rather than from that of a judge.[158] From the perspective of the child in the juvenile legal system, the threat or actual imposition of punishment, and therefore violence, is clear. The judge, the lawyers, the probation officers, and other juvenile legal system professionals, on the other hand, tend to wrap that violence in kinder, gentler language like rehabilitation, that convinces them that what the system does—what they are doing—is for children's own good. This also allows system professionals to place themselves in opposition to, or at least in tension with, the more extreme public calls for state-sanctioned violence—calls for children to be treated as adults, for them to be locked up and the key thrown away.[159]

Yet Alice Ristroph and Cecelia Klingele have made forceful and persuasive arguments for understanding the criminal punishment system as inherently violent.[160] Klingele gives a powerful example of the parallels between the violent treatment of children that would be condemned outside of the legal system and that which is sanctioned with-

---

157. Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1023–24 (2014) [hereinafter Ristroph, *Just Violence*].

158. Cover, *supra* note 2, at 1608 ("The experience of the prisoner is, from the outset, an experience of being violently dominated, and it is colored from the beginning by the fear of being violently treated.") John Ladd notes a similar relativistic phenomenon in his discussion of collective violence: "[I]ndeed we find that it is usually the victims and third parties who perceive a set of acts as violence while the protagonists themselves do not recognize it as such." John Ladd, *The Idea of Collective Violence*, *in* JUSTICE, LAW & VIOLENCE 27 (James B. Brady & Newton Garver eds., 1991).

159. These calls to more severe sanctions demonstrate U.S. reliance on regularized violence and carcerality for feelings of safety. Ruth Wilson Gilmore, *Fatal Couplings of Power and Differences: Notes on Racism and Geography*, *in* ABOLITION GEOGRAPHY: ESSAYS TOWARD LIBERATION 147–48 (2022) (explaining the centrality of state and state-sanctioned violence to the American national project and describing the American notion that "the key to safety is aggression").

160. *See generally* Cecelia Klingele, *Labeling Violence*, 103 MARQ. L. REV. 847 (2020); Ristroph, *Just Violence*, *supra* note 157, at 1017; Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011) [hereinafter Ristroph, *Criminal Law*].

in it.[161] This exercise reveals the ideologies that judges embrace to distance themselves from violence. Her story goes like this:

> Imagine two hypothetical cases. In the first, a mother is charged with disciplining her wayward teenage son by locking him in a cage the size of a tiny room for many consecutive weeks. Such a case, I suggest, would rank among the most severe instances of child abuse, likely attracting attention from the media and meriting not only child welfare consequences, but criminal charges, too. (The judges ordinarily nod in agreement at this assertion.) The second case involves a youth alleged to be delinquent. His behavior is risky, and his parents and teachers are at their wits' end trying to decide what to do with him. After considering other interventions that have been tried and failed, the judge orders him to—at this point in the story, I pause, and many audience members begin to look chagrinned. The punch line, of course, is that the judge does exactly what he condemned the mother for doing: he orders the boy to be locked in a cage. Not only will the judge in my scenario escape condemnation for his order, but in all likelihood, he will not even feel cognitive dissonance between his own action in the delinquency proceeding and his condemnation of the mother in the child welfare proceeding.[162]

The remainder of this section illuminates the reach of violence in the juvenile legal system that claims a legacy of child-saving, treatment, and rehabilitation, as Cover, Ristroph, and Klingele have done in the context of the criminal punishment system.[163] I now turn to the question of how to define violence in a system based on a rehabilitative ideal.

---

161. Klingele, *supra* note 160, at 871.

162. *Id.*

163. The theory of punishment animating the juvenile legal system, as explained in Parts I and II, is rehabilitation. As Ristroph points out, however, the theories that justify punishment do not, on their own, explain or defend the state's role in punishing. Ristroph, *Just Violence*, *supra* note 157, at 1042 (describing how the state applies physical force in the criminal legal system more broadly than the term of art "use of force" suggests). In the juvenile legal system, the doctrine of *parens patriae* may step into this gap in punishment theory, yet that explanation falls short in prescribing the modes of punishment permissible for children under this theory. Given that parents may not use violence against their children, as Klingele's illustration shows, violent responses, that is, those that result in injury, death, psychological harm, maldevelopment, or deprivation, are inappropriate.

B. Defining Violence

Violence lacks an agreed-upon definition.[164] Some scholars argue that defining violence is "relatively unhelpful."[165] Yet to assert that the status offense system inflicts a program of state violence on Black girls without defining what I mean by violence would be an empty argument. Notions of violence tend to revolve around two criteria: physical harm and the wrongfulness of the harm.[166] However, scholars disagree about the degree to which physical harm (injury or death) must be present to constitute harm;[167] whether physical harm can include harm to property, rather than only to the body;[168] and whether wrongfulness is constitutive of violence and thus distinct from conceptions of force or coercion, or instead may be either right or wrong, legitimate and justified or not.[169] Concepts like structural violence and collective violence challenge notions of physical injury as fundamental to violence. Instead, notions of structural violence conceive social injuries, including "racism, poverty, and economic and educational inequalities [as] 'violent.'"[170]

Public health also defines violence as premised on violation.[171] The World Health Organization ("WHO") defines violence as "[t]he

---

164. James B. Brady & Newton Garver, *Introduction to the Issues*, *in* JUSTICE, LAW & VIOLENCE 9 (James B. Brady & Newton Garver eds., 1991).

165. Robert Holmes, *Emotiveness and Elusiveness in Definitions of Violence*, *in* JUSTICE, LAW & VIOLENCE 48 (James B. Brady & Newton Garver eds., 1991).

166. Ristroph, *Criminal Law*, *supra* note 160, at 584.

167. Newton Garver, *What Violence Is*, NATION (June 24, 1968), at 819.

168. *See, e.g.,* NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 286 (1969), https://www.ojp.gov/pdffiles1/Digitization/275NCJRS.pdf; Ladd, *supra* note 158, at 27–28 (arguing that the destruction is constitutive of violence extends beyond the body to property, including religious or sacred objects, and to psychological injury such as injury to "honor, self-respect, or identity as a person.").

169. Robert Holmes, *Emotiveness and Elusiveness in Definitions of Violence*, *in* JUSTICE, LAW & VIOLENCE 48 (James B. Brady & Newton Garver eds., 1991); *see also* HANNAH ARENDT, ON VIOLENCE (1969).

170. Ristroph, *Criminal Law*, *supra* note 160, at 586 (*citing* Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RSCH. 167, 171 (1969)).

171. *Violence is a Public Health Issue: Public Health is Essential to Understanding and Treating Violence in the U.S.*, AM. PUB. HEALTH ASS'N (Nov. 13, 2018), https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-database

intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation."[172] The WHO definition of violence pairs neatly with the ostensible goals (and medical model) of the juvenile status offense system, which aims to treat or rehabilitate children. The stated therapeutic goals of juvenile legal system interventions, then, must be measured against a notion of violence equal to those goals: one that catalogs mental and emotional scars as much as physical ones. A system that is violent—one that uses physical force and power to cause "injury, death, psychological harm, maldevelopment or deprivation"—is incompatible with treatment.[173] In addition, understanding the carceral system as violent from a public health perspective reorients us from a criminal legal system notion of violence, which focuses on laying blame and apportioning punishment, and invites us to consider interventions that reduce harm and increase health and well-being.

The WHO definition also leaves room to contend with the way that the structural and collective violence of U.S. penal systems is distinct from individual or private violence. John Ladd defines collective violence as "the kind of violence that is practiced by one group on another and that pertains to individuals, as agents or as victims, only by virtue of their (perceived) association with a particular group," giving the examples of the U.S. genocide of Native Americans and enslavement of Black people.[174] For example, Ladd argues that it would be a mistake to understand the violence of chattel slavery as only owing to the violence of the individual.[175] Rather, the institution of slavery also imposes collective violence.[176] Ladd's point is often missed when defenders of the criminal and juvenile legal systems point to good or less-violent police or good or less-violent corrections officials. Schol-

---

/2019/01/28/violence-is-a-public-health-issue (relying on the World Health Organization definition of violence).

172. *World Report on Violence and Health*, WORLD HEALTH ORG. 5 (2002), https://apps.who.int/iris/bitstream/handle/10665/42495/9241545615_eng.pdf [hereinafter *World Report on Violence and Health*].

173. *Id.*

174. Ladd, *supra* note 158, at 19–20.

175. *Id.* at 23.

176. *Id.*

ars like Allegra McLeod and Kate Levine, who have critiqued individual police prosecutions, have made such points.[177] While individuals may inflict acts of violence in the service of the state, to attribute the same causes and motivations to collective violence as to individual violence obscures that police and carceral institutions have violence "built into" them.[178] Ladd points out two implications of theorizing collective violence as merely a form of private violence that are relevant to the criminal and juvenile legal systems: (1) that it invites a response that fails to address systemic harms; and (2) that it precludes the notion of state violence insofar as "society-approved violence [. . .] is ruled out by definition."[179] To date, the status offense system has persisted not because it violates societal norms but because it enforces them. To lay bare the violence of the system, then, is to reckon with the polity's endorsement of violence or, at the very least, its complacency to it.

C. Making Violence Visible

Girls' share of arrests and incarceration in the last twenty years has increased.[180] Evidence suggests that this is because of "more aggressive enforcement of non-serious offenses that are rooted in the experience of abuse and trauma."[181] Caught in this wave have been Black girls, who comprise 14% of the population[182] but represent 34% of girls in custody nationwide.[183] Girls of all races who find themselves in the system's crosshairs tend to find themselves there on relatively minor charges with a history of sexual violence.[184] A study by

177. Allegra McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1638–40 (2019); Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1047 (2021).

178. Ladd calls the attribution of the characteristics of individual violence to collective violence the "individualization fallacy." Ladd, *supra* note 158, at 23.

179. *Id.* at 32.

180. SAAR et al., *supra* note 18, at 7.

181. *Id.*; FELD, EVOLUTION OF THE JUVENILE COURT, *supra* note 20, at 171–72.

182. *See* SAAR et al., *supra* note 18, at 7.

183. *See* Samantha Ehrmann et al., *Girls in the Juvenile Justice System*, OFF. OF JUV. JUST. & DELINQ. PREVENTION: JUV. JUST. STAT. 1, 19 (Apr. 2019), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/251486.pdf.

184. SAAR et al., *supra* note 18, at 7.

the American Correctional Association found that 61% of girls in youth jails and prisons had experienced physical abuse, with nearly half saying they had experienced the abuse at least eleven times.[185] The same study found that 54% of the girls had experienced sexual abuse.[186] Often this abuse came at the hands of family members, making running away a coping or survival strategy.[187] For the majority of girls, then, status offense prosecutions could be described as cases more appropriately brought against parents in the child welfare (family policing) system.[188] Yet status offenses are typically prosecuted against the child. As a result, a history of trauma and abuse often serves as girls' point of entry into the juvenile legal system.

According to the Office of Juvenile Justice and Delinquency Prevention, girls made up 43% of the 43,100 status offense cases in 2015, while they accounted for only 28% of delinquency cases.[189] Girls are particularly represented when it comes to runaway offenses, of which they make up 56%.[190] They also make up 43% of ungovernability cases and 46% of truancy cases.[191] Though different behavior by girls and boys does not account for disparate rates of court involvement based on status offenses, Meda Chesney-Lind and Randall G. Shelden propose that stricter parental and societal expectations for girls, especially related to sexual behavior, are one important factor responsible for the disparity.[192]

---

185. MEDA CHESNEY-LIND & RANDALL G. SHELDEN, GIRLS, DELINQUENCY, AND JUVENILE JUSTICE 1, 40 (4th ed. 2014).

186. *Id*.

187. *Id.* at 39–40. A 2007 study of a jurisdiction in Texas found that children charged with running away had more recorded child abuse than other children referred to the juvenile legal system (29.7% of runaways, 6.6% of non-runaways). Kimberly Kempf-Leonard & Pernilla Johansson, *Gender and Runaways: Risk Factors, Delinquency, and Juvenile Justice Experiences*, 5 YOUTH VIOLENCE & JUV. JUST. 308, 316 (2007).

188. *See generally* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 1, 23–24 (2022) [hereinafter ROBERTS, TORN APART] (arguing that the child welfare or child protection system are more aptly described as a family policing system).

189. Ehrmann et al., *supra* note 183, at 14.

190. *Id.*

191. *Id.*

192. CHESNEY-LIND & SHELDEN, *supra* note 185, at 38.

When considering incarceration rates, the disparate treatment of girls and boys widens. In 2015, approximately 1,424 children were held for status offenses: 283 for running away, 306 for truancy, 636 for incorrigibility, 44 for a curfew violation, 49 for underage drinking, and 106 for another unspecified status offense.[193] Of the children held for status offenses, 1,070 had been committed, 258 were detained, and 87 were in diversion programs, despite being removed from their homes.[194] Girls account for only 14% of youth held for delinquent offenses; they account for 38% of youth held for status offenses.[195] Though status offense case data does not reflect the petitioned child's race, incarceration statistics suggest an even wider disparity for girls of color, who make up 47% of girls incarcerated for status offenses.[196]

Experts identify running away and truancy as signs that a child has been abused.[197] This is where the juvenile court often steps in, reasoning runaway, ungovernable, and truant girls are at risk. Therefore, status offenses can be used to subject them to mandatory programs that will get them the help they need: prosecution is for their own good. For decades, advocates of status offense programs and believers in the mission of the juvenile court have argued that it provides needed services, even if the behavior of children subject to its jurisdiction can be explained by the context of trauma and abuse.[198] Some go

193. *Easy Access to the Census of Juveniles in Residential Placement: 1997–2019*, OFF. OF JUV. JUSTICE & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/ezacjrp/ (last updated Apr. 26, 2022).

194. *Id.*

195. Ehrmann et al., *supra* note 183, at 18 (explaining that girls accounted for "52% of youth held for running away, 38% for ungovernability, 35% for truancy, and 25% for liquor law violations"). Girls are also more likely to be held for technical violations—24% of girls are held for technical violations, while 17% of boys are held for technical violations. *Id.* at 19.

196. *Id.*

197. *Girls, Status Offenses and the Need for a Less Punitive and More Empowering Approach*, COAL. FOR JUV. JUST. 1, 3 (2013), https://juvjustice.org/sites/default/files/resource-files/SOS%20Project%20-%20Girls,%20Status%20Offenses%20and%20the%20Need%20for%20a%20Less%20Punitive%20and%20More%20Empowering%20Approach.pdf.

198. Lawrence H. Martin & Phyllis R. Snyder, *Jurisdiction Over Status Offenses Should Not Be Removed from the Juvenile Court*, *in* STATUS OFFENDERS AND THE JUVENILE JUSTICE SYSTEM: AN ANTHOLOGY 8–9 (1978).

so far as to say removal from the home is for girls' own good, since needed help cannot be provided through other programs.[199]

This position fails to contend with the violence of the law and its intensified effects on Black girls. Black girls find themselves incarcerated for status offenses at higher rates due to protectionist rationales that collide with societal expectations of their behavior. These expectations are rooted in stereotypes prevalent during the Jacksonian and Progressive Eras that persist today. The Georgetown Center on Poverty and Inequality highlights three persistent "paradigms of Black femininity" that shape collective consciousness with respect to Black girls: the Sapphire, the Jezebel, and the Mammy.[200] Black girls are often stereotyped as controlling, aggressive, and hypersexualized.[201] At the same time, society perceives Black girls as older than their chronological age and expects them to behave as adults.[202] Therefore, Black girls are understood as more culpable than white girls of the same age.[203]

The status offense system wields physical force and power that studies show result in a high likelihood of injury, death, psychological harm, maldevelopment, or deprivation when directed against Black girls and their families and communities.[204] While a full reckoning with these harms would include addressing violence that occurs long before a girl is incarcerated,[205] here I focus only on the incarceration experience.

---

199. Francine T. Sherman, *Justice for Girls: Are We Making Progress*, 59 UCLA L. REV. 1584, 1602–12 (2012).

200. Rebecca Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, GEORGETOWN L. CTR. ON POVERTY & INEQ. 1, 5 (June 27, 2017), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf (defining the Sapphire paradigm as "emasculating, loud, aggressive, angry, stubborn, and unfeminine," the Jezebel paradigm as "hypersexualized, seductive and exploiter of men's weaknesses," and the Mammy paradigm as "self-sacrificing, nurturing, loving, asexual."); *Id.*

201. *Id*.

202. *Id.* at 4–5.

203. *Id.* at 8 ("Black girls are viewed as more adult than their white peers *at almost all stages of childhood*, beginning most significantly at the age of 5, peaking during the ages of 10 to 14, and continuing during the ages of 15 to 19.").

204. *World Report on Violence and Health*, *supra* note 172, at 5.

205. For example, just as traffic and public order offenses create a multiplicity of opportunities for police to stop adults, status offenses lower the bar for children's

Once a judge has ordered a girl into custody, she faces violence. Physical force keeps girls in handcuffs, transports them to cells, and moves their bodies down hallways, out of their homes, and into places where they are surveilled.[206] And then there are other forms of violence, which are so enmeshed in our carceral system that we often do not see them as such—sexual, emotional, psychological, and economic violence that shape not just girls but their families and communities. Monica Cosby's powerful analogy of state violence to intimate partner violence illustrates the multidimensionality of carceral violence.[207] Cosby argues that just as intimate partner violence can be inflicted through emotional abuse, intimidation and stalking, coercion and threats, economic abuse, use of privilege, minimization, denial and blame, isolation, and use of children, so, too, can state violence.[208]

---

contact with police. Offenses like truancy and curfew imbue the police with broad authority to initiate contact with children. To be sure, children, like adults, are subject to police stops by the breadth of U.S. criminal law and procedure. But for children, status offenses often create reasonable suspicion or probable cause for a stop simply due to presence in certain places at certain times of day. These opportunities for police to approach children lead to violence—psychological harm and subsequent maldevelopment imposed through physical force and power. An extensive body of literature documents the harms that mere police contact or arrest without incarceration can have on a child's development. *See, e.g.*, Alison E. Hipwell et al., *Police Contacts, Arrests and Decreasing Self-Control and Personal Responsibility Among Female Adolescents*, 59 J. OF CHILD PSYCH. & PSYCH. 1252, 1256 (2018); Dylan B. Jackson et al., *Police Stops and Sleep Behaviors Among At-Risk Youth*, 6 SLEEP HEALTH 435, 439 (2020); Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321 (2014); Amanda Geller et al., *Police Contact and Mental Health*, COLUM. L. RSCH. PAPER NO. 14-571 (2017); Abigail A. Sewell & Kevin A. Jefferson, *Collateral Damage: The Health Effects of Invasive Police Encounters in New York City*, 93 J. URB. HEALTH 542, 555 (2016); Susan A. Bandes et al., *The Mismeasure of Terry Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 BEHAV. SCI. & L. 176, 182 (2019); J.E. DeVylder et al., *Prevalence, Demographic Variation and Psychological Correlates of Exposure to Police Victimisation in Four US Cities*, 26 EPIDEMIOLOGY & PSYCHIATRIC SCI. 466, 474 (2016).

206. Ristroph, *Just Violence*, *supra* note 157, at 1024 (describing how the state applies physical force in the criminal legal system more broadly than the term of art "use of force" suggests).

207. DAVIS ET AL., *supra* note 22, at 113, 174.

208. Cosby gives the following examples of how each mechanism of violence plays out in the state violence power and control wheel: "Emotional abuse: makes them feel bad about themselves, infantilizes them, calls names; makes them think they are crazy, humiliates; Intimidation and stalking: shakes down their cells, strip

The parallels Cosby draws demonstrate why incarceration can be so damaging for girls in custody, 31% of whom have been sexually abused and 45% of whom have experienced complex trauma.[209]

For girls, contact with police and corrections exposes them to routinized sexual violence. Searches are intrusive, and, as India Thusi argues, when they involve non-consensual contact with intimate body parts, they can rightly be understood as sexual assaults.[210] When performed by male officers on girls, including trans or gender nonconforming girls, the sexual connotations and humiliation of the contact increase.[211] The intrusive physical touching associated with custodial procedures can trigger or heighten pre-existing stress, anxiety, and depression in girls who have experienced sexual trauma.[212] Once in cus-

---

searches, displays weapons, mandatory supervised release/parole and electronic monitoring; Coercion and Threats: threatens to call the tactical team, threatens to lose visits or programming, threatens with segregation; Economic abuse: exploitative prison labor; extortion of commissary prices; controls how they can spend and who can give money; Uses privileges: enforces arbitrary rules; forced to follow any and all officer rules, constant surveillance of self and property; Minimizing, Denying, and Blaming: retaliation for making grievances; says they are in prison "for their own good;" Isolation: controls who they can visit, who they can talk to by phone, reads their mail, uses solitary confinement; Uses Children: threatens to take visits away; holds DCFS programming against them; separation from children; threat of permanent separation from children." Reprinted in DAVIS ET AL., *supra* note 22, at 113, 174.

209. Michael T. Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 J. JUV. JUST. 1, 9 (2014).

210. Thusi, *supra* note 14, at 916. Thusi also refers to non-consensual exposure of girls' intimate body parts as part of carceral control as sexual abuse. *Id*. at 912.

211. Craig B. Futterman et al., *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, U. CHI. LEGAL F. 125, 141 (2016) (telling the story of a Chicago girl named Bryanna, who was refused a search by a female officer).

212. Bandes et al., *supra* note 205, at 182. Law enforcement and corrections officials need not touch a girl for the threatening, sexual connotations of their behavior to be clear. A teenage girl named Tytania described her first encounter with police, during which the officer questioned her, flirted with her, stood close to her, intimidated her, and put his face very near hers. Futterman et al., *supra* note 211, at 142. Though this incident occurred on a street in Chicago, girls have described similar sexual comments and innuendo from corrections officers. *See Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls*, HUM. RTS. WATCH (Sept. 24, 2006), https://www.hrw.org/report/2006/09/24/custody-and-control/conditions-confinement-new-yorks-juvenile-prisons-girls.

tody, non-consensual exposure and touching of intimate body parts become commonplace. Girls are searched and "patted down" upon entry to carceral facilities when moved between classes or brought to or from court.[213] As Thusi illustrates, this relentless, nonconsensual sexual contact of girls, all of whom are at high risk for sexual exploitation, and many of whom have a history of such abuse, is a "perverse" component of their "rehabilitation."[214] Even worse, custody sometimes includes new sexual victimization.[215]

The emotional violence of custody for Black girls can involve things like name-calling, but it can also manifest as being treated like a number. As one teenage girl named Nadiyah Shereff expressed, "I felt completely disconnected from my family, from friends [. . .] I felt like nobody believed that I could actually do something positive with my life—especially the staff inside the facilities, who treated me like a case number, not like a person."[216] Emotional damage may also occur when girls' dignity is routinely infringed by the state. Girls in custody are deprived of the types of grooming supplies necessary to care for their hair and maintain an appearance that reaffirms their self-worth and individual personalities.[217] Black hair products, especially, are often in short (or no) supply, and prison regulations often target Black hair specifically, either by requiring invasive searches of it or by ban-

213. Thusi, *supra* note 14, at 912, 916; SAAR et al., *supra* note 18, at 14 ("Routine procedures, including the use of restraints and strip searches . . . can be particularly harmful to victims of trauma by triggering their traumatic stress symptoms.") The United States Supreme Court has acknowledged that exposure of intimate body parts may be traumatic for a teenage girl. In *Safford Unified School District #1 v. Redding*, the Supreme Court recognized that a search that partially exposed the breasts and pelvis of a 13-year-old girl in school was "embarrassing, frightening, and humiliating" and that her "adolescent vulnerability intensifie[d] the patent intrusiveness of the exposure." 557 U.S. 364, 375 (2009). Seth Stoughton's description of the invasiveness of frisks, especially police and corrections officers' attention to the "waistband, front and back pockets, groin, and buttocks," helps underscore why girls with sexual assault histories may experience frisks as assaults. Seth W. Stoughton, *Terry v. Ohio and the (Un)Forgettable Frisk*, 15 OHIO ST. J. CRIM. L. 19, 29 (2017).

214. Thusi, *supra* note 14, at 916.

215. SAAR et al., *supra* note 18, at 15.

216. *Id.* at 14.

217. KC Ellen Cushman & CJ Alexander, *Black Hair in Prison Deserves More Compassion*, DAILY UTAH CHRON. (Apr. 21, 2022), https://dailyutahchronicle.com/2022/04/21/alexander-cushman-black-hair-prison/.

ning weaves or dreadlocks.[218] While states across the country have passed legislation to ban natural hair discrimination outside of custody, and federal legislation is pending, too many girls still face that discrimination in carceral facilities.[219] This is particularly critical because it is occurring at a time in girls' lives when their appearance is important and self-esteem is fragile.

The effects of these overlapping forms of force and power are often "injury, death, psychological harm, maldevelopment or deprivation."[220] According to the National Child Traumatic Stress Network, "[m]any characteristics of the detention environment (seclusion, staff insensitivity, loss of privacy) can exacerbate negative feelings and feelings of loss of control among girls, resulting in suicide attempts and self-mutilation."[221] Children's time spent in custody also manifests in "short-term declines in self-control and personal responsibility."[222] In addition, "for one-third of incarcerated youth diagnosed with depression, the onset of the depression occurred after they began their incarceration."[223] These effects are particularly troubling for girls in the juvenile legal system, who have high rates of post-traumatic stress disorder and complex trauma. Additionally, girls are more likely than boys in the system to have a mental health disorder

---

218. *Id.*

219. *See* Emily Tannenbaum, *Here's Every State that has Passed the Crown Act*, GLAMOUR (June 9, 2022), https://www.glamour.com/story/the-crown-act-banning-hair-discrimination; Jaclyn Diaz, *The House Passes the CROWN Act, A Bill Banning Discrimination on Race-Based Hairdos* KPBS (Mar. 18, 2022), https://www.npr.org/2022/03/18/1087661765/house-votes-crown-act-discrimination-hairstyle. D. Wendy Greene has argued that banning hairstyles associated with particular racial or ethnic groups violates Title VII, and her scholarship has played an important role in passing laws banning natural hair discrimination like the CROWN Act. D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do With It?*, 79 U. COLO. L. REV. 1355, 1385 (2008).

220. *World Report on Violence and Health*, *supra* note 172, at 4.

221. SAAR et al., *supra* note 18, at 14.

222. Julia Dmitrieva et al., *Arrested Development: The Effects of Incarceration on the Development of Psychosocial Maturity*, 24 DEV. & PSYCHOPATHOLOGY 1073 (2012).

223. Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUST. POL'Y INST. 1, 8 (Nov. 28, 2006) [hereinafter Holman & Ziedenberg, *Dangers of Detention*].

or depression.[224] Yet half of youth in custody are in facilities that do not provide mental health evaluations to all the children, and girls are more likely to be housed in facilities that lack treatment services.[225] Approximately 88% of children in custody are held in facilities that lack licensed mental health professionals, and they may also lack access to sufficient medical services.[226] This applies especially for girls with health needs arising from sexual abuse or pregnancy.[227]

The conditions of confinement, coupled with pre-existing mental health conditions, result in serious harm to children in detention. While some studies have indicated that children die by suicide at similar rates to the community at large, others show a double to quadruple rate increase for death by suicide for incarcerated children.[228] Some of this increased risk is likely traceable to corrections officials' responses to suicidal ideation and behavior that actually increase the risk of suicide in children, such as the use of solitary confinement.[229] Girls' psychological well-being may also be harmed in this setting through enforced femininity.[230] Juvenile incarceration is a site of constant surveillance.[231] This, along with arbitrary enforcement of rules that necessarily occur under constant supervision, can be psychologically harmful and is not compatible with teenagers' developmental

224. SAAR et al., *supra* note 18, at 12.

225. *Id.*at 14.

226. *Id.*

227. *Id.*

228. Holman & Ziedenberg, *Dangers of Detention*, *supra* note 223, at 9.

229. *Id.* (stating the United Nations considers solitary confinement longer than fifteen consecutive days torture.); Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 372 (2018) ("[P]sychological reactions to solitary confinement . . . include stress-related reactions (such as decreased appetite, trembling hands, sweating palms, heart palpitations, and a sense of impending emotional breakdown); sleep disturbances (including nightmares and sleeplessness); heightened levels of anxiety and panic; irritability; aggression, and rage; paranoia, ruminations, and violent fantasies; cognitive dysfunction, hypersensitivity to stimuli, and hallucinations; loss of emotional control, mood swings, lethargy, flattened affect, and depression; increased suicidality and instances of self-harm; and, finally, paradoxical tendencies to further social withdrawal.").

230. Fanna Gamal, *Good Girls: Gender-Specific Interventions in Juvenile Court*, 35 COLUM. J. GENDER & L. 228, 232 (2018).

231. Thusi, *supra* note 14, at 936.

stage, which inclines them to be intolerant of anything that seems unfair.[232]

Placing children in custody necessarily means removing them from their homes. The harms of separating children from their communities parallel historical harms visited upon marginalized communities in the United States as a form of collective violence.[233] Further, the concentration of children's incarceration among communities of color echoes that history. Today, children's incarceration inflicts state violence by isolating children from family and community and breaking important, supportive bonds that serve as a protective factor for adolescents.[234] Even more, their isolation in custody is often exacerbated by the long distances between children's homes and where they are actually held.[235] During the COVID-19 pandemic, the elimination of visits (which are also sometimes taken away as a punitive measure)

---

232. *Kids Are Different: How Knowledge of Adolescent Development Theory Can Aid Decision-Making in Court*, AM. BAR ASS'N JUV. JUST. CTR. 28 (Lourdes M. Rosado ed., 2000), https://jlc.org/sites/default/files/publication_pdfs/Understanding%20Adolscents.pdf. Teens' frustrations with arbitrariness may be with rules that appear arbitrary to them, like having to go to school despite having already graduated or not being allowed to roll up shirt sleeves or pant legs, or with the arbitrary enforcement of rules, like when one child gets in trouble for having rolled up her shirt sleeves while another who had done so did not. *Id.*

233. *See generally* LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR (2020). It should also be noted that in Black communities, extended kinship networks play an important role in children's lives. Carceral facilities displace these important bonds both by removing the child from their home and by creating visiting rules that do not facilitate maintenance of these relationships. *See* Brae Campion Young et al., *Visitation Policies in Juvenile Residential Facilities in All 50 States*, 18 JUST. POL'Y J. 1, 9–10 (2021).

234. Alyssa M. Mikytuck & Jennifer L. Woolard, *Family Contact in Juvenile Confinement Facilities: Analysis of the Likelihood of and Barriers to Contact*, 58 J. OFFENDER REHAB. 371, 372 (2019); Stephanie Kollman, *Parents as Partners: Family Connection and Youth Incarceration*, CHILD. AND FAM. JUST. CTR. (Feb. 2018), https://wwws.law.northwestern.edu/legalclinic/cfjc/documents/communitysafetyfeb.pdf (documenting difficulties with transportation, distance, time, cost, limited visiting hours, restrictive visitation rules, and visitation being taken away as a disciplinary measure as barriers to continued contact with children in custody).

235. For example, in South Carolina, children from all over the state are incarcerated at Broad River Road Complex in Richland County. *Secure Facilities*, S.C. DEP'T OF JUV. JUST., https://djj.sc.gov/facilities (last visited Aug. 23, 2022). This means some children are held more than three hours by car away from their homes—an expensive and time-consuming trip.

increased this isolation and feelings of despair among the children in custody.[236] It remains to be seen whether these fractured bonds will heal.

Compounding the harms of carceral power, incarceration for status offenses, like any incarceration of children, also generates a high likelihood of long-term deprivation and maldevelopment through foreseeable interruptions to schooling and future employment. Incarceration makes it far less likely that children will continue to attend school upon release or that they will graduate from high school.[237] These children's deprivation is then secured through the conditions that attend a lack of education in the United States: higher unemployment rates, worse health outcomes, premature death, and lower lifetime earnings.[238] The effects of these deprivations are worsened for Black youth. While incarcerated youth are likely to work three fewer weeks a year later in life, Black youth are likely to work five fewer weeks.[239] This economic violence is not confined to the children it directly affects. Instead, youth incarceration disrupts the economies of families and communities. Parents and siblings spend time and money on visits, court fees, and phone calls, and must take time off work to maintain relationships.[240] One in three court-involved families has reported having to choose between making court-related payments and

236. *See* Wasilczuk, *supra* note 141.

237. Holman & Ziedenberg, *Dangers of Detention*, *supra* note 223, at 9 (describing a series of studies that found that "43 percent of incarcerated youth receiving remedial education services in detention did not return to school after release, and another 16% enrolled in school but dropped out after only five months" and that "most incarcerated 9th graders return[ed] to school after incarceration but within a year of re-enrolling two-thirds to three-fourths withdr[e]w or drop[ped] out of school," and that four years later, "less than 15 percent of these incarcerated 9th graders had completed their secondary education.").

238. *Id*.

239. *Id.* at 10.

240. *See* Chris Bodenner, *When Being Locked Away Opens You Up*, THE ATLANTIC (Nov. 22, 2016), https://www.theatlantic.com/national/archive/2016/11/when-prison-brings-you-closer-to-your-sibling/622711/; *Families Unlocking Futures: Solutions to the Crisis in Juvenile Justice*, JUSTICE FOR FAMILIES 28 (Sept. 2012), https://www.youth4justice.org/wp-content/uploads/2012/12/Families-Unlocking-Futures.pdf [hereinafter JUSTICE FOR FAMILIES].

meeting their basic needs.[241] Studies show incarcerating youth also results in less stable future employment, resulting in a decrease in tax revenue, which further deprives communities of the means to survive and thrive.[242]

III. FOR THE GOOD OF OTHER PEOPLE'S CHILDREN

In "racism's changing same" we see connections between the Jacksonian and Progressive Eras of the juvenile legal system and its current incarnation.[243] From the 1850s to the 1920s, courts straightforwardly admitted they were worried about girls' sexuality—deviant and feebleminded girls, by which courts meant poor and Black girls, would ruin themselves or ruin society.[244] Today, even when concerns about sex and pregnancy are central, society couches those concerns in terms of the girls' safety.[245] Rebellious Black girls are told their hoop earrings are too big; they are too fast; they do not focus enough on their education.[246] In both eras, families play a complicated role. On the one hand, the Black family is told it imperils society: the degradation of morals—a failure of Black mothers—leads to Black girls'

241. JUSTICE FOR FAMILIES, *supra* note 240, at 28. One in five families also reported having to take out loans to make court-related payments. *Id*. at 29.

242. Holman & Ziedenberg, *Dangers of Detention*, *supra* note 223, at 10–11. For portraits of the impact of incarceration on families, *see generally* SYLVIA A. HARVEY, THE SHADOW SYSTEM: MASS INCARCERATION AND THE AMERICAN FAMILY (2020).

243. Ruth Wilson Gilmore, *Race and Globalization*, *in* ABOLITION GEOGRAPHY: ESSAYS TOWARD LIBERATION 114 (2022). Gilmore's definition of racism, "the state-sanctioned and/or extralegal production and exploitation of group-differentiated vulnerabilities to premature death, in distinct but interconnected political geographies" situates racism not as individual fault but as societal structure, making clear that the infrastructure of racism need not be rooted (or only rooted) in individual biases but lives in systems of oppression. *Id.*

244. HARTMAN, *supra* note 1, at 265.

245. Cynthia Godsoe notes this shift in justifications from explicit punishment for nonconformity to punishment for protection as a form of Reva Siegel's "preservation-through-transformation." Godsoe, *supra* note 13, at 1318 n.16 (citing Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2184 (1996)).

246. *See generally* Cheryl Dalby, *Gender Bias Toward Status Offenders: A Paternalistic Agenda Carried Out Through the JJDPA*, 12 L. & INEQ. 429, 446 (1994) (citing the Minn. Sup. Ct. Gender Fairness Task Force).

entanglement with the juvenile legal system.[247] On the other hand, many girls, both then and now, are brought to the court when parents are at their wits' end, afraid for their daughters or disapproving of their company and choices—though parents sometimes regret their referrals once they see how the courts operate.[248] For over 100 years, the violence of incarceration has been brought to bear on these "wayward" girls, their families, and their communities through the justifying power of *parens patriae*. However, as Ristroph recognizes in the adult criminal punishment system, "justifications of violence do not focus upon reasons *not* to use violence; they do not study the costs of violence, or elaborate its harms, or call upon our humanitarian principles."[249]

Recognition of the adult criminal punishment system's violence and an understanding of its reach call upon us to think differently about the limits of punishment. A recognition of similar violence in the status offense system calls upon us to contend with a much more fundamental question: whether violence can be justified at all given the underlying rationale of the system. I argue that it cannot and that we instead must heed Roberts's call to "imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems."[250] That reimagining must be not only of how we control or redirect misbehaving children but also of children's entire relationship to government.[251]

Relinquishing the violence of status offense incarceration is a small step, but one that has failed in the past. The 1974 Juvenile Justice and Delinquency Prevention Act ("JJDPA") outlawed incarceration for status offenses, believing that children were "inappropriate

247. ROBERTS, KILLING THE BLACK BODY, *supra* note 47, at 3, 7–19, 21.

248. BRENZEL, *supra* note 24, at 80 (In 1856, 41% of the girls at the Industrial School in Lancaster were referred by parents.); CHESNEY-LIND & SHELDEN, *supra* note 185, at 160 (stating that over time, girls have been more likely to be referred to juvenile court by their parents, and about 60% of all children referred for status offenses were referred by someone other than law enforcement.) Both in the early days of the juvenile court and now, parents often find the court process is slow or too far out of their control and try to reverse courts. *See* ANNE MEIS KNUPFER, REFORM AND RESISTANCE: GENDER, DELINQUENCY, AND AMERICA'S FIRST JUVENILE COURT 80 (2001).

249. Ristroph, *Just Violence*, *supra* note 157, at 1056.

250. Roberts, *Abolition*, *supra* note 5, at 7–8.

251. Rolnick, *Government Intervention*, *supra* note 11, at 848.

clients for the formal police courts and corrections process of the juvenile justice system."[252] That lasted only six years. In 1980, the National Council of Juvenile and Family Court Judges, among others, pushed Congress to pass the "Valid Court Order ("VCO") Exception," which allowed judges to lock up children in response to violating a court order related to their status offense proceedings.[253] Debates over the VCO exception explicitly called on protectionist aims, particularly concerning girls.[254] Since 1997, incarceration for status offenses has dropped by 40%, but some states continue to make heavy use of the VCO exception to incarcerate children.[255] Moreover, this drop may be deceiving, as there is evidence that the JJDPA led prosecutors to relabel status offenses as delinquent offenses to circumvent the prohibition.[256] In states that have tried to initiate change, resistance often comes from the courts themselves. Though the National Conference of Juvenile and Family Court Judges reversed its position with respect to the VCO exception in 2010,[257] in Washington, where lawmakers passed a bill to eliminate the use of detention for status offenses in 2019,[258] judges have sought to "get around or repeal the new law."[259]

Framing detention as an issue of violence, however, should motivate advocates, lawmakers, and judges to see the system for what it is

---

252. S. REP. NO. 93-1011 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5283, 5287.

253. D'lorah L. Hughes, *An Overview of the Juvenile Justice and Delinquency Prevention Act and the Valid Court Order Exception*, 2011 ARK. L. NOTES 29, 32 (2011).

254. Dalby, *supra* note 246, at 443 (quoting Judge John Milligan's speech to the House Education and Labor Committee on behalf of the National Council of Juvenile and Family Court Judges.).

255. Dawn R. Wolfe, *Thousands of Children On Probation Are Incarcerated Each Year for Nonviolent, Noncriminal Behaviors*, THE APPEAL (Sept. 4, 2020), https://theappeal.org/thousands-of-children-on-parole-are-incarcerated-each-year-for-nonviolent-noncriminal-behaviors/.

256. CHESNEY-LIND & SHELDEN, *supra* note 185, at 55.

257. *Valid Court Order (VCO Exception)*, COAL. FOR JUV. JUST., https://www.juvjustice.org/our-work/safety-opportunity-and-success-project/national-standards/section-iv-recommendations-poli-1 (last visited Oct. 14, 2022) (citing National Council of Juvenile and Family Court Judges, *Resolution Supporting Reauthorization of JJDP Act and Elimination of the VCO* (March 2010)).

258. S.B. 5290, 66th Leg., 2019 Reg. Sess. (Wash. 2019).

259. Wolfe, *supra* note 255.

and realize that we must do better for other people's children—and all our children. An abolitionist orientation to status offenses allows us to recognize "that there [is] no easy reformist solution[] to the hegemonic notion that Indigenous and Black people, other people of color, poor people, trans people, and women of all racial backgrounds who do not conform to dominant gender expectations [are] naturally inclined to criminality and belong in prison."[260] We see in the programs or services "offered" (usually mandated) after a status offense adjudication similar medical models to those in community-based disability service models, which all too often include an asymmetry of power and force children to earn basic rights to movement, privacy, and choice.[261] If they fail to check each box, children might find themselves in custody. Child protection cases similarly force families through a gauntlet of appointments, counseling, and classes—without consulting caregivers about how best to remediate the issues that brought them to Family Court.[262] None of these systems acknowledges that "treating" someone who will continue to be denied access to many of their basic needs, including security, education, housing, and medical services, will not have lasting effects. This also helps to explain why more incremental reforms like girls courts will continue to cause violence as long as they offer help only under the threat of removal from families and communities. Simply repackaging and relabeling the same procedures and orientations toward girls cannot break our nation's addiction to carceral responses.[263]

At the margins, reformist projects have seen some success. In Hawaii, no girls are currently held in long-term facilities.[264] This model, however, fails to question the underlying logic that the state

260. DAVIS ET AL., *supra* note 22, at 42.

261. Chapman et al., *supra* note 34, at 12.

262. *See* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 21 (2002).

263. Addie Rolnick makes a similar point with respect to the ways education, child welfare, and juvenile justice have worked toward the same ends ("assimilation") with the same means ("removal, discipline, and confinement") regardless of what the institutions have been named. Rolnick, *Government Intervention*, *supra* note 11, at 848.

264. Claire Healy, *Hawaii has no girls in juvenile detention. Here's how it got there.*, WASHINGTON POST (July 25, 2022), https://www.washingtonpost.com/nation/2022/07/25/hawaii-zero-girls-youth-correctional-facility/.

must intervene when children misbehave and that placement—even if at a "therapeutic" facility—is the best response to children's needs.[265] In this sense, the battles over whether children can be placed in secure facilities, while necessary, are only the beginning. To rid girls' lives of state violence, we must consider how we can provide resources without the threat of punishment and how we can invest in children without state control over their minds and bodies. This means recognizing that not all societal problems are the state's to solve, while also taking responsibility for the government's role in creating them. Centuries of plunder and disinvestment in Black communities require provision that comes without the restrictive surveillance government programs have brought in the past.

Law reform is not the only answer. Judges must also recognize the serious harms that custodial intervention for status offenses inflicts. As Cover recognizes in the unlikely context of the trial of a Nazi war criminal, "A judge may or may not be able to change the deeds of official violence, but she may always withhold the justification for this violence. She may or may not be able to bring a good prison into being, but she can refrain from sentencing anyone to a constitutionally inadequate one. Some judges have in fact followed this course."[266] Judges must recognize that the deep failures of punishment in our system are, in fact, up to them. When they impose a custodial sentence knowing the violence of status offense incarceration for Black girls, they cannot distance themselves from the acts they authorize, even if they are not the acts the law allows.

Addressing status offenses also requires us to question the proper role of *parens patriae* and protectionism in the juvenile legal system. Erica Meiners recognizes that the juvenile court helps construct childhood as a status of precarity, "[y]et this status of precarity often translates into forms of protectionism enforced through criminalization that

265. A similar fight over the underlying logics of incarceration can be seen in New York City, where abolitionist organizers have decried the city's plan for a "feminist" jail. *Compare An Open Letter Demanding Community Services and An End to Pretrial Detention and Gender-Based Imprisonment in New York City*, MEDIUM (July 26, 2022), https://medium.com/@nonewwomensjailnyc/over-200-community-members-organizers-scholars-and-formerly-incarcerated-people-and-their-ce9218e021ba, *with* Ginia Bellafante, *What Would a Feminist Jail Look Like?*, N.Y. TIMES (May 14, 2022), https://www.nytimes.com/2022/05/14/nyregion/jail-women.html.

266. Cover, *supra* note 2, at 1622 n.48.

not only erase young people's agency, but this punitive matrix advanced to ensure safety, captures and harms many youth: *Truant, delinquent, incorrigible, runaway, promiscuous*."[267] Moreover when we acknowledge that normal adolescent behavior involves sexual development and experiences, we can also acknowledge that placing notions of innocence at the center of childhood makes all youth more vulnerable when negotiating their sexuality, and makes it easier to deny some children the benefits of childhood status.[268] The centrality of innocence also makes sexuality "a prime focus of surveillance and regulation for all youth, particularly cisgendered girls."[269]

The *parens patriae* power can also play a contradictory role in the Black family. While the state's power as super-parent is "framed as an extension of parental authority from the parent to the state [. . .] it can serve as a legal basis for diminishing parental control or facilitating family separation through the severing of parental bonds."[270] This also explains why we must be cautious about moving children from a delinquency orientation to a dependency one. As Roberts argues, dependency proceedings inflict violence on families by renaming status offenses families or children in need of services petitions and placing the onus on parents rather than the child.[271] The family policing system also often serves as a pathway to delinquency court involvement. Studies indicate that more than half of the children placed in foster care become enmeshed in the juvenile legal system.[272] Later in life, criminal legal system involvement and lower earnings also follow youth who have been placed out of their homes.[273] As a result, plac-

267. MEINERS, *supra* note 7, at 6.

268. *Id.* at 6, 32–33.

269. *Id.* at 33.

270. Annamma & Morgan, *supra* note 7, at 490.

271. ROBERTS, TORN APART, *supra* note 188, at 282–84.

272. Mark Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Conditions of Youth Preparing to Leave State Care*, CHAPIN HALL CTR. FOR CHILD. AT THE U. OF CHI. (Feb. 22, 2004); *Young Adult Outcomes of Foster Care, Justice, and Dually Involved Youth in New York City*, N.Y. CITY OFF. OF THE MAYOR (June 2015), https://www1.nyc.gov/assets/cidi/downloads/pdfs/foster_care_justice_and_dually_involved_exec_summary.pdf; *see also* ROBERTS, TORN APART, *supra* note 188, at 223.

273. Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1599–1602, 1604 (2007); Jo-

ing the blame on parents and moving status offenses into the family policing system may have many of the same outcomes for children as addressing the issues within the juvenile legal system.

At bottom, our success in dealing with the many issues bound up in status offenses may come down to our willingness to address the causes of delinquency. Increasingly public health models of public safety intervention demonstrate that resources in communities are far more successful at curbing crime than probation and incarceration. The same is true of the circumstances that funnel children into the status offense system. As Feld bluntly writes, "The United States' failure to reduce child poverty is rooted in political economy, racial and economic inequality, and a lack of political leadership or willingness to care for other people's children."[274] Until we are, reform is all we will get, and it will not be enough.

CONCLUSION

Since the founding of carceral institutions for girls, Black girls have found themselves locked inside, sanctioned for survival, for their sexuality, and for the stereotypes society applies to them. These institutions have always been violent—sometimes brazenly, in the form of whips and shackles, and at others, more subtly, through the reinforcement of race-class hierarchies, denigration of girls' personalities, and isolation from caretakers and family. Recognizing incarceration as violent means that society cannot continue to use it to protect vulnerable Black girls from others or from what society perceives as their poor decisions. Further, states must not allow moralistic and developmentally inappropriate judgments to confine Black girls at higher rates than their peers. Progressives founded the youth-specific jails and prisons as a reform, which have since been reformed and reformed again, with little benefit to Black girls. Status offense incarceration has no place in the upbringing of children and must be done away with for girls' own good.

* * *

seph Ryan et al., *Juvenile Delinquency in Child Welfare: Investigating Group Home Effects*, 30 CHILD. & YOUTH SERVS. REV. 1088 (2008).

274. FELD, EVOLUTION OF THE JUVENILE COURT, *supra* note 20, at 16.