KEEPING KIDS OUT OF COURT: PROSECUTORIAL DISCRETION AND THE TRAUMA OF JUVENILE COURT REFERRAL

Jennifer Brinkman[*]

This Article will examine the critical role of pre-court diversion in the juvenile justice system and the traumatic impact that formal court referral has on children. Although juvenile proceedings are often described as rehabilitative rather than punitive, the act of being referred to court itself can produce lasting harm. Children who must appear in court—even before a formal adjudication—experience significant stress, shame, and fear, which can compound preexisting trauma and undermine healthy development. For children already facing instability at home or school, the courtroom environment can become another site of retraumatization rather than support.

At the center of this problem is prosecutorial discretion in determining whether a child is referred to court or diverted into alternative programs. Across the United States, prosecutors exercise wide latitude at this critical stage, yet the scope and limits of their discretion vary considerably by state. Some jurisdictions give prosecutors broad authority to divert youth away from formal proceedings, while others provide broad discretion to refer youth to court. This variation has profound consequences for children, since the decision to refer or divert determines whether a child encounters the trauma of court involvement at all.

This Article will analyze the ways in which referral to court exacerbates trauma in children and consider empirical evidence linking diversion to better long-term outcomes. It will describe various state statutes that serve to limit prosecutorial discretion in different ways. Ultimately, this Article will argue that the best path forward is to design legal frameworks that prioritize keeping children out of court. Whether by limiting prosecutorial discretion to refer cases into the system or by expanding discretion to allow more cases to remain in diversion, reforms should be structured with the understanding that minimizing court involvement is most consistent with children's well-being. In doing so, the Article aims to highlight how early legal decision-making can either perpetuate or prevent cycles of harm.

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[*] Jennifer Brinkman is an Assistant Professor of Law at Northern Kentucky University Salmon P. Chase College of Law. She thanks Kendal Pickens, Chase Law Class of 2026, for all of her hard work and dedication to this project.

I. INTRODUCTION

There have always been "inherent tensions in the institutional design of the juvenile court itself."[1] The question has, and continues to be, "whether the juvenile court should be a social agency that sought to provide services to children in need or whether it should function primarily as a court of law."[2] Perhaps it can be both. Perhaps it can provide services to children through diversion before sending them to the court of law.

Over the last year or more, the media has pushed a narrative that this country is in the midst of a violent youth crime wave. News reports have described youth crime as "out of control."[3] They have described an "alarming"[4] or "troubling"[5] surge in youth crime, particularly in violent crime. Some reports have even called it "organized"[6] crime. One news outlet released an entire series on the so-called "Juvenile Crime Crisis."[7]

However, the youth crime wave narrative is not borne out by recent crime and arrest data. Based on a 2024 report by the Rochester Institute of Technology focusing on homicide rates in the United States, Washington D.C. saw an over thirty percent decrease in crime from the year prior.[8] In Forsyth County, North Carolina, youth crime complaints were down during the first half of 2025, when compared to the same time period the previous year.[9]

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1. David S. Tanenhaus, *The Many Histories of Juvenile Justice*, 53 CRIM. & JUST. 161, 183 (2024).

2. *Id.*

3. Benji Ferraro, *DC Shop Owners Alarmed by 'Out of Control' Youth Crime as Trump Deploys National Guard*, FOX NEWS, (Aug. 14, 2025, at 17:55 ET), https://www.foxnews.com/media/dc-shop-owners-alarmed-out-control-youth-crime-trump-deploys-national-guard [https://perma.cc/8QKB-BK6W].

4. Mason Miller, *Shootings, Gangs, and Lost Youth: What's Driving Tangipahoa's Juvenile Crime Spike?*, UNFILTERED WITH KIRAN (June 26, 2025, at 19:25 ET), https://unfilteredwithkiran.com/tangipahoa-parish-sees-spike-in-juvenile-crime-as-officials-urge-community-action/ [https://perma.cc/BKS2-X4DU].

5. Keith Daniels, *Expert Blames Stress, Lack of Punishment for Youth Crime Wave in Baltimore Neighborhoods*, FOX45 NEWS, (May 8, 2025, at 23:45 ET), https://foxbaltimore.com/news/tiktok/expert-blames-stress-lack-of-punishment-for-youth-crime-wave-in-baltimore-neighborhoods [https://perma.cc/6EVR-KRJ9].

6. Taylor Leverett, *Business Owner Sees Organized Juvenile Theft as Social Media 'Game'*, WFMY NEWS2, (May 20, 2025, at 17:36 ET), https://www.wfmynews2.com/article/news/local/winston-salem-business-owners-on-youth-crime/83-0d9fc88f-4e27-4173-ae19-f5b39fe55e44 [https://perma.cc/N753-9N7W]; Miller, *supra* note 4.

7. Peter Fleischer, *Cleveland Sees Surge in Juvenile Crime as Community Debates Justice System's Response: 3News Investigates*, WKYC, (Feb. 25, 2025, at 00:35 ET), https://www.wkyc.com/article/news/investigations/3news-investigates-juvenile-crime-crisis-part-one/95-e5d4172c-da41-47ce-a43c-31cb868ac216? [https://perma.cc/QD63-8HPR].

8. Ferraro, *supra* note 3.

9. Leverett, *supra* note 6.

Arrest rates were the highest they have ever been in the mid-1990s. Since then, arrest rates, including those for youth, have decreased, hitting a historic low during the COVID-19 pandemic. Although youth arrest rates increased in 2022 and 2023, they began to fall again in the years following. In 2024, youth arrests were more than eighty percent lower than at their peak in 1996 and twenty-eight percent lower than in 2019.[10] Thus, although youth crime has slightly increased since the historic low in 2020, it still has not reached pre-pandemic levels, and, in fact, decreased in 2024 after the brief upward trend in 2022 and 2023.

Despite the empirical evidence refuting the "juvenile crime wave" narrative, that narrative is still perpetuated by the media. This is, at least in part, because media often focuses its reports on youth crime rather than reports on the positive acts in which youth engage.[11] As some commentators explain, "[t]he problem is not the inaccuracy of individual stories, but that the cumulative choices of what is included in the news—or not included—presents the public with a false picture of higher frequency and severity of crime."[12]

Because the perception most people form is shaped by what they see in popular media, it becomes their reality. Thus, there is a public push to impose harsher penalties on youth. A 2023 poll in Maryland found that over half of respondents wanted stricter laws in response to youth crime, including laws that would send more children to secure detention and boot camp-type programs.[13] A convenience store owner in Washington D.C. expressed what likely reflects the views of many Americans regarding the appropriate response to youth crime: "I think the kids need to be taught a lesson—lock them up. The parents can't do nothing with them. They are out of control. Lock them up! I don't know what else to say."[14] However, before we just "lock them up," we need to look at what effect pushing more children into the court system will have on those children.

It has been extensively documented that children who enter the formal court system are more likely to be arrested again than those who do not.[15] A 2010 report "found no evidence that juvenile system processing has a crime

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10. Stephanie Kennedy & Ernesto Lopez, *Who Gets Arrested in America: Trends Across Four Decades, 1980–2024*, COUNCIL ON CRIMINAL JUSTICE (Dec. 2025), https://councilоncj.org/who-gets-arrested-in-america-trends-across-four-decades-1980-2024/ [https://perma.cc/DL7L-SD7E].

11. DOUGLAS E. ABRAMS ET AL., CHILDREN AND THE LAW: DOCTRINE, POLICY, & PRACTICE 1015 (8th ed. 2024).

12. Lori Dorfman & Vincent Schiraldi, *Off Balance: Youth, Race & Crime in the News*, YOUTH LAW CENTER, 7 (Apr. 2001), https://www.ylc.org/wp-content/uploads/2018/11/media.pdf [https://perma.cc/T4ND-U25W].

13. ABRAMS ET AL., *supra* note 11, at 1014.

14. Ferraro, *supra* note 3.

15. ANNIE E. CASEY FOUNDATION, EXPAND THE USE OF DIVERSION FROM THE JUVENILE JUSTICE SYSTEM, 1 (2020).

control effect—whether in prevalence, incidence (or frequency) or severity of offense."[16] The Annie E. Casey Foundation explained that "in fact, most studies showed that formal processing increased delinquency."[17]

Additionally, the negative effects of formal court processing are exacerbated for children who are not at high risk of being rearrested.[18] A 2013 meta-analysis found that youth who were assessed as low risk and offered diversion reoffended at a forty-five percent lower rate than their peers from similar backgrounds who were formally processed through the court system.[19]

Studies from 2014 in Ohio and California both yielded results consistent with the 2010 report and the 2013 meta-analysis cited by the Annie E. Casey Foundation. In Ohio, youth who were deemed low risk for rearrest and who were diverted from court "reoffended far less frequently" than their similarly-situated peers who were sent to court for formal case processing and prosecution.[20] In Orange County, California, "delinquent behavior dropped by more than half among diverted youth but nearly doubled for those formally processed in court."[21] A study published in 2017, focusing on boys arrested for the first time for low-level offenses, also found similar results. Accounting for the boys' race, age, offense characteristics, socioeconomic status, and self-reported offending behaviors, the study "found that youth whose cases were processed formally were arrested three times as often as comparable youth whose cases were processed informally, and nine times as often as youth whose cases were dismissed entirely."[22]

Although recidivism rates are often viewed as the gold standard for determining the success of a diversion program, there are many other metrics by which success should be judged. Consistent with the idea that stakeholders

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16. *Id.* at 4 (citing Anthony Petrosino, Carolyn Turpin-Petrosino, & Sarah Guckenburg, *Formal System Processing of Juveniles: Effects on Delinquency*, 6 CAMPBELL SYSTEMATIC REVIEWS 1 (2010), https://journals.sagepub.com/doi/epub/10.4073/csr.2010.1 [https://perma.cc/PBX3-VALX]).

17. *Id.*

18. *Id.* at 6.

19. *Id.* (citing Holly A. Wilson & Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review*, 40 CRIM. JUST. & BEHAV. 497 (2013), https://journals.sagepub.com/doi/10.1177/0093854812451089 [https://perma.cc/9U4B-PJHS]).

20. *Id.* at 6 (citing Edward J. Latessa, Brian Lovins, & Jennifer Lux, *Evaluation of Ohio's RECLAIM programs*, UNIV. OF CINCINNATI SCH. OF CRIM. JUST. (Apr. 30, 2014), www.uc.edu/content/dam/uc/ccjr/docs/reports/FINAL%20Evaluation%20of%20OHs%20RECLAIM%20Programs%20(4-30-2014)%20.pdf [https://perma.cc/CWC9-28A4]).

21. *Id.* at 4 (citing Jordan Bechtold Beardslee, Under the Radar or Under Arrest: How Does Contact with the Juvenile Justice System Affect Delinquency and Academic Outcomes? (Jan. 1, 2014) (Ph.D. dissertation, University of California, Irvine) (on file with the UA Little Rock Law Review)).

22. *Id.* (citing Adam Fine et al., *And Justice for All: Determinants and Effects of Probation Officers' Processing Decisions Regarding First-time Juvenile Offenders*, 23 PSYCHOL., PUBLIC POL'Y, AND L. 105 (2017)).

and policymakers should look at the effect of court referral on youth, outside of the sole focus on recidivism, are the results of a 2018 survey conducted by the Institute for Innovation in Prosecution. The Institute surveyed a "diverse group of practitioners, academics, and people directly impacted by the criminal justice system" and found that "the [criminal justice] system needs to move beyond recidivism as a primary success metric."[23] Overall rehabilitation includes a youth's performance in school and other areas of life.

Studies have shown that formal court referral not only reduces a young person's odds of future success in employment but also his odds of success in school.[24] Young people who are arrested and incarcerated are eleven to twenty-six percent less likely to graduate from high school than their non-arrested peers.[25] Additionally, school suspensions fell by more than seventy-five percent for youth who went through diversion programs rather than the formal court process, while school suspensions increased substantially for youth formally processed in the court system.[26]

In addition to the other negative outcomes associated with formal court referral, this Article asserts that interaction with the court system through formal court referral causes trauma to children. Section II of this Article focuses on trauma. It explains what trauma is and describes the research that indicates that children who come in contact with the juvenile legal system are much more likely to have experienced trauma than the rest of the population. Then, it explains how formal court referral, as opposed to diversion, not only exacerbates a child's trauma but actually acts as an independent source of trauma for children.

Section III provides the legal background for the ultimate argument asserted in Section IV. Section III first describes the history of juvenile courts in America, from the Progressive Era to the Kids are Different Era. Then, it describes what juvenile diversion is and the immense discretion prosecutors have in deciding which children can take advantage of diversion programs. This discretion is similar to that which they exercise in other charging decisions, and which is only limited by the state's statutes. Lastly, Section III explains the statutory schemes that govern pre-court diversion for children in

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23. David Noble, *Mapping the Landscape of Prosecutor-Led Pretrial Diversion*, 9 CRIM. L. PRAC. 8, 9 (2020).

24. ANNIE E. CASEY FOUNDATION, *supra* note 15, at 1.

25. Jennica Janssen, *Collateral Consequences for Justice-Involved Youth: A Model Approach to Reducing the Number of Collateral Consequences*, 20 MARQ. BENEFITS & SOC. WELFARE L.R. 25, 29 (2018) (citing Randi Hjalmarsson, *Criminal Justice Involvement and High School Completion*, 63 J. OF URB. ECON. 613, 621 (2008)).

26. ANNIE E. CASEY FOUNDATION, *supra* note 15, at 4 (citing Jordan Bechtold Beardslee, Under the Radar or Under Arrest: How Does Contact with the Juvenile Justice System Affect Delinquency and Academic Outcomes? (Jan. 1, 2014) (Ph.D. dissertation, University of California, Irvine) (on file with the UA Little Rock Law Review)).

three states and compares their distinctive diversion elements that either provide or limit prosecutorial discretion.

Finally, Section IV of this Article argues for legislative amendments that allow prosecutors more discretion to divert higher-level offenses and increase the number and type of charges that are subject to mandatory diversion. The Article ends by acknowledging methods other scholars have asserted to keep more kids out of court.

II. TRAUMA

Understanding trauma is foundational to evaluating how the juvenile legal system affects children who come into contact with it. Trauma is neither monolithic nor confined to a single type of experience; rather, it exists along a spectrum, with varying sources, durations, and psychological effects that shape how children perceive and respond to authority, stress, and punishment. Empirical research consistently demonstrates that children charged with delinquent offenses are disproportionately likely to have already experienced significant trauma, including exposure to violence, neglect, instability, or caregiver involvement with the legal system. Yet the relationship between trauma and the juvenile court does not end at preexisting exposure.

Contact with the court itself, through investigation, adjudication, supervision, or even well-intentioned intervention, can exacerbate prior trauma and independently generate new traumatic harm. Legal involvement carries psychological consequences that the system too often fails to acknowledge. Recognizing trauma's prevalence, complexity, and compounding nature is therefore essential to any meaningful assessment of juvenile court practices and diversionary policy.

The first section of this Article begins by defining trauma. Then, it describes the empirical evidence which shows that children with trauma histories are disproportionately represented in the population of children involved in the juvenile legal system. Then it asserts that formal referral to juvenile court both exacerbates the trauma children have already experienced and also acts as an independent source of trauma.

A. Trauma Defined

Before discussing how formal court referral can, and often does, impose trauma on children, a brief overview of the basics of trauma is necessary. The American Psychological Association defines trauma as "an emotional response to a terrible event like an accident, crime, natural disaster, physical or emotional abuse, neglect, experiencing or witnessing violence, death of a

loved one, war, and more."[27] Similarly, "[a]n event is defined as traumatic when it renders an individual's internal and external resources inadequate, making effective coping impossible. A traumatic experience occurs when an individual subjectively experiences a threat to life, bodily integrity or sanity."[28] In short, "[a] traumatic experience is one that threatens a person's life, safety, and well-being, overwhelming the sufferer's ability to cope."[29]

Trauma, however, exists on a spectrum, from smaller traumas to longer-lasting, or chronic, trauma.[30] Samantha Buckingham explains that "[t]rauma ranges in types."[31] It can include anything from being the victim of abuse to witnessing violence to being deprived of the necessary food, shelter, and clothing and everything in between.[32] "Trauma may result from a single event or from repeated exposures to multiple types of trauma."[33]

Exposure to traumatic events can cause both short- and long-term effects. In the short-term, children may experience intrusive memories or other forms of feeling as if the traumatic event is reoccurring and may avoid people, places, and other stimuli associated with the event. [34] In the long-term, children can experience both physical and emotional effects. Physically, they may experience chronic symptoms such as headaches and nausea.[35] Emotionally, children may experience unpredictable emotions, flashbacks, and difficulty maintaining relationships.[36] They may also feel guilt, shame, and helplessness.[37] Children who have experienced trauma sometimes feel as if they are permanently damaged, have difficulty trusting others, and are vulnerable to re-victimization or to becoming a perpetrator of trauma.[38] Extremely important in the context of interactions with police and the juvenile legal system, trauma exposure can also cause "hyper-arousal, misinterpretation of cues,

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27. Am. Psych. Ass'n., *Trauma*, apa.org/topics/trauma [https://perma.cc/UL4P-VDH8].

28. Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 364 (2016).

29. Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 645–46 (2016) (citation omitted).

30. Eduardo R. Ferrer, *Transformation Through Accommodation: Reforming Juvenile Justice by Recognizing and Responding to Trauma*, 53 AM. CRIM. L. REV. 549, 563 (2016) ("[T]rauma is a type of stress and . . . stress itself exists on a spectrum.").

31. Buckingham, *supra* note 29, at 646.

32. *Id*.

33. *Id*.

34. Katz & Haldar, *supra* note 28, at 367 (citing Richard R. Kluft, Sandra L. Bloom, & John D. Kinzie, *Treating the Traumatized Patient and Victims of Violence*, in 86 NEW DIRECTIONS IN MENTAL HEALTH SERVICES 79, 4 (2000)).

35. *Trauma*, *supra* note 27.

36. *Id*.

37. Katz & Haldar, *supra* note 28, at 367 (citing JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE – FROM DOMESTIC TO POLITICAL TERROR, 4 (1992)).

38. *Id*.

overreaction, [and] fight or flight."[39] Finally, childhood trauma may further affect brain and bodily development by increasing the production of stress hormones, interfering with the maturation of neural pathways, and producing toxic stress.[40] Despite these generalized statements of possible reactions to experiencing a traumatic event, it is important to understand that "there are no universal indicators of, or responses to, traumatic events."[41]

Trauma exposure, even to just a single acute trauma event, can also lead to the development of Post-Traumatic Stress Disorder, or PTSD.[42] PTSD is "characterized by a hyper-aroused state of fear usually lasting more than six months."[43] It is often associated with "hypervigilance, an abnormally enhanced state of arousal, over-reaction to stimuli, and a constant attentiveness to potential threats in the sufferer's environment."[44] This is important because, as discussed below, these traits can be misidentified as delinquent behavior rather than trauma responses.

B. Over-Representation of Children with Trauma Histories

Research has repeatedly shown that children who are involved in the juvenile legal system are significantly more likely to have experienced trauma than those who never become involved in the system. About one-third of children in the United States report having experienced at least one traumatic event.[45] However, up to ninety percent of system-involved youth report exposure to one or more traumatic events.[46] The Northwestern Juvenile Project conducted a study of nearly 2,000 youth who had been arrested and detained in Cook County, Chicago, over a three-year period and found that ninety-two and a half percent of those youth had experienced at least one trauma event, and eighty-four percent had experienced more than one.[47] Studies have even

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39. Buckingham, *supra* note 29, at 646; Ferrer, *supra* note 30, at 571–73.
40. Buckingham, *supra* note 29, at 649.
41. Katz & Haldar, *supra* note 28, at 367.
42. Buckingham, *supra* note 29, at 646.
43. *Id.* at 650.
44. Buckingham, *supra* note 29, at 646 (citing Robert Franks, *Building a Trauma-Informed System of Care for Children in Connecticut*, CONN. CTR. FOR EFFECTIVE PRACTICE 11 (2013)).
45. Buckingham, *supra* note 29, at 654.
46. Eva McKinsey et al., *How Judges May Influence Kids' Experiences in Court*, 108 JUDICATURE 15 (2025) (citing Carly B. Dierkhising, et al., *Trauma Histories Among Justice-Involved Youth: Findings from the National Child Traumatic Stress Network*, 4 EUR. J. OF PSYCHOTRAUMATOLOGY 1, 1 (2013)).
47. LINDA A. TEPLIN ET AL., THE NORTHWESTERN JUVENILE PROJECT: AN OVERVIEW (Feb. 2013), https://ojjdp.ojp.gov/sites/ojjdp/files/pubs/234522.pdf [https://perma.cc/7YK7-KG7R].

shown that PTSD rates of children involved in the juvenile system are comparable to those of soldiers returning from deployment in Iraq.[48]

In addition, some types of trauma exposure make it more likely that a child will enter the juvenile legal system. For example, a study of children in Connecticut showed that "being abused or neglected increases the likelihood" of childhood arrest by fifty-nine percent.[49]

Understanding the high likelihood that a child involved in the juvenile legal system has experienced trauma is important for at least two reasons. First, it informs the way we should view, and then treat, the children who are accused of committing delinquent acts. Second, it provides context for some of the actions children take that lead them to system involvement. When considering children who are alleged to have violated the law, we must always be mindful that they are victims of trauma. Because of this, we should treat them in a trauma-informed way. Instead of merely asking "What is wrong with you?" we should ask "What has happened to you?"[50] Evidence that children have experienced significant trauma before entering the juvenile legal system is staggering and, some argue, requires the system to establish a presumption of a child's trauma history.[51] Through this lens, many actions previously viewed as delinquent behavior can now be viewed as a cry for help "to which society has an obligation to respond pro-actively and compassionately."[52]

Additionally, a child's trauma history will often lead the child to take actions that their non-trauma-impacted peers might not take, making them more likely to enter the juvenile legal system. Kristin Henning and Rebba Omer, experts on the impacts of trauma on system-involved youth, explain that "[a]dolescent and childhood trauma create another unnecessary and unwarranted pathway into the juvenile legal system."[53] They describe the research that shows "that youth with a history of trauma are more likely to have interactions with police and are thus at greater risk of accumulating juvenile records, compared to youth who have not experienced trauma."[54] This is because "[o]ften, behavioral responses to trauma 'resemble the common

48. Buckingham, *supra* note 29, at 654 (citing KAREN M. ABRAMS ET AL., PTSD, TRAUMA, AND COMORBID PSYCHIATRIC DISORDERS IN DETAINED YOUTH 5–6 (U.S. DEP'T OF JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION 2013)).

49. Buckingham, *supra* note 29, at 650.

50. Michael T. Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, OJJDP J. JUV. JUST. 13 (2014), http://www.journalofjuvjustice.org/JOJJ0302/JOJJ0302.pdf [https://perma.cc/KEZ8-32X2].

51. Buckingham, *supra* note 29, at 680.

52. *Id.*

53. Kristin N. Henning & Rebba D. Omer, *The Making of a Juvenile Record: The Insidious Consequences of Criminalizing Race, Adolescence, Disability, and Trauma*, 103 N.C.L. REV. 1373, 1389 (2025).

54. *Id.* at 1391.

delinquent behaviors seen in youth referred to the justice system and are therefore under-identified as posttraumatic symptoms.'"[55]

Trauma can profoundly affect a child's emotional and behavioral functioning. Children who have experienced trauma "may live in a constant state of hypervigilance or a persistent fear of danger that causes them to be constantly on guard, expecting something bad to happen to them."[56] They can often perceive danger or threats when there are none.[57] They may struggle to regulate their emotions and behavior, responding with anxiety, fear, anger, or confusion.[58] These trauma responses may be misinterpreted by adults as defiance or aggression, and children with significant trauma histories often experience emotional instability and intense anger.[59] Additionally, children who suffer from PTSD, a condition experienced by many children who have been exposed to trauma, "may respond violently with little or no provocation" because they may perceive threats that do not actually exist.[60] These children are also prone to extreme risk-taking, which can lead to increased interaction with the police.[61] The reactions of trauma-impacted youth to everyday occurrences can be perceived by adults as aggressive, dangerous, scary, or illegal, and can often lead to contact with the police and the juvenile legal system.[62]

C. Court Involvement Exacerbates Trauma and Causes Its Own Trauma

Research shows that children's experiences in court are overwhelmingly negative. Formal court referral, as opposed to diversion prior to court referral, often exacerbates the trauma that a child has already experienced. In a survey of court personnel (youth defenders and juvenile court counselors) in a southeastern state, some of those surveyed "noted how court can exacerbate youth's mental health issues."[63] For example, anxious kids become more anxious, depressed kids become more depressed, angry kids get angrier.[64]

In addition to exacerbating the trauma that children have already experienced, formal court involvement causes its own trauma. It seems obvious to those who have witnessed it that "[i]nvolvement in juvenile court is inherently

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55. Buckingham, *supra* note 29, at 656 (quoting ERICA J. ADAMS, HEALING INVISIBLE WOUNDS: WHY INVESTING IN TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE 4 (JUST. POL'Y INST. 2010)).
56. Henning & Omer, *supra* note 53, at 1389.
57. *Id.* at 1389–90.
58. *Id.* at 1390.
59. Henning & Omer, *supra* note 53, at 1390.
60. Buckingham, *supra* note 29, at 650.
61. *Id.*
62. *Id.* at 656.
63. McKinsey et al., *supra* note 46, at 18.
64. *Id.*

stressful."[65] Court involvement has negative impacts on youth, including decreased self-worth, increased anxiety, and exacerbated mental health issues.[66] A systematic review of qualitative literature published between 2006 and 2017 that directly consulted youth and their parents about their court experiences revealed that, "among other findings . . . youth often found court disorienting and upsetting."[67] Court involvement often lowers a child's self-worth by making them feel badly about themselves, as if they are bad kids.[68] It makes them anxious, angry, embarrassed, and scared.[69] A child's first appearance in court can make them very anxious, especially if they hear the other cases called before theirs, "because the atmosphere sometimes can be very hostile from the bench."[70] Additionally, merely being made to appear in court has been noted as being both "coercive and shaming."[71] Many of the negative impacts that court involvement has on children reflect common responses to trauma, such as anxiety, confusion, anger, and shame.[72] These emotional responses can overwhelm a child in such a way that they are unable to cope with the emotions or the reality of the situation.[73] Court-involved children are often threatened with the possibility of incarceration, and this threat to their very freedom and perceived safety can be a source of trauma.[74] This is consistent with prior research that suggests that "the act of going through court itself can trigger and exacerbate trauma symptoms."[75] The results of the survey of court personnel can be summarized simply: "juvenile court may be activating trauma instead of minimizing it."[76]

Additionally, over the last thirty years, the confidentiality of juvenile court proceedings has greatly decreased. Many states now require that not

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65. *Id.* at 16.

66. *Id.* at 18.

67. *Id.* at 16 (citing Bernadette J. Saunders, et al., *Understanding Children's Court Processes and Decisions: Perceptions of Children and Their Families*, 20 YOUTH JUST. 272 (2020)).

68. *Id.* at 18.

69. *Id.* at 16 (citing Bernadette J. Saunders, et al., *Understanding Children's Court Processes and Decisions: Perceptions of Children and Their Families*, 20 YOUTH JUST. 272 (2020)).

70. *Id.* at 18.

71. Buckingham, *supra* note 29, at 672.

72. McKinsey et al., *supra* note 46, at 22 (citing SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., *Understanding the Impact of Trauma*, in A TREATMENT IMPROVEMENT PROTOCOL: TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES 59, 61 (2014)).

73. Buckingham, *supra* note 29, at 646 (defining a traumatic experience as one that overwhelms a person's ability to cope).

74. Katz & Haldar, *supra* note 28, at 364 (defining a traumatic experience as one that threatens a person's bodily integrity).

75. McKinsey et al., *supra* note 46, at 22 (citing Nicole C. McKenna & Kristy Holtfreter, *Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness*, 30 J. AGGRESSION MALTREATMENT & TRAUMA 450 (2020)).

76. *Id.*

only adjudications, but even mere charges, be reported to schools and certain law enforcement officials. This mandated reporting serves to further shame and stigmatize the child, and therefore, further traumatizes him.[77]

A formal court referral can also have devastating consequences for a child's future educational achievement. When a child is referred to court, he is forced to miss school to attend multiple court dates, which can set him behind in school. Many children who engage in delinquent behaviors also have learning disabilities and other educational challenges.[78] Their inability to attend school because of court appearances only increases these difficulties.

Additionally, children whose cases are formally referred to court are left to battle the stress of not knowing what will happen as their case progresses through the system. This stress can affect the child's ability to focus on their schoolwork both in class and at home. A National Longitudinal Survey of Youth found that of the children who were arrested while in high school, those whose cases were formally referred to court were "far more likely to drop out of school" than those whose cases were not formally referred to court.[79] This remained true, even after controlling for "a wide variety of demographic, socioeconomic, academic and behavioral factors."[80] The adverse effects were particularly pronounced among youth with little prior history of delinquent behavior. [81]

Although many people normally think of detention as the ultimate consequence of the juvenile legal system, research has shown that formal court involvement, as opposed to diversion, is punitive in and of itself.[82] This is true even if the ultimate disposition of that court involvement is not detention.[83]

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77. Although this Article is focused on the trauma caused by formal court referral, the other negative effects of court involvement are worth noting. A study done in North Carolina showed that adjudications, and not just detention, can have a negative impact on a person's physical health. Because the vast majority of matters referred to court end in an adjudication of delinquency, the impacts of adjudication are closely related to the impacts of court referral itself. In fact, new studies have shown that even arrests themselves can pose health risks. Lucy Johnston-Walsh & Tom Welshonce, *Fending for Yourself: Lifetime Consequences of Sending Kids to Municipal Courts Without Legal Representation*, 52 FORDHAM URB. L.J. 45, 79 (2024) (citing April D. Fernandes, *How Far Up the River? Criminal Justice Contact and Health Outcomes*, 7 SOC. CURRENTS 29 (2019)).

78. Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD. 339, 339–40 (2005).

79. ANNIE E. CASEY FOUNDATION, *supra* note 15, at 8 (citing Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 4, 462–63 (2006)).

80. *Id.* (citing Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 4, 462–63 (2006)).

81. *Id.* (citing Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 4, 462–63 (2006)).

82. Josh Gupta-Kagan, *Beyond "Children are Different": The Revolution in Juvenile Intake and Sentencing*, 96 WASH. L. REV. 425, 463 (2021).

83. *Id.*

The punishment of merely going through the formal court process "runs contrary to the juvenile justice system's rehabilitative goals."[84]

This is not to say that diversion is without criticism. Two of the most often cited critiques of diversion are net-widening and state intervention without due process. A diversion program creates a net-widening problem when it brings more children under state control than otherwise would have been subject to state intervention, thus expanding the reach of the juvenile legal system rather than contracting it.[85] In this way, children who would have otherwise been given a warning and left to go on their way are pulled into the juvenile legal system. Diversion also raises concerns about the absence of procedural protections that accompany formal juvenile court proceedings. Critics have warned that diversion usually does not have the same procedural safeguards as are available in the formal court system, including the lack of an impartial decisionmaker, and that children can sometimes feel forced to complete the program because the threat of court referral is looming over them.[86] These limitations of diversion, however, do not eliminate the significant harms associated with formal juvenile court referral. When a child is referred to and processed through juvenile court, the consequences of that intervention extend beyond the immediate disposition of the case.

Some scholars have asserted that contact with the juvenile legal system has "counter developmental consequences" and "interferes with a natural maturation process that overwhelmingly yields desirable outcomes."[87] This finding is consistent with research summarized by the Council of State Governments in 2014, which concluded that "juvenile justice systems can do more harm than good by actively intervening with youth who are at low risk of reoffending."[88] Similarly, child and adolescent psychiatrist David E. Arredondo has emphasized the potential developmental harms of juvenile justice involvement, cautioning that "[s]imply put, there is the very real risk that the [juvenile legal] system can do more harm than good to a child who is still in the process of neurobiological, psychological, social, and moral

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84. *Id.*

85. Charles E. Frazier, Pamela Richards & Roberto Hugh Potter, *Juvenile Diversion and Net Widening: Toward a Clarification of Assessment Strategies*, 42 HUM. ORG. 115 (1983).

86. S'Lee Arthur Hinshaw II, *Juvenile Diversion: An Alternative to Juvenile Court*, 1993 J. DISP. RESOL. 305, 314–15 (1993).

87. TOM R. TYLER & RICK TRINKNER, WHY CHILDREN FOLLOW RULES: LEGAL SOCIALIZATION AND THE DEVELOPMENT OF LEGITIMACY, 185 (2018).

88. ANNIE E. CASEY FOUNDATION, *supra* note 15, at 6 (citing ELIZABETH SEIGLE ET AL., CORE PRINCIPLES FOR REDUCING RECIDIVISM AND IMPROVING OTHER OUTCOMES FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM, 1 (2014), https://csgjusticecenter.org/wp-content/uploads/2020/01/Juvenile-Justice-White-Paper-with-Appendices-.pdf [https://perma.cc/8DL9-7SKP]).

development."[89] Consequently, the negative impact of formal court referral is more enduring for a child than it would be for an adult.[90] Because of the trauma both exacerbated and caused by formal court referral, access to pre-court diversion is more supported by both developmental science and empirical evidence.

III. LEGAL BACKGROUND

The development of the juvenile court system provides critical context for understanding contemporary trends in juvenile justice and the ongoing tension among rehabilitation, accountability, and public safety. Although juvenile courts have evolved through distinct historical eras, the philosophies underlying those periods continue to influence contemporary policy choices and judicial approaches. Current trends regarding diversion cannot be fully understood without recognizing how earlier frameworks, such as paternalistic rehabilitation, procedural formalism, and punitive crime-control models, have shaped the structure and function of juvenile systems. In this section, this Article describes the history of the juvenile court and its evolution through distinct historical eras. It then transitions to focus on diversion in the juvenile system. It defines diversion and describes the statutory schemes governing juvenile diversion eligibility in three states. Finally, it identifies the distinctive mechanisms each state uses to minimize or otherwise control the use of prosecutorial discretion in determining which children will be referred to diversion rather than to court for formal processing. Each of these mechanisms serve to help keep kids out of court.

A. History of the Juvenile Court

Prior to the creation of a separate juvenile court system, children who violated criminal laws were largely treated the same as adults. Scholars attribute conflicting motivations to the beginnings of the juvenile justice system—some argue the system was created as a means to discipline poor, working-class, and immigrant children. Others argue it was created as a way to shield youth from the stigma of a criminal conviction and its lifelong impacts. Regardless of the reason, most scholars agree that the juvenile justice system began in Chicago in 1899 and can be split into distinct eras: the Progressive Era, the Due Process Era, the Tough on Crime Era, and the Kids are Different Era.

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89. David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL'Y REV. 13, 13 (2003).

90. *Id.*

1. Progressive Era

Most scholars and historians agree that the first juvenile court in the United States was created in Chicago, in Cook County, Illinois, in 1899.[91] Prior to the creation of that separate court, children who violated criminal laws were treated much the same as adults.[92] Illinois's 1899 Juvenile Court Act established significant procedural differences between the criminal and juvenile court systems.[93]

Some scholars have asserted that juvenile courts were invented by "child-savers" who used the juvenile court as a tool of social control aimed at regulating poor and working-class children.[94] Others contend that the creation of juvenile courts reflected broader efforts by the upper class to control immigrant communities and the urban poor in order to preserve existing social structures.[95] Still others assert that in establishing the nation's first juvenile courts, Progressive Era reformers sought to protect children from the lasting stigma of criminal convictions and the enduring consequences of adult criminal proceedings.[96] Regardless of the founders' motivations, the juvenile courts that emerged across the country were designed as child welfare institutions rather than traditional judicial systems with a primary goal to "protect, nurture, reform, and regulate dependent, neglected, and delinquent children."[97]

The founders of the original juvenile courts, commonly known as the Progressives, recognized that children differ from adults in ways that warrant care, guidance, and rehabilitation rather than punishment.[98] Consistent with that philosophy, the first juvenile courts focused on social welfare rather than strict legal justice.[99] Judge Julian Mack, the second judge of the Chicago juvenile court, explained that the founders believed that society's role was not to determine if the child committed the charged offense but instead to determine "[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."[100] Judge Mack further explained that the overarching principle of the original juvenile courts was "'not so much to punish, but to reform' children

91. Tanenhaus, *supra* note 1, at 163.

92. JAMES BURFEIND ET AL., JUVENILE JUSTICE: AN INTRODUCTION TO PROCESS, PRACTICE, AND RESEARCH 5 (2019).

93. Tanenhaus, *supra* note 1, at 168.

94. *Id.* at 174; BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT 19 (2017).

95. BURFEIND ET AL., *supra* note 92, at 19.

96. Henning & Omer, *supra* note 53, at 1378.

97. BURFEIND ET AL., *supra* note 92, at 6.

98. Buckingham, *supra* note 29, at 666.

99. HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES, CHAPEL HILL: UNIVERSITY OF NORTH CAROLINA PRESS 32 (1927).

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

who had broken the law."[101] Reflecting this rehabilitative philosophy, Progressive reformers viewed children as immature and particularly susceptible to harmful environmental influences.[102] Their response was therefore directed not simply at the child's conduct, but at the conditions that shaped it, which they sought to improve or eliminate.[103]

The original juvenile courts operationalized this approach by examining each child's circumstances rather than focusing solely on the charged offense.[104] Judges considered the child's background, character, and personal circumstances in determining the appropriate disposition.[105] To inform those decisions, courts relied on detailed social histories to identify the factors contributing to delinquent behavior and develop individualized assessments and treatment plans responsive to each child's needs.[106]

The new juvenile courts were purposefully designed to keep children out of the adult criminal justice system and to create a separate system that could focus on rehabilitation rather than culpability or punishment.[107] Because these courts focused on rehabilitation, they exercised broad jurisdiction over almost all matters concerning children including delinquent, dependent, and neglected youth.[108] Additionally, juvenile court proceedings were confidential, informal, and nonadversarial, with judges and other court personnel exercising substantial discretion to fashion individualized responses to each child's circumstances.[109]

Because early juvenile courts operated under the doctrine of *parens patriae* and were intended "to save, not punish" children, many of the procedural due process safeguards associated with criminal prosecutions were considered unnecessary.[110] Therefore, juvenile court judges were vested with almost limitless authority.[111] Juvenile court judges could leave children in their home, place them in another family's home, or send them to juvenile prisons for an indeterminate period of time.[112] Illinois's 1899 Juvenile Court Act illustrates this breadth of authority. It imposed virtually no meaningful constraints on a judge's choice of disposition. The statute authorized the court to select from

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101. Tanenhaus, *supra* note 1, at 164 (quoting Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909)).

102. BURFEIND ET AL., *supra* note 92, at 5.

103. FELD, *supra* note 94, at 35 (quoting DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 35 (2004)).

104. *Id.* at 21.

105. *Id.*

106. *Id.*

107. *Id.* at 20.

108. *Id.* at 21.

109. *Id.*

110. Tanenhaus, *supra* note 1, at 170.

111. BURFEIND ET AL., *supra* note 92, at 27–28.

112. Gupta-Kagan, *supra* note 82, at 434–35.

a range of placement options without establishing standards to guide that decision, limiting judicial authority only by prohibiting the incarceration of children in adult facilities and prohibiting incarceration beyond a specified age.[113]

2. The Due Process Era

Following the Progressive Era of the juvenile court was the Due Process Era, which began in the 1960s and lasted until the 1980s. During this period, the Supreme Court applied many of the procedural protections contained in the Bill of Rights to state criminal proceedings through the Fourteenth Amendment's Due Process Clause, including the right to counsel and protections against unreasonable searches and seizures and compelled self-incrimination.[114] Having transformed state criminal procedure, the Supreme Court then turned its attention to the nation's juvenile courts in what some have called "The Children's Hour."[115]

The Due Process Era of the juvenile court, defined in large part by the United States Supreme Court cases *Kent v. United States*[116] and *In re Gault*,[117] "would make the daily operations of an American juvenile court more like those of an American criminal court."[118] In *Kent*, the Supreme Court held for the first time that due process protections applied to children in juvenile court. The Court held that juvenile courts are required to provide children with certain procedural safeguards in hearings to transfer their case to adult court.[119] These procedural protections include a hearing, effective assistance of counsel, and a statement of reasons for the transfer.[120] The Court stopped short, however, of saying that children are entitled to all of the same constitutional guarantees as adults.[121] Instead, it relied heavily on Washington D.C.'s Juvenile Court Act and the D.C. Circuit Court of Appeals decision in reaching its holding.[122] Despite this, *Kent* provides an important constitutional backdrop to the *Gault* decision.

The following year, the transformation of the juvenile court from a welfare agency into a legal institution truly began with *In re Gault*. The Supreme

113. *Id.*
114. Tanenhaus, *supra* note 1, at 155.
115. Monrad G. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, SUP. CT. REV. 167, 167 (1966).
116. Kent v. United States, 383 U.S. 541, 542 (1966).
117. *In re* Gault, 387 U.S. 1, 3 (1967).
118. Tanenhaus, *supra* note 1, at 176.
119. *Kent*, 383 U.S. at 562.
120. *Id.* at 554.
121. *Id.* at 556.
122. *Id.* ("The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide an adequate basis for decision of this case, and we go no further.").

Court held that juvenile courts must conduct fundamentally fair adjudication proceedings.[123] This included notice of charges,[124] an impartial hearing, the opportunity to confront and cross-examine witnesses,[125] and the privilege against self-incrimination.[126] Perhaps most famously, *Gault* provides children with the right to counsel at their adjudication hearings.[127] Notably, the Court found these rights for children in the Fourteenth Amendment's Due Process requirement of fundamental fairness, not in the other amendments included in the Bill of Rights.[128] Thus, even as the Supreme Court extended several fundamental constitutional protections to children in *Gault*, it continued to recognize that the juvenile justice system was distinct from the adult criminal system. As the Court explained, "[f]rom the inception of the juvenile court system, wide differences have been tolerated -- indeed insisted upon -- between the procedural rights accorded to adults and those of juveniles."[129]

Although the Supreme Court provided increased rights to children in the juvenile justice system in cases that followed *Gault*, it continued to distinguish the adult system from the juvenile system. The Supreme Court drew a hard line between the adult and the juvenile systems in *McKeiver v. Pennsylvania*.[130] In *McKeiver*, the Supreme Court held that children accused of being delinquent are not entitled to a jury trial, unlike adults who are charged with committing crimes.[131] The Court's rationale for this holding was focused on accurate fact-finding.[132] The Court believed that juvenile court judges could find the facts just as accurately as a jury could and, therefore, a jury trial is not necessary in the juvenile court system.[133]

Regardless of some of the distinctions the Supreme Court made between the adult criminal court and the juvenile court, by the late 1960s, it became evident that at least during the adjudication stage of juvenile proceedings, "the ideal of parens patriae could no longer be used to justify denying juveniles many of the constitutional due process protections required in the criminal justice system."[134]

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123. *In re* Gault, 387 U.S. 1, 30–31 (1967).
124. *Id.* at 33.
125. *Id.* at 57.
126. *Id.* at 55.
127. *Id.* at 41.
128. This stands in contrast to, for example, an adult's right to counsel that is found in the Sixth Amendment.
129. *In re* Gault, 387 U.S. 1, 14 (1967).
130. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
131. *Id.* at 545.
132. *Id.* at 543.
133. *Id.* at 547 ("The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function.").
134. Tanenhaus, *supra* note 1, at 186.

As noted, however, the Due Process Era of the juvenile court "focused on procedural regularity at adjudication" only, and the increased procedural protections did not apply at intake or disposition.[135] The *Gault* Court was explicit that its holding did not apply to "the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process."[136] The Court explained, "[t]he problems of pre-adjudication treatment of juveniles . . . are unique to the juvenile process; hence what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps in the juvenile process."[137] Thus, despite the protections provided to children in the adjudication stage of a court case, no protections were provided during the pre-court referral stage, including at the time a child is either given an opportunity to participate in diversion or is referred for formal court intervention. So, as the adjudication stage of a juvenile case became more, although not exactly, like that of the guilt phase of an adult case, the Supreme Court was clear to distinguish the pre-court processes of the two.

3. The Tough on Crime Era

The Tough on Crime Era stemmed from a perceived "surge in youth violence" during the late 1980s and the early 1990s[138] and has been called the "War on Kids." During this time, the "developmental differences between adolescents and adults" were "downplayed" by those responding to youth crime.[139] Instead, "[a]ttention focused on the identification and control of serious, violent, and chronic offenders," regardless of their age.[140]

There were four key areas of change for children in the legal system during the Tough on Crime Era: (1) transfer of children from juvenile to adult court became easier and more prevalent; (2) juvenile courts gained greater sentencing authority; (3) juvenile court confidentiality was decreased; and (4) a greater emphasis was placed on juvenile offender accountability.[141] Additionally, during the Tough on Crime Era, multiple states lowered the maximum age at which children could remain in juvenile court, meaning fifteen, sixteen, or seventeen-year-olds were considered adults in the criminal legal system.[142]

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135. Gupta-Kagan, *supra* note 82, at 438.
136. *In re Gault*, 387 U.S. 1, 13 (1967).
137. *Id.* at 13 n.48.
138. Tanenhaus, *supra* note 1, at 198.
139. *Id.*
140. BURFEIND ET AL., *supra* note 92, at 27.
141. *Id.*
142. *Id.*

Regarding transfer of children's cases from juvenile to adult court, "the basic idea is that certain types of offenses and offenders, especially violent ones, are beyond the scope of the juvenile court."[143] The easier and more widespread use of transfer resulted in more children being subject to and tried in the adult criminal system and fewer children receiving the protection and rehabilitation of the juvenile system.[144]

During this era, the juvenile courts began to have greater authority to impose harsher dispositions without consideration of the individual circumstances of the child. "Traditionally, juvenile court dispositions were individualized and based on the background characteristics of the offender."[145] Juvenile court judges "customize[d] the disposition to fit the offender's needs and situation, with rehabilitation as the primary goal."[146] Thus, dispositions tended to focus on rehabilitation rather than punishment. However, "[a]s states shifted the purpose of their juvenile justice systems away from rehabilitation and toward punishment, accountability, and public safety, juvenile case dispositions began to be based more on the offense than the offender."[147] These changes included increased use of secure detention for youth, mandatory minimum sentences in youth prisons, as well as strict parole standards and intensive supervision after release from youth prison.[148]

Additionally, juvenile court confidentiality decreased during this time. Traditionally, one of the foundational elements of juvenile courts in America was the confidentiality of their proceedings.[149] However, during the Tough on Crime Era, many state legislatures significantly eroded juvenile court confidentiality by expanding access to court records for justice agencies, social service providers, schools, victims, and members of the public.[150] Some states went further and *required* juvenile courts to inform school districts when a student was charged with or adjudicated of a serious or violent offense.[151] These confidentiality changes included providing circumstances under which media could even have access to juvenile court records and proceedings.[152] This was a significant divergence from the confidentiality provided to those involved with the first juvenile courts in the United States and pushed the juvenile system closer to the adult system.

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143. *Id.*

144. RICHARD E. REDDING, U.S. DEP'T OF JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 1, 7 (2010).

145. BURFEIND ET AL., *supra* note 92, at 27.

146. *Id.*

147. *Id.*

148. *Id.* at 28.

149. Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 526–27 (2004).

150. BURFEIND ET AL., *supra* note 92, at 28.

151. *Id.*

152. *Id.*

This era also saw a "shift towards more prosecutorial control over intake decisions and prosecuting (rather than diverting or dismissing) a greater proportion of cases."[153] The proportion of cases that were formally prosecuted, rather than dismissed or diverted, increased by approximately ten percent during this period.[154] This increased prosecutorial control largely continues today and lies at the heart of this Article.

The sweeping changes that were brought to the juvenile legal system by the Tough on Crime Era signaled a change in the emphasis of juvenile courts from rehabilitation to punishment. Those changes resulted in more harsh penalties being imposed on children, including trying them in adult court, incarcerating them in more secure facilities at a higher rate, and allowing more public access to their court records. All of these changes have led to additional traumatization of children involved in the legal system. Although some of these harsh penalties were mitigated by a focus on adolescent brain development during the Kids are Different Era, as one juvenile justice expert explained, "[t]he story of twenty-first century juvenile justice has largely been an effort to undo the harm done during the late twentieth century."[155]

4. The Kids are Different Era

The Tough on Crime Era was followed by the Kids are Different Era, which began in earnest with the Supreme Court's 2005 decision in *Roper v. Simmons* that outlawed the death penalty for crimes committed prior to the defendant's eighteenth birthday.[156] Other Supreme Court cases during this time that limited severe sentencing, relying on adolescent brain development research, were *Graham v. Florida*[157] and *Miller v. Alabama*.[158] In *Graham*, the United States Supreme Court prohibited a sentence of life imprisonment without parole for non-homicide offenses committed by those under eighteen years old, determining that it was cruel and unusual punishment.[159] In *Miller*, the United States Supreme Court held that mandatory life without parole sentences for offenses committed prior to a child's eighteenth birthday constituted cruel and unusual punishment.[160] The Court relied heavily on adolescent brain development research to conclude that "adolescents differ from adults in ways that make them potentially less blameworthy than adults for their

153. Gupta-Kagan, *supra* note 82, at 442.
154. *Id.*
155. Tanenhaus, *supra* note 1, at 199 (citing FRANKLIN E. ZIMRING & DAVID S. TANENHAUS, CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE (2014)).
156. Roper v. Simmons, 543 U.S. 551, 578 (2005).
157. Graham v. Florida, 560 U.S. 48, 74 (2010).
158. Miller v. Alabama, 567 U.S. 460, 470 (2012).
159. *Graham*, 560 U.S. at 74.
160. *Miller*, 567 U.S. at 470.

criminal actions and less competent."[161] Researchers began to argue that "developmental immaturity is a mitigating factor in criminal responsibility" and that "youth are 'less guilty by reason of adolescence.'"[162]

This research led to three conclusions relevant to the Court's analysis. First, "[a]dolescents are less able to regulate their own behavior in emotionally charged contexts."[163] Second, "[a]dolescents are more sensitive to external influences such as peer pressure and immediate rewards."[164] Third, "[a]dolescents show less ability to make judgments and decisions that require future orientation."[165] Because of these differences, the Court held that children are categorically less culpable than adults and should be treated differently, prohibiting the most severe punishments for children under eighteen years old.[166]

Although the Kids are Different jurisprudence focused on sentencing, specifically sentencing after a child has been transferred to adult court, the lessons can be applied to the pre-court diversion context. The developmental realities of children and adolescents provides compelling justification to keep more children out of court.

B. Diversion

Pre-court diversion allows children to avoid the trauma caused by formal court involvement. The next section of this Article explains what diversion is and describes the diversion programs in South Dakota, Kentucky, and Washington.

1. Diversion Defined

The federal government defines diversion programs as "alternatives to initial or continued formal processing of youth in the juvenile delinquency system."[167] One commentator has described diversion as "allow[ing] criminal justice actors and service providers to intervene before youthful indiscretion turn[s] into a pattern of criminal offending."[168] Diversion can occur before formal charging, after charging but before formal court involvement, or even during court involvement. This Article focuses on diversion that occurs prior to formal court involvement, as it is the formal court processing that can cause

161. BURFEIND ET AL., *supra* note 92, at 30.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005); Graham v. Florida, 560 U.S. 48, 74 (2010); Miller v. Alabama, 567 U.S. 460, 470 (2012).
167. *Diversion Programs*, Youth.gov, https://youth.gov/youth-topics/juvenile-justice/diversion-programs [https://perma.cc/76TH-4XH7].
168. Noble, *supra* note 23, at 13.

additional trauma to children who most likely have already experienced significant trauma.

Which cases are eligible for diversion prior to formal court processing is largely determined by state statute. As discussed below, prosecutors often exercise great discretion in deciding which cases to divert and which to refer for formal court processing, so long as they operate within the bounds established by state diversion statutes. The prosecutor's specific role in diversion varies by jurisdiction and program design.[169] Programs differ in whether diversion occurs before or after charges are filed, the services offered to children in the program, and eligibility criteria, such as the nature of the offense or the child's prior record.[170] In jurisdictions that permit diversion before formal charges are filed, prosecutors often establish the eligibility criteria and determine which children are admitted into the diversion program.[171] Prosecutors usually are not required to justify their decisions, and this can sometimes lead to results that appear, at least on the outside, as arbitrary or unfair. As scholar John Pfaff has observed, "We don't know what [prosecutors are] doing, why they're doing it and what drives their decision process."[172]

In 1967, the President's Commission on Law Enforcement issued a report titled *The Challenge of Crime in a Free Society*. This report indicated that "early identification and diversion to other community resources of those offenders in need of treatment" was a possible solution to the problems facing the criminal legal system.[173] This resulted in additional federal moneys being given to the states to fund diversion programs and therefore an increase in diversion programs during the early to mid-1970s.[174]

However, the emphasis on diversion diminished as prosecutors became central actors in the Tough on Crime reforms in the 1980s and 1990s and assumed greater responsibility over intake decisions previously handled by judicial staff.[175] During this period, diversion rates declined as more children were referred to court for formal processing.[176] The percentage of cases formally prosecuted increased from approximately forty-three percent in 1985 to fifty-five percent in 1998 and 1999 and has remained relatively steady since

169. *Id.* at 14.
170. *Id.*
171. *Id.*
172. *Id.* at 29.
173. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134 (1967).
174. Noble, *supra* note 23, at 13 (citing Sally T. Hillsman, *Pretrial Diversion of Youthful Adults: A Decade of Report and Research*, 7 JUST. SYS. J. 361, 363 (1982)).
175. Gupta-Kagan, *supra* note 82, at 437.
176. *Id.*

then.[177] Between 1996 and 2018, the proportion of delinquency cases that were formally processed remained between fifty-three percent and fifty-nine percent annually.[178] In 2018, fifty-nine percent of delinquency cases were formally processed, despite only six percent involving violent offenses.[179] The result is a juvenile legal system in which prosecutors exercise increasing control over intake decisions and increasingly direct cases toward formal court processing rather than diversion.[180] This expansion of prosecutorial authority over diversion decisions makes statutory guidance and accountability mechanisms increasingly important in ensuring that more youth are eligible for diversion and that those eligible youth are not drawn into the formal juvenile court system unnecessarily.

2. Prosecutors' Charging Authority

Prosecutors often have immense discretion in deciding whether to divert an offense or refer it to court for formal processing. This discretion has very few limits, other than those imposed by statute, because it is generally viewed as a subset of the prosecutor's traditional charging authority. As one California court explained, "[P]retrial diversion is closely and intimately related to the district attorney's traditional executive authority over the prosecutorial process."[181] Just as prosecutors have long possessed the discretion to initiate or decline criminal charges even when supported by probable cause, they have also exercised the authority to forgo prosecution in favor of community-based alternatives when doing so better serves the interests of justice.[182] For that reason, the California court concluded that diversion decisions fall within the prosecutor's broader charging discretion. [183]

Other courts have echoed this. A Washington state court explained, "Under the juvenile justice system, it remains a prosecutorial duty to determine the extent of society's interest in prosecuting an offense."[184] The Ninth Circuit

177. *Id.* at 437–38 (citing *Statistical Briefing Book: Delinquency Cases*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST. (Mar. 31, 2020), https://www.ojjdp.gov/ojstatBB/court/qa06401.asp [https://perma.cc/B757-ZPDF]).

178. ANNIE E. CASEY FOUNDATION, *supra* note 15, at 5 (citing M. Sickmund et al., *Easy Access to Juvenile Court Statistics: 1985–2018*, WASHINGTON, DC: NATIONAL CENTER FOR JUV. JUST. (2020), https://ojjdp.ojp.gov/statistical-briefing-book/data-analysis-tools/ezajcs [https://perma.cc/U7TK-EMKX]).

179. *Id.*

180. Gupta-Kagan, *supra* note 82, at 487 (citing *Statistical Briefing Book: Delinquency Cases*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST. (Mar. 31, 2020), https://ojjdp.ojp.gov/statistical-briefing-book/court/faqs/qa06401 [https://perma.cc/YFA6-5TEB]).

181. Davis v. Mun. Court, 757 P.2d 11, 18 (1988).

182. *Id.* at 18–19.

183. *Id.*

184. State v. McDowell, 685 P.2d 595, 598 (1984).

Court of Appeals explained, "The decision to offer a defendant a pretrial diversion agreement in a given case rests squarely with the prosecutor."[185] Finally, the United States District Court for the Middle District of Pennsylvania stated, "Consistent with the authority to bring or dismiss federal charges, deferring prosecution through a pretrial diversion agreement constitutes a criminal charging decision, and the Constitution grants exclusive authority over such decisions to the Executive Branch."[186]

The criminal legal system in America relies heavily on the exercise of personal discretion at nearly every stage, with prosecutors possessing particularly broad authority.[187] Indeed, prosecutors have been described as "the most powerful actors in the entire criminal system."[188] Their power derives not only from the breadth of their decision-making authority, but also from the limited oversight and accountability that typically accompanies it.[189] Prosecutors exercise immense discretion over charging decisions and case resolutions, including whether to file charges, which charges to pursue, and whether to resolve a case through a negotiated plea.[190] Among these decisions, whether to file charges in the first place is particularly consequential because it determines whether an individual will enter the criminal legal system at all.[191] Yet these decisions are often made behind closed doors, in what scholars have described as a prosecutorial "black box," with little transparency or obligation to explain the reasoning behind them.[192] These same concerns arise in the juvenile context, where prosecutors often exercise substantial discretion over diversion decisions with little transparency, determining whether a child enters the formal juvenile court system and endures the trauma associated with it or is diverted from it altogether.

As one group of youth trauma-informed justice scholars explained, "American prosecutors are the most powerful actors in the criminal justice system. Prosecutors can use their institutional power to *inflict* trauma or to *alleviate* trauma. . . . The difference between these approaches could be as

185. United States v. Constantino, 738 F. App'x 556, 556 (9th Cir. 2018) (citing United States v. Edmonson, 792 F.2d 1492, 1497 (9th Cir. 1986)).

186. United States v. Stambaugh, No. 1:24-CR-275, 2025 U.S. Dist. LEXIS 212489, at *2 (M.D. Pa. Oct. 28, 2025).

187. Todd J. Clark, et al., *Trauma-Informed Justice*, 46 U. ARK. LITTLE ROCK L. REV. 535, 546 (2024) ("[T]he American criminal justice system is far more accurately described as criminal law mediated by and through a system of immense personal discretion.").

188. *Id.* at 546 (citing ANGELA J. DAVIS ET AL., POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 178–79 (2017)).

189. *Id.* at 546–47.

190. *Id.* at 547.

191. *Id.*

192. *Id.* (citing THE EZRA KLEIN SHOW, *Why Prosecutors, Not Cops, Are the Keys to the Criminal Justice System* (Apple Podcasts, Aug. 22, 2017), https://soundcloud.com/ezra-klein-show/why-prosecutors-not-cops-are-the-keys-to-criminal-justice-reform).

simple as using a trauma-informed approach to prosecution."[193] One way to use a trauma-informed approach to prosecution is to acknowledge that formal court referral inflicts trauma on children, even absent detention or adjudication, and then seek to limit that formal court interaction. Legislatures have the ability to take this approach and limit the exercise of prosecutorial discretion when it is used to force children into the formal court process.

3. Diversion in South Dakota, Kentucky, and Washington

Diversion is statute driven, and it varies widely from state to state. Legislatures determine the parameters of when diversion can be offered. These legislative decisions should align with the purposes and goals of the juvenile justice system, including rehabilitation. These statutory schemes often confer at least some authority for prosecutors[194] to use their discretion in deciding whether to offer diversion to children prior to formal court referral. Ensuring prosecutors' exercise of discretion is aligned with the goals of the juvenile justice system is incredibly important.

Legislatures can limit prosecutorial discretion in this area in several ways. A few of these mechanisms are detailed below using examples from three different states. One such mechanism is to delineate circumstances under which children's cases must be diverted and cannot be referred to juvenile court. By doing this, legislatures would completely eliminate the use of prosecutorial discretion in certain specific situations. Another mechanism is to provide explicit guidelines that prosecutors must follow when exercising their discretion regarding juvenile diversion. In doing this, legislatures would provide prosecutors with a list of things the prosecutor must consider when determining whether to refer a child to diversion or refer them to court. Third, legislatures could provide for judicial review of the use of prosecutorial discretion in referring a child to court. These are not all of the possible ways that legislatures can limit the use of prosecutorial discretion in juvenile diversion decisions, but each mechanism is worthy of consideration with an ultimate goal of keeping more kids out of court.

The next section of this Article describes eligibility criteria for juvenile diversion in South Dakota, Kentucky, and Washington. Each of these states uses one of the approaches just described.

193. *Id.* at 543.

194. This Article focuses on the discretion exercised by prosecutors at the pre-court diversion decision stage. In some states, this discretion is exercised by another officer, often a juvenile probation or intake officer. Legislatures can use the same mechanisms to limit the use of discretion by those other officers, with an ultimate goal of keeping more kids out of court.

a. South Dakota

Under the South Dakota statutory scheme governing diversion, after the prosecutor completes a preliminary investigation, "any apparent delinquent child shall be referred for informal adjustment or informal action . . . if the following criteria are met:

> (1) The child has no prior adjudications;
>
> (2) The child has had no informal adjustment or informal action within the last twelve months;
>
> (3) The child is an apparent child in need of supervision pursuant to § 26-8B-2 or an apparent delinquent pursuant to § 26-8C-2 and the alleged conduct constitutes a misdemeanor;
>
> (4) The child's alleged conduct did not include use of violence or force against another; and
>
> (5) All of the requirements in § 26-7A-11 are met."[195]

Although the statute appears to mandate diversion for certain children, under certain circumstances, that appearance is deceptive. The statutes go on to clarify that if the prosecutor "has good cause to believe that informal adjustment or informal action is insufficient to meet the purposes of this chapter . . ., the state's attorney may file a delinquency . . . petition." [196] Thus, although the South Dakota legislature has established what appears to be mandatory diversion for certain non-violent first offenders, the prosecutor has the discretion to effectively override the statutory mandatory diversion. When they do so, however, the petition they file must "include notice of the departure from informal adjustment or informal action."[197] The child then has the "right to move for informal adjustment or informal action."[198] If the child so moves and

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195. S.D. CODIFIED LAWS § 26-7A-11.1 (2026). South Dakota Codified Law § 26-7A-11 requires that child may be sent to diversion only if:

> (1) The child and the child's parents, guardian, or other custodian were informed of their constitutional and legal rights, including being represented by an attorney at every stage of the proceedings if a petition is filed;
> (2) The facts are admitted and establish prima facie jurisdiction; and
> (3) Written consent is obtained from the child's parents, guardian, or custodian and from the child if the child is of sufficient age and understanding. Efforts to effect informal adjustment or informal action may extend no longer than four months from the date of the consent.

S.D. CODIFIED LAWS § 26-7A-11 (2026).

196. S.D. CODIFIED LAWS § 26-7A-11.1 (2026).

197. *Id.*

198. *Id.*

the judge finds that no good cause existed for the prosecutor to believe that diversion was insufficient, the judge may refer the child back to diversion.[199]

South Dakota's statutory scheme does not include any children or charges that are subject to mandatory diversion. However, it is notable for requiring the prosecutor to have good cause before overriding the statutory mandatory diversion and then providing for a judicial review of that determination of good cause.[200] The South Dakota legislature has not limited the use of prosecutorial diversion by delineating any categories of cases in which the prosecutor cannot act, but it has, instead, provided a judicial check on the prosecutor's use of his discretion. This judicial review of the prosecutor's use of discretion is distinctive in South Dakota's diversion program.

b. Kentucky

Kentucky employs another mechanism to limit prosecutorial discretion in diversion decisions, which is to eliminate it altogether for certain categories of children and offenses. In Kentucky, pre-court diversion is mandatory for those children who are charged with a misdemeanor, have no prior adjudications, and have not previously gone through diversion.[201] There is no mechanism under Kentucky statutes for prosecutors to override or object to this mandatory diversion. Mandatory diversion without prosecutorial override is the notable feature of Kentucky's diversion system.

In addition to mandatory diversion, Kentucky's statutes also allow for permissive diversion. Children charged with misdemeanors who have had up to two prior misdemeanors can be diverted prior to formal court referral.[202] Additionally, children who are charged with their first felony offense can be diverted, so long as the felony is not a sexual offense and does not involve the use of a deadly weapon.[203] The prosecutor, however, can object to diversion under the permissive diversion statute without providing any justification, and the child has no right to challenge that objection.[204] Thus, there is no judicial review of the prosecutor's use of discretion in denying an eligible child access to diversion.

c. Washington

Like Kentucky, Washington's legislature has delineated a subset of children and charges that must be diverted, and the prosecutor has no ability to

199. *Id.*
200. *Id.*
201. KY. REV. STAT. ANN. § 635.010(4) (LexisNexis 2025).
202. *Id.* § 605.030(1)(e).
203. *Id.*
204. KY. JUV. CT. RULES OF PRAC. AND PROC. 10(E).

use his or her discretion to prevent it.[205] In addition to this, Washington's legislature has included a list of factors prosecutors should consider when exercising their discretion to determine whether a child should be referred to diversion or referred to court for formal court processing.[206]

In Washington state, prosecutors "shall divert the case if the alleged offense is a misdemeanor or gross misdemeanor or violation and the alleged offense is the offender's first offense or violation."[207] Additionally, prosecutors must divert certain first-time offenses, including prostitution loitering, minor selling depictions of himself or herself engaged in sexually explicit conduct, and distributing, transferring, disseminating, or exchanging sexually explicit images of minors age thirteen or older.[208] Finally, prosecutors must divert cases involving second-degree voyeurism when the child is under seventeen, it is the child's first such offense, and the child has received fewer than two diversions for any offense during the preceding two years.[209]

In addition to mandatory diversion, Washington also has permissive diversion. Prosecutors may divert any other offense that is not a sexual offense or certain violent offenses.[210] In deciding whether to divert an offense, "the prosecutor may be guided by the length, seriousness, and recency of the alleged offender's criminal history and the circumstances surrounding the commission of the alleged offense."[211] Washington's statutory scheme governing diversion is distinctive in that it provides prosecutors with this guidance on the criteria they should consider when deciding whether a child should be offered diversion or referred for formal court processing. However, it does not provide for judicial review of the use of that discretion.

Significantly, in early 2025, the Washington legislature expressly acknowledged the benefits of diversion. It stated, "The legislature finds that youth diverted from the justice system have lower likelihood for future arrests, higher rates of school completion and college enrollment, and earn higher incomes in adulthood than youth who are adjudicated through the court process."[212] Because of these benefits, along with the cost-saving benefits of diversion, the state expanded certain youth services for those children referred to diversion and now requires certain data collection in an attempt to create consistency in diversion across the state.[213] The legislature's express intent in

205. *See* WASH. REV. CODE § 13.40.070 (2026).
206. *Id.* § 13.40.070(8).
207. *Id.* § 13.40.070(6) (2026).
208. *Id.* § 13.40.070(7)(a), (c)–(d).
209. *Id.* § 13.40.070(7)(b).
210. *Id.* § 13.40.070(5).
211. *Id.* § 13.40.070(8).
212. Act of Mar. 5, 2025, ch. 140, 2025 Wash. Sess. Laws 795.
213. *Washington House Passes Bill to Standardize Juvenile Diversion Programs and Reduce Recidivism*, THE SEATTLE MEDIUM, Mar. 7, 2025, https://seattlemedium.com/washington-state-juvenile-justice-reform/ [https://perma.cc/K6ZY-RSWN].

making these changes was "to strengthen the ability of courts to offer robust diversion services and improve the data and accountability framework for diversions in Washington state."[214] This legislative effort is perhaps signaling the beginning of a return to the rehabilitative ideal of the original juvenile courts.

d. Comparison

The statutory schemes governing diversion in South Dakota, Kentucky, and Washington provide a good comparison of legislative choices and the ways they can encourage or discourage diversion and can constrain or fail to constrain the use of prosecutorial discretion. In South Dakota, no categories of children or delinquency offenses are provided mandatory diversion. The statutes seem to implicitly create a presumption that children accused of nonviolent first offenses will be diverted from the formal court system, but prosecutors have discretion to object to that diversion based on good cause to believe that diversion is insufficient.[215] If a child disagrees with the prosecutor's good cause determination, the child can ask a judge to review it.[216] In this way, the legislature provides a judicial check on the prosecutor's use of discretion to refer children for formal court processing.

In Kentucky, the legislature has provided for both mandatory and discretionary diversion. Children who are charged with first-offense misdemeanors are entitled to mandatory diversion.[217] Although this is a relatively narrow category of children, there is no ability for prosecutors in Kentucky to object or override this diversion. This is an explicit and strong legislative limitation on the use of prosecutorial discretion to refer children for formal court processing. However, for those children whose cases do not qualify for mandatory diversion and instead only qualify for discretionary diversion, there is absolutely no legislative limitation on the prosecutor's use of his discretion. Prosecutors can object to diversion for these children, without providing any reasoning, and the children will be referred for formal court processing.[218] There is also no way for the child to challenge the prosecutor's objection to diversion, and there is no judicial review of this use of the prosecutor's discretion.

Finally, similar to Kentucky, Washington's legislature has provided for both mandatory and discretionary diversion. Also, like Kentucky, the statutes do not provide for a prosecutorial objection or override to the categories of offenses eligible for mandatory diversion. For certain other offenses, the

214. Act of Mar. 5, 2025, ch. 140, 2025 Wash. Sess. Laws 795.
215. S.D. CODIFIED LAWS § 26-7A-11.1 (2026).
216. *Id.*
217. KY. REV. STAT. ANN. § 635.010(4) (LexisNexis 2025).
218. KY. JUV. CT. RULES OF PRAC. AND PROC. 10(E).

prosecutor does not override or object to diversion but instead can use his discretion to divert a child from formal court processing.[219] The state statutes provide criteria that a prosecutor can, but is not required to, use when determining whether to offer diversion to a child.[220] This legislative guidance to prosecutors makes Washington's statutory scheme distinctive from both South Dakota and Kentucky. However, there is no judicial oversight of the prosecutor's use of his discretion. Unlike in South Dakota, a child cannot challenge the prosecutor's decision not to divert the child's case, and a judge will not review it.

Each of these states include one or more limitations on the exercise of prosecutorial discretion regarding juvenile diversion. Each of the tools is powerful, and they would be even more powerful if they co-existed. A statutory scheme that utilized all of these mechanisms to limit prosecutorial discretion would be more effective than any single mechanism to help keep kids out of court.

IV. PRIORITY: KEEP KIDS OUT OF COURT

In 2020, the New Jersey Attorney General issued a directive to top law enforcement officials stating that the "system works best when juveniles are diverted away from formal court proceedings."[221] Consistent with that policy, research indicates that diversion programs generally reduce recidivism, while formal juvenile court processing is associated with more negative outcomes for youth.[222] Other scholars have likewise concluded that these findings support offense-based limits on juvenile court intake as a means of furthering the rehabilitative goals of the juvenile justice system.[223]

More than half a century ago, a federal commission concluded that, if the juvenile court has a guiding philosophy it should be one of "judicious nonintervention."[224] That principle has gained even greater support in light of modern developmental science. Scholars Tom Tyler and Rick Trinkner argue that most young people are better served by diversion and rehabilitation than

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219. *See* WASH. REV. CODE § 13.40.070 (2026).

220. *Id.* § 13.40.070(8).

221. Johnston-Walsh & Welshonce, *supra* note 77, at 68 (quoting GURBIR S. GREWELL, N.J. OFF. OF ATT' GEN., DIRECTIVE NO. 2020-12, DIRECTIVE ESTABLISHING POLICIES, PRACTICES, AND PROCEDURES TO PROMOTE JUVENILE JUSTICE REFORM (Dec. 3, 2020)).

222. Johnston-Walsh & Welshonce, *supra* note 77, at 74 (citing Holly A. Wilson & Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism*, 40 CRIM. JUST. & BEHAV. 497, 507 (2013)).

223. Gupta-Kagan, *supra* note 82, at 428.

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

by formal justice system involvement and punishment.[225] Their conclusion is consistent with a substantial body of research demonstrating that the vast majority of children naturally desist from delinquent behavior as they grow older and mature.[226]

Developmental science helps explain why diversion is more effective than formal court processing. Most children simply age out of delinquent behavior, and formal justice-system involvement, particularly in its more punitive forms, can interrupt the normal maturation processes.[227] Adolescence is a period of enormous learning, growth, and change, during which the brain is at its greatest capacity to adapt in response to experience.[228] Because of the brain's "plasticity," interventions that avoid unnecessary court involvement while supporting healthy development are more likely to produce positive long-term outcomes than formal processing and prosecution.[229]

The brain's plasticity during adolescence has often been described as a "double-edged sword."[230] This is because positive, developmentally appropriate interventions can have lasting positive effects that can increase a young person's ability to self-regulate, adapt, and respond positively during situations.[231] On the other hand, negative or developmentally inappropriate interventions can have harmful long-term effects, can decrease the child's ability to self-regulate moving forward, and can increase recidivism.[232] In other words, "youth encounter the juvenile justice system during a period in which the correct interventions can positively impact their future brain development, [and] the wrong interventions can have negative, long-lasting effects."[233]

A 2019 study found that children offered diversion utilized more mental health services than similarly situated children who were formally prosecuted and placed on probation, a difference that may help explain diversion's rehabilitative benefits.[234] These findings are consistent with the developmental

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225. TOM R. TYLER & RICK TRINKNER, WHY CHILDREN FOLLOW RULES: LEGAL SOCIALIZATION AND THE DEVELOPMENT OF LEGITIMACY 121, 185 (2018).

226. Buckingham, *supra* note 29, at 691.

227. Gupta-Kagan, *supra* note 82, at 462 (quoting TOM R. TYLER & RICK TRINKNER, WHY CHILDREN FOLLOW RULES: LEGAL SOCIALIZATION AND THE DEVELOPMENT OF LEGITIMACY 121, 185 (2018)).

228. Buckingham, *supra* note 29, at 645 (citing LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE, 5, 8–11 (2014)).

229. *Id.*

230. *E.g.*, Andrew Merluzzi, *Brain Development and Neuroplasticity*, ASS'N PSYCH. SCI. (Sept. 30, 2013), https://www.psychologicalscience.org/observer/brain-development-and-neuroplasticity [https://perma.cc/L3YL-XELU].

231. Ferrer, *supra* note 30, at 554.

232. *Id.* at 555.

233. *Id.*

234. Gupta-Kagan, *supra* note 82, at 463 (citing Elizabeth Janopaul-Naylor et al., *Promising Approaches to Police-Mental Health Partnerships to Improve Service Utilization for at-Risk Youth*, 5 TRANSLATIONAL ISSUES PSYCH. SCI. 206, 206, 212 (2019)).

science described above, which recognizes that adolescents have a unique capacity for growth, learning, and long-term behavior change as their brains continue to mature.[235] As adolescents mature, they develop stronger decision-making and planning abilities, especially when provided with appropriate guidance, support, and opportunities to learn from their mistakes.[236] With appropriate support and treatment, even the effects of childhood trauma can be substantially reduced, reinforcing the value of diversion programs that emphasize rehabilitation over formal court processing.[237]

The Annie E. Casey Foundation recommends that sixty percent of all cases be diverted.[238] In order to move closer to this recommendation, legislatures can establish categories of cases in which children should automatically be diverted and identify factors to guide diversion decisions in discretionary situations.[239] They can also allow for judicial review of the use of prosecutorial discretion to help ensure that prosecutors are exercising their discretion in a manner consistent with the rehabilitative ideals of juvenile court.

Limiting the number of cases that are subject to prosecution is critically important in the juvenile justice context, as prosecuting a child can itself serve as a form of punishment.[240] In many instances, this process does not advance the system's rehabilitative goals as effectively as diversion would.[241] Accordingly, intake decisions should involve more than simply determining whether an offense can be proven; they should also consider whether pursuing prosecution against a particular child for a specific offense serves the rehabilitative mission of the juvenile court, or whether diversion or even dismissal would better achieve that objective.[242] There is little reason to assume that prosecutors, without additional oversight or guidance, possess the specialized training or perspective necessary to consistently make these broader rehabilitative determinations.[243] When left unchecked, this discretion may lead to the use of the juvenile court process as an ineffective and counterproductive method of punishing children, particularly for low-level offenses.[244] By establishing prohibitions on prosecuting certain categories of offenses, guidelines for the use of discretion in other situations, and judicial review of the use of that

235. Buckingham, *supra* note 29, at 661.

236. *Id.*

237. *Id.* at 650 (citing EVA J. KLAIN & AMANDA R. WHITE, ABA CTR. ON CHILDREN & THE LAW, *Implementing Trauma-Informed Practices in Child Welfare* 3–5 (2013)).

238. Gupta-Kagan, *supra* note 82, at 463 (citing ANNIE E. CASEY FOUNDATION, TRANSFORMING JUVENILE PROBATION: A VISION FOR GETTING IT RIGHT 13, 20, 25 (2018), https://www.aecf.org/resources/transforming-juvenile-probation/ [https://perma.cc/4MZG-WVJK]).

239. *Id.*

240. Gupta-Kagan, *supra* note 82, at 486 (citations omitted).

241. *Id.*

242. *Id.*

243. *Id.*

244. Gupta-Kagan, *supra* note 82, at 486 (citations omitted).

discretion, legislatures can reinforce the importance of these considerations and align practice with research demonstrating the benefits of diversion.

A. Legislative Changes to Limit Prosecutorial Discretion

State legislatures determine the rules that govern juvenile court diversion eligibility. They determine whether prosecutors have discretion regarding which children to refer to diversion or to court for formal processing and what limits are placed on the exercise of that discretion. Research has shown that when prosecutors are granted more control over diversion decisions, fewer children are referred to diversion and more are referred to court.[245] This trend has remained consistent for the past forty years.[246] At the same time, research has shown that children who are diverted have better life-long outcomes than those who have formal court involvement.[247] Finally, this Article asserts that formal court referral imposes trauma on children, most of whom already have significant trauma histories.[248]

Armed with this knowledge, legislatures can and should seek to limit the use of prosecutorial discretion to send children to court rather than to diversion. This Article has described three distinct ways that some state legislatures have chosen to limit that discretion. They are not the only ways in which legislatures can accomplish this, but they can provide a roadmap that legislatures can use if they too want to limit the discretion prosecutors exercise over formal court referral for children.

One way is to completely eliminate prosecutorial discretion to send certain categories of children and cases to court at all. Both Kentucky and Washington have statutes that do this.[249] These states' statutes require that children charged with certain low-level offenses and with minimal prior system contact be sent to a diversion program rather than to court.[250] This serves to ensure those children stay out of the court system and prevents the prosecutor from exercising his discretion to force them there. States that do not have any provision for mandatory diversion should consider adding one. States that already have mandatory diversion under certain circumstances should consider expanding those circumstances to include more children. The greater number

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245. Gupta-Kagan, *supra* note 82, at 437.

246. *Id.* at 437–38 (citing *Statistical Briefing Book: Delinquency Cases*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST. (Mar. 31, 2020), https://www.ojjdp.gov/ojstatBB/court/qa06401.asp [https://perma.cc/B757-ZPDF]).

247. *See generally* ANNIE E. CASEY FOUNDATION, EXPAND THE USE OF DIVERSION FROM THE JUVENILE JUSTICE SYSTEM (2020).

248. *See supra* Section II.C.

249. KY. REV. STAT. ANN. § 635.010(4) (LexisNexis 2025); WASH. REV. CODE § 13.40.070 (2026).

250. KY. REV. STAT. ANN. § 635.010(4); WASH. REV. CODE § 13.40.070.

of circumstances under which diversion is mandatory, the greater number of children that stay out of court.

Legislatures can also limit prosecutorial discretion by providing guardrails within which prosecutors should exercise their discretion. The Washington legislature has done this by including in the relevant statutes the factors that prosecutors can consider when deciding whether to refer a child to diversion.[251] Washington provides two factors the prosecutor can consider: the child's prior delinquency history and the circumstances of the commission of the charged offense.[252]

This is helpful to prosecutors, but legislatures that want to use this method can make it stronger. Legislatures could require, rather than just permit or suggest, that prosecutors consider the enumerated factors when making a diversion decision. This would require a simple substitute of the permissive word "may" with the mandatory word "must" or "shall." Additionally, legislatures could require prosecutors to consider more factors than just the child's historical contact with the delinquency system and the circumstances of the charged offense. Some additional factors that a legislature might require the prosecutor to consider are age of the child, trauma, mental health, and substance use history of the child, family circumstances and support, prosocial contacts (such as involvement in extracurricular activities), and the availability of community resources to address the child's needs. The inclusion of these factors would switch the focus from the alleged offense and the child as the alleged offender to the child as an individual with unique needs.

The third way that legislatures can limit the use of prosecutorial discretion is to provide for review of the prosecutor's use of that discretion. South Dakota has utilized this method with its legislative provision for judicial review of the prosecutor's discretionary decision to refer a diversion-eligible youth to court for formal processing.[253] South Dakota allows prosecutors who have good cause to believe that diversion is inappropriate for a certain child to refer that child for formal court processing.[254] The prosecutor must provide notice to the child, and the child can seek judicial review of the prosecutor's belief in the existence of good cause.[255] If the judge finds that good cause did not exist, then the judge can refer the child back to diversion.[256]

This method of restraining prosecutorial discretion could be made stronger if a legislature chose to do so. It could do so by combining this method with the previous method and outlining explicit factors the prosecutor must consider when making his discretionary decision regarding diversion or

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251. WASH. REV. CODE § 13.40.070(8).
252. *Id*.
253. S.D. CODIFIED LAWS § 26-7A-11.1 (2026).
254. *Id*.
255. *Id*.
256. *Id*.

court referral. This would provide a reviewing judge with concrete factors against which he could compare the prosecutor's use of discretion. A legislature could also define an explicit standard the judge would use in reviewing the prosecutor's findings. The less deferential the standard is, the stronger the check on prosecutorial discretion.

South Dakota, Kentucky, and Washington provide examples of just three ways that legislatures could limit the amount of discretion prosecutors wield when determining whether a child should be referred to diversion or referred to court for formal processing. Other methods exist, and they are only limited by the imagination of state legislators and the constitution.

In addition to limiting prosecutorial discretion to prevent children from accessing diversion services, legislatures could move in the opposite direction. They could increase prosecutors' discretion to divert more children who are currently required to be referred to court. Under this proposal, prosecutors would have the discretion to divert children charged with higher level offenses rather than referring them to court. This discretion could also be checked by any of the above-described methods.

B. Other Options and Considerations

It is easy to assert that more children should be diverted and fewer should be formally referred to court. However, diversion will be effective only if it is accompanied by a "robust continuum" of therapeutic, educational, and other community-based services.[257] Achieving this goal may require state and local officials to redirect funding from traditional law-enforcement interventions toward programs that address the needs of young people with disabilities and trauma.[258]

There are also options, other than the legislative changes championed in this Article that could be considered. One option would be for states to "seek out" and divert children "who cycle in and out of the justice system," as those children would likely "benefit most from personalized services and support" offered by diversion programs.[259]

Kent Mendoza was incarcerated for five years as a teenager and is now the Manager of Advocacy and Community Organizing at the Anti-Recidivism Coalition.[260] He explained, "You can't expect a kid to change overnight—change is about relapses and further attempts."[261] "In other words, recidivism spotlights an individual's apparent failure at a specific moment in time while ignoring potential indices of progress and 'system-level factors that fail to

257. Henning & Omer, *supra* note 53, at 1413.
258. *Id.*
259. Noble, *supra* note 23, at 16.
260. *Id.* at 25.
261. *Id.*

support desistance.'"[262] By identifying the children who are making progress but could use additional supports in their attempts to avoid additional offenses, the juvenile legal system could acknowledge that progress and help ensure it continues.

Kristin Henning and Rebba Omer offer an idea that explicitly recognizes the trauma history of children accused of violating the law. They propose a pre-court procedure "similar to a 'manifestation hearing' in the school system to prevent the prosecution of children whose behavior is a manifestation of their disability [or trauma history]."[263] Court intake teams following this approach would review facts related to a child's disability and trauma history before deciding whether to recommend formal prosecution.[264] After reviewing all relevant facts, if the determination is made that a child's disability or trauma history is actually the behavioral cause of the delinquency, the team would then divert away from prosecution. Diverting the case from the formal process prevents the stigma associated with a juvenile court record and allows a referral for services in the community.[265]

Josh Gupta-Kagan offers an agency model of pre-court diversion. Under this model, juvenile justice agencies would have the power to determine if a child should be prosecuted, rather than elected prosecutors' offices.[266] Under this model, the referral of a child to juvenile court is subject to a framework of legislative and administrative standards that defense counsel may invoke and enforce within the proceedings.[267]

Finally, this Article would be remiss if it failed to mention Barry Feld's concerns with diversion. He rightfully notes that diversion allows state interference in the lives of children and families without the due process required by formal court intervention and even in situations in which the police and prosecutors may not have enough evidence to obtain an adjudication in court.[268] These are legitimate criticisms of diversion. However, unwarranted but rehabilitation-focused interventions in the life of a child are less likely to cause lasting harm on that child than formal court referral is. Therefore, the very legitimate negative aspects of diversion are outweighed by the harms of formal court referral, as described throughout this Article.

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262. *Id.* (quoting DAVID NOBLE, *Prosecutor-Led Pretrial Diversion: A Review of the Professional Literature*, 10 INST. FOR INNOVATION IN PROSECUTION (2018)).

263. Henning & Omer, *supra* note 53, at 1450.

264. *Id.* at 1423.

265. *Id.* at 1424.

266. Gupta-Kagan, *supra* note 82, at 487.

267. *Id.* at 488.

268. Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1095–96 (1995) ("[D]iversion provides a rationale to shift discretion from the juvenile court itself, where it is subject to some procedural formality under Gault, to the periphery, where police, prosecutors, or intake 'gate-keepers' operate on an informal pre-Gault basis with little accountability.").

V. CONCLUSION

The juvenile court was created on the premise that children are fundamentally different from adults and therefore require a legal system that prioritizes rehabilitation over punishment. Although the juvenile justice system has evolved dramatically over the past one hundred and twenty-five years, modern developmental science has reinforced rather than undermined that original belief. Research consistently demonstrates that adolescent delinquent behavior, even when it causes significant harm, is often a product of normal developmental immaturity rather than fixed criminality. As adolescents mature, the overwhelming majority naturally desist from offending without prolonged intervention by the legal system.

The empirical evidence likewise demonstrates that unnecessary formal court involvement often produces consequences that are inconsistent with the juvenile court's rehabilitative mission. Formal processing can expose children to additional trauma, disrupt healthy developmental processes, and impose the lasting stigma of a juvenile record, while diversion has been associated with lower recidivism, greater access to community-based services, and improved long-term outcomes. Diversion reflects the recognition that many of the challenges underlying delinquent behavior—including trauma, poverty, mental illness, family instability, and other adverse circumstances—are not best addressed through formal court intervention. Instead, meaningful accountability can be achieved while simultaneously promoting healing and connecting children with services in their communities.

Formal court referral imposes trauma on children who are likely to have already experienced significant trauma in their lives. In an effort to reduce this effect, states should craft legislation to establish mandatory diversion for broader categories of low-level offenses while also expanding eligibility for diversion in appropriate higher-level cases. Additionally, state legislatures should create legislative schemes that limit prosecutorial discretion to refer children for formal court processing rather than to diversion. This way, formal court processing can be reserved for the relatively small number of cases in which it is truly necessary to protect public safety or advance a child's rehabilitation. When developmental science, empirical research, and the juvenile court's historic rehabilitative mission all point toward diversion rather than formal prosecution, legislatures should ensure that state diversion statutes reflect those realities.