Of the Least of These: The Case Against Juvenile Confinement in America

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"Truly I tell you, whatever you did for one of the least of these brothers and sisters of mine, you did for me."

Matthew 25:40

Introduction

The air felt heavy as you drew near the entrance. The colors of the landscape camouflaged with the gray sky. Barbed wires decorated the horizon. The way to Rikers Island was elaborate, almost impenetrable. By design, those confined to its walls were shunned from the world. Their mothers, fathers, friends, all who dared to love them were assigned a cumbersome journey through buses and searches—just to savor a fleeting moment of contact. Past the guards, iron-clad doors, metal detectors, intimidating gaze of correctional officers, deep within the tangle of concrete and anger, stood a series of classrooms. This is where our group, students from Columbia University's undergraduate school and School of Social Work, met our inmate-students. There were six of them. Six bodies, as correctional officers labeled them. Young boys, as we saw them. They hailed from all over New York City—Black boys, all under the age of 17. Their detached expression filled the room with a dark cloud as they walked in. Their heads hung low; shoulders drooped

* J.D. Candidate, 2025; Executive Notes & Comments Editor, Howard Law Journal, Vol. 68; B.A. African-American Studies, Columbia University, 2018. My praise goes to my Lord, my Rock, and my Freedom—Jesus. Thank you Lord, for giving me grace to do exceedingly, abundantly above all I can think to do on my own. To my mentor, Professor Carla Shedd, thank you for lighting my fire. Thank you to my advisor, Professor Ziyad Motala, whose masterful instruction in the Constitution gave me boldness to write this Note. This Note is dedicated to Tony Webb and Elijah "E-Dot Baby" Irvin. You carried pain no child should bear, but you are free now. Here is to making this world more deserving of you. Rest in power.

like withered flowers. Their faces were dim, and eyes were vacant. They didn't have to say a word, for their suffering cried out in their stead. One young man lifted his eyes and met mine. Instantly, I felt a knot in my throat. I had never seen such sadness. Still, I did not want my body language to betray his dignity. These boys were incarcerated, but they were more than spectacles of ruin to be paraded around as cautionary tales. They were kids, with entire lives beyond their chains.

Understanding why a nation incarcerates its children[1] necessitates an interrogation of competing ideals on criminality, the purposes of punishment, and constructions of childhood. At its core, youth incarceration touches on the nation's beliefs about the dignity of an offender and their capacity to rehabilitate. In the United States, that interrogation would be incomplete without addressing how race arranges these perceptions along the colorline.[2] It is well-documented that in the era of mass incarceration, race can be understood as a proxy for criminality.[3] Thus, the expansion of the carceral state in recent decades has little to do with a rise in criminal activity.[4] Rather, commitments to the nation's hegemonic social and political order compel regurgitations of old systems of oppression.[5] It is no surprise then, that the insistence that America is a colorblind nation clashes with the oddity that prisons are filled with Black bodies, although Black

1. For purposes of this Note, the term "child" and its derivatives refer to persons under the age of eighteen. *See* UN Convention on the Rights of the Child art. 1, *adopted* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/736 (1989).

2. *See* W.E.B. DuBois, The Souls Of Black Folk 15 (1903) ("The problem of the twentieth century is the problem of the colorline.").

3. *See* Michelle Alexander, The New Jim Crow 123 (2010); *see also* Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 Fed. Sent'g Rep. 237, 237–38 (2015) (highlighting that criminality also functions as a proxy for race. "Prior criminal history has become a proxy for race."); Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DePaul L. Rev. 1013, 1014 (2004); U.S. Dep't Just. Civ. Rts. Div., Guidance Regarding The Use of Race by Federal Law Enforcement Agencies 5–6 (2003) (prohibiting law enforcement from race-neutral pretexts as an excuse to target persons of certain races and ethnicities. "The prohibition extends to the use of other, facially race-neutral factors as a proxy for overtly targeting persons of a certain race or ethnicity"); *Research Finds Evidence of Racial Bias in Plea Deals*, Equal Justice Initiative (Oct. 26, 2017), https://eji.org/news/research-finds-racial-disparities-in-plea-deals/ (showing significant racial disparities in plea deals suggests prosecutors may be using race as a proxy for criminality).

4. Comm. On Causes & Consequences Of High Rates Of Incarceration, Nat'l Rsch. Council, The Growth Of Incarceration In The United States: Exploring Causes And Consequences 44 (Jeremy Travis et al., eds.) (2014) ("The link between crime and the growth of the penal population is neither immediate nor direct. Incarceration trends do not simply track trends in crime, although trends in crime have clearly been an important part of the context in which incarceration rates have grown.").

5. *See* Alexander, *supra* note 3, at 1–2.

people do not commit crimes any more frequently than people of other races.[6] Youth incarceration lies at the crux of these paradoxes.

Untangling these paradoxes is a larger project than this Note attempts to undertake. While it is crucial to understand *why* a nation incarcerates its children, this Note addresses the question: what happens to a child *after* they have been incarcerated? Specifically, what, if any, constitutional safeguards exist to protect children from conditions of confinement so harsh, their otherwise bright futures are irreparably tainted? It is well-documented that juvenile incarceration is not effective.[7] Juvenile incarceration does not make communities safer nor rehabilitates children.[8] Instead, there is a pattern of abuse in juvenile detention facilities across the nation wherein the conditions under which children are confined levies physical and psychological damage they never recover from.[9] Nevertheless, states continue to render juvenile incarceration as the go-to response to juvenile delinquency.

While the Supreme Court has recognized that children are different, it has not considered whether children's distinctness bears on the analysis on where to draw the constitutional line for permissible

6. *See* Elizabeth Hinton, LeShae Henderson & Cindy Reed, An Unjust Burden: The Disparate Treatment Of Black Americans In The Criminal Justice System 3 (2014) ("Statistics linking [B]lack people and crime have historically overstated the problem of crime in [B]lack communities and produced a skewed depiction of American crime as a whole"). In 2018, the Federal Bureau of Investigation's ("FBI") Uniform Crime Reporting Program reported that Black people were overrepresented among persons arrested for nonfatal violent crimes and serious nonfatal violent crimes. While Black people constitute 12.5% of the population, 33% of arrests for nonfatal violent crimes and 36% of arrests for serious nonfatal violent crimes were of Black individuals. Allen J. Beck, Race And Ethnicity Of Violent Crime Offenders And Arrestees, 2018 1 (Jan. 2021), https://bjs.ojp.gov/content/pub/pdf/revcoa18.pdf. However, the FBI's Uniform Crime Report does not measure criminal justice outcomes beyond the point of arrest. Hinton et al., *supra* note 6, at 3. Thus, the overrepresentation of Black people in arrest rates do not expressly correlate to overrepresentation in the rate in which Black people commit crimes. Not every arrest results in a conviction. Moreover, the over-policing of communities of color is well-documented. *See* S. Rebecca Neusteter, Ram Subramanian, Jennifer Trone, Mawia Khogali & Cindy Reed, Gatekeepers: The Role of Police in Ending Mass Incarceration 4; *see generally* Jill Lepore, *The Invention of the Police*, New Yorker (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police (detailing how police have disproportionately patrolled and surveilled Black neighborhoods from the Progressive Era to modern times).

7. *See generally* Richard Mendel, Why Youth Incarceration Fails: An Updated Review of the Evidence, Sentencing Project (2022) [hereinafter Youth Incarceration Fails] (summarizing evidence documenting serious problems with youth incarceration); *see* Richard Mendel, No Place for Kids: The Case for Reducing Juvenile Incarceration 3 (2011) [hereinafter No Place for Kids] ("We now have overwhelming evidence showing that wholesale incarceration of juvenile offenders is a counterproductive public policy.").

8. Youth Incarceration Fails, *supra* note 7, at 4; *see also* No Kids in Prison, The Facts Report: The Geography of America's Dysfunctional & Racially Disparate Youth Incarceration Complex 10 [hereinafter The Facts Report], https://www.nokidsinprison.org/the-facts (last visited Feb. 20, 2025).

9. The Facts Report, *supra* note 8, at 5–6.

conditions of youth confinement. Necessarily, the Supreme Court's pronouncement that "children are constitutionally different from adults for sentencing purposes" invites the question of whether it follows that children are different from adults for confinement purposes.[10] Children are uniquely vulnerable, immature, and redeemable; thus, determining an appropriate response to the commission of a crime takes a different form when the perpetrator of that crime is a child. If, indeed, children are different from adults and their differences have constitutional import, then a condition of confinement that is constitutionally permissible for an adult may be unconstitutional when applied to a child.[11] However, constitutional standards governing condition of confinement claims do not distinguish between adults and children.

The question remains: what conditions of youth confinement push beyond constitutional bounds? There are disagreements among the lower courts concerning whether the Fourteenth Amendment's protection against punishment without conviction are coextensive with the Eighth Amendment's prohibition on cruel and unusual punishment.[12] Some courts hold that conditions that violate the Eighth Amendment are necessarily offensive to the Fourteenth Amendment.[13] Other courts do not factor the Eighth Amendment in the calculus, positing that the Eighth Amendment only applies to post-conviction claims.[14] Conditions of confinement claims brought under the Fourteenth Amendment are governed by the standard established in *Bell v. Wolfish*, where the Court held that pretrial detainees cannot be punished absent a conviction comporting with the requirements of due process.[15] Under *Bell*, conditions that constitute unconstitutional punishment are those that are not reasonably related and proportional to a legitimate governmental objective.[16] The leading case for Eighth Amendment conditions of confinement claims is *Farmer v. Brennan*, which established that conditions of confinement posing a substantial

10. Miller v. Alabama, 567 U.S. 460, 471 (2012).

11. *See* Cara H. Drinan, *Cruel and Unusual Youth Confinement*, 54 Ariz. St. L.J. 1161, 1205 (2022) [hereinafter Drinan, *Cruel and Unusual*].

12. *See* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. Pa. L. Rev. 1009, 1025-26 (2013).

13. *See* Blackmon v. Sutton, 734 F.3d 1237, 1241 (10th Cir. 2013) ("Conduct that violates the clearly established rights of convicts necessarily violates the clearly established rights of pretrial detainees.").

14. *See* Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.").

15. Bell v. Wolfish, 441 U.S. 520, 538–39 (1979).

16. *Id.*

risk of serious harm are unconstitutional if the defendant knew of and disregarded the risk.[17] Both of these cases dealt with adult plaintiffs.[18] Necessarily, the Court did not consider how these standards would apply to children in similar predicaments. Moreover, children in juvenile detention facilities are adjudicated delinquent, not convicted of crimes—a distinction that raises special due process concerns for conditions of youth confinement claims. Thus, the holdings in *Bell* and *Farmer*, in tandem, do not provide a clear line for permissible conditions of youth confinement.

Assuming, arguendo, that the *Farmer* and *Bell* standards are workable as applied to children, these standards are subject to a fatal flaw: the *modus operandi* of the judiciary in resolving challenges to conditions of confinement is to grant near plenary deference to state officials in the administration of their detention facilities.[19] Consider the standards articulated in *Bell* and *Farmer*. The *Bell* standard invokes the language of rational basis review, a standard of review so deferential it is seen as "minimal scrutiny in theory and virtually none in fact."[20] The *Farmer* standard contains a subjective component which is "dependent on the prison officials' state of mind," providing a fireproof mechanism for prison officials to escape liability.[21] When weighing incarcerated individuals' liberty interest in being free from oppressive conditions of confinement against the state's interest in public safety, courts tend to hold the state's interest as paramount, often denying the incarcerated individual relief from conditions that inflict irreparable harm.[22]

17. *See* Farmer v. Brennan, 511 U.S. 825, 836–37 (1994).

18. The incident that brought about Farmer occurred when the plaintiff, Dee Farmer, was nineteen years old. *See* Fight4Justice, FIGHT4JUSTICE, https://fight4justice.info/ (last visited Mar. 18, 2025). The detention facility at the center of *Bell* was a federal detention facility that only held adult pretrial detainees. *See, e.g.*, *Bell*, 441 U.S. at 523.

19. David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2037 (2018).

20. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1971).

21. Shapiro & Hogle, *supra* note 19, at 2039-40 ("In the Eighth Amendment context, doctrinal deference to prison administrators generally takes the form of exacting mens rea elements: to make out a claim, a prisoner must produce evidence not only that she suffered objectively inhumane treatment or conditions, but that the prison officials responsible had malign intent or failed to remedy known risks."). *See also* Drinan, *Cruel and Unusual*, *supra* note 11, at 1192 (explaining that the individual actor approach of the *Farmer* test shield prison officials from responsibility).

22. Brian Nam-Sonenstein, *Research Roundup: Evidence That a Single Day in Jail Causes Immediate and Long-Lasting Harms*, PRISON POL'Y INITIATIVE (Aug. 6, 2024), https://www.prisonpolicy.org/blog/2024/08/06/short_jail_stays/#:~:text=While%20all%20of%20these%20data,more%20severe%20consequences%20for%20each.&text=This%20growing%20body%20of%20research,destructive%20effects%20on%20people's%20livelihoods ("Under our current system, judges only weigh the government's interest in public safety and court appearance against an individual's constitutional right to liberty and due process. In other words, judges are entirely

Deference to state officials is tantamount to greenlighting abusive practices in the name of judicial restraint.[23] It asks states to define whether their conduct is abusive and trusts that determination over the individual who is subject to the abuse—a clear abdication of the judiciary's role in defining the bright-line for constitutional conduct.[24] When it comes to kids, the least protected class of people in our society, the implications are disastrous.[25]

Several legal scholars have proposed solutions to the law's insufficiency to relieve children confined in oppressive conditions. Professor Cara Drinan proposed modifying the standards along "dimensions of difference" between adult and children bearing on the Court's Eighth Amendment jurisprudence.[26] Another scholar proposed categorical bans on the type of conditions that children can be subjected to.[27] Both proposals are necessary to relieve children from oppressive conditions of confinement. Even still, children remain in chains long after they are released from youth prison. Their chains are invisible—but no less destructive, life-altering, and disfiguring.

This Note proposes a new standard for resolving condition of youth confinement claims; one that seeks to circumvent courts' tendency to grant state officials undue deference in conditions of youth confinement claims and protect the futures of incarcerated children. The new standard proposed is found in another provision of the Fourteenth Amendment—the Substantive Due Process Clause.[28] There is a common thread woven throughout the Supreme Court's jurisprudence on delinquent youth pointing to the Court's concern over practices impairing a child's ability to grow and reach their full potential. Indeed,

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focused on the risks of release and whether they outweigh someone's right to freedom—ignoring detention's serious, immediate risks to individuals and public safety.").

23. *See Bell*, 441 U.S. at 568 (Marshall, J., dissenting).

24. *Id.*

25. *See* Jeffrey Fagan & Aaron Kupchik, *Juvenile Incarceration and the Pains of Imprisonment*, 3 DUKE F. L. & SOC. CHANGE 29, 41 (2011) ("After all, juvenile inmates—those who suffer under noxious juvenile correctional conditions—have less status than just about any other custodial group that one can imagine. They are legally barred from political and civic participation, as they cannot even sign a contract, let alone vote. And they often lack access to counsel or other legal resources that are integral to the culture of state prisons for adults. Nor do juveniles have standing to bring lawsuits to remedy toxic conditions of confinement.").

26. Drinan, *Cruel and Unusual*, *supra* note 11, at 1203.

27. *See generally* Lilah Wolf, *Purgatorio: The Enduring Impact of Juvenile Incarceration and a Proposed Eighth Amendment Solution to Hell on Earth*, 14 STAN. J. C.R. & C.L. 89 (2018) (proposing a litigating strategy calling for categorical rules against certain classes of punishment).

28. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1.

this concern permeates throughout the history of juvenile justice and has formed the basis for a number of statutory reforms around youth delinquency. Unraveling this thread suggests that there is a "history and tradition"[29] in this nation to protect a child's right to self-actualize—that is the child's right to grow, mature, and realize their innate potential. This Note argues that a child's right to self-actualization is a "liberty" enshrined in the Substantive Due Process Clause of the Fourteenth Amendment and has significant implications for youth confinement.

Recognizing that the Substantive Due Process Clause protects children's right to self-actualize elevates the level of scrutiny courts apply to conditions of youth confinement claims. The question would no longer be whether the challenged condition is incident to a legitimate governmental objective or whether the condition poses a risk of harm. The question becomes whether the challenged condition unduly burdens a child's prospect to rehabilitate and reach their full developmental potential. Courts would have to employ the same methodology the Supreme Court employed in determining that children are different from adults—using developments in adolescent brain science to assess how the law ought to be applied to children. Juvenile detention facilities are inherently traumatic.[30] Trauma indubitably impairs a child's growth.[31] Thus, recognition of children's constitutionally protected right to self-actualization would shift how courts arrange its priorities.

This Note advances this argument in three Parts. Part I surveys the past and present of the juvenile justice system—foregrounding constructions of Black childhood at certain historical benchmarks to highlight how the juvenile justice system pivoted from having rehabilitative aims to punitive aims once it converted to a system of control over Black youth.[32] Part II unravels the convoluted law governing conditions of youth confinement claims by using a recent case in Louisiana as case study and asks: how can courts get conditions of youth confinement claims right? Part III argues that the current framework for examining claims of unconstitutional conditions of confinement is

29. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

30. *See* Thalia Gonzalez, *Juvenile (In)Justice: Youth Incarceration, Health, and Length of Stay*, 45 Fordham Urb. L. J. 45, 64 (2017).

31. *See* Melissa L. Breger, *Juvenile Brain Trauma as the New Frontier in Supreme Court Jurisprudence*, 98 Tul. L. Rev. 259, 293 (2023).

32. Throughout this Note, I substitute the term "juvenile offender" for "young offender" or other permutations of the term "young." This semantic choice serves to highlight that the term "juvenile offenders" does not describe different categories of offenders on par with other categorizations, such as sexual offenders, violent offenders, white crime offenders, and the like. Simply, a juvenile offender is a child who disobeyed the law.

woefully inadequate—contending that children have a fundamental right to self-actualization which is implicated when they are incarcerated under conditions that quell their rehabilitative potential. In recognizing their fundamental right to self-actualization, courts would be required to assess claims of unconstitutional conditions of juvenile confinement under strict scrutiny, requiring states to demonstrate a compelling interest in confining children under the challenged conditions. This Note concludes by re-contextualizing the story of juvenile justice to suggest that recognition of a child's constitutional right to self-actualization has special, redemptive implications for Black children.

Part I: The Least of These—Caged Kids in the Land of the Free

The juvenile justice system had benevolent origins. The modern conception of juvenile justice was born during the child-saving movement of the Progressive Era, a period in the early twentieth century marked by political and social reform.[33] At its inception, the juvenile justice system was designed to provide a rehabilitative, non-punitive alternative to the adult criminal justice system. Advocates maintained that adult penal institutions were inadequate to fashion competent adults out of unsophisticated, delinquent children.[34] Fueling the need for separate institutions was a construction of childhood positing that children are "embryonic citizens"—namely, the uniquely malleable developmental potential of children renders them capable of being "trained or tailored to fit social norms."[35] In the early twentieth century, juvenile courts sprang up around the country, functioning "like a kind and just parent ought to treat his children."[36] The hallmark of this new child-centered judicial system was the "concept of the rehabilitative ideal."[37] Judge Mack's classic statement on the original theory of the juvenile court articulated the founding principle for the opening of the country's first juvenile court in 1899:

> Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles

33. Geoff K. Ward, The Black Child-Savers: Racial Democracy & Juvenile Justice 77 (2012); *see generally The Progressive Era Key Facts*, Encyc. Britannica (Sep. 28, 2020), https://www.britannica.com/summary/The-Progressive-Era-Key-Facts (noting that the Progressive Era spanned from the 1890s to the 1920s).

34. Ward, *supra* note 33, at 78.

35. *Id.* at 20.

36. *Id.* at 78.

37. Wallace J. Mlyniec, *Juvenile Delinquent or Adult Convict–The Prosecutor's Choice*, 14 Am. Crim. L. Rev. 29, 30 (1976).

> his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.[38]

Under the model articulated by Judge Mack, troubled youth were connected with programs and personalized services that rehabilitated youth to ensure their civic development.[39] Proceedings in juvenile courts were designed to be informal, such that a child can "be made to feel that he is the object of its care and solicitude."[40] The rapid growth of the juvenile justice system was fueled by the belief that a "wayward child could be saved" and society had a mandate to save him. Thus, juvenile courts turned to "the social worker, the psychologist and psychiatrist;"[41] juvenile court judges became "instrument[s] of rehabilitation."[42] Probation replaced incarceration.[43] If a child needed to be removed from his home, the child "was placed in an environment conducive to rehabilitation."[44]

In the decades following the child-saving movement of the early twentieth century, the juvenile justice system began to metamorphose. The advent of the retributive zeitgeist that erupted the nation's incarceration rates during the 1970s seeped into the juvenile justice system, eroding the rehabilitative posture of juvenile justice. In the ensuing decades, juvenile justice policy shifted its focus from rehabilitating young offenders to criminalizing youthful conduct.[45] Thus, behaviors typically seen as characteristic of a child's lack of maturity or resulting from dysfunctional home environments were criminalized.[46] Children were incarcerated because they came from dangerous homes;

38. Julian W. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 107 (1909).
39. Ward, *supra* note 33, at 78.
40. Mack, *supra* note 38, at 120; Mlyniec, *supra* note 37, at 30. *Cf.* In re Gault, 387 U.S. 1, 25 (1967) (observing that the informality of juvenile delinquency proceeding raises due process concerns).
41. Mlyniec, *supra* note 37, at 30.
42. *Id.*
43. *Id.*
44. *Id.*
45. Fagan & Kupchik, *supra* note 25, at 30.
46. *See generally* Mahsa Jafarian & Vidhya Ananthakrishnan, *Just Kids: When Misbehaving is a Crime*, Vera Inst., https://www.vera.org/when-misbehaving-is-a-crime (last visited Apr. 14, 2025) (discussing how the juvenile justice system criminalizes behaviors stemming from normal adolescent development and poses little to no risk to public safety).

because they were homeless; because they were mentally ill; because they were sexually active; because they were not going to school; or because they were expected to commit crimes in the future.[47]

Similarly, the aims of juvenile incarceration shifted from being largely rehabilitative to retributive.[48] Conditions in juvenile detention facilities took on a punitive character, reflecting a growing cynicism about a child's capacity to rehabilitate.[49] States toughened their juvenile delinquency statutes to "deemphasize rehabilitation and focus on punishment, retribution, and incapacitation."[50] As a consequence, youth incarceration today is hardly distinguishable from adult incarceration.[51] Juvenile detention facilities feature most of the trappings of their adult counterparts—restricted movement, monochromatic uniforms, physical restraints, regimented routines, and complete submission to disciplinary authorities who dictate every aspect of their existence.[52] Whereas juvenile detention facilities were historically conceived to serve a rehabilitative function, today, they are "correctional facilities whose primary purpose is to punish."[53]

This punitive shift in juvenile justice raises profound contradictions in how society treats young offenders.[54] Children are conceptualized as innocent beings yet treated as if they were not. Beginning with New York's 1978 Juvenile Offender Law, state legislatures across the country decided that young offenders are more "criminally culpable and more dangerous at younger ages than they were in the past," marking a regression towards using the adult criminal justice system to handle youth crime.[55] While no state has abolished their juvenile court system, all states provide a slew of legal mechanisms to transfer

47. Jeffrey Fagan, *The Contradictions of Juvenile Crime & Punishment*, 139 DAEDALUS 43, 44 (2010) [hereinafter Fagan, *Contradictions*].

48. *Id.*

49. *Id.*

50. *Id.* at 48 ("'Getting tough' in the juvenile system was not an institutional project, but a statutory one.").

51. *See* Fagan & Kupchik, *supra* note 25, at 36 ("Juvenile facilities have the capacity to impose pain and restrict future opportunities, just like their adult analogs.").

52. Fagan, *Contradictions*, *supra* note 47, at 43.

53. *Id.*

54. *Id.* at 44–45 ("What this all adds up to is an institutional landscape that at once fears child criminals and wants to punish them harshly, but at the same time adheres to the transcendent philosophy of child-saving."). We believe deeply in child-saving, yet we are quick to expose violent children to the harshest punishments in service to the same punitive instincts that drive mass incarceration of adults. But even there, we pull our punches. We pull back from the brink of fully embracing punitiveness toward juveniles, reserving it instead for adults. Not only is the philosophy of child-saving an important normative modifier of these instincts, it is also deeply embedded in the institutions of juvenile justice and juvenile corrections.").

55. Fagan & Kupchik, *supra* note 25, at 31.

young offenders to adult courts where the sole goal of imprisonment is punishment. In doing so, states demonstrate a desire to punish, not save, children.[56] Inside juvenile detention facilities, state practices against incarcerated children show a "remarkable dedication to the retribution theory of punishment."[57] Incarcerated children are subject to conditions that cannot be justified by any other motive except to inflict suffering to make them "pay for [their] crimes."[58] For example, in Los Angeles, staff at a juvenile detention facility were indicted for staging "gladiator fights" among the children in their care, with one fight resulting in a child incurring traumatic brain injury.[59] In juvenile detention facilities throughout the country, children sustain trauma they have to carry for the rest of their lives. Demonstrated patterns of state-sanctioned abuse in juvenile detention facilities coupled with stubborn resistance to reform exposes inflexible beliefs about children that commit crimes and the treatment they deserve.[60]

An important distinction is crucial to make at this juncture. Tracking how race interacted with the founding principles of juvenile justice reveals parallel histories.[61] In the first few decades of the juvenile justice system, the system operated with fidelity towards its rehabilitative ideal largely because it exclusively treated white children. An essential premise of the rehabilitative ideal was that children were innocent, inherently good, and worth saving.[62] But innocence was raced white.[63] Positive constructions of childhood were not available to Black children.[64] Thus, Black children (and other non-white children) were categorically excluded from the benevolent promise of the

56. Nell Bernstein, Burning Down the House: The End of Juvenile Prison 75 (2014) [hereinafter Bernstein, Burning Down the House] (explaining that the super-predator myth popularized in the 1990s prompted states to revise their juvenile justice codes to make their intent to punish more explicit).

57. Prateek Shukla, *The Criminal Child and Its Potential for Change: A Presumption in Favor of Rehabilitation in Sentencing Juvenile Offenders*, 38 New Eng. J. on Crim. & Civ. Confinement 379, 391 (2012).

58. Bernstein, Burning Down the House, *supra* note 56, at 225.

59. Associated Press, *California Juvenile Detention Officers Staged 'Gladiator Fights' Between Youth, Indictment Says*, CNN (Mar. 4, 2025, 12:54 PM), https://www.cnn.com/2025/03/04/us/california-juvenile-detention-officers-charged-hnk/index.html.

60. *See* Shukla, *supra* note 57, at 391; No Place for Kids, *supra* note 7, at 5; Megan Shutzer & Rachel Lauren Mueller, *"Dying Inside": Chaos and Cruelty in Louisiana Juvenile Detention*, N.Y. Times (Oct. 30, 2022), https://www.nytimes.com/interactive/2022/10/29/us/juvenile-detention-abuses-louisiana.html.

61. *See* Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679, 680 (2002).

62. Robin Bernstein, Racial Innocence: Performing American Childhood from Slavery to Civil Rights 4 (David Kazanjian et al. eds., 2011) [hereinafter Bernstein, Racial Innocence].

63. *Id.*

64. *See* Nunn, *supra* note 61, at 679, 680.

early child-saving movement—suggesting that the history of juvenile justice splits along racial lines. Once Black children entered the fray, the juvenile justice system ceased to exercise a primary rehabilitative function to a punitive one, comporting with constructions of Black childhood. This Part considers the racial dimensions of the history of juvenile justice to argue that parallel histories began to converge when the juvenile justice system shifted towards a punitive approach to adapt to society's growing phobia toward Black adolescence.

A. A (Black) History of Juvenile Justice

For Black children, the promise of restorative juvenile justice was co-opted to maintain social hierarchies of the pertinent era. Early iterations of juvenile justice reform coexisted with the institution of chattel slavery.[65] While early juvenile justice institutions "prioritized the rehabilitative interventions in the lives of white children and youth," the legal system of many slave-holding states regarded Black children as assets on the same footing as animals.[66] Chattel slavery created an economic incentive by which slave owners and their contemporaries did not appreciate Black childhood as a stage of human development.[67] Antebellum Black children were never expected to become full participants of the American polity, rather they were regarded as "profitable beasts" whose existence was defined in terms of the slaveholder's economic interests.[68] As Thomas Jefferson said, "A [Black] child raised every two years is more of profit than the crop of the best laboring man."[69] From its inception, the juvenile justice system was erected as a citizen-building project at a time where Black Americans' access to the privileges and mandates of citizenship was attenuated.[70] Professor Geoff Ward observes that "enslavement essentially removed Black Americans from the scene of early juvenile justice reform."[71]

In the decades following emancipation, conceptions of childhood began to modernize. As the nation transformed from an agrarian nation to an industrial nation, shifts in the workforce encouraged parents to

65. WARD, *supra* note 33, at 34.
66. *Id.* at 35.
67. *Id.* at 36.
68. *Id.*
69. WILMA KING, STOLEN CHILDHOOD: SLAVE YOUTH IN NINETEENTH CENTURY AMERICA 2 (1995) (quoting Thomas Jefferson).
70. WARD, *supra* note 33, at 79.
71. *Id.* at 34.

invest in their children's education to give them a competitive edge in a modernizing economy.[72] Thus, an understanding of adolescence as a stage of development distinct from adulthood began to take shape—bringing along with it new privileges of extended education, opportunities for self-discovery, and insulation from adult activities.[73] States began passing compulsory education laws, laws banning child labor, and laws establishing social programs to impose middle-class values on children.[74] Democratic ambitions linking juvenile social control with the fate of the nation started to shape juvenile justice.[75] Prior to the emergence of specialize juvenile courts, courts operated under common law diminished child-criminal culpability standard providing that any offender under the age of fourteen enjoyed a presumption of incapacity.[76] Even young persons as old as twenty-one may be exempted from the harshest punishments under common law.[77] Thus, pre-existing presumptions of diminished capacity in youth coupled with the goals of reforming young offenders spurred a need for separate institutions to deal with juvenile delinquency. By 1917, juvenile courts had been established in all but three states.[78]

Yet, these reforms did not apply to Black children. In 1944, South Carolina killed 14-year-old George Stinney, the youngest person in modern America to be executed.[79] Three years later, Louisiana killed 16-year-old Willie Francis in a botched execution.[80] During the time George Stinney and Willie Francis were executed, states were professing a demonstrated commitment to the citizen-building project of juvenile courts. Yet, George Stinney and Willie Francis were erroneously convicted of crimes after proceedings described as "appalling disregard[s] for justice."[81] They were not regarded as children with a diminished capacity to understand the accusations against them.[82] They were not regarded as future citizens whose potential was worth protecting. Instead, as Black youth, they were regarded as "perennial

72. *Id.*
73. *Id.* at 10
74. *Id.*
75. Ward, *supra* note 33, at 31.
76. *Id.* at 6; s*ee also* Craig S. Lerner, *Originalism and the Common Law Infancy Defense*, 67 Am. Univ. L. Rev. 1577, 1586 (2018).
77. Lerner, *supra* note 76, at 1593.
78. Barbara Danzinger Flicker, *Juvenile Justice Standards Project Standards for Juvenile Justice: A Summary and Analysis*, Off. Just. Programs, https://www.ojp.gov/pdffiles1/ojjdp/83565.pdf.
79. *Id.* at 10.
80. *Id.* at 240.
81. *Id.*
82. Kristin Henning, The Rage of Innocence: How America Criminalizes Black Youth 240 (2021).

'lost cause[s]'. . . lacking the physical, moral, and intellectual capacity on which normalization would depend."[83] The reality that faced George Stinney, Willie Francis, and Black youth today, was that Black youth were simply not deemed worthy of rehabilitative efforts.[84] While white delinquent youth were afforded practical training, discipline, and moral guidance in reformatories, Black youth were excluded on the basis that "it would be degrading to the white children to associate them with beings given up to public scorn."[85] By 1945, a year after George Stinney's execution, all states had a separate juvenile court.[86] Despite the universal acceptance of leniency in juvenile justice, Black children were executed, imprisoned, and subjected to the brutality of the convict leasing system—a system regarded as "worse than slavery."[87] Even Black girls as young as six-years-old, such as Mary Gay, were imprisoned for petty crimes such as stealing a hat.[88]

The history of the juvenile justice system teaches that constructions of Black childhood were defined according to the interests of the dominant social order. During chattel slavery, Black childhood was constructed in economic terms—the value of a Black child was measured by their lifetime revenue potential. When slavery metamorphosed into Jim Crow, Black childhood was invisible. Then, political backlash against the victories of the Civil Rights Movement led to increased criminalization of Black youth. Mainstream media perpetuated images placing "the site of the Black body as the location of menace"—demonizing blackness by using the Black body "as a canvas for criminality."[89] "[N]ightmarish, boogieman-like" images of Black youth "titillate[d] deeply held convictions about white goodness and Black menace," a phenomenon which helped usher in the age of mass incarceration.[90] In recent decades, constructions of Black childhood were viewed in light of mass hysteria surrounding the urban, violence-disposed, "super-predator" caricature of the 1990s.[91] An "obsessive

83. WARD, *supra* note 33, at 39.
84. *See* HENNING, *supra* note 82, at 244; WARD, *supra* note 33, at 38.
85. WARD, *supra* note 33, at 52–53.
86. Erin Fitzgerald, *Put the Juveniles Back in Juvenile Court*, 68 VILL. L. REV. 367, 367 (2023).
87. *Id.* at 67–68. In 1868, of the 222 convicts in the Louisiana penitentiary, forty-three were between the ages of ten and twenty. By 1880, at least 25 percent of Mississippi's convicts were under the age of eighteen.
88. *Id.* at 68.
89. Blanche Bong Cook, *Death-Dealing Imaginations: Racial Profiling, Criminality, and Black Innocence*, 63 WAYNE L. REV. 9, 11 (2017).
90. *Id.* at 12; ALEXANDER, *supra* note 3, at 52–53.
91. HENNING, *supra* note 82, at 87–88; *see also* Jessica K. Heldman, *Transforming the Culture of Youth Justice in the Wake of Youth Prison Closures*, 26 LEWIS & CLARK L. REV. 1, 14 (2022)

fear of [B]lack youth and totalizing commitment to their surveillance and control" led to communities over-policing and over-incarcerating Black youth.[92] This fear was so pervasive that efforts to "prevent [B]lack youth from turning to crime and contain those involved with crime with aggressive policing and excessive incarceration became in many respects America's chief domestic objective"[93] towards the latter half of the twentieth century. Mechanisms by which Black children were criminalized expanded.[94] Even schools became gateways to prison.[95]

A consequence of the criminalization of Black youth is the disproportionate rate in which Black youth are incarcerated and the brutal conditions under which they are incarcerated. In 2019, the Office of Juvenile Justice reported that Black youth are 2.4 times more likely to be arrested than white youth.[96] While Black youth only represent 15% of the adolescent population, they are involved in 52% of juvenile arrests for violent crimes and make up 41% of all incarcerated children.[97] Some might argue that racial disproportionality rates in juvenile arrests and incarceration mirror actual trends in the rate Black youth commit crimes in comparison with white youth. However, in a study investigating stereotypic associations on visual studies, researchers found that when police officers were asked directly, "who looks criminal?" officers chose

("An anxious public was inundated with predictions of an impending juvenile crime wave and the portrayal of youth as particularly violent and remorseless–a new breed of 'super-predator'"); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1388 (2020) ("The 1990s, the image of wayward children had been supplanted by frightening depictions of young 'superpredators' prowling inner-city streets in gangs, bent on murder and mayhem. These racialized images suggest a particularly ugly aspect of the attitudes fueling the moral panic surrounding youth crime. The push for punitive reforms was infused with racist assumptions about the identity of the youths threatening society. Research indicated that the public and legal actors perceived youth of color as more mature, threatening, and deserving of harsh punishment than their white counterparts. In this racialized environment, politicians and the public viewed teenagers involved in crime not as children but as criminals, who should be punished as such.").

92. Jonathan Simon, *Is Mass Incarceration History?*, 95 TEX. L. REV. 1077, 1079 (2017).

93. *Id.*

94. *See generally id.* at 1079, 1082, 1101 (detailing how Nixon's "war on crime" promulgated an "obsessive fear of Black youth and totalizing national commitment to their surveillance and control" where law enforcement resolved to "confront, arrest, and punish those Black youth whose potentiality for crime crossed over into criminal behavior"). *See also* HENNING, *supra* note 82, at 48–49, 53, 62–63, 71 (discussing policies that criminalize Black youth culture such as laws prohibiting ski masks, city ordinances prohibiting sagging pants, school dress policies rendering Black hairstyles inappropriate, and prosecutorial tactics that criminalizing hip-hop music).

95. For background on the school-to-prison pipeline, *see* MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS 9–13, 66–71 (2015).

96. Nora Leonard, *Racial and Ethnic Disparities in the Youth Justice System*, COAL. FOR JUV. JUST. (Mar. 2, 2023), https://www.juvjustice.org/blog/1436.

97. *Id.*

Black faces more than white faces.[98] Racial bias in officers' perception of criminality inform arrest rates.[99] While recent decades have seen a decline in juvenile arrests, Black youth arrests are decreasing at a significantly slower pace than White youth.[100]

Youth incarceration is rife with racial disparities and brutal conditions. Black youth in placement are held in punitive corrections programs whereas white youth are more represented in residential programs.[101] In a survey of youth in corrections programs, children "reported sexual victimization, fear of attack, solitary confinement, strip searches, use of restraints, unnecessary use of force, and poor relations with staff."[102] While adult facilities are undoubtedly the worst place for youth, juvenile detention centers are functionally equivalent to adult jails.[103] Some are reportedly *worse*.[104] Thus, the difference between juvenile and adult facilities is often a matter of degree as juvenile facilities can impose pain and restrict future opportunities as much as their adult analogs.[105] Kristin Henning gives an account of one of Kalief Browder's first nights at the juvenile complex in Rikers Island: "Kalief and several other teenagers were lined up against a wall and repeatedly punched in the face, one at a time, by the guards . . . The guards told him, 'We're gonna break you,' and they did."[106] Given the brutality of punitive correction programs, Professor Jeffrey Fagan argues that "any incarceration ought to be used only as a last resort sentencing option."[107]

Nonetheless, states continue to incarcerate kids even though incarceration does not make communities safer.[108] Children experience

98. Jennifer L. Eberhardt, Valarie J. Purdie, Phillip Atiba Goff & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psych. 876, 878 (2004).

99. Cydney Schleiden, Kristy L. Soloski, Kaitlyn Milstead & Abby Rhynehart, *Racial Disparities in Arrests: A Race Specific Model Explaining Arrest Rates Across Black and White Young Adults*, 37 Child & Adolescent Soc. Work J. 1, 12 (2020) ("[This] study sheds light on racial disparities [in youth arrests] that are not accounted for by contextual or behavioral factors, implying there is a need for self-reflection in order to begin to understand that we each hold bias that can perpetuate this cycle of oppression.").

100. *Id.* at 1.

101. Andrea J. Sedlak & Karla S. McPherson, *Conditions of Confinement: Findings from the Survey of Youth in Residential Placement*, Off. Just. Programs, https://www.ojp.gov/pdffiles1/ojjdp/227729.pdf (last visited Mar. 31, 2025).

102. Press Release, Wendy Sawyer, Youth Confinement: The Whole Pie 2019 (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html (summarizing findings in Sedlak & McPherson's *Conditions of Confinement*).

103. *Id.*

104. *Id.*

105. Fagan & Kupchik, *supra* note 25, at 36.

106. Henning, *supra* note 82, at 259.

107. Fagan & Kupchik, *supra* note 25, at 30.

108. The Facts Report, *supra* note 8.

high recidivism rates.[109] In fact, juvenile incarceration substantially increases the likelihood that youth will be incarcerated as adults.[110] Children housed in prisons are often victimized and exposed to violence.[111] Exposing children to violence in adult prisons carries social and fiscal costs; communities may have to pay later in crime and violence upon their release.[112] Thus, implicit in the question of juvenile incarceration is whether confining a child to a punitive environment as punishment for misbehavior necessary?[113] Many Americans believe no—a recent public opinion poll showed that nearly three quarters of the American public believe that teaching young offenders to take responsibility for their actions does not require incarceration.[114]

B. Broken Wings: Pattern of Brutality in America's Youth Prisons

Across the country, children are confined under conditions advocates describe as "government-sanctioned child abuse."[115] A 2010 nationally representative survey of 7,073 children inside the nation's juvenile facilities revealed that childhood trauma was "so pervasive as to be nearly universal."[116] Unbelievably oppressive conditions are not extreme or isolated occurrences. Experts report that instances of extreme abuse in youth prisons follow a "sustained pattern of maltreatment," such that experts consider that "punishment, retribution, and tolerance of harsh conditions of confinement are

109. *Id.* High recidivism rates among incarcerated youth circumvents the argument that incarceration is necessary to the penological goal of incapacitation. *See* Graham v. Florida, 560 U.S. 48, 72 (2010) ("Recidivism is a serious risk to public safety, and so incapacitation is an important goal.").

110. The Facts Report, *supra* note 8.

111. Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 Juv. & Fam. Ct. J. 1, 1 (1989).

112. *Id.* at 11.

113. Studies show that juvenile violent offenses are rare. Youth crime is predominantly non-violent. In 2020, 8% of all youth arrests were for violent crimes such as aggravated assault, robbery, and murder. Joshua Rovner, *Youth Justice by the Numbers*, Sent'g Project, https://www.sentencingproject.org/app/uploads/2024/08/Youth-Justice-By-The-Numbers.pdf (last visited Mar. 31, 2025).

114. The Facts Report, *supra* note 8. *See generally New Poll Results On Youth Justice Reform*, No Kids In Prison, https://backend.nokidsinprison.org/wp-content/uploads/2021/02/Youth-First-National-Poll-Memo-Feb-2021-Final-4.pdf (describing key findings from a recent survey of 1,000 adults in the U.S. conducted by GBAO on behalf of Youth First Initiative where data shows "Americans overwhelmingly favor a youth justice system that focuses on prevention and rehabilitation (78 percent), while only 22 percent favor focusing on punishment and incarceration.") (last visited Mar. 31, 2025).

115. *Solitary Confinement & Harsh Conditions*, Juv. L. Ctr., https://jlc.org/issues/solitary-confinement-other-conditions (last visited Feb. 20, 2025).

116. Bernstein, Burning Down the House, *supra* note 56, at 153.

the . . . indicia of most juvenile detention facilities."[117] For example, inside the walls of one of Louisiana's largest juvenile detention facilities, children were attempting suicide in droves—some tying linens around their necks, others swallowing hazardous chemicals, and others trying to drown themselves.[118] The conditions driving them to suicide were torturous. Guards would beat them, drug them, and force them to endure sexual abuse in exchange for food.[119] Abuse was an open secret so resisting was futile.[120] Children were driven to despair knowing "that no one is going to rescue them from repeated acts of physical violence, sexual assault and psychological torment."[121] For example, officers in a detention facility stood by while a child attempted suicide, recording the ordeal on their cellphone instead of rushing to save the child.[122] In Texas, the Justice Department uncovered a pattern of abuse wherein detention centers subjected children as young as ten years old to physical and sexual abuse.[123] In Kansas, a 15-year-old boy was beaten by a guard who inflicted a 3-inch laceration to his skull.[124] Luckily, the child survived.[125] In Florida, a 14-year-old boy with sickle-cell trait was killed by guards within two hours of his arrival to the detention facility—guards suffocated him to death for collapsing while running laps, dealing blows even after his body turned limp.[126] In Maryland,

117. No Place for Kids, *supra* note 7, at 5; Michael L. Perlin, *Yonder Stands Your Orphan with His Gun: The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 Tex. Tech. L. Rev. 301, 316 (2013); *see also* Meg Anderson, *Youth Detention Facilities Face Increased Scrutiny Amid a Wave of Abuse Lawsuits*, NPR (May 17, 2024, 4:49 PM), https://www.npr.org/2024/05/17/1251963778/youth-detention-juvenile-crime-sexual-abuse-lawsuits ("Experts say juvenile facilities are inherently dangerous places for children. According to the Sentencing Project, a research and advocacy group, recurring abuse has been documented in state-funded juvenile detention facilities in 29 states and the District of Columbia in recent decades.").

118. Shutzer & Mueller, *supra* note 60.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Bianca Moreno-Paz & Minnah Arshad, *DOJ Finds 5 Texas Juvenile Detention Centers Abused Children*, USA Today (Aug. 1, 2024, 10:27 PM), https://www.usatoday.com/story/news/nation/2024/08/01/doj-abuse-texas-juvenile-detention-centers/74639886007/.

124. *Juvenile Beaten by Guards in Detention Center*, KBZK Bozeman (Aug. 15, 2018, 10:41 PM), https://www.kbzk.com/cnn-regional/2018/08/15/juvenile-beaten-by-guards-in-detention-center/.

125. *Id.*

126. Rosalind Bentley, *The Tragic Death of Martin Lee*, Essence (Jan. 4, 2022), https://www.essence.com/news/the-tragic-death-of-martin-lee/. There have also been instances of children dying at the behest of guards in Florida detention facilities. For example, a guard gave a group of detainees greenlight to attack a 17-year-old child, instructing them to "do what [they] got to do." The detainees went on to kill the child. Carol Marbin Miller, *5 Fired at Miami-Dade Lockup Where Teen Died in Beat-Down*, Miami Herald (Sept. 30, 2015, 10:41 PM), https://www.miamiherald.com/news/special-reports/florida-prisons/article37157142.html.

children were "routinely locked up for 23 hours a day in cells plagued by rodents and regular floods of sewage water."[127] In New Jersey, staff allowed a "'culture of abuse,' in which staff sexually abused boys, endure for decades."[128]

Youth incarceration is all-around painful.[129] The conduct of staff is a discrete piece of a larger ecosystem of trauma in juvenile detention facilities. Simply being surrounded by a specter of "abuse, neglect, [and] stigmatization" in detention facilities exposes children to trauma.[130] From the moment they enter the cold walls of the facility—cut off from their families, denied communication with their support networks, and surrendered to the unqualified authority of unsympathetic guards—they are stamped with stigma. It makes little difference whether the backdrop of a child's confinement is prison, jail, or a detention facility.[131] Oftentimes, the brutality of youth incarceration is minimized through euphemisms such as "youth center" or "juvenile justice center," but the fact remains that "juvenile prisons are indeed prisons that punish and impose pain on convicted (adjudicated) criminals (delinquents)."[132] Thus, regardless of whether the custodial staff wear jeans or police uniforms, the fact of incarceration itself harms children.[133]

Part II: The Legal Labyrinth of Conditions of Juvenile Confinement Claims

In September 2022, the United States District Court for the Middle District of Louisiana allowed the transfer of twenty-five youth in custody, most of whom are Black, to the Louisiana State Penitentiary; otherwise known as Angola—one of the nation's most notorious adult maximum security prisons.[134] The youth subject to the transfer filed

127. Jamiles Lartey, *How the Juvenile System Forces Minors into Unsafe Institutions*, Marshall Project (Apr. 15, 2023, 12:00 PM), https://www.themarshallproject.org/2023/04/15/texas-california-children-juvenile-detention-justice.

128. Mike Catalini, *A New Jersey Youth Detention Center Had 'Culture of Abuse,' New Lawsuit Says*, Associated Press (Jan. 17, 2024, 12:21 PM), https://apnews.com/article/new-jersey-justice-youth-detention-sexual-abuse-75ef0e8bfd0a6f9b82497eb1aee7c9de.

129. Fagan & Kupchik, *supra* note 25, at 59.

130. Comment, *The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution Due to a Due Process Dilemma*, 132 U. Pa. L. Rev. 95, 97 (1983).

131. Fagan & Kupchik, *supra* note 25, at 59.

132. *Id.* at 39, 58 ("Their account demonstrates how juvenile correctional facilities - even those mandated to offer educational and counseling services - are prisons first and therapeutic sites second.").

133. *Id.* at 59.

134. *First Day of Hearing in Angola Prison Case Highlights Abusive Conditions Youth Endure*, ACLU (Aug. 16, 2023), https://www.aclu.org/press-releases/first-day-of-hearing-in-angola-prison-case-highlights-abusive-conditions-youth-endure.

a lawsuit, alleging that the transfer constituted unlawful conditions of confinement and deprivation of due process under 42 U.S.C. § 1983.[135] The Office of Juvenile Justice ("OJJ") implored the court that the transfer was necessary due to the "present formidable security and safety risks" imposed by youth who had destroyed all secure care facilities in the state.[136] OJJ promised to the court that they would provide a "constitutional level of care" so that the conditions of their confinement would not violate their rights.[137] Upon those promises, the district court ruled in favor of the proposed transfer plan, even though it expressed doubts on the propriety of the transfer.[138]

A year later, the district court found that OJJ broke their promises.[139] For almost a year, over seventy children—mostly Black—were "held in solitary confinement, deprived of their education, and separated from their support systems and families."[140] The district court found that the "conditions of confinement of youth incarcerated at Angola constitute[d] cruel and unusual punishment."[141] One child testified that he was held in solitary confinement for nineteen out of thirty days in June, fourteen of which were consecutive.[142] The children were held in Angola's former death row chambers in windowless cells whose temperatures could rise to 133 degrees Fahrenheit.[143] They were deprived of family contact, sprayed with mace, and shackled indiscriminately.[144] Upon these findings, the district court ordered OJJ to move the children from Angola by September 15, 2023.[145] The Fifth

135. Alex A. *ex rel*. Smith v. Edwards [*Edwards I*], No. CIV.A.22-573-SDD-RLB, 2022 WL 4445499, at *18 (M.D. La. Sept. 23, 2022) (order denying Pls.' Mot. for Prelim. Inj.), *opinion vacated, appeal dismissed sub nom.* Smith v. Edwards, 88 F.4th 1119 (5th Cir. 2023).

136. *Id.* at *1.

137. *Id.*

138. *Id.* at *31 (finding that transferring "emotionally vulnerable adolescents" to Angola will likely have "deleterious psychological ramifications" and such choice is "emblematic of grave underlying systemic social issues." Nevertheless, the district court held that the fact that the children will likely suffer irreparable harm due to the transfer was not compelling enough to grant the children relief.).

139. Alex A. *ex rel*. Smith v. Edwards [*Edwards II*], No. CIV.A.22-573-SDD-RLB, 2023 WL 5984280, at *1 (M.D. La. Sept. 14, 2023) (order granting Pls.' 2d Mot. for Prelim. Inj.), *opinion vacated, appeal dismissed sub nom.* Smith v. Edwards, 88 F.4th 1119 (5th Cir. 2023). Hereinafter, *Edwards I*, *supra* note 135, and *Edwards II* will be collectively referred to as the "*Angola Transfer Case*."

140. Press Release, Wendy Sawyer, *supra* note 102.

141. *Edwards II*, 2023 WL 5984280, at *1.

142. *Id.* at *2.

143. Abe Asher, *Children Held at Former Death Row Prison in 133F Heat with No AC and Limited Water in Louisiana*, INDEP. (July 19, 2023, 2:01 PM), https://www.independent.co.uk/climate-change/angola-prison-children-heat-louisiana-b2377577.html.

144. *Edwards II*, 2023 WL 5984280, at *2.

145. *Id.* at *10.

Circuit issued a temporary stay of the district court order, allowing Louisiana to continue holding youth in Angola.[146] Louisiana appealed the district court's order.[147] However, after over a year of relentless advocacy and public outrage, Louisiana acquiesced to moving the children out of Angola.[148] Shortly after Louisiana moved the children, the injunction reached its expiration date, prompting the Fifth Circuit to render the issue moot and dismiss Louisiana's appeal.[149]

This Part argues that judicial deference to state officials in determining whether a challenged condition is permissible cripple constitutional protections under the Eighth and Fourteenth Amendments, providing states like Louisiana legal sanction to subject children to unbelievable conditions. The *Angola Transfer Case* provides a useful case study on the constitutional remedies available to children seeking relief from problematic conditions of confinement. Advocates vigorously protested the transfer, giving attention to the manifest reprehensibility of transferring Black children to the death row chambers of one of the most notoriously brutal prison facilities in the country. That Angola sits on a former slave plantation where its mostly Black inmates pick cotton "under the watch of white 'freemen' on horseback" adds a stomach-turning symbolic irony to the ordeal.[150] The children challenged their confinement in Angola under the Eighth and Fourteenth Amendments. This Part assesses the sufficiency of these constitutional remedies. The question driving the analysis is how could the district court have gotten it right the first time? To be clear, the district court did not make a mistake; it applied the law with fidelity. Instead, this Part argues that the legal standards governing the conditions of confinement claim before the district court compelled it to betray its instinct to not allow the transfer. Judicial deference to state officials required the district court to believe in Louisiana's promise to

146. *Appeals Court Allows Louisiana to Keep Children in Angola Prison*, ACLU (Sept. 15, 2023), https://www.aclu.org/press-releases/appeals-court-allows-louisiana-to-keep-children-in-angola-prison.

147. *See Court Cases:* Alex A. v. Edwards, ACLU (Sept. 28, 2022), https://www.aclu.org/cases/alex-v-edwards.

148. Press Release, Under Public and Legal Pressure, Louisiana Finally Moves Children Out of Angola Prison, ACLU (Sept. 15, 2023), https://www.aclu.org/press-releases/under-public-and-legal-pressure-louisiana-finally-moves-children-out-of-angola-prison.

149. *Id.* Litigation challenging Louisiana's future use of Angola to house children is on-going as of publication of this Note. *See Court Cases:* Alex A. v. Edwards, *supra* note 147.

150. Hassan Kanu, *US Prisons Rife with Human Rights Abuses, Especially Against Black People, UN Says*, Reuters (Oct. 4, 2023, 12:26 PM), https://www.reuters.com/legal/government/column-us-prisons-rife-with-human-rights-abuses-especially-against-black-people-2023-10-04/.

not abuse the children, despite broad acknowledgement that juvenile detention facilities have a penchant for abuse.[151]

A. Conviction versus Adjudication: Due Process for Kids?

Given the Supreme Court's silence on whether a child's youthfulness bears on the parameters of constitutionally permissible conditions of youth confinement, it is unsurprising that the case law surrounding these claims are chaotic.[152] Since the early nineteenth century, juvenile courts have been the primary venue for handling youth crime. Every state has statutes granting juvenile courts delinquency jurisdiction to adjudicate cases where a young person is accused of an act that would be a crime if committed by an adult.[153] Yet, the Supreme Court did not clarify the extent to which constitutional protections apply to juvenile delinquency proceedings until its landmark decision in *In re Gault.*

In *In re Gault*, the Supreme Court held that the procedural requirements of the Due Process Clause of the Fourteenth Amendment are applicable to juvenile proceedings where the adjudication of delinquency may result in commitment to a detention facility.[154] Considering the constitutional significance of incarceration and its import on a child's liberty, the *Gault* Court was concerned with whether procedures resulting in confinement sufficiently ensured "procedural regularity and exercise of care implied in the phrase 'due process.'"[155] However, the *Gault* Court purposely evaded the task of defining a child's due process rights at other stages of the adjudicatory process.[156]

151. Anderson, *supra* note 117.

152. *See* Martin R. Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 793 (1982) ("As a consequence, courts that have addressed the constitutionality of the juvenile justice system since Gault have done so with the understanding that the system reflects a mixture of theoretical underpinnings. Not surprisingly, the courts have had difficulty defining the constitutional rights of juveniles who are thrust into a system that is simultaneously punitive and therapeutic."); *see also* Struve, *supra* note 12, at 1012 ("I will argue that the state of the law in the lower courts is substantively undesirable, and, in a number of instances, chaotic.").

153. *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. STATE LEGISLATURES (Aug. 21, 2024), https://www.ncsl.org/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws. While all states have statutes allowing young offenders to be prosecuted as adults regardless of their age, recent data shows that the vast majority of delinquency cases are adjudicated in juvenile courts. This Note focuses on those cases.

154. In re Gault, 387 U.S. 1, 30–31 (1967).

155. *Id.* at 18–20, 27–28.

156. *Id.* at 13 ("We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile 'delinquents.' For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process.").

Its narrow application left open the question of defining due process at other stages of juvenile proceedings to states.[157] Thus, with states determining whether and to what extent due process applies beyond the adjudicatory phase, *Gault* left a huge gap in the law, resulting in a "legal patchwork among state jurisdictions."[158]

Despite its limited scope, *Gault* changed the legal landscape of children's rights by allowing courts to extend due process protections to various stages of the juvenile justice continuum. The *Gault* Court did not specify whether due process protections extend to post-adjudication matters—which is when challenges to problematic conditions of confinement would arise. However, since adjudication of delinquency is a determination of status rather than conviction of a crime, most courts provide that incarcerated youth are protected by the Due Process Clause—a determination that is in concert with the *Gault* decision.[159] Typically, courts impute children adjudicated as delinquents the same legal status as pretrial detainees for due process purposes.[160]

Under the Due Process Clause, incarcerated children pursuant to their delinquency status cannot be punished because they have not been convicted of a crime.[161] In *Bell v. Wolfish*,[162] the Supreme Court held that the Due Process Clause prohibits the punishment of all detainees prior to adjudication of guilt.[163] Pretrial detainees are presumptively innocent, thus any infliction of punishment violates their due process rights under the Fourteenth Amendment.[164] Under *Bell*, pretrial detainees, and by extension, children in juvenile detention facilities, can bring conditions of confinement claims if they are subject to conditions

157. *Due Process Rights and Children: Fifty Years of In Re Gault–Part One*, On the Civil Side: A UNC School Gov't Blog, https://www.sog.unc.edu/sites/default/files/course_materials/2.%20due-process-rights-and-children-fifty-years-of-in-re-gault.pdf (last visited Mar. 27, 2025).

158. *Id.*

159. *See* Cheryl A. Koris, *Constitutional Law-Rational Basis Test: Appropriate Constitutional Standard for Assessing Conditions of Juvenile Confinement*, 18 Suffolk Univ. L. Rev. 50, 52 (1984). *See also* Comment, *supra* note 130, at 99; *see, e.g.*, United States v. Gonzalez-Cervantes, 668 F.2d 1073, 1076 (9th Cir. 1981).

160. *See Juvenile Detention Explained*, Annie E. Casey Found. (Mar. 26, 2021), https://www.aecf.org/blog/what-is-juvenile-detention#:~:text=Juvenile%20detention%20is%20short%2Dterm,people%20only%20in%20extraordinary%20cases.%E2%80%9D. *See also* Gardner, *supra* note 152, at 791, 828.

161. *See* Bell v. Wolfish, 441 U.S. 520, 539 (1979). *See also* Santana v. Collazo, 714 F.2d 1172 (1st Cir. 1983) (reasoning that the state has no legitimate interest in punishing juveniles).

162. *Bell*, 441 U.S. 520 (1979).

163. *Id.* at 535.

164. Kate Lambroza, *Pretrial Detainees and The Objective Standard After* Kingsley v. Hendrickson, 58 Am. Crim. L. Rev. 429, 441 (2021).

amounting to punishment.[165] For a particular condition to amount to "punishment in the constitutional sense," the *Bell* Court established that courts must determine whether the condition was imposed with an "expressed intent to punish" and was "reasonably related to a legitimate governmental objective."[166] If a condition imposed is arbitrary or purposeless, and thus demonstrably unrelated to a legitimate purpose, courts may infer that the condition constitutes punishment in violation of the Due Process Clause.[167] As applied to children, the central question under *Bell* is whether the conditions under which the child is confined constitutes punishment.[168]

There is confusion among circuits on how to apply *Bell*. This confusion can be attributed to two reasons. First, constitutional protections available to the accused take on different forms as they traverse through the justice system. As defendants move from arrest to conviction, courts are not clear as to when the Fourteenth Amendment's due process protections cease to operate and the Eighth Amendment's post-conviction protections kicks in.[169] Under *Bell*, the Fourteenth Amendment protects pretrial detainees from conditions of confinement that amount to punishment. The Eighth Amendment protects convicted prisoners from conditions of confinement that constitute "cruel and unusual punishment."[170] Some jurisdictions overlay Eighth Amendment considerations over their due process analysis, reasoning that pretrial detainee conditions of confinement claims "implicate[s] Fourteenth Amendment liberty interests" and "the parameters of such an interest are coextensive with those of the Eighth Amendment's

165. *Id.* at 442.

166. *Bell*, 441 U.S. at 538–39.

167. *Id.* at 539.

168. *See id.* at 535 ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against the deprivation of liberty without due process of law, we think that the proper inquiry is whether those condition amount to punishment of the detainee.").

169. *See* Blackmon v. Sutton, 734 F.3d 1237, 1240 (10th Cir. 2013) ("We know that after the Fourth Amendment leaves off and before the Eighth Amendment picks up, the Fourteenth Amendment's due process guarantee offers detainees some protection while they remain in the government's custody awaiting trial. But we do not know where exactly the Fourth Amendment's protections against unreasonable searches and seizures end and the Fourteenth Amendment's due process detainee protections begin. Is it immediately after arrest? Or does the Fourth Amendment continue to apply, say, until arraignment? Neither do we know with certainty whether a single standard of care applies to all pretrial detainees—or whether different standards apply depending where the detainee stands in his progress through the criminal justice system.").

170. *See* U.S. CONST. AMEND. XIII; *see also* Farmer v. Brennan, 511 U.S. 825, 828 (1994) (holding that under the Eighth Amendment, prison officials can be held liable for violating prisoners' rights to humane conditions of confinement if they act with "deliberate indifference" to inmate health or safety).

prohibition against cruel and unusual punishment."[171] These courts consider that pretrial detainees are entitled to at least the same rights as those of convicted prisoners, assimilating pretrial detainees' claims to those of convicted prisoners and applying the Eighth Amendment to both.[172] Other courts posit that pretrial detainees are entitled to *greater* protections than convicted prisoners.[173] These courts tend to distinguish the constitutional standards applicable to pretrial detainees from those applicable to convicted prisoners, analyzing condition of confinement claims under one amendment. In one instance, there was intra-circuit incongruity on whether to apply the Eighth Amendment to a condition of pretrial confinement claim.[174] Since the Fourteenth and Eighth Amendments protect different rights, the standards under which claims are assessed are varied—rendering the state of the law amongst jurisdictions chaotic.[175]

Second, as case law develops, the infeasibility of the *Bell* reasonable-relationship test to govern *all* pretrial detainee claims becomes more apparent.[176] In *Kingsley v. Hendrickson*,[177] the Supreme Court held that police officers cannot employ excessive force against pretrial detainees and the determination for whether the force used was excessive is solely governed by an objective reasonableness standard.[178] *Kingsley* established that pretrial excessive force claims

171. Surprenant v. Rivas, 424 F.3d 5, 18 (1st Cir. 2005).

172. *See* Struve, *supra* note 12, at 1012; s*ee also* United States v. Hinds Cnty. Bd. of Supervisors, 120 F.4th 1246, 1257 (5th Cir. 2024) ("Because pretrial detainees retain at least those constitutional rights that courts have held are enjoyed by convicted prisoners, the Eighth Amendment standard extends to pretrial detainees, such as those at issue here, under the Fourteenth Amendment.").

173. Struve, *supra* note 12, at 1012; *see also* Gibbons v. Cnty. of Washoe, 290 F.3d 1175, 1188 n.9 (9th Cir. 2002) ("It is quite possible, therefore, that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment."). *Cf.* Bistrian v. Levi, 696 F.3d 352, 372 (3d Cir. 2012) ("As such, pretrial detainees have 'federally protected liberty interests that are different in kind from those of sentenced inmates.'").

174. *See Blackmon*, 734 F.3d at 1241–42 ("The district court analyzed his claim under Hudson's demanding Eighth Amendment 'malicious and sadistic' test for cruel and unusual punishments—and, even then, it found that Mr. Blackmon succeeded in stating a triable claim. We don't need to travel so far, however, to reach the same destination. While Hudson forbids a certain class of punishments for convicted prisoners (cruel and unusual ones), *Bell* forbids punishment altogether for pretrial detainees like Mr. Blackmon.").

175. Struve, *supra* note 12, at 1012 ("I will argue that the state of the law in the lower courts is substantively undesirable, and, in a number of instances, chaotic.").

176. *Id.*

177. Kingsley v. Hendrickson, 576 U.S. 389 (2015).

178. *See id.* at 397 ("Several considerations have led us to conclude that the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one."); *see also id.* at 398 ("*Bell*'s focus on 'punishment' does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated. Rather, as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by

were not governed by the first prong of the *Bell* test which called for a showing of subjective "intent to punish."[179] By holding that "proof of intent (or motive) to punish" is not required for a pretrial detainee to prevail on a due process claim, *Kingsley* clarified the proper standard for pretrial detainee excessive force claims.[180] But, *Kingsley* did not address whether the objective standard applies to all pretrial detainee claims.[181] Since *Kingsley*, courts are divided on whether to apply the objective reasonableness standard articulated in *Kingsley* to other kinds of pretrial detainee claims, including conditions of pretrial confinement claims.[182]

Confusion on how to apply *Bell* writ-large is exacerbated when it comes to conditions of youth confinement claims. The nature of juvenile proceedings raises the question of whether constitutional standards conceived in the context of the adult criminal system muddies its application towards children. Under *Bell*, "punishment is never constitutionally permissible for presumptively innocent individuals awaiting trial."[183] Yet, incarcerated children are not innocent in the strictest sense—they are adjudicated delinquents because they committed the act which they were accused of. At the same time, adjudication is not a conviction; thus, children adjudicated as delinquent are innocent in a constitutional sense and, therefore, cannot be legally punished. Herein lies a tension.[184] How can states respond to a crime committed by a child without punishing the child? The *Bell* reasonable-relationship test provides an answer: states can punish the child if they can mask their practices behind a legitimate governmental purpose. Courts defer to the state's interpretation of their actions. If a state denies that their actions are punitive, courts will likely agree—never mind the impact of that action on the children in their care. Typically, conditions that states maintain are in the interest of promoting safety

providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.").

179. Bell v. Wolfish, 441 U.S. 520, 538 (1979).

180. *Kingsley*, 576 U.S. at 398 ("*Bell*'s focus on 'punishment' does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated. Rather, as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.").

181. Lambroza, *supra* note 164, at 441. The district court in the *Angola Transfer Case* expressly denied that the objective deliberate indifference standard established in *Kingsley* applied to the childrens' conditions of confinement claim. *See Edwards I*, 2022 WL 4445499, at *21,

182. *Id.*

183. Blackmon v. Sutton, 734 F.3d 1237, 1241 (10th Cir. 2013).

184. Fagan, *Contradictions*, *supra* note 47, at 49.

pass constitutional muster.[185] Since the law imposes no bright-line rule for practices that constitute punishment, states can push the boundary. In conclusion, the rational basis standard of review implicated in the *Bell* reasonable-relationship test weakens due process protections available to incarcerated children under the Fourteenth Amendment.

B. The Premise and Promise of the Miller Trilogy—The Eighth Amendment Speaks

Since many jurisdictions regard Eighth Amendment standards as coextensive with due process requirements under the Fourteenth Amendment, the Supreme Court's analysis of the constitutional import of childhood under the Eighth Amendment bears significantly on conditions of youth confinement claims. The premise undergirding early juvenile justice efforts was a recognition that "youth is more than a chronological fact."[186] Youth is a transitory period of human development that demands a different scale for assessing culpability than adults. Starting with its decision in *Roper v. Simmons*, dealing with the death penalty, the Supreme Court has adopted this view in their most recent juvenile justice jurisprudence—marking a shift into more lenient penal practices for young offenders that scholars have called nothing short of revolutionary.[187]

In a trio of decisions referred to as the *Miller* trilogy, the Supreme Court imposed categorical limits on the kinds of punishments children might be subjected to.[188] In *Roper v. Simmons*, the Court imposed a categorical ban on the imposition of the death penalty on children who were under the age of eighteen at the time of their capital crime.[189] The Court reasoned that three general differences between children and adults prevent children from being classified among the worst offenders.[190] First, children are less mature and have an underdeveloped sense of responsibility than adults.[191] Second, children are more susceptible to negative influences.[192] Third, a child's character

185. Bistrian v. Levi, 696 F.3d 352, 373 (3d Cir. 2012).
186. Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).
187. Beth Caldwell, *Shifting the Paradigm: An Abolitionist Analysis of the Recent Juvenile Justice "Revolution,"* 23 Nev. L.J. 115, 142 (2022); *see also* Cara H. Drinan, *The* Miller *Revolution*, 101 Iowa L. Rev. 1787, 1789 (2016) [hereinafter Drinan, *The* Miller *Revolution*].
188. The *Miller* trilogy refers to Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 567 U.S. 460 (2012).
189. *Roper*, 543 U.S. at 578.
190. *Id.* at 569.
191. *Id.*
192. *Id.*

is not as well-formed as those of adults.[193] These differences coalesce to form the conclusion that children have an intrinsic diminished moral culpability as compared with adults.[194] A point of emphasis for this Note is the Court's insistence that these differences also weigh against the assumption that heinous crimes are evidence of an "irretrievably depraved character."[195] Children, due to their transitory nature, have infinite potential for rehabilitation. Therefore, states cannot terminate a child's potential to "attain a mature understanding of his own humanity" and make amends for unlawful behavior by ending their life.[196]

In *Graham v. Florida*, the Court considered a categorical ban on a term-of-years sentence for the first time.[197] The *Graham* Court held that sentencing a child who did not commit murder to die in prison is cruel and unusual punishment.[198] Likening a life without parole ("LWOP") sentence to the death penalty, the Court urged that a LWOP sentence "alters the offender's life by a forfeiture that is irrevocable"[199]—namely, the forfeiture of the hope that atoning for their crimes might make them worthy of their freedom. The Court observed that handing a child who did not commit murder a LWOP sentence requires the sentencer to proclaim that that child is incorrigible. However, as the Court notes, "incorrigibility is inconsistent with youth."[200] Thus, the Court concluded that, considering children's innate rehabilitative potential, none of the accepted penological goals—retribution, deterrence, incapacitation, and rehabilitation—were adequate to justify LWOP sentences for young non-homicide offenders.[201]

Then, in *Miller v. Alabama*, the Court expanded *Graham v. Florida* by holding that the Eighth Amendment forbids any sentencing scheme that mandates a LWOP sentence for young offenders.[202] In *Miller*, the Court conjoined its two previous conclusions that the "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on [young] offenders"[203] to forbid states from imposing automatic LWOP sentences on children "as though they were

193. *Id.*
194. *Id.* at 571; *see also* Graham v. Florida, 560 U.S. 48, 69 (2010).
195. *Roper*, 543 U.S. at 570.
196. *Id.* at 574.
197. *Graham*, 560 U.S. at 61.
198. *Id.* at 74.
199. *Id.* at 69.
200. *Id.* at 73 (citing Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968)).
201. *Graham*, 560 U.S. at 74.
202. Miller v. Alabama, 567 U.S. 460, 465 (2012).
203. *Id.* at 472.

not [children]."[204] In *Graham*, the Court mandated sentencers to always consider the young person's childness when deciding whether to impose the second harshest sentence.[205] In *Miller*, the Court took a further step. Not only did the Court mandate that an offender's youth weighs in the sentencing decision, the Court prescribed the direction in which that factor should weigh—even in cases involving murder.[206] The Court advised that "differences [between children and adults] counsel against irrevocably sentencing them to a lifetime in prison."[207] Thus, *Miller* closes the trilogy by making it constitutional dogma that youthfulness carries significant import in Eighth Amendment jurisprudence.

The *Miller* trilogy is revolutionary for its impact and methodology. In this line of decisions, the Supreme Court created a special status for young offenders based on developments in behavioral and neurobiological science that outlined differences between adult brains and young brains.[208] Criminal legal theory has long defined crime as "concurrence of an evil-meaning mind with an evil-doing hand."[209] Proving the commission of a criminal act requires a finding of a culpable mind which, in turn, presupposes the "duty of a normal individual to choose between good and evil,"[210] and a conscious decision to do what that individual understands as evil. A child's cognitive immaturity circumvents the presumption that a child who commits a crime appreciates the implications of their behavior. The question

204. *Id.* at 474.

205. *See Graham*, 560 U.S. at 69.

206. *Miller*, 567 U.S. at 480. In 2016, the Court held that *Miller* applied retroactively—explaining that *Miller* barred LWOP sentences for all but "the rarest of juvenile offenders . . . whose crimes reflect permanent incorrigibility," thus creating a substantive change in the law requiring an attendant procedure to ensure all persons to whom the change applies to can secure its guarantee. Montgomery v. Louisiana, 577 U.S. 190, 209, 210 (2016). Five years later, the Court swung in the opposite direction. In its 2016 decision in *Jones v. Mississippi*, the Court held that sentencing judges do not need to find that a child is "permanently incorrigible" before sentencing them to die in prison. Jones v. Mississippi, 593 U.S. 98, 113 (2021). In other words, after *Jones*, sentencing judges can sentence children to die in prison without first ascertaining whether they are permanently incapable of change—effectively weakening *Miller*. By the time *Jones* was decided, the Court's composition had changed. Caldwell, *supra* note 187, at 154. The 6-3 vote in *Jones* reflects the Court's reconfiguration. *Jones* was a "true mirror image" of *Montgomery*, except on opposite ideological lines. *See* David M. Shapiro & Monet Gonnerman, *To the States: Reflections on Jones v. Mississippi*, 135 Harv. L. Rev. 67, 69 (2021). The decision signaled a swing on the pendulum on the Court's stance on juvenile justice. Caldwell, *supra* note 187, at 154. In light of *Jones*, scholars doubt whether the *Miller* trilogy continues to hold any force in juvenile justice law. Nevertheless, intuiting that this doubt would arise, Justice Sotomayor issued a hopeful remainder that "*Miller* and *Montgomery* are still good law." *Jones*, 593 U.S. at 144 (Sotomayor, J., dissenting).

207. *Miller*, 567 U.S. at 480.

208. Elizabeth S. Scott, *Children are Different: Constitutional Values and Policy*, 11 Ohio St. J. Crim. Law. 71, 72 (2013).

209. Morissette v. United States, 342 U.S. 246, 251 (1952).

210. *Id.* at 250.

becomes: to what extent does culpability attach to criminal behavior perpetrated by a child, if at all? The Court concludes that, when measured against adults, the cognitive differences among youth make children categorically less culpable and, therefore, less deserving of certain punishments than adults. In weighing these considerations, the Court chartered a new frontier in Eighth Amendment jurisprudence by incorporating developmental science into the proportionality analysis—signaling that ignoring developmental differences between children and adults offend constitutional values.[211] Professor Elizabeth S. Scott argues that "the [*Miller* trilogy] decisions embody a set of constitutional values mandating fair treatment of young offenders."[212]

With respect to its methodology, the *Roper*, *Graham*, and *Miller* Courts adapted their approach to accommodate for the special consideration due to children in two consequential ways. Traditionally, the Court assesses the proportionality of a given sentence in one of two approaches: first, challenges to a term-of-years sentence are reviewed on a case-by-case basis, and second, challenges to the death penalty are resolved by considering categorical restrictions.[213] The *Graham* Court departed from its usual approach to consider the unique aspect of the challenge raised by the plaintiff—a categorical challenge to a term-of-years sentence.[214] Here, for the first time, the Court imposed a categorical ban on a term-of-years sentence because "the case dealt with children,"[215] and, as the *Roper* Court noted before, children are constitutionally different. The *Miller* Court expanded the *Graham* decision by requiring lower courts to consider how children are different, predicting that considerations of the offender's youthfulness will render juvenile LWOP sentences uncommon.[216] Second, the Courts in *Roper* and *Graham* considered the global consensus regarding the sentencing practice at issue to support its independent conclusion. In both cases, the Court noted that the United States was an outlier in many respects. In *Graham*, the Court noted that only two countries—the United States and Israel—sentenced children to life without parole in practice.[217] In *Roper*, the Court noted that, at the time the case was decided, the United States was the only country in the world that sanctioned the

211. Scott, *supra* note 208, at 73.
212. *Id.* at 74.
213. Graham v. Florida, 560 U.S. 48, 69 (2010)
214. *Id.* at 61–62.
215. Drinan, *The* Miller *Revolution*, *supra* note 187, at 1802.
216. *Miller*, 567 U.S. at 465.
217. *Graham*, 560 U.S. at 80.

death penalty for children.[218] Both Courts highlighted that the United Nations Convention on the Rights of the Child had been ratified by every country in the world, except two: the United States and Somalia.[219] In summary, the Court's departure from its usual Eighth Amendment methodology demonstrates that childness is an inherent trait with significant constitutional import because it circumvents the culpability finding necessary to justifiably invoke certain punishments.

While advocates applaud the Court for imposing constitutional limits on juvenile sentencing, much is to be said about the implications of the *Miller* trilogy on juvenile confinement. Indeed, "the language, logic, and science" of the *Miller* line of cases invite an expansive reading that reaches other areas of juvenile justice. Professor Drinan is among the first to charter a reading of the *Miller* trilogy onto the arena of juvenile incarceration. In her article, *Cruel and Unusual Youth Confinement*, Professor Drinan draws from the theory of the "states' carceral burden" to argue that rules governing juvenile sentencing "impose affirmative obligations upon the states in terms of how they incarcerate minors."[220] If children are constitutionally different from adults for the purposes of sentencing,[221] it follows that those constitutional differences require states to reconfigure procedural safeguards to ensure children's safety and well-being while incarcerated.[222] Thus, Drinan articulates a standard for assessing whether certain conditions of juvenile confinement violate the Eighth Amendment—modifying the *Farmer* standard along what she calls "dimensions of difference," namely, the differences the Court recognizes make children less amenable to culpability.[223]

The principal case for analyzing claims of unconstitutional prison confinement is *Farmer v. Brennan*.[224] In *Farmer*, the Court acknowledged that prison officials have a constitutional duty to provide

218. Roper v. Simmons, 543 U.S. 551, 578 (2005).

219. *Id.* at 576; *Graham*, 560 U.S. at 81. Somalia ratified the Convention on the Rights of the Child in 2015. *As The Fifth Anniversary of Somalia's Ratification of the Convention on the Rights of the Child Approaches, Protection Violations Against Children Continue to Rise*, UN Somalia (Sept. 21, 2020), https://somalia.un.org/en/91957-fifth-anniversary-somalia%E2%80%99s-ratification-convention-rights-child-approaches-protection#:~:text=Nearly%20five%20years%20 ago%2C%20on,of%20the%20Child%20(CRC). The United States is now the only UN member state to not ratify the Convention. *How Do US States Measure Up on Child Rights?*, Hum. Rts. Watch, https://www.hrw.org/feature/2022/09/13/how-do-states-measure-up-child-rights (last visited Mar. 31, 2025).

220. Drinan, *Cruel and Unusual*, *supra* note 11, at 1166.

221. *See Miller*, 567 U.S. at 465.

222. Drinan, *Cruel and Unusual*, *supra* note 11, at 1166.

223. *Id.* at 1203.

224. *See generally* Farmer v. Brennan, 511 U.S. 825 (1994).

humane conditions under the Eighth Amendment.[225] However, the Court explained that not every injury suffered by a prisoner implicates prison officials' liability.[226] Prison officials are liable for constitutional violations when two criteria are met.[227] First, the deprivation alleged must be "sufficiently serious" in that it results in a "denial of the minimal civilized measure of life's necessities."[228] Second, a prison official must have a "sufficiently culpable state of mind," which is defined as one of "deliberate indifference."[229] The Court further explained that a prison official evidences "deliberate indifference" when an official knows of and disregards a substantial risk of serious harm.[230]

Practically, the *Farmer* test has been an immobilizing hurdle for prisoners seeking to vindicate violations of their constitutional rights.[231] In *Farmer*, the Court detailed an objective and subjective framework for assessing prison-condition claims.[232] The first prong of the test inquires whether the deprivation alleged is *objectively* serious.[233] The second prong of the test conditions liability on the prison officials' *subjective* awareness of a risk of harm.[234] The subjective prong of the test—the "deliberate indifference" standard—is deferential to prison officials' purported knowledge of any risk threatening prisoner well-being. It incentivizes ignorance on the part of prison officials by shielding prison officials from being liable for risks they purport to not, but should have been, aware of.[235] At the same time, the *Farmer* test does not account for the ways in which prisons are systemically barbaric.[236] Thus, in a nation where it is conceivable that a prisoner can be "baked to death,"[237]

225. *Id.* at 832.
226. *Id.* at 834.
227. *Id.*
228. *Id.*
229. *Id.* at 835.
230. *Id.* at 837. The "deliberate indifference" standard comports with the conception of criminal recklessness. *See* Model Penal Code § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.").
231. Drinan, *Cruel and Unusual*, *supra* note 11, at 1189.
232. *Farmer*. 511 U.S. at 846.
233. *Id.* at 834.
234. *Id.* at 829.
235. Drinan, *Cruel and Unusual*, *supra* note 11, at 1195–96; *see also* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881, 946–48 (2009).
236. *Id.* at 945.
237. Martin Garbus, *Op-Ed: Cruel and Usual Punishment in Jails and Prisons*, L.A. Times (Sep. 29, 2014, 5:52 PM), https://www.latimes.com/opinion/op-ed/la-oe-garbus-prison-cruel-and-unusual-20140930-story.html (detailing the story of Jerome Murdough, a homeless, ex-Marine who was sent to Rikers after not being able to afford a $2,500 bail and died of hyperthermia with a body temperature of 103 degrees. An official described Murdough's death as being "basically baked to death.").

federal courts routinely reject prisoners' claims of unconstitutional conditions of confinement under *Farmer*.[238]

As applied to incarcerated youth, the *Farmer* test is a woefully inappropriate standard under which to analyze unconstitutional conditions of youth confinement claims because it does not reckon with how youthfulness adds layers of complexity to the kinds of harm contemplated nor critiques the appropriateness of deferring to state officials who oftentimes do not appreciate the gravity of the harm certain conditions impose on children.[239] Recognizing these inadequacies, Professor Drinan proposes modifying the *Farmer* standard along "dimensions of difference" recognized in the *Miller* trilogy.[240] First, Drinan proposes modifications on the kinds of harms contemplated by the objective prong of the *Farmer* test.[241] Second, Drinan proposes that the "deliberate indifference" culpability standard be exchanged for a modified strict liability standard allowing for causation and contributory negligence analysis.[242] Modifying the *Farmer* standard to account for youth's unique characteristics as recognized in the *Miller* trilogy might be fruitful. However, even with modifications, the *Farmer* standard falls short. The *Angola Transfer Case* illustrates this point very clearly.

C. Angola Transfer Case: A Case Study

While assessing the children's Eighth Amendment claim, the district court applied the *Farmer* test in a manner reminiscent of Drinan's modified approach. The district court was tasked with balancing what it regarded as untenable conditions of confinement with the intolerable threat of harm posed by the youth.[243] In doing so, the district court acknowledged that the "specter of the prison surroundings [at Angola] alone will likely cause psychological trauma and harm [to the children]."[244] At the same time, the district court held that the interest of protecting youth from potential psychological trauma did not outweigh Louisiana's interest in the administration of their juvenile justice system, as long as the constitutionally permissible minimum

238. Drinan, *Cruel and Unusual*, *supra* note 11, at 1193.

239. *See generally* Barney v. City of Greenville, 898 F. Supp. 372 (N.D. Miss. 1995) (dismissing a claim that state officials were liable for the wrongful suicide of a young girl housed in a jail rather than a youth detention center with proper suicide prevention care because, under *Farmer*, state officials did not disregard an obvious risk by placing young girls in jail).

240. Drinan, *Cruel and Unusual*, *supra* note 11, at 1203.

241. *Id.* at 1205.

242. *Id.* at 1208.

243. *Edwards I*, 2022 WL 4445499, at *1.

244. *Id.*

standard of care was met.[245] As the district court sifted through the facts of the case, it was not lost on the court that the plaintiffs were children. Thus, the contours of their analysis were drawn with considerations of the needs of the children. Nonetheless, even after accounting for the plaintiffs' youth, the district court's balancing act concluded that the "untenable must yield to the intolerable."[246] In other words, the fact of the plaintiffs' youth (and all that their childness signifies) was not weighty enough to protect them from the inevitable harm to be incurred by Louisiana's plan to transfer them to Angola.

The district court held that the proposed transfer plan satisfied the objective prong of the *Farmer* test.[247] While the court did not find a serious risk of loss of standard services to confined youth nor a serious risk of excessive or abusive solitary confinement, the court found that there was a serious risk of "psychological harm to juveniles by placing them in facilities that were designed to house adult prisoners."[248] In making this finding, the court relied on expert testimony verifying the harmful psychological impact of placing cognitively underdeveloped children, who were already suffering from trauma, in facilities that "scream prison."[249] The court found this proposition especially persuasive in light of the Supreme Court's recognition of the developmental differences in adults and children in *Roper* and *Montgomery v. Louisiana*.[250] Citing the Supreme Court's opinion in *Roper*, the district court highlighted that youth is a time and condition of life when a person may be most susceptible to psychological damage, such as the damage at risk in the case.[251]

The district court's approach in evaluating whether the proposed plan satisfied the objective prong of the *Farmer* test followed Drinan's modified approach in that the kind of harm at issue here would pass constitutional muster except as applied to children. The harm at issue here was the psychological harm incurred by placing youth in a facility designed for adults—precisely the kind of harm that would not have any constitutional implications but for the plaintiff's youth. Thus, in assessing the objective prong of the *Farmer* test, the district

245. *Id.* at *20.
246. *Id.* at *1.
247. *Id.* at *24.
248. *Id.* at *23.
249. *Id.*
250. *Id.*
251. *Id.*

court evaluated the proposed transfer along the "degrees of difference" explicitly detailed in the *Miller* trilogy.

However, the district court found that the proposed transfer plan did not satisfy the subjective prong because there was "no evidence that OJJ officials subjectively drew the inference that housing youth on the grounds of Angola in the designated facility poses a serious risk of psychological harm."[252] In other words, the court believed that the OJJ was ignorant to the possibility that sending the children to Angola would harm them. In making this finding, the district court relied on the good faith of OJJ staff who purported to be committed to the rehabilitation of the youth in custody.[253] The district court noted that there was no evidence suggesting that officials made a "knee-jerk" decision to move the youth to Angola after they destroyed all care facilities.[254] Instead, the district court gave credence to Louisiana's assertion that sending the youth to Angola was one of the only viable options to address safety concerns.[255] Nowhere in the district court's analysis did it question the legitimacy of Angola as the only viable transfer location nor did it inquire *why* the youth destroyed the other care facilities. Rather, the district court gave customary deference to the state in the administration of its juvenile justice system—holding that sending a group of Black kids to one of the nation's most notorious prisons was constitutionally permissible under *Farmer*.

With respect to the children's Fourteenth Amendment due process claim, the district court held that there was no evidence suggesting OJJ officials had an express intent to punish the children under *Bell*.[256] Moreover, the district court held that placing the children in Angola was rationally related to a legitimate non-punitive governmental purpose of ensuring safety. Despite agreeing that the grounds of Angola were "appallingly inappropriate," the district court deferred to the judgment of OJJ that the transfer plan was "needed to preserve internal order and discipline and to maintain institutional security"[257]—granting judicial deference to the OJJ's determination that the transfer was necessary to maintain safety despite its instinct that it was not the children who they were keeping safe.

252. *Id.* at *24.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at *25.
257. *Id.* at *26.

This confluence of constitutional standards might invite a debate on which constitutional provision is more favorable for children held in deplorable conditions. Examining the judicial posture around challenges to conditions of confinement reveals that seeking redress is not a matter of the severity of the condition or the robustness of the constitutional protection invoked. The *Angola Transfer Case* exposes the fundamental flaw of the applicable constitutional prison conditions standard as applied to children—as a matter of course, courts routinely give states plenary deference in the administration of their penal system. Justice Thomas articulated an axiom that tends to govern judicial review of any challenges to state action regarding inmates: "The Constitution has always demanded less within the prison walls."[258] Challenges to conditions of confinement for children who have *not* been convicted of any crime are principally reviewed under standards invoking the language of rational basis review, a permissive level of review widely regarded as virtually no review at all.[259] Even when problematic conditions of confinement are scrutinized under standards applicable to punishment, the *Farmer* test shields prison officials from liability.

Judicial deference to state officials required by *Bell* and *Farmer* is violently at odds with the constitutionally cognizable differences among children. There is a rather basic, common-sense explanation for the inapplicability of these standards to cases involving children: *Bell* and *Farmer* had to do with adult plaintiffs in adult facilities. The balancing of interests the Court employed in resolving *Bell* and *Farmer* did not consider how those interests change when weighed against a class of persons who are more vulnerable and deemed less culpable than adults. The *Angola Transfer Case* casts this point wide open. The harms at issue in the *Angola Transfer Case* were conceived in light of the children's distinct needs and vulnerabilities as children. Necessarily, the district court could not apply the relevant standards without accounting for their youthfulness because the fact of their youth changed the scope of the constitutional protections involved. As the Supreme Court established, youthfulness is not a mere mitigating

258. *See* Johnson v. California, 543 U.S. 499, 524 (2005) (Thomas, J., dissenting). *See also Edwards I*, 2022 WL 4445499, at *31 ("The Constitution affords juveniles in secure care no constitutionally protected interests that outweigh the Defendants' or the public's interests in the administration of juvenile justice."); *cf.* Turney v. Safley, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country.").

259. Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1629 (2016).

factor under the Eighth Amendment, it is a doctrinal keystone bearing on fundamental questions of fairness and proportionality. Tragically, as the *Angola Transfer Case* demonstrated, when pitted against the state's interest in safety, youthfulness is not enough to protect children from being brutalized by the same institutions purporting to keep them safe.

Part III: Letting Kids Be Kids—The Right to Self-Actualize

The *Miller* trilogy is the Court's most on-point articulation of how conceptions of childhood have profound legal force vis-à-vis adjudication of delinquent behavior. Throughout the *Miller* trilogy, one can trace a conviction to protect a fundamental facet of the human experience: the ability of a child to actualize their potential. This conviction stems from the Court's conception of childhood as a time of innocence and development.[260] In *Roper*, the Court wrote: "When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his *potential to attain a mature understanding of his own humanity*."[261] A major concern for the *Roper* Court's was the finality of death. Death eliminates a child's potential in perpetuity. For the *Roper* Court, permanently disabling a child to grow and actualize their innate potential to develop into a mature, fully cultivated adult was inconceivable. Analogizing the death penalty with LWOP, the *Graham* Court expressed the same concerns, writing: "Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation."[262] The *Graham* Court emphasized that allowing a child to reach maturity was necessary to ensure rehabilitation. In *Miller*, the Court doubled down on this logic to argue that sentencing a child to die in prison equated making an irrevocable judgment that that child is incorrigible—a determination that, in the Court's view, was inconsistent with what it means to be a child.[263] The bottom-line for the Court was that states cannot deny children "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" given a child's intrinsic capacity to change.[264]

260. *See* Chase S. Burton, *Child Savers and Unchildlike Youth: Class, Race, and Juvenile Justice in the Early Twentieth Century*, 44 L. & Soc. Inquiry 1251, 1252 (2019).
261. Roper v. Simmons, 543 U.S. 551, 578 (2005) (emphasis added).
262. Graham v. Florida, 560 U.S. 48, 69 (2010).
263. Miller v. Alabama, 567 U.S. 460, 465 (2012).
264. *See Graham*, 560 U.S. at 75; *Miller*, 567 U.S. at 473.

There is a rather common-sense proposition underlying the Court's conception of children—people grow.[265] Growth, development, and maturity are integral to the human experience.[266] Throughout the history of human thought, philosophers have conceptualized the human experience as possessing a teleological orientation towards the optimal self.[267] The notion of telos, "understood as an innate end whose actualization through a process of development constitutes the 'flourishing' or 'fulfillment' of the entity whose end it is,"[268] is as foundational to our understanding of what it means to be human being as the notion that every human being has a birth. What begins necessarily ends—but the passage of time between those moments compels progression towards a *desired* end. Our ability to define the "ends" we set our progression towards is a product of our agency, how we define those "ends" flows from our personalities or self-identification, and our success in achieving those "ends" is how we become self-realized or self-actualized.[269] From ancient thinkers, such as Aristotle, to modern psychologists, students of mankind have recognized "yearning and striving for self-realization" as a "central force in human development."[270] Even those in the natural sciences, such as humanistic biologists and organismic theorists, have "made a persuasive case for the presence of an innate growth force within the personality for achieving self-actualization."[271] As philosopher David L. Norton explains, "[a]n intrinsically rewarding life results from the integration of distinguishable aspects—faculties, desires, roles, life-shaping choices—and classical teleologists without exception recognized that such integration is a developmental outcome; it is not antecedently given, but must be achieved."[272]

265. Christopher Dankovich, *While My Friends Graduated High School, I Sat Behind Bars*, Prison Journalism Project (July 11, 2023), https://prisonjournalismproject.org/2023/07/11/coming-of-age-prison/ ("Even behind bars, people can grow.").

266. *See* Willard B. Frick, *Conceptual Foundations of Self-Actualization: A Contribution to Motivation Theory*, 22 J. Humanistic Psych. 33, 46 (1982).

267. Whether that orientation is towards positive ends is immaterial here for the individual makes that choice. *See* David L. Norton, *On Recovering the Telos in Teleology, or "Where's the Beef?"*, 75 Monist 3, 10 (1992) ("The ultimate case for autonomy is that individuals can by moral development become the best judges of which, among objectively valuable courses of life, is the right life for them. The reason that this is so is provided by the telos: each person possesses an inner criterion of right and wrong choice to which he or she has first-person privileged access.").

268. *Id.* at 3.

269. *See* Frick, *supra* note 266, at 46.

270. *Id.* at 34.

271. *Id.* at 33.

272. Norton, *supra* note 267, at 7 (emphasis omitted).

The *Miller* trilogy invokes a teleological conception of childhood that posits childhood as a time during which the "end" of an individual's developmental progression has not yet materialized but underway. For the Court, insofar as the child carries an inherent potential to transcend their current state once he is self-actualized, he ought to be allowed to grow. The Court's conception of childhood comports with dominant scientific conceptions of childhood positing that children develop "through a series of stages which may be scientifically mapped."[273] Jean-Jacques Rousseau, whose ideas shaped the Enlightenment ideals that influenced the American Revolution, was one of the earliest proponents of a developmental model of childhood—proposing that children travel through developmental stages as they reach adulthood.[274] Many developmental models of childhood categorize stages according to "universal and obvious"[275] biological milestones in a child's growth. Various social,[276] psychological,[277] legal,[278] and moral[279] meanings are imputed to these stages—principal of which is the notion that adolescence is crucial for formation of one's self-identity.[280] Adolescence, the latter stage of childhood, represents an exploratory stage where children begin to develop their sense of self, personalities, and untapped potential—all of which are crucial to self-actualization.[281] Thus, the relationship between self-actualization and child development is symbiotic—self-actualization represents the desired end towards

273. Adriana S. Benzaquen, *Childhood, History, and the Sciences of Childhood*, *in* MULTIPLE LENSES, MULTIPLE IMAGES 14, 14 (Hillel Goelman et al. eds., 2004). *See generally* Brief for American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) (discussing how research in developmental psychology shows children are more vulnerable, immature, and malleable than adults); *Graham*, 560 U.S. at 68 (citing to the Brief for American Psychological Ass'n as Amici Curiae).

274. *See* JONATHAN HERRING, LAW THROUGH THE LIFE COURSE 74 (2021).

275. Arlene Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 L. & CONTEMP. PROBS. 38, 43 (1975).

276. *See* Shweta Sundram, *Social Development in Children: An Analysis*, 2 INT'L J. ADVANCED ACAD. STUD. 82, 83 (2020).

277. *See* Alicia Nortje, *Piaget's Stages: 4 Stages of Cognitive Development & Theory*, POSITIVE PSYCH. (Nov. 10, 2024), https://positivepsychology.com/piaget-stages-theory/#:~:text=Sensorimotor%20stage%20(0%E2%80%932%20years,11%20years%20old%20through%20adulthood).

278. *See Age Matrix*, INTERSTATE COMM'N FOR JUVS. (Feb. 3, 2025), https://juvenilecompact.org/age-matrix. Many states set the age of criminal responsibility at age eighteen. Kansas sets it as young as ten years old. West Virginia has no minimum.

279. *See* Kendra Cherry, *Kohlberg's Theory of Moral Development: How We Learn to Tell Right From Wrong*, VERYWELL MIND (Jan. 29, 2025), https://www.verywellmind.com/kohlbergs-theory-of-moral-development-2795071.

280. *See* HERRING, *supra* note 274, at 80; Norton, *supra* note 267, at 6.

281. *See* Shazia Inayat Ali, Anjum Bano Kazimi & Rozina Ruknuddin Sewani, *Exploring the Path to Self-Actualization: A Study on Youth Development and Well-Being*, 6 RSCH J. FOR SOCIETAL ISSUES 293, 295 (2024).

which the trajectory of a child's development is pointed, and a child's development determines what will render them self-actualized.[282]

A. Defining Children's Right to Self-Actualize

The concept of self-actualization is a "widely recognized fundamental principle" in social and natural sciences.[283] Abraham Maslow, largely credited for advancing our understanding of self-actualization as an essential motivating human force, defines self-actualization as "people's desire for self-fulfillment, namely, the tendency for them to become actualized in what they are potentially."[284] Maslow theorized that self-actualization lies at the pinnacle of human needs, observing that:

> Even if all these [physiological, safety, and social] needs are satisfied, we may still often (if not always) expect that a new discontent and restlessness will soon develop, unless the individual is doing what he is fitted for. A musician must make music, an artist must paint, a poet must write, if he is to be ultimately happy. What a man *can* be, he *must* be. This need we may call self-actualization.[285]

For Maslow and other prominent psychologists of the twentieth century, the drive towards self-actualization explains the "innate tendency or striving within us to achieve wholeness, perfection, or some form and expression of self-realization."[286] There is an intrinsic link between our innate drive towards self-actualization and development of our personalities. Our personalities determine the metric upon which we measure the degree to which we are self-actualized. Determining whether writing poetry makes one self-actualized flows from whether their personality is that of a poet. According to leading theorists, progression towards self-actualization is driven by development of one's personality, "talents, capacities, creative tendencies, and constitutional potentialities."[287]

As applied to children, self-actualization refers to the child's progression toward "becoming fully human, everything the [child] can become."[288] Self-actualization represents the desired end towards

282. *See id.* at 294.
283. *Id.* at 295.
284. A. H. Maslow, Motivation and Personality 46 (3d ed. 1987).
285. A. H. Maslow, *A Theory of Human Motivation*, 50 Psych. Rev. 370, 382 (1943).
286. Frick, *supra* note 266, at 34.
287. *Id.* at 36 (quoting Maslow); s*ee also id.* at 35 ("The idea of an actualizing tendency as a powerful internal force within the personality was developed by Carl Jung in his concept of *individuation* to refer to a developmental process directed toward achieving wholeness.").
288. *Id.* at 36 (quoting Maslow).

which the trajectory of a child's development is pointed. Necessarily, development of the child's personality and potentialities are indispensable for a child to reach the end of his development and become self-actualized. Thus, the developmental importance of childhood is that it is a time where the child begins to form an understanding of who he is, who he can be, and who he wants to be—discoveries which are indelible to the pursuit of his self-actualization.[289]

These observations carry tremendous legal force. Policymakers and judicial bodies ground their decisions regarding children on their conceptions of childhood—ideas of what children need and which concerns are most relevant to children considering social, psychological, and physiological realities.[290] Children are conceptualized as vulnerable,[291] immature beings without autonomy.[292] But this state is temporary; eventually, the child will shed his childness and transform into an adult. Who the child becomes as an adult is intrinsically connected to the quality of their development. Thus, childhood is conceptualized by the law as a consequential stage of human development that requires protection.[293] Necessarily, the right of children to self-actualize—that is, the right of children to materialize their full developmental potential, to grow, to uncover who they are, who they want to be, to pursue it, and become the human beings they are capable of becoming—underpins many laws concerning children.[294]

B. Children's Right to Self-Actualize as a "Liberty" Interest Under the Substantive Due Process Clause

The Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law."[295] This constitutional provision, known as the Due Process Clause, has two

289. Norton, *supra* note 267, at 7 ("Adolescent exploration serves the developmental purpose of making sound life-shaping choices, i.e., choices that harmoniously combine to constitute an intrinsically rewarding adult life. And the ultimate argument for a full-bodied teleological conception of persons is that implementation of it will maximally actualize potential human values. This is because persons who experience their productive lives (work, family, avocations, friendships, place of residence, religious and civic responsibilities) as intrinsically rewarding are thereby led to identify with them and invest the best of themselves in them.").

290. Skolnick, *supra* note 275, at 38.

291. *See* Herring, *supra* note 274, at 85.

292. *See id.* at 88.

293. *See* Emily Buss, *Constitutional Fidelity through Children's Rights*, 2004 Sup. Ct. Rev. 355, 362 (2004).

294. *See* Skolnick, *supra* note 275, at 38 (discussing how the legal system reflects and codifies a conception of children as "incomplete beings").

295. U.S. Const. amend. XIV.

functions: "substantive" due process and "procedural" due process.[296] Substantive due process asks whether the government has a sufficiently substantial reason for infringing upon a fundamental liberty interest protected by the Due Process Clause. When the contested governmental action implicates a fundamental liberty interest, courts subject that action to scrutiny.[297] Yet, defining fundamental liberty interests remains a highly controversial area of the law.[298] While the Supreme Court has never defined substantive due process with exactitude,[299] in dicta, the Supreme Court has interpreted the word "liberty" to encompass "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[300] In *Loving v. Virginia*,[301] the Court reiterated the same language, explaining that fundamental freedoms are those long recognized as "vital personal rights essential to the orderly pursuit of happiness by free men."[302] Broad interpretations of the term "liberty" invited challenges on how to define the scope of substantive due process rights. In attempt to guide and "restrain" the courts, the Supreme Court in *Washington v. Glucksberg*[303] established that the concept of liberty should be interpreted as only protecting those rights that are "deeply rooted in this nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[304]

The right of children to self-actualize is a fundamental freedom enshrined in the word "liberty" under the Due Process Clause of the Fourteenth Amendment. Children cannot experience liberty if they are not allowed to grow. The Declaration of Independence famously declared that among our inalienable rights is the "pursuit of [h] appiness."[305] Time and time again, the Supreme Court has consecrated this hallowed American value in its exposition of fundamental liberties enshrined in the Constitution. If pursuing one's happiness means achieving a state of internal fulfillment indicative of a well-lived, successful life, of materializing our innate potential, of being able to

296. Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 Loy. L.A. L. Rev. 1143, 1149 (1992) [hereinafter Chemerinsky, *Unfulfilled Promise*].
297. *Id.* at 1153–54.
298. Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. 1501, 1501 (1999).
299. *Id.*
300. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
301. Loving v. Virginia, 388 U.S. 1 (1967).
302. *Id.* at 12.
303. Washington v. Glucksberg, 521 U.S. 702 (1997).
304. *Id.* at 720–21 (internal quotations omitted); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); Chemerinsky, *Substantive Due Process*, *supra* note 298, at 1520.
305. The Declaration of Independence para. 2 (U.S. 1776).

chart the course of our futures and seek after it, then the principle of self-actualization has been deeply rooted in our tradition of freedom since our nation's birth.[306] At its core, self-actualization is the aim of one's exercise of liberty.[307]

In *Obergefell v. Hodges*,[308] the Court reminded the nation that "[t]he Constitution promises liberty to all within its reach . . . to define and express their identity."[309] As it pertains to children, self-actualization is the mechanism by which children come to learn, define, and express who they are. It is both an enabling force and "critical outcome" of healthy child development.[310] As they develop, their personalities evolve towards "increasing complexity and wholeness."[311] They begin to form an ideal self-image by exploring possibilities within themselves and their environments.[312] Internal elements, such as "cognitive processes, emotional regulation, and personality attributes," and external elements, such as their culture, family structures, and education, informs how children perceive and pursue their self-actualization.[313] Thus, self-actualization is a function of the child's growing autonomy and sense of self—a natural consequence of a child exercising his liberty to be a child.[314]

Legal and social histories concerning children reveals a tradition of protecting a child's right to self-actualize. Throughout this nation's history, "[t]he core principle and goal of the legal regulation of children is the promotion of child wellbeing."[315] Self-actualization is widely

306. In a book examining what the "pursuit of happiness" meant to the Founding Father, Jeffrey Rosen explains that for the Founding Fathers, the "pursuit of happiness" signified "a quest for being good, not feeling good—the pursuit of lifelong virtue, not short-term pleasure. Among those virtues were the habits of industry, temperance, moderation, and sincerity, which the Founders viewed as part of a daily struggle for self-improvement, character development, and calm self-mastery." Jeffrey Rosen, *"The Pursuit of Happiness: How Classical Writers on Virtue Inspired the Lives of the Founders and Defined America*," Nat'l Const. Ctr., https://constitutioncenter.org/go/the-pursuit-of-happiness (last visited Mar. 10, 2025).

307. Norton, *supra* note 267, at 10 ("Self-directedness or autonomy . . . is the central necessary feature of human flourishing . . . It is not external to the essence of human flourishing, but is the very form, the only form, in which a life in accordance with virtue (human flourishing) can be lived. In other words, if I am not the author of the activity, that activity is not good or right for me even if it should nonetheless be true that if I were the author of that activity it would be good or right for me."). *See also* Maslow, *supra* note 285, at 382 ("A musician must make music, an artist must paint, a poet must write, if he is to be ultimately happy. What a man *can* be, he *must* be. This need we may call self-actualization.").

308. Kingsley v. Hendrickson, 576 U.S. 644 (2015).

309. *Id.* at 651–52.

310. Ali et al., *supra* note 281, at 295.

311. Frick, *supra* note 266, at 47.

312. *Id.* at 45.

313. Ali et al., *supra* note 281, at 297.

314. Frick, *supra* note 266, at 46.

315. Huntington & Scott, *supra* note 91, at 1375.

accepted as a necessary component of one's general wellbeing.[316] While the Supreme Court denied that the Due Process Clause protects a right to education, every state has compulsory education laws with the first law established in 1642—indicating an ancient, universally-accepted dedication to promoting self-actualized children.[317] Predictably, trends in laws concerning children show reliance on "psychological and biological research on child and adolescent development," demonstrating a commitment to healthy child development.[318] The Supreme Court itself relied on adolescent brain science in its *Miller* trilogy holdings.[319] Being persuaded by developmental science, the Court considered that justice would not be served if children are not allowed to self-actualize—if they are not allowed to fully mature.

C. Applying the Right to Self-Actualize: The Case Against Juvenile Confinement

Let us pause here to engage in a thought experiment. Imagine yourself at fourteen years old. Recall the way you used to wear your hair, how excited you were when you learned the latest dance craze of that summer, the silly jokes that made you erupt in laughter, the mischievous things you would do to seek a thrill of excitement. Now, place yourself in a courtroom. You look up towards the stern face of the judge presiding over your case and a familiar, yet bitter, sensation rushes from your cheeks to your stomach. It is the kind of shame you felt when your parents scolded you. But this particular shame feels hefty. It presses down on your head. Suddenly, you cannot bear to catch glimpses of the strange faces circling around you. So, you keep your head down—a feeble attempt to make yourself smaller than an atom.

Now, imagine yourself entering through a series of barricaded doors. You catch a heavy stench beyond the door. At first, you cannot ascertain what is amiss. A moment later, you sense it again—an omnipresent sense of fear hanging over the place like a thick fog.[320] Your body turns rigid. You begin to experience your movements with such hyperawareness, you can isolate the feeling of blood rushing to

316. Ali et al., *supra* note 281, at 299.
317. Michael S. Katz, *A History of Compulsory Education Laws*, ERIC, https://eric.ed.gov/?id=ED119389 (last visited Mar. 25, 2025).
318. Huntington & Scott, *supra* note 91, at 1375.
319. Drinan, *The Miller Revolution*, *supra* note 187, at 1796.
320. Bernstein, Burning Down the House, *supra* note 56, at 23.

your chest. The initial sense of dread settles into anguish. Before you start to dissociate, you seek a glimmer of relief. Suddenly, you fix your attention to the looming figure guiding you through the maze. You look up at the guard, clad in a menacing uniform, searching earnestly for a sympathetic face. A face that might remind you of the tenderness of your mom. Perhaps, offer a modicum of refuge in this strange place. The guard returns your glare. Instantly, your heart sinks with terror. There was a threat lurking behind his stare, deviously hiding behind feigned warmth. You shrug it off, pretending not to notice, hoping that foreboding feeling is simply your anxiousness conjuring up hazards like a ghost.

At night, you try to sleep. The cot in your cell is hard and uninviting. Your eyes start to swell, so you lay down and race to sleep before tears begin cascading down your cheeks. Right as you begin to doze off, an ominous figure inches towards you in the cover of the night. They come almost unperceived, except that the sound of the door creaking as they passed through ushered you out of your sleep like a gentle breeze. Initially, you cannot make out the figure that's approaching you. As the distance closes, you spot the sinister stare from earlier piercing through the darkness. Panic sets in. Suddenly, you feel the heat of their body pressed upon yours. You react. You do not remember what happened after that moment. All you can recall are limbs flailing about. Screams at the top of your lungs. Several blows. The first one expelled you out of your body. The other ones made dying seem like not such a scary thing. When you come back to yourself, you find yourself in a fetal position on the floor, trying to make yourself feel smaller than an atom again. The adrenaline subsides and pain washes over you all at once. It hurts everywhere, but you feel it most intensely in your heart; so, for the rest of the night, you sob uncontrollably. Something broke inside of you. You did not know that setting a toilet paper roll on fire would be such a bad thing.[321] You did not mean any harm. Now there is a stain you will have to carry for the rest of your life.

Hundreds of thousands of children experience this acute sense of anguish every day in our youth prisons. For many children, these nightmarish experiences become memories that are forever etched into their brains—permanently altering how they perceive themselves, form relationships, and navigate the world.[322] Youth incarceration

321. *See* Shutzer & Mueller, *supra* note 60.

322. *See* Breger, *supra* note 31, at 293. Childhood trauma is detrimental to brain development and a child's ability to develop healthy attachment styles. *Id.* When children are abused while their

infringes on a child's right to self-actualize because it subjects children to "disfiguring psychological trauma" that hinders their development.[323] The trauma incarcerated children incur impairs their rehabilitative potential, damages their educational prospects, causes life-long health defects, and circumvents their life outcomes.[324] For instance, the sense of isolation and fear children experience in juvenile detention facilities "create a cascading effect that shape long-term trajectories often marked by diminished opportunities for positive development and an increase in adverse outcomes."[325] These adverse outcomes include psychological consequences such as low self-esteem, mental illness, and relational issues.[326] Incarcerated children are also exposed to trauma that leads to physical illness in adulthood such as heart disease, diabetes, and obesity.[327] Juvenile detention facilities are catastrophic for children with pre-existing mental health issues and histories of abuse at home.[328] It is no surprise that the consensus among the scientific community is that youth incarceration does not treat children.[329]

The crux of the harm tends to be issues of perception. Children need to develop a healthy sense of self-esteem to self-actualize. But incarcerated children are perceived in terms similar to adult prisoners—unfit for society.[330] When society believes the worst in them, they begin believing the worst about themselves too. Thus, incarcerated children internalize negative perceptions of self that, in turn, sours their

neurobiology is "primed for attachment," their brains adapt to maladaptive connections impacting their stress-coping mechanisms and emotional regulation. *Id.*

323. *See* Fagan & Kupchik, *supra* note 25, at 59; *Solitary Confinement & Harsh Conditions*, *supra* note 115.

324. *Solitary Confinement & Harsh Conditions*, *supra* note 115; Wolf, *supra* note 27, at 98 ("Incarceration conditions for juveniles are not only deplorable, but they also have lasting and often permanent impact on the juveniles who endure them, undermining any potential prospect of rehabilitation."). Research shows that juvenile incarceration has deleterious effects on the employability of youth who have been incarcerated. *See* Robert Apel & Gary Sweeten, *The Impact of Incarceration on Employment during the Transition to Adulthood*, 57 Soc. Probs. 448, 472 (2010) ("[I]ncarceration promotes detachment from the labor market, which erodes human capital and thereby jeopardizes wage mobility over time, as ex-inmates become increasingly less attractive as potential employees because of their lack of steady work experience.").

325. E. Ackerman, J. Magram, & T.D. Kennedy, *Systematic Review: Impact of Juvenile Incarceration*, 3 Child Prot. & Prac. 1 (2024), https://www.sciencedirect.com/science/article/pii/S2950193824000834?via%3Dihub.

326. *See* Wolf, *supra* note 27, at 97.

327. *See id.*

328. *See* Gonzalez, supra note 30, at 55–56.

329. *See* Comment, *supra* note 130, at 96.

330. Fagan & Kupchik, *supra* note 25, at 41; *see also* Amy Kroska, James Daniel Lee & Nicole T. Carr, *Juvenile Delinquency and Self-Sentiments: Exploring a Labeling Theory Proposition*, 98 Soc. Sci. Q. 73, 75 (2017) ("[T]he link between an official designation as a delinquent and the development of deviant self-meanings is clear in labeling theory").

perception of the world and their place in it.[331] Children are dejected, "left with post-traumatic stress, hypervigilance and a 'diminished sense of self-worth'" at a time when their identities are still developing.[332] The labeling theory explains this phenomenon. Under the labeling theory, when a child commits an act, if institutions labels their behavior as "bad," the child "may come to define it and eventually himself as 'bad.'"[333] Since "[t]here is a persistent demand for consistency in character," a child labeled as delinquent "is defined as bad and is not believed if he is good."[334] This label is permanently etched in the child's psyche as "the labeled person rarely returns to non-deviant status."[335] Concurrently, custodial staff perceive their facilities as punitive, corrective environments responding to "bad" children—"increas[ing] the likelihood of staff either abusing prisoners or permitting abuse to go on under their watch" for the purposes of keeping order.[336] Thus, youth incarceration impairs a child's ability to self-actualize because it disfigures the psychological processes that produce a fully optimal self.

When government action implicates a fundamental right, it automatically triggers courts to review the challenged action under a high level of scrutiny. Recognition of a child's fundamental right to self-actualize under the Due Process Clause would require courts to review youth confinement claims under strict scrutiny because youth incarceration imposes a tremendous burden on a child's ability to self-actualize. To pass constitutional muster, the government would have to show that the conditions are narrowly tailored to a compelling interest—transforming court's state-centered deferential approach

331. According to the "looking-glass self" principle, "self-evaluations are formed from the reflected appraisals of others," so children labeled as "deviant" may show "low self-esteem because of negative societal reactions toward them" if they internalize those labels. Laurie Chassin & Susan F. Stager, *Determinants of Self-Esteem Among Incarcerated Delinquents*, 47 Soc. Psych. Q. 382, 382 (1984). Children that develop a low self-esteem because of the social stigma attached to these labels may be "expected to attain relatively low levels of achievement and social position." *Id. See also* Wolf, *supra* note 27, at 96, 97 n.65.

332. Keri Blakinger & Maurice Chammah, *How Juvenile Lockups Set Kids on a Path to Commit More Violence*, Slate (Feb. 1, 2022, 6:00 AM), https://slate.com/news-and-politics/2022/02/how-juvenile-detention-centers-perpetuate-violence.html. *See* Shukla, *supra* note 65, at 382 ("Because a child's identity is still developing, however, there exists a greater chance of excising the criminal element from their self-concept.")

333. Anne Rankin Mahoney, *The Effect of Labeling Upon Youth in the Juvenile Justice System: A Review of the Evidence*, 8 L. & Soc'y Rev. 583, 585 (1974). The term "labeling theory" is frequently used by juvenile justice practitioners and refers to the way in which the stigma attached to the juvenile justice system produces a label exerting powerful influence on the child's self-perception. *See id*. at 584–85 (detailing a simplified version of labeling theory).

334. *Id.* at 585.

335. *Id.* at 586.

336. Shapiro & Hogle, *supra* note 19, at 2025.

to a child-centered approach by focusing the inquiry on whether the child may enjoy her right to self-actualize notwithstanding the challenged condition. In effect, recognizing the right to self-actualize would make *Bell* and *Farmer* inapplicable in conditions of confinement claims involving children. The new standard would ask courts to assess whether, in light of the special considerations pertaining to childhood and concerns for healthy child development, the challenged condition of confinement unduly burdens the child's right to self-actualize—namely, can the child develop a healthy sense of self, fulfill their rehabilitative potential, and reach maturity notwithstanding the challenged condition. In their analysis, courts would use available scientific information bearing on the question, much like the Court did in the *Miller* trilogy.

Consider how recognition of a child's right to self-actualization might have resulted in a different outcome in the *Angola Transfer Case*. The district court acknowledged that the conditions in Angola would have disastrous effects on the children's development.[337] However, the district court weighed Louisiana's interest in keeping the public safe from the children more heavily than the children's interest in not incurring lasting psychological harm. Recognizing that children have a fundamental right to self-actualize under the Due Process Clause would turn the inquiry on its head. The effects of confinement on the children would have taken priority over Louisiana's purported interest in safety because under a substantive due process analysis, the question becomes whether Louisiana had a sufficiently compelling reason to subject the children to conditions that were "untenable."[338] Even if the district court would have found that Louisiana's interest in safety was sufficiently compelling, the district court would have had to consider an additional question it did not originally consider: were there any other viable alternatives to sending the children to Angola?[339] Given the ultimate outcome of the case, it seems as though Louisiana had other options.[340]

One may take recognition of a child's right to self-actualize as far as suggesting that the right to self-actualize renders *any* youth

337. *See infra* Part II.C.

338. *Edwards I*, 2023 WL 5984280, at *9.

339. In cases where courts apply strict scrutiny, courts assess whether the challenged action was the least restrictive means for achieving the government's purpose. The "least restrictive means" test considers whether there are viable alternatives to the government's action that would impose a lesser restriction on the fundamental right at issue. *See* Noah Marks, *"Least Restrictive Means":* Burwell v. Hobby Lobby, 9 HARV. L. & POL'Y REV. ONLINE 19, 21 (2015).

340. The children were ultimately removed from Angola and transferred to another facility. *See* Press Release, *supra* note 148.

incarceration presumptively unconstitutional. It is widely established that youth incarceration has deleterious effects on a child's future, infringing on their right to self-actualize. Youth incarceration would be constitutionally permissible only in circumstances where the young person has been accused of intentional, premeditated murder or other crimes of similar gravity, such that the state can justly demonstrate a compelling interest in confining the young person. However, youth incarceration in response to non-violent crimes and status offenses would be suspect. In those cases, courts may presume that youth incarceration imposes an undue burden on the child's ability to self-actualize because incarceration is not necessary to reform criminal behavior flowing from a child's youthfulness. Children can be mischievous and unruly, but they can course correct if allowed to develop healthily, improve themselves, and become self-actualized. Ancillary questions in a court's analysis may include whether the state has furbished requisite resources for the child to self-actualize despite confinement, i.e. provide a non-punitive, therapeutic environment, adequate schooling, recreational opportunities, plenty contact with loved ones, and short confinement terms. The practical effect of such reform is that youth incarceration would cease to exist as it has in recent decades and return to its rehabilitative origins.

Conclusion: Redemptive Implications on Black Youth

When it comes to children, how courts balance the public's interest in safety with children's interest in liberty exposes presumptions of a child's predilection to criminality and the supposed danger the child poses to the community if released. Herein lies the tragedy of juvenile justice. If children are conceptualized by courts as children, namely, beings that are inherently innocent and in need of guidance, any condition of confinement treating the child as though he was not can hardly be conceived as a legitimate governmental objective.[341] Moreover, the risk that the child would be irreparably harmed by oppressive conditions of confinement would be readily observable irrespective of the responsible official's point of view. Yet, society treats delinquent children, not as inherently innocent, but as inherently

341. *See* Bernstein, Racial Innocence, *supra* note 62, at 4 ("By the mid-nineteenth century, sentimental culture had woven childhood and innocence together wholly. Childhood was then understood not as innocent but as innocence itself; not as a symbol of innocence but as its embodiment. The doctrine of original sin receded, replaced by a doctrine of original innocence.").

dangerous, menacing, and culpable.[342] When society perceives children as inherently dangerous, the interest to ensure their safety against them becomes grave. In turn, it tolerates legal standards that fail to account for the distinct needs pertaining to children and are deferential to state officials who demonstrate a propensity for abuse.

However, if society views children as though they were children and treats them with a level of sympathy becoming of a society that understands that a child's behavior during their infancy does not forecast their behavior as adults, the urgency to protect itself becomes less salient. Perhaps, children would not be viewed as dangerous. Instead, they would be viewed as they are: immature, misguided, angry, hurting, frustrated, mischievous, in need of love and care. Perhaps, society will see that children ought not to be thrown out of society for behavior flowing from their youthfulness. Perhaps, youth incarceration would become obsolete.[343]

Analyzing whether children are subject to conditions of confinement infringing on their right to self-actualize require courts to reconfigure the weight they accord to the public's interest in safety—and how they perceive children's threat against their safety. Historically, there has been a racial undertone in how courts, and society, perceives youth danger. Thus, recognizing the right to self-actualization has profound redemptive implications for Black youth who are perceived to be less innocent, in a dual psychosocial and legal sense of the word. Recognition of the right to self-actualize is recognition that Black children, in particular, deserve a chance to grow even when they make a mistake. As all humans, Black children ought to have an opportunity to learn from their mistakes, make amends, and become more than the worst thing they have ever done.[344] In essence, recognition of the right to self-actualize operationalizes grace in juvenile justice law. It stands for the proposition that the law ought to, not just want the best but,

342. *See generally* Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psych. 526 (2014) (discussing the ways in which Black children are dehumanized and the consequences of dehumanization).

343. Many advocates have advanced proposals to abolish the youth prison system and replace it with community-based services that achieve better outcomes at lower costs. *See* Patrick McCarthy, Vincent Schiraldi, & Miriam Shark, The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model 21 (2016), https://www.ojp.gov/pdffiles1/nij/250142.pdf. In 1972, Jerome Miller closed all juvenile corrections facilities in Massachusetts and replaced them with a diversified network of community-based programs. The state saw no increase in delinquency. *See* Jeffrey Fagan, *Social and Legal Policy Dimensions of Violent Juvenile Crime*, 17 Crim. Just. & Behavior 93, 101 (1990); Fagan & Kupchik, *supra* note 25, at 40.

344. Bryan Stevenson, Just Mercy 290 (2014).

believe in the best of our children by protecting a child's ability to grow and become what society, and that child, hopes it can become someday. In a society where Black children are often criminalized for being children, recognizing their right to self-actualize allows Black children, as all children, to just be—be Black and be kids.