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THE FEDERAL JUVENILE SYSTEM

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ABSTRACT

With very few exceptions, the federal juvenile system has been ignored by legal scholars since its inception in 1938. Yet, this understudied system has much to offer in this current age. It offers a lens to better understand and address the pathologies of excessive prosecutorial power and punitiveness that plague our country's other criminal and juvenile legal systems. It also exemplifies and provides insights on limiting the carceral state.

This Article provides a detailed analysis of the federal juvenile system, situates its place in the overall American carceral landscape, and highlights its relevance to contemporary criminal and juvenile law movements. With only fifty-five youths prosecuted nationwide in the federal juvenile system in 2021, this system stands apart for its relative absence of state carceral reach and its accompanying pathologies. And by using the federal juvenile system as a foil for the federal criminal system—which grew the carceral state and amplified its harms—one can gain better insight into reducing the reach and attendant pathologies of the carceral state.

* Assistant Professor, Wake Forest University School of Law. For their generous insights and comments, I thank Ralph Richard Banks, Rachel E. Barkow, Guy-Uriel E. Charles, Jessica M. Eaglin, Martin Guggenheim, Jasmine E. Harris, Kristin Henning, Randy A. Hertz, Irene Oritseweyinmi Joe, Steven Arrigg Koh, Stephen Lee, Sandra Mayson, Erin E. Murphy, Melissa Murray, David Alan Sklansky, Ronald Wright, and the participants of the Emerging Scholars Conference at Stanford Law School, the Lawyering Scholarship Colloquium at the New York University School of Law, and the New York Area Family Law Scholars Workshop. I also would like to thank Daniel Kim, Kate McMurchie, Matthew Peterson, and Allison Scharfstein for their research assistance, and the editors of the *Boston University Law Review* for their editorial work.

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INTRODUCTION

Since its inception in 1938, the federal juvenile system[1] has been vastly overlooked in legal scholarship and public discourse. Yet, this unfamiliar system has much to offer in this current age. It offers a lens to better understand and address the pathologies of excessive prosecutorial power and punitiveness that plague our country's three other justice systems[2]—the federal criminal system, state criminal systems, and state juvenile systems.[3] The federal juvenile system also exemplifies and provides insights on limiting the carceral state.[4]

This Article sets forth a detailed analysis of the federal juvenile system, situates its place in the overall American carceral landscape, and highlights its relevance to contemporary criminal and juvenile law movements. With only fifty-five youths prosecuted nationwide in the federal juvenile system in

[1] *See* Federal Juvenile Delinquency Act of 1938, Pub. L. No. 75-666, §§ 921-929, 52 Stat. 764, 764-66 (1938) (codified as amended at 18 U.S.C. §§ 5031-5043).

[2] Some scholars and advocates criticize the use of the terms "justice" and "system" in "criminal justice system" because the word "justice" ignores the inequality and punitiveness of criminal law and the word "system" does not reflect the lack of order and consistency in criminal law. *See* Benjamin Levin, *Rethinking the Boundaries of "Criminal Justice,"* 15 OHIO ST. J. CRIM. L. 619, 619-20 (2018). This Article uses the term "system" as other scholars have used the term to signal structural systematic analyses. *See id*. To the extent that this Article uses the word "justice," I mean to refer to the criminal or juvenile legal systems.

[3] Reference to state criminal and juvenile systems also includes local systems.

[4] A theory of the American carceral state is yet to be fully formed. *See, e.g.*, Dan Berger, *Finding and Defining the Carceral State*, 47 REVS. AM. HIST. 279, 285 (2019) (stating that "[w]ith greater attention to the *forms, sites,* and *ends* through which state actors deploy carceral power, we can develop a more precise usage of [the carceral state]"). However, scholars generally have relied on this concept of the carceral state to refer to state control or punishment that is oppressive, illogical, and/or pervasive. *See, e.g.*, Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1693-94 (2006); Naomi Murakawa, *Mass Incarceration Is Dead, Long Live the Carceral State!*, 55 TULSA L. REV. 251, 251-52 (2020); Berger, *supra*, at 285 ("Carceral power is, at its core, repressive social control . . . ."). The carceral state also creates and perpetuates inequality. *See* Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203, 211 (2021); TONY PLATT, BEYOND THESE WALLS: RETHINKING CRIME AND PUNISHMENT IN THE UNITED STATES 53 (2019) (describing "economic, racial, and gendered prejudices of the carceral state" as "not occasional and erratic but [as] its lifeblood"). Lastly, the carceral state is expansive and invasive, impacting all facets of our society, and either interfering or directly abiding in spaces that may not be viewed initially as carceral. *See* Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 561 (2015) (stating that carceral state "is deeply entangled in the political, economic, and social fabric of the United States"); PLATT, *supra*, at 21 (noting "fragmented" nature of carceral state, meaning the carceral state also occupies spaces that are generally viewed to be care-based, civil, noncriminal, or nonpunitive).

2021[5]—a number consistent with past figures[6]—this system is notable for its relative absence of punitive reach and its accompanying pathologies. The common systemic problems of unwarranted prosecutorial power and punitiveness that have long vexed both criminal and juvenile legal scholars[7] barely register here.

The federal juvenile system's minimal footprint and lack of pathologies become even more pronounced when this system is juxtaposed against one of its counterparts—the federal criminal system. For several decades, criminal law scholars have criticized the role that the federal criminal system has had in perpetuating "unequal justice,"[8] overt punitiveness,[9] mass incarceration,[10] and the "collapse" and "dysfunction" of the entire American criminal system.[11] The federal government currently incarcerates more individuals than any other state (consistent with past years)[12] and federal prosecutions and policies have contributed to the rise and growth of the prison-industrial complex and the carceral state.[13]

The federal criminal system's excessive prosecutorial power, undue punitiveness, and disruption to state criminal systems and overall criminal law

[5] TABLE D-13. U.S. DISTRICT COURTS—CRIMINAL DEFENDANTS COMMENCED (EXCLUDING TRANSFERS), BY TYPE OF PROCEEDINGS, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2017 THROUGH 2021 [hereinafter TABLE D-13], https://www.uscourts.gov/sites/default/files/data_tables/jb_d13_0930.2021.pdf [https://perma.cc/W764-3ELX].

[6] *See infra* Part II (explaining that federal government prosecutes relatively few youth).

[7] *See infra* Parts I, V (discussing problematic reach and distinct pathologies of federal criminal system and state criminal and juvenile systems).

[8] William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008); *see also* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 646 (1997) (asserting that prosecution in state compared to federal court results in "dramatically disparate treatment of similarly situated offenders").

[9] *See* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 272 (2013) ("The federal system is now the most punitive jurisdiction in America.").

[10] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4 (2010) (discussing mass incarceration and racialized control).

[11] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2-4 (2011) (observing how federal criminal justice system became discretionary, discriminatory, and expansive).

[12] *See, e.g.*, Barkow, *supra* note 9, at 272.

[13] *See, e.g.*, andré douglas pond cummings, *"All Eyez on Me": America's War on Drugs and the Prison-Industrial Complex*, 15 J. GENDER RACE & JUST. 417, 418-19 (2012) (discussing federal drug policies resulting in mass incarceration); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 9-10 (2019) (identifying prison-industrial complex as "aspect[] of the carceral state"); *see also infra* Part I (explaining problematic reach of federal criminal system).

policy are well-documented.[14] The system has been so studied that its main components—federal criminal statutes, federal sentencing, federal prosecutors, and federal policing—have each spawned its series of critical scholarship.[15] And scholars are not alone in faulting the federal criminal system for these ills. Courts,[16] individual justices,[17] and various organizations[18] have raised concerns about the system's growth and punitive impact. Yet, in this vast abundance of analysis and scholarship, no one has turned to the federal government's other justice system—the federal juvenile system—for any insight into why these problems exist or how to resolve them.

There are myriad reasons for this void. Perhaps the most obvious is the different populations and natures of the proceedings between the two federal systems—the federal *criminal* system generally prosecutes adults, and the federal *juvenile* system generally prosecutes children. Another could be the federal criminal system's ability to capture the nation's attention. For its size, the federal criminal system has continually netted an outsized role in both legal scholarship and policy discussions regarding criminal law.[19] Meanwhile, the federal juvenile system is a confidential one, and the number and type of federal juvenile cases have not been thoroughly analyzed.

However, a comparison of the two systems reveals that they are more similar than is apparent on the surface. For example, they share the same underlying

[14] *See infra* Part I.

[15] *See infra* Part I.

[16] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 567 (1995) (holding federal Gun-Free School Zones Act as unconstitutional application of Commerce Clause and ruling that to hold otherwise would likely "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); Bond v. United States, 572 U.S. 844, 853-60, 865 (2014) (applying Tenth Amendment to reject use of Treaty Power to convict defendant for using rash-inducing chemicals on spouse's lover, and reversing conviction as improper intrusion into state police power).

[17] *See, e.g.*, Taylor v. United States, 579 U.S. 301, 319 (2016) (Thomas, J., dissenting) (cautioning against giving Congress general police power); *see also* William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, 11 FED. SENT'G REP. 134, 135 (1998) (raising grave concerns about federalization of criminal laws on federal judiciary).

[18] *See, e.g.*, JAMES A. STRAZZELLA, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998) (reporting on concerning increase in federal criminal legislation); Ames Grawert, *How to Fix the Federal Criminal Justice System (in Part)*, BRENNAN CTR. FOR JUST. (Jan. 2, 2020), https://www.brennancenter.org/our-work/research-reports/how-fix-federal-criminal-justice-system-part [https://perma.cc/5KCJ-E9F6]; Jeremiah Mosteller, *The Criminalization of Everything*, STAND TOGETHER TR. (Aug. 14, 2019), https://standtogethertrust.org/stories/the-criminalization-of-everything/ [https://perma.cc/ADV7-376C].

[19] John F. Pfaff, *Federal Sentencing Guidelines in the States: Some Thoughts on Federal Grants and State Imprisonment*, 66 HASTINGS L.J. 1567, 1573 (2015) ("Much of the discussion on criminal justice reform, in both academic and policy circles, is strongly focused on changes at the federal level; even debates about state reform often seem influenced by thoughts about sentencing at the federal level.").

federal criminal laws, federal actors, infrastructure, and history.[20] Yet, even with these similarities, the federal juvenile system does not suffer from widespread problems of excessive prosecutorial power or undue punitiveness.[21] It also rarely disrupts its state counterpart, the state juvenile system.[22] The federal government has restrained itself in imposing direct carceral control over youth.[23]

Examining the reasons for the relative absence of pathologies in the federal juvenile system yields a deeper understanding of the excessive prosecutorial power, punitiveness, and disruption embedded in the federal criminal system, as well as the state criminal and juvenile systems. It also provides insights on how to limit the carceral state.

In essence, the federal juvenile system stands apart for its internal and external institutional checks that provide oversight and accountability of prosecutorial power and punitiveness during the very early stages of cases.[24] These checks limit excessive prosecutorial power, undue punitiveness, and disruption to state systems. While these checks were initially created in deference to the express pronouncement by states that they would respond differently to youth crime—i.e., a care-based *parens patriae* response rather than a punitive one—these checks withstood the test of time, even when states expressly abandoned this goal.[25] Amid growing calls and emerging efforts to transform how the state responds to adult crime—from a carceral to a noncarceral approach[26]—the study of the federal juvenile system is even more timely and relevant. Additionally, by widening the justice landscape to properly include the federal juvenile system, this Article critiques and adds nuance to existing theories of excessive prosecutorial power, punitiveness, and the carceral state.

This Article proceeds in the following four Parts. Part I sets forth the common problems of the federal criminal system, such as excessive prosecutorial power, overt punitiveness, and disruptive impact on state criminal systems and criminal law policy overall. The first two pathologies are also embedded in state criminal and state juvenile systems.[27] Part II then shows the comparative absence of these pathologies in the federal juvenile system. For example, data about federal juvenile delinquency cases shows that these pathologies of excessive prosecutorial power, overt punitiveness, and disruption to state systems are

[20] *See infra* Part III.

[21] *See infra* Part II (describing comparatively fewer problems with federal juvenile system).

[22] *See infra* Part II.

[23] *See infra* Part II.

[24] *See infra* Parts IV, V (observing sentencing and institutional checks that limit prosecutorial power in federal juvenile system).

[25] *See infra* Part V.

[26] *See, e.g.*, Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1056-57 (2015).

[27] *See infra* Part I (discussing state prosecutors' broad discretion in plea bargaining process and punitive norms of targeting crimes and communities).

relatively absent.[28] Part III then explores the more obvious reasons why the federal juvenile system might be so different from the federal criminal system—such as a lower rate of federal crimes committed by youth or a different infrastructure—and shows that there is insufficient evidence to support these theories. Part IV sets forth the restrictions and restraints in the federal juvenile system—in the form of external and internal institutional checks—that appear to effectively and drastically limit the number of federal juvenile prosecutions. Part V then translates these restrictions into broader insights and reform ideas to address these pathologies and limit the carceral state beyond the federal juvenile system.

I. THE PROBLEMATIC FEDERAL CRIMINAL SYSTEM

The American criminal system is broken, and the federal government and its federal criminal system carry much of the blame. Scholars have long criticized the federal criminal system, particularly its laws, prosecutors, and sentencing. Moreover, they have underscored the federal criminal system's harmful impact on state criminal systems, with some holding it partly responsible for the "collapse" or "dysfunction" of the entire criminal system.[29] This two-part critique will be briefly summarized here.

First, the criticism of the federal criminal system is voluminous. Presently, the federal criminal system is known as the "most punitive jurisdiction in America" for incarcerating more individuals than any other jurisdiction in the United States.[30] According to recent comparative data, this description remains true—in 2020, the federal government continued to incarcerate more individuals than any state, including Texas and California.[31]

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[28] *See infra* Part II.

[29] STUNTZ, *supra* note 11, at 2-4 (explaining discrimination and injustice in dysfunctional system); *see also* Trevor George Gardner, *Right at Home: Modeling Sub-Federal Resistance as Criminal Justice Reform*, 46 FLA. ST. U. L. REV. 527, 531-32 (2019) ("Put simply, the federal government is in many ways responsible for contemporary criminal justice dysfunction. Over the past forty years, it has expanded the scope of criminal liability, increased the scope of criminal surveillance, and facilitated the militarization of police departments." (footnote omitted)).

[30] Barkow, *supra* note 9, at 272 ("Over the past decade, the federal prison population has increased 400 percent and at a rate nearly three times that of the states." (footnote omitted)). For example, there were 49,928 inmates in federal prison in 1988, which then increased to "all-time high of 217,815 [individuals] in 2012," a 336% increase in this twenty-four-year period. PEW CHARITABLE TRS., PRISON TIME SURGES FOR FEDERAL INMATES 2 (2015), http://www.pewtrusts.org/~/media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf [https://perma.cc/Q2L7-A8W2].

[31] In 2020, the federal government incarcerated 152,156 individuals, exceeding any state. The state with the highest amount of incarcerated persons is Texas with 135,906, followed by California, with an incarcerated population of 97,328. E. Ann Carson, U.S. Dep't of Just., Prisoners in 2020-Statistical Tables 7-8 (2021), https://bjs.ojp.gov/content/pub/pdf/p20st.pdf

Taking a closer look at the main components of the federal criminal system—federal criminal laws, federal sentencing, federal prosecutors—helps explain why the federal criminal system is so punitive and has generated so much scholarly lament.

To begin, scholars have criticized the amount, growth, and substance of federal criminal laws.[32] There is no consensus on the actual number of federal criminal laws,[33] but one estimate exceeds more than 4,450.[34] As a former Department of Justice ("DOJ") official who attempted this tally in the early 1980s quipped, one "will have died and resurrected three times" before figuring out this actual number.[35] Moreover, many of these laws were passed recently.[36] For example, 452 new federal crimes were created between 2000 to 2007.[37]

In addition to the number of federal criminal laws, the substance of federal criminal laws is also problematic. They are often duplicative of state laws,[38] thus taking away the focus of federal courts from distinct federal issues to matters

[https://perma.cc/4HXP-NXZN]. This is consistent with previous figures. In 2019, the federal government incarcerated 175,116 individuals, exceeding Texas' incarcerated population of 158,429 individuals and California's incarcerated population of 122,687 individuals. *Id*.

[32] *See* Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 2 (2012) ("Virtually all criminal law scholars bemoan the over-federalization of criminal law."); Mosteller, *supra* note 18 (demonstrating hazards of overcriminalization).

[33] *See* Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011, 1:01 AM), https://www.wsj.com/articles/SB10001424052702304319804576389601079728920.

[34] John Baker, *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. (June 16, 2008), https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes [https://perma.cc/7DGK-87P2].

[35] Fields & Emshwiller, *supra* note 33 (reporting DOJ official's comment that "laborious counting" was done to expose "idiocy of the system"). There is also a disagreement about the number of federal regulations—10,000 to 300,000—that can result in federal criminal charges. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991) ("By one estimate, there are over 300,000 federal regulations that may be enforced criminally."); Baker, *supra* note 34.

[36] In 1998, an American Bar Association Task Force observed that "[m]ore than 40% of the federal criminal provisions enacted since the Civil War" were passed between 1970 and 1996. STRAZZELLA, *supra* note 18, at 7.

[37] Baker, *supra* note 34 ("The increase of 452 [additional crimes] over the eight-year period between 2000 and 2007 averages 56.6 crimes per year-roughly the same rate at which Congress created new crimes in the 1980s and 1990s.").

[38] *See* John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 678 (1999) ("Federal criminal law, which once was exceptional and restricted to crimes affecting federal interests, now largely duplicates the coverage of state criminal law."); Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 524 (2011).

that should be handled by the states.[39] Also, Congress often passed federal criminal laws to send a message without sufficient expertise or concern about whether the federal law would assist or hinder states in their criminal issues.[40] For these reasons, various scholars, institutions, and organizations have criticized federal criminal laws.[41]

Next, federal sentencing has evoked criticism. Federal sentencing has been dubbed the "driver of the federal government's decision to get involved with questions of local crime."[42] Federal sentences generally tend to be longer and harsher than state sentences for similar offenses.[43] These laws result in the overt punitiveness that is associated with the federal criminal system. They are also one of the main reasons that federal prosecutors have such vast prosecutorial power.

Federal prosecutors—the enforcers of these federal criminal laws—and their excessive prosecutorial power have been subject to much criticism. Because federal prosecutors can "cherry pick" cases[44] and wield the large stick of harsh federal sentencing laws,[45] nearly all federal criminal cases result in a guilty plea.[46] Approximately 90-95% of federal cases end with defendants in a guilty

[39] *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1169-72 (1995).

[40] *See* Baker, *supra* note 38, at 679 (explaining Congress passes federal criminal law in response to public desire for action but "nature of local crime and the structure of the federal system mean that . . . Congress has little impact on local crime"); Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 237-38 (2019) ("It is remarkable that Congress would so cavalierly disrupt what has traditionally been a local matter and impose such a harsh punishment regime without pausing to think about or analyze how its new regime would have to adjust to fifty-one different jurisdictions and the ways they define crime.").

[41] *See* sources cited *supra* notes 16, 18 (noting various judicial and institutional criticisms of federal criminal system).

[42] Barkow, *supra* note 38, at 523.

[43] Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 VA. L. REV. 127, 171 (2020) (noting federal sentences are harsher than state sentences "almost across the board"). For example, the Comprehensive Crime Control Act of 1984 made federal sentences more punitive "through the use of mandatory minimum sentences, higher maximum sentences, and increased pretrial detention." Barkow, *supra* note 40, at 200. Even with the recent reduction in sentencing for certain offenses because of the First Step Act of 2018, the "architecture put in place in the 1980s remains." *Id.* at 214 (observing that most laws of 1980s and 1990s remain on books).

[44] *See* Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2265-66 (2014).

[45] *See* Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252-54 (2004) (describing how federal sentencing laws increased percentage of guilty pleas).

[46] *See* Barkow, *supra* note 9, at 272.

plea without a jury trial.[47] Federal prosecutors dictate the terms of the plea deals offered to defendants, including the charge(s), the recommended sentence, any requests to a judge for departures in sentencing, and stipulations of facts that may impact sentencing.[48] With such control over every major stage of a federal criminal case, federal prosecutors have been labeled as both the "law enforcers" and the "final adjudicators" in most federal criminal cases.[49] Additionally, federal prosecutors' charging decisions have resulted in racially disparate outcomes.[50] One study identified a gap of approximately 10% between federal sentences of Black defendants versus White defendants.[51] Even controlling for "pre-charge case characteristics," federal prosecutors were "nearly *twice* as likely" to file a charge with a mandatory minimum sentence against Black defendants than White defendants.[52] While the researchers labeled this finding as an "unexplained disparity" and not proof of discrimination,[53] this finding is nevertheless troubling. It is also consistent with other empirical studies that show that federal prosecutorial charging decisions manifested racial disparities.[54]

These main components of the federal criminal system are interrelated. As the late William Stuntz observed, the power of federal prosecutors to pick among potential defendants made individual federal laws less important, which led federal criminal laws and sentencing laws to "metastasize."[55] Rachel Barkow

[47] Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009) (noting 95% of cases end in pleas); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 10-11 (2013) (observing over 95% of cases result in guilty pleas); John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty [https://perma.cc/YD5K-Y6M3] (finding that in 2018, 90% of federal criminal cases ended in guilty plea, 8% were dismissed, and 2% went to trial).

[48] Starr & Rehavi, *supra* note 47, at 10-11 (explaining broad discretion of federal prosecutors).

[49] Barkow, *supra* note 47, at 870-73 ("Federal prosecutors control the terms of confinement in this vast penal system because they have the authority to make charging decisions, enter cooperation agreements, accept pleas, and recommend sentences.").

[50] *See* Starr & Rehavi, *supra* note 47, at 7; Mona Lynch, *Place, Race, and Variations in Federal Criminal Justice Practices*, 17 OHIO ST. J. CRIM. L. 167, 180 (2019) (describing racial disproportionality in drug prosecution).

[51] Starr & Rehavi, *supra* note 47, at 7.

[52] *Id*.

[53] *Id*. at 31.

[54] *See* Lynch, *supra* note 50, at 178-83 (finding racial disparities in charging and sentencing); MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT 147-48 (2016) (observing racially disparate outcomes in sentencing).

[55] William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 844 (2006).

described the domino effect in the following way: Congress passed federal criminal laws that "expand[ed] the list of substantive areas that can be taken away from local authorities."[56] Then, when determining whether it should prosecute and get involved in otherwise local matters, the federal government relied primarily on sentencing policy (of which federal policy is longer and harsher than state policy), rather than factors like institutional competence, costs, and accountability that guide many state and local governments in their decisions to allocate prosecutorial responsibility.[57]

Some scholars find the criticism of the federal criminal system undeserved. John Pfaff criticizes the overfocus on the federal criminal system in both academic and policy fields, arguing that state criminal systems, especially state prosecutors, warrant the attention of research and reform as they handle the majority of criminal cases.[58] Susan Klein and Ingrid Grobey observe that the federal criminal system has naturally cabined itself to enforce crimes that warrant "federal intervention" while allowing local law enforcement to take care of local crimes.[59] Others underscore that the federal criminal system is better equipped than state criminal systems to prosecute certain types of crimes,[60] or that the federal system is necessary to enforce crimes that states are less likely to prosecute, such as sexual assaults and police brutality against people of color.[61] Also, for some crimes that obviously attack the federal government, such as the Capitol riots on January 6, 2021, many desire a robust federal criminal system to investigate, arrest, and prosecute those involved.[62]

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[56] Barkow, *supra* note 38, at 571.

[57] *Id*. at 523 (asserting that while states are focused on institutional competence of prosecutors, federal government bases its decisions on local sentencing judgments).

[58] *See generally* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017) (arguing changes in prosecutors' behavior in 1990s better explain mass incarceration than sentencing laws); Pfaff, *supra* note 19, at 1573 ("[T]o understand what we conventionally think of as 'federal sentencing' is to understand only a small part of the puzzle, and one that does not shed much real light on the bigger part.").

[59] *See, e.g.*, Klein & Grobey, *supra* note 32, at 5 (stating that federal cases "reflect a careful consideration of federal interests" and federal system "defer[s] to states in areas of strictly local concern, such as violent crime and property crime").

[60] John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1125-26 (1995) (arguing federal criminal system is better suited than state systems to prosecute organized crimes).

[61] *See, e.g.*, Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 291-92 (1997) ("[L]eft to their own devices, states devote insufficient resources to combating crime in poor communities."); Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 852-58 (2018) (analyzing underenforcement of corruption, sexual assault, and police brutality).

[62] *See* Alan Feuer & Luke Broadwater, '*Suspicious' Visits Eyed as Nationwide Dragnet Snares 2 Police Officers*, N.Y. TIMES, Jan. 14, 2021, at A21; Masood Farivar, *US Identifies*

These points, however, do not fully capture the impact and role that the federal criminal system has had on criminal law and policy overall. First, it would be a misstep to allow recent events to detract from the reforms needed in the federal criminal system. For example, in the weeks following the Capitol attacks, over one hundred civil rights organizations released a joint statement to warn against passing new federal criminal legislation for domestic terrorism or expanding federal powers.[63] These organizations were mindful that popular support for the prosecution of those involved in attacking the Capitol may lead to further expansion of the federal criminal system, which would result in the undermining of civil liberties and other consequences.[64] After all, it was only six months prior, in the summer of 2020, that the federal government's response to the Black Lives Matter protests again exposed the pervasive and powerful reach of the federal criminal system. Unidentified federal police officers occupied the streets of Portland, Oregon, forcing protestors into "unmarked minivans" to arrest them.[65] Attorney General William Barr defended the federal intervention as necessary to protect the federal courthouse in Portland.[66] Federal prosecutors resuscitated rarely used federal laws to bring criminal charges against protestors for inciting violence despite the tenuous connection to federal jurisdiction.[67] President Trump issued an executive order for federal prosecutors to seek the maximum

Over 170 Capitol Rioters for Possible Criminal Charges, VOA (Jan. 13, 2021, 1:56 AM), https://www.voanews.com/usa/us-identifies-over-170-capitol-rioters-possible-criminal-charges [https://perma.cc/U7CX-XABV] (reporting FBI received 100,000 tips from members of public following Capitol riots).

[63] *See, e.g.*, *Leading Civil Rights Organizations Oppose Creation of New Domestic Terrorism Legislation*, LEADERSHIP CONF. ON CIV. AND HUM. RTS. (Jan. 19, 2021), https://civilrights.org/2021/01/19/leading-civil-rights-organizations-oppose-creation-of-new-domestic-terrorism-legislation/ [https://perma.cc/4RWM-EJP5] (urging Congress to use existing federal laws and abstain from passing new legislation).

[64] *See id*.

[65] Adam K. Raymond & Chas Danner, *Unidentified Federal Agents Are Detaining Protesters in Portland*, N.Y. MAG: INTELLIGENCER (July 17, 2020), https://nymag.com/intelligencer/2020/07/unidentified-federal-agents-detaining-protesters-in-portland.html [https://perma.cc/74DS-N4MM].

[66] Ted Sickinger, *Fact Checking Barr's Testimony Before Congress on Portland Protests*, OREGONIAN (July 28, 2020, 9:00 PM), https://www.oregonlive.com/politics/2020/07/fact-checking-barrs-testimony-before-congress-on-portland-protests.html [https://perma.cc/XPB9-P7NR].

[67] *See* Josh Gerstein, *Broken Windows and a Molotov Cocktail: DOJ Finds Creative Ways into Local Rioting Cases*, POLITICO (June 20, 2020, 7:00 AM), https://www.politico.com/news/2020/06/20/doj-local-rioting-cases-329735 [https://perma.cc/UTS2-VGDD] (noting that, in one instance, federal jurisdiction was based on protestor's use of imported tequila bottle, which federal authorities argued fell under regulation of foreign commerce).

ten-year sentence against protestors who damaged monuments or religious property.[68]

Indeed, the federal criminal system's punitiveness and excessive federal prosecutorial power are problematic. As one scholar observed, from an "offender's perspective," due to the "relative certainty of conviction and harsher sentencing" in federal court, a federal prosecutor's charging decision "may be the single most important decision that *any* actor in the criminal justice system makes."[69]

However, more worrisome is the fact that the federal criminal system's effects do not merely fall on the federal defendants caught in its nets. Rather, its existence shifts how state criminal systems operate on the ground and shapes overall criminal law policy. The federal government's involvement in criminal prosecutions and criminal law policies has led to the expansion of the prison-industrial complex and the carceral state.

For example, scholars have long identified excessive prosecutorial power as a problem in state criminal systems. Similar to federal prosecutors, state prosecutors also carry "tremendous clout."[70] They too have vast prosecutorial power that comes from the "broad discretion" in the charges they file due to generally little oversight in the charges they bring and no requirement to explain their decisions.[71] State prosecutors, like federal prosecutors, also drive the plea bargaining process which increasingly determines how cases end.[72] This pathology, however, grows even more harmful when state prosecutors leverage, rely on, or join with the federal prosecutorial power to target certain crimes, communities, or individuals.

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[68] Exec. Order No. 13,933, 85 Fed. Reg. 40,081 (June 26, 2020); *see also* Riley Beggin, *Trump Signs an Executive Order on Prosecuting Those Who Destroy Monuments*, VOX (June 27, 2020, 2:10 PM), https://www.vox.com/policy-and-politics/2020/6/27/21305396/trump-confederate-monuments-executive-order [https://perma.cc/BD6V-6TYL].

[69] *See* Clymer, *supra* note 8, at 677 (emphasis added); *cf.* Ouziel, *supra* note 44, at 2244-74 (attributing high conviction rate to traditional measures and more legitimacy in federal system).

[70] David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 480-82 (2016) (describing "limitless discretion" and "concentration of power" in hands of American prosecutors).

[71] Máximo Langer & David Alan Sklansky, *Prosecutors and Democracy—Themes and Counterthemes*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 300, 320-21 (Máximo Langer & David Alan Sklansky eds., 2017) ("[Prosecutors at the federal and state/local levels] are not required to articulate their grounds to dismiss charges and their decision may not be circumvented by victims and is unreviewable by the courts.").

[72] *Id.* at 321 ("And the extensive practice of plea bargaining creates incentives for local, state, and federal prosecutors to overcharge and undercharge, withhold evidence to the defense, and have an instrumental relationship to the law more generally."); *see* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 23 (1998) (asserting that charging and plea bargaining discretion "almost predetermines the outcome of a criminal case").

For example, in certain cases, state prosecutors may lean on the federal prosecutorial power to bypass restrictive state laws and policies that state legislators or courts implemented to keep state prosecutorial power in check. In general, federal prosecutors have access to a stronger federal grand jury system with fewer procedural rights for witnesses and prospective defendants, "lower standards for the approval of search warrants, a lower burden of proof to justify a wire tap, and more restricted discovery of the government's case."[73] Federal proceedings also may be less encumbered by state laws that ensure reliable outcomes, such as "rules prohibiting convictions based solely on the testimony of an accomplice."[74] As such, state prosecutors may refer cases to federal prosecutors to evade the restrictions that limit their own prosecutorial power.[75]

State prosecutors may also leverage federal prosecutorial power by using the threat of federal prosecution to pressure state defendants to agree to plea deals more quickly in their state cases.[76] Federal prosecutors help state prosecutors in this regard. In one example, a defendant's refusal to accept a state plea agreement that entailed four years in prison led to his prosecution in federal court where he was sentenced to life without parole.[77] His case was then publicized by federal prosecutors in a press release to "serve as an example" for other state defendants to accept plea deals offered by state prosecutors.[78]

Furthermore, formal cooperation agreements between federal prosecutors and state or local prosecutors and law enforcement, such as Project State Neighborhoods[79]—revived under the Trump Administration[80]—create even

[73] Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 768-70 (2005); *see also* NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 90 (7th ed. 2020) (citing to DOJ report listing various "procedural and evidentiary advantages" for federal prosecutions).

[74] Beale, *supra* note 73, at 769.

[75] *See id*. at 769-70. Some argue that for this very reason, federal prosecutors should handle certain prosecutions, like organized crime. *See, e.g*., Jeffries & Gleeson, *supra* note 60, at 1125-26 ("The ability to use uncorroborated accomplice testimony in federal court counsels in favor of bringing the types of cases that typically are based on historical accounts of continuing criminal activity.").

[76] *See* Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 909 (2000) (describing threat of federal prosecution as form of assistance to state prosecutors).

[77] *See* Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 1000-01 (1995).

[78] *Id*. at 1000.

[79] *See* Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 245 (2005).

[80] *See* Alan Neuhauser, *Sessions Instructs Federal Prosecutors to Renew Focus on Violent Crime*, U.S. NEWS (Oct. 5, 2017, 11:43 AM), https://www.usnews.com/news/national-news/articles/2017-10-05/ag-sessions-instructs-prosecutors-to-renew-focus-on-violent-

more refined channels for state prosecutors to borrow from the federal prosecutorial power in their state cases.[81] One empirical study of these formal agreements showed that by sending noncooperative defendants to federal prosecutors to face federal criminal charges, state prosecutorial power was enhanced at the expense of the power of state judges and defense counsel.[82] Therefore, the federal criminal system can directly skew how state criminal cases are handled in certain jurisdictions, increase the already problematic state prosecutorial power, and enable state prosecutors to act even more punitively.

Moreover, by operating its own federal criminal system, the federal government, and particularly federal prosecutors, have an incentive to implement tough-on-crime laws and policies that can then trickle down to state systems. Federal prosecutors are "at the helm of every major federal criminal justice matter," including the passage of new federal criminal laws, mandatory minimum sentences, as well as other policies such as clemency and forensic science.[83] The DOJ and National Association of Assistant U.S. Attorneys have incredible "power and influence" on federal legislators and policymakers,[84] and have consistently and effectively lobbied against criminal reforms.[85] Federal legislators often value federal prosecutors' opinions over the findings of other experts, such as criminologists, economists, and social scientists, because

crime; William Barr, Att'y Gen., Opening Statement of Attorney General William P. Barr Before the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies (Apr. 9, 2019), https://www.justice.gov/opa/speech/opening-statement-attorney-general-william-p-barr-house-appropriations-subcommittee [https://perma.cc/XW5F-26AR] (requesting $100 million in Project State Neighborhoods grants for 2020 budget).

[81] *See* Daniel C. Richman, *"Project Exile" and the Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369, 379 (2001) (describing cooperation between Virginia state officials and federal authorities in effort to combat gun violence).

[82] *See* Miller & Eisenstein, *supra* note 79, at 243 ("[T]he federal-state criminal prosecution nexus can create a new organizational context for local prosecutors, which enhances their discretionary authority in relation to defense attorneys and judges."). *See generally* William Partlett, *Criminal Law and Cooperative Federalism*, 56 AM. CRIM. L. REV. 1663 (2019) (arguing cooperation threatens defendants' rights by circumventing local systems).

[83] Barkow, *supra* note 9, at 272-74 (noting federal government led forensic science department and that its model of housing forensic laboratories in law enforcement agencies became dominant state model); *see also* MARC L. MILLER, RONALD F. WRIGHT, JENIA I. TURNER & KAY L. LEVINE, CRIMINAL PROCEDURES PROSECUTION AND ADJUDICATION 99 (6th ed. 2019) (observing passage of federal Bail Reform Act of 1984 inspired states to consider future dangerousness as factor for pretrial detention).

[84] Shon Hopwood, *The Misplaced Trust in the DOJ's Expertise on Criminal Justice Policy*, 118 MICH. L. REV. 1181, 1188 (2020).

[85] *Id*. at 1184-85, 1189-92 ("Through presidential administrations of both parties, the DOJ and the NAAUSA have affirmatively opposed most federal criminal justice reforms on issues involving sentencing, corrections, and clemency.").

prosecutors have on-the-ground experience in criminal law.[86] Researchers have noted how states adopted many of these harsh federal criminal laws and sentencing policies, further increasing the state criminal system's punitiveness.[87] Also, as noted above, even when state legislatures implement limitations on state prosecutorial power, federal prosecutors are not bound by such laws and can still prosecute such crimes in federal court.[88]

Consequently, some scholars have argued that the federal government's direct involvement in criminal law has contributed to the demise of the whole criminal system. The late William Stuntz attributed the damage that the federal government caused to local democratic control of criminal law as one of the reasons that the "criminal justice system has run off the rails."[89] Trevor Gardner observed that the "federal government has served as a catalyst for many of the first-order problems in criminal justice—problems such as prison proliferation, overcriminalization, and over-reliance on police departments" resulting in "contemporary criminal justice dysfunction."[90]

As such, while the federal criminal system may prosecute only a fraction of the cases processed by the collective state criminal system, it nevertheless maintains a significant role in the overall criminal system. Not only have scholars identified many problems with the federal criminal system itself—such as an overabundance of federal criminal laws, vast federal prosecutorial power and excessive punitiveness—but they have also detailed how this system subverts reforms, increases prosecutorial power, and harshens the operation of state criminal systems.

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[86] *Id*. at 1184-85, 1190-96 (citing findings undermining relationship between increased incarceration and drop in crime, and other discrepancies); *see also* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 7-10, 53-54 (2019) (discussing federal prosecutors' resistance to reform and continued support of longer sentences despite empirical evidence showing longer sentences do not deter crime).

[87] *See, e.g.*, Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 156 (2017) (noting states adopted harsher rhetoric and language after changes to federal criminal laws and policies in 1990s).

[88] *See supra* note 73; Divine, *supra* note 43, at 152-54 (describing federal prosecution against medicinal marijuana producers under federal laws even though decriminalized or legalized in states).

[89] STUNTZ, *supra* note 11, at 3-4, 5-8 (lambasting prosecutorial discretion and arguing for federal law to be limited to certain areas, like immigration or bribery of federal officials). *But see* Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1045-49 (2013) (analyzing Stuntz's argument and criticizing his view that, before any federal government involvement, pre-1960 criminal justice system worked well).

[90] Gardner, *supra* note 29, at 531.

II. THE LESS PROBLEMATIC FEDERAL JUVENILE SYSTEM

While scholars have picked apart the federal criminal system, they have essentially ignored the federal government's other justice system that prosecutes violations of its federal criminal laws—the federal juvenile system. The rest of this Article provides a thorough analysis of this system and explains how the federal juvenile system provides greater understanding of certain pathologies in the federal criminal system, such as excessive prosecutorial power and punitiveness that are also present in the state criminal and juvenile systems.[91] While the juvenile and criminal systems have obvious differences—children versus adults, and civil versus criminal—the lessons and ideas from the federal juvenile system are relevant and should be implemented widely, as explained in Part V.

This Part first highlights the absence of scholarship covering this system. Unlike the federal criminal system, the federal juvenile system has rarely been studied. As a result, it has not generated the type of critique that has long targeted the federal criminal system, such as excessive prosecutorial power, punitiveness, or interference in state systems. Then, this Part analyzes the number and type of cases in this system to show how few federal juvenile prosecutions take place, thus signaling that these pathologies are indeed lacking.

A. *The Silent System*

Since its creation in 1938, scholars have essentially ignored the federal juvenile system. Unlike the three other overarching American carceral systems—the federal criminal system, state criminal systems, and the state juvenile systems—silence accompanies the federal juvenile system. As for the very few articles about this system, what is *not* being said is just as important, if not more important, than what is being said. For example, no consistent indictments on excessive prosecutorial power exist in the federal juvenile system—an observation very common in federal and state criminal systems, as well as the state juvenile system.[92]

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[91] *See infra* notes 92, 291; *see also infra* Part V.

[92] *See* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 430 (2013) (describing prosecutors in juvenile system as "gatekeepers of juvenile court jurisdiction," who "wield enormous power to decline prosecution, divert youth from the system, and identify creative alternatives to adjudication"). Increasing prosecutorial discretion in juvenile cases resulted in more punitive outcomes. *See* Josh Gupta-Kagan, *Rethinking Family-Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. 743, 779 (2018) [hereinafter Gupta-Kagan, *Rethinking Family-Court Prosecutors*]. However, prosecutors in the juvenile system maintain less power than those in the criminal system. *See* Josh Gupta-Kagan, *Beyond "Children Are Different": The Revolution in Juvenile Intake and Sentencing*, 96 WASH. L. REV. 425, 483 (2021). In thirteen states, prosecutors have "complete

Instead, most of the scholarship about the federal juvenile system has focused on a particular issue or aspect of the underlying federal juvenile delinquency statute that resulted in circuit splits.[93] While certain legal interpretations of the FJDA may be more favorable to prosecutors or more punitive,[94] these critiques do not explore the actual impact that these interpretations have had on youth. Other scholars have discussed the FJDA or federal juvenile delinquency cases to highlight broader issues, such as interpretation of atypical youth convictions in immigration law or use of prior juvenile records in juvenile law generally.[95] Some have noted the disproportionate impact of the federal juvenile system on Native American youth.[96] However, this narrative is also incomplete or

or near-complete authority over intake decisions" in the juvenile system, such as decisions to prosecute, divert or dismiss cases. Gupta-Kagan, *Rethinking Family-Court Prosecutors*, *supra*, at 788-89 ("Eleven of these states assign such power to elected prosecutors, while two assign this power to other executive-branch attorneys or permit varying practices around the state." (footnote omitted)). In ten additional states, prosecutors have the ultimate authority over these decisions after receiving a recommendation from intake officers from probation departments or family courts. *Id*. (noting intake recommendations are required in these states). Moreover, in certain states, prosecutors may directly file cases in criminal court and bypass the juvenile system altogether. *See infra* note 291 (explaining direct file process).

[93] *See, e.g*., Meghan E. Lewis, Note, *Lessening the Rehabilitative Focus of the Federal Juvenile Delinquency Act: A Trend Towards Punitive Juvenile Dispositions?*, 74 MO. L. REV. 193, 204-05 (2009) (observing courts moving away from rehabilitative purpose of Federal Juvenile Delinquency Act); Juan Alberto Arteaga, Note, *Juvenile (In)justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants*, 102 COLUM. L. REV. 1051, 1051-53 (2002) (analyzing retributive reform enacted by Congress through Consequences for Juvenile Offenders Act of 1999); Bradley T. Smith, Comment, *Interpreting "Prior Record" Under the Federal Juvenile Delinquency Act*, 67 U. CHI. L. REV. 1431, 1432 (2000) (examining circuit split over what constitutes "prior delinquency record" in considering transferring minor to adult status); D. Ross Martin, Note, *Conspiratorial Children? The Intersection of the Federal Juvenile Delinquency Act and Federal Conspiracy Law*, 74 B.U. L. REV. 859, 867 (1994) (investigating application of Federal Juvenile Delinquency Act in "coconspirator" cases where minors conspired with adults).

[94] 18 U.S.C. §§ 5031-5043 (providing balancing factors for courts to determine whether minor should be tried as juvenile or adult).

[95] *See, e.g*., Esther K. Hong, *Fixing Deference in Youth Crimmigration Cases*, 48 N.M. L. REV. 330, 330-33 (2018) (analyzing impact of judicial deference on immigration cases involving youth); Lindsey Webb, *The Immortal Accusation*, 90 WASH. L. REV. 1853, 1881-82 (2015) (describing ways courts use prior accusations and convictions to determine whether youth should be prosecuted as adult).

[96] *See* Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 125-26 (2016); Amy J. Standefer, Note, *The Federal Juvenile Delinquency Act: A Disparate Impact on Native American Juveniles*, 84 MINN. L. REV. 473, 474 (1999) (discussing disproportionate sentencing in federal courts compared to tribal or state courts); *Custody & Care*, *Juveniles*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/juveniles.jsp [https://perma.cc/Q6SC-G9XF] (last visited Oct. 25, 2022) (noting "high percentage of Native American juveniles" in federal juvenile population).

outdated. While the percentage of Native American youth in the federal juvenile system may be high, the actual number of Native American youth prosecuted in the federal juvenile system is still very low and substantially outnumbered by those prosecuted in the state juvenile system.[97] In addition, the normative proposals that scholars put forward for Native American youth are not for reforms in the federal juvenile system, but for removal of federal (and state) involvement altogether. To the extent that prosecutions do take place, these scholars argue that tribal juvenile systems—not federal or state juvenile systems—should have primary jurisdiction over Native American youth offenses.[98]

This lack of criticism of the federal juvenile system is impressive and noteworthy. Analyzing the actual number of federal juvenile prosecutions may explain why scholarly critique has been lacking.

B. *The Small System*

The federal government prosecutes very few youth. From 1998 to 2020, the number of youth charged in federal juvenile cases never exceeded 0.35% of total criminal and juvenile defendants.[99] In the past five years, this figure dropped

[97] For certain states, such as Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin, the federal government's jurisdiction over crimes "in Indian Country by or against Native Americans" has been transferred to the state under Public Law 83-280. U.S. SENT'G COMM'N, YOUTHFUL OFFENDERS IN THE FEDERAL SYSTEM, FISCAL YEARS 2010 TO 2015, at 29 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf [https://perma.cc/RP43-UTJR]. State juvenile systems handle substantially more cases involving Native American youth than the federal system. For example, in 2014, states received 15,600 delinquency cases of Native American youth, and petitioned 8,800. *See* U.S. GOV'T ACCOUNTABILITY OFF., NATIVE AMERICAN YOUTH, INVOLVEMENT IN JUSTICE SYSTEMS AND INFORMATION ON GRANTS TO HELP ADDRESS JUVENILE DELINQUENCY 24 (2018), https://www.gao.gov/assets/700/694306.pdf [https://perma.cc/V4MW-SMUF].

[98] *See, e.g.*, Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1679-89 (2016); Rolnick, *supra* note 96, at 132-35 ("Tribes must be the first line of authority when it comes to local juvenile delinquency matters.").

[99] Comparative data on juvenile and adult prosecutions from 1998 to 2020 is available through the Federal Justice Statistics Program. *Federal Criminal Case Processing Statistics*, BUREAU OF JUST. STAT., https://www.bjs.gov/fjsrc/ (last visited Oct. 25, 2022). The most recent comparative data is for 2020.

To calculate the number of youth who had initial proceedings in the federal juvenile system, go to the Bureau of Justice Statistics ("BJS") Federal Justice Statistics Program website *supra*, follow the "trends" hyperlink next to the "Defendants charged in criminal cases" heading, select 1998 to 2020 from the range of years dropdown menus, select "Type of initial proceeding" from the variable dropdown menu, select "Juvenile proceedings" as the value, and then select a suitable file format to download.

To calculate the number of individuals who had initial proceedings in the federal criminal system, go to the BJS Federal Justice Statistics Program website *supra*, follow the "trends"

even further—youth charged in federal juvenile delinquency cases were less than 0.1% of total defendants.[100] Most recently, in 2021, the number of youth charged in federal juvenile prosecutions was 0.07% of total federal defendants prosecuted.[101] Meanwhile, state figures show that states prosecute youth at a higher rate. For example, in 2020, of the thirty-seven states and Washington, D.C. that provided data for both criminal and juvenile cases, state juvenile cases made up 0.63% to 8.9% of total juvenile and criminal cases, with an average of 3.79% and a median of 3.27%.[102] In Minnesota, for example, juvenile cases

hyperlink next to the "Defendants charged in criminal cases" heading, select 1998 to 2020 from the range of years dropdown menus, select "Type of initial proceeding" from the variable dropdown menu, select all values except for "Juvenile proceedings," and then select a suitable file format to download.

To calculate the total number of youth and adults who had initial proceedings in either system, go to the BJS Federal Justice Statistics Program website *supra*, follow the "trends" hyperlink next to the "Defendants charged in criminal cases" heading, select 1998 to 2020 from the range of years dropdown menus, select "Type of initial proceeding" from the variable dropdown menu, select all values, and then select a suitable file format to download.

Data for 2021 from the U.S. courts confirm the persistance of this vast disparity between the number of individuals in initial federal criminal proceedings and federal juvenile proceedings. *See* TABLE D-13, *supra* note 5. For example, from October 1, 2020, to September 30, 2021, a total of 74,273 adults were involved in federal criminal proceedings and only fifty-five youths were involved in federal juvenile proceedings. The data coming from BJS and the U.S. courts vary slightly because the data was gathered at different times. *See* E-mail from Mark Motivans, Statistician, Bureau of Just. Stat., to Esther Hong, Assistant Professor of L., Wake Forest Univ. Sch. of L. (Feb. 16, 2021, 1:09 PM EST) (on file with *Boston University Law Review*) (noting disparities are attributable to time differences across data requests). However, the disparity between federal criminal proceedings and federal juvenile proceedings is undisputed, regardless of whether the data source is BJS or the U.S. courts.

[100] *See Federal Criminal Case Processing Statistics*, *supra* note 99.

[101] According to the most recent data for 2021, the total number of adults with initial proceedings in the federal criminal system was 74,273, while the total number of youth with initial proceedings in the federal juvenile system were fifty-five. *See* TABLE D-13, *supra* note 5.

[102] Comparative data on state criminal and juvenile cases is available through the Court Statistics Project ("CSP"). S. Gibson, B. Harris, N. Waters, K. Genthon, M. Hamilton & D. Robinson, *CSP STAT Criminal*, CT. STAT. PROJECT [hereinafter *CSP STAT Criminal*], https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal (last updated July 8, 2022).

To view the total number of incoming criminal cases, navigate to *CSP STAT Criminal*, *supra*, find the header "Select criminal case type," and click on the handcuff icon to "filter data by Total Criminal." Next, navigate to the dropdown menu "Select caseload measure," choose "Incoming Cases," then navigate to the dropdown menu "Select year," and choose "2020." Click on each state in the "State Court Caseloads National View" map to record the number of incoming criminal cases in each state. There are a total of forty-one states that provided data in 2020.

composed 8.9% of total juvenile and criminal cases.[103] While the federal government tracks the number of *individuals* charged and states count the number of *cases*, the disparity is still apparent. The share of juvenile cases in all criminal and juvenile cases in individual state systems is eleven to 155 times higher than the share of youth charged in federal proceedings set against total federal defendants.[104]

Federal juvenile delinquency cases are confidential and sealed, and thus it is difficult to confirm exactly what takes place in this system. However, important information can still be gleaned from data that the federal government offers through the Federal Justice Statistics Program ("FJSP"),[105] including the number of youth charged in juvenile delinquency cases, the underlying offense, and the federal judicial circuits where the cases were originally filed. Limited case information and judicial opinions from court dockets and research databases also provide further data.

First, the following chart shows the number of youth who were prosecuted in the federal juvenile system compared to adults in the criminal system from 2010

To view the total number of incoming juvenile cases, navigate to S. Gibson, B. Harris, N. Waters, K. Genthon, M. Hamilton & D. Robinson, *CSP STAT Juvenile*, CT. STAT. PROJECT [hereinafter *CSP STAT Juvenile*], https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-second-row/csp-stat-juvenile (last updated July 8, 2022). Find the header "Select juvenile case type" and click on the icon "Total Delinquency." Next, navigate to the dropdown menu "Select caseload measure," choose "Incoming Cases," then navigate to the dropdown menu "Select year," and choose "2020." Click on each state in the "State Court Caseloads National View" map to record the number of incoming juvenile delinquency cases in each state. There are a total of forty-two states that provided data in 2020.

To view the total number of incoming status offense cases, navigate to *CSP STAT Juvenile*, *supra*, find the header "Select juvenile case type," and click on the icon "Status Offense." Next, navigate to the dropdown menu "Select caseload measure," choose "Incoming Cases," then navigate to the dropdown menu "Select year," and choose "2020." Click on each state in the "State Court Caseloads National View" map to record the number of incoming status offense cases in each state. There are a total of thirty-one states that provided data in 2020.

To calculate the total sum of delinquency and status offense cases for states that provide data on both, add the total number of incoming juvenile cases to the total number of incoming status offense cases. See *infra* Appendix A and Appendix B for a list of all the states that provided case data, and comparative information for the states that provided both juvenile and criminal case data.

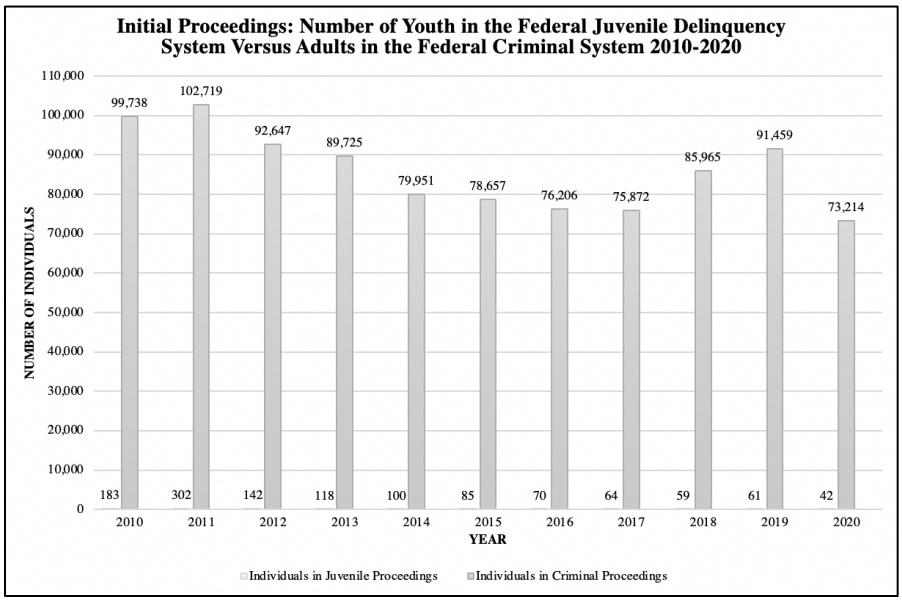
[103] *CSP STAT Criminal*, *supra* note 102; *CSP STAT Juvenile*, *supra* note 102; *see infra* app. A, app. B.

[104] *CSP STAT Criminal*, *supra* note 102; *CSP STAT Juvenile*, *supra* note 102; *see infra* app. A, app. B.

[105] The FJSP is operated by the BJS, a division of the Office of Justice Programs under the DOJ. *Agencies*, U.S. DEP'T OF JUST., https://www.justice.gov/agencies/list# [https://perma.cc/8SJZ-2G2C] (last visited Oct. 25, 2022) (showing relationship of FJSP with DOJ).

to 2020.[106] These figures account for the United States, including its territories. The figures from 2021 are consistent with prior years—fifty-five youths, compared to 74,273 adults, were prosecuted in the federal juvenile system.[107]

Figure 1. Initial Proceedings Population Comparison.



The comparison of these two populations provides one example of how small the federal juvenile system is relative to the federal criminal system. While 946,153 adults were subject to initial proceedings in the federal criminal system

[106] The figures from 2010 to 2020 originate from BJS. *See Federal Criminal Case Processing Statistics*, *supra* note 99. With respect to the data, the numbers are based on the "[t]ype of initial proceeding," which is defined as "[t]he type of court proceeding where the defendant first appeared." *FJSRC Statistics Online Help, Variable and Definition*, BUREAU OF JUST. STAT., https://www.bjs.gov/fjsrc/index.cfm?p=help&topic=definition&year=2010&db_type=CrimCtCases&saf=IN&agency=AOUSC&anal_name=Defendants%20charged%20in%20criminal%20cases [https://perma.cc/3TUC-NY8K] (last visited Oct. 25, 2022) (defining variables used by Federal Justice Statistics Resource Center). The number of prosecutions against youth is labeled as "juvenile proceedings." See *supra* note 99 and accompanying text for instructions on how to calculate juvenile statistics. The number of prosecutions against adults is the collective sum of filings that are not labeled "juvenile proceedings" such as indictments, felony and misdemeanor information, remand from appeals court, petition for removal, reopened cases, appeal to district court, consent to trial by U.S. magistrate, retrial after mistrial, retrial after remand, violation notice, and transfers. *See Federal Criminal Case Processing Statistics*, *supra* note 99 and accompanying text for instructions on how to calculate juvenile statistics.

[107] *See* TABLE D-13, *supra* note 5.

from 2010 to 2020, there were only 1,226 youths who had initial proceedings in the federal juvenile system during the same timeframe.[108]

Second, the actual reach of the federal juvenile system is quite limited. Most federal circuits did not have any youth federally prosecuted in their district courts. For example, in 2020, while adults were prosecuted in federal district courts of every federal circuit, there were zero youth prosecuted in the district courts of six federal circuits, and only one or two youths prosecuted in the district courts of three federal circuits.[109] The following graph exemplifies this divide. The graph compares the number of adult defendants in federal criminal proceedings with the number of youth prosecuted in federal juvenile proceedings in the district courts of the same federal circuits in 2020.[110]

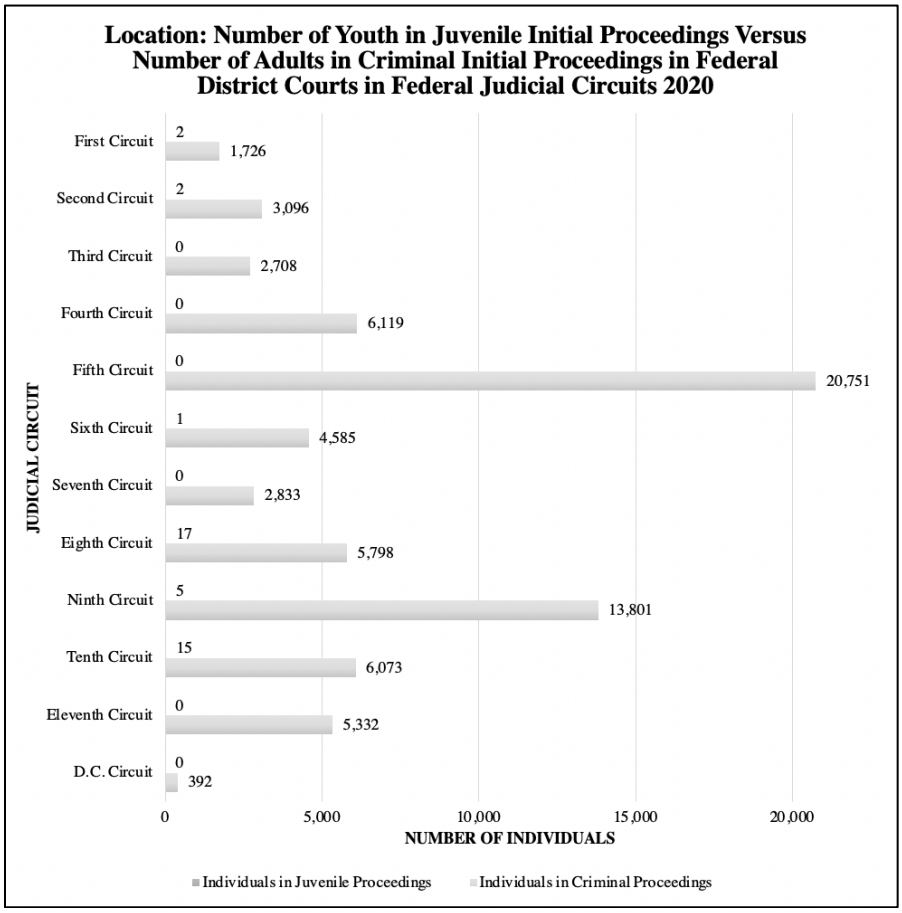
[108] *See Federal Criminal Case Processing Statistics*, *supra* note 99.

[109] *See Federal Criminal Case Processing Statistics*, *supra* note 99. To calculate the number of youth with initial proceedings in the federal juvenile system by federal circuit jurisdiction, go to *Federal Criminal Case Processing Statistics*, BUREAU OF JUST. STAT., https://www.bjs.gov/fjsrc/ [https://perma.cc/953H-H6N4] (last visited Oct. 25, 2022). Follow the "tables" hyperlink next to the "Defendants charged in criminal cases" heading, input the year 2020, select "Type of initial proceeding" as the variable, select "Juvenile proceedings" as the value. Next, click "add column," select "U.S. Federal judicial circuit" as the variable, and then select a value, for example, "First Circuit." Then select a suitable file format to download. Repeat these steps to get all of the figures for each of the judicial circuits.

To calculate the number of adults with initial proceedings in the federal criminal system by federal circuit jurisdiction, go to *Federal Criminal Case Processing Statistics*, BUREAU OF JUST. STAT., https://www.bjs.gov/fjsrc/ [https://perma.cc/953H-H6N4] (last visited Oct. 25, 2022). Follow the "tables" hyperlink next to the "Defendants charged in criminal cases" heading, input the year 2020, select "Type of initial proceeding" as the variable, select all values except "Juvenile proceedings" as the value. Next, click "add column," select "U.S. Federal judicial circuit" as the variable, and then select a value, for example, "First Circuit." Finally, select a suitable file format to download. Repeat these steps for data from each of the federal circuits.

[110] Initial proceedings include indictments, felony and misdemeanor informations, remand from appeals court, petition for removal, reopened cases, appeal to district court, consent to trial by U.S. magistrate, retrial after mistrial, retrial after remand, violation notice, and transfers. *See id.*

Figure 2. Location (Judicial Circuits).



As this chart demonstrates, the disparity between youth prosecuted in the federal juvenile system versus adults prosecuted in the federal criminal system is vast. For example, while 20,751 adults were prosecuted in the district courts in the Fifth Circuit, which are located in the states of Louisiana, Mississippi, and Texas, no youths were prosecuted in the same location. In conclusion, while federal prosecutors filed charges against adults for federal crimes in the district courts of *all* the federal judicial circuits, they only filed charges against youth for federal crimes in a fraction of them.

Third, the number of adults prosecuted in federal criminal cases greatly outnumber the number of youth charged in federal juvenile delinquency cases

for every type of offense. Offense is defined in relevant part as "[a] crime"[111] and is divided into seven "[f]iling offense types":[112] "[v]iolent," "[p]roperty," "[d]rug," "[p]ublic-order," "[w]eapon," "[i]mmigration," and "[o]ther offenses." For cases that involve more than one offense, the cases are labeled as the most serious offense charged.[113]

Based on FJSP data, the chart below sets forth the number of federal prosecutions in 2020 against youth versus adults for all offense types from the entire United States.[114]

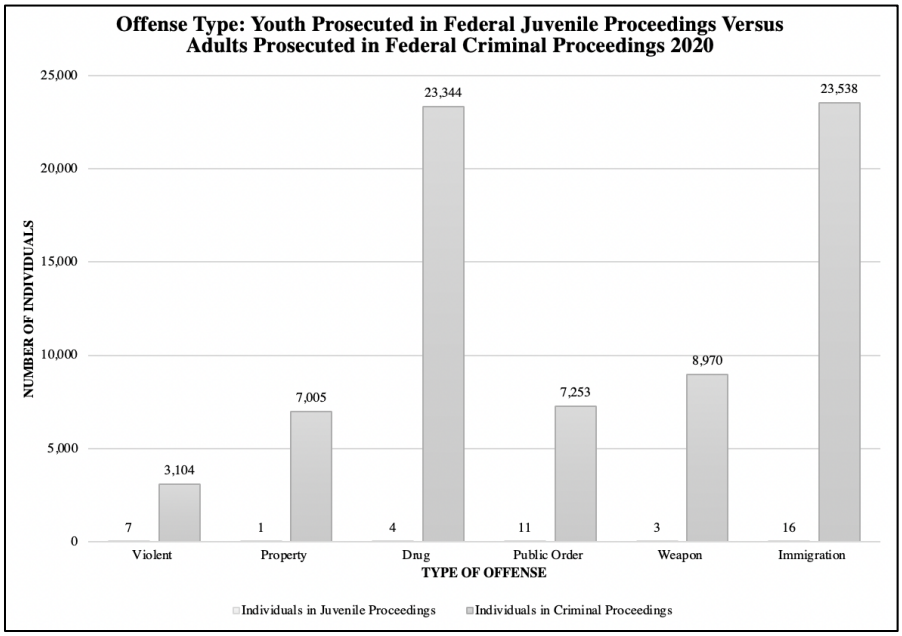
[111] *Glossary*, BUREAU OF JUST. STAT., https://bjs.ojp.gov/glossary?title=&page=6#glossary-terms-block-1-81he7oy0-8nr2azv [https://perma.cc/5J5Y-VYSU] (last visited Oct. 25, 2022).

[112] *See Federal Criminal Case Processing Statistics*, *supra* note 99. To show the different types of filing offenses: go to *Federal Criminal Case Processing Statistics*, BUREAU OF JUST. STAT., https://www.bjs.gov/fjsrc/ [https://perma.cc/953H-H6N4] (last visited Oct. 25, 2022). Follow the "trends" hyperlink next to the "Defendants charged in criminal cases" heading, input any range of years, and select "[f]iling offense type" as the variable. *See FJSRC Statistics On-Line Help, Variable and Definition*, BUREAU OF JUST. STAT., https://www.bjs.gov/fjsrc/index.cfm?p=help&topic=definition&year=1998&db_type=CrimCtCases&saf=IN&agency=AOUSC&anal_name=Defendants%20charged%20in%20criminal%20cases [https://perma.cc/4WDU-PCZ9]. For definitions of these offenses, see *Glossary*, *supra* note 111.

[113] *FJSRC Statistics On-Line Help, Variable and Definition*, *supra* note 112.

[114] No "other" offense exists. *See Federal Criminal Case Processing Statistics*, *supra* note 99. To calculate the number of youth and adults who had initial proceedings in the federal juvenile or criminal system by the offense: go to *Federal Criminal Case Processing Statistics*, BUREAU OF JUST. STAT., https://www.bjs.gov/fjsrc/ [https://perma.cc/953H-H6N4] (last visited Oct. 25, 2022). Follow the "tables" hyperlink next to the "Defendants charged in criminal cases" heading, input the year 2000, select "[f]iling offense type" as the variable, and check on the box "[a]ll values." Next, click "add column", select "[t]ype of initial proceeding" and check on the box "[a]ll values." Then select a suitable file format to download.

Figure 3. Offense Type.



This chart underscores that for every type of offense, many more adults were prosecuted in the federal criminal system than youth in the federal juvenile system.

In sum, the data lead to the conclusion that the federal government rarely prosecutes youth for federal offenses. These figures explain why assertions of widespread excessive prosecutorial power or punitiveness are indeed lacking in the federal juvenile system: there are so few prosecutions in the system to begin with.

C. *The Nondisruptive System*

Furthermore, unlike the federal criminal system, the federal juvenile system has very little impact on the policy or operation of its state counterpart.

The juvenile system "falls largely within the purview of state and local governments[.]"[115] For example, in 2019, approximately 386,605 cases were petitioned[116] (or formally filed) against youth in the overall state juvenile system,

[115] Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform*, 86 GEO. WASH. L. REV. 1604, 1639 (2018).

[116] *Glossary*, EASY ACCESS TO JUV. CT. STAT. 1985-2019, https://www.ojjdp.gov/ojstatbb/ezajcs/asp/glossary.asp#petitioned_case

and approximately 336,020 cases were nonpetitioned[117] (or informally processed) against youth nationwide, for a total of approximately 722,625 state juvenile delinquency matters.[118] Meanwhile, in 2019, sixty-one youths were prosecuted in the federal juvenile system nationwide.[119]

It is also telling that nearly all of the seminal Supreme Court cases regarding the juvenile system and minors' constitutional rights in juvenile and criminal law—which generated waves of juvenile law scholarship and research—originated from state juvenile courts, not federal district courts.[120]

In sum, the federal juvenile system lacks many of the pathologies that are present in other systems,[121] such as excessive prosecutorial power, excessive punitiveness, or disruption to the state juvenile system. The federal government's carceral control of youth is indeed limited in size and scope. The next two Parts examine the underlying reasons for these characteristics.

III. THE NOTEWORTHY FEDERAL JUVENILE SYSTEM

This quiet, tiny, and nondisruptive federal juvenile system should prompt scholars to ask why this system is the way it is. The seemingly obvious answers to this question, once closely examined, do not fully explain the relative dearth of related cases and pathologies.

This Part presents two arguments that may appear at first to justify these unique characteristics of the federal juvenile system, but, at the end of the day, do not hold sufficient weight. This Part also chips away at the idea that the difference in population—children versus adults—is the immutable reason for the uniqueness of the federal juvenile system.

[https://perma.cc/6RJX-DT47] (last updated June 22, 2021) ("Petitioned (formally handled) cases . . . appear on the official court calendar in response to the filing of a petition or other legal instrument requesting the court to adjudicate the youth delinquent or to waive the youth to criminal court for processing as an adult.").

[117] *Id.* ("Nonpetitioned (informally handled) cases are those cases that duly authorized court personnel screen for adjustment without the filing of a formal petition. Such personnel include judges, referees, probation officers, other officers of the court, and/or an agency statutorily designated to conduct petition screening for the juvenile court.").

[118] To access data, go to Easy Access to Juvenile Court Statistics. *Easy Access to Juvenile Court Statistics*, EASY ACCESS TO JUV. CT. STAT., OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/ezajcs [https://perma.cc/3NHM-N4HT] (last visited Oct. 25, 2022). Click on "Analyze Delinquency Cases." For the header that states "Row Variable," select "Year of Disposition." For the header that states "Column Variable," select "Manner of Handling." Under the table "Year of Disposition," select only the year "2019." Then click the button "Show Table."

[119] *See supra* Section II.B.

[120] *See, e.g.*, *In re* Gault, 387 U.S. 1, 1 (1967); *In re* Winship, 397 U.S. 358, 359-60 (1970); J.D.B. v. North Carolina, 564 U.S. 261, 267-68 (2011); *cf.* Kent v. United States, 383 U.S. 541, 541, 557 (1966).

[121] *See infra* Part V.

The first argument considers the possibility that youth simply do not commit federal crimes, or that federal prosecutors have no interest in prosecuting youth. The second argument examines whether the federal juvenile system has a completely different infrastructure than the federal criminal system. Both arguments lack evidence and provide an even stronger incentive to explain the federal juvenile system.

A. *Youth and Federal Crimes*

Some may believe that youth do not commit federal crimes or that federal prosecutors have no interest in prosecuting youth. Both assumptions lack evidence. Many youth commit federal crimes, and during several moments in history, high-ranking federal prosecutors and officials expressly stated that they wanted federal prosecutors to prosecute more youth for federal crimes.[122] Yet the number of youth prosecuted by the federal government remained consistently small.

First, the FJDA uses a very broad definition that theoretically allows every federal offense to be prosecuted in the federal juvenile system.[123] A federal act of juvenile delinquency is currently defined as a violation of a federal law "committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult."[124] There is also an additional age requirement in the federal juvenile system—the youth must be younger than twenty-one years old during the federal juvenile delinquency hearing and disposition.[125] Therefore, *any* violation of federal criminal law can technically qualify as an act of federal juvenile delinquency if committed before a youth's eighteenth birthday, and the hearing (trial) and disposition (sentencing) take place before the youth turns twenty-one years old. While in practice, there may be some laws that youth are less likely to violate simply due to their age and relative lack of resources, the FJDA itself does not provide any categorical exemptions. Instead, it adds an additional offense that prohibits the use and possession of firearm and

[122] *See, e.g.*, *AG Racine on OAG's Prosecution of Juvenile Violent Crime*, OFF. OF U.S. ATT'Y GEN. FOR D.C. (Jan. 28, 2022), https://oag.dc.gov/release/ag-racine-statement-oags-prosecution-juvenile-0 [https://perma.cc/8U9Y-V5XQ] ("Anyone, including a young person, who commits a violent crime should be held accountable.").

[123] *See* 18 U.S.C. § 5031 (providing statutory definition of "juvenile delinquency").

[124] *Id.* § 5031.

[125] *Id.* (defining juvenile as "person who . . . for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency . . . has not attained his twenty-first birthday"). Youth who commit offenses before the age of eighteen, but are prosecuted after the age of twenty-one must face prosecution in the federal criminal system. *See, e.g.*, United States v. Perry, No. 16-20062, 2017 WL 1364083, at *11-12 (E.D. Mich. Apr. 7, 2017) (holding that, absent showing that delay in proceedings caused defendant "substantial prejudice to his right to a fair trial," defendant can be charged as adult notwithstanding his age at time of crime).

ammunition for those under eighteen years old, unless certain statutory exceptions apply.[126]

For example, drug and property offenses are commonly prosecuted in the federal criminal system. In 2019, there were 27,832 individuals prosecuted in federal criminal cases for drug offenses, and 9,811 for property offenses.[127] Meanwhile, in the same year, only five youths were prosecuted by the federal government for drug offenses and only one for a property offense.[128]

That youth simply do not commit drug or property offenses cannot explain this disparity. They do, but states prosecute them instead. For example, in 2019, the state juvenile system heard a total of 96,412 cases involving drug offenses and 214,485 cases involving property offenses.[129] These state drug and property offenses share a common definition with the federal one, although the state drug offenses include some additional behavior.[130] Even if state laws are overinclusive and prohibit actions not covered by federal criminal laws, there are certainly more than five youths who have violated federal drug laws and more than one youth who violated federal property laws in 2019.

Moreover, in present times, as well as historically, high-ranking federal prosecutors and officials have expressed a desire to prosecute more youth for violations of federal law. In 2018, the Chief of the Organized Crime and Gang Section of the DOJ published a roadmap for federal prosecutors to prosecute youth.[131] He underscored the importance of these prosecutions because of the "increase in organized and violent criminal acts"[132] committed by youth. While this participation is not entirely new, federal law enforcement became aware of "organizations and gangs actively recruiting juveniles to commit the group's

[126] 18 U.S.C. § 5031 (referring to *id*. § 922(x)) (referencing list of expressly juvenile-specific crimes).

[127] *See supra* Section II.B, fig.3 (providing visualization of FJSP data).

[128] *See supra* Section II.B, fig.3.

[129] To access data, go to Easy Access to Juvenile Court Statistics. *Easy Access to Juvenile Court Statistics*, EASY ACCESS TO JUV. CT. STAT., OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/ezajcs [https://perma.cc/3NHM-N4HT] (last visited Oct. 25, 2022). Click on "Analyze Delinquency Cases." Under the heading "Year of Disposition," check the box for "2019." Under the heading "Referral Offenses," check the box for "drugs" or "property." Above the "Show Table" button, set the "Row Variable" to "Referral Offense" and the "Column Variable" to "Year of Disposition." Then, click "Show Table."

[130] Both state and federal categorization of offenses rely on the FBI's Uniform Crime Report labels. However, state offenses may include more acts that are unlawful for youth. For example, state "drug offenses" also include "[s]niffing of glue, paint, gasoline, and other inhalants." *Glossary*, *supra* note 116.

[131] *See* David Jaffe, *Strategies for Prosecuting Juvenile Offenders*, DEP'T JUST. J. FED. L. & PRAC., Nov. 2018, at 91, 92 ("This article seeks to assist the organized crime or gang prosecutor . . . , both where the prosecutor seeks to maintain a juvenile within the juvenile offender process, and also when the prosecutor seeks to transfer the offender to adult status.").

[132] *Id*. at 91.

more heinous acts, in part based upon the belief that a juvenile will receive leniency or no punishment for their crimes."[133]

This language about youth violence and necessary federal prosecution harkens back to the 1980s and 1990s when federal officials used even harsher words against youth, particularly targeting Black youth, deemed "super-predators," from inner-cities.[134] President Clinton stated that youth crime "has got to become our top law-enforcement priority," warning that if the problem of juvenile crime were not fixed within six years, then "our country is going to be living with chaos."[135] Also, in a prior version of the Justice Manual for federal prosecutors, a section of the Criminal Resource Manual, quoting the Attorney General and a supervising U.S. Attorney, stated that "[c]learly, youth violence is the greatest single crime problem that this nation faces."[136] It characterized "youth violence" as "not only a criminal justice problem but . . . one of the great public health problems we face in America today."[137] Another part of this Manual criticized the state handling of youth offenders as too soft and too focused on rehabilitation rather than punishment, stating that "[i]t is imperative for the safety of the citizens of the United States that United States Attorneys' Offices become more involved in seeking out the most serious juvenile offenders for prosecution as delinquents or transferring them for criminal prosecution as adults."[138] According to the Manual, these youth gangs were "motivated by violence, extortion, intimidation, and the illegal use and trafficking of drugs and weapons" and were a "national problem."[139] Finally, the manual urged United States Attorneys to "take a leadership role in the prosecution of these individuals who threaten the security and order of our communities."[140]

Yet, despite this markedly punitive time period of the 1980s and 1990s, alongside the rise of mass incarceration, the prison-industrial complex,[141] and

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[133] *Id*.

[134] *See* Barry C. Feld, *Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts*, 102 MINN. L. REV. 473, 474 (2017) (referring to era of 1980s to 1990s as "Get Tough Era"); Robert J. Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 425 (2017); John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 582-84 (2016); Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 472-73 (2012).

[135] Alison Mitchell, *Clinton Urges Campaign Against Youth Crime*, N.Y. TIMES, Feb. 20, 1997, at B9.

[136] U.S. Dep't of Just., Crim. Res. Manual § 101 (2020) (quoting Janet Reno, U.S. Att'y Gen., Remarks at Weekly Press Conference at the United States Department of Justice (Oct. 27, 1994)).

[137] *Id*.

[138] *Id*. § 106.

[139] *Id*. § 149.

[140] *Id*.

[141] *See generally* Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC, Dec. 1998.

the carceral state,[142] federal prosecutions of youth remained low. The number of youth prosecuted in federal juvenile prosecutions (calculated by terminated proceedings) from 1989 to 1995 never exceeded 217 proceedings a year nationwide.[143] In fact, a high of 217 proceedings were terminated in 1990, and, by 1995, the number dropped to 122 proceedings.[144] Even when youth committed federal crimes, and powerful federal officials like the President or Attorney General expressly voiced their desire to prosecute more youth, a sharp rise in prosecutions did not follow.

B. *Shared Infrastructure*

Next, one might believe that the present and past infrastructure of the federal juvenile system is completely separate from the federal criminal system. This too is incorrect. Presently, the two systems share much of the same infrastructure, including the same underlying criminal laws, federal prosecutors, defense attorneys, federal courts, and proceedings. Their pasts are even more intertwined.

1. Present

First, as described above, the same federal criminal laws apply in both federal juvenile and federal criminal systems. In addition to these same underlying laws, the federal juvenile system relies on the same prosecutors as the federal criminal system—U.S. Attorneys and Assistant U.S. Attorneys.[145] The management of federal juvenile delinquency cases, similar to federal criminal cases, falls under the Criminal Division of the DOJ,[146] even though juvenile delinquency proceedings are technically deemed civil (or more commonly viewed as quasi-criminal hearings) and not criminal proceedings.[147] Currently, the Organized Crime and Gang Section of the Criminal Division of the DOJ is "available for consultation on all issues pertaining to the prosecution of juveniles",[148] even though prosecutions are not limited to organized crimes or gang crimes.

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[142] *See* Roberts, *supra* note 13, at 9-10.

[143] JOHN SCALIA, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: JUVENILE DELINQUENTS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 2 (Tom Hester & Tina Dorsey eds., 1997), https://www.bjs.gov/content/pub/pdf/Jdfcjs.pdf [https://perma.cc/R9Q5-LXGF].

[144] *Id*.

[145] U.S. Dep't of Just., Just. Manual § 9-2.001 (2018); *id*. § 9-8.110 (2020).

[146] *See* U.S. Dep't of Just., Just. Manual § 9-8.000 (2020).

[147] Jonah R. v. Carmona, 446 F.3d 1000, 1006-07 (9th Cir. 2006) (observing civil nature of federal juvenile proceedings and noting how FJDA conflates "juvenile delinquency" with "crime"); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1932 (2000) (stating that juvenile delinquency is one "obvious example" of "arguably civil proceedings" that "have been recognized as criminal or quasi-criminal in nature").

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

Youth also have a constitutional right to counsel.[149] Similar to indigent defense representation in federal criminal cases,[150] federal public defender organizations, assigned counsel, panel attorneys, or contract attorneys provide a defense for indigent youth.[151]

Federal juvenile delinquency cases are filed in the same federal district courts as federal criminal cases, and they are heard and managed by the same federal judges and magistrate judges.[152] In other words, there are no separate courts or judges that specialize in juvenile prosecutions.[153] Federal juvenile delinquency cases are also handled in a very similar manner as federal criminal cases. Federal prosecutors initiate prosecutions against youth for violations of federal law by using a charging document often used in federal criminal cases—an information.[154] The information in a juvenile case is like an information filed in an adult criminal case, except that the youth's initials are used instead of the name, and the Juvenile Justice and Delinquency Prevention Act of 1974 must be referenced in the information.[155] Additionally, there is no requirement for a grand jury indictment in juvenile cases.[156] The one material difference between adult and juvenile criminal proceedings is a certification requirement, which will be explained in detail in the next Part.[157]

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[149] *In re* Gault, 387 U.S. 1, 41 (1967) (granting right to counsel in juvenile delinquency hearings under Fourteenth Amendment).

[150] *See Defender Services*, U.S. CTS., https://www.uscourts.gov/services-forms/defender-services [https://perma.cc/9UAG-AQAP] (last visited Oct. 25, 2022); *Indigent Defense Systems*, BUREAU OF JUST. STAT., https://www.bjs.gov/index.cfm/content/data/index.cfm?ty=tp&tid=28 [https://perma.cc/GS8T-JPY3] (last visited Oct. 25, 2022); OFF. OF JUV. JUST. & DELINQ. PREVENTION, LITERATURE REVIEW: INDIGENT DEFENSE FOR JUVENILES 3-4 (2018), https://www.ojjdp.gov/mpg/litreviews/Indigent-Defense-for-Juveniles.pdf [https://perma.cc/4ZJT-83Z3] (listing types of indigent defense, including public defender offices and panel attorneys).

[151] OFF. OF JUV. JUST. & DELINQ. PREVENTION, LITERATURE REVIEW: INDIGENT DEFENSE FOR JUVENILES 3-4 (2018), https://www.ojjdp.gov/mpg/litreviews/Indigent-Defense-for-Juveniles.pdf [https://perma.cc/4ZJT-83Z3].

[152] 18 U.S.C. §§ 5032-5033 (detailing procedure for delinquency proceedings).

[153] *Id*.

[154] An information in a federal criminal case is "the charging instrument employed when a defendant waives his rights to a grand jury and agrees to be charged by the United States Attorney." Jaffe, *supra* note 131, at 94.

[155] *Id*.

[156] *Id*.

[157] 18 U.S.C. § 5032 (requiring prosecutors to certify case meets one of three conditions to prosecute juveniles in federal court).

Next, a federal juvenile delinquency case may be resolved by plea[158] or proceed to a "trial" called a delinquency hearing.[159] These hearings are adversarial and very similar to criminal trials, except that they are generally confidential[160] and no constitutional right to a jury exists.[161] While the lack of these constitutional rights may appear material, this significance is minimized when one considers that most federal criminal cases are resolved by plea and never make it to trial anyway, with no interaction with a jury and limited oversight by the public.[162]

For juvenile delinquency cases, a judge, instead of a jury, decides guilt under the same standard of proof that applies in criminal cases: beyond a reasonable doubt.[163] After a judge makes a finding that a youth committed the alleged offense(s) beyond a reasonable doubt, a disposition hearing—the equivalent of a sentencing hearing in criminal cases—takes place.[164] At the disposition hearing, the court may issue similar types of rulings as adult criminal cases: the court may suspend the findings of juvenile delinquency, place the youth on probation, commit the youth to official detention, order restitution, or order supervised release after detention.[165]

Similar to adults convicted of federal crimes, custody of youth found delinquent is overseen by the Federal Bureau of Prisons ("BOP"), an agency in the DOJ.[166] However, due to the very small population of youth who are

[158] *See, e.g.*, United States v. E.K., 471 F. Supp. 924, 926-27 (D. Or. 1979).

[159] Jaffe, *supra* note 131, at 101 ("The delinquency hearing is basically the trial for a juvenile for whom the prosecutor has not sought to transfer to adult status.").

[160] The proceedings, records, and filings are confidential, unless certain exceptions apply. 18 U.S.C. § 5038(a) (listing limited circumstances under which juvenile delinquency proceeding records may be released); Jaffe, *supra* note 131, at 97-98 (noting juvenile proceeding records are generally sealed, but sex registry requirement under the Sex Offender Registration and Notification Act still applies to juveniles convicted of sex crimes).

[161] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (finding no constitutional right to jury trial in juvenile delinquency proceeding). The DOJ's policy is that it "opposes" jury trials in juvenile delinquency cases. U.S. Dep't of Just., Just. Manual § 9-8.200 (2018) ("The law does not authorize jury trial for juveniles, and the Department opposes them.").

[162] *See* Gramlich, *supra* note 47.

[163] *See In re* Winship, 397 U.S. 358, 368 (1970).

[164] 18 U.S.C. § 5037(a) ("If the court finds a juvenile to be a juvenile delinquent, the court shall hold a disposition hearing concerning the appropriate disposition . . . .").

[165] *Id.*

[166] *Organizational Chart*, U.S. DEP'T OF JUST., https://www.justice.gov/agencies/chart [https://perma.cc/8C23-AKBS] (last visited Oct. 25, 2022); *Juveniles*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/juveniles.jsp [https://perma.cc/G3C6-2ZQQ] (last visited Oct. 25, 2022).

prosecuted and detained for federal offenses, there is no separate federal facility, and the BOP usually contracts to incarcerate youth in state and local facilities.[167]

Thus, as to the underlying federal criminal laws, prosecutors, courts, types of proceedings, and types of outcomes, the federal juvenile system has much in common with the federal criminal system. Yet still, the number of youth in the federal juvenile system is small.[168]

2. Past

Next, the history of the two federal systems is even more intertwined. Congress formally created the federal juvenile system by statute in 1938 through the FJDA.[169] The FJDA created a separate track for juveniles—defined as those under eighteen years old—who are accused of violating federal criminal laws.[170] Prosecution under the FJDA determines whether juveniles are "delinquent"—a status—rather than convicting them for a separate offense.[171]

Before the passage of the FJDA in 1938, federal prosecutors treated youth who committed federal criminal offenses in the same manner as adult offenders. As a national commission headed by former Attorney General George W. Wickersham observed in a report submitted on May 28, 1931, a child prosecuted in federal court is "on the same footing as the adult" and "[t]he concept of juvenile delinquency is unknown to the Federal Penal Code."[172] As the federal government ramped up its involvement in criminal law after the Civil War, youth were prosecuted for federal offenses, just like adults. For example, "2,243 boys and girls of 18 years and under . . . were held in jail for Federal offenses during the six months ending December 31, 1930."[173] Those offenses included violations of "various Federal laws such as the prohibition acts, the immigration

[167] *See* Beth Schwartzapfel, *There Are Practically No Juveniles in Federal Prison—Here's Why*, MARSHALL PROJECT (Jan. 27, 2016, 7:13 AM), https://www.themarshallproject.org/2016/01/27/there-are-practically-no-juveniles-in-federal-prison-here-s-why [https://perma.cc/G529-ESWA] ("Because federal prisons lack programs and services appropriate for young people, juveniles in the federal system are sent to local prisons and jails around the country.").

[168] *See supra* Section II.B.

[169] Federal Juvenile Delinquency Act of 1938, Pub. L. No. 75–666, §§ 1-9, 52 Stat. 764, 764-66 (codified as amended at 18 U.S.C. §§ 5031-5043) (establishing act to "provide for the care and treatment of juvenile delinquents"). The statutory provisions of the FJDA have been amended by other federal criminal and juvenile statutes, such as the Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93–415, 88 Stat. 1109 (1974) (codified as amended in scattered sections of 18 U.S.C. and 34 U.S.C.); Standefer, *supra* note 96, at 476 (noting Juvenile Justice and Delinquency Prevention Act amended FJDA).

[170] *See* 18 U.S.C. § 5031.

[171] William S. Sessions & Faye M. Bracey, *A Synopsis of the Federal Juvenile Delinquency Act*, 14 ST. MARY'S L.J. 509, 510 & n.4 (1983).

[172] NAT'L COMM'N ON L. OBSERVANCE & ENF'T, REPORT ON THE CHILD OFFENDER IN THE FEDERAL SYSTEM OF JUSTICE 2 (1931) [hereinafter WICKERSHAM REPORT].

[173] *Id*.

acts, the motor vehicle theft act, the antinarcotic act, the white slave act, and the postal laws."[174] Even children under fourteen years old were imprisoned for federal offenses.[175]

And while certain communities made arrangements for youth to enter into the burgeoning state juvenile courts for a similar state offense instead,[176] no official route to transfer these children or to put them on a separate federal track existed.[177] The Commission thus proposed that states handle all juvenile offenses to the extent possible, and not that a separate federal juvenile system be created.[178] Congress disagreed.

Instead, in 1932, Congress passed a law that allowed federal prosecutors to surrender individuals under the age of twenty-one who had committed an offense that violated both state and federal laws to state authorities if in the best interest of the United States and the child.[179] This discretion, however, did not result in widespread change. By the 1930s, the federal government's involvement in local criminal matters was in "full swing."[180] And until 1938, "a juvenile offender against the laws of the United States [was] treated and prosecuted in the same manner as an adult," as then Attorney General Homer S. Cummings informed Congress.[181]

Finally, in 1938, Congress created a separate path to hold youth accountable for violating federal laws through the FJDA, thereby creating the federal juvenile

[174] *Id*.

[175] *Id*. at 34.

[176] *Id*. at 149-51. Before the late nineteenth century, children over seven years old could be prosecuted and punished as adults, with some protection for those between seven and fourteen years old. *See* Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 145 (2003) (explaining that in late eighteenth century, children below seven years "were incapable of committing criminal offenses," and there was rebuttable presumption that children between seven and fourteen "lacked the capacity to form the mens rea for a given offense"); Robert M. Mennel, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 CRIME & DELINQ. 68, 70 & n.8 (1972) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *23) (noting that, before 1825, children under seven were "considered incapable of mischief" and children between seven and fourteen were "assumed to be incapable of felony" unless court and jury found that they "could discern between good and evil"). In 1899, states began to create juvenile courts to adjudicate juvenile offenses, a movement driven by upper- and middle-class reformers. BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE 19-20, 28 (2017).

[177] *See* WICKERSHAM REPORT, *supra* note 172, at 149-51.

[178] *See id*. at 151-53.

[179] Act of June 11, 1932, ch. 243, 47 Stat. 301 (codified as amended at 18 U.S.C. § 5001); United States v. Smith, 675 F. Supp. 307, 311 n.2 (E.D.N.C. 1987).

[180] Brickey, *supra* note 39, at 1143.

[181] H.R. REP. NO. 2617, at 2 (1938).

system.[182] The first version of the FJDA defined a juvenile as "a person seventeen years of age or under," and defined juvenile delinquency as "an offense against the laws of the United States committed by a juvenile and not punishable by death or life imprisonment."[183] Yet, the law remained relatively toothless for decades. The decision to prosecute youth in the federal juvenile system required both the accused youth and federal prosecutors to agree.[184]Also, upon the Attorney General's sole discretion, youth still could be tried as an adult in the federal criminal system or surrendered to state authorities to face state charges.[185]

While small changes were made to the FJDA after 1938, it was not until 1974 that Congress imposed more significant restrictions in the federal prosecution of youth through the Juvenile Justice and Delinquency Prevention Act of 1974,[186] which revised the FJDA, as detailed in Part IV. The fact that Congress revised the FJDA in 1974 should be more carefully studied by legal scholars and historians. The 1970s were a pivotal time when federal criminal jurisdiction and federal prosecution against adults significantly expanded.[187] Thus, the reforms to the federal juvenile system in 1974 likely served as the point at which the federal juvenile system and federal criminal system diverged.

Thus, until the late 1930s and perhaps even until the early 1970s, the histories of the two systems were interwoven. Much is still shared between the two systems, such as the infrastructure and underlying federal criminal laws. Yet, the size and scholarly and policy impact of the federal criminal system greatly outweigh the size and impact of the federal juvenile system. The next Part considers the material differences between the two systems that likely account for this vast discrepancy.

IV. THE RESTRAINED FEDERAL JUVENILE SYSTEM

This Part explores the reasons that the federal juvenile system remains small, limits the punitive reach of the federal government over youth, and also lacks the widespread pathologies—such as excessive prosecutorial power or punitiveness—that manifest in the federal criminal system, as well as in the state criminal and juvenile systems. Two unique features of the federal juvenile system stand out: first, greater restrictions in charging youth with federal crimes; and second, more lenient sentencing along with limits on transferring of youth

[182] Federal Juvenile Delinquency Act of 1938, Pub. L. No. 75–666, §§ 1-9, 52 Stat. 764, 764-66 (1938) (codified as amended at 18 U.S.C. §§ 5031-5043).

[183] *Id*. § 1.

[184] *See id*. § 2.

[185] *See id*.

[186] Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified as amended in scattered sections of 18 U.S.C. and 34 U.S.C.).

[187] *See* Simons, *supra* note 76, at 911 (marking 1970s as introducing first of "three periods of sustained growth" in federal prosecutions against adults); Barkow, *supra* note 9, at 276-77 (observing that "biggest growth spurt" of federal criminal laws took place in 1970s).

to the adult criminal system. As a case example will show,[188] when several of these factors come together to create just enough delay or diminished returns, federal prosecutors may take the path of least resistance and rely on state authorities to handle the matter instead.

A. *Prosecutorial Certifications*

The unique rules pertaining to federal prosecution of youth often make it harder and more time-consuming to prosecute them. As David Jaffe, the Chief of the Organized Crime and Gang Section of the DOJ, wrote, federal juvenile prosecutions "can be incredibly challenging."[189] Also, if the federal government wants to prosecute youth as adults in the federal criminal system, federal prosecutors generally have to file charges first in the federal juvenile system, and then move to transfer the youth, which takes even more work. Here, a prosecutor must "engage in significant investigation to secure relevant records and make important tactical decisions given how quickly a delinquency proceeding can be scheduled, or how slow a transfer and attendant transfer process may take."[190]

First, in nearly every federal juvenile prosecution, a prosecutorial certification must be filed.[191] The certification requires a statement that at least one of the following three conditions is met in the case: (1) the "juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction" over the case; (2) "the State does not have available programs and services adequate for the needs of juveniles"; or (3) the offense violates an enumerated drug or firearm law,[192] or is a felony crime of violence,[193] "and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction."[194] There is some ambiguity as to whether the "substantial federal interest" requirement applies to all three conditions, or only to the third condition.[195] As recently as 2014, the Ninth Circuit ruled on an issue

[188] *See* discussion *infra* Section IV.C.

[189] Jaffe, *supra* note 131, at 91.

[190] *Id*. at 116-17.

[191] 18 U.S.C. § 5032 (providing certification requirement for all offenses other than certain maritime law violations).

[192] *Id*.

[193] There is no statutory definition of "crime of violence." In the past, courts have relied on definitions outlined in 18 U.S.C. § 16 pertaining to use, threatened use, attempted use, or by nature, substantial risk of physical force against person or property. *See* § 16. However, the Supreme Court held in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), that 18 U.S.C. § 16(b) is unconstitutionally vague in its incorporation into the Immigration and Nationality Act. *Id*. at 1223. Therefore, there is some ambiguity as to how the courts will define a crime of violence. *See* Jaffe, *supra* note 131, at 95-96 (noting that § 16 "operates as the default definition for a 'crime of violence'").

[194] 18 U.S.C. § 5032.

[195] Jaffe, *supra* note 131, at 95.

of first impression that it applied only to the third condition.[196] If this certification requirement is met, then the case may proceed. If it is not met, then the youth must be returned to the legal authorities of a state, the District of Columbia, or any U.S. commonwealth or territory.[197]

The certification requirement restricts federal prosecutorial power over youth because the certification must be signed by either the Attorney General,[198] or the U.S. Attorney.[199] An individual Assistant U.S. Attorney cannot sign this certification unless the U.S. Attorney gives express permission.[200] This means that in federal juvenile prosecutions, either the Attorney General or the U.S. Attorney of a federal judicial district must formally agree to take every case.

Federal district courts then conduct procedural review of the certification to ensure timely filing and signing by the proper official.[201] The Fourth Circuit also subjects the certifications to substantive judicial review.[202] For example, one district court in the Fourth Circuit found that a youth's armed bank robbery offense did not meet the "substantial federal interest" requirement and prevented the case from proceeding,[203] even though bank robberies are commonly prosecuted in federal court.[204] The Fourth Circuit, however, is unique in requiring judicial review of the prosecutor's certification. In all other courts of

[196] United States v. IMM, 747 F.3d 754, 764 (9th Cir. 2014).

[197] 18 U.S.C. § 5032.

[198] *Id*.

[199] *See* United States v. Doe, 98 F.3d 459, 460-61 (9th Cir. 1996) (holding that Attorney General and Assistant Attorney General can delegate certification authority to U.S. Attorneys); United States v. Angelo D., 88 F.3d 856, 860 (10th Cir. 1996) ("We believe the above statutes clearly show the Attorney General may delegate her power to the Assistant Attorney General who may in turn delegate his power to the United States Attorneys who may delegate their power to the Assistant United States Attorneys."); U.S. Dep't of Just., Just. Manual § 9-8.110 (2020).

[200] *See, e.g.*, United States v. Male Juvenile, 148 F.3d 468, 471-72 (5th Cir. 1998); *Angelo D.*, 88 F.3d at 860-61; United States v. Doe, 871 F.2d 1249, 1256-57 (5th Cir. 1989).

[201] *See* 18 U.S.C. § 5032; United States v. F.S.J., 265 F.3d 764, 771 (9th Cir. 2001) ("Therefore, we join the majority of our sister circuits and hold that the United States Attorney's certification of a 'substantial federal interest' under § 5032 is not subject to judicial review except for such formalities as timeliness and regularity (e.g., signed by the proper official) and for allegations of unconstitutional prosecutorial misconduct."); United States v. Smith, 178 F.3d 22, 26 & n.2 (1st Cir. 1999).

[202] *See* United States v. Juvenile Male No. 1, 86 F.3d 1314, 1317-21 (4th Cir. 1996).

[203] *See* United States v. Male Juvenile, 844 F. Supp. 280, 284 (E.D. Va. 1994) ("Therefore, since the Government's interest in an ordinary bank robbery, absent some allegation of a special *Federal* concern, per se does not rise to the level of a substantial Federal interest, this Court does not believe that the certification is in compliance with § 5032.").

[204] *See, e.g.*, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, 17 FED. SENT'G REP. 269, 272 (2005) ("The most common federal violent crime is bank robbery, which has long been of special concern to federal law enforcement.").

appeals that have considered this issue, certifications are not subject to substantive judicial review[205] except for very limited circumstances, such as when there are "allegations of unconstitutional prosecutorial misconduct."[206] Therefore, the prosecutor's case can survive judicial review by merely reciting the certification language outlined in the FJDA. For example, in one juvenile certification filed in the Eastern District of New York, the U.S. Attorney set forth the charges, and wrote that "these offenses are crimes of violence that are felonies; and there is a substantial Federal interest in the case and the offenses to warrant the exercise of Federal jurisdiction."[207]

Even when a certification uses formulaic language, a U.S. Attorney must still file the certification and a court must review it—albeit, minimally. These steps create hurdles in the federal juvenile system that are not expressly required in the federal criminal system.

B. *More Lenient Sentencing and Difficulty in Transfers*

Second, more lenient sentencing laws apply in the federal juvenile system than in the federal criminal system. This factor likely makes the federal juvenile system a less attractive forum for federal prosecutors.

The federal government often decides whether to prosecute federal crimes that are also state crimes based on federal sentencing policies, which tend to be longer and harsher.[208] Federal sentencing laws have been characterized as the "driver of the federal government's decision to get involved with questions of local crime."[209] Thus, restricted sentencing in the federal juvenile system likely reduces federal prosecutors' willingness to prosecute youth. Moreover, youth must be transferred from the juvenile system to the criminal system to be subject to adult criminal sentencing laws. This transfer process is burdensome and time-consuming, further disincentivizing federal prosecutors from even initiating a case in the federal juvenile system.

In the federal juvenile system, the length of probation, detention, or supervised release is limited by either age or the maximum sentence applicable to adults for the same offense. For example, for those younger than eighteen years old at the disposition (or sentencing) hearing, the term of probation or detention will not extend past the age of twenty-one.[210] For those between the

[205] *F.S.J.*, 265 F.3d at 768 (summarizing that, of nine circuit courts that have addressed this issue, only Fourth Circuit subjects certification to judicial review).

[206] *Id.* at 771.

[207] Juvenile Certification, United States v. McLen, No. 16-429 (E.D.N.Y. Aug. 2, 2016). This document was unsealed once the youth was transferred to the criminal system.

[208] *See, e.g.*, Divine, *supra* note 43, at 171.

[209] Barkow, *supra* note 38, at 523.

[210] The probation term must be the *lesser* of the date of when a youth turns twenty-one years or "the maximum term that would be authorized by [18 U.S.C.] section 3561(c)" if tried and convicted as an adult. 18 U.S.C. § 5037(b)(1). The detention term must be the *lesser* of

ages of eighteen and twenty-one, the maximum term of probation and detention will typically not exceed more than three years, and five years for some felonies.[211] Depending on the circuit, some district courts must follow the rehabilitative purpose of the FJDA, while others do not.[212]

If federal prosecutors are insistent on prosecuting and sentencing youth in federal criminal court, then they must transfer the youth from the federal juvenile system to the federal criminal system. Jaffe observed that prosecutions in the federal juvenile system are not worth the time and effort unless the youth is transferred to federal criminal court to be sentenced as an adult.[213]

However, the transfer process is onerous and not guaranteed. First, cases generally must begin in the federal juvenile system,[214] and the U.S. Attorney must still satisfy the certification requirement. Then, unless the youth consents

(1) the date when the individual turns twenty-one years old, (2) the maximum guideline range for a similarly situated adult (unless an aggravating factor justifies an upward departure), or (3) the maximum term of authorized imprisonment if the youth had been tried and convicted as an adult. *Id*. § 5037(c)(1).

[211] For probation, the term must be the *lesser* of three years or "the maximum term that would be authorized by [18 U.S.C.] section 3561(c)" if tried and convicted as an adult. *Id*. § 5037(b)(2). For detention, if the youth is convicted of a Class A, B, or C felony, then the detention term must be the *lesser* of five years or the maximum of the guidelines range applicable to a similarly situated adult, unless an aggravating factor allows an upward departure. *Id*. § 5037(c)(2)(B). For all other convictions, the term must be the *lesser* of (1) three years, (2) the maximum of the guidelines range applicable to a similarly situated adult (unless an aggravating factor allows an upward departure), or (3) the maximum term of authorized imprisonment if the youth had been tried and convicted as an adult. *Id*. § 5037(c)(2). Supervised release terms after detention also depend on age and offense. *Id*. § 5037(d).

[212] United States v. A.S., 939 F.3d 1063, 1085 (10th Cir. 2019) (summarizing circuit split regarding FJDA purpose, and agreeing with First, Eighth, and Ninth Circuits that rehabilitation is only one, but not exclusive, purpose).

[213] Jaffe, *supra* note 131, at 105 ("Given the burdens of the above described process, and the limited punishment available to juvenile offenders, prosecutors of organized crime or gang cases will most likely forgo the juvenile process unless they intend to transfer the offender to adult status.").

[214] In limited circumstances, a youth must be transferred to the federal criminal system if: (1) one is currently "alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony offense that has as an element thereof the use, attempted use, or threatened use of physical force against" another person, or involves a substantial risk of physical force, or is one of the enumerated drug offenses set forth in this paragraph in 18 U.S.C. § 5032; *and* (2) he was previously "found guilty of an act which, if committed by an adult, would have been one of the offenses set forth" in the first prong or an equivalent state felony. 18 U.S.C. § 5032. Even in cases of mandatory transfer, prosecutors still initially file charges in the federal juvenile system and include a certification before they subsequently file a motion for transfer, which is decided by a court. *See, e.g*., United States v. D.J.H., 179 F. Supp. 3d 866, 880 (E.D. Wis. 2016) (granting government's motion to mandatorily transfer youth from federal juvenile system to federal criminal system).

to being transferred to the criminal system,[215] the U.S. Attorney must move to transfer the youth from the juvenile system to the adult system. This also assumes that initial age and offense requirements for the transfer are met.[216] Further, the motion to transfer is ultimately decided by a judge. Even when the FJDA mandates the transfer, prosecutors must still move to transfer and the district court must grant the motion and provide the youth with an opportunity to oppose.[217]

For discretionary transfer requests, the judge considers multiple factors to determine whether it would be in the interest of justice to grant the transfer. These factors include: (1) age and social background, (2) nature of the offense—including whether one was a leader in an organization or influenced others to engage in criminal activities "involving the use or distribution of controlled substances or firearms," (3) prior delinquency record, (4) "present intellectual development and psychological maturity," (5) "nature of past treatment efforts" and response to them, and (6) "availability of programs designed to treat [their] behavioral problems."[218] After a ruling in the district court, either side may challenge the transfer decision immediately on interlocutory appeal, which introduces yet another court to oversee the prosecutor's desire to transfer the youth.[219]

These limitations on the federal prosecutor's power to transfer youth to the adult criminal system also appear to make juvenile prosecutions less worthwhile to pursue. For example, in 2020, only two youths were transferred to a federal criminal court and prosecuted as adults; in 2019, no youths were transferred; in 2018, two youths were transferred; in 2017, seven youths were transferred; and in 2016, three youths were transferred.[220] As the following case shows, these hurdles may discourage the federal government from directly prosecuting youth.

C. *Sample Case in the Federal Juvenile System*

The following case exemplifies the difficulty that a federal prosecutor may encounter while trying a case against a youth in the federal juvenile system. Not all cases are this difficult. For example, federal juvenile delinquency cases may

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[215] *See* 18 U.S.C. § 5032.

[216] *See id.* § 5032. In order for the prosecutor to file a discretionary motion for transfer, the juvenile offender must either have been (1) fifteen or older when the act was committed and the act, if committed by an adult, would have been a felony crime of violence, felony enumerated drug offense, or felony enumerated firearm offense; or (2) thirteen or older and alleged to have committed specific "crimes of violence," including assault, murder, attempted murder, robbery with possession of a firearm, bank robbery, or aggravated sexual abuse. *Id.* § 5032.

[217] *See, e.g.*, D.J.H., 179 F. Supp. 3d 866, 880 (granting government's motion for mandatory transfer).

[218] 18 U.S.C. § 5032.

[219] United States v. Y.C.T., 805 F.3d 356, 357 (1st Cir. 2015).

[220] *See* TABLE D-13, *supra* note 5.

be quickly resolved by pleas, just as they are in the federal criminal system.[221] But as the following case showcases, the federal juvenile system also poses hurdles that ultimately lead to a dismissal of a case.

In October 2014, federal prosecutors filed an information against a teenager in the Eastern District of Virginia, alleging that he was an MS-13 gang member who conspired to commit murder with a firearm.[222] The certification was filed, as required under the FJDA, revealing that the "case was a felony 'crime of violence' implicating a 'substantial Federal interest,' and that Virginia prosecutors had declined to exercise their jurisdiction over" the teen.[223] Thus, both the first and third conditions of the certification requirement were met, even though only one condition was necessary.[224]

That same day, federal prosecutors filed a motion to transfer the teen to the federal criminal system to be tried as an adult. However, six months later, the judge denied the motion to transfer.[225] The federal prosecutors then appealed the decision on interlocutory appeal. While the appeal was pending, federal and state prosecutors invited the teen's attorney to meet in July 2015.[226]

At the meeting, federal prosecutors announced that they planned to dismiss the interlocutory appeal and information against the teen.[227] State prosecutors announced that they would file charges against the teen instead, and then presented a plea offer for the teen to plead to a murder charge as an adult, which he declined.[228] Two days after the meeting, federal prosecutors moved to dismiss the interlocutory appeal, and after it was granted, successfully dismissed the information without prejudice.[229]

The teen then sought to make the dismissal of the case with prejudice, which the district court denied.[230] After the dismissal, the teen returned to the custody of immigration authorities and was eventually deported to El Salvador, but remains subject to federal prosecution for the underlying offense.[231] In sum, the federal government's failure to immediately prosecute the teen as an adult led to the case's temporary dismissal, most likely to allow for deportation rather than adjudication in the federal juvenile system.[232]

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[221] *See, e.g.*, United States v. E.K., 471 F. Supp. 924, 926-27 (D. Or. 1979).

[222] *See* United States v. Under Seal, 853 F.3d 706, 713 (4th Cir. 2017).

[223] *Id.*

[224] *See* 18 U.S.C. § 5032.

[225] *Under Seal*, 853 F.3d at 713.

[226] *Id.* at 714.

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] It is unlikely that this teen would be allowed back into the country. If he returned after the age of twenty-one, he would automatically be prosecuted as an adult because the FJDA

Other federal prosecutions of youth may not be so complicated, especially when courts more quickly grant federal prosecutors' request for a transfer,[233] or if cases are resolved by pleas. However, these impediments may help explain why there are so few federal juvenile prosecutions.

V. THE DISRUPTIVE FEDERAL JUVENILE SYSTEM

The persistent oversight of the federal juvenile system has been detrimental. Theories about prosecutorial power, punitiveness, and other characteristics of our American carceral system have been shaped and articulated without considering the federal juvenile system. The federal juvenile system should disrupt the status quo and change how scholars, policymakers, and reformers approach entrenched pathologies—including excessive prosecutorial power, unchecked punitiveness, and reach of the carceral state—that manifest in other carceral systems in our country.

This last Part will set forth the broad lessons and principles that emerge from the federal juvenile system. It also explains how the federal juvenile system further develops or illustrates theories of prosecutorial power, punitiveness, and the carceral state.

A. *Excessive Prosecutorial Power*

The federal juvenile system stands apart from the other carceral systems for lacking a widespread problem with excessive prosecutorial power. The system provides general insights on effectively restricting prosecutorial power and provides critique and nuance to certain theories about prosecutorial power.

1. Broad Principles

The limitations on prosecutorial power in the federal juvenile system appear effective because they incorporate both internal and external institutional checks on prosecutors. The timing of these checks is also significant, as oversight exists in the early stages of a case. Furthermore, the fact that the checks are required by statute—not merely left to the discretion of prosecutors—ensures that this oversight exists regardless of which administration is in charge.

First, internal checks on prosecutors exist in the federal juvenile system. The Attorney General or a U.S. Attorney must file the required certification in nearly every federal juvenile prosecution.[234] Additionally, prosecutors also must file a

requires the proceedings and disposition to take place before a youth turns twenty-one. *See* 18 U.S.C. § 5031.

[233] *See, e.g.*, United States v. J.J., 704 F.3d 1219, 1220 (9th Cir. 2013) (affirming transfer to criminal prosecution for teen accused of second-degree murder and using firearm); United States v. Juvenile Male, No. 12-CR-317, 2012 WL 6043271, at *1 (E.D.N.Y. Dec. 3, 2012), *aff'd*, 546 F. App'x 24, 26 (2d Cir. 2013) (granting transfer to criminal proceedings for youth accused of conspiracy and murder).

[234] *See supra* Section IV.A.

motion to transfer youth to adult criminal court if that is desired.[235] Moreover, while not statutorily required, the Justice Manual advises that "to maintain uniformity, United States Attorneys should notify the Organized Crime and Gang Section of the Criminal Division prior to authorizing that a motion to transfer be filed."[236] The certification and transfer requirements thus create mandatory internal oversight and centralize prosecutorial decisions against youth.

There are also external institutional checks by courts. Courts ensure that certifications are timely filed and signed by the proper official, and they review any claim of unconstitutional prosecutorial misconduct.[237] District courts in the Fourth Circuit also conduct a substantive review of the contents of the certifications, such as the federal interest question.[238] Additionally, a federal prosecutor's desire to transfer a youth to be tried by an adult is subject to ultimate approval by judges,[239] unless the youth agrees to be transferred to the criminal system.[240] In the limited situations where a prosecutor claims that transfer is mandatory, defense counsel may still file an opposition, and judges still make the ultimate decision.[241] For all other transfer motions, assuming that initial age and offense requirements are met, judges must apply a multi-factor test to determine whether transfer is appropriate.[242] Furthermore, transfer decisions may be immediately appealed via interlocutory appeal, introducing yet another layer of external institutional supervision.[243]

Second, these institutional checks occur in the early stages of a case. As scholars have emphasized, prosecutors wield significant power because they exercise discretion in filing charges, which directly affects the final outcome of a case, including the defendant's ultimate sentence and whether the case ends in a plea or proceeds to a jury trial.[244]

In addition to providing these insights on how to control excessive prosecutorial power, the federal juvenile system adds nuance and depth to several theories about prosecutorial power. First, the juvenile system highlights the fact that prosecutors possess vast power in the adult criminal system. For

[235] While the FJDA requires the Attorney General to file a motion to transfer under 18 U.S.C. § 5032, the authority to file this motion was delegated to U.S. Attorneys. *See* United States v. Doe, 871 F.2d 1248, 1249-50 (5th Cir. 1989); United States v. B.N.S., 557 F. Supp. 351, 352 (D. Wyo. 1983).

[236] U.S. Dep't of Just., Just. Manual § 9-8.130 (2018).

[237] *See* United States v. F.S.J., 265 F.3d 764, 771 (9th Cir. 2001); United States v. Smith, 178 F.3d 22, 26 & n.2 (1st Cir. 1999).

[238] *See* United States v. Juvenile Male No. 1, 86 F.3d 1314, 1317-21 (4th Cir.1996).

[239] *See id*. at 1321; *supra* Section IV.B.

[240] *See* 18 U.S.C. § 5032.

[241] *See supra* note 214.

[242] *See supra* Section IV.B.

[243] *See* United States v. Y.C.T., 805 F.3d 356, 357 (1st Cir. 2015).

[244] *See supra* Part I.

those who dispute the broadly accepted argument that prosecutors have excessive power,[245] the federal juvenile system shows a system where prosecutorial power is actually restricted and limited. Second, the federal juvenile system provides another iteration of the "hydraulic" theory of criminal law.[246] The theory provides that when discretion or power of one actor in the criminal system is constrained (such as a judge), then the power ends up shifting to another (such as a prosecutor).[247] This hydraulic theory may not be limited to intra-system arrangements, such as judge and prosecutor, but also intersystem relationships. Here, for example, given the constraints on federal prosecutors over juvenile offenses, it is not surprising to see scholars now criticize excessive state prosecutorial power over youth in the state juvenile system.[248] Scholars also have observed that when state prosecutorial power in a certain jurisdiction is restrained, then state prosecutors may refer cases to federal prosecutors to handle these cases in federal courts, where such state constraints do not apply.[249] Alternatively, federal prosecutors may rely on state prosecutors to prosecute youth instead. This theory perhaps underscores the fact that both federal and state prosecutorial power must be constrained for the entire criminal system to be significantly changed. Merely focusing on state prosecutorial power may not be enough.

The federal juvenile system also further sharpens the theory of "ad hoc instrumentalism" which provides that "[i]n any given situation, faced with any given problem, officials are encouraged to use whichever tools are most effective against the person or persons causing the problem."[250] In other words, many state or federal prosecutors may not intentionally flout oversight or act in an overly punitive manner, but rather find the most efficient means to resolve the "problem" at hand. In fact, office policies may encourage such behavior by requiring attorneys to pursue the harshest sentences.[251] This phenomenon played

[245] *See, e.g.*, Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 174-76 (2019).

[246] *See, e.g.*, Starr & Rehavi, *supra* note 47, at 13.

[247] *Id.*

[248] *See supra* note 92; *see also infra* note 291.

[249] *See supra* note 75 and accompanying text.

[250] David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 161 (2012).

[251] For example, Attorney General Jeff Sessions reversed the policy of the Obama Administration and directed federal prosecutors to charge and pursue provable offenses that have the harshest sentences, including mandatory minimums. Press Release, Office of the Attorney General, Department Charging and Sentencing Policy (May 10, 2017), https://www.justice.gov/opa/press-release/file/965896/download [https://perma.cc/ULT5-7S9V]; Christopher Ingraham, *It Took Jeff Sessions Just One Month to Turn Obama-Era Drug Policy on Its Head*, WASH. POST (June 2, 2017, 9:12 AM), https://www.washingtonpost.com/news/wonk/wp/2017/06/02/it-took-jeff-sessions-just-one-month-to-turn-obama-era-drug-policy-on-its-head/.

out in the case example in the prior Part.[252] In that case, when federal prosecutors failed to transfer the teenager to adult criminal court, they then went to state prosecutors to offer a state plea to the teen in exchange for dismissing the federal case.[253] When the teen rejected it, federal prosecutors dismissed the case and let immigration authorities begin the process of deporting him.[254] To limit prosecutorial power, oversight in various institutions is required.

2. Limiting Prosecutorial Power

How then does one translate all of these broad ideas into an actual policy or law? As this Article began with the problems of the federal criminal system, this specific proposal considers how the federal government can limit federal prosecutorial power and excessive punitiveness and prevent it from disrupting the operation of state criminal systems.

One way to reform the federal criminal system is to implement the prosecutorial certification requirement more widely for new federal crimes or certain categories of crimes, such as those duplicative of state crimes.[255] Congress already has shown its willingness to do this by imposing a similar certification requirement for hate crime prosecutions in the Matthew Shepard-James Byrd Jr. Hate Crimes Prevention Act of 2009 ("HCPA"), which criminalized bodily injury or attempted bodily injury due to actual or perceived race, color, religion, or national origin.[256] Before any individual can be prosecuted, the Attorney General or U.S. Attorney must file a certification that one of four conditions are met: (1) "the State does not have jurisdiction," (2) "the State has requested that the Federal Government assume jurisdiction," (3) "the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence," or (4) "a prosecution by the United States is in the public interest and necessary to secure substantial justice."[257]

A prior version of the federal hate crime law, which passed the House and Senate in 1999 but was vetoed by President Bill Clinton, also had a very similar certification requirement.[258] Daniel Richman labeled this effort as a "move in

[252] *See supra* Section IV.C.

[253] *See* United States v. Under Seal, 853 F.3d 706, 713-14 (4th Cir. 2017).

[254] *Id*.

[255] Crimes that are exclusively federal or require coordination with other countries, such as foreign affairs prosecutions, should not be subject to this certification requirement. *See, e.g.*, Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 363-65 (2019).

[256] 18 U.S.C. § 249; *see also* Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 AM. CRIM. L. REV. 1863, 1865-66 (2012).

[257] 18 U.S.C. § 249(b)(1).

[258] *See* Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, *in* 2 BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81, 103 (2000),

the right direction" and perhaps evidence that Congress recognized the "need for more transparency, and perhaps even more accountability, in Federal enforcement decisions."[259]

The current certification requirement of the HCPA is broader than the juvenile prosecutorial certification, as it contains the fourth condition that the federal prosecution is "in the public interest and necessary to secure substantial justice."[260] This broad language can be construed to apply to any federal prosecution, especially as an explanation is not required. Thus, allowing this condition may not be as effective in controlling federal prosecution than one that requires a substantial federal interest.

Also, a certification requirement that applies more expansively in the federal criminal system, such as one that applies to vast categories of crimes like those duplicative of state laws, or perhaps even certain federal crimes after a certain date, would need specific modifications. Most importantly, the requirement should provide internal institutional checks and external institutional checks during the very beginning stages of a case.

As for internal institutional checks, due to the current size of the federal criminal system, as well as biased attorneys general or U.S. Attorneys who may not agree to file certifications in certain cases, a modified approach to the certification requirement may be required.[261] For instance, an independent committee within every U.S. Attorney's office should be tasked with investigating and filing certifications for applicable federal charges.

The idea of having certain prosecutors solely focus on specific charging tasks is not new. Both criminal and juvenile law scholars have identified or proposed horizontal prosecution models, where certain prosecutors or individuals make charging decisions separately from those who prosecute a case.[262] Similar to the horizontal prosecution model, an independent committee would be solely in charge of investigating and filing certifications.

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https://www.ncjrs.gov/criminal_justice2000/vol_2/02d2.pdf [https://perma.cc/L2UX-ZAGK].

[259] *Id*.

[260] 18 U.S.C. § 249(b)(1)(D).

[261] Barbara Campbell, Ryan Lucas, Colin Dwyer & Jason Slotkin, *President Trump Fires Top U.S. Prosecutor Who Investigated His Allies, Barr Says*, NPR (June 20, 2020, 12:30 AM), https://www.npr.org/2020/06/20/881148365/geoffrey-berman-u-s-attorney-who-prosecuted-trump-allies-says-he-wont-quit [https://perma.cc/87FV-4K5C].

[262] *See* Barkow, *supra* note 47, at 895-906 (relying on administrative law to propose changes to management of prosecutorial offices, including creating division between prosecutors who make "adjudicative decisions," like charging decisions, and prosecutors who make executive or enforcement decisions); *see also* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1000-02 & n.166 (2009) (calling for better management within prosecutor's offices, such as centralized charging units); Gupta-Kagan, *Rethinking Family-Court Prosecutors*, *supra* note 92, at 748-49 (highlighting state juvenile systems where intake officers decide to divert or prosecute case toward rehabilitative purpose).

As for the content of certifications, these independent officials would be required to attest that the state does not have jurisdiction or refused jurisdiction in the case, or that there is a substantial federal interest in the case. Substantial federal interest should be defined statutorily alongside this statutory certification requirement or be defined for each type of crime. For example, one federal district court relied on the legislative history of the juvenile certification requirement to find that "substantial federal interest" meant a "finding that the nature of the offense or the circumstances of the case give rise to special Federal concerns."[263] The examples of such crimes were "an assault on, or assassination of, a Federal official, an aircraft hijacking, a kidnapping where state boundaries are crossed, a major espionage or sabotage offense, participation in large-scale drug trafficking, or significant or willful destruction of property belonging to the United States."[264]

In addition to internal checks, the certification requirement should invite external checks by the federal judiciary. The most restrictive check would be if federal judges were allowed to review the content of certifications, as is done in the Fourth Circuit.[265] However, even if the contents were not subject to judicial review, the mere act of filing such a certification in court and allowing defense counsel to make potential arguments would ensure a level of accountability and oversight that do not exist now.

Using the federal juvenile system as a starting point, scholars of the federal criminal system and state criminal and juvenile systems should think more expansively about implementing institutional checks on prosecutors both internally and externally in the early stages of a case.

B. *Excessive Punitiveness*

The federal juvenile system also yields important lessons and insights about excessive punitiveness. The United States has the largest prison population[266] and the highest incarceration rate in the world.[267] It imprisons individuals "at a rate 5 to 10 times" that of other industrialized nations.[268] This mass incarceration and its uncontrolled rise—500% increase over the past forty years in all jails and

[263] United States v. Male Juvenile, 844 F. Supp. 280, 283 (E.D. Va. 1994) (quoting S. REP. NO. 98-225, at 389 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3529).

[264] *Id.* (quoting S. REP. NO. 98-225, at 389).

[265] *See* discussion *supra* Section IV.A.

[266] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/6ELM-FCCG].

[267] Paola Scommegna, *U.S. Has World's Highest Incarceration Rate*, PRB (Aug. 10, 2012), https://www.prb.org/resources/u-s-has-worlds-highest-incarceration-rate/ [https://perma.cc/3H56-ZKPE].

[268] *United States Still Has Highest Incarceration Rate in the World*, EQUAL JUST. INITIATIVE (Apr. 26, 2019), https://eji.org/news/united-states-still-has-highest-incarceration-rate-world/ [https://perma.cc/UX4Q-MTAY].

prisons[269] and 336% increase in the federal prison population over the past twenty-four years[270]—signal deep dysfunction within our carceral systems and our society more broadly.

Punishment is currently a part of both juvenile and criminal systems. Theories of punishment form the foundations of the criminal legal system.[271] Also, while a nonpunishment theory originated in the juvenile legal system where "responsibility and punishment were not part of the vocabulary," over time, governmental interests in punishment and public safety were expressly adopted in the juvenile legal system.[272] While debates about punishment may persist, the excessive punitiveness that plagues all other systems and disproportionately impacts Black youth and adults should be excised.

As previously mentioned, the federal criminal system is marked by its punitiveness with federal sentencing laws generally harsher than state sentences for similar offenses,[273] and federal prosecutors often making decisions to get involved in otherwise local matters based on these harsher federal penalties.[274] The lack of widespread federal juvenile prosecutions—likely due in large part to lenient juvenile sentencing laws or hurdles for imposing adult sentences[275]—provides even further support to the theory that punitiveness still has a role in determining when the federal government decides to prosecute.[276] For example, federal prosecutors have not rushed to file juvenile prosecutions to ensure that certain youth receive a basic level of procedural protection in the transfer process that they do not receive often in the state systems,[277] or to allow youth to receive a restricted sentence under the FJDA. Prosecutors' inaction in the federal juvenile system thus helps show that they are driven by punitiveness in the less-restricted federal criminal system.[278]

Also, even more problematic, racial disparities manifest from the very beginning of federal criminal cases. As noted, prosecutors were "nearly twice as likely" to file a charge with a mandatory minimum sentence against Black defendants than White defendants in one sample, which then resulted in Black

[269] *Id*.

[270] *See* PEW CHARITABLE TRS., *supra* note 30.

[271] *See* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 8-9 (11th ed. 2022).

[272] Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 800 (2003); *see also* Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1387 (2020) (observing that "lenient" approach in early juvenile system was not effective, and that "failure to acknowledge society's interest in public safety corroded confidence" in system).

[273] *See supra* note 43 and accompanying text.

[274] *See* Barkow, *supra* note 38, at 574-75.

[275] *See supra* Section IV.B.

[276] *See* Barkow, *supra* note 38, at 574-75.

[277] *See infra* note 291 and accompanying text.

[278] *See* Barkow, *supra* note 38, at 575-76.

defendants receiving sentences that were ten percent longer than White defendants.[279] In previous studies, scholars compared the federal prosecutions of defendants selling crack cocaine (the majority of whom were Black) against defendants selling powder cocaine (the majority of whom were White), and highlighted the hundred-to-one sentencing disparity between these two groups.[280] Meanwhile, efforts to discover whether the disparity between shorter state sentences and longer federal sentences was driven by discriminatory factors have been blocked.[281] In one case, federal defendants sought to discover whether federal prosecutors engaged in selective prosecutions against Black defendants in federal court to face stiffer sentencing while allowing state prosecutors to handle similar offenses of White defendants to face less punitive sentences in state court.[282] This lawsuit ended when the Supreme Court imposed an "extremely heavy" initial evidentiary burden to pursue such a claim of selective prosecution.[283] When racial disparities appear in prosecutorial charging decisions and sentences, the belief that punishment is fair and proportional is undermined.

But again, this pathology is not limited to the federal criminal system. The state criminal system also suffers from excessive punitiveness, again disproportionately targeting Black individuals. As one scholar described, the "three keys" that signal the dysfunction of the entire American criminal system are the collapse of the rule of law, growing "discrimination against both black suspects and black crime victims," and the increase in the prison population, which led to the American criminal system being the "harshest in the history of democratic government."[284] Similarly, in the state juvenile system, Black youth are much more likely to be prosecuted rather than have their cases diverted, and are more likely to be detained.[285] In some state juvenile systems, like Connecticut, New Jersey, Wisconsin, and the District of Columbia, Black youth were "at least 10 times more likely to be held in placement as are white

[279] *See* Starr & Rehavi, *supra* note 47, at 7; LYNCH, *supra* note 54.

[280] David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1283 (1995); Davis, *supra* note 72, at 50-56, 66-67. The Fair Sentencing Act of 2010 reduced the disparity to eighteen to one. Pub. L. No. 111-200, § 2, 124 Stat. 2372, 2372 (2010) (codified as amended at 18 U.S.C. 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii)) (increasing crack cocaine quantities required to trigger five-year and ten-year mandatory minimum sentences, resulting in an eighteen-to-one ratio between powder cocaine and cocaine base requirements).

[281] Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 211-14 (2007) (citing United States v. Armstrong, 517 U.S. 456 (1996)).

[282] *Id.*

[283] *Id.* ("The Court has even imposed onerous requirements on defendants seeking the necessary evidence to make a prima facie case of selective prosecution . . . [i]n *United States v. Armstrong*.").

[284] STUNTZ, *supra* note 11, at 2-3 ("There are three keys to the system's dysfunction, each of which has deep historical roots but all of which took hold in the last sixty years.").

[285] Gupta-Kagan, *Rethinking Family-Court Prosecutors*, *supra* note 92, at 750-54.

youth."[286] Minorities, especially those identified as Hispanic youth, were also more likely to be detained while awaiting their court disposition.[287]

Here again, the federal juvenile system can provide some key insights into this pathology. The federal juvenile system ensures oversight and accountability over its most punitive outcomes, such as when youth are transferred to the adult criminal system. Both internal and external institutional oversight exists over the decisions to transfer, prosecute, and sentence youth in the federal criminal system.[288] In most cases, the judge ultimately decides whether to transfer youth to the adult criminal court after weighing several factors,[289] and this decision is then subject to interlocutory appeal.[290] Even for those who might fundamentally disagree with the idea of transferring youth to adult criminal systems, the federal juvenile system still provides more oversight than many state juvenile systems as it also generally requires the U.S. Attorney to file the motion to transfer and then for the court to approve the transfer.[291] The very few number of youth who are prosecuted and tried as adults in the federal criminal system—just two youths in 2020—again show that the federal government rarely prosecutes youth as adults.[292]

The federal juvenile system underscores that when a state or federal government wants to target a particular population for its most punitive policies and not let it fall upon unintended individuals, it needs to set up the necessary accountability measures to ensure that this goal is met. This principle may seem

[286] SENT'G PROJ., BLACK DISPARITIES IN YOUTH INCARCERATION (July 15, 2021), https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/ [https://perma.cc/YR3Q-3JTK].

[287] SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., JUVENILE COURT STATISTICS 34 (2019), http://www.ncjj.org/pdf/jcsreports/jcs2017report.pdf [https://perma.cc/37WQ-AENP].

[288] *See supra* Part IV.

[289] *See supra* notes 218-19 and accompanying text.

[290] *See supra* note 219.

[291] For example, in fifteen states, prosecutors have the discretion to file charges against youth directly in criminal court in a process called direct-file. *See* Martin Guggenheim & Randy Hertz, *Selling Kids Short: How "Rights for Kids" Turned into "Kids for Cash,"* 88 TEMP. L. REV. 653, 663-64 (2016). In twenty-nine states, certain charges require youth to be tried as adults. *Id*. Because prosecutors can decide which charges to file, they can trigger this mandatory transfer. For example, if prosecutors include the charge of criminal homicide in Pennsylvania, children—even as young as ten years old—are required to be transferred to criminal court. Stephanie Slifer, *Expert: Adult Murder Charge For Boy, 10, "Defies All Logic,"* CBS NEWS (Oct. 20, 2014, 12:05 PM), https://www.cbsnews.com/news/expert-adult-murder-charge-for-boy-10-defies-all-logic/ [https://perma.cc/C2L2-9PSM]; Robert Gearty, *Pennsylvania Boy, 13, Accused of Killing Little Brother During 'Cops And Robbers,'* FOX NEWS (July 12, 2020, 11:15 AM), https://www.foxnews.com/us/pennsylvania-boy-killing-brother-cops-robbers [https://perma.cc/3HXP-BZGA]. Including this charge alone might result in a quicker resolution by plea on terms more favorable to prosecution.

[292] *See* TABLE D-13, *supra* note 5.

obvious, but it is still not enforced. For example, one scholar observed that a majority of those incarcerated in federal prisons serving time for drug convictions do not meet the criteria for defendants that Congress originally had in mind when it passed federal drug laws.[293] Congress expected federal law enforcement and federal prosecutors to target the "most serious offenders" such as "major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs," with the next focus on "serious traffickers."[294] However, the actual federal prosecutions of lower-level offenders reveal that prosecutors will not always pursue these substantial federal interests. Rather, when incentives are created for prosecutors to pad their own performance metrics to rack up easy wins to "buy autonomy" for their preferred cases, then many individual prosecutors will take advantage of these opportunities to prosecute low-level drug offenses.[295]

But, in the federal juvenile system, consistent data points to the effectiveness of institutional checks in limiting federal prosecution of youth, even as scholars observed that the federal government is often the most punitive government actor in the criminal legal system.[296]

Those on the other side may counter that implementing such institutional checks will slow down the ability of governments to convict and punish an individual for a crime. However, checking government powers is one of the core tenets of criminal prosecution. The separation of powers between various individuals, such as judge, prosecutor, and jury, results in prosecutions moving slowly, as imagined by the Constitution.[297] Many constitutional requirements restrict a government's power over individuals in criminal matters, such as a defendant's right to confrontation, cross-examination, and jury trial.[298] While the plea-heavy nature of the criminal system subverts these checks, the federal juvenile system stands alone for its systemwide internal and external hurdles that must be cleared before a youth faces the most punitive outcomes, such as being prosecuted and sentenced as an adult.

Implementing similar internal and external checks may be different for each system. For example, in the federal criminal system, the prosecutorial certification requirement is one way to enforce these checks. Prosecuting drug offenses should require a certification that a substantial federal interest is

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[293] *See* Lauren M. Ouziel, *Ambition and Fruition in Federal Criminal Law: A Case Study*, 103 VA. L. REV. 1077, 1087, 1091-93 (2017).

[294] *Id*. at 1087 (quoting H.R. REP. NO. 99-845, pt. 1, at 11-12 (1986)).

[295] *Id*. at 1109.

[296] *See supra* Part I.

[297] Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012-16 (2006).

[298] *Id*. at 1017 ("[T]he Constitution's provisions addressing crime and the separation of powers reflect the fact that the Framers weighed the need for federal government efficiency against the potential for abuse and came out heavily in favor of limiting federal government power over crime.").

present, and this substantial federal interest should be tied directly to the very type of offenses and offenders that Congress envisioned that federal authorities would handle. Another idea is to create internal and external oversight over punitive sentencing enhancements that are currently mandatory. First, an internal and independent committee of prosecutors within a federal judicial district should agree to file charges that trigger sentencing enhancements. Then, judges should be the ultimate decisionmaker of these enhancements, after hearing from both defense and prosecution. The sentence should then be reviewable on appeal.

For example, Congress should reform the mandatory fifteen-year sentence for defendants who meet the requirements of the Armed Career Criminal Act ("ACCA")[299] (if not repeal the whole law itself) such that an independent committee of prosecutors must agree to its enforcement. Then once a judge finds that the basic conditions of the sentencing enhancement are met, the court should ultimately decide whether to impose this sentence enhancement due to certain factors, such as the defendant meeting the profile of the "most dangerous, frequent and hardened offenders" that Congress had in mind for this recidivist statute. This change would better ensure that the application of this enhancement—both in plea bargaining and in sentencing—is carried out in a more reasonable and accountable manner, and not applied or threatened against those who do not fit this profile.[300] By bringing in more internal and external institutional checks at the beginning stages of a case, concerns about excessive punitiveness can be more adequately addressed.

Additionally, certain policies in the federal juvenile system that prioritize development of individuals should be implemented more broadly. The federal juvenile system has at times provided a path for transferring certain reforms to the federal criminal system. For example, on January 25, 2016, President Obama penned an op-ed in the Washington Post[301] and a Facebook post[302] explaining his executive order that banned or limited solitary confinement in federal

[299] Under the ACCA, if a person violates 18 U.S.C. § 922(g), which prohibits a felon from possessing a firearm, and that person "has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another," then that person must receive a mandatory minimum sentence of fifteen years. *Id*. § 924(e)(1).

[300] *See, e.g*., Aliza Hochman Bloom, *Time and Punishment: How the ACCA Unjustly Creates a "One-day Career Criminal,"* 57 AM. CRIM. L. REV. 1, 1-2 (2020) (describing defendant who pled guilty to three interrelated drug counts, was first sentenced in one judgment, and then separately sentenced to ACCA fifteen-year mandatory minimum for constructive firearm possession when his girlfriend attempted to sell gun online).

[301] Barack Obama, *Barack Obama: Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html.

[302] POTUS 44, FACEBOOK (Jan. 25, 2016), https://www.facebook.com/potus44/photos/a.428389484017564.1073741830.424207551102424/448102858712893/?type=3&permPage=1.

prisons. He opened both pieces with the story about a sixteen-year-old teenager named Kalief Browder who, while awaiting trial, spent nearly two years in solitary confinement and experienced lasting psychological harm that led him to eventually take his own life after his release from pretrial detention.[303] The President tasked the DOJ with reviewing the use of solitary confinement in federal prisons, which then led to the ban of solitary confinement for all minors and those who committed low-level offenses, more treatment for those with mental illness, and modified usage for the rest of the adult population.[304] The spotlight on Kalief's story (which actually took place in a New York state prison, Rikers Island, and not in federal prison), and the ban of solitary confinement against youth under federal jurisdiction (which only impacted a handful of youth),[305] led to national media attention on solitary confinement, as well as momentary changes for adults.[306] Such policies that restrict unwarranted punitiveness should be implemented more widely.

C. *Shrinking the Carceral State*

The foundational theories and key characteristics of the federal juvenile system also provide insight into limiting the power and reach of the carceral state. One may wonder why the federal government legislated institutional checks that made it difficult to prosecute youth in the federal juvenile system or to transfer youth to be tried as adults, especially when there is no requirement to do so. The federal government enforces federal criminal laws against both youth and adults pursuant to its enumerated powers in the Constitution.[307] Under the doctrine of dual sovereignty, recently upheld by the Supreme Court in *Gamble v. United States*,[308] the federal government may independently pursue charges against youth for the same underlying offending conduct, irrespective of how a state responds to youth offenses or crimes. And historically, the federal government prosecuted youth for violations of federal criminal laws, just as it did adults.[309]

As a separate sovereign, the federal government need not modify the exercise of its enumerated powers to take state plenary powers into account. In fact, one

[303] *Id.*

[304] *Id.*

[305] *See* Schwartzapfel, *supra* note 167.

[306] While the ban against solitary confinement for youth adjudicated in the federal juvenile system was made into law by the First Step Act, the reforms for adults were not. First Step Act, Pub. L. No. 115-391, Title VI, § 613(a), 132 Stat. 5247 (2018) (codified at 18 U.S.C. § 5043(b)).

[307] United States v. Lopez, 514 U.S. 549, 552, 556 (1995) (identifying as "first principle[]" concept that "Constitution creates a Federal Government of enumerated powers" and striking down federal criminal law that would otherwise give federal government virtual police power).

[308] 139 S. Ct. 1960, 1964 (2019).

[309] *See supra* Section III.B.2.

of the main theoretical critiques about the federal criminal system is that it improperly and unconstitutionally intrudes on state police power.[310] However, the history of the federal juvenile system and the statutory language of the FJDA demonstrate that when the federal government designed the federal juvenile system, it willingly chose to defer to the state *parens patriae* power and its emerging state juvenile system. The state *parens patriae*, like the police power, is an exclusive state plenary power.[311] However, the state *parens patriae* power was supposed to lead states to act in a benevolent, caretaking manner, prioritizing the best interests of children.[312] Prior to this articulation of the *parens patriae* power, children who committed crimes and had the requisite mens rea generally were tried and punished in criminal courts, just like adults.[313] In the late nineteenth century, states invoked their *parens patriae* power to create a juvenile court system that was to carry out this care-based state of benevolence and nonpunishment.[314] The first juvenile court appeared in Illinois in 1899,[315] and by 1920, all but three states and the federal government had formed their own juvenile courts.[316]

Moreover, even before the passage of the FJDA and the creation of the federal juvenile system in 1938, the federal Wickersham Commission report from 1931 advised the federal government to leave juvenile offenses entirely to the state and even cautioned against creating a federal system to prosecute youth. The report stated that "[t]he power parens patriae is so intimately a State function, that it would seem unwise to place it within the judicial power of the United States, even though there be no constitutional objections."[317] There would be an administrative burden on the federal system to "care for these child offenders adequately" such as "a separate system of courts but judges with specialized training and an army of qualified probation officers."[318] And the "[d]uplication of systems already set up in the States should be avoided."[319]

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[310] *See supra* text accompanying notes 16, 18.

[311] Esther K. Hong, *A Reexamination of the Parens Patriae Power*, 88 TENN. L. REV. 277, 283-84 (2021).

[312] *Id*. at 289; Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 104-05, 109 (1909).

[313] *See supra* text accompanying note 176.

[314] Hong, *supra* note 311, at 283-84. These goals, however, were largely unfulfilled. *Id*.

[315] Feld, *supra* note 176, at 27.

[316] *See* Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 61 (2009). By 1945, juvenile courts were in every state and federal jurisdiction. *See* Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 451 (1985).

[317] WICKERSHAM REPORT, *supra* note 172, at 151.

[318] *Id*. at 151-52.

[319] *Id*. at 152.

While the Commission's proposals were not fully adopted, the impact of its statements regarding the state *parens patriae* power is evident in the FJDA. The FJDA stated that the federal government will forego the prosecution of a youth offender and surrender the youth to state authorities if (1) the youth commits an offense covered by state law or the laws of the District of Columbia, (2) the state "can and will assume jurisdiction," and (3) it is in the best interest of the United States and the youth.[320] Similar language appeared in the 1932 precursor statute to the FJDA.[321]

The next major reform to the FJDA in 1974 again reflected the federal government's express acknowledgment of the state *parens patriae* power by making it much more difficult for the federal government to prosecute youth for federal crimes.[322] Here, Congress added the certification requirement to the FJDA such that the federal government could prosecute youth *only* when states did not have or refused jurisdiction, or when states did not have available programs and services for the youth's needs.[323] The 1974 Act also limited the Attorney General's discretion to transfer youth to the adult criminal system.[324] These amendments made it much more difficult for federal prosecutors to file charges against youth for federal crimes, as the federal government could *only* get involved when states did not or could not assume jurisdiction. And as stated in Part III, this change took place right as the federal government substantially increased its involvement in criminal law and rapidly built the necessary infrastructure to prosecute and incarcerate adults for federal crimes.[325] Therefore, both the creation of the federal juvenile system, as well as its significant amendments in 1974, reflected a deference to the state *parens patriae* power.[326] Later, in the 1980s and 1990s, Congress grew tired of leaving juvenile offenses solely to the state *parens patriae* power and expanded the certification requirement to make it easier for federal prosecutors to prosecute federal

[320] 18 U.S.C. § 622a (1934).

[321] *See* Act of June 11, 1932, ch. 243, 47 Stat. 301 (1932).

[322] *See* Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109, 1133-34 (codified as amended at 18 U.S.C. §§ 5032-5043).

[323] *See id*.

[324] *See id*.

[325] The federal prison population increased from under 22,000 inmates in 1970 to over 110,000 inmates in 1997. *Before Looking Ahead, You Must Look Behind*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/history/timeline.jsp [https://perma.cc/RVR9-NGNK] (last visited Oct. 25, 2022) (noting 21,266 federal inmates in 1970); DARRELL K. GILLIARD & ALLEN J. BECK, BUREAU OF JUST. STAT. BULLETIN, PRISONERS IN 1997 (Aug. 1998), https://bjs.ojp.gov/content/pub/pdf/p97.pdf [https://perma.cc/8FDS-CH6B] (noting 112,973 federal prisoners in 1997). For example, despite forty-five federal prisons being built from 1990 to 1995, federal prisons still operated 24% above capacity. *In 90's, Prison Building by States and U.S. Government Surged*, N.Y. TIMES, Aug. 8, 1997, at A14.

[326] *See* 88 Stat. at 1133-34.

offenses, such as crimes of violence, drug offenses, and firearm offenses.[327] Even with these changes, the foundational checks in the federal juvenile system continued to effectively limit the federal government when it sought to prosecute youth.

With the federal government yielding to a state power that has been traditionally associated with youth, it is tempting to view the federal juvenile system as a complete aberration. For many people, even those outside the law, it may seem like common sense that local and state authorities—and not federal authorities—primarily handle youth offenses, just like how these officials invoke responsibility for other facets of youth lives, like education or healthcare.[328]

Nonetheless, the federal juvenile system remains relevant in modern times. For one, this clear divide between the *parens patriae* and police powers no longer remains. Just as states have expressly incorporated police power interests into the juvenile system (or as some scholars observe, the system was always rooted in the state police power but just covered it with the *parens patriae* power),[329] states too have increasingly relied on *parens patriae* language and principles—such as treatment-based programs, progressive prosecution, nonprosecution, diversionary programs, and decriminalization—to treat and rehabilitate adults who commit crimes.[330]

The federal juvenile system thus reveals that when another state or nongovernmental entity can effectively claim expertise in addressing a violation of penal laws or its underlying harms, it may restrain other state actors from turning to punitive solutions. Here, for example, the states' initial claim that they had the expertise to respond to youth crime by treating and rehabilitating youth led the federal government to voluntarily impose barriers to federal prosecutions. The barriers themselves changed from discretionary to mandatory

[327] For example, in the Comprehensive Crime Control Act of 1984, Congress added the third condition for certification that gave federal prosecutors jurisdiction over youth who committed an enumerated drug offense or a crime of violence with substantial federal interest, regardless of the state's desire or ability to prosecute these offenses. Comprehensive Crime Control Act of 1984, Pub. L. No 98-473, tit. II 98 Stat. 1976 (codified as amended in scattered sections of 18 and 28 U.S.C.). Congress also made transfer to the adult criminal system available for younger-aged youth and more types of crimes. *Id*. In 1994, Congress expanded the third condition of certification to allow for federal prosecution for firearm offenses, including mere possession of a firearm. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110201, 108 Stat. 1796, 2012 (codified as amended in 18 U.S.C. § 5032).

[328] However, one should still consider why this belief is now "common sense." It may be because the federal government's prosecution of youth has been so minimal for several decades that the practice has now become unusual.

[329] ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 158-59 (Rutgers Univ. Press Expanded 40th Anniversary ed. 2009) (1969); Hong, *supra* note 311, at 280-81.

[330] Hong, *supra* note 311, at 313-19.

to discretionary again, but over time these checks consistently limited the federal government.[331]

Another iteration of this principle is found in the prosecution of drug offenses. In the late 1970s and early 1980s, some government officials and leaders framed the rise in drug addictions as a criminal problem that required carceral solutions, like arrests and incarceration.[332] For example, in Washington, D.C., there is scant evidence that these leaders even considered turning to the city's health and treatment agencies to intervene in the growing drug crimes.[333] Yet recently, some states and cities have noticeably stepped away from carceral solutions by reconstructing drug addictions and offenses as public health and medical issues that are most effectively handled by medical- and treatment-based providers.[334]

Others may argue that merely shifting the prosecution or handling of offenses from one government actor to another, or even relying on the "care" arm of the state, instead of the carceral arm of the state, may not actually reduce state carceral control over individuals.[335] This is a fair critique, as the juvenile system provides support to these concerns. For example, many juvenile law scholars argue that even from its beginnings, the juvenile legal system enabled states to use their *parens patriae* role to justify oppressive control over youth and hide their abusive application of the state police power.[336] The Supreme Court acknowledged that youth may receive "the worst of both worlds" because they not only faced similar punishment as adults when they committed offenses, but

[331] *See supra* notes 321-27.

[332] *See* Jennifer J. Carroll, Bayla Ostrach, Loftin Wilson, Jesse Lee Dunlap, Reid Getty & Jesse Bennett, *Drug Induced Homicide Laws May Worsen Opioid Related Harms: An Example from Rural North Carolina*, 97 INT'L J. DRUG POL'Y 1, 2-3 (2021); *More Imprisonment Does Not Reduce State Drug Problems*, PEW CHARITABLE TRS. (Mar. 8, 2018), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems [https://perma.cc/P3TW-T2KW]; Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. AM. PROGRESS (June 27, 2018), https://www.americanprogress.org/article/ending-war-drugs-numbers/ [https://perma.cc/K99K-LEBR].

[333] *See, e.g.*, JAMES FOREMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 146-48 (2017).

[334] *See, e.g.*, Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 395 (2019) (describing two modern approaches to dealing with opioid users, including diversionary program to social services and voluntary detoxification program); Anna Roberts, *LEAD Us Not into Temptation: A Response to Barbara Fedders's "Opioid Policing,"* 94 IND. L.J. SUPPLEMENT 91, 91 (2019); Nina Feldman, *Time for Safehouse to Ask Forgiveness, Not Permission, on Philly Supervised Injection Site, Experts Say*, WHYY (Dec. 2, 2021), https://whyy.org/articles/time-for-safehouse-to-ask-forgiveness-not-permission-on-philly-supervised-injection-site-experts-say/ [https://perma.cc/B6WU-YDQM].

[335] *See, e.g.*, Natapoff, *supra* note 26, at 1065.

[336] PLATT, *supra* note 329, at 158-59 (describing justification of juvenile system as "ex post facto fiction").

they also lacked the constitutional rights to challenge them.[337] Eventually every state in the Get Tough Era of the 1980s and 1990s abandoned the singular goal of *parens patriae* in their juvenile systems and added police power interests, like retribution, into juvenile law statutes.[338] Even now, problems with excessive prosecutorial power, punitiveness, and discriminatory actions persist in the state and local juvenile systems.[339]

However, modern developments and trends in the juvenile system show that some noticeable changes are taking place. The advent of the Developmental Era in juvenile law in the early 2000s reinvigorated reliance on developmental science and neuroscience to shape juvenile law and policy.[340] The number of youth prisons and state juvenile prosecutions has dramatically declined nationwide.[341] Also, by examining the role that the federal criminal system has had in the overall criminal system,[342] it is likely that this nonintrusive and small federal juvenile system prevented further pathologies from taking hold in the

[337] Kent v. United States, 383 U.S. 541, 556 (1966) ("There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.").

[338] *See* Lois A. Weithorn, *A Constitutional Jurisprudence of Children's Vulnerability*, 69 HASTINGS L.J. 179, 218-19 (2017) (observing that state *parens patriae* and police powers are "inextricably intertwined" in state policies toward children). In the 1980s, state and federal legislators grew tougher on juvenile crime and cabined the rehabilitative goals of the juvenile system by increasing punishment for youth in juvenile court, and allowing juveniles to be transferred more easily into the criminal system. *See* Guggenheim, *supra* note 134, at 472-73 (2012) ("As a result of a new narrative about dangerous youth, and the complete absence of restraint in the political process, children under the age of eighteen became ever more eligible for prosecution as adults and for adult-like punishments."); Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 877-78 (2010) ("As crime rates continued to climb in the early 1990s, the calls for stiffer penalties for juvenile offenders reached a fever pitch. . . . Between 1992 and 1997 alone, legislatures in forty-five states enacted or enhanced waiver laws that made it easier to transfer juvenile offenders to the adult criminal justice system . . . .").

[339] *See supra* Sections V.A, V.B.

[340] Hong, *supra* note 311, at 291-97 ("[S]cientific research . . . advanced reforms based on . . . neuroscience and developmental science regarding youth's lessened culpability compared to adults."); Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741, 741 (2016).

[341] Nell Bernstein & Vincent Schiraldi, Opinion, *The Successful Closing of Youth Prisons Shows a Path to Police Reform*, WASH. POST (June 16, 2020, 12:28 PM), https://www.washingtonpost.com/opinions/2020/06/16/successful-closing-youth-prisons-shows-path-police-reform/; SAMANTHA HARVELL, CHLOE WARNBERG, ANDREA MATEI & ELI MENSING, URB. INST., JUST. POL'Y CTR., CLOSING YOUTH PRISONS: LESSONS FROM AGENCY ADMINISTRATORS (Mar. 2020), https://www.urban.org/sites/default/files/publication/101917/closing-youth-prisons-lessons-from-agency-administrators_1.pdf [https://perma.cc/ZBT8-Z73W].

[342] *See supra* Part I.

overall juvenile system. Future research might examine the role that the federal government has had in the development of juvenile law and policy, such as federal statutes[343] and executive actions[344] that influence and direct state actions. While there is much to be done to transform the collective state juvenile system, this change is much more possible because the federal government maintains a minimal role in directly prosecuting youth.

CONCLUSION

For too long, the federal juvenile system has remained hidden in plain sight. The system's longstanding record in effectively limiting the expression of the carceral state and its tethered pathologies against youth should invite greater analysis of this system. The federal juvenile system also serves both as a powerful foil for the other carceral systems and as a barometer of the entire American carceral system. That such a system exists—one that prosecuted fifty-five youths nationally in 2021—should encourage further examination and questioning about why things are this way, as well as a realization that systemic change can take place. While the federal juvenile system should continue to remain small, its insights should spread to impact how we understand and work toward transforming our criminal and juvenile legal systems.

[343] *See Authorizing Legislation*, OFF. JUV. JUST. & DELINQ. PREVENTION, https://ojjdp.ojp.gov/about/legislation [https://perma.cc/QM33-SBFJ] (last visited Oct. 25, 2022) (describing milestones of federal Juvenile Justice and Delinquency Prevention Act and subsequent reauthorizations); *Juvenile Justice and Delinquency Prevention Act*, COALITION FOR JUV. JUST., http://www.juvjustice.org/federal-policy/juvenile-justice-and-delinquency-prevention-act [https://perma.cc/2CDH-LXT5] (last visited Oct. 25, 2022).

[344] *See, e.g.*, *Coordinating Council on Juvenile Justice and Delinquency Prevention*, FED. REG., https://www.federalregister.gov/agencies/coordinating-council-on-juvenile-justice-and-delinquency-prevention [https://perma.cc/84EQ-758V] (last visited Oct. 25, 2022); *President's Commission on Law Enforcement and the Administration of Justice Holds Hearing on Juvenile Justice via Series of Teleconferences*, DEPT. OF JUST. (May 8, 2020), https://www.justice.gov/opa/pr/president-s-commission-law-enforcement-and-administration-justice-holds-hearing-juvenile [https://perma.cc/C3AT-XDFY].

APPENDIX A. STATE CASE DATA[†]

State	Total Criminal Cases	Juvenile Delinquent Cases	Juvenile Status Offenses	Total Juvenile Cases	Total Cases	Percent of Juvenile Cases
AL	204,595	9,966	1,995	11,961	216,556	5.523%
AK	28,958	425	--	425	29,383	1.446%
AZ	425,973	6,906	0	6,906	432,879	1.595%
AR	495,418	5,511	3,433	8,944	504,362	1.773%
CA	979,485	29,270	1,186	30,456	1,009,941	3.016%
CO	254,909	7,370	1,296	8,666	263,575	3.288%
CT	80,805	4,789	60	4,849	85,654	5.661%
DC	11,128	729	12	741	11,869	6.243%
DE	72,155	3,396	--	3,396	75,551	4.495%
FL	513,900	21,959	--	21,959	535,859	4.098%
GA	1,220,526	18,837	7,157	25,994	1,246,520	2.085%
HI	111,381	2,502	2,757	5,259	116,640	4.509%
ID	84,695	5,571	--	5,571	90,266	6.172%
IL	210,714	7,431	--	7,431	218,145	3.406%
IN	262,887	8,791	3,810	12,601	275,488	4.574%
IA	108,477	2,907	--	2,907	111,384	2.610%
KY	242,541	3,561	490	4,051	246,592	1.643%
ME	36,516	839	--	839	37,355	2.246%
MD	200,255	5,210	271	5,481	205,736	2.664%
MA	119,168	3,893	2,628	6,521	125,689	5.188%
MI	632,186	15,319	--	15,319	647,505	2.366%

[†] The average percentage of juvenile cases is 3.79% and the mean percentage of juvenile cases is 3.27%.

State	Total Criminal Cases	Juvenile Delinquent Cases	Juvenile Status Offenses	Total Juvenile Cases	Total Cases	Percent of Juvenile Cases
MN	157,763	13,399	2,060	15,459	173,222	8.924%
MO	177,616	1,367	291	1,658	179,274	0.925%
NE	127,663	8,609	1,444	10,053	137,716	7.300%
NV	179,824	5,641	69	5,710	185,534	3.078%
NH	29,186	1,166	118	1,284	30,470	4.214%
NJ	600,303	14,083	149	14,232	614,535	2.316%
NM	116,268	2,524	--	2,524	118,792	2.125%
NY	264,896	7,707	885	8,592	273,488	3.142%
OH	574,603	30,224	8,066	38,290	612,893	6.247%
PA	364,008	11,872	328	12,200	376,208	3.243%
RI	27,166	2,014	0	2,014	29,180	6.902%
TX	1,913,975	18,387	167	18,554	1,932,529	0.960%
UT	201,808	12,309	778	13,087	214,895	6.090%
VT	13,533	1,035	--	1,035	14,568	7.105%
WV	120,663	1,979	650	2,629	123,292	2.132%
WI	141,601	5,795	0	5,795	147,396	3.932%
WY	109,416	582	116	698	110,114	0.634%

APPENDIX B. EXCLUDED STATES[††]

State	Total Criminal Cases	Juvenile Delinquent Cases	Juvenile Status Offenses
KS	No Data	No Data	No Data
LA	191,353	No Data	No Data
MS	No Data	No Data	No Data
MT	59,790	No Data	No Data
NC	1,257,498	No Data	No Data
ND	No Data	3,438	1,407
OK	No Data	No Data	No Data
OR	No Data	No Data	No Data
SC	No Data	8,316	1,380
SD	No Data	3,911	No Data
TN	No Data	No Data	No Data
VA	No Data	22,443	5,939

[††] These states were excluded from Appendix A because there was either no criminal case data available or no juvenile case data available.