

# “CARE AS A SMOKESCREEN” AND THE CRIMINALIZATION OF YOUNG PEOPLE

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## I. INTRODUCTION

Wendy A. Bach’s book, *Prosecuting Poverty, Criminalizing Care*, presents an in-depth analysis of a law that turned drug use during pregnancy into a crime, exposing how the language of providing care was used to enact a system of punishment for women who struggled with drug addiction or dependence when they were pregnant.<sup>1</sup> Because much of my research focuses on young people who have been prosecuted in juvenile delinquency courts, the parallels between the Tennessee law that Professor Bach’s book discusses and juvenile delinquency laws jumped out at me from the pages.

On a big picture level, Professor Bach’s book traces the creation and implementation of a Tennessee law that criminalized fetal assault.<sup>2</sup> The law was justified, in Professor Bach’s words, “by a very strange and deeply disturbing set of ideas: that the only way to help women who used illegal drugs while pregnant was to prosecute them, and that the prosecution itself was not only a road to treatment but was actually a form of treatment in and of itself.”<sup>3</sup> Unsurprisingly, the result of these criminal prosecutions was not positive for the women who were charged and convicted of the crime. Rather than receive care, they received jail, probation, and financial debt.<sup>4</sup> The law Bach explores in *Prosecuting Poverty, Criminalizing Care* fits into a larger group of laws that are couched in benevolent language about providing treatment and care, but that “are often nothing more than a façade behind which we find mostly subordination.”<sup>5</sup>

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\* Professor of Law, Southwestern Law School. Many thanks to Wendy A. Bach for writing such a thought-provoking book, and to Southwestern Law Professor Danielle Kie Hart for inviting me to contribute to this symposium. Thanks also to the hard-working and talented students of the Southwestern Law Review who edited this piece.

1. WENDY A. BACH, *PROSECUTING POVERTY, CRIMINALIZING CARE* (2022).
2. *Id.*
3. *Id.* at 1.
4. *Id.*
5. *Id.* at 2.

Juvenile delinquency systems, where young people are criminalized and prosecuted under the guise of providing help and care, have developed along a very similar path to the Tennessee law Professor Bach's book examines. The U.S. juvenile delinquency system emerged in the 1800s, animated by benevolent language about the need to save and protect children.<sup>6</sup> As I wrote in an article tracing the history of the emergence of juvenile courts, "[b]enevolent language obscured the abusive practices, as incarcerating young people in these facilities was framed as a benefit rather than a punishment."<sup>7</sup> Writing in the *Harvard Law Review* in 1909, a judge described the juvenile court as "a wise and merciful father" who, if he learns his child "is treading the path that leads to criminality, [should] take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."<sup>8</sup> Nineteenth century legal decisions demonstrate that judges routinely sent "minors to reformatories for noncriminal acts on the premise that the juvenile institutions would have a beneficial effect."<sup>9</sup>

Benevolent language focusing on helping children continues to be employed to justify punitive treatment of young people. In the present day, judges routinely employ justify incarcerating young people in places where abusive conditions have been well-established because incarceration will somehow "help" the young person.<sup>10</sup> Although study after study has demonstrated that incarcerating a young person is the worst thing we as a society can do to them in terms of preventing future criminal behavior, juvenile incarceration continues to be justified on the ground that it is in the child's best interest.<sup>11</sup>

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6. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107, 109 (1909).

7. Beth Caldwell, *Shifting the Paradigm: An Abolitionist Analysis of the Recent Juvenile Justice "Revolution,"* 23 NEV. L.J. 115, 127 (2022).

8. Mack, *supra* note 6, at 107.

9. Caldwell, *supra* note 7.

10. See Richard E. Redding et al., *Juvenile Delinquency: Past and Present*, in JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT, AND INTERVENTION 3, 8 (Kirk Heilbrun et al. eds., 2005) ("[I]t not being uncommon (even today) for juvenile court judges to adjudicate a juvenile 'delinquent' without sufficient evidence of guilt to ensure juvenile court jurisdiction for the delivery of services."); see also Stephen Pimpo, *Youth Court Judge Says Juvenile Detention Center Is Helping with Starkville's Violent Crime, NAACP Leader Says It Does More Harm*, WCBI (Aug. 17, 2022), <https://www.wcbi.com/juvenile-crime-debate/> [<https://perma.cc/9CAJ-C8NV>] (A juvenile court judge in Mississippi, for example, justified sending adolescents to detention facilities because, she said, "A lot of these kids are truants and at least they're going to school in detention . . . They also get a psychological analysis. And in that assessment, if there are some specific needs that can be handled by Community Counseling (Services) and things like that, they're given those referrals.").

11. RICHARD MENDEL, WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE 12–13 (Dec. 2022), <https://www.sentencingproject.org/reports/why-youth-incarceration>

This essay draws parallels between the Tennessee law and juvenile delinquency laws and, in doing so, bolsters Bach's central claim that the specific law she focuses on in the book is just one example of a larger pattern of "criminalizing care, a phenomenon at the heart of US social welfare, child welfare, and criminal system policy."<sup>12</sup> Bach explains that Tennessee's law was based on the idea that "with the stick of the criminal legal system, these 'bad mothers' would have a chance to be reformed, to become 'good mothers,'" through prosecution, courts, and treatment that would be provided through these systems.<sup>13</sup> Similarly, the juvenile delinquency system has long been justified on the basis that juvenile courts can transform "bad kids" into "good kids" through prosecuting them, incarcerating them, and offering treatment services through probation and the courts.<sup>14</sup>

And yet, in both the fetal assault law and juvenile delinquency contexts, interventions in the name of "care" have caused far more harm than good. Many of the mothers who were prosecuted in Tennessee did not receive any treatment.<sup>15</sup> Those who did, often received substandard care that was limited by fear of the punitive sanctions that loomed over interactions with treatment providers. And those who slipped up along the way were punished more severely than if they had not participated in treatment in the first place. Women prosecuted under this law spent time in jail and owed thousands of dollars of debt as a result of their prosecutions.<sup>16</sup> The same pattern appears for young people who are prosecuted in juvenile delinquency courts. Many are incarcerated in facilities that have been shown to be so abusive that they are subject to federal consent decrees that seem unable to stop the abuse even after being in place for years.<sup>17</sup> Parents have been saddled with thousands of dollars of fines to compensate the state for the cost of providing "care" to their children by incarcerating them.<sup>18</sup> Further, juveniles in delinquency

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-fails-an-updated-review-of-the-evidence/ (presenting a literature review of studies that have documented wide-ranging negative effects of juvenile incarceration).

12. BACH, *supra* note 1, at 2.

13. *Id.* at 189.

14. Caldwell, *supra* note 7, at 123.

15. BACH, *supra* note 1, at 83.

16. *Id.* at 1.

17. *See, e.g.,* Farrell v. Allen, No. RG 03079344, 2004 Cal. Super. LEXIS 2978, at \*2-3 (Cal. Super. Ct. Nov. 14, 2004) (California lawsuit resulting in consent decree); Joint Motion to Enter Settlement Agreement, United States v. New York, No. 1:10-cv-00858 (N.D.N.Y. July 14, 2010) (New York settlement agreement for federal oversight of four juvenile facilities after an investigation by the Department of Justice uncovered the use of illegal physical restraints, beatings, lengthy periods of solitary confinement, and a pattern of abuse and neglect and the denial of mental health services).

18. *See* Eli Hager, *Your Kid Goes to Jail, You Get the Bill*, MARSHALL PROJECT (Mar. 2, 2017) (describing parents who were charged for the cost of the state incarcerating their children). S.B. 190

court are often punished more harshly than adults would be; this differential treatment tends to be justified by the idea that the courts' interventions are to help the young people.

This essay discusses three specific parallels between Tennessee's fetal assault law and U.S. juvenile delinquency law. First, I explore how, in both cases, racial stereotypes informed the choice to respond to the perceived problem through the carceral system rather than through a social safety net rooted in promoting social welfare and equitable access to resources. Second, I discuss how benevolent language has been employed in both of these areas to mask the punitive realities and to obscure the harm caused to the people prosecuted under these laws. Third, I conclude by joining Professor Bach's abolitionist call to move outside of the carceral state to create social responses that uplift and support people rather than punish, and to think radically about redistributing resources so that people can thrive.

## II. RESPONDING TO SOCIAL WELFARE NEEDS THROUGH THE CARCERAL SYSTEM BASED ON RACIALIZED CONCEPTIONS

At the root of both discussions—Bach's about the fetal assault law and mine about juvenile delinquency—lies the fundamental, yet often unstated premise, that societies make choices about what behavior they criminalize, and different societies make different choices about what constitutes a crime. In some countries, drug use is framed as a public health issue, meaning that treatment is accessible and keeping people safe and healthy is the state's priority.<sup>19</sup> In the United States, drug use has been framed as a criminal offense against the state, making punishment and incarceration the default response.

Tennessee lawmakers could have designed a different way to respond to their concerns about keeping babies healthy when their mothers used drugs during pregnancy. They could have offered free drug treatment or financial incentives to encourage healthy behaviors. They could have designed free and accessible mental health treatment, housing, and other social supports. Instead, Tennessee chose to criminalize women whose babies were born with

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(Cal. 2018) (recognizing the harms of saddling people whose children are facing challenges with debt, some states, including California, have passed laws to bar fines and fees for juvenile delinquency case); see also *California SB 190: Juveniles, FINES & FEES* JUST. CTR. (Jan. 26, 2017) <https://finesandfeesjusticecenter.org/clearinghouse/?sortByDate=true> (describing national efforts to curtail fines and fees attached to juvenile delinquency cases).

19. See, e.g., Lauren Frayer, *In Portugal, Drug Use Is Treated as a Medical Issue, Not a Crime*, NPR PARALLELS (Apr. 18, 2017), <https://www.npr.org/sections/parallels/230418494/politics-policy> (describing how Portugal decriminalized drug use and requires medical treatment rather than prosecutions and jail for people who are caught using drugs).

drugs in their systems. *Prosecuting Poverty* traces the origins of the Tennessee law back to the 1970s when states began to craft laws designed to prosecute Black mothers.<sup>20</sup> Professor Bach unpacks how prosecuting women who give birth to babies with drugs in their systems was a strategy designed for—and initially applied almost exclusively against—poor Black women, rooted in “the devaluation of Black women as mothers.”<sup>21</sup> A moral panic about the dangers of “crack babies” took root in the eighties and early nineties, constructing the problem of babies born addicted to crack cocaine in highly racialized terms that focused on Black mothers, informing Tennessee’s choice to pursue criminalization rather than social support.<sup>22</sup>

The juvenile delinquency system has also been shaped by racist assumptions. The modern framing of the issue of delinquency as crime “committed by lower-class youth, appeared in Western Europe and America about two hundred years ago, when the modern, urban industrialized society was born.”<sup>23</sup> During the nineteenth and early twentieth centuries, the end of slavery and the arrival of poor Irish and Eastern European immigrants combined with the shift to an industrialized economy, giving rise to the progressive movement that framed young immigrants, Black youth, and girls who did not comply with the dominant moral code as threats to the social order. The solution that emerged was to incarcerate them under the guise of criminality. This framework has continued through the present day.

Alongside the moral panic about crack babies in the 1990s, a highly racialized public fear of an impending crime wave committed by young “super-predators” emerged.<sup>24</sup> Created by criminologist John Dilulio, the super-predator myth framed Black youth as a looming threat to public safety.<sup>25</sup> For example, Dilulio “wrote, all that’s left of the black community in some pockets of urban America is deviant, delinquent and criminal adults surrounded by severely abused and neglected children, virtually all of whom were born out of wedlock.”<sup>26</sup> He predicted that “hordes upon hordes of

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20. BACH, *supra* note 1, at 49.

21. *Id.*

22. *Id.* at 48–49, 53–55.

23. THOMAS J. BERNARD & MEGAN C. KURLYCHEK, *THE CYCLE OF JUVENILE JUSTICE* 232 (2d ed. 2010).

24. See BARRY C. FELD, *THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE* 105 (2017) (referring to this era as the “Get Tough Era” of juvenile justice policy).

25. See Vincent Schiraldi, *Can We Eliminate the Youth Prison? (And What Should We Replace It With?)*, SQUARE ONE PROJECT 9, 19 (June 2020), <https://squareonejustice.org/wp-content/uploads/2020/08/CJLJ8431-Square-One-Youth-Prisons-Paper-200828-2-WEB.pdf> [<https://perma.cc/28KX-R6FZ>] (“The racial animus behind this assault on the more benign youth justice system was thinly-veiled, or sometimes not veiled at all.”).

26. *Id.* at 9 (citation omitted).

depraved teenagers [would] resort[] to unspeakable brutality . . . .”<sup>27</sup> The media disseminated this myth, tapping into the public’s racialized stereotypes and associating youth of color with a projected wave of crime that never materialized.<sup>28</sup> This fear inspired harsher, more punitive juvenile delinquency laws throughout the country.<sup>29</sup>

While the fetal assault law targeted poor Black mothers who were framed as being “bad mothers,” juvenile justice laws targeted poor Black teenagers who were framed as being “bad kids.”<sup>30</sup> Policies were designed in accordance with these frameworks, focusing on punishment rather than compassion, carceral responses rather than care.

As a society, we could decide to respond to problematic behaviors committed by young people differently. Adolescence is a time where young people develop their senses of self by pushing boundaries and taking risks. We could perceive of transgressions during this time period as part of a developmental stage that warrants treatment and support rather than criminalization and punishment, or we could adapt an approach rooted in research about the most effective way to prevent juvenile crime, rather than waiting for problems to emerge. In the juvenile delinquency context, for example, a Nurse Family Partnership program that matches a nurse with young, poor, first-time mothers during their pregnancy and provides twenty home visits from pregnancy through the first two years of the child’s life has been consistently proven to reduce both child abuse and arrests.<sup>31</sup> The program is both effective and affordable, and is delivered through the healthcare system rather than through the carceral state.<sup>32</sup> We could expand this kind of program, and we would dramatically reduce juvenile delinquency.

We could also choose to provide support and care for young people who are abused and hurt, rather than waiting for them to act out as a result of the trauma. The vast majority of young women who are prosecuted in juvenile

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27. Clyde Haberman, *When Youth Violence Spurred ‘Superpredator’ Fear*, N.Y. TIMES (Apr. 6, 2014), <https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html> [<https://perma.cc/5CXP-49Z4>].

28. See Beth Caldwell & Ellen C. Caldwell, “*Superpredators*” and “*Animals*”—*Images and California’s “Get Tough on Crime” Initiatives*, J. INST. JUST. & INT’L STUD., 61, 66–67 (2011) (discussing the influence of media representations of young people of color on the punitive juvenile justice policy of the 1990s).

29. See generally FELD, *supra* note 24, at 105–06 (describing the superpredator myth).

30. See BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 265 (1999).

31. Peter Greenwood, *Prevention and Intervention Programs for Juvenile Offenders*, 18 FUTURE CHILDREN 185, 195–96 (2008).

32. *Id.*

courts have been sexually abused, usually by a family member.<sup>33</sup> Criminologists have established clear patterns between the trauma of the sexual abuse and the “crimes” that funnel young women into the juvenile delinquency system—often things like running away, or staying out late—coping mechanisms for avoiding further victimization.<sup>34</sup> Sexually abused young women who are perhaps “acting out” could be seen as victims in need of help and support, but instead they have been construed as criminal delinquents who need punitive rules and enforcement to get them to act in accordance with how they “should.”<sup>35</sup>

Young men who act out violently have also generally experienced trauma and abuse in their homes and communities.<sup>36</sup> Their externalized violence is a reflection of internal pain that has not been addressed or healed. In other contexts, we see child soldiers as victims of a violent regime who warrant compassion and help. And yet, when young people act out violently in the United States, they are framed as dangerous criminals who need court-sanctioned intervention, rather than victims who need help and compassion.

### III. OFFERS OF CARE AS SMOKE SCREENS FOR PUNISHMENT

*Prosecuting Poverty* explains how our collective response to social problems has become so reliant on the carceral state that, in many cases, the only way that people without access to financial resources can participate in treatment programs is by being criminalized.<sup>37</sup> Opportunities to access drug treatment, for example, were not available to many of the women who were prosecuted for Tennessee’s fetal assault law.<sup>38</sup> Thus, incarceration has become “the new safety net,”<sup>39</sup> because it is only after being incarcerated that

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33. MALIKA SAADA SAAR, REBECCA EPSTEIN, LINDSAY ROSENTHAL & YASMIN VAFA, GEORGETOWN LAW, *THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS’ STORY* 11–12 (2019), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2019/02/The-Sexual-Abuse-To-Prison-Pipeline-The-Girls%E2%80%99-Story.pdf>.

34. *Id.* at 9.

35. Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1097, 1101–03 (2014) (summarizing research demonstrating that girls have historically been, and continue to be, prosecuted and incarcerated disproportionately for status offenses).

36. Cynthia Godsoe, *The Victim/Offender Overlap and Criminal Justice Reform*, 87 BROOK. L. REV. 1319, 1320 (2022).

37. BACH, *supra* note 1, at 1, 63.

38. *Id.* at 1.

39. *Id.* at 63.

many people qualify for healthcare, mental health services, or drug treatment.<sup>40</sup>

The same rings true for young people who are in need of help and support to navigate the challenges of adolescence and to overcome trauma and abuse they have experienced. There are a number of programs that have been proven to be effective at helping young people who disengage with delinquent patterns of behavior. For example, a program called Family Functional Therapy [FFT] and Multi-Systemic Therapy [MST]—both family-based programs designed to help improve family communication and support through intensive therapy delivered in-home—have been demonstrated in numerous studies to be quite effective at reducing juvenile delinquency.<sup>41</sup> These programs are designed to support young people and their families in multi-dimensional ways and need not be tied to the carceral state. However, in most jurisdictions, juvenile delinquency courts control the funding for these programs, and a young person must be found to have committed a crime and be placed on probation in order to participate.<sup>42</sup> Later, if they fail to comply with some aspect of probation, they will be incarcerated.<sup>43</sup>

While the consequences of pleading to a low-level offense in order to access treatment may seem minor to some,<sup>44</sup> the consequences of a criminal conviction can be quite severe. Both the women prosecuted for the fetal assault law and young people charged in delinquency court face incarceration, a very serious consequence for the person experiencing it. Moreover, being incarcerated can leave lasting results. When controlling for other factors, young people who are incarcerated are much more likely to be re-incarcerated in the future.<sup>45</sup> Young people who are incarcerated are also less likely to graduate from high school, less likely to enroll in college, and have lower earnings as adults.<sup>46</sup> In jails and youth detention facilities, people

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40. *Id.*; *see also id.* at 146 (quoting a social service professional who links people to treatment as explaining that her strategy for helping people with addiction is “lock ‘em up, clean ‘em up [and] start over” because, according to Bach, “[i]f the person could be arrested for that crime, then she can help”).

41. Greenwood, *supra* note 31, at 198.

42. BACH, *supra* note 1 at 150–53.

43. *Id.* at 161.

44. *Id.* at 146 (summarizing an interview with a justice professional and explaining that, “from her perspective, a misdemeanor is not that big a deal,” but that in reality “the consequences can be significant”).

45. *See* MENDEL, *supra* note 11, at 4, 8, 12–13 (summarizing studies that have found higher rates of recidivism and re-incarceration among young people who have been incarcerated than among similarly situated peers who were not incarcerated).

46. *Id.* at 5, 8, 14–15.

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- . *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).
  - . *Id.* at 547.
  - . *Id.* at 550.

This reasoning is faulty in both contexts. For the women charged with violating the fetal assault law, they were routinely sentenced to longer terms of incarceration if they failed in their court-ordered treatment than they would have been sentenced to if they had foregone the treatment option in the first place. Thus, they were actually punished more harshly and needed more protections than in the traditional criminal court system. Similarly, young people are often punished more harshly than adults for engaging in similar transgressions. Accordingly, they arguably should be entitled to higher—or at least equal—levels of due process protections.

#### IV. ABOLISHING CARE BASED IN THE CARCERAL STATE

The end result of offering care only through the carceral state is that people suffer. This is not surprising given the origins of these kinds of interventions as part of a broader effort to control and punish members of historically marginalized groups.

Bach ultimately concludes that rather than offer care through the carceral state, we should “transfer significant resources out of punishment systems and into high quality care systems.”<sup>56</sup> She calls for “a wholesale shrinking of the criminal legal and child welfare systems, a significant transfer of resources toward family and community support that respects those who receive that support, and widescale reform of the relationship between legal institutions and families.”<sup>57</sup>

Similarly, because so much harm is caused by the juvenile delinquency system, and because framework that gave it shape was so rooted in problematic racialized assumptions, meaningful reform within the context of the current juvenile delinquency paradigm seems impossible.<sup>58</sup>

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56. BACH, *supra* note 1, at 194.

57. *Id.* at 208.

58. For an in-depth exploration of the extensive abuse that has been documented in juvenile detention facilities across the country, see Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001 (2005); see also Jamiles Lartey, *Confronting America's 'Cruel and Unusual' Juvenile Detention Crisis*, MARSHALL PROJECT (Aug. 13, 2022), <https://www.themarshallproject.org/2022/08/13/confronting-america-s-cruel-and-unusual-juvenile-detention-crisis> [<https://perma.cc/234X-VCKM>] (describing horrendous conditions in juvenile detention facilities in Texas and Louisiana, including youth “having to use water bottles as makeshift toilets on the weekends” and isolation policies that drive young people to harm themselves); Richard Winton, *70 Girls Sexually Assaulted in Juvenile Camps by Probation Employees, Lawsuits Allege*, L.A. TIMES (Aug. 19, 2022, 6:00 AM), <https://www.latimes.com/california/story/2022-08-19/70-girls-sexually-assaulted-in-juvenile-camps-suits-allege> [<https://perma.cc/MV5V-A8PR>] (documenting multiple rapes and sexual assaults by probation employees towards detained girls); Keri Blakinger & Maurice Chammah, *They Went to Prison as Kids. Now They're on Death Row.*, MARSHALL PROJECT (Feb. 1, 2022), <https://www.themarshallproject.org/2022/02/01/they-went-to-prison-as-kids-now-they->

Like Professor Bach concludes in *Prosecuting Poverty Criminalizing Care*, the path forward in the field of juvenile justice lies in creating a new paradigm that addresses the underlying social conditions that drive crime, such as poverty.<sup>59</sup> A new paradigm would include a “radical redistribution of wealth and a dramatic shift away from a system based on individual blame and punishment and toward a community-focused approach to responding to problems rooted in a restorative justice model.”<sup>60</sup>

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re-on-death-row [<https://perma.cc/LNS4-JLEH>] (reporters with The Marshall Project identified twelve people on death row who had previously been incarcerated in juvenile facilities, many of which were “plagued by abuse for decades”).

59. BACH, *supra* note 1, at 208–10.

60. Caldwell, *supra* note 7, at 170.