

# TOO YOUNG TO SUSPEND: ENDING EARLY GRADE SCHOOL EXCLUSION BY APPLYING LESSONS FROM THE FIGHT TO INCREASE THE MINIMUM AGE OF JUVENILE COURT JURISDICTION

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## INTRODUCTION

In North Carolina, an eight-year-old child misbehaves at school. Fortunately, due to recent reforms that raised the lower age of juvenile court jurisdiction from six-years-old to ten-years-old for most offenses, this eight-year-old will never see the inside of a courtroom as a result of the

misbehavior. However, at the same time, the eight-year-old can be suspended from school for that same behavior, leading to days, weeks, or even months, of missed instruction, on top of the psychological, social, and familial consequences that can flow from the imposition of exclusionary discipline on young children.

Across the country, there is an emerging trend of states raising the minimum age at which a child can be processed through the juvenile courts. This trend has been spurred by an abundance of research that supports raising juvenile court age boundaries to developmentally appropriate levels and utilizing non-legal responses to more effectively address childhood misbehavior.<sup>1</sup> Slower to emerge, but just as needed, is a trend among schools that would prohibit the use of out-of-school suspension and other exclusionary discipline measures on young children in early school grades.<sup>2</sup>

In many respects, the evolution of juvenile court reform and school discipline reform follow similar trajectories. This Article begins by tracking those respective evolutions. Part I outlines the evolution of the juvenile court system in the United States and focuses on the fledgling system's distinction of children from adults and its "rehabilitative ideal" that children could outgrow challenging behavior if given the right treatment and services. After a long period of "adultification" of the juvenile court in response to rising crime rates, more recent reform efforts have focused on returning to the early court's rehabilitative model, including policies that would keep young children out of juvenile court altogether.

With the context of the juvenile court's evolution in mind, Part II tracks the history of exclusionary school discipline, which is defined as any school disciplinary action, typically a suspension or expulsion, that removes a student from his or her typical education setting.<sup>3</sup> Many of the same rationales for the "adultification" of juvenile court, including the myth of the juvenile superpredator and the rise of a zero-tolerance approach to discipline, led to a sharp increase in the use of exclusionary discipline throughout the latter half of the twentieth century.<sup>4</sup> However, with a growing body of research showing the harm and inefficacy of exclusionary discipline, advocates for discipline reform have pushed to decrease its use,

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1. See *infra* Sections III.C.2, III.C.7.

2. There is no settled definition of "early grades," although it is typically used to refer to elementary or primary school grades (prekindergarten through fifth) in contrast to the grades served by middle and high schools (sixth through twelfth). In some cases, "early grades" is used to refer only to the lowest grades in an elementary or primary school (e.g., prekindergarten through second).

3. ABBIE LIEBERMAN & AARON LOEWENBERG, NEW AMERICA, REDUCING EXCLUSIONARY DISCIPLINE PRACTICES IN EARLY CHILDHOOD EDUCATION: PERSPECTIVES FROM PRACTITIONERS IN ILLINOIS AND COLORADO 7 (2022), [https://d1y8sb8igg2f8e.cloudfront.net/documents/Reducing\\_Exclusionary\\_Discipline\\_Practices\\_in\\_Early\\_Childhood\\_Education\\_.pdf](https://d1y8sb8igg2f8e.cloudfront.net/documents/Reducing_Exclusionary_Discipline_Practices_in_Early_Childhood_Education_.pdf) [<https://perma.cc/CS3K-W9QU>].

4. Eric Blumenson & Eva Nilson, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L. Q. 65, 75–76 (2003).

which has included proposals to ban or limit exclusionary discipline for young students.<sup>5</sup>

The efforts to protect young children from both juvenile court intervention and exclusionary discipline are explored respectively in Parts III and IV. Part III describes the movement to “Raise the Minimum Age” of juvenile court jurisdiction as an avenue to bar court processing for young children. Notably, Part III outlines the variety of rationales that have been used to support raising the minimum age and charts the success of the movement in the last decade.

Against this backdrop, Part IV turns to the movement to end exclusionary discipline for young children. Although important differences between the juvenile court and school discipline exist, many of the same rationales that support keeping young children out of juvenile court also apply to protecting young children from exclusionary discipline.<sup>6</sup> Despite these similar rationales, which are explored in Part IV, the movement to end exclusionary discipline for young children has had less success, with fewer states adopting these measures. Further, most states that have passed laws limiting school exclusion for young students still allow exclusions to move forward in many circumstances.<sup>7</sup> Part IV tracks existing statewide efforts to limit exclusionary discipline for young children and describes some of the challenges faced by these reform efforts.

Despite the challenges, there are also opportunities. Part V highlights lessons learned from the “Raise the Minimum Age” movement to make recommendations for building momentum for states to end exclusionary discipline for young children. Given the willingness in many states to protect young children from juvenile court intervention, there is hope that similar arguments and advocacy strategies can be utilized to advance statewide policies that will protect those same young children from the harm of exclusionary discipline.

## I. EVOLUTION OF JUVENILE COURT

In order to effectively compare efforts to protect young children in the juvenile court context with efforts to protect young children from exclusionary discipline, there must first be an understanding of the history and goals of those two systems. In every U.S. state, there is a specialized trial court that handles various proceedings concerning children,<sup>8</sup> often known as juvenile court.<sup>9</sup> Although states vary in the way they structure their juvenile courts, these courts typically have exclusive original

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5. LIEBERMAN & LOEWENBERG, *supra* note 3, at 9.

6. *Id.*

7. *See infra* Table 2.

8. ABRAMS ET AL., CHILDREN AND THE LAW: DOCTRINE, POLICY & PRACTICE 15 (7th ed., 2020).

9. *Id.*

jurisdiction over four major categories of proceedings involving children: delinquency, status offenses, abuse and neglect, and adoption.<sup>10</sup> This Article focuses on the delinquency jurisdiction of juvenile court. A delinquency proceeding alleges that the juvenile has committed an act that would be a felony or misdemeanor if committed by an adult.<sup>11</sup> For the purposes of this Article, the term juvenile court is defined as the court that has exclusive original jurisdiction over claims that a youth has committed a delinquent act.

As described further in this section, the juvenile court system in America began as an informal intervention aimed at keeping children out of the adult criminal system for childhood misbehavior. However, that system has evolved over the years in response to a variety of factors, including shifts in public perception of juvenile culpability, fluctuations in the juvenile crime rate, growing scientific understanding of the child and adolescent brain, and U.S. Supreme Court decisions. Ultimately, the current juvenile court system is a much more formal and adversarial system than its first iteration, leading to questions about the effectiveness of juvenile court intervention for certain types of offenses or particular groups of children, including children under the age of fourteen.<sup>12</sup>

### A. Origins of Juvenile Court

Prior to the creation of juvenile courts, there was little to no distinction between children and adults in the criminal system.<sup>13</sup> Children were processed in the same criminal courts as adults.<sup>14</sup> Children faced the same punishments and were incarcerated in the same jails.<sup>15</sup> Because there was no child-specific system for children who committed criminal acts, the common law rule was that children under seven could not be guilty of a felony or punished for any capital offense.<sup>16</sup> Essentially, children under the age of seven were seen as “infants” who did not have a “vicious will” to

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10. *Id.* at 15–16. (“In some states, the juvenile court is a distinct trial court. In other states, the general jurisdiction trial court has juvenile jurisdiction. Still, in others, the juvenile court is a separate division of the general jurisdiction trial court, such as ‘the juvenile division of the superior court.’”).

11. *Id.* at 941.

12. Travis Watson, Note, *From the Playhouse to the Courthouse: Indiana’s Need for a Statutory Minimum Age for Juvenile Delinquency Adjudication*, 53 *IND. L. REV.* 433, 436 (2020).

13. *Juvenile Justice History*, *CTR. ON JUV. & CRIM. JUST.*, <http://www.cjcj.org/education1/juvenile-justice-history.html> [https://perma.cc/N4YW-M8HD].

14. *Id.*

15. *Id.*

16. *Allen v. United States*, 150 U.S. 551, 558 (1893).

commit crime and therefore would not be held responsible in the same way as adults.<sup>17</sup>

A similar presumption applied for children between the ages of seven to fourteen, but it was *prima facie* and rebuttable.<sup>18</sup> If it appeared that the child knew between right and wrong, the presumption of no “vicious will” was overcome, and the child could “suffer the full consequences of the crime.”<sup>19</sup> Children over the age of fourteen were treated as adults and given no special treatment if found guilty of a crime.<sup>20</sup>

Additionally, many states passed statutes in the 1800s that specified the age a child must reach before they could be held criminally responsible for their actions.<sup>21</sup> However, with the creation of separate juvenile courts in the early twentieth century that, in theory, protected children from the dangers of the adult criminal system, these common law and statutory protections that exempted young children from the court system no longer applied.<sup>22</sup>

In 1899, the nation’s first juvenile court was created in Cook County, Illinois.<sup>23</sup> This new program was premised on an emerging idea that children needed to be protected from adults and thus, separated from them.<sup>24</sup> Additionally, there was a growing focus on rehabilitation for young offenders to help them avoid a future life of crime.<sup>25</sup> The idea spread quickly, and within twenty-five years, most states set up their own juvenile court systems focused on rehabilitating young offenders.<sup>26</sup>

Beyond separating children and adults, the early juvenile court’s delinquency jurisdiction was marked by four additional characteristics that distinguished it from the adult criminal system. First, the juvenile court’s

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17. 4 WILLIAM BLACKSTONE, COMMENTARIES (J.W. Jones trans., Lonang Inst. 2005) (1823); *see also* AM. BAR ASS’N DIV. FOR PUB. EDUC., THE HISTORY OF JUVENILE JUSTICE, <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf> [<https://perma.cc/8STG-8L7E>].

18. *Allen*, 150 U.S. at 558.

19. BLACKSTONE, *supra* note 17; *see also* AM. BAR ASS’N DIV. FOR PUB. EDUC., *supra* note 17; *Allen*, 150 U.S. at 558.

20. BLACKSTONE, *supra* note 17; *see also* AM. BAR ASS’N DIV. FOR PUB. EDUC., *supra* note 17.

21. *Allen*, 150 U.S. at 558–59 (citing Ark. Stat. Dig. 1884, 425, c. 45, § 1498).

22. AM. BAR ASS’N DIV. FOR PUB. EDUC., *supra* note 17.

23. ABRAMS ET AL., *supra* note 8, at 951–52. *See generally* HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 19 (1927); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 9 (1969); STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF “PROGRESSIVE” JUSTICE, 1825–1920 82 (1977); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187 (1970); Marygold S. Melli, *Wisconsin Law Review Symposium Introduction: Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 376 (1996).

24. Melli, *supra* note 23; *see also* AM. BAR ASS’N DIV. FOR PUB. EDUC., *supra* note 17.

25. Melli, *supra* note 23, at 375; *see also* AM. BAR ASS’N DIV. FOR PUB. EDUC., *supra* note 17.

26. Melli, *supra* note 23, at 376–77; *see also* AM. BAR ASS’N DIV. FOR PUB. EDUC., *supra* note 17.

focus on “the rehabilitative ideal” was markedly different from the punishment-oriented approach of the adult criminal court.<sup>27</sup> In many cases, juvenile courts acted as a quasi-welfare agency, with broad discretion to craft a disposition that took into account the youth’s attitude, school performance, community standing, mental health, and family support.<sup>28</sup>

The juvenile court’s focus on rehabilitation and treatment naturally led to its other distinguishing features. For example, the juvenile courts exercised only civil jurisdiction, as opposed to criminal jurisdiction.<sup>29</sup> Since the goal of the court was not to punish, but rather to “protect” the child from a life of future crime, civil jurisdiction was deemed appropriate even when used to detain or incarcerate children.<sup>30</sup> Additionally, many argued that given the non-adversarial, rehabilitative role of the juvenile court, the formal procedures of the adult court system were not needed and may even “tend to confuse a child’s mind.”<sup>31</sup> Therefore, early juvenile courts used informal procedures and lawyers were rarely present.<sup>32</sup> Finally, to promote the goal of rehabilitation, juvenile court proceedings, dispositions, and records were treated as confidential and only made public in rare circumstances.<sup>33</sup>

### B. “Adultification” of the Juvenile Court

By the mid-twentieth century, the non-adversarial and informal processes of the juvenile court drew mounting criticism. Tension emerged between the juvenile court’s expressed goal of rehabilitation and the reality that rehabilitation was not a realistic objective in many cases due to both inadequate facilities and staff and a lack of understanding on how to support children with a variety of complex needs.<sup>34</sup> In these cases, “public safety” became the primary objective, leading to a more punitive approach as seen in the adult court system. This began to raise questions about whether the juvenile court’s informal procedures were sufficient to protect the interests of the children within its jurisdiction.<sup>35</sup>

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27. Melli, *supra* note 23, at 377–78.

28. ABRAMS ET AL., *supra* note 8, at 951–52.

29. *Id.* at 952.

30. *Id.* at 952–55.

31. *Id.*

32. *Id.*

33. *Id.* at 955–56.

34. FRANCIS A. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY* 49–54 (1964) (explaining that reasons for failure to rehabilitate included inadequate facilities and personnel, as well as lack of knowledge on how to rehabilitate adolescents who had experienced trauma and had little societal or family support); *see also* Melli, *supra* note 23, at 383.

35. Melli, *supra* note 23, at 384 (quoting LOU, *supra* note 23). *See generally* PLATT, *supra* note 23; Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 7 (1965).

These concerns ushered in a “due process revolution” for juvenile courts. A series of U.S. Supreme Court cases established and strengthened due process protections for children in juvenile court. The most notable was a 1967 decision, *In re Gault*, that applied criminal due process requirements to juvenile court cases and held that due process required juveniles receive adequate notice of the charges against them, the opportunity to confront and cross-examine their accuser, court-appointed counsel, and a warning of their right against self-incrimination.<sup>36</sup> Subsequent cases added the requirement that the state establish proof beyond a reasonable doubt<sup>37</sup> and the prohibition against double jeopardy<sup>38</sup> to the growing list of rights held by juvenile defendants. By the late 1970s, state legislatures were revising their juvenile codes to incorporate these protections and formalize juvenile court procedures using criminal court protections as the baseline.<sup>39</sup>

While the new formality of the juvenile court system undermined the goal of rehabilitation by creating a more adversarial process, the true challenge to the rehabilitative ideal arose in the 1960s, as crime rates rose nationwide.<sup>40</sup> The rise in crime rates, including a rise in violent crime and juvenile crime, lasted through the early 1990s. Many theories have been advanced to explain this spike and subsequent decline in crime, including but not limited to, changing population demographics, rapid urbanization, economic shifts, childhood lead exposure, and changes in policing tactics.<sup>41</sup> Regardless of the cause, this spike greatly impacted the juvenile courts as policymakers adopted a “get tough” approach in an attempt to counter the rise in youth crime.<sup>42</sup> For example, during this time period, most states modified their laws to allow more youth to be tried as adults.<sup>43</sup>

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36. *In re Gault*, 387 U.S. 1, 27–29 (1967).

37. *In re Winship*, 397 U.S. 358, 358–68 (1970).

38. *Breed v. Jones*, 421 U.S. 519, 541 (1975).

39. Melli, *supra* note 23, at 375.

40. ABRAMS ET AL., *supra* note 8, at 944.

41. E.g., JAMES ALAN FOX, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING 1 (1996) (attributing the explosion of crime during the 1960s and 1970s as the result of demographic shifts as baby boomers reached their late adolescence and early twenties, an age at which aggressive tendencies are strongest); Edward L. Glaeser & Bruce Sacerdote, *Why Is There More Crime in Cities?* 107 J. POL. ECON. S225, S225–58 (1999) (exploring possible factors in the higher crime rates of big cities when compared to small cities or rural areas); LAUREN-BROOKE EISEN ET AL., BRENNAN CTR FOR JUST. WHAT CAUSED THE CRIME DECLINE? 9 (2015), <https://www.brennancenter.org/our-work/research-reports/what-caused-crime-decline> [<https://perma.cc/9MR7-Z28Z>] (exploring reasons for the dramatic decline in crime and highlighting the significant role of various social, economic, and environmental factors, as well as the role of data-driven policing); *Studies Show Lead Linked to Violent Crime Trends*, EQUAL JUST. INITIATIVE (Jan. 9, 2013), <https://eji.org/news/studies-show-lead-linked-to-violent-crime-trends/> [<https://perma.cc/WM8Z-RV5K>] (summarizing studies that link childhood lead exposure to violent crime).

42. ABRAMS ET AL., *supra* note 8, at 943.

43. Shannon McLatchey, Note, *Juvenile Crime and Punishment: An Analysis of the “Get Tough” Approach*, 10 U. FLA. J. L. & PUB. POL’Y 401, 407 (1999).



Additionally, sentences for youth crime grew increasingly severe, including a rise in the use of life without parole sentences for young offenders.<sup>44</sup> The attitude of “old enough to do the crime, old enough to do the time” became prevalent.<sup>45</sup> This attitude was fueled by highly publicized accounts of violent crimes committed by youth.<sup>46</sup> The rise in youth crime and the punitive response led the juvenile arrest rate to reach a peak in 1996, with nearly 2.7 million arrests of youth ages zero to seventeen.<sup>47</sup>

### C. A Return to the “Rehabilitative Ideal”

Over the past twenty-five years, perspectives on juvenile delinquency have swung back towards the rehabilitative model in juvenile courts with an emphasis on the special status of children. One cause of this pushback is that rates of violent juvenile crime have fallen significantly.<sup>48</sup> Data has also revealed that the public fear of juvenile crime in the 1980s and 90s was over exaggerated in many cases.<sup>49</sup> These factors alongside shrinking state budgets led policymakers to question whether the punitive approach, associated with higher numbers of youth detained in costly facilities, was an effective use of resources.<sup>50</sup>

Further, the growing body of scientific research concerning adolescent brain development played a role in this shift, which demonstrated that children have “diminished culpability” due to developmental factors.<sup>51</sup> This diminished culpability is based on three distinguishing characteristics of youth development. First, compared to adults, youth lack the same maturity and sense of responsibility. As a result, they are more likely to engage in impetuous actions and make ill-considered decisions. Second, children are more vulnerable to negative influences and outside pressures than adults. This vulnerability is heightened by their lack of control over their own environment. Finally,

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44. Priyanka Boghani, *They Were Sentenced as “Superpredators.” Who Were They Really?*, PBS FRONTLINE (May 2, 2017), <https://www.pbs.org/wgbh/frontline/article/they-were-sentenced-as-superpredators-who-were-they-really/> [<https://perma.cc/DL3S-2V3H>].

45. See AKIVA LIBERMAN ET AL., LABELING EFFECTS OF FIRST JUVENILE ARRESTS: SECONDARY DEVIANCE AND SECONDARY SANCTIONING 2 (2014), <https://www.urban.org/sites/default/files/publication/33701/413274-Labeling-Effects-of-First-Juvenile-Arrests-Secondary-Deviance-and-Secondary-Sanctioning.PDF> [<https://perma.cc/W648-ANV4>].

46. McLatchey, *supra* note 43, at 401–02 (highlighting several accounts of violent crimes committed by children and adolescents).

47. CHARLES PUZZANCHERA, OFF. JUV. JUST. & DELINQ. PREVENTION, JUVENILE ARRESTS, 2019 1 (2021), <https://ojjdp.ojp.gov/publications/juvenile-arrests-2019.pdf> [<https://perma.cc/W3VN-FRPM>].

48. ABRAMS ET AL., *supra* note 8, at 945.

49. JAMES C. HOWELL, JUVENILE JUSTICE & YOUTH VIOLENCE 49, 52–57 (1997) (noting that in 1994, adults accounted for 86% of clearances for violent crimes and for 90% of clearances for murder).

50. ABRAMS ET AL., *supra* note 8, at 945–48.

51. *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005).

children continually undergo character development throughout their youth, and their personality traits are less fixed, making them more likely to grow out of irresponsible behavior.<sup>52</sup> These scientific findings spurred decisionmakers across all lawmaking bodies to confront the reality that children are different from adults in the criminal context. From the U.S. Supreme Court to state legislatures to Congress, there has been a resounding call to develop a juvenile system that is developmentally appropriate for the youth it serves.<sup>53</sup>

Additional research exposed that juvenile court intervention may actually be harming youth and undermining public safety. Recent studies reveal that even brief involvement with the formal juvenile court system results in negative short- and longer-term psychological, educational, and employment consequences that outweigh any potential benefit received from that involvement.<sup>54</sup> Once in the juvenile court system, children often lack adequate access to counsel. Even though *Gault* purported to establish a right to counsel in delinquency proceedings, less than half of adjudicated juveniles receive assistance of counsel due to inadequate public funding.<sup>55</sup> Additionally, even though juvenile dispositions are supposed to focus on rehabilitation, the requirements of juvenile court orders, including probation, can be expensive and burdensome for children and their families.<sup>56</sup> Since children often do not have control over their circumstances, they are often wrongfully punished for non-compliance with probation conditions which can then lead to stricter sanctions and a cycle of re-incarceration.<sup>57</sup> Ultimately, juvenile court intervention is associated with

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52. *Id.*

53. *See, e.g., id.* at 555–56; MACARTHUR FOUND., JUVENILE JUSTICE IN A DEVELOPMENTAL FRAMEWORK: A 2015 STATUS REPORT 20–21 (2015), [https://www.macfound.org/media/files/macarthur\\_foundation\\_2015\\_status\\_report.pdf](https://www.macfound.org/media/files/macarthur_foundation_2015_status_report.pdf) [<https://perma.cc/P29G-4BH7>] (state after state has adopted developmentally appropriate legislation); Juvenile Justice Reform Act of 2018, Pub. L. No. 115-385, § 201, 132 Stat. 5123, 5127 (2018) (showing bipartisan support for Act, which requires states receiving federal funding to submit plans to improve juvenile justice by “taking into account scientific knowledge regarding adolescent development and behavior.”); PUZZANCHERA, *supra* note 47 (“Arrests of juveniles (youth ages 0–17) peaked in 1996, at nearly 2.7 million. Arrests of juveniles have since declined—the number in 2018 was 73% below the 1996 peak.”).

54. U.S. DEP’T OF JUST., REPORT OF THE ATTORNEY GENERAL’S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 171 (2012), <https://www.justice.gov/sites/default/files/defendingchildhood/cev-rpt-full.pdf> [<https://perma.cc/DJ6J-P59L>].

55. JESSICA FEIERMAN ET AL., JUV. L. CTR., THE PRICE OF JUSTICE 4 (2018), <https://debtorsprison.jlc.org/documents/JLC-Debtors-Price-of-Justice.pdf> [<https://perma.cc/552Z-TE36>].

56. Michelle S. Phelps, Ending Mass Probation: Sentencing, Supervision, and Revocation, 28 THE FUTURE CHILD. 125, 126 (2018).

57. In one study, youth who were put on probation were twelve times more likely to be arrested as adults than youth who were not put on probation. TUELL ET AL., ROBERT F. KENNEDY NAT’L RES. CTR. FOR JUV. JUST., DEVELOPMENTAL REFORM IN JUVENILE JUSTICE: TRANSLATING THE SCIENCE OF ADOLESCENT DEVELOPMENT TO SUSTAINABLE BEST PRACTICE 8 (2017), [https://rfknrcjj.org/wp-content/uploads/2017/09/Developmental\\_Reform\\_in\\_Juvenile\\_Justice\\_RFKNRCJJ.pdf](https://rfknrcjj.org/wp-content/uploads/2017/09/Developmental_Reform_in_Juvenile_Justice_RFKNRCJJ.pdf) [<https://perma.cc/2V8H-UCUP>] (citing Gatti et al.,

an increased future risk of future juvenile and criminal legal system involvement.<sup>58</sup> Instead of effectively addressing juvenile crime, juvenile court referral may actually be fueling it.

Certain groups of children are also disproportionately referred to the juvenile system, increasing their exposure to the associated harms. For youth of color, especially Black and Indigenous youth, data reveals their overrepresentation at every stage in the juvenile court process.<sup>59</sup> The research shows that race effects are greatest at earlier stages in the process, including arrest, referral to court, and placement in secure detention. Further, youth of color tend to remain in the system longer than white youth.<sup>60</sup> These racial disparities are not explained by higher levels of offending, but rather more likely due to “subjective decision making . . . , intentional or unintentional profiling, biased policies, economic disadvantage, and inadequate community resources.”<sup>61</sup> Children and teens with disabilities are also overrepresented in juvenile court referrals and detainments, making up at least two thirds of all youth involved in the juvenile legal system.<sup>62</sup> There is also evidence that children who identify as LGBT, questioning, or gender nonconforming are confined in juvenile detention facilities at three times the rate as the general youth population.<sup>63</sup> Once confined, these children are also more at risk of experiencing sexual assault.<sup>64</sup>

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*Iatrogenic Effect of Juvenile Justice*, 50 J. CHILD PSYCH. & PSYCHIATRY 991, 991–98 (2009)).

58. Elizabeth S. Barnert et al., *Setting a Minimum Age for Juvenile Justice Jurisdiction in California*, 13 INT’L J. PRISONER HEALTH 49, 51–52 (2017); *Community-Based Alternatives: Key Issues*, JUV. JUST. INFO. EXCH., <https://jjie.org/jjie-hub/community-based-alternatives/key-issues/> [<https://perma.cc/L2VQ-LXS6>] (citing Petrosino et al., *Formal System Processing of Juveniles: Effects on Delinquency*, 6 CAMPBELL SYSTEMATIC REV. 1, 38 (2010)); see also NAT’L JUV. JUST. NETWORK, EMERGING FINDINGS AND POLICY IMPLICATIONS FROM THE PATHWAYS TO DESISTANCE STUDY 2 (2012); WASH. STATE BD. OF HEALTH, HEALTH IMPACT REV. OF S-6720.1 7 (2020).

59. NAT’L JUV. JUST. NETWORK, POLICY PLATFORM: RAISE THE MINIMUM AGE FOR TRYING CHILDREN IN JUVENILE COURT 11–12 (2020), [https://www.njjn.org/uploads/digital-library/updated%20March%2021%20NJJN%20Policy%20Platform\\_RaiseTheMinimumAge.pdf](https://www.njjn.org/uploads/digital-library/updated%20March%2021%20NJJN%20Policy%20Platform_RaiseTheMinimumAge.pdf) [<https://perma.cc/5292-JWD8>].

60. RICHARD J. BONNIE, ET AL., NAT’L RSCH. COUNCIL OF THE NAT’L ACADS., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 3 (2013); ABRAMS ET AL., *supra* note 8, at 957–58.

61. ABRAMS ET AL., *supra* note 8, at 959; Barry Krisberg & Angela M. Wolf, *Juvenile Offending*, in JUVENILE DELINQUENCY 67, 80 (Kirk Heilbrun et al. eds., 2005).

62. Matt Krupnick, *Disabled students at higher risks for arrests, dropping out and being unready for adulthood*, *Juvenile Justice Information Exchange*, JUV. JUST. INFO. EXCH. (Mar. 8, 2023), <https://jjie.org/2023/03/08/disabled-students-at-higher-risks-for-arrests-dropping-out-and-being-unready-for-adulthood/> [<https://perma.cc/5ATX-DWB5>].

63. SHANNON WILBER, JUV. DET. ALT. INITIATIVE, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN THE JUVENILE JUSTICE SYSTEM 4 (2015), [https://www.nclrights.org/wp-content/uploads/2015/09/AECF\\_LGBTinJJS\\_FINAL2.pdf](https://www.nclrights.org/wp-content/uploads/2015/09/AECF_LGBTinJJS_FINAL2.pdf) [<https://perma.cc/N8C4-JVQP>].

64. *Id.*

All of these factors have led to a growing public sentiment that children are in need of protection rather than an ineffective and potentially harmful juvenile court response.<sup>65</sup> As a result, juvenile court reforms in the last few decades have focused on keeping children out of court, especially young children.<sup>66</sup> Notably, these reforms often garner bipartisan support.<sup>67</sup> One of the most effective reform tools for keeping young children out of court has been setting a minimum age of juvenile court jurisdiction, below which a child cannot be referred to juvenile court. This “Raise the Minimum Age” movement, as well as the factors that have helped make it successful, are addressed further in Part III.

## II. EVOLUTION OF EXCLUSIONARY SCHOOL DISCIPLINE

School discipline is a broad, and somewhat vague, concept. It can be applied to a wide variety of actions taken by a school or school staff. It can be a teacher reminding a student to raise their hand instead of talking out during class. It can be a school principal asking a group of students to stop running in the hall. It can be a negative report home to a parent, lunch detention, a revocation of privileges, or an out-of-school suspension. It can also be positive and preventative, such as a school-wide reward system to incentivize good behavior. The National Center on Safe Supportive Learning Environments defines school discipline as “the rules and strategies applied in school to manage student behavior and practices used to encourage self-discipline.”<sup>68</sup>

Traditionally, school discipline has several goals. The first is to ensure the safety of staff and students.<sup>69</sup> The second is to create an environment conducive to learning.<sup>70</sup> The third and final goal is tied to the

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65. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 *THE FUTURE CHILD* 15, 16 (2008) (“[O]pinion polls show that public anger has abated and that more paternalistic attitudes toward offenders have resurfaced.”).

66. SARAH ALICE BROWN, NAT’L CONF. OF STATE LEGISLATURES, *TRENDS IN JUVENILE JUSTICE STATE LEGISLATION 2011–2015* 3 (2015), [https://www.njln.org/uploads/digital-library/NCSL-Trends\\_in\\_Juvenile\\_Justice\\_State\\_Legislation\\_2011-2015\\_Nov-2015.pdf](https://www.njln.org/uploads/digital-library/NCSL-Trends_in_Juvenile_Justice_State_Legislation_2011-2015_Nov-2015.pdf) [<https://perma.cc/K89R-PBZC>] (“Today, juvenile justice reform has become a largely bipartisan issue as lawmakers work together to develop new policies to align sound fiscal responsibility, community safety and better outcomes for youth. New legislative reforms reflect an interest in developmentally appropriate approaches to more evidence-based methods and cost-effective alternatives to incarceration.”).

67. *Id.*

68. *Discipline*, NAT’L CTR ON SAFE SUPPORTIVE LEARNING ENV’TS, <https://safesupportivelearning.ed.gov/topic-research/environment/discipline> [<https://perma.cc/3T3T-3K5W>].

69. OFF. OF EDUC. RSCH. & IMPROVEMENT, U.S. DEP’T OF EDUC., *STRATEGIES TO REDUCE STUDENT MISBEHAVIOR* 1 (1989); Joan Gaustad, *School Discipline*, 78 *ERIC DIG.* 1, 1 (1992).

70. OFF. OF EDUC. RSCH. & IMPROVEMENT, *supra* note 69; Gaustad, *supra* note 69.

overall pedagogical objective of public education: to create good citizens.<sup>71</sup> Effective school discipline seeks to encourage responsible behavior and to discourage future misconduct.<sup>72</sup> Importantly, most discipline problems that arise in schools involve minor offenses and noncriminal student behavior.<sup>73</sup>

This Article will focus on the use of exclusionary discipline as a response to childhood misbehavior in schools. Exclusionary discipline refers to a school disciplinary action, typically a suspension or expulsion, that removes a student from his or her typical education setting.<sup>74</sup> Similar to a referral to the juvenile court system, exclusionary discipline is viewed as a stronger response to more serious and challenging childhood behaviors. Like juvenile court processing, exclusionary discipline also represents a more significant infringement on a child's liberty interest under the Constitution.<sup>75</sup> As explored in later parts of this Article, juvenile court intervention and exclusionary school discipline present similar challenges when applied to young children. But first, it is important to understand the evolution of exclusionary school discipline and current day trends.

#### A. The Rise of Exclusionary School Discipline in the United States

The origins of exclusionary school discipline are difficult to trace. Although teachers have reported behavior problems in school since the beginning of the public school system, it was not until the 1960s that the use of exclusionary school discipline became commonplace, and more formal policies and protections for students arose.<sup>76</sup> By the 1970s, exclusionary school discipline had become a widely utilized tool to discipline students in school. In 1975, the issue of school suspension reached the U.S. Supreme Court, with the Court ruling that a public school must conduct a hearing before suspending a student.<sup>77</sup> Otherwise, suspension risks violating the student's due process rights under the Fourteenth Amendment of the Constitution.<sup>78</sup> In 1978, the Safe School Study, which collected data from over 4,000 schools, reported that suspensions were the most widely used disciplinary procedure and most prevalent in large cities.<sup>79</sup> During this time, imposing suspension was seen

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71. Gaustad, *supra* note 69.

72. *Id.*

73. *Id.*

74. LIEBERMAN & LOEWENBERG, *supra* note 3.

75. *Goss v. Lopez*, 419 U.S. 565, 574–76 (1975).

76. Kristen L. Allman & John R. Slate, *School Discipline in Public Education: A Brief Review of Current Practices 2* (May 25, 2011) (manuscript), <https://files.eric.ed.gov/fulltext/EJ973838.pdf> [<https://perma.cc/D5YN-C9TV>].

77. *Goss*, 419 U.S. at 578–79.

78. *Id.* at 574–76.

79. Rhonda N. T. Nese et al., *Moving Away from Disproportionate Exclusionary Discipline: Developing and Utilizing a Continuum of Preventative and Instructional Supports* (2020) (unpublished manuscript), <https://files.eric.ed.gov/fulltext/ED604960.pdf> [<https://perma.cc/57E2-JSMS>].

by educators as a necessary responsibility to manage student behavior *in loco parentis*.<sup>80</sup> Unlike the juvenile court system, founded on the rehabilitative ideal that the child in question needed treatment and support, exclusionary discipline primarily focused on ensuring safety and order of the school community with less interest given to the child's well-being or potential for rehabilitation.<sup>81</sup>

This sentiment only deepened during the 1980s and 1990s, when the perceived epidemic of “juvenile superpredators” swept the public consciousness.<sup>82</sup> Sensationalized media coverage of tragic school-based violence, such as the 1999 Columbine High School shooting, reinforced the superpredator theory.<sup>83</sup> Just as juvenile courts grew more punitive during this time in response to rising juvenile crime rates and public fear, so too did schools. A moral panic over drugs and gang violence led many schools to adopt draconian disciplinary practices.<sup>84</sup> Notably, many school districts adopted “zero-tolerance” policies that imposed mandatory expulsion or suspension for a wide range of misconduct that would typically have been handled through lower-level disciplinary interventions.<sup>85</sup> “A zero-tolerance school policy is generally understood to be one that applies a prescribed, mandatory sanction for an infraction— typically expulsion or suspension— with minimal, if any, consideration of the circumstances or consequences of the offense, or the intent, history, disabilities, or prospects of the offender.”<sup>86</sup> The federal Gun-Free Schools Act (GFSA) nationalized this zero-tolerance mentality by requiring states to have a law mandating a one-year suspension for weapon possession, and a referral of violating students to the criminal or juvenile systems.<sup>87</sup>

Instead of focusing on keeping at-risk students in school and offering remediation, zero-tolerance policies instituted a “one strike and you are out” approach that included “a raft of mutually reinforcing laws and policies designed to investigate, identify, remove, and punish troublesome students.”<sup>88</sup> School discipline in the zero-tolerance era was marked by a regime of mandatory expulsions and suspensions, expansion of disciplinary action for trivial infractions, school-based surveillance and searches, and dramatic increase in referral and punishment of students to the juvenile and

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80. See RICHARD ARUM, *JUDGING SCHOOL DISCIPLINE* (2005).

81. Allman & Slate, *supra* note 76, at 2, 4.

82. Boghani, *supra* note 44; Blumenson & Nilson, *supra* note 4, at 65–66.

83. See Glenn W. Muschert, *The Columbine Victims and the Myth of the Juvenile Superpredator*, 5 *YOUTH VIOLENCE & JUV. JUST.* 351, 354 (2007).

84. Paul J. Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 *THEORETICAL CRIMINOLOGY* 79, 79 (2008).

85. Blumenson & Nilson, *supra* note 4, at 65–66; RUSSEL SKIBA ET AL., *AM. PSYCH. ASS'N, ARE ZERO-TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS?: AN EVIDENTIARY REVIEW AND RECOMMENDATIONS* 3 (2006); ABRAMS ET AL., *supra* note 8, at 961.

86. Blumenson & Nilson, *supra* note 4, at 65–66.

87. Gun Free Schools Act, Pub. L. No. 101-647, § 1702, 104 Stat. 4844–45, 5127 (1990).

88. Blumenson & Nilson, *supra* note 4, at 68.

adult criminal court systems.<sup>89</sup> The result was a stark increase in suspension rates, which peaked around 2010.<sup>90</sup> The overall suspension rate increased from four percent in 1973 to seven percent in the 2009-2010 school year.<sup>91</sup>

These policies also specifically targeted students of color.<sup>92</sup> Although Black students had always been disproportionately subjected to exclusionary discipline compared to their white peers, this racial gap increased drastically with the increase in the use of suspension.<sup>93</sup> While suspension rates increased modestly for white middle school students between 1973 and 2006, the rates more than doubled for Latinx students, and nearly tripled for Black students.<sup>94</sup> Students with disabilities, already extremely vulnerable to the educational and psychological impacts of suspension, also faced exclusionary discipline at higher rates.<sup>95</sup>

## B. Pushback Against Exclusionary School Discipline

Historical data never supported the outsized fear that led to the marked increase in the use of exclusionary school discipline from the 1970s to the early 2010s. At the time that zero-tolerance and other punitive school discipline policies were being pushed, juvenile crime was actually trending downwards.<sup>96</sup> A growing body of research revealed that exclusionary discipline was ineffective at changing student behavior and may even make future misbehavior more likely.<sup>97</sup> Horror stories of children as young as five being arrested, handcuffed, and led out of school for throwing a temper

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89. *Id.* at 68–69.

90. M. LEUNG-GAGNÉ ET AL., LEARNING POL'Y INST., PUSHED OUT: TRENDS AND DISPARITIES IN OUT-OF-SCHOOL SUSPENSION 5 (2022), [https://learningpolicyinstitute.org/media/3885/download?inline&file=CRDC\\_School\\_Suspension\\_REPORT.pdf](https://learningpolicyinstitute.org/media/3885/download?inline&file=CRDC_School_Suspension_REPORT.pdf) [<https://perma.cc/G4RS-3UTS>].

91. *Id.*

92. Stephen Hoffman, *Zero Benefit: Estimating the Effect of Zero Tolerance Discipline Policies on Racial Disparities in School Discipline*, 28 EDUC. POL'Y 69, 70 (2014).

93. *Id.*

94. DANIEL J. LOSEN & RUSSEL J. SKIBA, S. POVERTY L. CTR., SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 3 (2010), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/Suspended\\_Education.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Suspended_Education.pdf) [<https://perma.cc/V7DK-EARU>].

95. ABRAMS ET AL., *supra* note 8, at 960–61.

96. Blumenson & Nilson, *supra* note 4, at 67. (“With hindsight, we know that the sensational school shootings were in fact unconnected events, aberrant in the affected schools and unreflective of the substantial downward trend of juvenile crime. Various studies reported that juvenile crimes of violence fell in the 1990s by as much as 30%.”).

97. OFF. OF ELEMENTARY & SECONDARY EDUC. & OFF. OF SAFE & SUPPORTIVE SCHS., TECHNICAL ASSISTANCE, CREATING AND SUSTAINING DISCIPLINE POLICIES THAT SUPPORT STUDENTS’ SOCIAL, EMOTIONAL, BEHAVIORAL, AND ACADEMIC WELL-BEING AND SUCCESS: STRATEGIES FOR SCHOOL AND DISTRICT LEADERS 2 (2023) (“If the goal is to change student behavior, a substantial body of research has found no evidence that exclusionary discipline accomplishes this, and some research has found that it may make future misbehavior more likely.”).

tantrum circulated.<sup>98</sup> Public awareness of the significant racial disproportionality in who received exclusionary school discipline also grew.<sup>99</sup>

All of these findings resulted in calls to limit or decrease the use of exclusionary school discipline. In 2014, the Department of Education's Office for Civil Rights issued a "Dear Colleague" letter discouraging the use of exclusionary discipline and urging school leaders and educators to take steps to decrease suspensions and reduce disparities based on race and disability.<sup>100</sup> By May 2015, twenty-two states and the District of Columbia passed new laws to limit or discourage the use of exclusionary discipline.<sup>101</sup> Instead of suspension, many schools began to implement restorative justice practices, Positive Behavioral Interventions and Support (PBIS), and other social-emotional learning strategies and disciplinary systems.<sup>102</sup> More educators received training in conflict mediation and trauma-informed practices.<sup>103</sup> This new approach to school discipline encouraged schools to use disciplinary practices that focus on improving student behavior with evidence-based, non-punitive interventions and supports.<sup>104</sup>

This new approach to school discipline has led to declining rates of suspension, with school suspension rates reaching five percent in 2017-2018.<sup>105</sup> However, this is still higher than the rates of suspension observed in the 1970s and early 1980s.<sup>106</sup> Further, most of these decreases were concentrated in middle and high schools, with smaller and less consistent decreases at the elementary level.<sup>107</sup> There is concern that suspensions may be on the rise again as students return to in-person learning post Covid-

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98. ABRAMS ET AL., *supra* note 8, at 960 ("In 2012, ABA President testified that 'children, even those as young as five years-old, are being arrested, handcuffed and led out of school for offenses such as throwing a temper tantrum, truancy, being late to school or breaking a pencil.'") (quoting Laurel G. Bellows, Statement on Ending the STPP Before Committee on the Judiciary of the U.S. Senate (Dec. 12, 2012)).

99. U.S. COMM'N ON C.R., BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 10 (2019) ("Students of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their white peers- but black students, Latino students, and Native American students in the aggregate receive substantially more school discipline than their white peers and receive harsher and longer punishments than their white peers receive for like offenses.").

100. U.S. Dep't of Educ. & U.S. Dep't of Just., Joint Dear Colleague Letter (Jan. 8, 2014).

101. Matthew P. Steinberg & Johanna Lacoë, *What Do We Know about School Discipline Reform?* 17 EDUC. NEXT 44, 44 (2017).

102. *Id.* at 50-51.

103. Anne Gregory & Edward Fergus, *Social and Emotional Learning and Equity in School Discipline* 27 FUTURE CHILD. 117, 123 (2017).

104. OFF. OF ELEMENTARY & SECONDARY EDUC. & OFF. OF SAFE & SUPPORTIVE SCHS., *supra* note 97.

105. LEUNG-GAGNÉ ET AL., *supra* note 90, at 5.

106. *Id.*

107. *Id.* at 6.



19.<sup>108</sup> During the 2020-2021 school year, most districts put instruction online in response to the Covid-19 pandemic, resulting in a steep drop in exclusionary discipline.<sup>109</sup> As students return to in-person learning, preliminary data from medium and large school districts around the country reveals that exclusionary discipline is approaching or exceeding pre-pandemic levels in many places.<sup>110</sup> Finally, disparities among who is most likely to be suspended persist, with Black, Indigenous, and students with disabilities still experiencing exclusionary discipline at higher rates than white students and students without disabilities.<sup>111</sup>

### C. Comparing the Evolutions of the Juvenile Court and Exclusionary School Discipline

In many respects, the evolution of exclusionary school discipline has followed a similar trajectory as the evolution of juvenile court intervention. At their core, they are both interventions aimed at addressing more serious childhood misbehavior, and both strive to regulate children's behavior to achieve a societal interest in safety and order.<sup>112</sup> Both spheres have also been heavily influenced by trends in public perception on the "dangers" presented by juvenile offenders, as well as research undermining the effectiveness of punitive interventions on children.<sup>113</sup> However, there are some key differences.

A primary difference is that juvenile courts were originally developed as an alternative to adult court. Since their founding, juvenile courts have historically been defined by their similarities or differences to the adult criminal court system.<sup>114</sup> In the world of school discipline, there is no clear adult corollary for comparison.

Another difference is that juvenile court, as an arm of the court system, is a more formalized intervention driven by statewide laws and policy. School discipline is typically much more informal. While exclusionary school discipline often is the most regulated version, it still can vary significantly among schools, even where those schools are in the same district. Although all states have laws regulating school discipline,<sup>115</sup>

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108. Tara Garcia Mathewson, *Some Kids Have Returned to In-Person Learning Only to Be Kicked Right Back Out*, THE NATION (Jan. 20, 2022), <https://www.thenation.com/article/society/schools-suspension-covid/> [https://perma.cc/7ZHB-4ZVP].

109. *Id.*

110. *Id.*

111. LEUNG-GAGNÉ ET AL., *supra* note 90, at 6–7.

112. OFF. OF ELEMENTARY & SECONDARY EDUC. & OFF. OF SAFE & SUPPORTIVE SCHS., *supra* note 97; Hoffman, *supra* note 92, at 44, 46.

113. OFF. OF ELEMENTARY & SECONDARY EDUC. & OFF. OF SAFE & SUPPORTIVE SCHS., *supra* note 97; Steinberg & Laco, *supra* note 101.

114. ABRAMS ET AL., *supra* note 8.

115. *See generally* NAT'L. CTR ON SAFE SUPPORTIVE LEARNING ENV'TS, COMPENDIUM OF SCHOOL DISCIPLINE LAWS AND REGULATIONS FOR THE 50 STATES, DISTRICT OF COLUMBIA AND THE U.S. TERRITORIES (2023), <https://safesupportivelearning.ed.gov/sites/default/>

much discretion is given to local boards and school administrators imposing the discipline.<sup>116</sup> Conversely, the procedures governing the decision-making of juvenile court actors are much more likely to be prescribed by statewide laws or court regulations.<sup>117</sup>

These differences are important to keep in mind, but they do not diminish the value of looking at the success of the recent juvenile court reform efforts for lessons in how to advocate for similar safeguards in the sphere of exclusionary school discipline. The rest of this Article focuses on that comparison, highlighting potential challenges and opportunities for advocates who want to protect young children from the harms of exclusionary school discipline.

### III. JUVENILE COURT REFORM AND THE RISE OF THE “RAISE THE MINIMUM AGE” MOVEMENT

The first wave of juvenile court reform that came with the resurgence of the “rehabilitative ideal” in the early twenty-first century was not focused on young children. Instead, efforts were fixated on keeping children out of the adult system and widening the age range of juvenile court jurisdiction.<sup>118</sup> This is due to the fact that, during the “tough on crime” period of the 1980s and 1990s, more and more children found themselves in adult court because they were in states that had a low maximum age of juvenile court jurisdiction or allowed for easy transfer of juveniles to adult court for prosecution.<sup>119</sup> The adultification of juvenile behavior in the criminal courts led to urgent calls for reforms that would keep children within the jurisdiction of juvenile court, which was more rehabilitative and protective as compared to the adult court system.<sup>120</sup>

One of the primary reform mechanisms utilized by states was raising the age at which children could be treated as adults in the criminal court context.<sup>121</sup> In 2007, fourteen states treated all youth above the age of

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files/discipline-compedium/School%20Discipline%20Laws%20and%20Regulations%20Compendium.pdf [https://perma.cc/9FMH-98HK].

116. See JOSH WEBER, COURTING JUDICIAL EXCELLENCE IN JUVENILE JUSTICE: A 50-STATE STUDY, NAT’L COUNCIL OF FAM. CT. JUDGES 6 (2022), <https://csgjusticecenter.org/wp-content/uploads/2022/04/Courting-Judicial-Excellence-in-Juvenile-Justice-A-50-State-Study-2.pdf> [https://perma.cc/3XNG-2UBE].

117. *Id.*

118. See NAT’L GOVERNORS ASS’N, AGE BOUNDARIES IN JUVENILE JUSTICE SYSTEMS 2–3 (2021), [https://www.nga.org/wp-content/uploads/2021/08/Raise-the-Age-Brief\\_5Aug2021.pdf](https://www.nga.org/wp-content/uploads/2021/08/Raise-the-Age-Brief_5Aug2021.pdf) [https://perma.cc/P43V-NYXT].

119. See NAT’L JUV. JUST. NETWORK, POLICY PLATFORM: YOUTH IN THE ADULT SYSTEM 1 (2013), <https://www.njjn.org/uploads/Youth-in-Adult-System-policy-platform-FINAL.pdf?phpMyAdmin=14730ab3483c51c94ca868bccffa06ef> [https://perma.cc/E5CB-E3S8].

120. *Id.*; NAT’L GOVERNORS ASS’N, *supra* note 118.

121. NAT’L JUV. JUST. NETWORK, *supra* note 119; NAT’L GOVERNORS ASS’N, *supra* note 118.

fifteen or sixteen as adults for the purposes of criminal court processing.<sup>122</sup> By 2013, only ten states had not raised the maximum age of juvenile court jurisdiction to seventeen.<sup>123</sup> By 2017, only five states had not yet raised the age to seventeen.<sup>124</sup> Currently, all but three states (Georgia, Wisconsin, and Texas) have raised the maximum age of juvenile court jurisdiction to seventeen for most offenses.<sup>125</sup> Some states have gone even further, expanding juvenile court jurisdiction in some circumstances to young adults between ages eighteen and twenty-five based on scientific research that shows brain development continues up to age twenty-six.<sup>126</sup>

Alongside the success of the “Raise the Maximum Age” movement came the concurrent recognition that, although it was better for children to be processed in juvenile court instead of adult court, for many children, the best option was no court intervention at all.<sup>127</sup> This was especially true for young children. As explored below, the juvenile court system has an established history of treating young children differently, laying a foundation for the arguments that ultimately fueled the “Raise the Minimum Age” movement.

#### A. Different Treatment of Young Children in Juvenile Court

Dating back to the common law, there has been some agreement that court intervention is not typically appropriate for young children.<sup>128</sup> Even once the juvenile court was established under the guise of offering developmentally appropriate services to children, legal mechanisms developed to provide different treatment or consideration in the cases of young children. For example, some states allow a juvenile defendant in delinquency court to raise an infancy defense asserting that the juvenile defendant should not be subject to criminal prosecution because they are too young or immature to form criminal intent.<sup>129</sup>

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122. Chuck Carroll, *Raise the Age: Where Legislation Stands in the Final Three States*, THE IMPRINT (Feb. 24, 2021, 7:00 PM), <https://imprintnews.org/justice/raise-age-where-legislation-stands-final-three-states/52186> [<https://perma.cc/VKM4-GX3X>].

123. *Id.*

124. *Id.*

125. *Id.*

126. See Katie Dodds, *Why All States Should Embrace Vermont’s Raise the Age Initiative*, COAL. FOR JUV. JUST. (July 22, 2020), <https://www.juvjustice.org/blog/1174> [<https://perma.cc/MX5H-UXLK>]; NAT’L GOVERNORS ASS’N, *supra* note 118.

127. See Dodds, *supra* note 126; NAT’L GOVERNORS ASS’N, *supra* note 118.

128. BLACKSTONE, *supra* note 17; see NAT’L JUV. JUST. NETWORK, *supra* note 59, at 11–12.

129. See Robert Henderson, ALASKA CRIMINAL LAW: THE 2022 EDITION (2021) (ebook) (explaining that where infancy defense is recognized, courts weigh various factors to determine whether the juvenile knew the wrongfulness of their actions, including looking at the child’s age and maturity.); see also JACQUELYN GREEN, INCLUDING YOUNG CHILDREN IN DELINQUENCY JURISDICTION: ISSUES OF INFANCY AND CAPACITY 2–5 (2021).

Similarly, most states confer the right to a competency hearing in delinquency proceedings under the state constitution, laws, or court rules.<sup>130</sup> This stems from the recognition that, in adult criminal proceedings, due process requires that a defendant have sufficient present ability to consult with their lawyer with a reasonable degree of rational understanding of the proceedings against them.<sup>131</sup> Behavioral research indicates children under fifteen are considerably less able than older children to understand the meaning of a trial, assist their counsel, or make decisions in their own defense.<sup>132</sup> Thus, most states allow juvenile competency to be challenged based on mental illness or disability or developmental immaturity.<sup>133</sup> Some courts have found particularly young children incompetent even when they do not have a mental disability.<sup>134</sup>

The different treatment of young children in juvenile court also extends to the level of constitutional protection they receive under the Fourth, Fifth, and Sixth Amendments.<sup>135</sup> Some states have gone beyond the federal constitutional standard, mandating heightened protection during custodial interrogations for younger children.<sup>136</sup> For example, in Washington, if the child is under twelve, only their parent or guardian can

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130. ABRAMS ET AL., *supra* note 8, at 951–52, 1065.

131. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

132. See Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 356 (2003) (finding that juveniles under sixteen are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants in a criminal proceeding and approximately one-third of eleven to thirteen year olds and one-fifth of fourteen to fifteen year olds were “as impaired . . . as are seriously mentally ill adults who would likely be considered incompetent to stand trial by clinicians who perform evaluations for courts”); see also NAT'L RSCH. COUNCIL, REFORMING JUVENILE JUSTICE 420 (The Nat'l Acads. Press, 2013) (finding notable developmental gaps between youth aged sixteen to eighteen years old and those fourteen years old and younger, which could impact their ability to understand trial matters).

133. See *In re Charles B.*, 978 P.2d 659, 660 (Ariz. Ct. App. 1998) (competency challenge in case where an eleven year old was charged with aggravated assault).

134. See *id.*

135. Courts have considered a child's age when determining whether a search of a student by a public school official meets the reasonableness standard under the Fourth Amendment. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). Similarly, in a court's analysis of whether Fifth and Sixth Amendment protections apply, age is a factor in determining if a child was “in custody” or if a child voluntarily, knowingly, and intelligently waived their privilege against compulsory self-incrimination and right to counsel. *J.D.B. v. North Carolina*, 564 U.S. 261, 271–72, 281 (2011) (held juvenile's age relevant to whether juvenile is “in custody” for *Miranda* purposes); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (held totality-of-the-circumstances approach, including consideration of age, is adequate to determine whether juvenile has voluntarily, knowingly, and intelligently waived privilege against compulsory self-incrimination and right to counsel).

136. *E.g.*, WASH. REV. CODE § 13.40.140(10) (where a juvenile is under twelve, waiver of *Miranda* rights may be made only by parent or guardian); *State v. Presha*, 163 N.J. 304, 315–16 (N.J. 2000) (finding totality-of-the-circumstances test insufficient for juveniles under age fourteen).

waive their right against self-incrimination or their right to counsel.<sup>137</sup> This approach is backed by the U.S. Justice Department and research that shows young children are especially prone to giving false confessions.<sup>138</sup>

Ultimately, these attempts to provide different treatment and protection to young children in juvenile delinquency court recognize the ineffectiveness and inappropriateness of juvenile court intervention at younger ages. However, they do little to mitigate harm since these protections can only be raised post-arrest or referral. While they may have some chilling effect, they do not adequately keep young children out of the court system altogether or prevent the harm of juvenile arrest or referral.<sup>139</sup>

### **B. Efforts to Keep Young Children Out of Court Through “Minimum Age” Reforms**

The harm of juvenile court coupled with the inadequacy of current protections for young children have caused many to advocate for reforms that prohibit the use of juvenile court intervention for children under a particular age. Until recently, the majority of states had no minimum age for prosecuting children in the juvenile court system.<sup>140</sup> In this respect, the United States is an outlier internationally, with most countries recognizing fourteen as the minimum age of criminal responsibility.<sup>141</sup> The lack of a minimum age has allowed young children to be arrested and referred to juvenile court in droves. Between 2013 and 2018, 30,467 children under age ten and 266,321 children aged ten to twelve years old were arrested in the United States.<sup>142</sup> While the overall arrest rate for young children has

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137. *E.g.*, WASH. REV. CODE § 13.40.140(10).

138. *See* JUDITH B. JONES, OFF. OF JUV. JUST. & DELINQ. PREVENTION, ACCESS TO COUNSEL 2 (2004) (U.S. Department of Justice affirming that many younger juveniles “do not know the meaning of the word ‘waive’ or understand its consequences.”). *See generally* Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed*, 27 L. & HUM. BEHAV. 141 (2003).

139. *See* Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365, 387 (2018); *see also* ELIZABETH GLADDEN KEHOE & KIM BROOKS TANDY, IND. JUV. JUST. TASK FORCE, INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 35–36, 45–46 (2006), <http://njdc.info/wp-content/uploads/2013/11/Final-Indiana-Assessment.pdf> [<https://perma.cc/VT6P-V55L>].

140. *See* Caitlin Cavanagh et al., *The Developmental Reform in Juvenile Justice: Its Progress and Vulnerability*, 28 PSYCH. PUB. POL. & L. 151, 162 (2022).

141. *See Raising the Minimum Age for Prosecuting Children*, NAT’L JUV. JUST. NETWORK, <https://www.njcn.org/our-work/raising-the-minimum-age-for-prosecuting-children> [<https://perma.cc/D2GP-LFUU>].

142. Bill Hutchinson, *More than 30,000 Children Under Age 10 Have Been Arrested in the US Since 2013: FBI*, ABC NEWS (Oct. 1, 2019, 9:31 AM), <https://abcn.ws/3owx2HE> [<https://perma.cc/5AAY-UZNN>].

declined from 1980 to 2010, tens of thousands of young children are still arrested each year.<sup>143</sup>

In states with no minimum age, few protections exist to keep young children out of the court system for relatively low-level misbehavior. For example, in Florida, which has no minimum age, a six-year-old child was arrested for throwing rocks at cars, and a four-year-old, not yet in kindergarten, was arrested with a group of children for felony burglary and misdemeanor criminal mischief for breaking into and vandalizing a neighbor's shed.<sup>144</sup> In Detroit, a ten-year-old was arrested for throwing a ball at a child's face during a dodgeball game.<sup>145</sup> In Kansas City, a seven-year-old was arrested for refusing to go to the principal's office.<sup>146</sup> These stories have been met with a resounding and often bipartisan call from advocates to keep young children out of court by setting or raising the statewide minimum age of juvenile court jurisdiction.

### C. Reasons to “Raise the Minimum Age”

There are several justifications that advocates have used to explain why a statutory minimum age is needed. These justifications range from the fact that most crimes committed by young children are not serious to the short- and long-term harms that juvenile court intervention can cause to the financial and administrative costs of juvenile court. Each of these justifications, as well as other arguments in support of “Raising the Minimum Age” are explored below.

#### 1. *Young Children Rarely Commit Serious Offenses*

Children under twelve represent a small percentage (eight percent) of total arrests of youth under eighteen.<sup>147</sup> Of that eight percent, most arrests of children under twelve are for nonviolent offenses, such as property crimes or theft.<sup>148</sup> From 1980 to 2008, children under age fourteen constituted less than half a percent of total homicide offenders.<sup>149</sup> Given the small risk to public safety posed by young children, it is easier for

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143. See 2019: *Crime in the United States, Table 38, Arrests by Age*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-38> [<https://perma.cc/87R8-BUKV>].

144. See Watson, *supra* note 12, at 435.

145. Hutchinson, *supra* note 142.

146. *Id.*

147. See 2019: *Crime in the United States, supra* note 143.

148. See MELISSA SICKMUND & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 160–61 (2014), <https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf> [<https://perma.cc/M6GJ-YHGT>].

149. See ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUST., HOMICIDE TRENDS IN THE UNITED STATES 1980-2008 3 (2011), <https://www.bjs.gov/content/pub/pdf/htus8008.pdf> [<https://perma.cc/3QPB-HFH7>].

advocates and policymakers to argue that young children should be excluded from juvenile court intervention, instead reserving the court's resources for more serious crimes that threaten public safety or endanger lives.<sup>150</sup>

## 2. *Juvenile Court Does Not Adequately Address Underlying Issues*

Despite the professed goal of rehabilitation, juvenile courts are ill-equipped to adequately assess and treat underlying mental health disorders or substance abuse problems, especially in young children.<sup>151</sup> Nine out of ten children in the juvenile court system have experienced some traumatic event in their life, with approximately three out of ten meeting the criteria for post-traumatic stress disorder.<sup>152</sup> An overwhelming majority (seventy percent) of children in juvenile court also meet the criteria for some mental health disorder.<sup>153</sup> Likely due to unaddressed trauma and mental illness, 78.4% of youth taken into custody suffer from substance abuse and are four times more likely to commit suicide than the general population.<sup>154</sup> Although some juvenile courts have made efforts to increase substance abuse and mental health programming, their work is not enough to keep up with the demand and often is not developed with young children in mind.<sup>155</sup>

A statutory minimum age removes juvenile court as an available tool for young children. Instead of wasting precious time and court resources going through an ineffective juvenile court intervention, those responsible for the young child must look at other options, such as behavioral health treatment or community-based supports that are better equipped to address the underlying issues. Further, research shows that the earlier evidence-based interventions can be applied, the more likely the child is to benefit from those interventions and experience associated benefits in academic achievement, behavior, and educational progression.<sup>156</sup>

150. *Id.*; SICKMUND & PUZZANCHERA, *supra* note 148, at 160–61.

151. See NAT'L RSCH. COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE 191 (Joan McCord et al. eds., 2001).

152. Carley B. Dierkhising et al., *Trauma Histories among Justice-Involved Youth: Findings from the National Child Traumatic Stress Network*, 4 EUR. J. PSYCHOTRAUMATOLOGY 1, 1 (2013).

153. *Id.*

154. See COLUM. UNIV. NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, CRIMINAL NEGLECT: SUBSTANCE ABUSE, JUVENILE JUSTICE AND THE CHILDREN LEFT BEHIND (Oct. 2004), <https://www.centeronaddiction.org/addiction-research/reports/criminal-neglect-substance-abuse-juvenile-justice-and-children-left> [<https://perma.cc/2XY5-S278>].

155. *Id.* See generally RECLAIMING FUTURES, MODEL POLICIES FOR JUVENILE JUSTICE & SUBSTANCE ABUSE TREATMENT (Joey Binard & Mac Prichard eds., 2008), [http://www.njjn.org/uploads/digital-library/resource\\_860.pdf](http://www.njjn.org/uploads/digital-library/resource_860.pdf) [<https://perma.cc/J4TX-AF5M>] (In recent years, juvenile justice systems have increased the number of substance abuse programs to keep up with the demand of juveniles needing assistance, however, it is still not enough to keep up with the growing drug epidemic in the United States.).

156. See generally LYNN A. KAROLY ET AL., RAND CORP., PROVEN BENEFITS OF EARLY CHILDHOOD INTERVENTIONS (2005).

Finally, with juvenile court off the table, children and families are often more likely to access treatment because they do not fear legal repercussions.<sup>157</sup>

### 3. *Juvenile Court Harms Young Children*

Juvenile court can cause both direct and indirect harm to young children. One of the possible outcomes of juvenile court referral is incarceration in a juvenile detention facility. Unfortunately, there is widespread documentation of abuse in these facilities, including systemic violence, physical or sexual abuse by facility staff, and excessive use of isolation and restraints.<sup>158</sup> A 2018 national survey of youth incarcerated in juvenile facilities found that seven percent of surveyed youth reported being victimized sexually in the prior year.<sup>159</sup> These harms are amplified for younger children. More than one quarter of youth under thirteen years old were victims of some type of violence while confined, compared to nine percent of twenty-year-olds.<sup>160</sup> Raising the minimum age of juvenile court jurisdiction ensures young children are not exposed to this increased risk of violence and abuse during juvenile incarceration.

In addition to the direct risk of abuse in the juvenile system, young children also face collateral consequences. Collateral consequences are indirect or secondary impacts of juvenile court involvement that can negatively impact youth and their families even at the lowest level of engagement with the juvenile system.<sup>161</sup> These can include barriers to future education, employment, and housing; financial penalties such as fines, court fees, and restitution; a bar or revocation of certain privileges such as getting a driver's or firearms license; and negative psychological impacts.<sup>162</sup>

Many of these consequences are intensified by state policies that allow certain juvenile court information to become public in some

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157. See NAT'L JUV. JUST. NETWORK, *supra* note 59, at 13.

158. See generally R.A. MENDEL, THE ANNIE E. CASEY FOUND., MALTREATMENT OF YOUTH IN U.S. CORRECTIONS FACILITIES (2015).

159. See E.L. SMITH & J. WIDICO-STROOP, U.S. DEP'T OF JUST., SEXUAL VICTIMIZATION REPORTED BY YOUTH IN JUVENILE FACILITIES, 2018 1 (2018), <https://bjs.ojp.gov/content/pub/pdf/svryjfl8.pdf> [<https://perma.cc/V5YE-HRVX>].

160. See NAT'L JUV. JUST. NETWORK, *supra* note 59, at 13.

161. See NAT'L GOVERNORS ASS'N, STATE STRATEGIES TO ADDRESS THE NEEDS OF JUSTICE-INVOLVED YOUTH IMPACTED BY COLLATERAL CONSEQUENCES (2023), [https://www.nga.org/wp-content/uploads/2023/02/NGA\\_Juvenile\\_Justice\\_Collateral\\_Consequences\\_Feb2023.pdf](https://www.nga.org/wp-content/uploads/2023/02/NGA_Juvenile_Justice_Collateral_Consequences_Feb2023.pdf) [<https://perma.cc/P43V-NYXT>].

162. *Id.*; see MODELS FOR CHANGE, INNOVATION BRIEF: AVOIDING AND MITIGATING THE COLLATERAL CONSEQUENCES OF A JUVENILE ADJUDICATION 1 (2013), [https://www.modelsforchange.net/publications/484/Innovation\\_Brief\\_Avoiding\\_and\\_Mitigating\\_the\\_Collateral\\_Consequences\\_of\\_a\\_Juvenile\\_Adjudication.pdf](https://www.modelsforchange.net/publications/484/Innovation_Brief_Avoiding_and_Mitigating_the_Collateral_Consequences_of_a_Juvenile_Adjudication.pdf) [<https://perma.cc/2M3E-5YA3>].



circumstances.<sup>163</sup> In most states, a child must petition the court to expunge the juvenile court records once they turn eighteen.<sup>164</sup> Often, college applications ask students to self-report any arrests or offenses, including juvenile arrests or delinquency offenses.<sup>165</sup> This can limit a student's chances of entering college.<sup>166</sup> Some states have scholarship programs that disqualify students who have committed a crime or delinquent act.<sup>167</sup> Employment applications often ask if the applicant has ever been arrested, without excluding juvenile arrests.<sup>168</sup> Applicants face the choice of disclosing the juvenile arrest or being caught in a potential lie, even where the arrest was supposed to be confidential.<sup>169</sup> Juvenile records are also often considered in later adult criminal proceedings, which can lead to harsher punishments.<sup>170</sup> Minimum age laws ensure that a juvenile court referral for something a child did in elementary school does not have devastating life-long impacts.

#### 4. *Juvenile Court Referral for Young Children Reduces Public Safety*

Referring young children to juvenile court can actually increase the likelihood of re-arrest later on.<sup>171</sup> Research shows that early contact with the juvenile court system has a negative impact on future behavior of children, increasing inversely with the age of the first contact.<sup>172</sup> Most young children are likely to age out of criminal behavior as they develop psychological maturity.<sup>173</sup> In general, sixty-three percent of youth referred

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163. See Jeffrey A. Butts & Ojmarrh Mitchell, *Brick by Brick: Dismantling the Border Between Juvenile and Adult Justice*, in 2 BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 167, 190 (Charles M. Friel ed., 2000). See generally Radice, *supra* note 139.

164. Radice, *supra* note 139, at 409; e.g. IND. CODE § 31-39-8 (2016); see *How to Expunge your Juvenile Records*, IND. PUB. DEF. COUNS., <https://www.in.gov/ipdc/public/2654.htm> [<https://perma.cc/3AML-GP2B>].

165. See Stephanie Saul, *Colleges That Ask Applicants About Brushes with the Law Draw Scrutiny*, N.Y. TIMES (Jan. 28, 2016), <https://www.nytimes.com/2016/01/29/us/colleges-that-ask-applicants-about-brushes-with-the-law-draw-scrutiny.html> [<https://perma.cc/7CFR-ZK5Q>].

166. Radice, *supra* note 139, at 387.

167. *Id.*; see, e.g., IND. CODE § 21-12-6-6(a)(5) (2018). See generally IND. COMM'N FOR HIGHER EDUC. 21ST CENTURY SCHOLARS 25 YEARS OF SUPPORTING STUDENT SUCCESS, [https://www.in.gov/che/files/25th\\_Anniversary\\_Brochure\\_11-18-15\\_Final\\_pages.pdf](https://www.in.gov/che/files/25th_Anniversary_Brochure_11-18-15_Final_pages.pdf) [<https://perma.cc/44JY-4WTY>].

168. Radice, *supra* note 139, at 387; see Jeff Parrott, *Indiana First State to Scrap Local "Ban the Box" Laws*, SOUTH BEND TRIB. (July 2, 2017), [https://www.southbendtribune.com/news/local/indiana-first-state-to-scrap-local-ban-the-box-laws/article\\_c1a31101-db3e-5d10-aae1-407396f1948e.html](https://www.southbendtribune.com/news/local/indiana-first-state-to-scrap-local-ban-the-box-laws/article_c1a31101-db3e-5d10-aae1-407396f1948e.html) [<https://perma.cc/S24W-ZZL6>].

169. Radice, *supra* note 139, at 387; Parrott, *supra* note 168.

170. Radice, *supra* note 139, at 388; e.g., IND. CODE § 35-38-1-7.1 (2018).

171. Barnert et al., *supra* note 58, at 52.

172. *Id.*

173. See generally RICHARD MENDEL, THE SENT'G PROJECT, WHY YOUTH INCARCERATION FAILS (2022), <https://www.sentencingproject.org/app/uploads/2023/03/Why-Youth-Incarceration-Fails.pdf> [<https://perma.cc/4C4V-8WJB>].

to juvenile court never return.<sup>174</sup> However, incarcerating youth impedes their psychological development. Rather than aiding public safety, formal processing often has “a negative or backfire effect” for young children, making them more likely to have future involvement with the juvenile and criminal legal systems.<sup>175</sup> Therefore, because juvenile court referral may increase recidivism and create unnecessary threats to public safety, raising the minimum age to keep young children out of the system has inherent overall benefits for public safety since those children will be less likely to commit any harm to others in the future.

##### 5. *Research Supports the Idea of Diminished Culpability of Young Children*

The U.S. Supreme Court has recognized research that adolescent brains are not as developed as adult brains and thus, less culpable.<sup>176</sup> A growing body of research has shown that prepubescent children are even less equipped to make mature decisions and fully understand the consequences of their actions.<sup>177</sup> Puberty, which generally starts between the ages of eleven to fourteen for males and nine to twelve for females, is a period of rapid development for children that can last from two to five years.<sup>178</sup> The part of the brain that controls reasoning, thought, and impulse control is the final part of the brain to mature.<sup>179</sup> Therefore, because of the rapid brain development occurring during and after puberty, young children who have not reached puberty, or are going through it, are much less likely to have the requisite culpability for processing through the juvenile court system.<sup>180</sup>

##### 6. *Juvenile Court is Costly Intervention*

Juvenile court has associated costs that are borne by both the child’s family and the state.<sup>181</sup> For example, many states require families to

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174. *Id.*

175. See Barnert et al., *supra* note 58, at 52; see also NAT’L JUV. JUST. NETWORK, *supra* note 58. See generally *Community-Based Alternatives*, *supra* note 58.

176. See generally Barnert et al., *supra* note 58, at 52.

177. See generally COAL. FOR JUV. JUST., WHAT ARE THE IMPLICATIONS OF ADOLESCENT BRAIN DEVELOPMENT FOR JUVENILE JUSTICE? (2006), [https://www.juvjustice.org/sites/default/files/resource-files/resource\\_134.pdf](https://www.juvjustice.org/sites/default/files/resource-files/resource_134.pdf) [<https://perma.cc/YN3B-EZY5>].

178. *Id.*; see Barbara Huberman, *Growth and Development, Ages Nine to Twelve-What Parents Need to Know*, ADVOC. FOR YOUTH (Nov. 17, 2008), <http://www.advocatesforyouth.org/publications/155-parents> [<https://perma.cc/FBH9-7EMJ>].

179. See generally Stephanie Tabashneck, “Raise the Age” Legislation: *Developmentally Tailored Justice*, 32 CRIM. JUST. 13, 16 (2018).

180. *Id.* See generally COAL. FOR JUV. JUST, *supra* note 177.

181. See JESSICA FEIERMAN ET AL., JUV. L. CTR., DEBTORS’ PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 1, 3, 6 (2016),

pay court costs and other fees related to their child's involvement in juvenile court.<sup>182</sup> These costs can place an extreme financial burden on children's families, the majority of whom are already low-income.<sup>183</sup>

Further, placing young children in the juvenile court system also burdens the state.<sup>184</sup> Juvenile detention is expensive, as the state must take on all costs associated with the child's housing, education, and medical and behavioral health care.<sup>185</sup> In 2019, the average state cost for secure confinement of a youth was \$588 per day (\$214,620 per year).<sup>186</sup> Even when a child is not detained, the state must cover the court-related costs not passed on to the family.<sup>187</sup> Ultimately, given the ineffectiveness and potential harm of juvenile court intervention for young children, it is difficult to justify the significant financial costs associated with this intervention. Keeping young children out of the system through raising the minimum age allows the state to focus its resources on older youth, who are more likely to commit serious crimes and need substantial services.<sup>188</sup>

### 7. *Raising the Age Protects Vulnerable Groups*

Minimum age laws can also serve as a mechanism to help disrupt disparities for children of color, children with disabilities, and LGBTQIA+ students.<sup>189</sup> As described above, these groups are disproportionately represented in juvenile court referrals, making them more at risk for the increased recidivism associated with juvenile court intervention.<sup>190</sup> This risks perpetuating an escalating cycle that spurs further racial disproportionality in the juvenile and adult court systems. These groups also bear the disparate weight of the direct and collateral harms of juvenile court intervention, including educational and employment barriers.<sup>191</sup> A broad prohibition on referring young children to the juvenile court system

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<http://debtorsprison.jlc.org/documents/jlc-debtors-prison.pdf> [<https://perma.cc/E2GM-BZFT>].

182. *Id.*

183. See Peter M. Cicchino, *The Problem Child: An Empirical Survey and Rhetorical Analysis of Child Poverty in the United States*, 5 J. L. & POL'Y 5, 28–29 (1996).

184. See FEIERMAN ET AL., *supra* note 181; see also DEP'T OF CORR., PER DIEM REPORT FISCAL YEAR 2016 JUVENILE FACILITIES 1, <https://www.in.gov/idoc/files/FY16%20Per%20Diem.pdf> [<https://perma.cc/Y6RA-HD69>].

185. DEP'T OF CORR., *supra* note 184.

186. See *Youth Involved with the Juvenile Justice System*, YOUTH.GOV, <https://youth.gov/youth-topics/juvenile-justice/youth-involved-juvenile-justice-system> [<https://perma.cc/7FW2-F9R4>].

187. *Id.*; FEIERMAN ET AL., *supra*, note 181.

188. See *supra* Section III.C.1.

189. *We Came to Learn*, ADVANCEMENT PROJECT & ALL. FOR EDUC. JUST. (Sept. 13, 2018), <https://advancementproject.org/wecametolearn/> [<https://perma.cc/LEB4-Y2KW>].

190. See *supra* Section I.C.

191. See *supra* Sections I.C, II.C.

will reduce the number of children from marginalized groups who are referred, helping decrease the disparities in the system down the road.

For all these reasons, there has been an outgrowth of calls for state-level reform aimed at establishing or increasing a minimum age for juvenile court jurisdiction. These calls have gained the support of many prominent organizations, such as the American Academy of Pediatrics, the National Juvenile Justice and Delinquency Prevention Coalition, and the Society for Adolescent Health and Medicine.<sup>192</sup> As described in the next section, the “Raise the Minimum Age” movement has experienced significant success over the past decade, with lawmakers in many states introducing bills to set a statutory minimum age or raise the current minimum age.<sup>193</sup>

#### D. Charting the “Raise the Minimum Age” Movement

Before charting the success of the “Raise the Minimum Age” movement, it is important to reiterate that the United States is an outlier in the practice of using juvenile court processing and detention to address the behaviors of young children.<sup>194</sup> Fourteen is the most common minimum age of criminal responsibility internationally.<sup>195</sup> This has been affirmed by calls from the United Nations for nations to set their minimum age at fourteen years old.<sup>196</sup> Despite this, as of June 2023, only twenty-six states had established any minimum age of prosecution. Of the states that have set a minimum age, none have set the age at fourteen. Rather, the most typical minimum age is ten years old (sixteen states). The chart below details the minimum age (or lack thereof) in each of the U.S. states and territories.<sup>197</sup>

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192. See, e.g., M.C. Owen & S.B. Wallace, *Advocacy and Collaborative Health Care for Justice-Involved Youth*, 146 PEDIATRICS 1, 1 (2020); NAT’L JUV. JUST. & DELINQ. PREVENTION COAL., THE FUTURE OF YOUTH JUSTICE 2021: A POLICY PLATFORM FOR THE BIDEN/HARRIS ADMINISTRATION (2021), [https://www.act4jj.org/sites/default/files/resource-files/TransitionDoc%20\(2\).pdf](https://www.act4jj.org/sites/default/files/resource-files/TransitionDoc%20(2).pdf) [<https://perma.cc/D396-Q88E>]; Soc’y for Adolescent Health & Med., *International Youth Justice Systems: Promoting Youth Development and Alternative Approaches*, 59 J. ADOLESCENT HEALTH 482, 482 (2016).

193. See generally *Juvenile Justice Bills Tracking Database*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/ncsls-juvenile-justice-bill-tracking-database.aspx> [<https://perma.cc/CLB6-LHXV>].

194. See NAT’L JUV. JUST. NETWORK, CHARTING U.S. MINIMUM AGES OF JURISDICTION, DETENTION, AND COMMITMENT 1 (2003) <https://www.njjn.org/our-work/brief-charting-us-minimum-ages-of-jurisdiction-detention-and-commitment-2023> [<https://perma.cc/SRYF-VA FE>]; see also NAT’L JUV. JUST. NETWORK, *supra* note 59, at 3.

195. See NAT’L JUV. JUST. NETWORK, *supra* note 194.

196. *Id.*

197. *Id.*

<b>Minimum Age for Juvenile Court Jurisdiction (as of June 2023)</b>		
<b>Minimum Age of Jurisdiction</b>	<b>Number of States</b>	<b>States</b>
None	24 states (& D.C.)	Alabama, Alaska, District of Columbia, Georgia, Hawaii, <sup>198</sup> Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Michigan, Missouri, Montana, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, Wyoming
7	1 state	Florida <sup>199</sup>
8	1 state	Washington <sup>200</sup>
10	16 states	Arizona, Arkansas, <sup>201</sup> Colorado, Connecticut, Kansas, Louisiana, Minnesota, Mississippi, Nevada, <sup>202</sup> North Carolina, <sup>203</sup> North Dakota, Pennsylvania, South Dakota, Texas, Vermont, <sup>204</sup> Wisconsin
11	1 state	Nebraska
12	5 states	California, <sup>205</sup> Delaware, <sup>206</sup> Massachusetts, New York, <sup>207</sup> Utah <sup>208</sup>

198. Except that the court does not have jurisdiction over a child under twelve unless there is a written recommendation from a licensed psychologist, psychiatrist, or physician. HAW. REV. STAT. § 571-11.

199. Except for the commission of a forcible felony. FLA. STAT. § 985.031.

200. Note that children of eight age and under twelve are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong. WASH. REV. CODE § 9A.04.050.

201. Except for the commission of capital murder or murder in the first degree. ARK. CODE ANN. § 9-27-303.

202. Except for the commission, by a child at least eight years old, of murder or a sexual offense as defined in NEV. REV. STAT. § 62F.100. NEV. REV. STAT. § 194.010. Note that children between the ages of eight and fourteen years old are not considered capable of committing crimes “in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness.” NEV. REV. STAT. § 194.010.

203. Except for the commission, by a child that is at least eight years old, of an A-G felony, or who has been previously adjudicated delinquent. N.C. GEN. STAT. ANN. § 7B-1501.

204. Except for the commission of murder. VT. STAT. ANN. tit. 13 § 2301.

205. Except for the commission of murder, rape, sodomy, oral copulation, and sexual penetration. CAL. WELF. & INST. CODE § 602(b) (West 2019).

13	2 states	Maryland, <sup>209</sup> New Hampshire <sup>210</sup>
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**Table 1**

As noted, some of the states do create exceptions where a child under the minimum age can be referred to the juvenile court. Typically, these exceptions are only applied in narrowly defined circumstances where the crime at issue is considered extremely serious or violent, such as murder or sexual assault. Further, some states may have an even higher minimum age restriction for pre-trial detention or long-term commitment in the juvenile court system.<sup>211</sup>

When compared with international standards, the “Raise the Minimum Age” movement may not appear to be a victory. This is especially true when considering that most “Raise the Minimum Age” advocacy efforts have asked state legislatures to set a standard minimum age for juvenile justice jurisdiction at age fourteen, in line with the United Nations Convention of the Rights of the Child, and fallen short.<sup>212</sup> However, while disappointing, it is wrong to consider this movement a failure as the current laws reflect a drastic change over the past decade. In 2012, thirty-three states had no specified minimum age (compared to twenty-four now).<sup>213</sup> At that time, the lowest minimum age set by a state was six and the highest minimum age was ten. As of 2023, the lowest age is seven, and eight states have raised the minimum age beyond ten.<sup>214</sup> Since 2012, fifteen states have passed legislation that either set a minimum age

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206. Except for the commission of murder in the first or second degree, rape in the first or second degree, or using, displaying, or discharging a firearm during the commission of a Title 11 or a Title 31 violent felony. DEL. CODE ANN. tit. 11 § 4201(c) (2023); DEL. CODE ANN. tit. 10 § 1002 (2023).

207. Except for children over the age of seven years old charged with aggravated criminally negligent homicide and certain manslaughter and murder offenses. N.Y. FAM. CT. ACT § 301.2 1(a)(3) (Consol. 2023).

208. Except for the commission of various felonies including murder, aggravated kidnapping, aggravated sexual assault, aggravated arson, aggravated burglary, and aggravated robbery. UTAH CODE ANN. § 80-6-305(2) (LexisNexis 2023).

209. Except for the commission, by a child ten or older, of a crime of violence as defined in MD. CODE ANN., CRIM. LAW § 14-101 (LexisNexis 2023); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03(A)(1) (LexisNexis 2023).

210. Except for the commission of a violent crime as defined in N.H. REV. STAT. ANN. § 169-B:35-a,1(c) (2023). N.H. REV. STAT. ANN. § 169B:2(IV) (2023).

211. See Nat’l Juv. Just. Network, *supra* note 194.

212. See *Cavanagh et al.*, *supra* note 140; JAY BLITZMAN, THE STATE OF CRIMINAL JUSTICE 155 (Mark E. Wojcik ed., 2021).

213. Compare *Jurisdictional Boundaries*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (2012), [https://www.ojjdp.gov/ojstatbb/structure\\_process/qa04102.asp?qaDate=2012&text=no&maplink=link1](https://www.ojjdp.gov/ojstatbb/structure_process/qa04102.asp?qaDate=2012&text=no&maplink=link1) [<https://perma.cc/P54X-H6M7>], with NAT’L JUV. JUST. NETWORK, *supra* note 194.

214. See sources cited *supra* note 213.

for the first time or increased their minimum age.<sup>215</sup> This is a significant change in a short time period and represents a shift in the approach policymakers and the public view as appropriate for young children.

#### IV. THE MOVEMENT TO END EXCLUSIONARY DISCIPLINE FOR YOUNG CHILDREN

As discussed above, the use of exclusionary discipline has declined significantly in schools over the past twenty years as research reveals its ineffectiveness and harm. However, while almost half the states have passed laws limiting or discouraging the use of exclusionary discipline and encouraging alternatives, it is rarer for a state or school district to outright ban disciplinary exclusion.<sup>216</sup> Even where bans have occurred, it is often only on using out-of-school suspension or expulsion as a consequence for certain low-level, particularly subjective offenses, or only using it as a last resort.<sup>217</sup> There are several common reasons cited by opponents of school exclusion bans, including that teachers and administrators need exclusion as a tool to advance school safety and order, teacher training and resources are too limited to effectively implement alternatives, and the mistaken belief that the threat of punitive action deters misbehavior in many students.<sup>218</sup> These sentiments have stuck regardless of data revealing that the use of disciplinary exclusion does not improve safety or overall academic achievement.<sup>219</sup>

Still, despite the unwillingness in many districts and states to ban exclusionary discipline outright, there has been progress in decreasing its use.<sup>220</sup> However, this decrease has largely been due to fewer suspensions given in middle and high schools; decreases in elementary schools have been less consistent.<sup>221</sup> While suspension data by age or grade is not consistently reported on the federal level, state-level data reveals tens of thousands of young children in the United States are suspended from school

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215. See sources cited *supra* note 213.

216. Steinberg & Lacoë, *supra* note 101, at 44, 46.

217. E.g., CAL. EDUC. CODE § 48900(k) (West 1976) (limiting ban to offenses involving “willful defiance”); see BROWARD CNTY. PUB. SCH. ADMIN. DISCIPLINE MATRIX (SY 2021-2022 THROUGH 2023-2024) 5–8, [https://www.browardschools.com/cms/lib/FL01803656/Centricity/Domain/13726/SY22\\_Discipline%20Matrix-Gr6-8.pdf](https://www.browardschools.com/cms/lib/FL01803656/Centricity/Domain/13726/SY22_Discipline%20Matrix-Gr6-8.pdf) [<https://perma.cc/4B WG-Z56W>] (limiting ban to certain low-level offenses or only after a certain number of incidents).

218. See K. Juree Capers, *Some Officials Want to Ban School Suspensions – Here’s How that Could Backfire*, THE CONVERSATION (Mar. 20, 2018, 6:42 AM), <https://theconversation.com/some-officials-want-to-ban-school-suspensions-heres-how-that-could-backfire-90631> [<https://perma.cc/S3C9-ZCLF>].

219. See Carly Berwick, *Ban School Suspensions!*, THE WK. (Aug. 9, 2016), <https://theweek.com/articles/640318/ban-school-suspensions> [<https://perma.cc/GL7T-XR NW>]. See generally Skiba et al., *supra* note 85.

220. LEUNG-GAGNÉ ET AL., *supra* note 90.

221. *Id.*

each year. In Louisiana, during the 2018-2019 school year, more than a thousand kindergarteners were suspended from school.<sup>222</sup> In Connecticut, state education department data revealed that more than 1,100 suspensions were issued to 670 students in prekindergarten through second grade in the 2019-2020 school year.<sup>223</sup> In North Carolina in 2021-2022, over 45,000 short-term suspensions (ten days or less) were given to elementary school students.<sup>224</sup> While the rate of suspension for young children is typically much lower than the rate of suspension for students in middle and high school,<sup>225</sup> it is still extremely high.

### A. Reasons to Prohibit Exclusionary Discipline for Young Learners

Analyzing bans on early grade school exclusion is a starting point for effectuating broader bans and other school discipline reforms. In recognition of this principle, advocates began promoting “Too Young to Suspend” campaigns.<sup>226</sup> Many of the same justifications for keeping young children out of the juvenile court system apply to the argument that disciplinary exclusion from school is not appropriate for young children. The next sections explore these justifications to reveal how the same rationales that fuel the “Raise the Minimum Age” movement can be applied to efforts to end exclusionary discipline for young children.

#### 1. Young Children Rarely Commit Serious Offenses at School

Just as young children make up a small percentage of juvenile court referrals, elementary school students constitute a small number of the students who receive suspensions and expulsions.<sup>227</sup> While there is no

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222. Brenda Alvarez, *School Suspensions Do More Harm than Good*, NEATODAY (Sept. 10, 2021), <https://www.nea.org/advocating-for-change/new-from-nea/school-suspensions-do-more-harm-good> [<https://perma.cc/EA9H-7NM5>].

223. Lisa Backus, ‘*Absolutely indefensible*’: *Over 1,100 Pre-K to Second Grade Suspensions in 2019-20 School Year*, CT NEWS JUNKIE (Oct. 1, 2021, 5:00 AM), <https://ctnewsjunkie.com/2021/10/01/absolutely-indefensible-over-1100-pre-k-to-second-grade-suspensions-in-2019-20-school-year/> [<https://perma.cc/YV6N-LU8C>].

224. See N.C. STATE BD. OF EDUC. & DEP’T OF PUB. INSTRUCTION, REPORT TO THE NORTH CAROLINA GENERAL ASSEMBLY: CONSOLIDATED DATA REPORT, 2021-2022 15 (2023), <https://www.dpi.nc.gov/consolidated-data-report-2021-22/open> [<https://perma.cc/Q2W9-6LLC>].

225. *Id.*

226. See *Too Young to Suspend*, EDUC. JUST. ALL., [https://www.ejanc.org/too\\_young\\_to\\_suspend#:~:text=The%20Too%20Young%20to%20Suspend,white%20co%20partners%20to%20be%20suspended,%20https://publicleadershipinstitute.org/model-bills/education/young-suspend-act/](https://www.ejanc.org/too_young_to_suspend#:~:text=The%20Too%20Young%20to%20Suspend,white%20co%20partners%20to%20be%20suspended,%20https://publicleadershipinstitute.org/model-bills/education/young-suspend-act/) [<https://perma.cc/68D3-S7XK>].

227. In Connecticut in 2019–2020, suspensions given to students in grades K-5 made up less than 9% of all suspensions given. CONN. DEP’T OF EDUC., 2019-10 REPORT ON STUDENT DISCIPLINE IN CONNECTICUT PUBLIC SCHOOLS, <https://edsight.ct.gov/related-reports/Discipline%20State%20Board%20Presentation%202021.pdf>



national data that breaks down suspension data by grade and offense, some states collect and report this data, which reveals that young children are rarely suspended for serious offenses.<sup>228</sup> For example, in 2014, Georgia public schools suspended 14,292 kindergarten-through-third-grade students.<sup>229</sup> Over half of those suspensions were given for “student incivility” or “disorderly conduct.”<sup>230</sup> Only twenty-two were for offenses causing “serious bodily injury.”<sup>231</sup> Ultimately, young children are not the students most likely to commit offenses that pose a substantial risk to school safety and order and thus require a serious response. Therefore, just as there is less basis for juvenile court intervention as a response to a young child’s behavior, there is less justification for using exclusionary discipline as a response to a young child’s behavior at school.

## 2. *Exclusionary Discipline Doesn’t Adequately Address Underlying Issues*

In many instances, childhood misbehavior is developmentally appropriate and part of the learning process. In some instances, misbehavior at school is caused by exposure to trauma, disability, or other environmental factors.<sup>232</sup> Rather than examining and addressing the root causes of the behavior, exclusionary discipline merely removes the child from the learning environment for a set period of time. Not only do exclusionary discipline practices fail to address underlying issues, they also remove children from learning environments that provide pro-social and enriching experiences linked to healthy development and future academic success.<sup>233</sup> These positive experiences are especially important in a child’s

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[<https://perma.cc/W3RX-XMZP>]; In North Carolina in 2021–2022, the rate of short-term suspension per 1000 students was 67.35 for elementary grades compared with 269.02 for middle grades. N.C. STATE BD. OF EDUC. & DEP’T OF PUB. INSTRUCTION, *supra* note 224.

228. *See e.g.*, *K-12 Student Discipline Dashboard*, GOVERNOR’S OFF. OF STUDENT ACHIEVEMENT (2022), <https://public.gosa.ga.gov/noauth/extensions/DisciplineDASHV1/DisciplineDASHV1.html> [<https://perma.cc/N7MT-M95W>].

229. WXIA Staff, *Too young to suspend? Kindergartners facing suspension*, 11 ALIVE (March 4, 2015, 6:24 PM), <https://www.11alive.com/article/news/education/too-young-to-suspend-kindergartners-facing-suspension/85-132173697> [<https://perma.cc/9FUR-8JTS>].

230. *Id.*

231. *Id.*

232. *See generally* KY. DEP’T OF EDUC., TRAUMA-INFORMED DISCIPLINE RESPONSE AND BEHAVIOR SYSTEM: GUIDE AND RESOURCE (2021), <https://www.education.ky.gov/school/sdfs/Documents/Trauma%20Informed%20Discipline%20Response%20and%20Behavior%20System.pdf> [<https://perma.cc/4QAQ-AEFT>]; J.D. Naik & Sandip S Jogdand, *Study of family factors in association with behavior problems amongst children of 6-18 years age group*, 4 INT’L J. APPLIED & BASIC MED. RSCH. 86 (2014); HAMIDA LABI ET AL., NAACP LEGAL DEF. FUND, POSITION ON REOPENING AND OPERATING SCHOOLS DURING THE COVID-19 PANDEMIC (2021), <https://www.naacpldf.org/wp-content/uploads/2021-09-15-Schools-Reopening-7.pdf> [<https://perma.cc/8E7F-YZ4A>].

233. U.S. DEP’T OF HEALTH & HUM. SERVS. & U.S. DEP’T OF EDUC., POLICY STATEMENT ON EXPULSION AND SUSPENSION POLICIES IN EARLY CHILDHOOD SETTINGS 3,

early years.<sup>234</sup> By removing exclusionary discipline as a tool for young children, school staff are forced to identify alternative measures that address the root causes of the child's behavior. Conversely, if disciplinary exclusion is allowed, the young child comes back to school with the same challenges that led to the misbehavior in the first place, along with the additional harms caused by the exclusion, which is likely to spur a continuing cycle of misbehavior.

### 3. *Exclusionary Discipline Harms Young Children and Their Families*

Studies have established a link between exposure to exclusionary discipline and a wide variety of educational, economic, and social impacts.<sup>235</sup> These impacts include school avoidance and diminished educational engagement;<sup>236</sup> decreased academic achievement;<sup>237</sup> increased behavior problems;<sup>238</sup> increased likelihood of dropping out;<sup>239</sup> substance abuse;<sup>240</sup> and involvement with juvenile legal systems.<sup>241</sup> For example, studies show that students who receive just one suspension are five times more likely to drop out of school and three times more likely to be involved with the juvenile legal system within one year.<sup>242</sup>

Young children are especially vulnerable to these harms as their brains are developing rapidly and heavily influenced by their positive and negative experiences.<sup>243</sup> Studies reveal that young students who are expelled or suspended are up to ten times more likely to drop out of high

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<https://oese.ed.gov/files/2020/07/policy-statement-ece-expulsions-suspensions.pdf>  
[<https://perma.cc/MA7L-BQ22>].

234. *Id.*

235. U.S. Dep't of Educ. Key Policy Letters (Jan. 8, 2014), <https://www2.ed.gov/policy/elsec/guid/secletter/140108.html> [<https://perma.cc/4HK3-X6QW>].

236. *See, e.g.*, Emily Arcia, *Achievement and Enrollment Status of Suspended Students: Outcomes in a Large, Multicultural School District*, 38 EDUC. & URB. SOC'Y 359, 366–68 (2006).

237. *Id.*

238. S.A. Hemphill et al., *The Effect of School Suspensions and Arrests on Subsequent Adolescent Antisocial Behavior in Australia and the United States*, 39 J. ADOLESCENT HEALTH 736, 743 (2006).

239. *See* Arcia, *supra* note 236; TONY FABELO ET AL., BREAKING SCHOOL'S RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENT'S SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 85 (2011); Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, 99 NEW DIRECTIONS FOR YOUTH DEV. 17, 30 (2003).

240. S.A. Hemphill et al., *The Impact of School Suspension on Student Tobacco Use: A Longitudinal Study in Victoria, Australia, and Washington State, United States*, 39 HEALTH EDUC. & BEHAV. 45, 46 (2012).

241. Virginia Costenbader & Samia Markson, *School Suspension: A Study with Secondary School Students*, 36 J. SCH. PSYCH. 59, 78 (1998).

242. FABELO ET AL., *supra* note 239.

243. U.S. DEP'T OF HEALTH & HUM. SERVS. & U.S. DEP'T OF EDUC., *supra* note 233, at 2; *see* NAT'L RSCH. COUNCIL, ET AL., FROM NEURONS TO NEIGHBORHOODS: AN UPDATE: WORKSHOP SUMMARY 4–5 (Steve Olson eds., 2012).

school, experience academic failure and grade retention, hold negative school attitudes, and face incarceration.<sup>244</sup> Therefore, it is critically important to prevent students from experiencing the stressful and negative experience of school exclusion at a young age.<sup>245</sup>

#### 4. *Exclusionary Discipline for Young Children Reduces School Safety*

Although the rise of exclusionary discipline was premised on the assumption that removal of disruptive students will result in safer schools, a number of indicators of school climate have actually shown the opposite.<sup>246</sup> Studies show that schools with higher rates of school suspension and expulsion appear to have less satisfactory ratings of school climate,<sup>247</sup> less satisfactory school governance structures,<sup>248</sup> and spend a disproportionate amount of time on school discipline.<sup>249</sup> Research also reveals a negative relationship between the use of school suspension and expulsion and schoolwide academic achievement. Although the reasons for this link are unclear, one possible factor is that rather than reducing future disruption, school suspension actually leads to higher future rates of misbehavior and suspension among students who are suspended.<sup>250</sup> Therefore, the use of exclusionary discipline can actually make schools less safe and harm overall school climate and achievement levels. Given that most young children are not engaging in behaviors that represent serious threats, along with the likelihood that suspension will actually undermine its intended goals of safety and order, it makes sense to remove exclusionary discipline as a tool for young children.

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244. Council on Sch. Health, *Out-of-School Suspension and Expulsion*, 131 PEDIATRICS e1000, e1001 (2013); Hanno Petras et al., *Who Is Most at Risk for School Removal? A Multilevel Discrete-Time Survival Analysis of Individual- and Context-Level Influences*, 103 J. EDUC. PSYCH. 223, 223 (2011). See generally Am. Psych. Ass'n Zero Tolerance Task Force, *Are Zero-Tolerance Policies Effective In the Schools?*, 63 AM. PSYCH. 852 (2006).

245. U.S. DEP'T OF HEALTH & HUM. SERVS. & U.S. DEP'T OF EDUC., *supra* note 233.

246. Am. Psych. Ass'n Zero Tolerance Task Force, *supra* note 244, at 854.

247. See Frank Bickel & Robert Qualls, *The Impact of School Climate on Suspension Rates in Jefferson County Public Schools*, 12 URB. REV. 79, 85 (1980).

248. Shi-Chang Wu et al., *Student Suspension: A Critical Reappraisal*, 14 URB. REV. 245, 264 (1982).

249. See Terrance M. Scott & Susan B. Barrett, *Using Staff and Student Time Engaged in Disciplinary Procedures to Evaluate the Impact of School-Wide PBS*, 6 J. POSITIVE BEHAV. INTERVENTIONS 21, 22 (2004).

250. Costenbader & Markson, *supra* note 241; Mendez, *supra* note 239. See generally Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEV. 9, 13 (2003).

### 5. *Research Supports the Idea of Diminished Culpability of Young Children*

The same research on childhood and adolescent development that supports “Raising the Minimum Age” can be applied to the rationale that exclusionary discipline is inappropriate for young students. This research makes clear that before the age of fifteen, children have psychosocial immaturity in four areas that impact a child’s ability to follow school rules.<sup>251</sup> Those include: poor resistance to peer influence,<sup>252</sup> attitudes and assessment of risk,<sup>253</sup> ability to foresee future consequences,<sup>254</sup> and impulse control.<sup>255</sup> As discussed above, these findings are even starker for prepubescent children.<sup>256</sup> Given the ineffectiveness of suspension in addressing or deterring misbehavior, the primary effect of exclusionary discipline on young children is punishment, often for behavior that young children have little control over. The fundamental unfairness of severe punishments for children who are unable to fully control their actions or understand their impacts is a strong rationale for banning the use of exclusionary discipline for this age group.

### 6. *Exclusionary Discipline is a Costly Intervention*

The long-term costs of exclusionary discipline to communities and broader society are significant. These costs are based on the increased likelihood that a student who experiences suspension will drop out and have future criminal legal system involvement. These outcomes impose substantial social costs on states and municipalities due to lost wages and taxes, increased crime, higher welfare costs, and poorer health.<sup>257</sup>

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251. Am. Psych. Ass’n Zero Tolerance Task Force, *supra* note 244, at 855.

252. See Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCH. 625, 625 (2005).

253. Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339, 343–44 (1992); see Catalina J. Hooper et al., *Adolescents’ Performance on the Iowa Gambling Task: Implications for the Development of Decision Making and Ventromedial Prefrontal Cortex*, 40 DEV. PSYCH. 1148, 1149 (2004).

254. See A. L. Greene, *Future-Time Perspective in Adolescence: The Present of Things Future Revisited*, 15 J. YOUTH & ADOLESCENCE 99, 100 (1986); Grisso et al., *supra* note 132.

255. Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgement in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 759 (2000). See generally Luna Beatriz et al., *Maturation of Cognitive Processes From Late Childhood to Adulthood*, 75 CHILD. DEV. 1357 (2004).

256. Brianna Hill, *Legislative Update: Massachusetts Raises Minimum Age of Criminal Responsibility*, 39 CHILD. LEGAL RTS. J. 168, 169 (2019).

257. See RUSSELL W. RUMBERGER ET AL., CTR. FOR C.R. REMEDIES, THE HIGH COST OF HARSH DISCIPLINE AND ITS DISPARATE IMPACT (2016), [https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harsh-discipline-and-its-disparate-impact/UCLA\\_HighCost\\_6-2\\_948.pdf](https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harsh-discipline-and-its-disparate-impact/UCLA_HighCost_6-2_948.pdf) [<https://perma.cc/8TZ4-944J>].

Researchers have calculated that a tenth-grade California student who drops out because of suspension could end up costing the public \$175,120 in lost tax revenue, increased health care, and criminal legal system expenses over the student's lifetime.<sup>258</sup> Conversely, researchers calculated that if Texas reduced school suspension rates, the state would save up to one billion dollars in social costs.<sup>259</sup> By banning early-grade suspensions, states and school districts could reinvest these savings in early interventions that actually address misbehavior and prepare the student to be a productive member of society.

When a young child is suspended, there can also be immediate economic impacts on the child's entire family. If a young child cannot attend school, their parent or guardian must provide supervision. This might require an adult or older sibling to stay home from work or school, resulting in loss of wages or other employment or educational consequences. Alternatively, the adult could try to find other childcare, which typically costs money. Although the familial costs of early-grade suspension have not been well-studied, this is an important burden that should be examined when advancing early-grade suspension bans.

#### 7. *Ending School Exclusion for Young Children Protects Vulnerable Groups*

Just like minimum age laws help disrupt disparities in juvenile court, so too can ending exclusionary discipline for young children help disrupt school discipline disparities. Black children are 3.6 times more likely to be suspended from preschool than white children.<sup>260</sup> Further, research does not support that these racial disparities can be attributed to more frequent or more serious misbehavior by Black students.<sup>261</sup> Instead, a

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258. *Id.*

259. Miner P. Marchbanks III et al., *The Economic Effects of Exclusionary Discipline on Grade Retention and High School Dropout* 18 (unpublished manuscript), <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/the-economic-effects-of-exclusionary-discipline-on-grade-retention-and-high-school-dropout/marchbanks-exclusionary-discipline-crr-conf.pdf> [<https://perma.cc/J5SV-B6NX>].

260. Cory Turner, *Why Preschool Suspensions Still Happen (and How to Stop Them)*, NPR (June 20, 2016, 7:00 AM), <https://www.npr.org/sections/ed/2016/06/20/482472535/why-preschool-suspensions-still-happen-and-how-to-stop-them> [<https://perma.cc/9LNN-RTKL>].

261. See generally Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-jail" Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633 (2011); Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCH. REV. 85 (2011); FABELO ET AL., *supra* note 239; Anne Gregory & Aisha R. Thompson, *African American High School Students and Variability in Behavior Across Classrooms*, 38 J. CMTY. PSYCH. 386 (2010); Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School*

likely reason for these disparities is implicit bias. A study by Dr. Walter Gilliam at the Yale Child Study Center revealed that preschool teachers who watched a video and were asked to detect challenging behavior in the classroom spent most of their time focused on the Black boy in the video, even though he displayed no challenging behavior whatsoever.<sup>262</sup> These implicit racial biases are especially prevalent in the use of suspension for offenses that are highly subjective, such as “disruption” or “willful defiance.”<sup>263</sup> Removing exclusion as an option protects young Black children from missing important class time as a result of educator bias.

Additionally, children with disabilities disproportionately experience exclusionary discipline.<sup>264</sup> Although children with disabilities have certain protections from excessive discipline under federal law, young children may not have been through the identification and evaluation process to become eligible for these protections.<sup>265</sup> Ultimately, given the associated harms, early exposure to exclusionary discipline can contribute to launching a young child’s educational path in a negative direction, with certain students at greater risk of being put on this educational trajectory.<sup>266</sup> Instead, exclusion should be off the table, forcing educators to look at other evidence-based interventions or identify the need for additional training or resources to combat their own potential biases.

### **B. Efforts to End Exclusionary Discipline for Young Children**

In the past decade, there has been a growing willingness by some states to recognize the harm of early-grade suspension. As of September 2023, at least seventeen states and the District of Columbia adopted legislation limiting disciplinary exclusion for young students.<sup>267</sup> In some states where legislation has not passed, large school districts have initiated

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*Punishment*, 34 URB. REV. 317 (2002); Michael Rocque, *Office Discipline and Student Behavior: Does Race Matter?*, 116 AM. J. EDUC. 557 (2010).

262. Cory Turner, *Bias Isn’t Just a Police Problem, It’s A Preschool Problem*, NPR (Sept. 28, 2016, 5:00 AM), <https://www.npr.org/sections/ed/2016/09/28/495488716/bias-isnt-just-a-police-problem-its-a-preschool-problem> [<https://perma.cc/2978-2U6E>].

263. See Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59, 62 (2010).

264. Research suggests that “students of color with disabilities face exclusionary discipline pushing them into the ‘school-to-prison pipeline’ at much higher rates than their peers without disabilities. And while exclusionary discipline has been shown to be harmful for the educational attainment of all students, students with disabilities, particularly those who are students of color, face even more challenges when they are not able to receive a quality education.” U.S. COMM’N ON C.R., *supra* note 99, at 4.

265. See 20 U.S.C. § 1415(k)(1), (7); 34 C.F.R. § 300.530.

266. U.S. DEP’T OF HEALTH & HUM. SERVS. & U.S. DEP’T OF EDUC., *supra* note 233.

267. See *infra* Table 2 (State Laws that Limit Exclusionary Discipline of Young Learners).

their own early-grade suspension limits, including districts in New York City and Boston.<sup>268</sup>

While district-level policies to restrict early-grade disciplinary exclusion are commendable and often an important first step in broader reform, this Article focuses on statewide policy changes as an avenue of creating widespread impact and building on statewide “Raise the Minimum Age” legislation. Unfortunately, statewide legislation limiting early-grade disciplinary exclusion typically includes significant limits or carve outs that allow for the continued imposition of exclusionary discipline against young children in many instances. Illinois is the only state that has adopted an outright ban on suspensions for young children, but that ban only applies to preschool students.<sup>269</sup> Even in states where the age range has been expanded to include some elementary school grades, the ceiling is typically set at second or third grade, where the average student age is eight and nine respectively.<sup>270</sup> This leaves many elementary school children vulnerable to disciplinary exclusion. It is also incongruent with the age limits that have been drawn in juvenile court reform efforts, where twenty-four states currently set the minimum age at ten or above.<sup>271</sup>

Further, most statewide “bans” on school exclusion for young children are limited in the offenses they apply to or are riddled with exceptions that still allow many young children to experience school exclusion. For example, California’s suspension ban only applies to offenses involving willful defiance or disruption.<sup>272</sup> Other laws create exceptions for offenses involving certain circumstances, such as weapons, drugs, violent conduct, or threats to safety.<sup>273</sup> While the exact language of the exceptions vary by state, it is often broad and ill-defined.<sup>274</sup> An example is Connecticut, where suspension of a student in prekindergarten through second grade is banned unless an administrator deems it is appropriate because conduct is of a violent or sexual nature that endangers others.<sup>275</sup> Many have criticized the law, passed in 2015, as giving administrators too much discretion to deem non-serious offenses as “violent.”<sup>276</sup> In spite of the law, in 2019-2020 Connecticut still imposed 1,100 suspensions on 670 students in prekindergarten through second grade.<sup>277</sup> Similarly, in Arkansas,

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268. See N.Y.C. DEP’T OF EDUC., CITYWIDE BEHAVIORAL EXPECTATIONS TO SUPPORT STUDENT LEARNING GRADES K-5 (2019) (only allowing out-of-school suspension in limited cases where student’s behavior is repeatedly violent or could cause serious harm); BOS. PUB. SCHS., THE CODE OF CONDUCT 18, 19 (2023), <https://www.bostonpublicschools.org/site/default.aspx?PageID=8996> [<https://perma.cc/PPN5-X2TD>].

269. 2017 Ill. Laws 100-0105.

270. See *infra* Table 2.

271. See *supra* Table 1.

272. CAL. EDUC. CODE § 48901.1 (West 2019).

273. See *infra* Table 2.

274. See *infra* Table 2.

275. 2015 Conn. Acts 374 (Reg. Sess.).

276. Backus, *supra* note 223.

277. *Id.*

school exclusion is permitted if a student's behavior poses a physical risk or causes a serious disruption that cannot be addressed through other means.<sup>278</sup> Since the law was passed in 2017, suspensions have steadily declined; however, kindergarten-through-fifth-grade students were still commonly suspended for minor infractions such as disorderly conduct, fighting, and insubordination.<sup>279</sup> In contrast, although laws setting a minimum age of juvenile court jurisdiction often contain exceptions, those exceptions are typically narrowly defined and limited to violent felonies.<sup>280</sup>

Some states only limit the duration of exclusion for young students. For example, Virginia allows exclusions for students in prekindergarten through third grade for up to three school days for any offense and longer in other circumstances.<sup>281</sup> Georgia still allows suspensions for up to five days for young students.<sup>282</sup> Allowing exclusions of any length to go forward significantly lessens the impact of these laws given that even one suspension makes it more likely that a student will drop out of school and be involved with the juvenile legal system within one year.<sup>283</sup>

<b>State Laws that Limit Exclusionary Discipline of Young Learners (as of September 2023)</b>		
<b>State</b>	<b>Applicable Grades/Ages</b>	<b>Limits/Exceptions</b>
Arkansas	K-5	Allows exclusion if conduct: -Poses physical risk to student or others; or -Causes a serious disruption that cannot be addressed through other means. <sup>284</sup>
California	K-8	Only protects students from suspensions for disruption or willful defiance. <sup>285</sup>
Colorado	PreK-2	Allows exclusion if conduct: -Involves possession of a dangerous weapon; -Involves drugs or controlled substances; or -Endangers the health or safety of others.  Schools can also remove if, after consideration of specific factors, it determines that failure to remove the student

278. ARK. CODE ANN. § 6-18-507 (2020).

279. Kaitlin Anderson & Sarah C. McKenzie, *2020 Arkansas Student Discipline Report*, 18 ARK. EDUC. REP. 1, 4 (2021).

280. *See supra* Table 1.

281. VA. CODE ANN. § 22.1-277 (2020).

282. GA. CODE ANN. § 20-2-742 (2023).

283. Fabelo et al., *supra* note 239.

284. ARK. CODE ANN. § 6-18-507 (2020).

285. CAL. EDUC. CODE § 48901.1 (West 2019).



		would create a safety threat that cannot be otherwise addressed. <sup>286</sup>
Connecticut	PreK-2	Allows exclusion if school determines conduct is of violent or sexual nature that endangers persons. <sup>287</sup>
D.C.	K-8	Allows exclusion only where a school determines that the student has willfully caused, attempted to cause, or threatened to cause bodily injury or emotional distress to another person. <sup>288</sup>
Georgia	PreK-3	Limits exclusion to five days (consecutive or cumulative) unless: -Student has received a multitiered system of supports; -Student possessed weapon, illegal drugs, or other dangerous instrument; or -Student's behavior endangers the physical safety of other students or staff. <sup>289</sup>
Illinois	PreK only	Total prohibition. Does allow for "planned transitions" to another setting. <sup>290</sup>
Kentucky	K-3	Allows exclusion only in exceptional cases where there are safety issues for the child or others. <sup>291</sup>
Maine	PreK-5	Allows exclusion: -Under Gun-Free Schools Act; or -If the principal determines there is imminent danger of serious physical injury to the student or others and less restrictive interventions would be ineffective. <sup>292</sup>
Maryland	PreK-2	Allows exclusion if: -Required by federal law; or -School administrator, in consultation with school psychologist or other mental health professional, determines there is imminent threat of serious harm that cannot be

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286. COLO. REV. STAT. § 22-33-106.1.

287. 2015 Conn. Acts 374 (Reg. Sess.).

288. *Student Fair Access to School Act and DCMR - Chapter 25 Title 5: Discipline Policy*, D.C. PUB. SCH., <https://dcps.dc.gov/chapter25> [<https://perma.cc/TAM9-U8TV>].

289. GA. CODE ANN. § 20-2-742 (2023).

290. 2017 Ill. Laws 100-0105.

291. KY. REV. STAT. ANN. § 158.150 (West 2023).

292. ME. STAT. tit. 20-A, § 1001(9)-(9-A) (2021).

		otherwise addressed (exclusion limited to five school days). <sup>293</sup>
Minnesota	K-3	Allows dismissal from school for less than one school day. Allows exclusion if listed resources have been exhausted <u>and</u> there is an ongoing serious safety threat to child or others. <sup>294</sup>
New Jersey	K-2	Allows exclusion if: -Allowed under federal “Zero Tolerance for Guns Act;” or -If conduct is of violent or sexual nature that endangers others. <sup>295</sup>
Nebraska	PreK-2	Allows exclusion if student brings a deadly weapon on campus. <sup>296</sup>
Ohio	PreK-3	Allows exclusion if student: -Brings a firearm to school; -Brings a knife capable of causing serious bodily injury; -Commits criminal offenses resulting in serious physical harm to persons or property; or -Makes a bomb threat to school.  Allows exclusion for the remainder of the school day if a student poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process. Otherwise, allows exclusion only as necessary to protect immediate health and safety. <sup>297</sup>
Oregon	PreK-5	Allows exclusion in the following circumstances: -Nonaccidental conduct causing serious physical harm; -School determines student’s conduct poses direct threat to health or safety; or -When required by law. <sup>298</sup>
Texas	PreK-2	Allows exclusion if offense involves:

293. MD. CODE ANN., EDUC. § 7-305.1 (LexisNexis 2017).

294. MINN. STAT. § 121A.425 (2023).

295. N.J. STAT. ANN. § 18A:37-2a (West 2016).

296. NEB. REV. STAT. § 79-265.01 (2023).

297. OHIO REV. CODE ANN. § 3313.66 (LexisNexis 2019); OHIO REV. CODE ANN. § 3313.668 (LexisNexis 2019).

298. OR. REV. STAT. § 339.250 (2021).

		-Weapons on campus; -Violent conduct; or -Drugs, alcohol, or controlled substances on campus. <sup>299</sup>
Vermont	Under age 8	Allows exclusion if a student poses imminent threat of harm or danger to others in the school. <sup>300</sup>
Virginia	PreK-3	Allows exclusion for up to three school days. Allows longer exclusion if: -Offense involves physical harm or credible threat of physical harm; or -Aggravating circumstances are found. <sup>301</sup>

**Table 2**

These measures represent a significant advancement in the movement to limit the use of exclusionary discipline for young children and have resulted in thousands of fewer students experiencing suspension.<sup>302</sup> However, given the significant limitations and exceptions, especially as compared to “Raise the Minimum Age” bills, the impact of these laws has been limited.

### C. Challenges in Banning Suspension for Young Learners

Despite the evidence showing the harm that exclusionary discipline causes to young students, as well as its ineffectiveness in improving school safety and order, statewide reform efforts aimed at prohibiting school exclusion for young learners have been less successful than statewide reforms to raise the minimum age of juvenile court. Resistance to bans on the use of early-grade exclusion exists even in states where policymakers have adopted “Raise the Minimum Age” reforms to protect young children. For example, in Massachusetts, the state legislature adjusted the age range of juvenile court jurisdiction in 2018, increasing the minimum age from seven to twelve.<sup>303</sup> However, attempts to pass statewide legislation banning school exclusion in prekindergarten through third grade have failed for the past several years.<sup>304</sup> Similarly, North Carolina raised its minimum age of

299. TEX. EDUC. CODE ANN. § 37.0013 (West 2017).

300. VT. STAT. ANN. tit. 16, § 1162 (2022).

301. VA. CODE ANN. § 22.1-277 (2020).

302. *Report: TX Schools Still Suspending Many Pre-k – 2nd Graders, But Out-of-School Suspensions Dropped Sharply*, TEXANS CARE FOR CHILD. (Aug. 28, 2019), <https://txchildren.org/posts/2019/8/27/report-tx-schools-still-suspending-many-pre-k-2nd-graders-but-out-of-school-suspensions-dropped-sharply> [https://perma.cc/X79B-UNGK].

303. Hill, *supra* note 256.

304. H.B. 453, 193 Gen. Ct. (Mass. 2023); S.B. 289, 193 Gen. Ct. (Mass. 2023); H.B. 3876, 192 Gen. Ct. (Mass. 2022).

juvenile court jurisdiction from six to ten in 2021.<sup>305</sup> Yet, an effort to protect young learners from exclusionary discipline has not gained similar traction in the state.

It is difficult to pinpoint the exact reasons that bans on the use of early-grade exclusion have not had the same success as “Raise the Minimum Age” campaigns. One factor may be the lack of clear data showing the extent of the problem. Since the federal government and many states do not publicly report suspensions by grade or age, the public may not be aware of the full scope of the problem.<sup>306</sup> In contrast, juvenile arrest numbers are available nationally by age and offense.<sup>307</sup>

Another factor that has limited the success of early-grade exclusionary discipline bans is the lack of a national coalition advocating for reform across the country. In the context of juvenile court reform, several national organizations spearheaded efforts to raise both the minimum and maximum age of juvenile court jurisdictions across the country.<sup>308</sup> Prominent national groups, such as the American Academy of Pediatrics, joined in the call to raise the minimum age.<sup>309</sup> The national network and attention to the issue was instrumental in raising public awareness, building political will, and creating collective resources that benefited state campaigns.<sup>310</sup> Although there have been state-level campaigns to ban early grade disciplinary exclusion, they have not had the benefit of a national network in the same way that “Raise the Minimum Age” campaigns had.<sup>311</sup>

A different challenge faced by early-grade exclusionary discipline bans is the long-established history of discretion given to schools in matters of discipline.<sup>312</sup> While states have increased their willingness to pass laws limiting or discouraging the use of suspensions,<sup>313</sup> local boards of education and schools maintain a lot of authority in day-to-day operations. There is a much stronger tradition of state-level intervention in the juvenile and

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305. N.C. GEN. STAT. § 7B-1501 (2021).

306. The U.S. Department of Education conducts the Civil Rights Data Collection, which gathers a variety of information including data on student discipline, most of which is disaggregated by race/ethnicity, sex, English learner, and disability. U.S. DEP’T OF EDUC., 2021-22 CIVIL RIGHTS DATA COLLECTION: LIST OF CRDC DATA ELEMENTS FOR SCHOOL YEAR 2021-22 1 (2023), <https://www2.ed.gov/about/offices/list/ocr/docs/2021-22-crdc-data-elements.pdf> [<https://perma.cc/8BRD-BZ9N>]. However, only preschool students are reported separately. *Id.* at 2–3. All other discipline data is grouped kindergarten through twelfth grade, with no disaggregation by age/grade. *Id.*

307. See CHARLES PUZZANCHERA ET AL., NAT’L CTR. FOR JUV. JUST., YOUTH AND THE JUVENILE JUSTICE SYSTEM: 2022 NATIONAL REPORT 105 (6th ed. 2022), <https://ojjdp.ojp.gov/publications/2022-national-report.pdf> [<https://perma.cc/S2U9-NMWN>].

308. *Raising the Minimum Age for Prosecuting Children*, *supra* note 141.

309. *Id.*

310. *Id.*

311. *Too Young to Suspend*, *supra* note 226.

312. *Goss v. Lopez*, 419 U.S. 565, 589–90 (1975) (Powell, J., dissenting). See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

313. Steinberg & Lacoce, *supra* note 101.

criminal court system, with state legislators defining the jurisdiction of those courts through juvenile codes and state agencies overseeing the day-to-day operations of the juvenile court system.<sup>314</sup> In the school context, despite evidence to the contrary, there is a persistent fear that removing discretion to suspend will undermine teachers' ability to teach, harm fellow students, and threaten safety and order.<sup>315</sup> As a result, even states that pass "bans" do so with limited scope or broad exceptions.<sup>316</sup> The only instance of a total ban is Illinois's law, which just applies to prekindergarten students.<sup>317</sup> Ultimately, this tradition of discretion given to local schools is a huge hurdle for statewide efforts to pass early-grade suspension bans, and when bans are passed, it will likely lead to the inclusion of significant exceptions.

Most school districts are also facing a severe lack of resources, limiting their ability to implement effective and evidence-based alternatives to suspension. In the case of "Raise the Minimum Age," advocates can point to the high costs of juvenile court intervention and the cost-savings that would directly flow from keeping young children out of the system.<sup>318</sup> While there are long-term costs to school exclusion,<sup>319</sup> there is not the same short-term financial incentive to prohibit exclusion for young children. Instead, when looking at short-term costs, disciplinary exclusion is a relatively cheap tool for schools compared to the more resource-intensive alternatives of restorative justice programs, training staff on behavior management, and providing support to address underlying issues.<sup>320</sup> In Connecticut, a legislatively created committee tasked with studying the impact of school suspension on children in kindergarten through second grade specifically cited limited resources as a justification for not recommending a full ban on suspension for these children.<sup>321</sup> Despite these challenges, there are still opportunities to learn from the "Raise the Minimum Age" movement and apply those lessons to efforts to pass legislation that bans early-grade exclusionary discipline.

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314. WEBER, *supra* note 116, at 10.

315. Capers, *supra* note 218.

316. *See supra* Table 2.

317. 2017 Ill. Laws 100-0105.

318. WEBER, *supra* note 116.

319. RUMBERGER, *supra* note 257.

320. *See* Jenni Owen et al., DUKE CTR. FOR CHILD & FAMILY POL'Y & DUKE L. SCH., *INSTEAD OF SUSPENSION: ALTERNATIVE STRATEGIES FOR EFFECTIVE SCHOOL DISCIPLINE* (Alison Jones et al. eds. 2015), [https://law.duke.edu/childedlaw/instead\\_of\\_suspension.pdf](https://law.duke.edu/childedlaw/instead_of_suspension.pdf) [<https://perma.cc/7PSC-EFNQ>].

321. Lisa Backus, *Temporary or Trend: Suspensions for Youngest Students Fall*, CT NEWS JUNKIE (Jan. 17, 2022, 5:00 AM), <https://ctnewsjunkie.com/2022/01/17/temporary-or-trend-suspensions-for-youngest-students-fall/> [<https://perma.cc/Q2ZZ-YG7G>].

## V. RECOMMENDATIONS FOR ADVANCING EARLY GRADE SCHOOL EXCLUSION BANS

There are a wealth of justifications supporting the idea that school exclusion is especially unnecessary and harmful for younger students. Given the willingness in many states to protect young children from juvenile court intervention, there is an opportunity to make the leap that these same young children should also be protected from disciplinary exclusion. Based on lessons learned from the “Raise the Minimum Age” movement, there are several steps that could help push statewide efforts to end exclusionary discipline for young children.

### A. Increase Data Collection and Reporting of Exclusionary Discipline by Grade

National data on juvenile arrest by age has played a critical role in efforts to raise the minimum age of juvenile court jurisdiction.<sup>322</sup> However, there is no regularly published national data on the use of exclusionary discipline by grade.<sup>323</sup> Further, few states collect and report suspension or expulsion data by grade.<sup>324</sup> Because of this, the public is largely unaware that tens of thousands of young children experience disciplinary exclusion each year. Where data is available, it reveals that young students are too often excluded for conduct that could be better addressed through interventions that target underlying issues and don’t remove the student from school.<sup>325</sup>

In states that have adopted legislation limiting the use of exclusionary discipline on young students, disaggregated discipline data has played an important role in both supporting the need for limits and monitoring the effectiveness of those limits.<sup>326</sup> For example, in Oregon,

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322. *See infra* Section IV.C.

323. U.S. DEP’T OF EDUC., *supra* note 306.

324. *E.g.*, N.C. STATE BD. OF EDUC. & DEP’T OF PUB. INSTRUCTION, *supra* note 224; Elizabeth Shockman, *How Young is Too Young to be Suspended from School?*, MPR NEWS, (Jun. 4, 2019, 2:09 PM), <https://www.mprnews.org/story/2019/06/04/how-young-is-too-young-to-be-suspended-from-school> [<https://perma.cc/Y4U6-JRF5>] (noting that in 2019, Minnesota did not track preschool suspensions or publicly separate data on kindergarten suspensions).

325. *See supra* Part IV.

326. *E.g.*, *Pupil discipline: suspensions: willful defiance: Hearing on S.B. 419*, Gen. Assemb., (Cal. 2019) (in expanding existing ban to older grades, Senate Floor analysis looks at data from California Department of Education showing decrease in suspensions for willful defiance after initial prohibition for suspending students in grades K-3); Backus, *supra* note 223 (pointing to disaggregated data from Connecticut Department of Education to show that exceptions to statewide ban are too broad and still allow many children to be suspended each year); MINN. DEP’T OF HUM. RTS., *SUSPENSIONS AND EXPULSIONS REPORT: LESSONS LEARNED AND NEXT STEPS 11* (2022), [https://mn.gov/mdhr/assets/Suspensions%20and%20Expulsions%20Report\\_tcm1061-529594.pdf](https://mn.gov/mdhr/assets/Suspensions%20and%20Expulsions%20Report_tcm1061-529594.pdf) [<https://perma.cc/2WL6-ECA5>] (using disaggregated data to recommend that Minnesota adopt statewide ban on K-3 suspensions,

statewide legislation that focused on the study of early-grade suspension, including a review of exclusionary discipline, played a key part in an ultimately successful effort to pass a statewide ban.<sup>327</sup> In states that are not yet ready to adopt a full ban, state legislation or action to collect, report, and analyze data on this issue could be an important first step.

## B. Develop Coalitions

The potential role for state and national coalition-building in campaigns to end early-grade disciplinary exclusions cannot be understated. National organizations focused on building cross-state networks played a critical part in “Raise the Minimum Age” efforts.<sup>328</sup> By developing a national coalition, raising the minimum age became a national issue, which helped raise awareness and build political will. To some extent, an infrastructure already exists in the school discipline context, where there is a strong history of national campaigns and multi-stakeholder coalitions focused on limiting the use of exclusionary discipline.<sup>329</sup> These existing coalitions are a natural home for a national campaign focused on ending early-grade suspension. Further, dedicating resources to a national “Too Young To Suspend” campaign is likely to benefit long-term efforts to end suspension for all students. This is exemplified in states like California and Minnesota, where early-grade suspension bans were ultimately broadened to include more students.<sup>330</sup>

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as well as increase collection and public report of discipline data disaggregated by many indicators including grade level).

327. In July 2021, the Oregon legislature established the Early Childhood Suspension and Expulsion Prevention Program and launched a study on Oregon’s use of suspension and expulsion in early childhood care and education programs. *Early Childhood Suspension & Expulsion Prevention Program*, OR. DEP’T OF EARLY LEARNING & CARE, <https://www.oregon.gov/delc/programs/pages/sepp.aspx> [<https://perma.cc/T4D3-JHNR>]. In 2022, Oregon approved \$5.8 million in funding to reduce the use of exclusion in early care and education programs with the goal of a full ban by 2026. *Id.*

328. *Raising the Minimum Age for Prosecuting Children*, *supra* note 141.

329. *E.g.*, SOLUTIONS NOT SUSPENSIONS COAL., <https://www.solutionsnotsuspensions.org/> [<https://perma.cc/4G44-CJ2K>]; DIGNITY IN SCHOOLS, <https://dignityinschools.org/> [<https://perma.cc/DD5G-D6AZ>]; ADVANCEMENT PROJECT, <https://advancementproject.org/issues/education-justice/> [<https://perma.cc/6U97-LVC6>]; Council on Sch. Health, *supra* note 244, at e1000-e1007; Alvarez, *supra* note 222.

330. Tony Thurmond, *State Guidance for New Laws on Discipline*, CAL. DEP’T OF EDUC. (Feb. 15, 2023), <https://www.cde.ca.gov/nr/el/le/yr21ltr0819.asp> [<https://perma.cc/59SY-6RYV>] (outlining expansion of California’s ban on suspension for willful defiance from grades kindergarten through third to kindergarten through eighth); Rachel Kats, *Proposal Would Prohibit Schools from Suspending Young Elementary Students*, MINN. HOUSE OF REPRESENTATIVES (Mar. 3, 2021, 6:00 PM), <https://www.house.mn.gov/sessiondaily/Story/15722> [<https://perma.cc/2SX6-5G7U>] (outlining Minnesota bill that would expand grade range of 2020 law limiting disciplinary dismissals of pre-kindergarten students).

### C. Build on Local Reforms

In the “Raise the Minimum Age” movement, local pilot programs were integral to gathering the data needed to show that statewide reform was feasible.<sup>331</sup> The same principle is true in the early-grade exclusion context, where many states only adopted legislation after a school district within the state took local action to limit or ban early-grade disciplinary exclusions. For example, California’s ban on suspending students in kindergarten through eighth grade for willful defiance came several years after the Los Angeles Unified School District adopted a similar local ban in 2013.<sup>332</sup> In 2014, Minneapolis Public Schools was an early adopter of a policy stopping suspension for students in prekindergarten through first grade.<sup>333</sup> Despite initial criticism, Minnesota adopted a statewide ban on suspension for prekindergarten students in 2021 and expanded that ban to students in kindergarten through third grade in 2023.<sup>334</sup> In states where a ban is unlikely to pass, advocates may choose to focus on changing policies in one or more school districts as an initial starting point.

### D. Limit Exceptions

Most statewide bans list exceptions in which disciplinary exclusion of a young student can move forward. In some states, these exceptions are clearly defined and narrow. For example, Nebraska’s law only allows school exclusion of students in prekindergarten through second grade if the

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331. In 2010, Santa Clara County in California adopted a twelve-and-over threshold for juvenile court adjudications. See Times Edit. Bd., *How Young is Too Young for Jail? California Doesn’t Have an Answer, But it Should*, L.A. TIMES (Aug. 11, 2018, 4:15 AM), <http://www.latimes.com/opinion/editorials/la-ed-minimum-age-jail-20180811-story.html> [https://perma.cc/M8MC-34BA]. The success of this model led state senators to introduce legislation establishing a minimum age of twelve in California juvenile courts. *Id.* This legislation passed in 2019. Maureen Washburn, *SB 439 Becomes Law, Ending the Prosecution of Children Under 12*, CTR. ON JUV. & CRIM. JUST. (Oct. 23, 2018), <https://www.cjcj.org/news/blog/sb-439-becomes-law-ending-the-prosecution-of-children-under-12> [https://perma.cc/W5V4-HU7N].

332. Carolyn Jones, *L.A. Unified’s Ban on Willful Defiance Suspensions, Six Years Later*, EDSOURCE (Dec. 13, 2019), <https://edsources.org/2019/how-l-a-unifieds-ban-on-willful-defiance-suspensions-turned-out-six-years-later/620949> [https://perma.cc/4W4X-PMMN]; Taylor Swaak, *As California Expands Ban on ‘Willful Defiance’ Suspensions, Lessons From L.A. Schools, Which Barred Them Six Years Ago*, THE 74 (Sept. 18, 2019), <https://www.the74million.org/article/as-california-expands-ban-on-willful-defiance-suspensions-lessons-from-l-a-schools-which-barred-them-six-years-ago/> [https://perma.cc/6MFD-DF8G].

333. *Mpls. Schools End Suspensions for Youngest Students with Nonviolent Issues*, CBS NEWS MINN. (Sept. 5, 2014, 9:35 AM), <https://www.cbsnews.com/minnesota/news/mps-schools-end-suspensions-for-youngest-students-with-nonviolent-behavior-issues/> [https://perma.cc/2M67-DKLLK].

334. *Suspension*, MINN. DEP’T OF EDUC., <https://education.mn.gov/MDE/fam/disc/susp/#:~:text=Minnesota%20law%20does%20not%20allow,in%20preschool%20or%20prekindergarten%20programs> [https://perma.cc/PSX3-PU9X].



incident involves a deadly weapon on campus.<sup>335</sup> In Illinois, there are no exceptions to the state's ban on excluding prekindergarten students, only an option to develop a "planned transition" to another educational setting.<sup>336</sup>

However, as described above, other states have allowed exclusion in broad and vaguely defined circumstances such as where conduct is "violent,"<sup>337</sup> causes a "serious disruption,"<sup>338</sup> or "endangers the health and safety of others."<sup>339</sup> Although laws setting a minimum age of juvenile court jurisdiction also include exceptions in which a younger child can be processed in juvenile court, those circumstances typically involve violent felonies such as murder or sexual assault.<sup>340</sup> Advocates pushing for early-grade exclusion bans should be wary of exceptions that are too broad, subjective, or vague in order to avoid diluting the impact of the ban.

#### **E. Focus on States that have Passed "Raise the Minimum Age" Reform**

A number of states have raised their minimum age of juvenile court jurisdiction but not yet passed or considered early-grade exclusion bans.<sup>341</sup> Given that the same rationales apply in both reform efforts, these states make viable targets for campaigns to ban early-grade suspension. Further, these states may already have statewide coalitions and stakeholders in place related to their "Raise the Minimum Age" campaigns that can be utilized in efforts to pass legislation limiting exclusionary discipline for young children. Some states that have recently lowered their age of juvenile court jurisdiction but do not yet have bans on early-grade exclusion include Arizona, Delaware, Florida, Massachusetts, Nevada, New Hampshire, New York, North Carolina, North Dakota, Utah, and Washington.<sup>342</sup>

### **CONCLUSION**

Young children exhibit misbehavior for a variety of reasons. Often, the behavior is developmentally appropriate and the result of immaturity, impulsivity, and a diminished ability to assess risk or foresee potential consequences. The misbehavior is rarely a serious threat to the safety of others. Across the country, more and more state legislatures have recognized these truths and adopted "Raise the Minimum Age" legislation that keeps young children out of juvenile delinquency court for misbehavior that can be better addressed through community- and evidence-based

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335. NEB. REV. STAT. § 79-265.01 (2023).

336. 2017 Ill. Laws 100-0105.

337. 2015 Conn. Acts 374 (Reg. Sess.).

338. ARK. CODE ANN. § 6-18-507 (2020).

339. COLO. REV. STAT. § 22-33-106.1 (2022).

340. *See supra* Table 1.

341. *Compare supra* Table 1, with *supra* Table 2.

342. *Compare supra* Table 1, with *supra* Table 2.

responses. However, these children continue to be at risk of experiencing school exclusion for the same misbehavior, despite a body of research showing that such disciplinary exclusion is just as ineffective and harmful as juvenile court intervention. There is an opportunity to build on the same policy arguments that have led to adoption of “Raise the Minimum Age” laws in many states. By adopting legislation that bans or significantly limits the use of exclusionary discipline for children in early school grades, states can expand protection for these vulnerable children and safeguard their potential as thriving members of society.