

Keeping Ferris Out of Foster Care: Reforming the JJDP A to Prevent Home Removals Based on Truancy

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Truancy is directly correlated with negative educational and life outcomes for students. The state exacerbates these negative effects when it removes students from their homes for truancy. Far from addressing the underlying causes of truancy, home removals—whether into secure or non-secure placements—cause devastating harm.

The Juvenile Justice Delinquency and Prevention Act (JJDP A) allows, with some restriction, for children to be incarcerated for truancy. Additionally, the JJDP A has never regulated the civil removal of juvenile status offenders to non-secure yet prison-like placements. JJDP A reform has so far focused on the harms of incarceration—a worthy cause, but one that must not overshadow the overlapping harms of non-secure removals.

This Note argues that truancy should not be handled by removing children from their homes and proposes revisions to the JJDP A that would bring the Act closer to its purpose: preventing delinquency and providing necessary services. To achieve the intended purpose of the JJDP A, Congress must implement further reform. This Note offers an analysis of how non-secure home removals intersect with the JJDP A and extends existing discourse through its analysis of post-2018 valid court order (VCO) exceptions. Ultimately, this Note demonstrates how non-secure civil removals and VCO incarcerations frustrate the intended purpose of the JJDP A.

Part I discusses the scope of the truancy problem and the JJDP A's background and context. Part II offers insight into the unique harms of home removals, and Part III demonstrates how current loopholes frustrate the purpose of the JJDP A. Part IV suggests revisions to strengthen the JJDP A's protections and more closely align the bill with its purpose.

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INTRODUCTION

In 2019, a court removed J.L., a sixteen-year-old boy in Philadelphia with special education needs, from his home and placed him in a residential facility on the basis of truancy.¹ While the trial court described J.L.’s parents as “loving” and “vigilant,” it nevertheless concluded that “years of truancy indicate that J.L.’s parents did not know what to do [with their son].”² The court considered how J.L. was “digging [himself] a hole that[] [was] way deep—not too deep to get out of it, but way deep” and that he was “academically capable, but digging [his] heels in.”³ The court found that current interventions were not working and ordered J.L.’s removal from his family home.⁴

The idea that the government can remove children from their homes for poor school attendance feels reminiscent of the boogeyman—an imaginary story parents might tell children to frighten them into perfect attendance.⁵ The real-life case of J.L., however, is not unique. Each year, more than one thousand children are removed from their homes and placed in foster homes, group homes, or juvenile detention centers for truancy.⁶ Federal legislation intended to protect children from incarceration has largely failed to prevent children from being removed from their homes civilly, and in some circumstances, criminally. The Juvenile Justice Delinquency and Prevention Act (JJDP), passed in 1974 and most recently reauthorized in 2018, is a sweeping piece of legislation intended to prevent delinquency and to provide effective social and rehabilitative services to children who need them.⁷ While the JJDP prohibits long-term incarceration for offenses like truancy, it allows for both brief incarcerations

1. Int. of J.L., 2019 PA Super 224, 216 A.3d 233 (2019).

2. *Id.* at 236; Brief of Juvenile Law Center and Education Law Center-PA at 8, Int. of J.L., 2019 PA Super 224, 216 A.3d 233 (2019) (citing Tr. Disposition Hearing, Jan. 8, 2019 at 9, 11).

3. *Id.*

4. *Id.* at 13.

5. This Note consciously refers to “children,” which is the legal term typically used to categorize individuals under eighteen. *Child*, LEGAL INFO. INST. (2021), <https://www.law.cornell.edu/wex/child> [<https://perma.cc/9WQ2-88HG>]. Terms such as youth, adolescent, kid, and juvenile appear in this Note, as they are common within the systems discussed, but should not be read to have any specific meaning.

6. Dana Goldstein, *Inexcusable Absences*, MARSHALL PROJECT

(Mar. 6, 2015), <https://www.themarshallproject.org/2015/03/06/inexcusable-absences> [<https://perma.cc/2BWC-5TQ8>].

7. *See infra* Part II.C.

through Valid Court Orders (VCOs) and removals into “non-secure” settings.⁸ Under the JJDPa, “secure” placements are those in public or private residential facilities which include “construction fixtures designed to physically restrict the movements and activities of juveniles” and are either used for “the temporary placement of any juvenile who is accused of having committed an offense” or to hold juveniles post-adjudication.⁹ Non-secure placements, despite their ubiquitousness, are not formally defined in the JJDPa.¹⁰ The term “non-secure,” however, is typically used to refer to placements in foster care, group homes, boot camps, treatment centers, residential facilities, and other similar methods of not-quite-incarcerating children. While considered separate under the JJDPa, the distinct yet overlapping harms of non-secure home removals and incarcerations both have devastating consequences for children.¹¹

While stories of incarcerations for truancy are abundant,¹² juvenile cases involving home removals to non-secure placements are less so. Juvenile cases in general are less readily accessible than adult cases, as they are rarely reported or appealed.¹³ Ample

8. See *infra* Part I.B.

9. See Juvenile Justice Delinquency Prevention Act (JJDPa), Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified as amended at 34 U.S.C. § 11103(12)(A)–(13)(B)) (defining “secure detention facility” and “secure correctional facility”).

10. See Goldstein, *supra* note 6.

11. See *infra* Part II.

12. See, e.g., Susan Ferriss, *Juvenile Injustice: Truants Face Courts, Jailing Without Legal Counsel to Aid Them*, PUB. INTEGRITY (2014), <https://publicintegrity.org/education/juvenile-injustice-truants-face-courts-jailing-without-legal-counsel-to-aid-them/> [<https://perma.cc/WBY6-VRSN>] (telling the story of A.G., a fifteen-year-old girl without counsel who became truant due to anxiety and bullying, and who was shackled and sent to a detention center where she was ultimately institutionalized for suicidal ideation). In another case, a student named Elizabeth Diaz was fined over \$1,600 after she missed school because of a medical condition. Unable to pay the fines, she served eighteen days in jail, and as a result of the absences caused by incarceration, did not graduate high school. Elizabeth A. Angelone, *The Texas Two-Step: The Criminalization of Truancy Under the Texas “Failure to Attend” Statute*, 13 SCHOLAR 433, 434–38 (2010). In yet another case, a thirteen-year-old boy named Francisco worked to support his family after his father’s death. Francisco missed school and was petitioned to court for truancy. After missing court, he was incarcerated in secure detention for eighteen days. Amanda McNelly, *Truancy, Secure Detention, and the Right to Liberty*, 24 SUFFOLK J. TRIAL & APP. ADVOC. 112, 112 (2019).

13. Megan Annitto, *Juvenile Justice on Appeal: Making Our System of Justice More Accountable*, JUV. JUST. INFO. EXCH., at 1 (Sept. 4, 2012), <https://jjie.org/2012/09/04/juvenile-justice-on-appeal-making-system-of-justice-more-accountable/> [<https://perma.cc/FHS4-Q5M8>] (noting that “[o]nly 1 in 200 cases where a youth is found delinquent will ever be appealed” and that in Florida, which had the highest juvenile appellate rate in the study, only two percent of juvenile delinquency cases included appeals). A review of juvenile appeals in Michigan from 2014 to 2019 revealed only 45 opinions issued, with only two of those published. See Kim Tandy, *Overdue for Justice: An Assessment of Access to and*

evidence of non-secure home removals for truancy, however, can still be found in case law and state statutes. For example, when the sole basis of a petition is truancy, Minnesota law states that courts can order out-of-home placements into foster care, shelter care, residential facilities, and inpatient treatment, for which parents can be ordered to pay fees.¹⁴ Truant children are often placed into group homes, as was done in a Minnesota case in which the court placed a truant child into a group foster home that operated “much like a military boot camp.”¹⁵ In Ohio, the court placed an eighth grade girl in foster care three separate times for truancy.¹⁶ When the child continued her truancy after returning from her third foster placement, the court charged her mother with contributing to the unruliness of a minor.¹⁷ In West Virginia, courts have repeatedly placed children into residential facilities for truancy, including in the case of a young mother who was later stripped of her parental rights after allegations of abuse while placed in a residential facility for truancy.¹⁸ In another Philadelphia case, the court responded to Oliver Francis’ truancy by placing him in foster care more than three hundred miles away

Quality of Juvenile Defense Counsel in Michigan, NAT’L JUV. DEF. CTR., 1, 38–40 (2020). In 85% of Michigan counties, no juvenile appeals resulted in orders. *See id.* Research revealed that attorneys rarely informed youths of their right to counsel, and that attorneys do not pursue appeals because of paperwork, a cumbersome and unfamiliar process, youths’ lack of knowledge of their rights, and compensation issues. *Id.*

14. MINN. STAT. ANN. § 260C.163(3)(e) (2022) (establishing that “before any out-of-home placement, including foster care or inpatient treatment, can be ordered, the court must appoint a public defender or other counsel at public expense in accordance with this subdivision”); HUM. SERV., *Consequences—Truancy*, STEARNS CNTY. MINN., <https://www.stearnscountymn.gov/1059/Consequences---Truancy> [<https://perma.cc/W4FD-PAVJ>]; *see also* Vilas Cnty. Dep’t of Soc. Servs. v. Jeremy L. L. (*In re* Jeremy L. L.), 298 Wis. 2d 552, 2007 WI App 19, 727 N.W.2d 376) (upholding decision to place a truant child in a group home).

15. *Matter of Welfare of L.J.C.*, 367 N.W.2d 101, 103 (Minn. Ct. App. 1985) (holding that a child adjudicated truant could be placed in a group foster home but not a secure detention facility while awaiting post-adjudication placement).

16. *State v. Groves*, 1994 Ohio App. 2867 (finding a mother guilty of contributing to the unruliness of a minor under OHIO REV. CODE ANN. § 2919.24(A)(1) after the child returned from foster care and still did not attend school).

17. *Id.* at 6.

18. *In re* R.T., 2014 W. Va. 170 (affirming an order placing a child in a residential facility after she continued to be truant after returning from her original placement in a non-secure shelter for truancy); *In re* A.H., 2015 W. Va. 1018 (terminating a seventeen-year-old mother’s parental rights after a finding of abuse or neglect was entered against her while placed under court order at a residential facility for truancy). Teenage pregnancy is a major barrier to attendance, especially when school policies do not prioritize accessibility. For more information, see Kelli Garcia & Neena Chaudhry, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting*, NAT’L WOMEN’S L. CTR. (2017).

from his home—“too far to run.”¹⁹ Students, including those experiencing significant barriers to education, have been and continue to be removed from their homes for missing school.

Academic theory and field practice have shifted to embrace the ideas that children should not be locked up for missing school and that any amount of time incarcerated is inappropriate for children. In the debate regarding JJDDPA reauthorization, many scholars and advocates have called for the removal of the VCO exception.²⁰ But the conversation has not reached far enough regarding home removals and the JJDDPA. Many cases of removal, including those of J.L. and Oliver Francis, would still be permissible under the JJDDPA even if the VCO exception was removed. Unregulated non-secure removals are harmful, unsafe, and ineffective truancy treatments, and in many cases, a quasi-incarceration.²¹

Existing scholarship focuses on incarceration in secure facilities to the exclusion of non-secure removals.²² This Note challenges discourse to reach further. Current and past JJDDPA reform proposals overlook state-sanctioned efforts to punish truant children through non-secure systems unregulated by the JJDDPA. This Note argues that Congress should amend the JJDDPA to include definitions, procedures, and regulations for non-secure detentions. While incarceration is singularly harmful to children, home removals through the civil child welfare system are not a safe alternative.²³ In the criminal justice system, analogous efforts would be prohibited by the JJDDPA’s deinstitutionalization of the

19. Caroline Preston, *Institutions for Foster Kids Aren’t Doing Enough to Educate Them*, HECHINGER REP. (Nov. 10, 2018), <https://hechingerreport.org/institutions-for-foster-kids-arent-doing-enough-to-educate-them/> [<https://perma.cc/TRF4-VSA6>].

20. For examples, see Janet Chiancone, *Addressing Girls Delinquency: Recommendations for Policymakers and Practitioners*, in *DELINQUENT GIRLS: CONTEXTS, RELATIONSHIPS, AND ADAPTATION* 179, 182–83 (Shari Miller, Leslie Leve, & Patricia Kerig, eds., 1992); Patricia Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception that Swallowed the Rule*, 7 SEATTLE J. SOC. JUST. 555, 556 (2008); DeAnna Baumle, *Creating the Trauma-to-Prison Pipeline: How the U.S. Justice System Criminalizes Structural and Interpersonal Trauma Experienced by Girls of Color*, 56 FAM. CT. REV. 695, 703 (2018); Gabe Shoglow & Alessandra Meyer, *Reducing Youth Confinement Key to Proposed JJDDPA Reauthorization*, VERA INST. (Jan. 8, 2015), <https://www.vera.org/news/reducing-youth-confinement-key-to-proposed-jddpa-reauthorization> [<https://perma.cc/SA87-6F7Z>]; Naomi Smoot, *The Valid Court Order (VCO) Exception: Bad for Our Communities, Bad for Our Kids*, COAL. FOR JUV. JUST. 1, 1–2; Christina Delgado, *Tom Cotton on the Wrong Side of Juvenile Delinquency Act*, HILL (Oct. 7, 2017), <https://thehill.com/opinion/criminal-justice/354218-tom-cotton-rand-paul-on-the-wrong-side-of-juvenile-delinquency-act/> [<https://perma.cc/8MCY-H9MR>].

21. See *infra* Part II.

22. See 34 U.S.C. § 11103(12)(A)–(13)(B)).

23. See *infra* Part II.

status offenders mandate,²⁴ which leaves children uniquely unprotected in civil courts. In addition to separating children from their families, home removals also separate children from their schools, communities, and other support networks. Home removals isolate children, inflict trauma, damage mental health, and have lifelong negative impacts for children and families.²⁵

This Note sheds light on loopholes that allow home removals for truancy and proposes recommendations for JJDPa reform. Part I discusses truancy and the foundation of the JJDPa as evidenced by its fifty-year history, competing values of retribution and rehabilitation, and legislative intent. Part II details the harms caused by removing children from their families, incarcerating children, and detaining children in congregate care settings, as well as explores effective truancy interventions that provide alternatives to home removals. Part III analyzes how current practices frustrate the Act's legislative intent and the consequences of such disconnect. Part IV proposes reforms that would better align the JJDPa with its intended purpose: preventing the onset of delinquency and providing children with necessary rehabilitative services.

I. TRUANCY AND THE JJDPa

Part I explores the context and scope of the truancy problem, as well as factors that contribute to truancy and the relationship among school absenteeism, race, and poverty. Then, Part I delves into the JJDPa's history, from its conception to its most recent reauthorization. Beyond being an ineffective truancy treatment strategy,²⁶ home removals traumatize children and families, and disproportionately affect poor, Black, and Native American populations.²⁷ In theory, the goal of truancy regulation and treatment is to promote student achievement and positive youth development, to support children and communities, and to increase positive outcomes.²⁸ The JJDPa offers an inroad to connecting

24. See 34 U.S.C. § 11133(a)(11)(A) (providing that status offenders cannot be held in secure detention).

25. See *infra* Part II.A.

26. See *infra* Part II.C.

27. See *infra* text accompanying notes 55–65.

28. *Best Practice Approaches to Truancy Reduction: Information for School Attendance Officers*, WIS. DEP'T OF PUB. INSTRUCTION STUDENT SERV. PREVENTION AND WELLNESS 1, 1,

practice and theory and to reaching better outcomes for truant children and their families. The legislation can be strengthened to promote its goals with fidelity, rather than exacerbate the harms of the juvenile justice system.

A. THE TRUANCY PROBLEM

“Truancy” is a legal term used to describe situations in which students experiencing attendance barriers violate compulsory education laws, which require children to attend school.²⁹ Truancy is a status offense—an offense that would not be criminal if committed by an adult—which punishes excessive school absences.³⁰ Charges of this kind account for most status offense cases in the United States.³¹ Truancy cases may be dealt with in civil courts, such as family court, or in criminal juvenile courts, depending on state statute.³²

In considering school absence, courts should distinguish between truancy and educational neglect on the part of the parent or guardian. As a legal term, truancy typically refers to situations in which an older student’s absence is perceived as a willful choice to miss school. The number of absences required to be considered “truant” varies by state law, but can be as brief as one day of uncommunicated absence.³³ Truancy charges emphasize a child’s

[https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/](https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Best_Practice_Approaches_to_Truancy_Reduction.pdf)

[Best_Practice_Approaches_to_Truancy_Reduction.pdf](https://perma.cc/L75M-PUHL) [https://perma.cc/L75M-PUHL].

29. “Truancy” refers to unexcused school absences by children who are statutorily compelled to attend school through compulsory education laws; *see also School Refusal*, STAN. MED. CHILD. HEALTH, <https://www.stanfordchildrens.org/en/topic/default?id=school-refusal-90-P02288> [https://perma.cc/FPZ8-HVDK] (explaining medical understandings of school refusal, a condition that the law does not distinguish from truancy).

30. *See* 34 U.S.C. § 11103(42) (defining the term “status offender” as “a juvenile who is charged with or who has committed an offense that would not be criminal if committed by an adult”). Additionally, while the discussion in this Note is likely applicable to many status offenses, due to the special nature of truancy, the scope of the Note extends only to truancy under the JJDP.

31. *Petitioned Status Offense Cases*, U.S. OFF. OF JUV. JUST. AND DELINQ. PREVENTION (2020), <https://www.ojjdp.gov/ojstatbb/court/qa06601.asp> [https://perma.cc/8Q3M-AAR3]. Truancy cases accounted for over 58% of petitioned status offenses in the U.S. in 2020, with truancy offenses making up 33,400 cases of 57,400 total status offenses. Curfew violations, in contrast, made up just 2,800, and runaway offenses made up 6,500.

32. For an example of a case in civil family court, see *Int. of J.L.*, 2019 PA Super 224, 216 A.3d 233 (2019). For examples of cases in criminal court, see *infra* note 12.

33. *See* WIS. STAT. ANN. § 118.16 (2016) (stating that truancy means any uncommunicated absence of part or all of one or more days); *cf.* MINN. STAT. ANN. § 260A.02 (2022) (stating that “continuing truant” refers to a child who has been absent from school without valid excuse for three days if in elementary school or three or more class periods on

non-compliant behavior and are often accompanied by ungovernability, unruliness, or incorrigibility charges.³⁴ Educational neglect, in contrast, is demonstrated by caregivers' non-actions, like failing to enroll children in school.³⁵ When young children miss school, their guardians are often presumed to be at fault.³⁶

According to researchers, the underlying factors that lead to truancy fall into four categories: student, family, school, and community factors.³⁷ Truancy is typically associated with student- or school-specific factors, like fear of bullying, lack of positive relationships with adults, teen parenthood, school accessibility, teacher quality, and student-teacher interactions.³⁸ One judge noted that truancy can be a symptom of depression or defiant

three days for middle, junior, and high school); *cf.* KAN. STAT. ANN. § 72-1113 (c)(1) (2012) (classifying students as truant when they miss “significant parts” of three consecutive school days, five in a semester, or seven in a year).

34. For an example of a statutory definition of “incorrigibility,” see Ariz. Rev. Stat. Ann. § 8-201(19) (2005) (defining an incorrigible child as one who “(a) Is adjudicated as a child who refuses to obey the reasonable and proper orders or directions of a parent, guardian or custodian and who is beyond the control of that person. (b) Is habitually truant from school . . . (d) Habitually behaves in such a manner as to injure or endanger the morals or health of self or others.”). For an example of a statutory definition of “ungovernable,” see La. Child. Code Ann. art. 728(6) (2019) (defining “ungovernable” to “[mean] the child’s habitual disregard of the lawful and reasonable demands of his caretakers and that the child is beyond their control.”). Internal policies and local standards often conflate non-compliance charges, such that “truancy” may be categorized as “incorrigibility,” “ungovernability,” or “unruliness.” See Livingston Cnty. Mich., Incorrigibility, <https://milivcounty.gov/juvenile/justice-services/incorrigibility/> [<https://perma.cc/5ZHS-YBQX>] (explaining that local standards allow truancy to be included in incorrigibility petitions); see also Mercer Cnty. Prob./Juv. Ct., Unruly Child, <https://www.mercercountycourts.com/unruly.php> [<https://perma.cc/FQZ6-P4UP>] (including truancy and incorrigibility in the definition of “unruly child”).

35. For further discussion on educational neglect, see Melissa Van Wert et al., *Educational Neglect: Understanding 20 Years of Child Welfare Trends*, 75 CHILD ABUSE AND NEGLECT 50, 50–60 (2017); *Educational Neglect*, CHILD USA, <https://childusa.org/educational-neglect/> [<https://perma.cc/XZX6-7VFP>]; Philip Kelly, *Where are the Children?: Educational Neglect Across the Fifty States*, 23 RESEARCHER 41, 41–58 (2010).

36. For one example of a state statute specifying a presumption of parental fault for young students’ absences, see MINN. STAT. ANN. § 260C.163 (2022) (stating that “[a] child’s absence from school is presumed to be due to the parent’s, guardian’s, or custodian’s failure to comply with compulsory instruction laws if the child is under 12 years old . . . A child’s absence from school without lawful excuse, when the child is 12 years old or older, is presumed to be due to the child’s intent to be absent from school.”).

37. Aime Black, Wendy Kekahio & Richard Seeder, *Review of Research on Student Nonenrollment and Chronic Absenteeism: A Report for the Pacific Region*, REGUL. EDUC. LAB’Y, 1, 1–9 (2014).

38. Brian A. Jacob & Kelly Lovett, *Chronic Absenteeism: An Old Problem in Search of New Answers*, BROOKINGS INST. (2017).

disorder, or even a result of working jobs which leave students too exhausted to get out of bed in the morning.³⁹

Pop culture icon Ferris Bueller skipped school to embark on a legendary journey of delinquency.⁴⁰ Beyond truancy itself, Bueller arguably made false representations, committed odometer fraud, tampered with computers, trespassed, committed grand theft auto, jaywalked, and disturbed the peace, among other likely violations.⁴¹ Bueller's beloved day of teenage rebellion is, however, perceived as relatively innocent. As a wealthy white male from the suburbs, Bueller was likely never in any danger of being petitioned to court or of being forcibly removed from his home for truancy.⁴² Low-income students and students of color are at higher risk of becoming chronically absent from school, of having their absences classified as unexcused, and of being petitioned to court for truancy.⁴³ It is no surprise that a character like Bueller was chosen as the star of the best-selling movie, which portrays truancy as a light-hearted and even formative part of adolescence. For non-white, non-wealthy students, however, school absence can lead to removal from their homes and families.⁴⁴ The roles of race and class must be interrogated, addressed, and acknowledged in any discussion of truancy, delinquency, and home removal determinations.

To understand how truancy interacts with the juvenile justice system, it is critical to understand the context of truancy and that truancy is not an untreatable or inevitable circumstance. Truancy is a crisis, both systemically⁴⁵ and individually: truant students are more likely to be academically behind, to use drugs, to drop out

39. Justice Robin Jean Davis, *Truants and Dropouts: Headed for A Lifetime of Trouble*, Jan.–Mar. 2012, W. VA. LAWYER, at 52, 52.

40. FERRIS BUELLER'S DAY OFF (Paramount Pictures 1986).

41. [S]teinwald, "Crimes Committed by Ferris Bueller During His Day Off," Ask MetaFilter (Apr. 25, 2009), <https://ask.metafilter.com/120479/Crimes-committed-by-Ferris-Bueller-during-his-Day-off> [<https://perma.cc/YBK7-UCW7>].

42. Alan Siegel, *Get Over 'Ferris Bueller,' Everyone*, ATLANTIC (June 9, 2011), <https://www.theatlantic.com/entertainment/archive/2011/06/get-over-ferris-bueller-everyone/240155/> [<https://perma.cc/94SH-TADK>].

43. See *infra* notes 52–61.

44. *Id.*

45. See Emily DeRuey, *The Economic Cost of Truancy*, ATLANTIC (Aug. 28, 2015), <https://www.theatlantic.com/education/archive/2015/08/the-economic-cost-of-growing-truancy/402688/> [<https://perma.cc/K45M-BFLC>] (noting that truant children are more likely to earn less than peers as adults, have higher dropout rates, and that if half the dropouts in the Class of 2010 graduated, the U.S. would have seen "\$7.6 billion in earnings, \$713 million in tax revenue in an average year, and \$9.6 billion in economic growth" by the time the children reached mid-career points).

of school, and to enter the justice system.⁴⁶ Truancy is also not an easy problem to solve. Its entanglements with poverty, racism, home environment, family dynamics, and individual school climates increase its complexity.⁴⁷ Truancy is a symptom of other less visible issues that students are facing, and it is best conceptualized as an externalizing behavior rather than a collection of unrelated, isolated incidents.⁴⁸ In 2018, nearly 61,000 students were petitioned to courts across the country for missing school, leading to the detainment of 1,500 students and the incarceration of 736 students in long-term facilities.⁴⁹

For absences to be labelled as truancy, they must be unexcused, which leads to disparities by creating opportunity for bias in excusal definitions and in policy implementation. Determining whether an absence is excused is highly discretionary and often falls to a principal or other staff member.⁵⁰ A nationally representative study of schools found that school absences tend to be excused when students' reasons are judged as meritorious or responsible. Meanwhile, schools were "less likely to excuse absences due to life experiences that were more likely to be experienced by racially minoritized students."⁵¹ In the districts studied, students were commonly excused for absences such as medical appointments, illnesses with doctor's notes, time spent with military parents, extracurriculars, or family trips.⁵² On the other hand, examples of unexcused absences in the same districts included illnesses without doctor's notes, no alternative

46. Lynn Bye et al., *TRUANCY PREVENTION AND INTERVENTION: A PRACTICAL GUIDE* 1, 49–60 (Oxford Acad., 2010).

47. *Id.* at 29–48.

48. See generally Richard Dembo & Laura M. Gullede, *Truancy Intervention Programs: Challenges and Innovations to Implementation*, 20 *CRIM. JUST. POL. REV.* 437 (2009).

49. *Rethinking Juvenile Justice + Schools: Improving Youth's School Attendance and Educational Outcome*, COUNSEL OF STATE GOVERNMENTS JUSTICE CENTER (2020), <https://csgjusticecenter.org/publications/truancy/> [<https://perma.cc/7CL9-ZY5R>].

50. For examples of policies authorizing principals and others to determine whether an absence is excused, see *Attendance Policy Student Code of Conduct*, NASSAU CNTY. SCH. DIST. 1, 3 (2021–22), <https://www.nassau.k12.fl.us/site/handlers/filedownload.ashx?moduleinstanceid=3152&dataid=9087&FileName=Attendance%20Policy%20Student%20Code%20of%20Conduct%202022.pdf> [<https://perma.cc/7CP5-79K9>]; see also *Board Policy Absences and Excuses*, GA. DEP'T. OF EDUC. 1, 1, https://www.gadoe.org/External-Affairs-and-Policy/Policy/Lists/Attendance/Attachments/142/753_StdAttnProt.pdf [<https://perma.cc/GDV7-HVP8>].

51. Clea A. McNeely et al., *Exploring an Unexamined Source of Racial Disparities in Juvenile Court Involvement: Unexcused Absenteeism Policies in U.S. Schools*, 7 *AM. EDUC. RSCH. ASS'N* 1, 7 (2021).

52. *Id.* at 10.

transportation after missing the bus, caring for family members, suspensions, unapproved employment, lack of clothing, and visiting incarcerated parents.⁵³ These circumstances are often judged as irresponsible on the part of students or families and disproportionately affect students of color and poor students.⁵⁴ The study found that Native American and Black students were twice as likely as their white peers to have their absences categorized as unexcused.⁵⁵ Such discretion in definitions allows for and leads to bias and judgment in decision-making. For students living in poverty and students of color, these decision-making processes can lead to truancy adjudications, which can result in home removals.⁵⁶

The urgency of the need for truancy law reform is highlighted by the inequitable application of these laws, as demonstrated by the disparities in which student populations miss school, which students' absences are considered unexcused, and which absences count toward truancy. In the 2015–2016 school year, over seven million students were chronically absent.⁵⁷ Compared to white students, 14.5% of whom are absent, Native American and Pacific Islander students are over 50% more likely to lose three weeks of school or more, Black students are 40% more likely, and Hispanic students are 17% more likely.⁵⁸ Black and multiracial students face similar disproportionality in chronic absenteeism rates, with approximately 20% of Black students and 18% of multiracial students experiencing chronic absenteeism.⁵⁹ Additionally, students with disabilities are 50% more likely to be chronically absent than peers without disabilities.⁶⁰ Educational continuity and stability are severely disrupted by absenteeism, which

53. *Id.* at 8.

54. *Id.* at 3.

55. *Id.* at 11.

56. *Id.* at 3.

57. *Chronic Absenteeism in the Nation's Schools*, U.S. DEP'T OF EDUC. (2019), <https://www2.ed.gov/datastory/chronicabsenteeism.html> [https://perma.cc/AB3X-H2WH] (defining "chronically absent" as signifying that a student has missed at least 15 school days in a year).

58. *Id.*

59. *Id.*

60. *Id.* Students with disabilities may be absent at higher rates because of conditions causing fatigue or side effects, anxiety about bullying, medical appointments, and "inappropriate or inadequate special education and related services, trauma, food, and housing insecurity." NAT'L CTR. ON EDUC. OUTCOMES, *Students with Disabilities & Chronic Absenteeism*, 1, 2 (2018), <https://nceo.umn.edu/docs/OnlinePubs/NCEOBrief15.pdf> [https://perma.cc/T75P-RMWT].

disproportionately harms students of color and students living in poverty.⁶¹

There are also disparities in which students are petitioned to court for these absences.⁶² Such disparities might be explained by systemic and individual racism, disproportionate contact with police and courts, overreporting and overregulation in the child welfare system, or over-policing of Black and Brown communities.⁶³ In any scenario, Black and Brown children and poor children are more likely to be adjudicated truant than other students.⁶⁴ One study found that Native American students were nearly four times more likely than white students to be brought into court for absenteeism, while Black students were twice as likely and Hispanic students 50% as likely.⁶⁵ Overall, there has been an overwhelming and alarming trend to petition truancy cases to court: from 1986 (just twelve years after the JJDPA's enactment) to 2019, a year after the bill's most recent reauthorization, court-petitioned truancy cases increased by 166%.⁶⁶

61. See Kathleen McNaught et al., *Advocating for Educational Stability for Youth in Foster Care*, A.B.A. (May 1, 2017), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/may-june-2017/advocating-for-educational-stability-for-youth-in-foster-care/ [<https://perma.cc/6TDL-J94Z>] (stating that educational stability promotes positive learning experiences and school engagement).

62. McNeely, *supra* note 51, at 1.

63. For discussion on bias in the child welfare system, see Andy Newman, *Is N.Y.'s Child Welfare System Racist? Some of Its Own Workers Say Yes*, N.Y. TIMES (Nov. 22, 2022), <https://www.nytimes.com/2022/11/22/nyregion/nyc-acs-racism-abuse-neglect.html> [<https://perma.cc/9W8K-TFTV>]. The child welfare system is described by some as a “predatory system that specifically targets Black and brown” families, who are subject to “a different level of scrutiny.” In New York, Black families were seven times as likely as white families to be accused of maltreatment and thirteen times more likely to have their children removed. The system punishes symptoms of poverty as neglect, and poor Black and Latino families are especially likely to come under the scrutiny of the system. For further discussion on overreporting and disparate outcomes, see Ashley Lehrer-Small, *Ending ‘Child Poverty Surveillance’: NYU Professor on Schools & Child Welfare*, 74 MILLION (Oct. 7, 2022), <https://www.the74million.org/article/ending-child-poverty-surveillance-nyu-professor-on-schools-child-welfare/> [<https://perma.cc/TTD5-8DFH>].

64. Brandy Maynard et al., *Truancy in the United States: Examining Temporal Trends and Correlates by Race, Age, and Gender*, 81 CHILD YOUTH SERV. REV. 188, 189 (2017).

65. McNeely, *supra* note 51, at 1.

66. See *National Estimates of Petitioned Status Offense Cases*, OFF. OF JUV. JUST. AND DELINQ., <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/juvctstats/estim-pet.html> [<https://perma.cc/P8QZ-BXZE>] (reflecting that 20,800 truancy cases were petitioned in 1986); *OJJDP Statistical Briefing Book*, OFF. OF JUV. JUST. AND DELINQ. (June 22, 2021), <https://www.ojjdp.gov/ojstatbb/court/qa06603.asp> [<https://perma.cc/EZ5G-BCZZ>] (reflecting that 33,400 truancy cases were petitioned in 2020).

B. THE JJDPa

Congress needs to enact limits on non-secure home removals, as well as return to a version of the JJDPa that prohibits child incarceration. To understand the urgency of these reforms, it is important to know the history and context of the JJDPa. This Section explores the enactment of the JJDPa, the VCO amendment, the most recent reauthorization, and directions for future reform.

1. *Original Legislation and Early Amendments*

Prior to the first half of the 20th century, juvenile justice was left to the purview of states and localities.⁶⁷ The JJDPa, a landmark piece of legislation passed by Congress in 1974 and signed into law by President Ford, centered on preventing juvenile delinquency and on providing rehabilitative services to children.⁶⁸ Upon signing, President Ford stated that the JJDPa “represents a continuation of our national commitment to . . . keep juveniles from entering the treadmill of the criminal process.”⁶⁹ The bill was originally authorized for three years with a budget of \$350 million.⁷⁰ The JJDPa created a unified national baseline of protections by establishing a dedicated federal agency, providing grants to fund state and local juvenile justice efforts, and mandating core requirements that states must comply with in order to receive funding.⁷¹ Ultimately, the Act passed with

67. CONG. RSCH. SERV., RL33947, JUVENILE JUSTICE: LEGISLATIVE HISTORY AND CURRENT LEGISLATIVE ISSUES 4 (2015). The first juvenile court was established in Cook County, Illinois, in 1899. By the mid-1920s, some form of a juvenile justice system had been created in every state. Originally, the court process was highly informal, often just a conversation between children and judges, sans legal representation. Early juvenile justice systems did not detain children but focused on probation and juvenile rehabilitation and treatment facilities. See *Youth in the Justice System: An Overview*, JUV. L. CTR., <https://jlc.org/youth-justice-system-overview> [<https://perma.cc/4LCM-9BWA>].

68. Presidential Statement on Signing Pub. L. No. 93-415PS Juvenile Justice and Delinquency Prevention Act of 1974 (Sept. 7, 1974).

69. *Id.*

70. U.S. OFF. OF JUV. JUST. AND DELINQ. PREVENTION, *Prior Federal Juvenile Delinquency Activity*, 1, 2, <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/jjdpchronology.pdf>. [<https://perma.cc/B7WQ-VGSV>].

71. CONG. RSCH. SERV., RS22070, JUVENILE JUSTICE: OVERVIEW OF LEGISLATIVE HISTORY AND FUNDING TRENDS 1 (2007), https://www.everycrsreport.com/files/20070125_RS22070_6187c76778d47d04d2108b9208882df23ca4c71f.pdf [<https://perma.cc/G6P8-2JYA>]. The JJDPa established the Department of Justice’s Office of Juvenile Justice and Delinquency Prevention to coordinate and administer JJDPa programs. Formula grant

bipartisan support: a vote of 329 yeas and 20 nays in the House, and 88 yeas and 1 nay in the Senate.⁷²

The JJDPa provides resources to states to support the development of effective delinquency prevention programs, to divert children from the justice system, to connect children with necessary services, to provide alternatives to institutionalization, and to improve the quality of the juvenile justice system.⁷³ In order for states to receive federal JJDPa funding, the Act mandates compliance with core protections in four areas: deinstitutionalization of status offenders, adult jail and lock-up removal, “sight and sound” separation, and racial and ethnic disparities.⁷⁴ These protection areas are meant to ensure that children who commit non-criminal offenses are treated rather than incarcerated, that states assess and address racial and ethnic disparities in the system, that children are not detained in adult facilities, and—in the exceptional cases in which children are detained in adult facilities—that children are not near enough to adult criminals to see or hear them.⁷⁵

The JJDPa’s sponsors intended the legislation to serve dual purposes of prevention and treatment.⁷⁶ Congressional debates emphasized the interplay of the two, noting that children can become delinquent through criminalization of school issues and systemic failures to provide effective services.⁷⁷ Congress enacted the JJDPa in response to concerns about crime,⁷⁸ and Senator Bayh, who introduced the bill, summarized its necessity in his discussion of the system’s failure to “[do] the kind of rehabilitation job that is necessary.”⁷⁹ By strengthening prevention and

funding supports juvenile justice prevention and delinquency administration, services, and programs. *Id.* at 1–10.

72. 120 CONG. REC. S25185-6 (daily ed. July 25, 1974); 120 CONG. REC. H21906 (daily ed. July 1, 1974).

73. See 34 U.S.C. § 11102(1)–(2).

74. *Core Requirements*, ACT 4 JUV. JUST., <https://www.act4jj.org/what-jjdp/core-requirements> [<https://perma.cc/Z6JM-G64M>]; see also 34 U.S.C. § 11133(a)(11)(A) (providing that status offenders cannot be held in secure detention).

75. *Id.*

76. See 34 U.S.C. § 11102(1)–(4).

77. For examples, see 120 Cong. Rec. 21866 (daily ed. July 1, 1974) (statement of Rep. Herman Badillo) (reflecting the inefficiency of waiting for juveniles to be pushed out of school and accrue criminal charges before assisting them); 120 Cong. Rec. 21892 (daily ed. July 1, 1974) (statement of Rep. William Ford) (reflecting dissatisfaction with current juvenile service provision and calling for change).

78. 120 CONG. REC. S25155 (daily ed. July 25, 1974) (statement of Sen. Birch Bayh).

79. 120 CONG. REC. S25164 (daily ed. July 25, 1974) (statement of Sen. Birch Bayh).

rehabilitation programs, the JJDPa was intended to stop crime before it started—redirecting children from lives of crime before the onset of delinquency through prevention and services.⁸⁰

Proponents of the original JJDPa recognized the difference between criminal adults and status-offending youths, with one co-sponsor noting that “40 percent of the children processed by the formal juvenile justice system had committed no criminal act,” and that children are better served through treatment rather than punishment.⁸¹ The same co-sponsor explained that court and law enforcement officers too often weaken rehabilitation efforts through “outmoded procedures, a lack of funds[,] and inadequate facilities,” and that the juvenile justice system functions as a “catchall” for children “too difficult to be dealt with” by society.⁸² The juvenile justice system too often simply “processes kids in trouble.”⁸³

The JJDPa sought to protect the rights of children by standardizing court processes and requiring services instead of incarceration, thereby ending a practice of “second-class justice” for children, who “we ought to treat . . . equally” to, if not better than, adults.⁸⁴ Voicing his concerns about various “shocking” and “questionable” procedures used to alter children’s behavior, one legislator proposed an amendment solely intended to ensure federal money would not subsidize programs that harm children.⁸⁵ Another reasoned that the JJDPa was a necessary effort to “prevent the juvenile from reaching what unfortunately has become the end of the road, incarceration.”⁸⁶

The JJDPa’s early history also emphasized the connection between school difficulties and state-created delinquency. Legislators supported the JJDPa’s protection of would-be “school pushouts,” referring to students who leave school because of discriminatory treatment, arbitrary actions of school authorities, or hostile school environments—all of which Black and Brown

80. See generally 120 CONG. REC. S21882-21907 (daily ed. July 25, 1974); 120 CONG. REC. H25148-25193 (daily ed. July 1, 1974).

81. 120 CONG. REC. S25165-6 (daily ed. July 25, 1974) (statement of Sen. Roman Hruska).

82. *Id.*

83. *Id.* at S25182 (statement of Sen. Charles Mathias).

84. *Id.* at S25165 (statement of Sen. Birch Bayh).

85. *Id.* at S25181 (statement of Sen. James Buckley).

86. 120 CONG. REC., H21890 (daily ed. July 1, 1974) (statement of Rep. Stewart McKinney).

students experience at higher rates than their peers.⁸⁷ One lawmaker commented that “a solution to the problem of the student pushout is central to the effort to reduce juvenile delinquency” and that school issues lead to youth offenses.⁸⁸ This representative also encouraged JJDDPA-funded organizations to consider hiring advocates to protect students’ rights and to address disruptive behavior rather than “[removing] the problem from the jurisdiction of the schools,” as home removals do.⁸⁹

In order for states to receive federal funding through the JJDDPA, the Act requires that states implement policies to deinstitutionalize status offenders, a mandate which prohibits the placement of status offenders in secure detention.⁹⁰ In 1974, the JJDDPA required that states implement plans to remove status offenders from secure detention and banned the placement of youth offenders in institutions where they would have contact with adult criminals.⁹¹ The JJDDPA as originally enacted prohibited institutionalization of status offenders without exception, even for chronic offenders or for status offenders who also violated court orders.⁹² While the deinstitutionalization mandate protected status-offending children from being placed into secure settings, it did not consider or regulate non-secure placements.⁹³

2. *Valid Court Order Exception and Expired Authorization*

In 1980, the JJDDPA was reauthorized for another four years, but with a significant amendment: the Valid Court Order (VCO) exception.⁹⁴ The amendment was intended to return some flexibility to the states,⁹⁵ addressing concerns that the JJDDPA

87. *Id.* at H21890 (statement of Rep. Shirley Chisholm).

88. *Id.*

89. *Id.* at H21891.

90. CONG. RSCH. SERV., RS22070, JUVENILE JUSTICE: OVERVIEW OF LEGISLATIVE HISTORY AND FUNDING TRENDS 1, 3–4 (2007); *Core Requirements*, ACT 4 JUV. JUST., <https://www.act4jj.org/what-jjddpa/core-requirements> [<https://perma.cc/85UR-B8UG>]. Notably, VCOs are the exception to this rule. See 34 U.S.C. § 11133(a)(23); 34 U.S.C. § 11133(a)(11)(A) (providing that status offenders cannot be held in secure detention).

91. CONG. RSCH. SERV., RS22070, JUVENILE JUSTICE: OVERVIEW OF LEGISLATIVE HISTORY AND FUNDING TRENDS 1, 1 (2007).

92. See 34 U.S.C. § 11133(a)(23).

93. *Core Requirements*, ACT 4 JUV. JUST., <https://www.act4jj.org/what-jjddpa/core-requirements> [<https://perma.cc/85UR-B8UG>].

94. *Id.* See also 34 U.S.C. § 11133(a)(23).

95. See 34 U.S.C. § 11102(1)–(3). The VCO exception was introduced out of recognition that in under-resourced areas with low population density, conditions sometimes necessitated the temporary detention of children when no acceptable alternative was yet

overly restricted judicial discretion by not allowing any exceptions, which resulted in youths ignoring orders and a perception of diminished respect for courts.⁹⁶ As written in 1980, VCO exceptions allowed courts to incarcerate children for unrestricted periods of time upon violation of a court order.⁹⁷ For example, through the VCO exception, a judge could order a child to comply with certain conditions, like not missing any school, and if the child then missed a day of school, the judge could order incarceration.⁹⁸ The 1980 VCO amendment launched an enduring and contentious battle over the next half-century, and though it has since been amended, its legacy endures.⁹⁹

The amendment was not universally supported in Congress, as its opponents made clear in debate. One lawmaker called VCOs “callous” and “inhumane,” with the potential to cause irreparable damage to children.¹⁰⁰ Another emphasized the amendment’s disregard for both facts and the JJDPAs’ purpose, and pointed out that the JJDPAs already provided for alternatives for difficult-to-treat offenders.¹⁰¹ Legislators worried that VCOs would thwart rehabilitation, would punish children who missed school for reasons such as escaping abuse, and would “bootstrap[]” children into criminals.¹⁰² One legislator prophetically warned, “If this amendment is approved, a child could be incarcerated for truancy. . . .”¹⁰³ The 1980 debates were marked by concerns that the JJDPAs had neglected to consider serious violent crimes against persons and instead chose to insulate status-offending children from the system.¹⁰⁴ Following contentious debate, the bill passed,

available. 126 CONG. REC. H30216; H30224 (daily ed. Nov. 19, 1980) (statement of Rep. E. Thomas Coleman). Under the original JJDPAs, no exceptions could be made in such situations. JJDPAs, Pub. L. No. 93-415, 88 Stat. 1109 (1974). The reasons for the relaxation of the previous hardline rule highlight the need for JJDPAs funding, which could provide resources for the development of acceptable facilities and alternatives to incarceration. There are, and were, better solutions than the VCO amendment.

96. 126 CONG. REC. H30216-17 (daily ed. Nov. 19, 1980) (statement of Rep. E. Thomas Coleman).

97. CONG. RSCH. SERV., RS22070, JUVENILE JUSTICE: OVERVIEW OF LEGISLATIVE HISTORY AND FUNDING 1, 3 (2007).

98. 34 U.S.C. § 11133(a)(23).

99. See *supra* Part III.B.

100. 126 CONG. REC. H30218 (statement of Rep. Ike Andrews).

101. 126 CONG. REC. at H30228 (statement of Rep. Dale Kildee).

102. 126 CONG. REC. at S30230 (statement of Sen. George Miller).

103. 126 CONG. REC. at S30229 (statement of Sen. Thomas Railsback).

104. Such concerns were typical of the environments that gave rise to the now-discredited “youth superpredator” myth, which hit its stride in the following decade. James C. Howell, *Super Predators and Other Myths About Juvenile Delinquency*, in PREVENTING

and the VCO exception was incorporated into the JJDPa in December 1980.¹⁰⁵

In 1984, 1988, and 1992 respectively, the JJDPa was again reauthorized in four-year segments.¹⁰⁶ The 1988 reauthorization included an amendment to address disproportionate minority contact in the juvenile justice system, requiring states to assess and address racial disparities at all junctures of the juvenile justice system.¹⁰⁷ In 2002, the JJDPa was reauthorized for six years and was amended specifically “for the purpose of permitting non-violent juvenile offenders (including status offenders) to remain at home with their families as an alternative to incarceration or institutionalization.”¹⁰⁸ Another 2002 amendment required states to prioritize the support and development of evidence-based programs.¹⁰⁹

In 2008, the JJDPa was again considered for reauthorization, but this time, nothing came of it, and the JJDPa’s authorization expired.¹¹⁰ For the first time, the 2008 bid for reauthorization included provisions to phase out the highly controversial VCO

AND REDUCING JUVENILE DELINQUENCY 3, 4 (2d ed. 2008). The myth’s ascendance to popular belief, perpetuated by politicians wanting to appear tough on crime, warned of an impending “bloodbath” at the hands of “baby-faced criminals.” *Id.* at 5–7. Juvenile crime began to fall in the mid-1990s and fell to a pre-1985 point by 2000, in contrast with the myth’s narrative that there would be another 270,000 juvenile criminals on the streets by 2020. The creators of the myth admitted that they were wrong and submitted an amicus brief in *Miller v. Alabama*, noting that tough-on-crime juvenile laws failed to reduce crime and that “the superpredator myth contributed to the dismantling of transfer restrictions, the lowering of the minimum age for adult prosecution of children, and it threw thousands of children into an ill-suited and excessive punishment regime.” *The Superpredator Myth, 25 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), <https://eji.org/news/superpredator-myth-20-years-later/> [<https://perma.cc/LP7P-EXT4>]; see also Barry Krisberg, *There Is No Juvenile Crime Wave: A Call to End the War Against Children*, in *TO BUILD A BETTER CRIMINAL JUSTICE SYSTEM: 25 EXPERTS ENVISION THE NEXT 25 YEARS OF REFORM* 32, 32–33 (Marc Mauer & Kate Epstein eds., 2012).

105. JJDPa, Pub. L. No. 96-509, 94 Stat. 2750 (1980).

106. U.S. OFF. OF JUV. JUST. AND DELINQ. PREVENTION, *Prior Federal Juvenile Delinquency Activity*, 1, 3–5, <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/medialdocument/jjdpchronology.pdf>. [<https://perma.cc/B7WQ-VGSV>].

107. *Id.* at 4; see also *Core Requirements*, ACT 4 JUV. JUST., <https://www.act4jj.org/what-jjdp/core-requirements> [<https://perma.cc/FZ8P-T689>].

108. 34 U.S.C. § 11133(a)(9)(F)(i). Truancy is a primary example of a non-violent status offense that is not remedied by institutionalization or incarceration.

109. *JJDPa Core Requirements*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION (2013), https://www.ojjdp.gov/ojstatbb/structure_process/qa04302.asp?qaDate=2013 [<https://perma.cc/R92C-FJ24>]; see also 34 U.S.C. § 11102(3)–(4) (stating the bill’s preference for evidence-based programs).

110. See *JJDPa Core Requirements*, *supra* note 109.

exception.¹¹¹ The Senate never voted on the bill, and eventually, it expired.¹¹² In 2009, the Senate Judiciary Committee approved reintroduction of the JJDPa with significant modifications, including a phasing out of the VCO; the bill, however, never received a floor vote, and the House did not introduce companion legislation.¹¹³

Senate and House representatives introduced additional bills to reauthorize the JJDPa in subsequent years, but none passed, let alone received a floor vote.¹¹⁴ Attempts to reauthorize the bill sought to eliminate the VCO exception but were blocked by Senator Tom Cotton, the bill's sole opponent.¹¹⁵ Senator Cotton objected on the basis that eliminating the VCO exception restricted judicial discretion.¹¹⁶ The bill was on a fast track that would circumvent floor debate and required unanimous support from legislators, allowing a single holdout to derail progress.¹¹⁷ Senator Cotton's stark opposition stemmed from his beliefs that the United States has an "under-incarceration" problem, and that judicial discretion to incarcerate is a crucial government function.¹¹⁸

111. John Kelly, *Two Big Takeaways from Latest Failure to Pass Juvenile Justice Bill*, IMPRINT (Feb. 13, 2016), <https://imprintnews.org/justice/juvenile-justice-2/legal-exception-on-detaining-juvenile-status-offenders-holds-up-jjdp-a-bill/15721> [<https://perma.cc/PY3J-2KUM>].

112. *See id.*

113. John Kelly, *Bipartisan Juvenile Justice Bill Would Phase Out Valid Court Order, Demand Data on Isolation*, IMPRINT (Dec. 11, 2014), <https://imprintnews.org/news-2/bipartisan-juvenile-justice-bill-would-phase-out-valid-court-order-demand-data-on-isolation/8928> [<https://perma.cc/3VAW-7NEY>].

114. Naomi Smoot, *The Valid Court Order (VCO) Exception*, COAL. FOR JUV. JUST. 1, 2 (discussing two bills, H.R. 1885 and S. 866, which would have phased out the VCO exception).

115. Arthur Rizer, *Tom Cotton Lone Holdout on Juvenile Justice Reform Bill*, R STREET INST. (July 18, 2017), <https://www.rstreet.org/commentary/tom-cotton-lone-holdout-on-juvenile-justice-reform-bill/> [<https://perma.cc/9FVT-FSFM>].

116. Kelly, *supra* note 111.

117. *Id.* Such fast-track unanimous consent procedures are sometimes referred to as "hotlining." Hotlining was also implicated when prior youth bills on violence prevention, sex trafficking, and adoption incentives were sunk by single holds. *See id.*

118. Sen. Tom Cotton, *Our Under-Incarceration Problem*, TOM COTTON SENATOR FOR ARK. (Aug. 11, 2021), <https://www.cotton.senate.gov/news/op-eds/our-under-incarceration-problem> [<https://perma.cc/AXG6-FFW3>]. Senator Cotton's claim that the United States has an under-, rather than over-, incarceration problem conflicts with evidence demonstrating that the United States regularly leads the world in per capita incarceration. *See* MARY LOOMAN, *A COUNTRY CALLED PRISON: MASS INCARCERATION AND THE MAKING OF A NEW NATION* x–xv (2015). *See also* PETER ENNS, *INCARCERATION NATION* 10–15 (2016) (discussing the rise of mass incarceration and punitive policies in the United States).

Political leaders were unwilling to put JJDPa reauthorization to a floor vote, where it likely would have passed.¹¹⁹

As a result of congressional unwillingness to consider JJDPa reauthorization, the Act's future became uncertain, casting doubt upon the long-term reliability of the comprehensive protections and programs within the JJDPa. Additionally, no action was taken on the VCO exception, though advocacy for its elimination remained staunch.¹²⁰ In 2010, the National Council of Juvenile and Family Court Judges, which had advocated for the creation of the VCO exception in the 1970s, voted to support VCO elimination—a policy endorsed by the American Bar Association, American Civil Liberties Union, American Psychiatric Association, and Human Rights Watch, among other organizations.¹²¹ The pendulum of popular belief had swung back from retribution to rehabilitation. This time, it was backed by science, rather than myth.¹²²

3. 2018 Reauthorization

In 2018, after sixteen years of uncertainty, the JJDPa was reauthorized. The Juvenile Justice Reform Act of 2018 passed under President Trump with unanimous bipartisan support.¹²³ Leading up to the bill's passage, Senator Cotton continued to block

119. *Juvenile Justice Reauthorization Again on Brink of Passage, or Collapse*, IMPRINT (Oct. 2, 2018), <https://imprintnews.org/youth-services-insider/juvenile-justice-reauthorization-on-brink-of-passage-again/32388> [<https://perma.cc/3C36-YJXT>].

120. In a congressional hearing prior to the 2008 JJDPa amendments, Judge Paul Lawrence stated, "You have to take that [VCO] option off the table." Nancy Gannon Hornberger, *Improving Outcomes for Status Offenders in the JJDPa Reauthorization*, JUV. & FAM. JUST. TODAY 15, 17 (2010) (citing Paul Lawrence, Presiding Justice of the Goffstown District Court (NH) in 2007). Judge Brian Huff testified that VCOs "are morally wrong and fiscally wrong." John Kelly, *Judges Switch Stand on Incarcerating Status Offenders*, YOUTH TODAY (Apr. 1, 2010), <https://youthtoday.org/2010/04/judges-switch-stand-on-incarcerating-status-offenders> [<https://perma.cc/P2S9-Z4FN>] (citing Brian Huff, Presiding Circuit Judge in Jefferson County Family Court (AL) in March 2010).

121. *Id.* (discussing the National Council of Juvenile and Family Court Judges switch in policy stance); see also *Juvenile Justice & Delinquency Prevention Act*, A.B.A., https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/criminal_justice_system_improvements/juvenile_justice_delinquency_prevention_act/ [<https://perma.cc/5DTM-ZURZ>]; see also *National Sign-On Letter Supporting Elimination of the Valid Court Order (VCO) Exception to the JJDPa*, A.C.L.U. (July 14, 2008), <https://www.aclu.org/documents/national-sign-letter-supporting-elimination-valid-court-order-vco-exception-jjdp> [<https://perma.cc/3C8B-9L9Z>].

122. See *supra* text accompanying note 104.

123. Lacey Johnson, *JJDPa Reauthorization Passes Congress After 16 Years*, JUV. JUST. INFO. EXCH. (Dec. 13, 2018), <https://jjiie.org/2018/12/13/jjdp>-reauthorization-passes-congress-after-16-years [<https://perma.cc/DT5A-9RMZ>].

reauthorization attempts that included VCO elimination and was partially successful; VCO elimination was traded away in the political bargaining process, leaving the VCO restricted but intact in 2018's reauthorization.¹²⁴

Although elimination failed, the 2018 JJDPa imposed new restrictions on the use of VCO exceptions. New amendments restricted judicial discretion in incarcerations by requiring that courts not incarcerate children for VCO violations in secure or correctional facilities for more than seven days, and that judges must issue written orders for incarcerations within forty-eight hours.¹²⁵ Such orders must include “findings of fact to support a determination that there is no appropriate less restrictive alternative available to placing the status offender in such a facility, with due consideration to the best interest of the juvenile,” and a plan for release.¹²⁶

Other amendments centered on youth protection and rehabilitation. The JJDPa's commitment to evidence-based and “promising” programs was expanded to include “delinquency prevention, intervention, mental health, behavioral health and substance abuse treatment, family services, and services for children exposed to violence” that are “trauma informed, reflect the science of adolescent development, and are designed to meet the needs of at-risk youth and youth who come into contact with the justice system.”¹²⁷ Additional amendments ensured that “youth have access to appropriate legal representation” and explicitly supported truancy reduction and prevention programs.¹²⁸ Amendments like these emphasize Congress's intent that the JJDPa be an inroad to keeping children in their homes and communities, and to providing responsive, necessary services rather than locking children up. Still, the reauthorization did not breach the subject of the unregulated non-secure removals used as civil punishments when criminal punishments are prohibited.

124. *Id.*

125. *See* 34 U.S.C. § 11133(a)(23)(C)(i)–(ii).

126. *Id.*

127. *See id.*, § 11102(4).

128. *See id.*, § 11133(a)(9)(G)(i).

II. DANGERS TO CHILDREN

Having reviewed the legislative history of the JJDPa and the overall truancy problem, Part II explores the consequences of home removals for children, as well as analyzes the Act's alignment with its stated goals. This Part argues that home removals are an unacceptable and inappropriate response to truancy. First, Part II details the harms of separating children from their families, incarcerating children, and placing children in congregate care settings. Part II then examines these consequences against the backdrop of legislative intent, demonstrating how current practices conflict with the purpose underlying the JJDPa. Finally, Part II explores best practices for truancy prevention and reduction, which aim to address truancy without removing children from their homes.

A. HARMS OF HOME REMOVALS

Removing children from their families and homes is one of the most drastic interventions the child welfare system can order, perhaps second only to termination of parental rights.¹²⁹ Such extreme state actions should be used sparingly. Decisions to remove children from their homes often stem from a misplaced confidence in the child welfare system; in reality, the system inflicts profound and irreparable damage on children and families.¹³⁰ JJDPa reform is one path that legislators can take to end the practice of removing children from their homes through

129. For discussion on termination of parental rights, see Deirdre Smith, *Termination of Parental Rights as a Private Remedy: Rationales, Realities, and Remedies*, 72 SYRACUSE L. REV. 1173, 1174 (2022).

130. See Vivek Sankaran et al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1163, 1163–94 (2019) (discussing the harms of removal on children and families and the inadequacy of the current system); see also Dorothy Roberts, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022) (discussing the harms of the system, how it punishes Black families, and the case for abolition); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y. UNIV. REV. OF L. & SOC. CHANGE 523, 523–80 (2019) (discussing harms of removal and how considerations of these harms can be built into existing legal frameworks); Zach Ahmad & Jenna Lauter, *How the So-Called “Child Welfare System” Hurts Families*, N.Y. C.L. UNION (Oct. 29, 2021), <https://www.nyclu.org/en/news/how-so-called-child-welfare-system-hurts-families> [https://perma.cc/A49V-9DEB] (explaining that the child welfare system is better understood as a family regulation system and harms poor families of color).

civil or criminal systems for truancy, which harms thousands of children annually.¹³¹

1. *Harms of Family Separation*

Both law and social science have recognized the harms of family separation, a logical consequence of home removals to both secure and non-secure placements.¹³² There is inherent trauma in home removals, as well as the compounding grief, isolation, confusion, and anxiety that result from the invasive severance of a child from parents, siblings, pets, possessions, friends, extracurriculars, jobs, and community.¹³³ The child's resulting condition is referred to by scholars as "ambiguous loss," characterized by distress from being physically part of a new family while psychologically belonging to the biological family.¹³⁴ This can result in a child internalizing that they do not belong to any family.¹³⁵ For low-income Black and Brown children, who constitute the majority of the foster care population,¹³⁶ such removals often coincide with a severance of community identity.¹³⁷ Additionally, out-of-home placements with foster families are often unsafe: sexual abuse cases in foster care settings are substantiated at a rate four times higher than that of

131. See Dana Goldstein, *Inexcusable Absences*, MARSHALL PROJECT (Mar. 6, 2015), <https://www.themarshallproject.org/2015/03/06/inexcusable-absences> [https://perma.cc/D64N-KCAT] (noting that more than one thousand children are removed from their homes and placed in foster homes, group homes, or juvenile detention centers for truancy each year); Max Schmitz, *The Juvenile Justice and Delinquency Prevention Act's Contempt Provision: Time to Amend*, 13 J. L. & SOC. DEVIANCE 147, 147 n.4 (2017) (citing NAT'L CTR. FOR JUV. JUST., JUVENILE COURT STATISTICS 80 (2013)) (noting that in 2013, approximately 3,800 children were removed from their homes and placed in facilities for status offenses).

132. See *Ms. L. v. U.S. Immig. & Customs Enft.*, 310 F. Supp. 3d 1133, 1146–8 (S.D. Cal. 2018) (discussing the harms of forced parent-child separations). For additional case law on the harms of family separation, see *Case Law that Discussed the Effects of Removal from Parents*, A.B.A., https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/case-law-that-discusses-the-effects-of-removal-from-parents.pdf [https://perma.cc/8L27-2R2A]; see also Johayra Bouza et al., *The Science is Clear: Separating Families has Long-term Damaging Psychological and Health Consequences for Children, Families, and Communities*, SOC. FOR RSCH. IN CHILD DEV. 1, 1–2 (2018), <https://www.srcd.org/briefs-fact-sheets/the-science-is-clear> [https://perma.cc/CWD4-RWA4] (discussing evidence of harmful effects of parent-child separation at all ages); Trivedi, *supra* note 130.

133. See *supra* text accompanying note 6. See also Trivedi, *supra* note 130, at 533.

134. Trivedi, *supra* note 130, at 533 (citing MONIQUE B. MITCHELL, *THE NEGLECTED TRANSITION: BUILDING A RELATIONAL HOME FOR CHILDREN ENTERING FOSTER CARE* 81 (2016)).

135. *Id.*

136. *Id.* at 534–535.

137. *Id.* at 540.

the general population, and for physical abuse cases, at a rate twice as high.¹³⁸ One study of maltreatment reports relating to foster family homes identified foster parents as the perpetrators in 80% of physical abuse and neglect allegations and 40% of sexual abuse allegations.¹³⁹

Even brief family separations negatively affect brain development and functioning.¹⁴⁰ Family separations cause the release of high levels of cortisol, the stress hormone. At such high levels, cortisol can irreparably damage children's brain cells, leading to long-term psychological and physical damage.¹⁴¹ Charles Nelson, a pediatric professor at Harvard Medical School, studied the brains of children who were removed from their parents and observed significantly decreased volumes of white and gray matter, which are critical for the brain's transmission of messages, processing of issues, and problem solving.¹⁴² Their brains also manifested alarmingly low neurological activity and exhibited permanently impaired fight-or-flight responses.¹⁴³ Dr. Nelson stated that "there's so much research on [the catastrophic effects of forcible separation of children from parents] that if people paid attention at all to the science, they would never do this."¹⁴⁴

2. Harms of Incarceration

In addition to being inappropriate for children, secure placements in detention and correctional facilities are ineffective as truancy treatment—and treatment is the goal of both the

138. M. I. Benedict et al., *Types and Frequency of Child Maltreatment by Family Foster Care Providers in an Urban Population*, 18 CHILD ABUSE & NEGLECT 577, 582 (1994).

139. *Id.* at 580 (noting that in sexual abuse cases, foster siblings were often the perpetrator, meaning more than 40% of sexual abuse perpetrators were from within the foster family).

140. William Wan, *What Separation from Parents Does to Children: "The Effect Is Catastrophic"*, WASH. POST (June 18, 2018), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html [https://perma.cc/Z9P8-AZZC]; Johanna Bick et al., *Effect of Early Institutionalization and Foster Care on Long-term White Matter Development: A Randomized Clinical Trial*, 169 JAMA PEDIATRICS 211, 211–219 (2015) (finding that severe neglect is associated with compromised brain development and behavioral functioning).

141. Wan, *supra* note 140.

142. *Id.*

143. *Id.*

144. *Id.*

juvenile justice system and the JJDP. Research shows that incarceration for even minor offenses increases recidivism rates, a finding that conflicts with the argument that juvenile incarceration effectively curbs truancy.¹⁴⁶ Research demonstrates that “the most significant predictor of recidivism [is] prior commitment.”¹⁴⁷ When students struggling with truancy are incarcerated even briefly for their absenteeism, they become more likely to continue missing school or to commit delinquent acts.¹⁴⁸ Research suggests that children with histories of absenteeism often attend class even less frequently once removed from their home, as the underlying conditions causing truancy were not treated.¹⁴⁹ Research also shows that the majority of children who were previously securely detained were again arrested or securely detained within a year of release, and that secure detention deters only a small percentage of children from future offenses.¹⁵⁰

While the seven-day limit on VCO incarcerations is a step in the right direction, even short-term institutionalization has a devastating impact.¹⁵¹ The goal of truancy treatment—better educational outcomes for children¹⁵²—is not served by seven days of learning loss and interruption from school, or by the stigma of incarceration, or by seven days of absence from jobs, caregiving responsibilities, extracurricular pursuits, and support networks. While the magnitude of these negative effects increases with the length of incarceration, the shorter nature of a seven-day incarceration does not prevent the trauma and subsequent harms

145. CONG. RSCH. SERV., RL33947, JUVENILE JUSTICE: LEGISLATIVE HISTORY AND CURRENT LEGISLATIVE ISSUES 1, 3–5 (July 14, 2015); see *supra* Part I.B.

146. Emily Robertson et al., *Do Callous–Unemotional Traits Moderate the Effects of the Juvenile Justice System on Later Offending Behavior?*, 62 J. CHILD PSYCH. AND PSYCHIATRY 211, 211–12 (2021) (stating that “formal processing through the juvenile justice system increases recidivism” and suggesting that the effect of processing on recidivism has been underestimated).

147. Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUST. POL’Y INST. 1, 4 (2006) (finding that “[t]he most significant predictor of recidivism was prior commitment”).

148. See Brent B. Benda et al., *Recidivism Among Adolescent Serious Offenders*, 28 CRIM. JUST. AND BEHAVIOR 588, 588, 606 (2001).

149. Timothy Ross et al., *The Experiences of Early Adolescents in Foster Care in New York: Analysis of the 1994 Cohort*, VERA INST. OF JUST. 1, 19 (2001).

150. See Holman & Ziedenberg, *supra* note 146, at 4 (citing DON BEZRUKI ET AL., AN EVALUATION OF SECURE JUVENILE DETENTION (1999)).

151. See *infra* Part I.B.2–3.

152. WIS. DEP’T OF PUB. INSTRUCTION, *Best Practice Approaches to Truancy Reduction: Information for School Attendance Officers* 1, 1.

of home removal.¹⁵³ One study, which controlled for covariates associated with incarceration and health, found that children involved in the juvenile justice system for less than a month were still 41% more likely to develop symptoms of depression as adults as compared to children who had never been incarcerated.¹⁵⁴ As the Casey Family Foundation, a leading organization providing resources regarding the child welfare system, put it, “any amount of time that a young person spends in an institutional placement is too long.”¹⁵⁵

3. *Harms of Congregate Care*

Congregate care settings that place children with histories of misconduct together—whether in secure detention or in non-secure group placements—harm children, negatively affect behavior, and increase chances of reoffending.¹⁵⁶ There is a particularly high risk of abuse in congregate care facilities when compared with placement in foster family homes.¹⁵⁷ When children at-risk for externalizing disorders are grouped together, a process called “peer deviancy training” can occur. Deviancy training in adolescent friendships is a process through which youth mutually influence one another and encourage antisocial or deviant behaviors.¹⁵⁸ Such processes can lead to significantly

153. See *infra* Part II.A.2. Additionally, while juvenile justice practices such as probation are even less restrictive than brief incarcerations, they, too, fail to treat truancy; research shows that school attendance of youth placed on probation significantly declines in the first year of system involvement. See COUNCIL OF STATE GOV'T JUST. CTR., *Rethinking the Role of the Juvenile Justice System: Improving Youth's School Attendance and Educational Outcomes* 1, 9 (2020).

154. See Andrew M. Seaman, *Being Incarcerated as a Juvenile Tied to Poor Health Years Later*, REUTERS (Jan. 23, 2017), <https://www.reuters.com/article/us-health-pediatric-incarceration/being-incarcerated-as-a-juvenile-tied-to-poor-health-years-later-idUSKBN1572W7> [<https://perma.cc/SKQ3-3NGB>] (citing Elizabeth S. Barnert et al., *How Does Incarcerating Young People Affect Their Adult Health Outcomes?*, 139 PEDIATRICS 1 (2017)).

155. *What Are the Outcomes for Youth Placed in Group and Institutional Settings?*, CASEY FAM. PROGRAMS (June 29, 2022), <https://www.casey.org/group-placement-impacts/> [<https://perma.cc/HL2G-WHAU>].

156. See *id.* The term “congregate care” is an umbrella term referring to a variety of out-of-home placements, including group homes, childcare institutions, residential treatment facilities, emergency shelters, and inpatient hospitals, among others. Chelsea Payne, *Literature Review: Alternatives to Congregate Care*, S. AREA CONSORTIUM OF HUM. SERVS. 3–4 (2016).

157. *Id.*

158. Thomas Dishion & Jessica Tipsord, *Peer Contagion in Child and Adolescent Social and Emotional Development*, 62 ANNUAL REV. PSYCH. 189, 189–90 (2011). The negative effects of peer deviancy training are amplified when compounded with poverty and

higher rates of school difficulties, delinquency, substance abuse, and maladjustment to adulthood.¹⁵⁹ If the goal is to protect communities, to promote children's well-being, and to divert children from future crime, home removals are an illogical treatment for truancy.

State-ordered group placements often place already traumatized children into extremely unsafe environments. When children are removed to congregate care placements, they face an elevated risk of further harm, despite the lack of physical restraints that would label the placements "secure" under the JJDPA.¹⁶⁰ Children with truancy issues are often referred to such institutional settings,¹⁶¹ which claim to offer intensive services and enforce attendance. Such remedies, however, are neither safe nor sufficiently tailored to the problem.¹⁶² Even when children are placed in non-secure residential facilities, they are often routed to secure placements or corrections facilities while on the waitlist for their placement and are thus subjected to the harms of both secure and non-secure systems.¹⁶³ Once placed in residential treatment centers or inpatient units, children may be forced to stay even once cleared for discharge because community-based services are unavailable.¹⁶⁴

The dangers of congregate care do not outweigh any perceived benefits it may have, especially for children struggling with truancy. As compared to children placed in foster family homes, youths in group homes are at an even higher risk of both physical

unstructured settings lacking oversight. One example of peer deviancy training is youth gangs. The increase in delinquency for high-risk youth in groups after peer deviancy training has been observed to last years. *Id.* at 199.

159. See Holman & Ziedenberg, *supra* note 146, at 5.

160. *What Are the Outcomes for Youth Placed in Group and Institutional Settings?*, *supra* note 154.

161. See *supra* cases discussed in Introduction; see also Lois Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1363 (2005).

162. Home removals do not treat the root issues underlying truancy, and thus, do not solve the problem. For further discussion, see Parts I.A. and II.C.

163. See 34 U.S.C. § 11133(a)(7)(B)(v) (requiring that to receive formula grants, states must have a plan to reduce the number of children housed in secure facilities while awaiting residential placement).

164. See Weithorn, *supra* note 161, at 1363. In one year, Massachusetts children spent the equivalent of 57 years stuck waiting for community mental health services to become available. *Id.* at 1364. Additionally, orders to out-of-home inpatient placements outpace both availability and growth in the outpatient services sector by a drastic margin. *Id.*

and sexual abuse.¹⁶⁵ Studies suggest that children in such out-of-home congregate placements are over three times more likely to be physically abused than the general population, and over thirty times more likely to be sexually abused.¹⁶⁶ Often, short-term benefits garnered by punitive measures such as compelled school attendance are not sustained after release.¹⁶⁷ Children placed in institutions or group homes have higher rates of re-entry into out-of-home placements, are two and a half times more likely to become delinquent, and have even poorer educational outcomes and lower graduation rates than peers in foster family homes.¹⁶⁸ These educational outcomes speak for themselves: the answer to truancy is not to harness a system that exacerbates the underlying causes of truancy.

Non-secure, JJDP-compliant group and institutional placements are often experienced by children as prison-like and traumatic.¹⁶⁹ In one case that reached the Supreme Court, *In Re Gault*, a child was removed from his home and committed to an industrial school for years.¹⁷⁰ Justice Abe Fortas, writing for the majority of the Court, noted the following:

It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a ‘receiving home’ or an ‘industrial school’ for juveniles is an *institution of confinement* in which the child is *incarcerated* for a greater or lesser time. His world becomes ‘*a building with whitewashed walls, regimented routine and institutional hours. . . .*’ Instead of mother and father and sisters and

165. Saskia Euser et al., *The Prevalence of Child Sexual Abuse in Out-of-Home Care: A Comparison Between Abuse in Residential and in Foster Care*, 18 CHILD MALTREATMENT 221, 228 (2013).

166. Saskia Euser et al., *Out of Home Placement to Promote Safety? The Prevalence of Physical Abuse in Residential and Foster Care*, 37 CHILD. & YOUTH SERV. REV. 64, 67 (2014); see also J. William Spencer & Dean D. Knudsen, *Out-of-Home Maltreatment: An Analysis of Risk in Various Settings for Children*, 14 CHILD. AND YOUTH SERV. REV. 485, 488 (1992).

167. See Holman & Ziedenberg, *supra* note 146, at 2–9; see also Gay Eastman et al., *Finding Effective Solutions to Truancy*, WHAT WORKS, WISCONSIN: RSCH. TO PRAC. SERIES 1, 5 (2007).

168. *What Are the Outcomes for Youth Placed in Group and Institutional Settings?*, *supra* note 154.

169. See generally *infra* Part II.

170. *In re Gault*, 387 U.S. 1, 7–8 (1967) (reversing an order to remove a child from his home for truancy).

brothers and friends and classmates, his world is peopled by *guards, custodians, state employees* and ‘delinquents’ confined with him for anything from waywardness to rape and homicide.¹⁷¹

In his concurring opinion, Justice Hugo Black acknowledged the juvenile justice system’s failure to rehabilitate children and its propensity to take “juveniles by force of law away from their parents and [to turn] them over . . . for confinement. . . .”¹⁷² Justice Black’s concurrence speaks to the Supreme Court’s understanding of forced home removal as quasi-incarceration; he acknowledges that the ordered commitment was more realistically a sentencing, and that the child was ordered to confinement in “what is in all but name a penitentiary or jail.”¹⁷³ Justice Black’s characterization was fitting. Labeling this sort of institutional confinement, complete with guards, a “school” does little to change the lived experiences of the children forced to endure its prison-like conditions. A child-centered solution to the JJDPAs’ current loopholes must include consideration of these placements.

B. UNIQUE HARMS WITHIN THE EDUCATIONAL CONTEXT

In addition to the general consequences of home removals, there are unique harms of removals in the truancy context specifically. While attendance rates may rise in stable foster care placements, such placements are rare, and home removals are likely to increase educational instability.¹⁷⁴ Out-of-home placements are associated with lower academic achievement, higher rates of suspensions and

171. *Id.* at 27 (emphasis added) (internal citations removed).

172. *Id.* at 60 (Black, J., concurring).

173. *Id.* at 61.

174. See David Ruben et al., *Improving Education Outcomes for Children in Child Welfare*, POL’Y LAB AT CHILD. HOSP. OF PHILA. (2013) (discussing absenteeism rates of children ages 5–8 throughout stages of educational instability); *Fact Sheet: School Stability & Immediate Enrollment for Children in Foster Care*, EDUC. L. CTR. (2019), <https://www.elc-pa.org/wp-content/uploads/2017/08/School-Stability-for-Students-in-Foster-Care-Fact-Sheet-w-attachmt-August-2019.pdf> [<https://perma.cc/AU2P-ELLF>] (noting that “children in foster care change living placements on average two to three times while in care, and a third of older youth experience five or more school changes”). Young students who have been shuttled among foster care homes and then return to their family homes experience high rates of absenteeism even after returning home—demonstrating that removals do not treat underlying conditions contributing to truancy and that educational stability and addressing root causes are crucial to understanding absenteeism. This statistic should not be interpreted to mean that home removal cures the issues underlying truancy.

expulsions, and increased instability from frequent re-entry into new schools.¹⁷⁵ Children in foster care are twice as likely to miss school as other students and are significantly less likely to complete high school or earn a bachelor's degree.¹⁷⁶ It is predictable that a system that causes instability, decreases academic achievement, and tears children away from their homes will not magically remedy the underlying causes of truancy, but will instead often make it worse. Foster children's educational experiences are rife with systemic barriers, and the additional disruptions that foster children are likely to face—such as being pulled out of school for meetings, medical appointments, court appearances, and visits from social workers and lawyers—further disrupt the educational experience.¹⁷⁷ Through these disruptions, the very system attempting to remedy truancy contributes to increased school absence and educational discontinuity.

While research on the harm of home removals provides a basis for ending the practice, devastating stories from children impacted by these removals underscore the urgency of the issue. In 2016, seventeen-year-old David Hess was murdered by staff at Wordsworth Academy, a residential treatment center for youth with behavioral problems.¹⁷⁸ Further investigation revealed at least forty-nine sex crimes committed at the Academy in the

175. *How Foster Care Involvement Affects Educational Outcomes*, PARTNERS FOR OUR CHILD., <https://partnersforourchildren.org/projects/foster-care-and-education> [<https://perma.cc/M5KL-9VXM>]. High school mobility is associated with negative outcomes including lower test score gains, grade retention, lower self-esteem, trouble fitting into schools, dropping out, and adult substance abuse. Evidence suggests that these negative effects are worse for poor students and students of Black and Brown communities. Jeremy Fiel et al., *Reducing School Mobility: A Randomized Trial of a Relationship-Building Intervention*, 50 AM. EDUC. RSCH. J. 1188, 1189–90 (2013).

176. NAT'L WORKING GRP. ON FOSTER CARE AND EDUC., *Fostering Success in Education: National Factsheet on the Educational Outcomes of Children in Foster Care* 1, 2 (2018), <https://fosteringchamps.org/wp-content/uploads/2018/04/NationalEducationDatashet2018-2.pdf> [<https://perma.cc/XS4A-ZKS5>].

177. In one case, Faith, a high school senior living in a group home, missed one school day for a court hearing and another for a clinic appointment. Although these were not full-day commitments, the staff at her group home did not have the capacity to take her back to school, despite the fact that Faith had already failed classes due to excessive absences. *System-Induced School Absenteeism: The Hidden Scourge of Foster Care*, CHILD WELFARE MONITOR (Nov. 4, 2019), <https://childwelfaremonitor.org/2019/11/04/system-induced-school-absenteeism-the-hidden-scourge-of-foster-care/> [<https://perma.cc/SND7-938X>].

178. See Christina Sorenson, *Screaming into the Void: Youth Voice in Institutional Placements*, JUV. L. CTR. 1, 11 (2022) (citing Julia Terruso & Chris Palmer, *Two Years After Wordsworth Teen's Death, More Details But No Charges*, PHILA. INQUIRER (Dec. 20, 2018), <https://www.inquirer.com/news/wordsworth-philadelphia-david-hess-death-dhs-report-charges-20181220.html> [<https://perma.cc/SQ6Q-2H7B>]).

preceding decade.¹⁷⁹ At its closure in 2016, Wordsworth's mission statement continued to tout its trauma-informed approach and evidence-based practices.¹⁸⁰ Children placed in Glen Mills, a residential school and youth facility, recount staff throwing them through doors and slamming them against walls, as well as choking, punching, kicking, slapping, and pushing them.¹⁸¹ The Dozier School for Boys operated until 2011 as a state-run reformatory school where children were sent for crimes, status offenses, and dependency status.¹⁸² At the Dozier School, staff brutally beat children, and eighty-one children are known to have died there.¹⁸³ Anthropologists continue to search for unmarked graves at the reform school.¹⁸⁴ The stories, and the harms to children, continue.

Out-of-home placements are an ineffective and injurious attempt to manage truancy. Institutional and residential placements, even when labelled as schools, often directly mimic incarceration through prison-like conditions and denial of autonomy. Home removals isolate children, correlate with lower educational outcomes, and inhibit autonomy by cutting off resources and family support while replacing them with the regimented rules of a facility, group home, or the child welfare

179. *See id.* (citing Nancy Phillips & Chris Palmer, *Death, Rapes, and Broken Bones at Philly's Only Residential Treatment Center for Troubled Youth*, PHILA. INQUIRER (Apr. 22, 2017), <https://www.inquirer.com/philly/news/pennsylvania/philadelphia/Death-rape-Philadelphia-Wordsworth-residential-treatment-center-troubled-youth.html> [<https://perma.cc/53FM-W9FZ>]).

180. Wordsworth Academy, LINKEDIN, <https://www.linkedin.com/company/wordsworth-academy/about/>. Chris Palmer, *State Shuts Down Philly Program After Teen's Death in Fight with Staff*, PHILA. INQUIRER (Oct. 24, 2016), https://www.inquirer.com/philly/news/20161025_State_shuts_down_W_Philly_program_after_teen_s_death_in_fight_with_staff.html [<https://perma.cc/V3L6-6GU4>].

181. Lisa Gartner, *Beaten, Then Silenced*, PHILA. INQUIRER (Feb. 20, 2019), <https://www.inquirer.com/crime/a/glen-mills-schools-pa-abuse-juvenile-investigation-20190220.html> [<https://perma.cc/HL2D-KV7U>]. Glen Mills was shut down in April 2019 after the abuses within its walls came to light but was approved in January 2023 to reopen under its previous director. ED. BD., *Keep Glen Mills Schools Closed*, PHILA. INQUIRER (Feb. 5, 2023), <https://www.inquirer.com/opinion/editorials/glen-mills-schools-child-abuse-closed-reopen-reform-20230205.html> [<https://perma.cc/5LZN-CETA>].

182. *Florida's Dozier School for Boys: A True Horror Story*, NPR (Oct. 15, 2012), <https://www.npr.org/2012/10/15/162941770/floridas-dozier-school-for-boys-a-true-horror-story> [<https://perma.cc/N4UP-XGX9>]. The Dozier School rose to notoriety for its feature as the true story behind Colson Whitehead's novel *Nickel Boys*. Fresh Air, *Colson Whitehead on The True Story of Abuse and Injustice Behind 'Nickel Boys'*, NPR (July 16, 2019), <https://www.npr.org/2019/07/16/742159523/colson-whitehead-on-the-true-story-of-abuse-and-injustice-behind-nickel-boys> [<https://perma.cc/M5BY-T4GZ>].

183. *A True Horror Story*, *supra* note 182.

184. *Id.*

system.¹⁸⁵ Whether through secure or non-secure placement, the damage done when children are removed from their homes, loved ones, and communities for truancy must not be minimized.

C. TRUANCY PREVENTION AND INTERVENTIONS

Best practices for truancy reduction aim to treat children in their homes, families, and communities, offering a safer, more effective, and evidence-based alternative to home removals.¹⁸⁶ The factors contributing to truancy are not a mystery. Rather, they often go unnoticed until they manifest in school absences.¹⁸⁷ The Colorado Foundation for Families and Children identified five elements necessary for effective truancy reduction programming: parent or guardian involvement, comprehensive services, collaboration with community resources, school administrative support, and ongoing evaluation.¹⁸⁸ The authors of the JJDPA understood this.¹⁸⁹ Home removals are an attempt to remedy truancy through a method associated with increased truancy.¹⁹⁰ Removing children from their family, community, and school eliminates the possibility for the most effective truancy treatments.¹⁹¹

While the root factors contributing to truancy have been identified, truancy remains a highly nuanced behavior and under-researched topic.¹⁹² Even though truancy's underlying causes are known, they are intertwined with complex systemic issues such as poverty, racism, and mental illness. Still, evidence-backed, effective truancy prevention and reduction services exist.¹⁹³ Some particularly promising options include support groups; collaboration with families of at-risk students to provide students with incentives for attendance and contingency plans; comprehensive school reorganization; and in-community

185. See *supra* Part II.A–B.

186. Cf. Part II.A.

187. Richard Dembo & Laura M. Gullledge, *Truancy Intervention Programs: Challenges and Innovations to Implementation*, 20 CRIM. JUST. POL. REV. 437, 438–39 (2009).

188. *Id.* at 439–40.

189. 120 CONG. REC. 21882 (daily ed. July 1, 1974) (statement of Sen. Birch Bayh).

190. See *supra* Part II.B.

191. See Dembo & Gullledge, *supra* note 187, at 438–39.

192. *Id.*

193. *Id.* at 437–56.

partnership-building for mental health service offerings.¹⁹⁴ Additionally, studies have identified Family Functional Therapy (FFT),¹⁹⁵ a short-term and high-quality youth and family intervention, as an effective treatment for truancy which improves youth behavior, family functioning, and school outcomes. The same is true of Multisystemic Therapy (MST), which effectively treats children with externalizing behaviors such as truancy at individual, family, school, and community levels, and Positive Behavior Support (PBS), which “incorporates several individually empirically validated practices into a continuum of supports.”¹⁹⁶ When a child has already been removed to foster care but is at risk of being placed in a less-safe congregate care setting, options such as Multidimensional Treatment Foster Care (MTFC) provide an alternative to incarceration or group home care even when other in-home and out-of-home services have failed.¹⁹⁷ Additionally, experimental research demonstrates positive outcomes for Brief Strategic Family Therapy (BSFT), a short-term treatment for behavioral problems like truancy.¹⁹⁸

Beyond therapy, courts can play a role in truancy reduction. One judge noted the success of truancy intervention efforts in certain West Virginia counties where local school boards fund probation officers who deal specifically with truant students.¹⁹⁹ In

194. Richard D. Sutphen et al., *Truancy Interventions: A Review of the Research Literature*, 20 RSCH. ON SOC. WORK PRAC. 1, 1–11 (2010).

195. Maria Michelle Vardarian et al., *An International Examination of the Effectiveness of Functional Family Therapy (FFT) in a Danish Community Sample*, 46 J. MARITAL AND FAM. THERAPY 289, 289–303 (2020).

196. Dalun Zhang et al., *Truancy Offenders in the Juvenile Justice System*, 28 REMEDIAL AND SPECIAL ED. 244, 253 (2007); see also Kristyn Zajac et al., *Multisystemic Therapy for Externalizing Youth*, 24 CHILD AND ADOLESCENT PSYCH. CLINICS OF N. AM. 601, 601–16 (2015).

197. Scott Henggeler & Sonja Schoenwald, *Evidence-Based Interventions for Juvenile Offenders and Juvenile Justice Policies that Support Them*, 25 SOC. POL’Y REP. 1, 6 (2011).

198. Jill Farrell et al., *Brief Strategic Family Therapy in Maryland: FY 2014 Implementation Report*, INST. INNOVATION & IMPLEMENTATION, UNIV. MD. SCH. SOC. WORK 1, 3 (2015).

199. Hoang Tran, *Putnam Judge Says Truancy Program Works Because It Handles Cases Differently*, W. VA. REC. (Nov. 5, 2015), <https://wvrecord.com/stories/510646416-putnam-judge-says-truancy-program-works-because-it-handles-cases-differently>

[<https://perma.cc/CCW3-NPGS>] (citing the reflections of Circuit Judge Phillip Stowers (WV)). It is important to note, however, the growing body of research indicating that juvenile probation is “not an effective strategy for reversing delinquent behavior” and can “become a gateway to unnecessary confinement for youth who frustrate authorities with noncompliant behavior but pose minimal risk to public safety.” See *Frequently Asked Questions About Juvenile Probation*, ANNIE E. CASEY FOUND. (Nov. 2, 2021), <https://www.aecf.org/blog/frequently-asked-questions-about-juvenile-probation> [<https://perma.cc/T4KR-GNXA>].

these counties, judges sometimes visit students at risk of dropping out in their schools, and state officials and school personnel participate in truancy hearings alongside students and their families.²⁰⁰ Mandatory diversion to mediation at the intake stage, before a formal petition is filed, could also improve truancy and serve students.²⁰¹ In West Virginia, which does not use VCO exceptions,²⁰² such a system was made possible through legislation providing special programs for students experiencing truancy.²⁰³

Considered alongside the JJDPAs' 2018 commitment to evidence-based and promising programs,²⁰⁴ alternatives to home removals for truancy should be developed and strengthened. While only 5% of high-risk juvenile offenders are treated with an evidence-based intervention, the JJDPAs offer an inroad to raising that number.²⁰⁵ The most recent iteration of the JJDPAs promotes highly effective, evidence-based truancy treatments.²⁰⁶ At minimum, 75% of state JJDPAs funds are to be used on programming.²⁰⁷ The JJDPAs permit states to use this funding for community- and home-based alternatives to detention and for programs that allow status offenders to remain in the home.²⁰⁸ Additional JJDPAs reforms could positively reshape the legal landscape regarding truancy and home removals.

200. See Tran, *supra* note 199.

201. Tracy Simmons, *Mandatory Mediation: A Better Way to Address Status Offense*, 21 OHIO ST. J. ON DISP. RESOL. 1043, 1068 (2006).

202. *Use of the Valid Court Order*, COAL. FOR JUV. JUST. 1, 1 (2020).

203. See W. VA. CODE § 49-4-702(b)(1) (2020) (providing that "If the matter is for a truancy offense, the prosecutor shall refer the matter to a state department worker, probation officer or truancy diversion specialist who shall develop a diversion program pursuant to subsection (d) of this section.>").

204. 34 U.S.C. § 11102(4).

205. See Henggeler & Schoenwald, *supra* note 197, at 3 (citing Peter Greenwood, *Prevention and Intervention Programs for Juvenile Offenders: The Benefits of Evidence-Based Practice*, 18 FUTURE OF CHILD. 11, 203, 205 (2008) (discussing the fact that despite more than a decade of solid research on evidence-based programs that reduce delinquency and promote pro-social behavior, they have not been integrated into mainstream juvenile justice efforts, and only 5% of eligible youth participate in such programs)).

206. This Note endorses such interventions with the caveat that requiring children and families to attend yet another series of appointments when already overwhelmed and struggling can add another obstacle in solving problems. Thus, comprehensive treatment programs must be developed responsibly by courts.

207. 34 U.S.C. § 11133(a)(9).

208. *Id.*

III. DISCONNECT FROM PURPOSE

This Part demonstrates how current practices directly conflict with the legislative intent of the JJDPa. Home removals based on truancy are at odds with the JJDPa's stated purposes of preventing delinquency and providing children with effective rehabilitative services.²⁰⁹ Like incarceration, out-of-home placements do not prevent delinquency, promote safety, or treat root causes.²¹⁰ This is particularly true for truancy, a non-violent offense arising from a need for services.²¹¹ JJDPa reforms ought to reach further than merely limiting the VCO exception, and their application must be guided to align with intent. If Congress neglects to make these changes, it fails children, families, the public, and the spirit of the Act.

A. FRUSTRATION OF LEGISLATIVE INTENT

The JJDPa was enacted with the purpose of keeping children out of the justice system,²¹² but instead, today, the JJDPa enables practices that keep children in in the justice system. The JJDPa was meant to prevent crime and rehabilitate juvenile offenders, rather than just “process[] kids in trouble.”²¹³ Formally processing children within the justice system results in more delinquency, which only threatens public safety.²¹⁴ Truancy research confirms legislators' understanding in 1974 that children need services and rehabilitation rather than punishment.²¹⁵ The Act's sponsors noted that the bill was supposed to offer an alternative to “outmoded procedures.”²¹⁶ Yet, the legislation's lack of attention to civil out-of-home placements, as well as the curtailed-but-persisting VCO exception system, are themselves outmoded

209. See *supra* Part I.A.

210. See *supra* Part II.A–B.

211. See *supra* Part I.A.

212. See *supra* Part I.B.

213. 120 CONG. REC. S25182 (daily ed. July 25, 1974) (statement of Sen. Charles Mathias).

214. Anthony Petrosino et al., *Formal System Processing of Juveniles: Effects on Delinquency*, 6 CAMPBELL SYS. REV. 5, 38 (2010); see also Henggeler & Schoenwald, *supra* note 197, at 3.

215. See *supra* Part I.B., Part I.A., and Part II.B–C. The JJDPa was intended to prevent children “from reaching . . . the end of the road, incarceration.” 120 CONG. REC. 21890 (daily ed. July 1, 1974) (statement of Rep. Stewart McKinney). Instead, the JJDPa allows incarceration through the VCO exception. See *supra* Part I.B.2.

216. 120 CONG. REC. S25166 (daily ed. July 25, 1974) (statement of Sen. Roman Hruska).

procedures. The JJDDPA's sponsors recognized that the bill must harness "the strengths of youth and those of the families and communities in which they live" to serve children.²¹⁷ Best practices for truancy reduction emphasize treating children in their families and communities, which cannot be done from distant out-of-home placements.²¹⁸ The JJDDPA's drafters recognized that children experiencing challenging behaviors are still children and deserve services, not a system that removes "the problem from the jurisdiction of the schools" by sending children to institutions, foster care, or prison.²¹⁹

Congressional records demonstrate an intent to treat children through appropriate services, but despite the existence of such services, truant children are rarely matched with effective evidence-based treatments.²²⁰ Placements and their staff are rarely prepared or able to meet the rehabilitative needs of children.²²¹ The JJDDPA was intended to keep children from being placed in inadequate facilities,²²² and the Act incentivizes evidence-based programs.²²³ Nevertheless, relatively few community-based alternatives to incarceration exist,²²⁴ and an alarmingly low number of children are provided access to evidence-backed services.²²⁵

Children's stories and outcomes make clear that they are often either treated poorly or not treated at all.²²⁶ Research shows that home removals have extremely negative effects that do not reflect science or youth needs.²²⁷ Home removals are not trauma-

217. *Id.* at S21882 (statement of Sen. Augustus Hawkins).

218. *See supra* Part II.C.

219. 120 Cong. Rec. S21890–91 (daily ed. July 25, 1974) (statement of Sen. Shirley Chisholm); *see supra* Part I.B.1. *See also* Henggeler & Schoenwald, *supra* note 197, at 1–27.

220. *See* Henggeler & Schoenwald, *supra* note 197; *see also* 120 Cong. Rec. 21892 (daily ed. July 1, 1974) (statement of Rep. William Ford) (reflecting dissatisfaction with current juvenile service provision and calling for change).

221. *Id.* at 4–5. *See generally* Lois A. Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1363 (2005) (detailing the extreme inadequacy of available services and the consequences of the lack of institutional alternatives for troubled children, and attributing this to the government's failure to invest in expansion of services).

222. 120 CONG. REC. S25165–6 (daily ed. July 25, 1974) (statement of Sen. Roman Hruska).

223. 34 U.S.C. § 11113(a)(7)(B)(viii); 34 U.S.C. § 11102(3)–(4).

224. Kelly, *supra* note 116 (citing Paul Kelly, a senior policy analyst for Arkansas Advocates for Children and Families).

225. *See* Henggeler & Schoenwald, *supra* note 197, at 1–27.

226. *Id.*

227. *See supra* Part II.A–B.

informed; they cause trauma. They also do not reflect the science of adolescent development.²²⁸ “Tough on crime” techniques of removing poor and Black and Brown children from their homes and families for minor infractions, while technically compliant with the JJDP, disregard its purpose and mission.²²⁹ Rather than promote safety, these loopholes hurt children, families, and communities.

At first glance, one might interpret the 1980 inclusion of VCOs as necessary for the enforcement of the Act. The purpose of the Act, however, is to prevent delinquency and to treat the conditions that cause delinquency, not to enable judges to punish children for manifestations of their unmet needs.²³⁰ Truancy, like many other forms of delinquency, stems from underlying issues;²³¹ a court order requiring that a child maintain perfect attendance will rarely, if ever, ensure that barriers to attendance have been removed for the child. It is predictable that children will not or cannot perfectly adhere to such orders, opening the door to incarceration through VCOs and exacerbating the original problem.²³² Truancy treatment requires patience and connection with evidence-based interventions, not an order requiring children to suddenly overcome externally imposed barriers to attendance that are often insurmountable without assistance. In the context of truancy, incarceration is never an appropriate response.²³³

The VCO conflicted with the purpose of the JJDP in 1974, in 1980 (as many lawmakers then recognized), in 2018, and today.²³⁴ As advocates feared in 1980, incarcerating children for even

228. *Id.*

229. *See supra* Part I.B.1.

230. *Id.*

231. *See supra* Part I.A.

232. Everett’s story is one example of such a court order and its predictable violation, due to the lack of connection between the problem and proposed remedy. *See supra* Introduction. Further, there is “no significant difference in attendance between youth specifically mandated by the court to comply with a school attendance order and their peers who were not.” *See* Josh Weber, *Rethinking the Role of the Juvenile Justice System: Improving Youth’s School Attendance and Educational Outcomes*, JUST. CTR. COUNCIL STATE GOV. 1, 10 (2020), <https://csgjusticecenter.org/publications/rethinking-the-role-of-the-juvenile-justice-system-improving-youths-school-attendance-and-educational-outcomes/> [<https://perma.cc/36CU-6XXA>].

233. The JJDP cannot value evidence-based practice, delinquency prevention, and treatment of root causes while also enabling overbroad VCO incarcerations in any form. As The Council of State Governments Justice Center put it, “the juvenile justice system is not well positioned to assess and address the underlying factors driving repeated school absences.” *Id.*

234. *See supra* Part I.B.2. and Part II.A.2.

truancy has become common practice.²³⁵ VCOs and unregulated out-of-home placements allow the JJDPa to be circumvented in ways that not only defeat the purpose of the legislation, but exacerbate the very concerns that led lawmakers to adopt it.²³⁶

B. CONSEQUENCES OF DISCONNECT FROM INTENT

The 2018 JJDPa amendments were substantial but did not reach far enough. As early advocates predicted, the VCO exception became a method through which courts can bootstrap a status offense into an incarcerable delinquent offense.²³⁷ While the 2018 amendments are an improvement upon previous unrestricted incarceration provisions, any incarceration is devastating for children.²³⁸ The seven-day limit on VCO incarcerations for status offenses must be brought to zero, and the harms of home removals must be addressed.

The JJDPa as written fails to protect children from home removal for truancy through two glaring, JJDPa-compliant loopholes: unregulated non-secure placements and VCO exceptions. First, the VCO exception circumvents the purpose of the JJDPa and allows for the incarceration of students who miss school.²³⁹ While Congress's narrowing of this exception through limiting these detentions to seven days is a welcome step, it is not nearly enough. These practices reflect a disconnect from the

235. See *supra* Part II.A.2. and *infra* Part III.B.

236. See *supra* Parts I–II.

237. See *supra* Part I.B.2.

238. See *supra* Part II.A.2. Not all states and territories utilize VCOs. In 2021, while 38 states either did not utilize or failed to report usages of the VCO exception, 10 states and territories reported between 1 and 100 uses, and 3 states and territories reported more than 100 uses. In 2021, one state reported 981 uses. *State Use of the Valid Court Order Exception*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, <https://ojjdp.ojp.gov/state-use-valid-court-order-exception#7gdrda> [<https://perma.cc/CY9E-YY4L>]. These discrepancies are often due to acknowledgement of VCOs as an overly harsh and ineffective remedy, and some states ban the practice altogether. For instance, in 2016, Washington used VCOs 1,723 times, but in 2019, signed into law S.B. 5920, which set a 2021 deadline for phasing out VCO use. *Use of the Valid Court Order*, COAL. FOR JUV. JUST. 1, 1 (2020), <https://www.juvjustice.org/sites/default/files/resource-files/State%20VCO%20Usage%20-%20Updated%20Version%20Feb.%202020.pdf> [<https://perma.cc/UAR3-RXQH>]. Note that data was collected in 2021 and in 2016, which was prior to the 2018 reauthorization and amendments. While the 1,411 uses in 2021 are lower than the 5,085 incarcerations reported in 2016, the 2021 incarcerations still represent devastating, life-altering injustice imposed upon far too many children. *State Use of the Valid Court Order Exception*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <https://ojjdp.ojp.gov/state-use-valid-court-order-exception#7gdrda> [<https://perma.cc/CY9E-YY4L>].

239. See *supra* Part I.B.2.

JJDPA's intent to rehabilitate and serve children, rather than to remove those children from home and to make them another jurisdiction's problem.²⁴⁰ Second, while many scholars agree that the VCO should be eliminated, this Note calls attention to a second loophole which ought to be closed: non-secure home removals for truancy. These non-secure removals do not violate the JJDPA because, unlike secure placements, the JJDPA has never limited non-secure placements.²⁴¹ Beyond returning to a version of the JJDPA that prohibits child incarceration, the JJDPA must introduce necessary limits on home removals. Currently, it creates a preference for the court to tear children away from their homes, families, and communities, and to send them into non-secure placements on the basis of truancy, so long as the placement does not have physical shackles or handcuffs.²⁴²

While the harms of non-secure home removals are different and likely less severe than those of incarceration, such state-condoned removals still cause trauma and damage children's mental health.²⁴³ Despite the absence of handcuffs or jail cells (which would categorize a placement as secure), children in need of treatment are routinely removed from their homes and sent to live with strangers. There, they are isolated, traumatized, and stigmatized—thereby set onto the “treadmill of criminal process” that the JJDPA was meant to disrupt.²⁴⁴

The JJDPA's reauthorization runs through Fiscal Year 2023.²⁴⁵ The need for reform is urgent, and children's lives hang in the

240. See *supra* text accompanying notes 87–89.

241. In considering why the original JJDPA did not include home removals, it is worth noting that foster care usage exploded alongside the war on drugs and peaked well after 1974. In 1982, 262,000 children were in foster care. By 1999, that number rose to 567,000. Since then, foster care involvement has dipped but remains high, with 428,000 children involved in 2015. Jeremy Kohomban et al., *The Foster Care System was Unprepared for the Last Drug Epidemic—Let's Not Repeat History*, BROOKINGS INST. (Jan. 31, 2018), <https://www.brookings.edu/articles/the-foster-care-system-was-unprepared-for-the-last-drug-epidemic-lets-not-repeat-history/> [<https://perma.cc/7VH3-NNFJ>]. As home removals grew in popularity, so too did the body of research and advocacy acknowledging the harms of foster care.

242. See 34 U.S.C. § 11103(12)(A)–(13)(B) (defining “secure detention facility” and “secure correctional facility”).

243. See *supra* Part II.A.

244. Presidential Statement on Signing the Juvenile Justice and Delinquency Prevention Act of 1974, 2 PUB. PAPERS 105 (Sept. 8, 1974).

245. *Overview of the Juvenile Justice Reform Act of 2018*, ACT 4 JUV. JUST., <https://www.act4jj.org/sites/default/files/resource-files/JJDPA%20Reauthorization%20Summary%20December%202018.pdf> [<https://perma.cc/4BCQ-Q28F>].

balance. As part of reauthorization discussions in 2023 (and perhaps in years to come), Congress ought to consider amendments to the JJDPa that would realign it with its original intent and would end the current practice of removing children from their homes for truancy. In doing so, Congress will better protect children, families, and communities. If Congress declines to seize this opportunity, children and families will remain at the mercy of the looming VCO exception, ineffective interventions, and unregulated civil punishment—a reality hardly different from the “outmoded procedures” admonished in 1974.²⁴⁶

IV. RECOMMENDATIONS FOR REFORM

This Part proposes JJDPa reforms that would bring the Act into alignment with its stated intent and addresses arguments against reform. Through the lens of truancy, this Part proposes regulating non-secure home removals, eliminating the VCO exception, and bolstering effective, evidence-based truancy programs. Reformers should create a right to counsel in truancy cases, mandate a framework that weighs the harm of removal against its necessity, and establish a floor for the minimum level of services that must be provided. While some recommendations could be implemented in unison, and others independently, all proposed reforms would increase the JJDPa’s capacity to better protect children.

The fact that truancy is managed with removals, despite their ineffectiveness as a truancy treatment,²⁴⁷ highlights the tension between retribution and rehabilitation that exists within the justice system. A common counterargument offered as a justification for incarceration is that to learn the difference between right and wrong, children must follow the rules and must be punished when they break rules. Law and science, however, reflect the understanding that children are developmentally different, and thus are less culpable for their crimes than adults would be.²⁴⁸ In cases of truancy and other status offenses, the prohibited acts do not even rise to the level of crime. Adolescents take risks without considering consequences, are vulnerable to

246. 120 CONG. REC. S25166 (daily ed. July 25, 1974) (statement of Sen. Roman Hruska).

247. See *supra* Part II.

248. Elizabeth S. Scott, “*Children are Different*”: *Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 73 (2013).

peer pressure and external forces, adopt transient personality traits, have low social intelligence and emotional regulation, and take less time to problem solve than adults.²⁴⁹ Because of the temporary nature of adolescence and its role in affecting behavior, children who do commit criminal offenses typically cease these activities as they mature.²⁵⁰ The juvenile justice system is intended to rehabilitate and redirect children, not punish them.²⁵¹

A common pro-incapacitation argument is that intervention is necessary to prevent children from harming themselves.²⁵² Truancy puts children at risk of harm and correlates with undesirable outcomes.²⁵³ The solution to this issue, however, cannot be to force children into a system that produces the same undesirable outcomes. Truancy harms children, but home removals do also. Removals, in contrast with in-home services proven to reduce and prevent truancy, do not remedy the issues underlying truant behavior.²⁵⁴

These counterarguments raise the question of what society ought to do with a chronically truant student. This student might be a seventeen-year-old high schooler, disproportionately likely to be poor and Black or Native American,²⁵⁵ who refuses to listen to their parents, refuses to go to school, and seems impossible to control. Here, it might seem that the only solution is to remove the child from their supposedly failing family for their own good. However, as research makes clear, home removals harm children

249. *Id.* at 72. Morgan Tyler, *Understanding the Adolescent Brain and Legal Culpability*, A.B.A. (Aug. 1, 2015), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/august-2015/understanding-the-adolescent-brain-and-legal-culpability/ [https://perma.cc/WCU7-NSV5].

250. Scott, *supra* note 248, at 72–73.

251. CONG. RSCH. SERV., RL33947, *JUVENILE JUSTICE: LEGISLATIVE HISTORY AND CURRENT LEGISLATIVE ISSUES* 1, 1 (2015) (exploring the history of early juvenile courts in America and how their rehabilitative mission led to today's substantively and procedurally different adult and juvenile courts).

252. The paternalism and interventionism underlying the juvenile justice system have contributed to today's status offense structure, which is steered by adult beliefs that sending children to court is "for their own good." See Mahsa Jafarian & Vidhya Ananthakrishnan, *Just Kids: When Misbehaving is a Crime*, VERA INST. (2017), <https://www.vera.org/when-misbehaving-is-a-crime> [https://perma.cc/N732-PSQC]; see also Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 92–95 (1997).

253. See *supra* Part I.A.

254. *Id.*

255. See *supra* Part I.A. (discussing disparate treatment of and overrepresentation of Black, Native American, and socioeconomically disadvantaged students in determining which absences count as excused and which truancy cases are petitioned to court, despite the fact that white and wealthy students also skip school).

and do not solve truancy.²⁵⁶ High-quality intervention treatments and services, on the other hand, improve educational, professional, and family outcomes while treating the root causes of truancy.²⁵⁷ These services, though under-resourced and under-researched, offer a safer alternative to home removals. Instead of asking what can be done with a student who does not listen, lawmakers should ask how children can be better matched to effective services and how funding for services can be increased so that they can be meaningfully, appropriately, and sustainably utilized. Such services can guide a so-called “uncontrollable” child onto a more productive path, as the JJDPA intended.²⁵⁸

In addition to the benefits of community-based services for children and families, increased funding for community-based services would reduce the high costs of removing children from their homes.²⁵⁹ In West Virginia, for example, a government task force found in 2015 that placing a child in an out-of-home facility cost an estimated \$289 per day, totaling \$105,000 per child per year.²⁶⁰ These costs were only slightly lower for children in juvenile justice facilities.²⁶¹ While the government funneled \$105,000 per child per year into paying for placements, many communities lacked access to community-based services at all, with youth service and treatment centers operating in only twelve of West Virginia’s fifty-five counties.²⁶² More money directed toward developing community-based programs would also decrease significant placement expenditures.

A. ELIMINATION OF VALID COURT ORDER EXCEPTIONS

VCO elimination, alongside expansion of home removal regulation to include non-secure placements, is crucial and urgent. While scholars and advocates have long called for elimination,

256. *See supra* Part II.A.

257. *See supra* Part II.C.

258. *See supra* Part I.B.

259. For further discussion, see Elizabeth Brico, *The Government Spends 10 Times More on Foster Care and Adoption Than Reuniting Families*, TALKPOVERTY (Aug. 23, 2019), <https://talkpoverty.org/2019/08/23/government-more-foster-adoption-reuniting/index.html> [<https://perma.cc/R2VR-2H4M>].

260. W. VA. INTERGOV. TASK FORCE ON JUV. JUST., *West Virginia’s 2015 Juvenile Justice Reform* 1, 6 (2016), <https://www.pewtrusts.org/~media/assets/2016/05/west-virginias-2015-juvenile-justice-reform.pdf> [<https://perma.cc/C8CM-DURU>].

261. *Id.*

262. *Id.*

VCOs continue to merit brief discussion because they are central to aligning the JJDPa with best practices and legislative intent, and because the 2018 amendments were inadequate. The philosophy underlying incarceration is not treatment, but punishment; the goal of the juvenile justice system is rehabilitation.²⁶³ To serve children instead of punishing them, the seven-day limit on incarcerations ought to be brought down to zero.²⁶⁴ While a phase-out would end a vicious practice, too many children are left at the mercy of the VCO exception during transitional years.²⁶⁵ The practice ought to be done away with immediately. While this would best be done through reauthorization amendments, it could also be achieved through later legislation—whichever comes first.

Elimination of the VCO would cabin judges' authority to incarcerate status-offending children. Compliance with the JJDPa, however, has never been mandated. Rather, states must choose to adopt the JJDPa, which not all states have done.²⁶⁶

263. NAT'L RSCH. COUNCIL & INST. OF MED., *JUVENILE CRIME JUVENILE JUSTICE* 157 (Joan McCord, Cathy Spatz Widom, & Nancy A. Crowell, eds., 2001).

264. Preceding decades have demonstrated a legal trend to recognize that children are mentally, physically, and developmentally different from adults. Scott, *supra* note 248, at 72–74. Decades of case law have accordingly cabined judicial discretion, including affording children accused of crimes the same due process rights as adults, prohibiting the death penalty for children, and banning life without parole sentences for children who commit non-homicide crimes. See *In re Gault*, 387 U.S. 1 (1967) (acknowledging juvenile's right to various due process); *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (holding that it is unconstitutional to impose the death penalty on minors); *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010) (holding that juveniles cannot be sentenced to life in prison without the possibility of parole for non-homicide crimes); *Miller v. Alabama*, 132 S. Ct. 2455, 2460–61 (2012) (holding that mandatory life imprisonment without parole is cruel and unusual punishment when applied to juveniles); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (holding that Miller's rule should be applied retroactively for crimes committed as a juvenile). In restricting judicial discretion to punish juveniles, the Supreme Court's concern about overbroad judicial discretion has informed a range of reforms that reach well beyond the black letter of Eighth Amendment cases and seek to treat children in a developmentally appropriate way. See generally Elizabeth S. Scott, *Miller v. Alabama and the (Past and) Future of Juvenile Crime Regulation*, 31 L. & INEQ. 535 (2013). Judicial authority has already been limited to prohibit judges from taking the most drastic actions possible for children.

265. The JJDPa prioritizes evidence-based practices. 34 U.S.C. § 11102(3)–(4). Research shows that locking children up, especially with the goal of advancing their educational potential, is ineffective and tremendously harmful. See *supra* Part II.A–B. The JJDPa cannot both promote both evidence-based practices and permit VCOs. Their purposes are too inherently contradictory.

266. *State Compliance with JJDP Act Core Requirements*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, <https://ojjdp.ojp.gov/states/state-compliance-jjdp-act-core-requirements> [https://perma.cc/84AV-B4HG]. In FY2020, Connecticut, Nebraska, Texas, Wyoming, and American Samoa elected to not participate in the JJDPa. *Id.* New Mexico, New York, Puerto Rico, and the Virgin Islands were categorized as ineligible for funding.

Judges implementing the JJDPa with fidelity would not need authority to incarcerate children, because fidelity to the JJDPa would negate such actions. Judges would still have the authority to order in-community services that effectively treat truancy.

Such reform would prevent judges from responding to truancy with the most extreme and disproportionate of actions.²⁶⁷ VCOs are an inappropriate response even when dealing with the complexities of chronic offenders, who are likely those most in need of services.²⁶⁸ While chronic offenders may require more complex treatment, they do not transcend their status as children just because they continue to miss school. Irresponsible actions, shortsighted as they may be, must be expected from children.²⁶⁹ Chronic offenders' violations of court orders could stem from the trauma of system processing or from court-ordered compliance with inappropriate services.²⁷⁰ Truant children should not be met with prison sentences for making poor choices, particularly when those decisions would be legal at age eighteen.

The field of children's law centers on the understanding that "children are different"²⁷¹ and values rehabilitation over accountability. To incarcerate truant students, judges must overlook alternative services, in-home detainment, and the principles of rehabilitation, research, and fidelity to the JJDPa. Discretion to lock up children who miss school is neither necessary nor aligned with the goals of juvenile justice.

B. EXPANSION OF DEFINITIONS TO INCLUDE NON-SECURE HOME REMOVALS

While VCOs have been contentiously debated and their harms well established, legislatures should also address the JJDPa's role in civil home removals. The JJDPa's deinstitutionalization mandate—a core protection that must be met to qualify for federal

meaning that they did not satisfy the state plan requirement. *Id.* Seven states and territories were categorized as non-compliant. *Id.*

267. Anti-VCO advocates in 1980 defended this, arguing that it is not wrong or onerous to ask juvenile courts to use ingenuity in crafting paths forward. 126 CONG. REC. H30228–31 (daily ed. Nov. 19, 1980) (statement of Rep. Dale Kildee).

268. *3 Tiers of Intervention*, ATTENDANCEWORKS (2022), <https://www.attendanceworks.org/chronic-absence/addressing-chronic-absence/3-tiers-of-intervention/> [<https://perma.cc/56QW-6DX8>].

269. Scott, *supra* note 248, at 85–87.

270. Petrosino, *supra* note 214, at 38.

271. *Miller v. Alabama*, 567 U.S. 460, 480 (2012).

grant money—ought to be broadened to prevent non-secure home removals based on truancy and should recognize the harm of such removals.²⁷² The JJDPa does not adequately account for the crossover of civil and criminal systems that children are particularly vulnerable to, and so long as non-secure placements remain unregulated, they will defeat the purpose of the JJDPa.

Rather than being incorporated into expanded definitions of “secure detention facility” and “secure correctional facility,” a separate definition of “non-secure facility” should be added.²⁷³ This would cover out-of-home placements into foster homes, group homes, residential facilities, in-patient facilities, or other placements. Facilities do not need physically restrictive construction fixtures to harm children or to compel children to stay in placements against their will.²⁷⁴ In many cases, locked doors, monitoring, medications, laws, and geographic distance will achieve similarly devastating harm, with or without constructed fixtures.²⁷⁵

With respect to non-secure congregate care settings, the JJDPa should follow the lead of the 2018 Family First Prevention Services Act (FFPSA) and take measures to promote child wellbeing. The FFPSA seeks to keep children with their families to avoid the trauma of home removals. It also encourages appropriate services and disincentivizes congregate care placements.²⁷⁶ The FFPSA aims to reduce the number of children who are placed into congregate care settings simply because other placements were not available, despite not needing complex residential treatment.²⁷⁷ The legislation restricts funding for placements in congregate care exceeding fourteen days, and it requires states to assess whether children’s needs could be met in a less restrictive setting.²⁷⁸ Outside of the FFPSA, state funding for residential programs is

272. See 34 U.S.C. § 11133(a)(11)(A) (providing that status offenders cannot be held in secure detention).

273. See 34 U.S.C. § 11103(12)(A)–(13)(B).

274. *Id.*

275. See *supra* Part II.A–B.

276. *Investing in Community-Based Care for Children and Youth Involved with Child Welfare*, CAPACITY BLDG. CTR. FOR STATES 1, 1–5 (2022); *Family First Prevention Services Act*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/systemwide/laws-policies/federal/family-first/> [https://perma.cc/6VTA-ZHDW].

277. CAPACITY BLDG. CTR. FOR STATES, *Congregate Care in the Age of Family First* 1, 1, <https://capacity.childwelfare.gov/states/resources/family-first-overview> [https://perma.cc/AVW3-ZAJB].

278. *Id.* at 6.

relatively unrestricted.²⁷⁹ The JJDPAs' only requirement to fund residential programs or group homes is that the programs are licensed in the relevant state.²⁸⁰ The JJDPAs should do more to screen non-secure placements.

One potential method of disincentivizing congregate care placements is through accountability checks for residential facilities. For example, states could be barred from continuing to fund programs that fail to demonstrate specific, substantial success within a set time frame.²⁸¹ Funding could then be diverted to services that effectively treat children or to prevention services that proactively identify students at risk of becoming truant, treating root causes long before court petitions are ever considered. Given the harms of group placements,²⁸² the JJDPAs should restrict funding of congregate care facilities and should instead bolster resources for effective truancy reduction programs.

Congress ought to define non-secure placements, and that definition ought to be broad enough to capture the breadth of ways children are removed from their homes for truancy. Once non-secure placements are defined, Congress should then provide guidance to courts regarding their abilities to place truant children into non-secure facilities, and especially congregate care facilities—or prohibit some methods of home removal altogether. Such an expansion would bring JJDPAs implementation into alignment with its own alleged prioritization of in-home placement.²⁸³

C. ADOPTION OF A “BALANCE OF HARMS” FRAMEWORK

Another way that the JJDPAs could curtail home removals into secure and non-secure out-of-home placements is by requiring or incentivizing a “balance of harms” test. Typically, courts use highly subjective “best interests of the child” or “reasonable efforts” tests.²⁸⁴ These tests, especially the broad best interests test, do not

279. See 34 U.S.C. § 11184.

280. *Id.*

281. See 34 U.S.C. § 11133(a)(22)(C).

282. See *supra* Part II.A.3.

283. See 34 U.S.C. § 11133(a)(9)(A).

284. It is true that a “balance of harms” test also leaves room for subjective interpretation and could be used inappropriately. This being said, if judges will retain discretion in any method, then a method that requires consideration of the predictable harms of removal is still a considerable step toward trauma-informed, holistic, child-centered practice. See Trivedi, *supra* note 130, at 566–67.

consider the harm that removals cause to children, such as the trauma of severing a parent-child bond, or the gravity of the violation versus the severity of its punishment.²⁸⁵ In contrast, the framework of a balance of harms test makes harm to children explicit and requires that judges account for the consequences of removal. Reforms such as the balance of harms test, which require consideration of the harms of removal, “are necessary to ensure that our system recognizes these detrimental effects, because these reforms would ultimately reduce harm to children, which should be everyone’s goal.”²⁸⁶ While a shift to a balance of harms test might also be included in state statutes, inclusion in the JJDPa would more closely align the Act’s impacts with its intent. Such a test, while still allowing judicial discretion in calculating harm, would force judges to acknowledge and account for the harms of removing children from their homes and placing them in unsafe settings.²⁸⁷

Currently, to incarcerate a child through a VCO, the JJDPa requires a court to evaluate less restrictive alternatives “with due consideration to the best interest of the juvenile.”²⁸⁸ The fact that many children are still incarcerated as the least restrictive option speaks to the need for more high-quality community alternatives. It also indicates that the bar for secure removals should be raised, and that a bar for non-secure removals ought to be established. A balance of harms test that weighs the benefits of home removal against its harms could provide this.

For example, in West Virginia, fourteen-year-old Damian R. was adjudicated truant and placed into a facility after yelling at a

285. See Carl Funderburk, *Best Interest of the Child Should Not Be an Ambiguous Term*, 33 CHILD. LEGAL RTS. J. 1 (2013) (exploring the bias, ambiguity, complexity, and difficulties in practice that are created by a best interest framework). “Ask anyone who deals with children within the legal system what ‘best interest’ is, and often they will respond, ‘whatever the judge says it is.’” *Id.* at 1–2. Some states have begun the process of requiring consideration of important factors by adding elements to restrict the overbroad discretion in the best interest test. For example, Alaska law notes the importance of visitation, approximately 12 states consider children’s wishes, and Florida law “considers the love, affection, and other emotional ties between the child and his or her parents, siblings, and other relatives to be important in determining the manifest interests of the child.” CHILD WELFARE INFO. GATEWAY, *Determining the Best Interests of the Child.*, U.S. DEPT OF HEALTH & HUM. SERV. 1, 3 (2020), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest/> [https://perma.cc/55T5-CCZT].

286. Trivedi, *supra* note 130, at 572.

287. For examples of such legislation in Washington, D.C., and codified case law in New York, see *id.* at 523–580.

288. See 34 U.S.C. § 11133(a)(23)(C)(iii)(I)(cc).

teacher.²⁸⁹ Testimony from Damian's mother reflected his negative experience in placement: "When he walks out of here, he is not . . . even going to want to try."²⁹⁰ The decision to remove Damian from his home was later reversed by the Supreme Court of Appeals of West Virginia.²⁹¹ The court overturned the decision on the basis that a petition to remove a child can only be granted when three conditions are met: clear and convincing evidence that the placement is necessary, that effective services cannot occur without placement, and that all reasonable efforts have been made to provide appropriate services without out-of-home placement.²⁹² While these are all crucial considerations, such tests do not reach far enough. They do not consider the harmful impact on the child and family, nor do they consider the realities of current systemic breakdowns. For example, high numbers of children removed from their homes coupled with a shortage of available foster homes has led to a common practice in which children are removed from their homes and then placed in juvenile detention facilities, casinos, offices, and hotels, among other inappropriate placements.²⁹³

Other approaches, such as the balance of harms test, require consideration of these realities. New York, for example, uses the balance of harms test to rebut presumptions of removal and to determine whether imminent risk to children could be mitigated by reasonable efforts.²⁹⁴ To more objectively decide whether home removal is in the child's best interest, New York courts balance the risk of children staying in their homes "against the harm removal

289. *State v. Damian R.*, 214 W. Va. 610, 591 S.E.2d 168 (2003) (reversing an order to remove a juvenile from his home for truancy when all reasonable efforts to provide services before removing a child have not been made and when the effective provision of services can occur absent such an order).

290. *Id.* at 614.

291. *Id.* at 619.

292. *Id.* at 612.

293. Eleanor J. Bader, *Kids Awaiting Foster Care Placement Are Being "Housed" in Jails and Offices*, TRUTHOUT (July 12, 2023), <https://truthout.org/articles/kids-awaiting-foster-care-placement-are-being-housed-in-jails-and-offices/> [<https://perma.cc/N2GX-FMFF>]. This practice has been exacerbated by an unwillingness to bring new people into homes after COVID-19. *Id.*; see also Samantha Melamed, *Here's How Philly Kids Ended up Sleeping in a DHS Conference Room for Weeks on End*, PHILA. INQUIRER (Aug. 4, 2022), <https://www.inquirer.com/news/philadelphia-dhs-children-offices-childcare-room-backlogs-20220804.html> [<https://perma.cc/U56N-Y6L4>]; Sean Hughes et al., *Why Foster Children Are Sleeping in Offices and What We Can Do About It*, AM. ENTER. INST. (Apr. 4, 2023), <https://www.aei.org/research-products/report/why-foster-children-are-sleeping-in-offices-and-what-we-can-do-about-it/> [<https://perma.cc/CL8M-LDF4>].

294. Trivedi, *supra* note 130, at 569–71.

may bring.”²⁹⁵ Truancy harms children, but out-of-home placements do as well.²⁹⁶ Because truancy is best treated in families and communities,²⁹⁷ can be mitigated by services,²⁹⁸ and does not place children in imminent danger, the harms of removal theoretically outweigh any benefits.²⁹⁹

While there may be no one-size-fits-all test that appeases all jurisdictional nuances, and while decisions on test adoption might be best left to the states, explicit consideration of the harm of removals would prevent unnecessary and damaging removals. The JJDP A could incentivize or require consideration of harms before secure or non-secure home removals. While such a mandate might appear beyond the purview of the current JJDP A, if legislators expanded the Act’s breadth to address its role in pushing delinquent youth into civil courtrooms, such guidance would be necessary.

Similarly, when courts do connect children with services, courts should consider the quality of and challenges to implementing those services. By requiring or incentivizing a standardized minimum level of services, the JJDP A could better ensure that status offenders are set on a path toward rehabilitation and not recidivism. For students experiencing truancy, such reforms would promote better educational and life outcomes and would divert youth from further absenteeism by treating root causes and by preventing the extreme trauma of removal. Most importantly, and differently from the current JJDP A, such reforms would protect all students, no matter whether their truancy has come before a civil or criminal court.

295. *Nicholson v. Scopetta*, 3 N.Y.3d 357, 378 (2004).

296. *See supra* Part II.A–C.

297. *See supra* Part II.C.

298. *Id.*

299. This Note does not contend that there are no situations in which home removals would be warranted in a balance of harms test, but that home removals would and should be ordered much more sparingly, and only when truly necessary for a child’s safety. The number of cases involving violence or other extreme danger, which exist but are comparatively rare, are vastly outnumbered by the most common means of entry into the system—allegations of child neglect. Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, IOWA L. REV. (forthcoming). Child neglect is often used as an allegory for the criminalization of poverty. “The law asserts that neglect and poverty are distinct, so the legal system’s decision to label parental behavior as neglectful frames the case as about some parental fault or pathology and not about poverty.” *Id.* In such cases of criminalized poverty, provision of needed resources or services might help the family, whereas home removals have been shown to cause harm.

D. STANDARDIZATION OF LEVEL OF SERVICES

The JJDPa should standardize the minimum level of services that must be provided before children can be removed from the home, and it ought to make this bar difficult to reach.³⁰⁰ Before children can be removed, services usually must be provided, but the level of services is typically prescribed by state case law or statute. For example, in 1983, the Supreme Court of Wisconsin found that where less restrictive alternatives were not considered, a trial court could not securely detain a truant child.³⁰¹ However, services provided are too often inadequate or inappropriate, and definitions of “reasonable efforts” vary by state statute. In the case of J.L., the court failed to consider alternatives that would allow him to stay with his family.³⁰² At the time that the court removed him, he had only had the opportunity to receive two hours of in-home MST treatment.³⁰³ Typically, such services must run for three to six months to be effective.³⁰⁴

The JJDPa should make clear that less restrictive services must be provided before a child can be removed from the home for a status offense. It should also provide guidance on what constitutes reasonable efforts in providing services. There is no objective, one-size-fits-all answer to how many hours of services must be received or how many services must be tried to be successful for each student.³⁰⁵ VCOs require findings of fact “to support a determination that there is no appropriate less restrictive alternative available to placing the status offender in such a facility.”³⁰⁶ At minimum, the same test should be required

300. This point assumes removals are sometimes necessary. While home removals are often unjustified, they are especially so in the context of truancy. Truancy can be safely treated in the home and does not place children in such imminent danger that the only effective response must be removal.

301. In *Int. of D.L.D.*, 110 Wis. 2d 168, 327 N.W.2d 682 (1983) (reversing an order in which a juvenile was held in contempt of court and incarcerated for missing school when the court did not exhaust less restrictive alternatives).

302. See *supra* Introduction.

303. Brief of Educ. L. Ctr. & Juv. L. Ctr. as Amici Curiae Supporting Petitioner at 16, *Int. of J.L.*, 2019 PA Super 224, 216 A.3d 233 (2019). See *supra* Part II.C.

304. *Multisystemic Therapy Frequently Asked Questions*, MST SERV., <https://www.mstservices.com/faq-mst> [<https://perma.cc/9TMG-9EFS>].

305. See, e.g., *FAQs*, FAM. SOL., <https://www.famsolutions.org/faqs> [<https://perma.cc/67CY-V45U>] (stating that child and family therapy is individualized, and there is no magic number of sessions that guarantee a patient will meet their goals).

306. 34 U.S.C. § 11133(a)(23)(C)(iii)(I)(cc).

in non-secure removals. Establishing a floor of services would prevent hasty decisions and promote connection with services.

E. CREATION OF A RIGHT TO COUNSEL IN TRUANCY PROCEEDINGS

A right to counsel should be created in truancy cases, if not for all status offense cases. While children typically must be appointed counsel before home removal,³⁰⁷ representation from the initial truancy proceeding to the last step before removal could impact case outcomes. When children are represented by high-quality counsel from the start, judges may not even consider home removal as an option.³⁰⁸ In 2018, the JJDPA was amended to permit funding to be used to ensure children’s “access to appropriate legal representation” and to expand access to court-appointed attorneys trained to represent children.³⁰⁹ Permission to fund, however, is as far as the JJDPA goes toward ensuring children’s access to counsel. Representation is fundamental to the justice system and is critical when children, schools, and the court interact. The Supreme Court has found that children have a constitutional right to counsel during juvenile court proceedings,

307. Benjamin Good, *A Child’s Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109, 109–157 (2014). As of 2009, 37 states required representation for children in child welfare matters, which include child removals. Additionally, some courts have recognized children’s constitutional right to counsel in child welfare proceedings. *Id.* at 123–24. Laws such as the Federal Child Abuse Prevention and Treatment Act (CAPTA) require states to document plans to provide advocates to represent children’s best interests in all neglect and abuse cases, including representation before children can be placed in out-of-home foster care. *See generally* Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101–5107 (2000); CHILD WELFARE INFO. GATEWAY, *Representation of Children in Child Abuse and Neglect Proceedings*, U.S. DEPT OF HEALTH & HUM. SERV. 1, 1 (2021), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/represent/> [<https://perma.cc/2Z8N-N7MX>].

308. *See* Ashley Goins, *Justice for Juveniles: The Importance of Immediately Appointing Counsel to Cases Involving Status Offenses and Engaging in Holistic Representation of Juveniles in All Cases*, 2 THE FORUM: A TENN. STUDENT LEG. J. 22 (2015). There is evidence that the presence of attorneys can be an aggravating factor and can correlate with harsher sentences, but this can be explained by the fact that there is also a direct relationship between the seriousness of a juvenile offense and likelihood of representation. Status offenses are some of the least serious offenses and are less likely to result in harsh sentences than felony or other offenses, although they still can. *See* Barry C. Feld, *The Right To Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1240 (1989) (showing that “juveniles charged with [status] offenses had lower rates of representation . . . and, as a result, these were the offense categories in which the largest proportions of unrepresented juveniles were removed from their homes and incarcerated.”).

309. *See* 34 U.S.C. § 11133(a)(9)(G)(i–ii).

recognizing that children “require[] the guiding hand of counsel at every step in the proceedings against [them].”³¹⁰ Children are often pressured to appear without counsel, especially in status offense cases.³¹¹ This puts children already struggling with truancy in a particularly vulnerable position with extremely high stakes.

Courts have not found a due process right to counsel in children’s initial truancy proceedings,³¹² and some state statutes explicitly declare that no counsel will be provided in truancy proceedings.³¹³ For children facing removal, appointment of counsel at the last possible opportunity is far too late, as decisions of whether to remove children have likely already been informally made. To prevent truancy cases from escalating to extreme outcomes, the JJDPa should more strongly incentivize, if not require, counsel for children in truancy proceedings.

CONCLUSION

The JJDPa is a landmark piece of legislation with great potential to do exactly what it set out to do—namely, to protect children, families, and communities from the harms of delinquency. A substantial part of this harm is generated by the system’s handling of delinquency cases, which the JJDPa recognized and attempted to address through its deinstitutionalization mandate. There is, however, much work to be done. Loopholes in the legislation have led to disastrous outcomes for children struggling with truancy. The consequences of these loopholes disproportionately harm poor children and children of color.

In late 2023, as Congress considers reauthorizing and amending the JJDPa, two issues should be top of mind: broadening the Act’s conception of home removals to include non-

310. *In re Gault*, 387 U.S. 1, 36 (1967).

311. *Youth Interrogations & Access to Counsel*, JUVENILE L. CTR., <https://jlc.org/issues/access-counsel> [<https://perma.cc/L9YD-XCVJ>].

312. *See Bellevue Sch. Dist. v. E.S.*, 171 Wash. 2d 695, 257 P.3d 570 (2011) (holding that due process did not require appointment of counsel to represent child at initial truancy hearing).

313. For one example, see MINN. STAT. ANN. § 260C.163 (3)(e) (2022) (establishing that “In any proceeding where the sole basis for the petition is habitual truancy, the child . . . do[es] not have the right to appointment of a public defender or other counsel at public expense . . . [B]efore any out-of-home placement, including foster care or inpatient treatment, can be ordered, the court must appoint a public defender or other counsel. . .”).

secure and congregate care placements and eliminating the VCO exception. For students whose familial, financial, or peer circumstances manifest in truancy, and especially where truancy is the sole issue, home removals are one of the most extreme and unjust actions courts can take. Home removals do not solve the root problem of truancy, nor do they improve the child's life or educational outcomes.

Truancy should not be handled by removing children from their homes. Further revision to the JJDPA would bring it closer to its stated purpose of protecting children and communities. The practice of incarcerating truant children must end. Non-secure placements, especially in congregate care, should be tightly regulated by the JJDPA. The JJDPA can achieve massive strides for children, families, and communities by ending or further restricting non-secure placements and VCOs, among other reforms. As legislators contemplate reauthorization and further reforms, they should consider the words of Ferris Bueller on his day off: "The question isn't 'what are we going to do,' the question is 'what aren't we going to do?'"