

Senate Bill 853
Testimony in Support
National Juvenile Defender Center

Maryland Senate Judicial Proceedings Committee
Submitted: March 1, 2021

The National Juvenile Defender Center (NJDC) is a nonpartisan, nonprofit organization dedicated to promoting justice for all children by ensuring excellence in juvenile defense. NJDC respectfully encourages the Maryland Senate Judicial Proceedings Committee to vote favorably on Senate Bill 853, an important step forward in supporting the success and protecting the futures of Maryland's youth.

Maryland Should Adopt a Minimum Age of Juvenile Court Jurisdiction

Arrest and the possibility of prosecution subject children to profoundly negative direct and collateral consequences, even when they are not held in custody. Yet, in contravention of international human rights standards and global norms, the United States continues to arrest, detain, and incarcerate children and young adolescents.

Of the 728,280 children under the age of 18 arrested in the United States in 2018, 30 percent—or 217,380 children—were under the age of 15.¹ In 2017 (the most recent year for which national data is publicly available), of the 43,580 children incarcerated in juvenile detention centers or youth prisons, more than 13 percent were 14 or younger.² Maryland is among those states arresting and charging very young children.

Commonsense knowledge of child development³ and international standards⁴ compel removal of younger children from the juvenile legal system. Because younger children are inherently more

¹ Office of Juvenile Justice and Delinquency Prevention, *Statistical Briefing Book 2019*, available at <https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qaDate=2018>.

² Office of Juvenile Justice and Delinquency Prevention, *Census of Juveniles in Residential Placement 2017*, available at <https://www.ojjdp.gov/ojstatbb/ezacjrp/default.asp>.

³ *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (noting that there was no special training required to account for a child's age).

⁴ The UN's Global Study on Children Deprived of Liberty recommends that all UN member states set a minimum age of criminal responsibility no lower than age 14. Gen. Assembly, United Nations, *Global Study on Children Deprived of Liberty 10* (2019), <https://undocs.org/en/A/74/136>. Additionally, the UN Committee on the Rights of the Child encourages countries to consider minimum ages as high as 16, based on collective international standards. Convention on the Rights of the Child, United Nations, General Comment No. 10: Children's Rights in Juvenile Justice 10 (2007), <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>.

vulnerable,⁵ they should not be subject to the potential harms of juvenile court and the lifelong consequences that stem from such involvement.

NJDC encourages states to strengthen community supports outside the court system and to set a minimum age of prosecution of at least 14.

Maryland has no minimum age of juvenile jurisdiction

Maryland has no minimum age of juvenile court jurisdiction,⁶ and it arrests a significant number of very young children. In FY19, the Maryland Department of Juvenile Services received 1,882 complaints for children under the age of 13.⁷ Compare that to California, with six times Maryland's population, which referred just 687 children under 12 to the juvenile system in 2018.⁸ Children in Maryland are not engaging in behavior that is at odds with the behavior of children in California or anywhere else in the country; the only difference is the juvenile legal system's response.

Black youth are disproportionately impacted

Although Black youth comprised approximately 17 percent of the total child population of the United States in 2018,⁹ Black youth made up approximately 36 percent of youth 12 and under charged with delinquency offenses.¹⁰ Maryland follows a similar trend, as Black children are overrepresented among children arrested in the state.¹¹

The overrepresentation of Black youth in the juvenile legal system is not due to differences in rates of problem behavior,¹² but to the juvenile legal system's disproportionate criminalization of the behavior of Black children. For example, research demonstrates that Black youth are more likely to be perceived as older than their actual age and are seen as more culpable than white youth.¹³ This implicit racial bias

⁵ Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333 (2003) (noting the vulnerability of youth in legal contexts, as study demonstrates that youth 15 and younger are more likely than older adolescents and adults to lack competence-related capacities, and that developmental immaturity may impact youth's legal decision-making in other contexts such as confessing to the police or the decision to take a plea agreement). See also Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28 (2009) (indicating the vulnerability of youth through research on mechanisms underlying developmental immaturity in adolescents, with results demonstrating that age is related to future orientation with younger youth less likely to plan ahead and think about the future consequences of their actions).

⁶ Until 1995, Maryland relied on the common-law doctrine of *doli incapax*, which holds that children under seven have no criminal capacity. For children aged 7-13, the law required a presumption that the child did not have criminal capacity, which the prosecution had the burden to overcome beyond a reasonable doubt. As part of the 1994 crime bill, Maryland eliminated the common-law presumption of infancy for children aged 7 to 13.

⁷ DJS Data Resource Guide (DRG) , FY2019, at 26, <https://djs.maryland.gov/Pages/Data-Resource-Guides.aspx>.

⁸ SB439 Fact Sheet, https://youthlaw.org/wp-content/uploads/2017/04/SB-439-MinAgeFactSheet_June20-1.pdf. California passed SB439 and established a new minimum age of criminal responsibility of 12 years old in 2018.

⁹ https://www.ojjdp.gov/ojstatbb/ezapop/asp/profile_display.asp.

¹⁰ <https://www.ojjdp.gov/ojstatbb/ezajcs/asp/demo.asp>.

¹¹ DJS Data Resource Guide (DRG) , FY2019, note 2, <https://djs.maryland.gov/Pages/Data-Resource-Guides.aspx>.

¹² Skiba, R. J. (2000). *An analysis of school disciplinary practice*. Policy Research Rep. No. SRS2. Bloomington, Indiana Education Policy Center (noting that overrepresentation of Black students is related to referral bias on the part of school officials).

¹³ Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psychol. 526 (2014).

can result in prosecutors and police criminalizing the typical adolescent and pre-adolescent behavior of Black and brown youth. Setting a minimum age of prosecution in juvenile court can help counteract the impact of implicit racial bias on charging decisions for younger Black and brown youth.

Prosecuting very young children is contrary to developmental science

A leading developmental study on children's capacity as trial defendants compared a cohort of adolescents (ages 11-17) to one of young adults (age 18-24).¹⁴ The researchers found that youth aged 15 and younger were substantially less able to reason and understand trial-related issues than 16- and 17-year-olds. Similarly, children younger than 14 were less likely to focus on the long-term consequences of legal decisions than older youth.¹⁵ The researchers determined that 33 percent of the 11- to 13-year-olds and 20 percent of the 14- and 15-year-olds were "as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial by clinicians who perform evaluations for courts."¹⁶

Researchers similarly have determined that youth aged 15 and younger are less able to understand legal terminology; less likely to have adequate legal knowledge and understanding, including in the *Miranda* context; and more likely to waive their legal rights than adults.¹⁷ Relying on this and similar research, younger children are much more likely to be found incompetent to stand trial and much more likely to misunderstand and exercise their *Miranda* rights.

Juvenile legal system involvement puts youth and public safety at risk

Research shows that contact with the juvenile legal system can have lasting and negative psychological and health impacts on children.¹⁸ When children are thrust into the legal system, their likelihood of re-offending increases and public safety is undermined, as subjecting them to juvenile court processing increases, rather than decreases, the likelihood of future criminal activity.¹⁹ In contrast, numerous studies have determined that the majority of youth who have broken the law will simply outgrow their delinquent behavior without legal intervention.²⁰

¹⁴ Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, STATIC.PRISON.ORG, available at <https://static.prisonpolicy.org/scans/juvenilecompetence.pdf>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Alison D. Redlich and Reveka V. Shteynberg, *To Plead or Not to Plead: An Analysis of Juvenile and Adult True and False Plea Decisions*, 40 LAW & HUMAN BEHAVIOR 611, 612 (2016).

¹⁸ Elizabeth S. Barnert et al., *Setting a Minimum Age for Juvenile Court Jurisdiction in California*, 13 INT'L J. PRISON HEALTH 49, 52 (2018); National Center for Mental Health and Juvenile Justice, *Trauma Among Youth in the Juvenile Justice System*(2016), available at <https://www.ncmhjj.com/wp-content/uploads/2016/09/Trauma-Among-Youth-in-the-Juvenile-Justice-System-for-WEBSITE.pdf>.

¹⁹ See generally, Joy Radice, *The Juvenile Record Myth*, 106 Geo. L. J. 365 (2018); Models for Change, "Innovation Brief: Avoiding and Mitigating the Collateral Consequences of a Juvenile Adjudication" (Chicago, IL: John D. and Catherine T. MacArthur Foundation, December 2013): 1, https://nijn.org/uploads/digital-library/Innovation_Brief_Avoiding_and_Mitigating_the_Collateral_Consequences_of_a_Juvenile_Adjudication-Dec2013.pdf.

²⁰ Anthony Petrosino, et al., *Formal System Processing of Juveniles: Effects on Delinquency*, CAMPBELL SYSTEMATIC REVIEWS (Jan. 2010); Ed Mulvey, et al., *Pathways to Desistance*, NCJRS.GOV (JAN 2014), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/244689.pdf>.

Decisions to incarcerate youth too often fail to take into account the risks associated with incarceration: increased victimization, recidivism, school drop-out, and long-term physical and mental health issues.²¹ Reports of systemic maltreatment persist in juvenile detention centers and secure commitment facilities across the country, with documented reports of widespread physical and sexual abuse, excessive use of force by facility staff, and rampant overreliance on isolation and restraint.²² Rather than being nurtured, our most vulnerable children are at risk for physical and sexual abuse, institutional violence, suicide, and educational disruption while in custody.²³

System involvement often gives rise to disastrous long-term consequences, as well.²⁴ Juvenile legal system records create barriers to enrolling and remaining in school, college admissions, employment, and stable housing.²⁵ Arrest and prosecution of the youngest children thus is directly averse to the juvenile court system's twin goals of rehabilitation and public safety.²⁶

²¹ Andrea J. Sedlak et al., U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Nature and Risk of Victimization: Findings from the Survey of Youth in Residential Placement* (2013), OJJDP Juv. Just. Bull., <https://www.ojjdp.gov/pubs/240703.pdf>. Allen J. Beck et al., U.S. Dep't of Justice, Office of Justice Programs, *Sexual Victimization in Juvenile Facilities Reported by Youth* (2012), <https://www.bjs.gov/content/pub/pdf/svjfry12.pdf>. Thomas J. Dishion & Jessica M. Tipsord, *Peer Contagion in Child and Adolescent Social and Emotional Development*, 62 *Ann. Rev. Psychol.* 189 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3523739/>. Umberto Gatti et al., *Intergenerational Effect of Juvenile Justice*, 50 *J. Child Psychol. & Psychiatry* 591 (2009). David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 *Soc. Educ.* 36 (2013), <http://www.asanet.org/sites/default/files/savvy/journals/soe/Jan13SOEFeature.pdf/>. Elizabeth S. Barnert et al., *Does Incarcerating Young People Affect Their Adult Health Outcomes?*, 139 *Pediatrics* 1 (2017), <https://pediatrics.aappublications.org/content/pediatrics/139/2/e20162624.full.pdf>.

²² Richard Mendel, *Maltreatment of Youth in U.S. Juvenile Corrections Facilities*, <https://www.aecf.org/resources/maltreatment-of-youth-in-us-juvenile-corrections-facilities/>.

²³ *Key Issues: Why We Need Alternatives to Formal Juvenile Justice System Processing and Incarceration*, Juv. Just. Info. Exchange, <http://jjiie.org/hub/community-based-alternatives/key-issues/>, citing National Juvenile Justice Network, *The Real Costs and Benefits of Change* (2010), available at http://www.njjn.org/uploads/digital-library/resource_1613.pdf; Just. Pol'y Inst., *The Costs of Confinement: Why Good Juvenile Justice Policies Make Good Fiscal Sense* (2009), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/09_05_rep_costsofconfinement_jj_ps.pdf; Barry Holman & Jason Zeidenberg, Just. Pol'y Inst., *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2006), available at http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf.

²⁴ See generally, Joy Radice, *The Juvenile Record Myth*, 106 *Geo. L. J.* 365 (2018); Models for Change, "Innovation Brief: Avoiding and Mitigating the Collateral Consequences of a Juvenile Adjudication" (Chicago, IL: John D. and Catherine T. MacArthur Foundation, December 2013): 1, https://njjn.org/uploads/digital-library/Innovation_Brief_Avoiding_and_Mitigating_the_Collateral_Consequences_of_a_Juvenile_Adjudication-Dec2013.pdf.

²⁵ *Id.*

²⁶ Laura Garnette, *Juvenile Court is No Place for Kids—California Must Set a Minimum Age*, *SAN FRANCISCO CHRONICLE*, April 13, 2018, <https://www.sfchronicle.com/opinion/openforum/article/Juvenile-court-is-no-place-for-kids-13153447.php>.

The international standard is a minimum age of 14

Prosecuting very young children violates international human rights standards.²⁷ Since its introduction in 1989, the International Convention on the Rights of the Child has been ratified by every member nation of the United Nations except the United States.²⁸ Article 40 of the Convention includes a directive that countries establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.”²⁹

In 2019, the Committee on the Rights of the Child encouraged nations “to take note of recent scientific findings, and to increase their minimum age . . . to at least 14 years of age.”³⁰

Maryland should join the growing trend to establish or raise the minimum age of jurisdiction

There is an accelerating trend toward more states setting a minimum age of criminal responsibility.³¹ It is time that Maryland treats children like children and institutes a reasonable minimum age of juvenile court jurisdiction.

Prohibiting the arrest or prosecution of younger children would not prevent schools, child welfare agencies, or mental health systems from supporting youth when necessary to address behavior concerns. Indeed, developmentally appropriate, individualized programs and services are more effective, less harmful, and less expensive than formal arrest and juvenile court processing.

SB 853 would set Maryland’s minimum age of juvenile court jurisdiction at 13. While NJDC believes the minimum age should be at least 14 with no statutory exceptions, this bill is an important step toward keeping young people in their communities and out of the juvenile legal system.

Maryland Should Reduce the Size of its Juvenile Delinquency System

By limiting probation terms, increasing opportunities for diversion, and limiting the use of incarceration, Senate Bill 853 takes several other important steps toward reducing the negative impact of the juvenile delinquency system.

²⁷ Juvenile Justice Geography, Policy, Practice and Statistics, Jurisdictional Boundaries, Delinquency Age Boundaries <http://www.jjgps.org/jurisdictional-boundaries#transfer-discretion>. The UN CRC requires members to set the minimum age of criminal responsibility at 12 and to commit to continue to raise the age.

²⁸ See <https://indicators.ohchr.org/>.

²⁹ Convention on the Rights of the Child, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

³⁰ General Comment 24 (2019) on children’s rights in the child justice system, IV.C.22. available at <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqlkirKQZLK2M58RF%2f5F0vEnG3QGKUXfivhToQfjGxYjV05tUAlgpOwHQJsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vJ%2bf0RPR9UMtGkA4>

³¹ According to the National Minimum Age Coalition, 12 states will be considering legislation to establish or raise the minimum age of juvenile court jurisdiction during their 2021 legislative sessions. Three states currently have a minimum age of 12: California (with exceptions), Cal. Welf. & Inst. Code § 602; Massachusetts, Mass. Gen. Laws Ann. ch. 119, § 52; Utah Code Ann. § 78A-6-116 (2020). Nebraska’s minimum age is 11, Neb. Rev. Stat. Ann. § 43-247(1)-(2).

Youth probation should be limited in application, length, and conditions

In 2014, approximately 63 percent of youth found delinquent were sentenced to probation, making probation supervision the most common disposition for youth involved in the juvenile court system.³² Each year, approximately 2,000 Maryland youth are placed on probation.³³ But evidence shows supervision-based probation is often ineffective.

Programs that focus on counseling, skill-building, and restorative justice reduce youth recidivism by an average of ten percent, while supervision-based programs reduce recidivism by just one percent.³⁴ Probation appears to be especially ineffective for low-risk youth, with one study finding that low-risk youth placed on probation were more than 50 percent more likely to reoffend than those not placed on probation.³⁵

In addition to focusing the use of probation on youth most likely to benefit, probation orders themselves should be limited in number and tailored to the needs of each youth, as youth have a greater likelihood of success when they are focused on a few clear and targeted objectives.³⁶ Carefully tailored probation orders that target specific issues leading to court involvement promote greater youth success and community safety.

By reducing the number of probation conditions and ensuring that each condition correlates to the youth's interests and goals of probation, youth will be more likely to understand the expectations and be more able to comply with the conditions of probation. This also enables probation officers to address the unique and individualized characteristics of youth outside the realm of compliance and punishment. Goals identified for youth should be youth-centered, strengths-based, and developed as the probation officer builds a relationship with the youth. Engaging the youth to identify and prioritize these goals will help achieve the youth's buy-in, increasing the likelihood of success and completion.

Probation supervision should be limited in length of time and scope, and should focus on building the skills young people need to succeed. Limiting the amount of time youth spend on probation and using

³² Transforming Juvenile Probation: A Vision for Getting it Right, The Annie E. Casey Foundation, Executive Summary, 1, available at <https://www.aecf.org/resources/transforming-juvenile-probation-executive-summary/>.

³³ Maryland Department of Juvenile Services Data Resource Guide, 207, available at <https://djs.maryland.gov/Documents/DRG/Recidivism.pdf>.

³⁴ Lipsey, M. W. (2009). The primary factors that characterize effective interventions with juvenile offenders: A meta-analytic overview. *Victims and Offenders*, 4, 124–147, www.episcenter.psu.edu/sites/default/files/community/Lipsey_Effective%20interventions%20-%202009.pdf.

³⁵ Latessa, E. J., Lovins, B., & Lux, J. (2014, April 30). Evaluation of Ohio's RECLAIM programs. Cincinnati, OH: University of Cincinnati School of Criminal Justice, [www.uc.edu/content/dam/uc/ccjr/docs/reports/FINAL%20Evaluation%20of%20OHs%20RECLAIM%20Programs%20\(4-30-2014\)%20.pdf](http://www.uc.edu/content/dam/uc/ccjr/docs/reports/FINAL%20Evaluation%20of%20OHs%20RECLAIM%20Programs%20(4-30-2014)%20.pdf).

³⁶ See NAT. JUVENILE DEF. CTR., PROMOTING POSITIVE DEVELOPMENT: THE CRITICAL NEED TO REFORM YOUTH PROBATION ORDERS 4 (2016), <http://njdc.info/wp-content/uploads/2016/12/Promoting-Positive-Development-Issue-Brief.pdf>; RICHARD J. BONNIE ET AL., REFORMING JUVENILE JUSTICE, A DEVELOPMENTAL APPROACH, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES 4 (2013); WASHINGTON JUDICIAL COLLOQUIES PROJECT, supra note 1, at 9 (finding that youth interviewed minutes after hearings recalled only one third of the ordered conditions).

incentive-based probation practices that reward youth with decreases in the amount of time on probation can “improve outcomes and reduce costs with no harm to public safety.”³⁷

By limiting the length of time young people can be placed on probation, SB 853 takes an important step toward limiting the use and potential harmful impacts of probation supervision. Maryland should also limit or eliminate the use of probation supervision for youth deemed to be low-risk and ensure probation conditions are limited in number and tailored to each individual youth, what brought them into the system, and what they need to be successful.

Increasing opportunities for diversion and decreasing youth incarceration

SB 853 takes two additional steps toward reducing the size of Maryland’s juvenile delinquency system: increasing opportunities to divert youth from the court system entirely and prohibiting the incarceration of youth whose most serious charge is a misdemeanor or technical probation violation. In addition to a general shrinking of the system overall, these two reforms offer important opportunities to decrease racial disparities in Maryland’s delinquency system.

According to the Maryland Department of Juvenile Services, youth of color are nearly twice as likely to have their cases referred to juvenile court, 50 percent more likely to have their cases petitioned, and 30 percent less likely to be referred to diversion than white youth.³⁸ Similarly, while Black youth comprise approximately 35 percent of Maryland’s youth population,³⁹ they accounted for more than 72 percent of youth incarcerated in Maryland’s seven state-run facilities in FY 2020.⁴⁰

By expanding opportunities for pre-court diversion and disallowing incarceration for misdemeanor offenses and technical probation violations, SB 853 will help protect youth from the stigma of juvenile court involvement and the harms associated with incarceration. Maryland should monitor the implementation of these reforms, to ensure that youth of color receive equal access to diversion opportunities, and that charging decisions and plea offers are not changed to pursue unnecessary incarceration.

Maryland Should Enact Senate Bill 853

Senate Bill 853 is an important step toward rightsizing Maryland’s juvenile delinquency system. NJDC encourages the state to adopt the new law; track its implementation, including its impact on racial disparities; and continue to reform its juvenile delinquency system to ensure it reflects research about ensuring positive outcomes for youth and communities, national best practices, and international human rights norms.

³⁷ *Transforming Juvenile Probation: A Vision for Getting it Right*, The Annie E. Casey Foundation, p17, <https://www.aecf.org/resources/transforming-juvenile-probation/>.

³⁸ Department of Juvenile Services, Data Resource Guide 2018, p. 233.

³⁹ https://www.ojjdp.gov/ojstatbb/ezapop/asp/profile_display.asp.

⁴⁰ Maryland Department of Juvenile Services, Data Resource Guide 2020, 172–185, <https://djs.maryland.gov/Documents/DRG/Committed-Programs.pdf>.