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# THE AGE OF CREATIVITY AND CRIME

ESTHER K. HONG\*

## ABSTRACT

*Creativity and crime may seem worlds apart, yet they intersect and overlap in striking ways. While legal scholars have largely ignored the relationship between the two, this Article brings it to the forefront. It examines the legal implications of their connections, particularly for adolescents and emerging adults, who display heightened tendencies toward both.*

*In many instances, the line that separates creative acts from criminal ones is thin and arbitrary, drawn by the biases of decisionmakers such as police, prosecutors, and school administrators. Creative acts are mischaracterized as criminal ones. Creative expressions are used as evidence of one's criminality or dangerousness. These mischaracterizations are generally harmful, but they cause particular harm for adolescents and emerging adults, who have developmental traits that increase their associations with crime and creativity, have a developmental need to engage in creativity, and are in a crucial developmental period of growing their creativity. That young people have their creativity criminalized imposes a distinct developmental harm.*

*These considerations underscore the need to apply an increasingly influential legal framework for young people called the developmental framework. Implementing this framework in a manner that protects and prioritizes young people's creativity requires changes in the prosecution and*

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\* Associate Professor of Law, Arizona State University, Sandra Day O'Connor College of Law. For their generous insights and comments, the author thanks Chaz Arnett, Rachel Barkow, Alyse Bertenthal, Emily Buss, Sheldon Evans, Trevor Gardner, Josh Gupta-Kagan, Vivian Hamilton, Elizabeth Scott, Ronald Wright, and the participants of the ABA-AALS Criminal Justice Roundtables; the AALS Family and Juvenile Law Section Works-in-Progress Session, The Future of Family Law; Culp Colloquium at Duke University School of Law; CrimFest; the University of Ottawa Public Law Centre Criminal Law Workshop; the University of Arizona/Arizona State University Junior Faculty Workshop; and the Wake Forest University School of Law Juniors Workshop. The author also thanks Donny Stewart and Haley Potter for their excellent research assistance, and the editors of the *Southern California Law Review* for their excellent editorial work.

*punishment of crime, further dismantling of the school-to-prison pipeline, and increased opportunities for creativity. Making such changes will not only enhance young people's well-being and reduce their risk of becoming entangled in the criminal system, but also pave the way for broader systemic reform for all.*

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#### INTRODUCTION

Creativity and crime may seem worlds apart, yet they intersect and overlap in striking ways. While legal scholars have largely ignored the relationship between the two, this Article brings it to the forefront. It examines the legal implications of their connections, particularly for

adolescents and emerging adults,<sup>1</sup> who display heightened tendencies toward both creativity and crime.<sup>2</sup>

To begin, creativity is defined by the “two traditional components” of originality and usefulness.<sup>3</sup> Even though it is technically a neutral trait—one that “can be applied in many different ways, some of which are benevolent and some of which are unethical and immoral”<sup>4</sup>—it is “universally” presented in a positive light.<sup>5</sup> The vast majority of scholarship and research about creativity lauds its beneficial effects on individuals, organizations, and society.<sup>6</sup>

It is no wonder then that creativity is so highly desired. The most popular TED Talk of all time—*Do Schools Kill Creativity?* by Sir Ken

1. This group of young people—adolescents and emerging adults—generally includes those from the ages of ten to twenty-five years old and may even extend to the age of twenty-nine. Adolescence is now widely defined as including the period from age ten to the early-to-mid-twenties. Susan M. Sawyer, Peter S. Azzopardi, Dakshitha Wickremarathne & George C. Patton, *The Age of Adolescence*, 2 LANCET CHILD & ADOLESCENT HEALTH 223, 223 (2018) (defining *adolescence* as age ten to twenty-four); Amy Peykoff Hardin & Jesse M. Hackell, *Age Limit of Pediatrics*, PEDIATRICS, Sep. 2017, at 1, 1 (describing that the American Academy of Pediatrics generally identifies adolescence from age eleven to twenty-one). Developmental psychologist Laurence Steinberg labels the period from ten to twenty-five years old as adolescence, with the timeframe of nineteen to twenty-five years old distinguished as “late adolescence” or young adulthood. LAURENCE STEINBERG, *YOU AND YOUR ADOLESCENT: THE ESSENTIAL GUIDE FOR AGES 9, 10–25* (2011). Researchers also recognize the stage of emerging adults as those between eighteen to twenty-five, and for some, up to twenty-nine years old. Jewel Scott, Anandita Agarwala, Carissa M. Baker-Smith, Matthew J. Feinstein, Karen Jakubowski, Jill Kaar, Niyati Parekh & Kershaw V. Patel, *Cardiovascular Health in the Transition from Adolescence to Emerging Adulthood: A Scientific Statement from the American Heart Association*, J. AM. HEART ASS’N, Mar. 26, 2025, at 1, 2. Meanwhile, legal frameworks largely continue to define those under eighteen years old as children, with some recognizing the emerging adult stage as including those between the age of eighteen and twenty-five years old. Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131, 1134–35 (2020).

2. See *infra* Section I.B.

3. James C. Kaufman & Vlad P. Glăveanu, *An Overview of Creativity Theories*, in CREATIVITY: AN INTRODUCTION 17, 17 (James C. Kaufman & Robert J. Sternberg eds., 2021) (noting the “strong consensus” that creativity consists of “something that is new and original . . . [and] task-appropriate”). For example, one study described creativity as “a blend of *originality* (newness, novelty) and *usefulness* (worthwhile, meaningful) as defined within a particular context.” Petrie J.A.C. van der Zanden, Paulien C. Meijer & Ronald A. Beghetto, *A Review Study About Creativity in Adolescence: Where Is the Social Context?*, THINKING SKILLS & CREATIVITY, Aug. 2020, at 1, 2. Perhaps the most creative definition of creativity is “extra/ordinary, original and fitting, full-filling, in(ter)ventive, coopera-tive, un/conscious, fe< >male, re. . . creation.” Bayard D. Nielsen, Cynthia L. Pickett & Dean K. Simonton, *Conceptual Versus Experimental Creativity: Which Works Best on Convergent and Divergent Thinking Tasks?*, 2 PSYCH. AESTHETICS, CREATIVITY & ARTS 131, 131 (2008) (alterations in original) (quoting ROB POPE, CREATIVITY: THEORY, HISTORY, PRACTICE 52 (2005)).

4. Mark A. Runco, *Creativity Has No Dark Side*, in THE DARK SIDE OF CREATIVITY 15, 15 (David H. Cropley et al. eds., 2010).

5. DAVID H. CROPLEY & ARTHUR J. CROPLEY, CREATIVITY AND CRIME 95 (2013); Keith James & Aisha Taylor, *Positive Creativity and Negative Creativity (and Unintended Consequences)*, in THE DARK SIDE OF CREATIVITY, *supra* note 4, at 33, 33 (observing that “[v]irtually all existing empirical and theoretical work on creativity to this point . . . has either explicitly focused on or implicitly assumed only positive outcomes from creativity”). Unless otherwise noted, references to *creativity* in this Article refer to this positive and beneficial expression of creativity.

6. CROPLEY & CROPLEY, *supra* note 5, at 95.

Robinson—has more than 79 million views.<sup>7</sup> In 2023, the World Economic Forum identified “[c]reative thinking” as the top skill that is increasing in importance for the future<sup>8</sup> and as, currently, the second most essential skill for workers.<sup>9</sup> Over a decade before in 2010, IBM conducted a global survey of 1,500 CEOs across 33 industries in 60 countries and found that the highest number of respondents identified creativity as the most valuable leadership skill.<sup>10</sup>

Creativity spurs new ideas, promotes flexibility, and supports problem-solving and adaptation to new environments.<sup>11</sup> Also, while creativity is often associated with the arts, it extends far beyond them. Creativity can be implemented in everyday activities and environments through acts of “little-c” creativity.<sup>12</sup> After all, any thought, action, or work that is original and useful is, by definition, a creative one.<sup>13</sup> The lucky few are deemed to possess “Big-C” creativity, or eminent creativity, with some receiving this distinction posthumously.<sup>14</sup> Big-C creativity refers to “clear-cut, eminent creative contributions,” and includes works that have won prestigious prizes and have a lasting impact on a field.<sup>15</sup> Unless otherwise specified, this Article uses the term *creativity* to refer to this positive conception, encompassing both ordinary, everyday expressions of creativity and the more rarefied category of eminent, or Big-C, creativity.

Meanwhile, such descriptions and findings are rarely associated with crime or criminality. Unlike the plethora of sources that praise the positive effects of creativity and offer advice on how to cultivate it,<sup>16</sup> research on

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7. *The Most Popular TED Talks of All Time*, TED, <https://www.ted.com/playlists/171> [<https://perma.cc/QQD7-PKHK>].

8. *Future of Jobs Report 2023: Insight Report*, WORLD ECON. F., May 2023, at 1, 38–39, [https://www3.weforum.org/docs/WEF\\_Future\\_of\\_Jobs\\_2023.pdf](https://www3.weforum.org/docs/WEF_Future_of_Jobs_2023.pdf) [<https://perma.cc/M8JR-GCGR>].

9. *Id.*

10. Samuel J. Palmisano, *Capitalizing on Complexity: Insights from the Global Chief Executive Officer Study*, IBM, May 2010, at 1, 8, <https://www.ibm.com/downloads/cas/1VZV5X8J> [<https://perma.cc/J5HF-9RND>]; Austin Carr, *The Most Important Leadership Quality for CEOs? Creativity*, FAST CO. (May 18, 2010), <https://www.fastcompany.com/1648943/most-important-leadership-quality-ceos-creativity> [<https://perma.cc/7542-ZKPM>].

11. MARK A. RUNCO, *CREATIVITY: THEORIES AND THEMES: RESEARCH, DEVELOPMENT, AND PRACTICE* xii (2d ed. 2014).

12. Kaufman & Glăveanu, *supra* note 3, at 18. *See generally* Zorana Ivcevic & John D. Mayer, *Mapping Dimensions of Creativity in the Life-Space*, 21 *CREATIVITY RSCH. J.* 152 (2009) (exploring how creativity manifests in daily life and everyday activities).

13. *See supra* note 3 and accompanying text.

14. Kaufman & Glăveanu, *supra* note 3, at 18.

15. James C. Kaufman & Ronald A. Beghetto, *Beyond Big and Little: The Four C Model of Creativity*, 13 *REV. GEN. PSYCH.* 1, 2, 6 (2009).

16. *See, e.g.*, Emma Seppälä, *How Senior Executives Find Time to Be Creative*, *HARV. BUS. REV.* (Sep. 14, 2016), <https://hbr.org/2016/09/how-senior-executives-find-time-to-be-creative> [<https://perma.cc/A4NQ-9J24>]; KEN ROBINSON & LOU ARONICA, *CREATIVE SCHOOLS: THE GRASSROOTS REVOLUTION THAT’S TRANSFORMING EDUCATION* (2015); SCOTT D. ANTHONY, PAUL COBBAN, NATALIE PAINCHAUD

crime tends to focus on the opposite—how to reduce crime or how to decrease the likelihood that individuals will commit crimes or recidivate.<sup>17</sup> Crime is often associated with harm to individuals and society at large. One definition of *crime* provides that it is “the intentional commission of an act usually deemed socially harmful or dangerous and specifically defined, prohibited, and punishable under criminal law.”<sup>18</sup>

At first glance, creativity and crime may seem unrelated. By some measures, such as their perceived social value or associations, creativity and crime appear to be polar opposites. However, a deeper examination of the two reveals that they have much more in common than intuition or initial impressions may suggest.

First, at their core, both creativity and crime involve some form of deviance or departure “from the norm.”<sup>19</sup> Deviance that is praised is more likely to be characterized as a creative act, while deviance that is negative is more likely to be characterized as a crime. As one framework explains, creativity involves “constructive” deviance, while crime involves “destructive deviance.”<sup>20</sup> However, the line separating positive and constructive deviance from negative and destructive deviance often blurred and shifted over time.<sup>21</sup> History is replete with examples—such as the theory that the earth is not the center of the universe—that were initially branded as destructive, harmful, and even criminal but were later recast as constructive,

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& ANDY PARKER, *EAT, SLEEP, INNOVATE: HOW TO MAKE CREATIVITY AN EVERYDAY HABIT INSIDE YOUR ORGANIZATION* (2020); MATTHEW A. CRONIN & JEFFREY LOEWENSTEIN, *THE CRAFT OF CREATIVITY* (2018).

17. See, e.g., Brian Bell, Rui Costa & Stephen Machin, *Why Does Education Reduce Crime?*, 130 J. POL. ECON. 732 (2022); Aaron Chalfin, Benjamin Hansen, Jason Lerner & Lucie Parker, *Reducing Crime Through Environmental Design: Evidence from a Randomized Experiment of Street Lighting in New York City*, 38 J. QUANTITATIVE CRIMINOLOGY 127 (2022); Gabrielle Beaudry, Rongqin Yu, Amanda E. Perry & Seena Fazel, *Effectiveness of Psychological Interventions in Prison to Reduce Recidivism: A Systematic Review and Meta-Analysis of Randomised Controlled Trials*, 8 LANCET PSYCHIATRY 759 (2021); EDWARD J. LATESSA, SHELLEY L. JOHNSON & DEBORAH KOETZLE, *WHAT WORKS (AND DOESN'T) IN REDUCING RECIDIVISM* (Routledge 2d ed. 2020) (2014).

18. David A. Thomas, *Crime*, BRITANNICA (Feb. 6, 2026), <https://www.britannica.com/topic/crime-law> [<https://perma.cc/2MWX-TPRE>].

19. *Deviance*, DICTIONARY.COM, <https://www.dictionary.com/browse/deviance> [<https://perma.cc/ERY6-MVF9>]; *Deviant*, DICTIONARY.COM, <https://www.dictionary.com/browse/deviant> [<https://perma.cc/5WDJ-FY6E>]; *Deviance*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deviance> [<https://perma.cc/SD6A-UJZU>]; *Deviant*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deviant> [<https://perma.cc/V4WW-MGNF>]. While other definitions of *deviance* may carry a negative connotation, the basic form of *deviance* is used here. See, e.g., ROSS COOMBER, JOSEPH F. DONNERMEYER, KAREN MCELRATH & JOHN SCOTT, *KEY CONCEPTS IN CRIME AND SOCIETY* 3 (Chris Rojek ed., 2017) (defining *deviance* as “an attitude or action which violates the norms, values, or beliefs of the mainstream”).

20. CROPLEY & CROPLEY, *supra* note 5, at 194.

21. See *infra* Section I.A and Part II.

creative, and innovative.<sup>22</sup> Émile Durkheim, the “father figure of sociology,”<sup>23</sup> also observed the intermingling of the two. He wrote that for moral consciousness “to evolve, individual originality must be allowed to manifest itself. But so that the originality of the idealist who dreams of transcending [their] era may display itself, that of the criminal, which falls short of the age, must also be possible. One does not go without the other.”<sup>24</sup> In other words, those who fail to align with the prevailing standards of their time may be celebrated as visionaries or punished as criminals. In this sense, creativity and crime are not rigid opposites but fluid, interdependent forces that together help propel societal change.

The two are also linked by the shared traits of people who have a high tendency to engage in creative or criminal acts, such as those with an increased appetite for risk-taking.<sup>25</sup> This overlap is especially pronounced during adolescence and emerging adulthood, a developmental period generally understood to span the ages of ten to twenty-five.<sup>26</sup> These individuals are referred to as “young people” throughout this Article.

Specifically, for crime, age is not only a “consistent predictor of crime,”<sup>27</sup> but also its “strongest predictor.”<sup>28</sup> The age-crime curve, considered a “brute fact” of criminology,<sup>29</sup> generally shows that crime begins “in adolescence, increases sharply to a peak in late adolescence or early adulthood, and then plummets toward zero for the rest of the life course.”<sup>30</sup> Similarly, young people are highly inclined toward creativity—particularly

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22. Richard Brower & Jan M. Stahl, *Crime and Creativity*, in ENCYCLOPEDIA OF CREATIVITY 318, 320 (Mark A. Runco & Steven R. Pritzker eds., 2d ed. 2011). Galileo Galilei, who helped spread astronomer Nicolaus Copernicus’s theory that the earth was not the center of the universe, was criminalized for publicizing this theory. *Id.*

23. Wayne Morrison, *What Is Crime? Contrasting Definitions and Perspectives*, in CRIMINOLOGY 3, 4 (Chris Hale et al. eds, 3d ed. 2013). In the late 1800s, Émile Durkheim observed that crime is present in “all societies of all types” and that it is not only “inevitable,” but also “a factor in public health, an integrative element in any healthy society.” ÉMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 98, 99 (Steven Lukes ed., W.D. Halls trans., 1982). His theory that criminal punishment serves a useful societal function of creating social cohesion is considered a foundational theory in criminal law. *See, e.g.*, SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 43–44 (11th ed. 2022).

24. DURKHEIM, *supra* note 23, at 101.

25. *See infra* Section I.B.

26. *See supra* note 1 and accompanying text.

27. Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY 377, 393 (Kevin M. Beaver et al. eds., 2015).

28. Maureen G. Mones & Virginia G. Clegg, *Age*, in THE ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 34, 34 (Jay S. Albanese ed., 2014) (emphasis added).

29. Matt DeLisi, *Age–Crime Curve and Criminal Career Patterns*, in THE DEVELOPMENT OF CRIMINAL AND ANTISOCIAL BEHAVIOR: THEORY, RESEARCH AND PRACTICAL APPLICATIONS 51, 51 (Julien Morizot & Lila Kazemian eds., 2015).

30. *Id.*

certain forms called divergent thinking<sup>31</sup> and conceptual innovation<sup>32</sup>—and this developmental period is critical for cultivating creative capacity.<sup>33</sup> Taken together, these age-linked patterns in crime and creativity point to a deeper connection between the two. As explained below, recent findings in developmental and neuroscience research shed light on this connection. When integrated into an emerging legal framework that prioritizes young people’s developmental well-being, these insights call for meaningful reforms in law and policy affecting young people.

First, recent developmental and neuroscience research makes clear that the overlap between creativity and crime among young people is not merely coincidental, but fundamentally developmental. Traits associated with adolescence and emerging adulthood, including increased risk-taking and nonconformity, can motivate both creative and criminal behavior.<sup>34</sup> Young people’s maturing prefrontal cortex contributes to these developmental traits that are linked to both behaviors.<sup>35</sup> Moreover, this period of flexibility and heightened neuroplasticity is a crucial time for fostering young people’s creativity, which itself is essential to healthy development.<sup>36</sup>

Second, the developmental foundations of creativity and crime take on added significance when viewed through the lens of the developmental framework, an increasingly influential legal framework that applies to young people.<sup>37</sup> This framework provides that laws, regulations, and policies that

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31. Creativity tasks can be categorized into ones that require either divergent or convergent thinking. Nielsen et al., *supra* note 3, at 133. Divergent thinking is the “ability to generate a variety of associations to a word or solutions to a problem.” Sandra W. Russ & Jessica A. Dillon, *Associative Theory*, in *ENCYCLOPEDIA OF CREATIVITY*, *supra* note 22, at 66, 66. It “allows for various answers that are correct.” Nielsen et al., *supra* note 3, at 133. Meanwhile, convergent thinking generally “brings together information focused on solving a problem, especially problems that have a single correct solution.” *Id.*

32. Another way to distinguish creativity is whether it leads to conceptual or experimental innovation. Bruce A. Weinberg & David W. Galenson, *Creative Careers: The Life Cycles of Nobel Laureates in Economics*, 167 *DE ECONOMIST* 221, 221 (2019). Conceptual innovation refers to a form of innovation that relies primarily on abstract principles and out-of-the-box thinking. *Id.* Meanwhile, experimental innovation relies on inductive thinking, or knowledge that results from experience. *Id.*

33. *See infra* Section II.B.

34. *See infra* Section II.A.1.

35. *See infra* Section II.A.2.

36. *See infra* Section II.B.

37. Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 291, 299 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Scott, *Criminal Responsibility*] (using the phrase “developmental framework”); Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 *TEMP. L. REV.* 675, 678 (2016) (same).

Other terms refer to the same general idea, such as a “developmental approach” or “developmental jurisprudence.” *See, e.g.*, Emily Buss, *Kids Are Not So Different: The Path from Juvenile Exceptionalism to Prison Abolition*, 89 *U. CHI. L. REV.* 843, 843 (2022) (using “developmental approach”); Alexandra

pertain to young people should be primarily guided by developmental and neuroscience research. Such research advances young people's well-being while also promoting societal interests such as community well-being.<sup>38</sup>

While the developmental framework's most visible impact has been in reshaping legal approaches to young people's relationship to criminality,<sup>39</sup> far less attention has been paid to how the framework should also account for their creativity. This Article argues that creativity should likewise be a core consideration in applying the developmental framework. Implementing a developmental framework that prioritizes young people's creativity should drive significant changes in areas in which creativity and crime overlap and intersect, including criminal and juvenile delinquency prosecutions, punishment, and education. First, greater efforts are needed to identify and eliminate biases, especially racial and class biases, that shape whether acts are perceived as creative or criminal. Even in cases in which there is a clear divide between creativity and crime, such as violent *malum in se* crimes,<sup>40</sup> biases can lead decisionmakers to misconstrue a young person's creativity as proof of their dangerousness and likelihood of committing a crime. One striking example of this misclassification is the use of rap lyrics in criminal trials as evidence of their criminality or likelihood of having committed a criminal act. Although this practice has persisted for decades, it has recently garnered national attention through several high-profile events. These include the criminal prosecutions of rap artists Young Thug and Gunna.<sup>41</sup>

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O. Cohen, Richard J. Bonnie, Kim Taylor-Thompson & BJ Casey, *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMP. L. REV. 769, 773 (2016) (same); Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741, 741 (2016) (using "developmental jurisprudence").

Elizabeth Scott and Clare Huntington have incorporated this developmental framework as the first prong of the three-part "Child Wellbeing framework," which they argue is, and should continue to be, the main framework that guides laws, policies, and regulations that impact children. Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1377 (2020).

This Article will continue to rely on the term *developmental framework* since the arguments in this Article apply to both children (which includes adolescents) and emerging adults. The overall arguments in this Article, however, are consistent with the Child Wellbeing framework. In addition to focusing on the first part of the Child Wellbeing framework (in other words, the developmental framework), the arguments also address the remaining two parts of the Child Wellbeing framework but with a focus on adolescents and emerging adults: the (2) "convergence of adolescent [as well as emerging adults] wellbeing and social welfare" and (3) "recognition of the pernicious role of racial bias." *Id.* at 1398. A framework that covers the wellbeing of both children (which includes adolescents) and emerging adults, such as a Young Person Wellbeing Framework, or one made specifically for emerging adults, such as an Emerging Adult Wellbeing Framework, should be articulated and analyzed in the near future.

38. Huntington & Scott, *supra* note 37, at 1398.

39. *Id.* at 1436–38; Elizabeth S. Scott, *Restating the Law in a Child Wellbeing Framework*, 91 U. CHI. L. REV. 279, 282 (2024).

40. *Malum in se* means "a crime or an act that is inherently immoral, such as murder, arson, or rape." *Malum in Se*, BLACK'S LAW DICTIONARY (11th ed. 2019).

41. Deena Zaru, *Judge Rules Rap Lyrics Can 'Conditionally' Be Used As Evidence in Young Thug*

The Protect Black Art movement<sup>42</sup> and documentaries on this topic, including *As We Speak* that premiered at the 2024 Sundance Film Festival,<sup>43</sup> have spurred legislative efforts to limit the use of rap lyrics as evidence in criminal trials. This practice, along with attempts to either directly criminalize or associate criminality with other classic creative expressions like fashion and street art,<sup>44</sup> speak to a larger problem of misconstruing creativity for crime or criminality, particularly against young people of color or lower classes. Recognizing, addressing, and removing such racial and class biases is essential.

Additionally, a developmental framework that prioritizes creativity also calls for significant changes in education. While education is critical for creativity, schools are currently not providing sufficient opportunities for it, as evidenced by the “creativity crisis” amongst our young people.<sup>45</sup> Even more worrisome is the increased reliance on criminal processes and tools to control, monitor, discipline, and punish students, leading many schools to serve as pipelines to prison or model prison-like environments.<sup>46</sup> Dismantling the school-to-prison pipeline, preventing the mischaracterization of creativity as crimes or disciplinary offenses, and increasing opportunities for creativity will create a better educational environment. It will motivate young people to continue their education, which also reduces the risk that they will become entangled in the criminal system.<sup>47</sup> Creativity enables young people to engage in positive risk-

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*Trial*, ABC NEWS (Nov. 9, 2023, at 10:19 AM), <https://abcnews.go.com/US/judge-rules-rap-lyrics-conditionally-evidence-young-thug/story?id=104760646> [https://perma.cc/9Y2N-N6T5]; Bill Donahue, *Judge Rules Young Thug’s Lyrics Can Be Used in YSL RICO Case: ‘The First Amendment Is Not on Trial’*, BILLBOARD (Nov. 9, 2023), <https://www.billboard.com/business/legal/young-thug-lyrics-can-be-used-ysl-rico-case-judge-ruling-1235467208> [https://perma.cc/QS67-GGP2].

42. Deena Zaru, Ashan Singh, Tenzin Shakya & Sally Hawkins, *‘Protect Black Art’: How the Indictment of Young Thug and Gunna Sparked a Movement*, ABC NEWS (Oct. 15, 2022, at 12:39 PT), <https://abcnews.go.com/US/protect-black-art-indictment-young-thug-gunna-sparked/story?id=91395434> [https://perma.cc/XV3E-SEUN]; see also *infra* Section III.A.4.

43. Jordan Mintzer, *‘As We Speak’ Review: A Revealing Exposé on the Criminalization of Rap Lyrics*, HOLLYWOOD REP. (Jan. 22, 2024, at 16:06 PT), <https://www.hollywoodreporter.com/movies/movie-reviews/as-we-speak-review-hip-hop-lyrics-1235789411> [https://perma.cc/BJM9-5GVU]; Chris Vognar, *‘As We Speak’ Exposes the Racism Behind Criminalizing Rap Lyrics*, ROLLING STONE (Jan. 22, 2024), <https://www.rollingstone.com/tv-movies/tv-movie-reviews/as-we-speak-doc-rap-lyrics-criminalized-sundance-racism-kemba-1234951871> [https://perma.cc/9ERF-W8RW].

44. See *infra* Section II.A.

45. KYUNG HEE KIM, THE CREATIVITY CHALLENGE: HOW WE CAN RECAPTURE AMERICAN INNOVATION 13 (2016).

46. See *infra* Section IV.A.

47. See *infra* Part IV.

taking,<sup>48</sup> thus reducing their urge to engage in negative risk-taking,<sup>49</sup> such as harmful behavior that is clearly criminal.<sup>50</sup>

This focus on the overlap of creativity and crime in young people is intentional but is not meant to be exclusionary. From the outset, it is very important to recognize this period of adolescence and emerging adulthood as a distinct one. Young people suffer distinct developmental harm when their creativity is criminalized or even discouraged to avoid associations with criminality. As developmental psychologist Laurence Steinberg observed, while change is possible in all people, the period between the ages of ten and twenty-five may very well be the “last significant window of opportunity” or final “real opportunity we have to put individuals on a healthy pathway and to expect our interventions to have substantial and enduring effects.”<sup>51</sup> In other words, these changes can produce profound, long-lasting impacts that extend into the rest of young people’s lives.

However, this focus on young people and the developmental framework does not mean it is exclusionary. Rather, as with other meaningful changes in criminal law that have gained mainstream acceptance or evidence of their effectiveness through their initial implementation for youth,<sup>52</sup> one of the goals of this discussion is to pave the way for widespread changes. As a practical matter, this very population of adolescents and emerging adults make up the majority of those who commit crimes.<sup>53</sup> Accordingly, policies and practices directed at this population can generate broader systemic change if they demonstrate their effectiveness and become widely adopted.

These arguments will be addressed in the following four Parts: Part I introduces the general ties between creativity and crime. It describes the conceptual connections that scholars have observed for centuries. It also highlights the commonalities in people with heightened associations with creativity and crime, focusing on young people. Part II then examines the developmental basis that helps explain young people’s strong connections to

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48. *Positive risk-taking* is defined as risks that “carry potential costs that are mild in severity” and “are legal and socially acceptable.” Natasha Duell & Laurence Steinberg, *Positive Risk Taking in Adolescence*, 13 CHILD DEV. PERSPS. 48, 49 (2019). The authors recognized that the term *socially acceptable* can itself be controversial and here, defined it as actions that would generally be viewed as socially acceptable by adults. *Id.*

49. *See infra* notes 146–47 and accompanying text.

50. *See infra* notes 206–09 and accompanying text.

51. LAURENCE STEINBERG, *AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE* 17 (2014).

52. Examples include restorative justice processes and a decarceration model. *See, e.g.*, Lode Walgrave, *Restoration in Youth Justice*, 31 CRIME & JUST.: REV. RSCH. 543, 565–71 (2004) (discussing restorative justice); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1634 (2012) (discussing the decarceration model).

53. *See infra* Section I.C.

the two. This basis invites the application of the increasingly influential developmental framework, a legal framework that calls for developmental research to create, shape, and implement laws, policies, and regulations that affect young people. It contends that the developmental framework should prioritize young people's creativity as it is both a manifestation of their development and integral to their development. The final two Parts apply this modified developmental framework in areas in which creativity and crime overlap and coexist. Part III focuses on the prosecution and punishment of crime and offenses, and Part IV addresses the educational environment. These normative proposals will better protect and foster young people's creativity while minimizing their associations with crime and criminality. They will also pave the way for broader systemic reform.

### I. THE TIES BETWEEN CREATIVITY AND CRIME

Creativity and crime overlap and intersect in meaningful ways. While each concept retains unique features, they also share a significant zone of overlap. This shared space consists of a common core of deviance, an essential role in driving societal progress, and a heightened manifestation in certain people, particularly young people.

#### A. GENERAL SIMILARITIES

Creativity and crime are conceptually linked. First, they share a common core of deviance.<sup>54</sup> “All creativity involves products that deviate from the norm, processes that also involve deviation—both in thought and action . . . .”<sup>55</sup> Similarly, crime also involves deviance from established societal standards. Crime and deviance are often theorized together and defined in relation to one another.<sup>56</sup> For example, one definition of *crime* provides that it is “deviance which violates a law.”<sup>57</sup> It is then the type and form of deviance—constructive versus destructive,<sup>58</sup> beneficial versus harmful—that distinguish the two.

If we were to imagine these concepts along a “deviance” spectrum with creativity at one end and crime or criminality at the other, there would be certain acts of deviance for which it is self-evident whether the act is constructive or destructive, creative or criminal. For instance, acts that are

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54. See *supra* note 19.

55. CROPLEY & CROPLEY, *supra* note 5, at 137 (emphasis added).

56. See, e.g., DAVID DOWNES, PAUL ROCK & EUGENE MCLAUGHLIN, UNDERSTANDING DEVIANCE: A GUIDE TO THE SOCIOLOGY OF CRIME AND RULE-BREAKING 1–20 (7th ed. 2016).

57. COOMBER ET AL., *supra* note 19, at 3. *Deviance*, here, is defined as “an attitude or action which violates the norms, values, or beliefs of the mainstream.” *Id.*

58. CROPLEY & CROPLEY, *supra* note 5, at 150.

classified as *malum in se*—“inherently immoral, such as murder, arson, or rape”<sup>59</sup>—are universally viewed as harmful, destructive, and criminal. The criminal and destructive nature of these acts persists even when they are accomplished in a “creative” manner, meaning in an original and useful way. Conversely, acts such as music, literature, art, or film generally fall on the creative end of the spectrum.

However, for other acts of deviance that fall in the middle of this spectrum, the distinction becomes less clear and determining whether an act should be labeled primarily as criminal or creative can be ambiguous and left primarily to the discretion of decisionmakers. Moreover, for certain acts, society’s characterization of the type of deviance (criminal or creative) can change drastically over time, reflecting society’s differing judgments.<sup>60</sup> What was once considered criminal behavior may move closer to or fall squarely within the creative end of the spectrum, reflecting changing historical, cultural, and social views. This is especially evident when considering how both creativity and crime play an important role in societal progress and advancement.

That creativity is necessary for societal innovation and development is uncontroversial. *Innovation* itself means the “actual implementation and execution of creative ideas.”<sup>61</sup> As creativity scholar Arthur J. Cropley observed, societies around the world and throughout history highly regarded creativity as crucial for societal advancement.<sup>62</sup> For instance, Chinese Emperor Han Wudi, whose empire lasted until 87 BCE, rewarded “innovative thinkers” with “high rank in the civil service.”<sup>63</sup> Similarly, “founders of modern science” like Francis Bacon and René Descartes from the sixteenth and seventeenth century recognized the necessity of “scientific creativity” for societal progress.<sup>64</sup>

A more provocative theory, however, is that crime also promotes societal progress. Yet this theory too dates back centuries. Durkheim observed in the nineteenth century that “crime itself may play a useful part

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59. *Malum in Se*, BLACK’S LAW DICTIONARY (11th ed. 2019).

60. Morrison, *supra* note 23, at 3–20.

61. Hannah Kremer, Isabel Villamor & Herman Aguinis, *Innovation Leadership: Best-Practice Recommendations for Promoting Employee Creativity, Voice, and Knowledge Sharing*, 62 BUS. HORIZONS 65, 66 (2019) (defining *creativity* as “the generation of novel and useful ideas or solutions to problems” and *innovation* as the “implementation” of these ideas); SIR KEN ROBINSON, *OUT OF OUR MINDS: THE POWER OF BEING CREATIVE 2* (3d ed. 2017) (defining *creativity* as “the process of developing original ideas that have value” and *innovation* as “the process of putting new ideas into practice”).

62. Arthur J. Cropley, *The Dark Side of Creativity: What Is It?*, in *THE DARK SIDE OF CREATIVITY*, *supra* note 4, at 1, 3.

63. *Id.*

64. *Id.*

in [the] evolution” of moral consciousness in a society.<sup>65</sup> “Not only does it imply that the way to necessary changes remains open, but in certain cases it also directly prepares for these changes.”<sup>66</sup> Durkheim illustrated this point through Socrates, who, living under the applicable Athenian law, was “just[ly]” punished as a criminal for his “independence of thought.”<sup>67</sup> However, over time, it became clear that Socrates’s “crime” was one of necessary creativity and innovation, proving “useful not only for humanity but for his country” as “[i]t served to prepare a way for a new morality and a new faith” for the Athenians.<sup>68</sup> Similarly, Galileo Galilei was labeled a criminal in the sixteenth century for publishing and disseminating the theory that the earth was not the center of the universe.<sup>69</sup> For these acts, he was placed under house arrest for approximately ten years until his death.<sup>70</sup> Over time, however, the “criminal” characterization of these acts shifted and were later recognized as necessary creative and innovative contributions.

Events from the United States also support the theory that crime prompts societal progress and may later be recognized as innovative acts. The civil rights movement, which propelled the United States toward a more just and equal society, was sparked by acts that were criminalized at the time. In March 1955, a fifteen-year-old teenager named Claudette Colvin refused to give up her bus seat to White passengers. As a result, she was arrested, charged with “assault and battery, disorderly conduct and defying the segregation law,” and confined in an adult jail.<sup>71</sup> While there had been similar incidents of Black individuals refusing to give up their seats before this incident—although it does not appear that Colvin was aware of them— “[w]hat was without precedent, though, is Colvin wanted to get a lawyer and she wanted to fight.”<sup>72</sup> Yet while she sought to challenge the underlying laws,<sup>73</sup> the leaders of the Black community chose to wait for another person who would be less controversial, given Colvin’s “mouthy, emotional and feisty” attitude and her eventual out-of-wedlock pregnancy.<sup>74</sup> This occurred nine months later when Rosa Parks—who, as secretary of the NAACP, was

65. DURKHEIM, *supra* note 23, at 102.

66. *Id.*

67. *Id.*

68. *Id.*

69. Brower & Stahl, *supra* note 22, at 320.

70. *Id.*

71. RADIO DIARIES: *Before Rosa Parks, a Teenager Defied Segregation on an Alabama Bus* (NPR, Mar. 2, 2015, at 18:13 ET), <https://www.npr.org/sections/codeswitch/2015/02/27/389563788> [<https://perma.cc/3W5B-FZ8Y>].

72. *Id.*

73. *Id.*

74. Brooks Barnes, *From Footnote to Fame in Civil Rights History*, N.Y. TIMES (Nov. 25, 2009) (internal quotation marks omitted), <https://www.nytimes.com/2009/11/26/books/26colvin.html> [<https://web.archive.org/web/20251102175906/https://www.nytimes.com/2009/11/26/books/26colvin.html>].

well aware of Colvin's act—refused to give up her seat.<sup>75</sup> That refusal officially initiated the Montgomery bus boycott, a “formative turning point of the twentieth century.”<sup>76</sup> Colvin, meanwhile, eventually joined a federal lawsuit as one of the four plaintiffs that ended the segregation of buses.<sup>77</sup>

Similarly, on February 1, 1960, four college freshmen from Greensboro, North Carolina—“Ezell Blair, Jr. (now Jibreel Khazan), David Richmond, Franklin McCain and Joseph McNeil”—sat at a Woolworth counter designated for White patrons and attempted to order lunch.<sup>78</sup> They were denied service, heckled, and harassed, but refused to leave, even when the police arrived.<sup>79</sup> The store manager eventually closed the store early to make everyone leave, including the “Greensboro Four.”<sup>80</sup> This highly publicized act inspired sit-ins across the South, with more than fifty students eventually arrested.<sup>81</sup> The student-led activism that swept across the country was pivotal to the civil rights movement.<sup>82</sup> These acts defied the laws and societal norms of segregation in the 1950s and 1960s.

While these acts were described widely at the time as crimes and disobedience, they are now better understood as creative and innovative acts—acts of originality that created substantial progress in society. These then-deviant acts challenged and helped dismantle the existing racial hierarchies in the United States. Consistent with Durkheim's observations, they illustrate how creativity and crime coexist and how the characterization of certain acts may themselves morph from one to the other over time. The boundary that separates the two is fragile, movable, and at times, arbitrarily drawn.

Lastly, the ties between creativity and crime also appear in fundamental theories and frameworks about creativity such as the “four primary categories,” or 4Ps, of creativity—person, product, process, and press (environment).<sup>83</sup> Creativity scholars David H. Cropley and Arthur J. Cropley

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75. *Id.*

76. UNIV. N.C. PRESS, *DAYBREAK OF FREEDOM: THE MONTGOMERY BUS BOYCOTT* xi (Stewart Burns ed., 1997).

77. *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd*, 352 U.S. 903 (1956) (per curiam); *Browder v. Gayle (1956)*, SUP. CT. HIST. SOC'Y, <https://civics.supremecourthistory.org/article/browder-v-gayle> [<https://perma.cc/4FZA-NPVN>].

78. *February One: The Story of the Greensboro Four*, PBS: INDEP. LENS, <https://www.pbs.org/independentlens/documentaries/februaryone> [<https://perma.cc/HC2V-NQNC>].

79. *Id.*

80. Nadra Kareem Nittle, *How the Greensboro Four Sit-In Sparked a Movement*, HIST. (Jan. 27, 2026), <https://www.history.com/news/greensboro-four-sit-in-civil-rights> [<https://perma.cc/B9T9-G65K>].

81. *Id.*

82. *Id.*

83. The 4Ps “are focused on the way that an individual creates” and consist of “Person, Product, Process, and Press (i.e., environment).” Kaufman & Glăveanu, *supra* note 3, at 18. Each P corresponds

slightly revised the 4Ps to illustrate how there is much overlap in people engaging in benevolent forms of creativity, referred to as “creatives,” and malevolent forms of creativity, referred to as “resourceful criminals.” Both groups of people share similar processes, personal properties, personal motivations, and personal feelings.<sup>84</sup> For example, regarding their “personal properties,” both display “openness”; “flexibility”; “lack of inhibition”; and “non-conformity.”<sup>85</sup> While the Cropleys acknowledged that meaningful differences exist between creativity and crime,<sup>86</sup> the two are not so distinct that they repel each other like oil and water. To the contrary, even if their similarities are often overshadowed by the largely positive field of creativity research, the study of their overlap is considered a well-established subfield of creativity.<sup>87</sup> For example, “malevolent creativity” refers to deliberately creative acts that are intended to benefit the wrongdoers but harm or destroy others, such as terrorism, war, and abuse.<sup>88</sup> “Creative crimes” are those in which individuals use novel means to “achieve statutorily prohibited goals.”<sup>89</sup> Also, creativity can facilitate or enhance criminal behavior, such as fraud or deceit.<sup>90</sup>

Various scholars throughout the centuries have recognized the overlap between creativity and crime. They share a common core of deviance, play a necessary role in societal progress, and can shift from one to the other over time. History is replete with acts that were previously criminalized but later recharacterized as essential creative and innovative acts that advanced society. Creativity and crime coexist and overlap in meaningful ways.

#### B. THE OVERLAP IN YOUNG PEOPLE

Creativity and crime are also connected by the types of people who have a higher tendency to engage in creative acts and criminal acts. The similarities have led researchers to explore potential root causes or shared traits that prompt both types of behavior. For example, Hans J. Eysenck’s

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to the following questions: “What type of person is creative? What is considered to be creative? How do we create? How does the environment shape creativity?” *Id.*

84. CROPLEY & CROPLEY, *supra* note 5, at 150.

85. *Id.*

86. David H. Cropley and Arthur J. Cropley also noted differences between the two traits using the foundational 4P’s framework of creativity. For example, the “person” is different—those who engage in positive creativity have “high empathy,” while those who engage in criminal behavior have “low empathy.” *Id.* Regarding the product, positive creativity involves an end result that is “socially” and “morally responsible,” while crime involves a product that is “socially irresponsible” and “morally valueless.” *Id.*

87. *Id.* at 137 (citing research from the 1970s to 2000s).

88. *Id.* at 15; David H. Cropley, James C. Kaufman & Arthur J. Cropley, *Malevolent Creativity: A Functional Model of Creativity in Terrorism and Crime*, 20 CREATIVITY RSCH. J. 105, 106 (2008).

89. CROPLEY & CROPLEY, *supra* note 5, at 5.

90. *Id.* at 160.

arousal theory posits that there is a “common biological origin” for creativity and criminality, claiming that individuals with low arousability have a need to engage in behavior that is “impulsive, risk-taking and sensation-seeking . . . in order to raise their arousal to a comfortable level.”<sup>91</sup> Scholars have also independently observed that young people—adolescents and emerging adults—demonstrate heightened tendencies toward creativity and crime.

First, young people are strongly associated with crime and criminality. They are more likely to commit crimes than any other age group. For centuries, criminologists have recognized a correlation between adolescents and emerging adults, and criminal behavior.<sup>92</sup> Age—more so than any other factor such as gender, race, or ethnicity—has been identified as the “strongest”<sup>93</sup> and most “consistent predictor”<sup>94</sup> of crime. Crime generally begins in one’s adolescence, “increases sharply to a peak in late adolescence or early adulthood,” and then falls “toward zero” for one’s remaining life.<sup>95</sup> The height of criminal activity takes place between the ages of sixteen and twenty-four.<sup>96</sup> This phenomenon is captured by the age-crime curve, which has been described as a “brute fact” of criminology.<sup>97</sup>

These connections between crime and young people have been observed for nearly 200 years across different cultures. In the 1830s, Belgian astrologer, sociologist, and mathematician Adolphe Quetelet was the first to formally document this relationship between youthfulness and crime.<sup>98</sup> Modern crime statistics in the United States continue to support the persistence of the age-crime curve.<sup>99</sup> While there are secondary debates about this age-crime correlation, such as its causes<sup>100</sup> and slight variances in the data,<sup>101</sup> the connection between youth and criminality is strong and widely accepted.

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91. *Id.* at 154.

92. Ulmer & Steffensmeier, *supra* note 27, at 377–78.

93. Mones & Clegg, *supra* note 28, at 34.

94. Ulmer & Steffensmeier, *supra* note 27, at 393.

95. DeLisi, *supra* note 29, at 51.

96. Mones & Clegg, *supra* note 28, at 34.

97. DeLisi, *supra* note 29, at 51.

98. Ulmer & Steffensmeier, *supra* note 27, at 377.

99. Elizabeth P. Shulman, Laurence D. Steinberg & Alex R. Piquero, *The Age–Crime Curve in Adolescence and Early Adulthood Is Not Due to Age Differences in Economic Status*, 42 J. YOUTH & ADOLESCENCE 848, 848–50, 854–56 (2013); Mones & Clegg, *supra* note 28, at 34; Ulmer & Steffensmeier, *supra* note 27, at 377–78.

100. Ulmer & Steffensmeier, *supra* note 27, at 379–80.

101. DeLisi, *supra* note 29, at 59; *From Youth Justice Involvement to Young Adult Offending*, NAT’L INST. JUST. (Mar. 10, 2014), <https://nij.ojp.gov/topics/articles/youth-justice-involvement-young-adult-offending#reports> [<https://perma.cc/DWR5-JKTY>].

Young people are also strongly associated with creativity. Adolescents and emerging adults are noticeably adept at engaging in creative acts, particularly those involving divergent thinking and conceptual innovation. Moreover, this period of adolescence and emerging adulthood is crucial for developing creativity.

The age-distribution curve observed in criminal behavior is also present in certain creative fields. Researcher Satoshi Kanazawa found that the age distribution of renowned creative jazz musicians, painters, and authors—whom he referred to as “geniuses”—was very similar to the age-crime curve.<sup>102</sup> Both curves have a similar form—they rapidly rise during adolescence, peak in early adulthood, and then quickly decline by midlife.<sup>103</sup> The “age-genius” curve, however, peaked later than the age-crime curve, likely due to the fact that the genius curve required “special talent” or responses to “evolutionarily novel stimuli and situations.”<sup>104</sup> This correlation between two sets of data—“age and creativity/crime” and “marriage and creativity/crime”—suggests that creativity and criminality may be driven by the same underlying urge to “gain status and power in order to increase success” in producing offspring.<sup>105</sup>

While Kanazawa’s study focused on young men, creativity researchers have found no evidence of gender differences in creativity tests.<sup>106</sup> To the extent that there are observable differences in the real world, they are “due to environmental and interactional factors, such as gender discrimination in education and employment, and require an explanation at the sociocultural rather than the individual level.”<sup>107</sup>

Recent research also found that the peak timeframe for conceptual innovation occurs during one’s youth. Economists Bruce A. Weinberg and David W. Galenson found that among Nobel Prize laureates in economics, “the probability of a single best year” for conceptual innovation “peak[ed] at age 24.8.”<sup>108</sup> Conceptual innovators are those who “work deductively,

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102. Satoshi Kanazawa, *Why Productivity Fades with Age: The Crime-Genius Connection*, 37 J. RSCH. PERSONALITY 257, 257–63 (2003).

103. *Id.* at 259–64.

104. *Id.* at 265–66.

105. CROPLEY & CROPLEY, *supra* note 5, at 152–53. In addition to age, Satoshi Kanazawa also observed that marriage has a “strong desistance effect” on both crime and creative productivity. *Id.* at 153.

106. R. KEITH SAWYER & DANAH HENRIKSEN, *EXPLAINING CREATIVITY: THE SCIENCE OF HUMAN INNOVATION* 69, 75 (3d ed. 2024).

107. *Id.*

108. Weinberg & Galenson, *supra* note 32, at 221, 237. This curve also peaks later than the age-crime curve and may be explained by the additional training that creativity requires. *See, e.g., supra* notes 102–05 and accompanying text.

applying abstract principles.”<sup>109</sup> They “‘think outside the box,’ challenging conventional wisdom and . . . come up with new ideas suddenly.”<sup>110</sup> Meanwhile, “experimental innovators,” or those who “work inductively, accumulating knowledge from experience,” tended to be those in their mid-fifties.<sup>111</sup>

Another study—the first to use an algorithmic approach to assess participants’ ability to “produce configurations of high algorithmic randomness”—found that those who had the highest ability to do so peaked at age twenty-five.<sup>112</sup> Researchers here utilized a “continuous age range” and tested 3,400 individuals from ages 4 to 91.<sup>113</sup> This skill in creating and recognizing randomness is linked to higher creativity since creativity itself depends on “develop[ing] new approaches and test[ing] different outcomes.”<sup>114</sup>

Moreover, while some creativity researchers maintain that creativity is a skill that can be developed throughout one’s lifespan, young people continue to show distinct ties to creativity. In addition to their strength in conceptual innovation and their ability to make random connections, they are also more prone to divergent thinking, defined as the “ability to generate a variety of associations to a word or solutions to a problem.”<sup>115</sup> Divergent thinking is also viewed as a more reliable “measure[] of creative behavior.”<sup>116</sup> Studies show a notable decline in divergent thinking starting in one’s thirties.<sup>117</sup> Others identify this time period, particularly “[m]id-to late adolescence (15–20 years) and early adulthood (20–30 years),” as an “important time” for developing divergent thinking skills.<sup>118</sup> In general, this “period of increased potential for flexible thinking”<sup>119</sup> makes it an ideal

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109. Weinberg & Galenson, *supra* note 32, at 221.

110. Jeff Grabmeier, *Creativity Is Not Just for the Young, Study Finds*, OHIO ST. U.: OHIO ST. NEWS (Apr. 26, 2019), <https://news.osu.edu/creativity-is-not-just-for-the-young-study-finds> [<https://perma.cc/L4LA-BK6U>].

111. Weinberg & Galenson, *supra* note 32, at 221.

112. Nicolas Gauvrit, Hector Zenil, Fernando Soler-Toscano, Jean-Paul Delahaye & Peter Brugger, *Human Behavioral Complexity Peaks at Age 25*, PLOS COMPUTATIONAL BIOLOGY, Apr. 13, 2017, at 1, 3; see also Jordana Cepelewicz, *Our Ability to Keep ‘Em Guessing Peaks Around Age 25*, SCI. AM. (Apr. 14, 2017), <https://www.scientificamerican.com/article/our-ability-to-keep-em-guessing-peaks-around-age-251> [<https://perma.cc/R478-M2VU>].

113. Cepelewicz, *supra* note 112.

114. *Id.*

115. Russ & Dillon, *supra* note 31, at 66.

116. KENNETH J. GILHOOLY & MARY L.M. GILHOOLY, *AGING AND CREATIVITY* 72 (2021).

117. *Id.*

118. Janna Cousijn, P. Cédric M.P. Koolschijn, Kiki Zanolie, Sietske W. Kleibeuker & Eveline A. Crone, *The Relation Between Gray Matter Morphology and Divergent Thinking in Adolescents and Young Adults*, PLOS ONE, Dec. 16, 2014, at 1, 2.

119. Sietske W. Kleibeuker, Claire E. Stevenson, Laura van der Aar, Sandy Overgaauw, Anna C. van Duijvenvoorde & Eveline A. Crone, *Training in the Adolescent Brain: An fMRI Training Study on*

period to foster creativity. The “interests, preferences, and leisure activities” that young people engage in during their childhood or adolescence are strong predictors of “later creative productivity.”<sup>120</sup>

Furthermore, young people are more likely than other age groups to view themselves as creative. A recent survey of all generations found that those in the “Gen Z” generation (aged thirteen to twenty-three years) were the most likely to “consider themselves creative.”<sup>121</sup> More than half of those in that generation, or 56% of respondents, saw themselves as creative.<sup>122</sup> In another study, researchers observed a growth in creative self-efficacy and creative personal identity for people during late adolescence and early adulthood, and a decline in older adults.<sup>123</sup> This self-perception regarding one’s ability to be creative is important because “creative self-efficacy [has] well-established links to creativity.”<sup>124</sup>

Also, young people’s creativity is apparent in the real world. Stories permeate our culture of Big-C creatives who, during their adolescence or emerging adulthood, changed trajectories in the arts, technology, or daily life. For example, while deejaying his first block party in the Bronx, sixteen-year-old DJ Kool Herc (Clive Campbell) introduced a style of music that many now recognize as the birth of hip-hop.<sup>125</sup> Beyoncé, Rihanna, and Taylor Swift each signed their first recording contracts at age fifteen.<sup>126</sup> Major tech companies like Facebook, Tumblr, and Bumble were all founded by nineteen-year-olds; Snapchat and Twitter were created by those in their early twenties.<sup>127</sup> At twenty-one years of age, Steve Jobs and Steve Wozniak

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*Divergent Thinking*, 53 DEVELOPMENTAL PSYCH. 353, 353 (2017).

120. Karen D. Arnold, Rena F. Subotnik & Michael Ross, *Longitudinal Studies*, in ENCYCLOPEDIA OF CREATIVITY, *supra* note 22, at 62, 64.

121. Khrysgiana Pineda, *Generation Create? Gen Z Might Be the Most Creative Generation Yet, Poll Says*, USA TODAY (Aug. 18, 2020, at 13:52 ET), <https://www.usatoday.com/story/news/nation/2020/08/18/generation-z-may-most-creative-yet-study-says/5589601002> [<https://perma.cc/572P-SCY6>].

122. *Id.*

123. Maciej Karwowski, *The Dynamics of Creative Self-Concept: Changes and Reciprocal Relations Between Creative Self-Efficacy and Creative Personal Identity*, 28 CREATIVITY RSCH. J. 99, 99, 103 (2016).

124. Kim van Broekhoven, David Cropley & Philipp Seegers, *Differences in Creativity Across Art and STEM Students: We Are More Alike Than Unalike*, THINKING SKILLS & CREATIVITY, Aug. 13, 2020, at 1, 11.

125. *DJ Kool Herc (Clive Campbell)*, ASK.HIPHOP: HIP HOP HIST. (June 24, 2019), <https://history.hiphop/dj-kool> [<https://perma.cc/89VG-MGGX>].

126. *Beyoncé*, BRITANNICA (Feb. 23, 2026), <https://www.britannica.com/biography/Beyonce#ref937618> [<https://perma.cc/M2JX-7NTW>]; *Beyoncé*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Beyonc%C3%A9> [<https://perma.cc/UG5N-W7DA>]; *Rihanna*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Rihanna> [<https://perma.cc/GLR9-6B4L>]; *Taylor Swift*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Taylor\\_Swift](https://en.wikipedia.org/wiki/Taylor_Swift) [<https://perma.cc/XG4V-EBZH>].

127. Evan Spiegel was twenty-two years old when he founded Snapchat, and Jack Dorsey was twenty-three years old when he founded Twitter. Paige Leskin, *Bill Gates, Mark Zuckerberg, and Jeff Bezos: Here’s How Old the Founders of 23 Tech Giants Were When They Started Their First Companies*,

co-founded Apple.<sup>128</sup> Larry Page and Sergey Brin were twenty-five when they created Google.<sup>129</sup> Even Galileo's early scientific discoveries, such as the law of the pendulum, originated from his observations of a swinging lamp at a cathedral when he was just nineteen years old.<sup>130</sup>

In summary, researchers have identified young people's strong associations with creativity through an age-creativity curve, as well as an adeptness at conceptual innovation and divergent thinking. They have also identified this period of adolescence and emerging adulthood as a critical one for developing one's creativity. Real-life examples of young people's Big-C creative acts, as well as their elevated self-assessment of their creativity, provide further evidence of these strong associations. These ties are consistent with the long-established associations between young people and crime.

As the next Part explains, these heightened connections are not merely coincidental. Rather, they are largely developmental. Recognizing the underlying developmental basis for young people's tendencies toward creativity and crime is significant because it invites the application of the developmental framework, an increasingly influential legal framework that prioritizes the development of young people in laws, policies, and regulations that affect them.

## II. THE RELEVANCE OF THE DEVELOPMENTAL FRAMEWORK

The heightened associations between youthfulness and crime, and youthfulness and creativity, do not appear to be mere coincidences or random occurrences. Instead, recent research on young people's developmental traits and brain development shows that this phenomenon is largely developmental. That developmental and neuroscience research explains the shared basis for creativity and crime in young people is itself noteworthy. However, this understanding takes on even greater significance in the present age as the growing influence of the developmental framework encourages

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BUS. INSIDER (Feb. 27, 2020, at 08:45 PT), <https://www.businessinsider.com/ages-of-tech-founders-when-they-started-their-first-companies-2019-4> [<https://web.archive.org/web/20251027210002/https://www.businessinsider.com/ages-of-tech-founders-when-they-started-their-first-companies-2019-4#tesla-founder-elon-musk-age-24-1>].

128. *Apple's Steve Jobs: An Extraordinary Career*, ENTREPRENEUR, <https://www.entrepreneur.com/growing-a-business/who-was-steve-jobs-see-the-apple-founders-career-and-more/197538> [<https://web.archive.org/web/20251027204842/https://www.entrepreneur.com/growing-a-business/who-was-steve-jobs-see-the-apple-founders-career-and-more/197538>]; Sean Peek, *Steve Jobs Biography*, BUS. NEWS DAILY (Aug. 23, 2024), <https://www.businessnewsdaily.com/4195-business-profile-steve-jobs.html> [<https://perma.cc/UTC7-UL4J>].

129. Leskin, *supra* note 127.

130. Brower & Stahl, *supra* note 22, at 320.

the incorporation of such findings into laws, regulations, and policies that impact young people.

This Part begins by explaining the developmental basis for young people's strong associations with creativity and crime. It then explains how creativity is not only an expression of their development but also necessary for their healthy development. It then concludes by explaining the developmental framework, detailing both its origins and evolution, and arguing that creativity should be prioritized in this framework as it is vital for young people's developmental well-being.

#### A. DEVELOPMENTAL BASIS FOR CREATIVITY AND CRIME

The idea that creativity and crime may have a shared origin is not entirely new.<sup>131</sup> However, recent research sheds light on why young people in particular have stronger inclinations toward creativity and crime. Adolescents and emerging adults share a common developmental basis for their heightened connections to criminal and creative behavior. This consists of young people's general developmental traits, including their brain development.

First, the stages of adolescence and emerging adulthood are marked by traits that are linked to both criminal and creative behavior, including increased risk-taking as well as nonconforming behavior, especially toward authority figures.<sup>132</sup> Adolescents generally have "heightened sensation seeking and still-maturing impulse control, as well as a greater willingness to take risks."<sup>133</sup> This is not limited to just American adolescents but applies to adolescents worldwide. Steinberg—whose research played a pivotal role in the Supreme Court's landmark cases that ushered in the developmental framework for young people<sup>134</sup>—conducted a cross-national study of adolescents, including in the United States, "China, Colombia, Cyprus, India, Italy, Jordan, Kenya, the Philippines, Sweden, and Thailand."<sup>135</sup> Steinberg found that all adolescents engaged in risky behavior and were developing their impulse control.<sup>136</sup> However, the specific forms of risk-taking varied as "different countries [gave] young people differing levels of

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131. See *supra* notes 84–85, 89 and accompanying text.

132. STEINBERG, *supra* note 51, at 84. *Risk-taking* is "defined as involving actions taken when the consequences or probabilities of outcomes are unknown or only partially known." Veena P. Prabhu, *Risk-Taking*, in *ENCYCLOPEDIA OF CREATIVITY*, *supra* note 22, at 319, 319.

133. STEINBERG, *supra* note 51, at 84.

134. See, e.g., *Miller v. Alabama*, 567 U.S. 460, 471 (2012); *Roper v. Simmons*, 543 U.S. 551, 569, 570, 573 (2005); *infra* Section II.C.

135. STEINBERG, *supra* note 51, at 84.

136. *Id.*

opportunity to try risky behaviors.”<sup>137</sup> For instance, in Jordan, where access to alcohol is highly restricted, adolescent-drinking rates remained low, but other risky behavior that was more accessible, like smoking, rose sharply during adolescence.<sup>138</sup> These findings suggest that while risky behavior may manifest in various ways, “the underlying inclinations that lead adolescents to take risks appear to be universal.”<sup>139</sup>

Emerging adults are also more likely to engage in risky, nonconforming behavior. Until around age twenty-five, emerging adults are “still developing the capacity to rein in their impulses, emotions, and susceptibility to peers, which explains why so many risky behaviors—like crime, binge drinking, reckless driving, and unsafe sex—peak during this stage, and why so much of this risky behavior occurs in groups,”<sup>140</sup> as they remain inclined to peer pressure.<sup>141</sup> The similarities between adolescence and emerging adulthood are so strong that Steinberg labeled the entire age range from ages ten to twenty-five as adolescence,<sup>142</sup> with the period from nineteen to twenty-five referred to as “late adolescence and the transition to adulthood” or “young adulthood.”<sup>143</sup> Many other scholars refer to the stage of eighteen to twenty-five years old as emerging adulthood.<sup>144</sup>

These developmental traits of heightened risk-taking and nonconforming behavior against authority contribute to both crime and creativity. When it comes to crime, researchers have observed that both adolescents and emerging adults are more likely to commit criminal acts due to their developmental traits, such as risk-taking and nonconformity.<sup>145</sup> Similarly, creativity also “involves taking chances and risks.”<sup>146</sup> In essence, “[r]isk taking is a distinguishing factor of creative individuals—they are not afraid of the unknown—in fact it is the unknown that arouses their curiosity.”<sup>147</sup> Risk-taking and creativity “share a common domain of factors

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137. *Id.*

138. *Id.*

139. *Id.*

140. LAURENCE STEINBERG, *YOU AND YOUR ADULT CHILD: HOW TO GROW TOGETHER IN CHALLENGING TIMES* 7 (2023).

141. Lael E.H. Chester, Ruth T. Shefner & Vincent Schiraldi, *Emerging Adult Justice: America's Recent Attempts to Apply Research to Policies and Practices*, *CRIM. JUST.*, Winter 2024, at 17, 17–18.

142. STEINBERG, *supra* note 1, at 5, 17, 84.

143. *Id.* at 9, 18.

144. *See supra* note 1 and accompanying text; Chester et al., *supra* note 141, at 17–18.

145. Chester et al., *supra* note 141, at 17–18; STEINBERG, *supra* note 140, at 7.

146. Prabhu, *supra* note 132, at 319.

147. *Id.* at 322.

that affect them,”<sup>148</sup> including the traits of “open-minded[ness],” “curious[ity],” “courage,” “out-of-box thinking,” “attract[ion] to complexity,” and “non-conforming behavior.”<sup>149</sup>

Second, young people’s brain development also helps to explain their inclinations toward creativity and crime. Neuroscience research shows that young people’s ongoing brain growth plays a critical role in shaping their developmental traits described above.<sup>150</sup> The prefrontal cortex, responsible for various executive functions like self-regulation and self-control,<sup>151</sup> continues to develop until around age twenty-five.<sup>152</sup>

Scholars and courts have explicitly recognized the underdeveloped prefrontal cortex as a reason why adolescents and emerging adults are more prone to criminal behavior than other age groups,<sup>153</sup> thus making them less culpable for crimes and having a greater capacity for change.<sup>154</sup>

Similarly, foundational research in creativity and neuroscience also reveals that creativity is associated with the suppression of the brain’s dorsolateral prefrontal cortex region,<sup>155</sup> which is responsible for “planning, inhibition, and self-censorship.”<sup>156</sup> While studies also show that brain activity for creativity involves multiple regions of the brain, this specific area in the prefrontal cortex continues to be associated with creative activity and thought.<sup>157</sup> Suppression of this region appears to lead to greater creative

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148. *Id.* at 319.

149. *Id.* at 320.

150. STEINBERG, *supra* note 51, at 69–71.

151. *Id.* at 70.

152. Mariam Arain, Maliha Haque, Lina Johal, Puja Mathur, Wynand Nel, Afsha Rais, Ranbir Sandhu & Sushil Sharma, *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 451–54 (2013); Lael E.H. Chester & Rachel Barkin, *New Responses Emerge on 18- to 25-Year Olds Who Commit Crimes*, IMPRINT (Jan. 20, 2022, at 06:00 PT), <https://imprintnews.org/opinion/new-responses-emerge-on-18-to-25-year-olds-who-commit-crimes/62074> [<https://perma.cc/39ZT-3HDL>].

153. Arain et al., *supra* note 152, at 451–54; Chester & Barkin, *supra* note 152; Buss, *supra* note 37, at 742–43.

154. See, e.g., Scott, *Criminal Responsibility*, *supra* note 37, at 292; Esther K. Hong, *A Reexamination of the Parens Patriae Power*, 88 TENN. L. REV. 277, 291–92 (2021).

155. Kylah Goodfellow Klinge, *Mapping Creativity in the Brain*, ATL. (Mar. 21, 2016), <https://www.theatlantic.com/science/archive/2016/03/the-driving-principles-behind-creativity/474621> [<https://perma.cc/YWA9-A7C4>]; Oshin Vartanian, *Neuroscience of Creativity*, in CREATIVITY: AN INTRODUCTION, *supra* note 3, at 84, 90–92.

156. Klinge, *supra* note 155.

157. *Id.*; see also Caroline Di Bernardi Luft, Ioanna Zioga, Michael J. Banissy & Joydeep Bhattacharya, *Relaxing Learned Constraints Through Cathodal tDCS on the Left Dorsolateral Prefrontal Cortex*, SCI. REPS., June 7, 2017, at 1, 6; Nicola Davis, *Suppressing the Reasoning Part of the Brain Stimulates Creativity, Scientists Find*, GUARDIAN (June 7, 2017, at 12:27 ET), <https://www.theguardian.com/science/2017/jun/07/thinking-caps-on-electrical-currents-boost-creative-problem-solving-study-finds> [<https://perma.cc/AP3V-VZ5A>].

activity.<sup>158</sup> It is therefore unsurprising that adolescence and emerging adulthood—when the prefrontal cortex is still not fully developed—is such a critical period for creativity.

In sum, creativity and criminality in young people stem from their developmental traits, including their ongoing brain development. However, of the two, creativity is also identified as essential for healthy development.

#### B. YOUNG PEOPLE’S DEVELOPMENTAL NEED FOR CREATIVITY

While creativity and criminality stem from similar developmental traits and brain development, creativity is essential for healthy development in adolescents and emerging adults. The need to prioritize creativity is even more urgent in light of what scholars have called a “creativity crisis” among youth in the United States.<sup>159</sup> Kyung Hee Kim found that young people’s creative thinking skills have “significantly decreased” since the 1990s.<sup>160</sup> She analyzed over 270,000 results from the Torrance Test of Creative Thinking—the “most commonly used creativity test”<sup>161</sup>—that kindergarteners to twelfth graders took from 1966 to 2008.<sup>162</sup> Her research revealed that there was a “steady and persistent” decline in creative thinking scores in the most recent two decades covered by her study (1990 to 2008).<sup>163</sup> Her 2021 study similarly continued to find declines in indicators for creativity in students.<sup>164</sup>

This stage of adolescence and emerging adulthood is a critical time *for* creativity, as creativity is an essential factor in development and identity formation. For young people, the “rapid neurodevelopmental changes, including the development of more advanced levels of objective, rational, hypothetical, abstract, and metacognitive thinking,” make this period “a critical period for creative identity development.”<sup>165</sup> Identity formation is fundamental.<sup>166</sup> As biologist and naturalist Edward O. Wilson wrote,

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158. Klinge, *supra* note 155.

159. KIM, *supra* note 45, at 13.

160. Kyung Hee Kim, *The Creativity Crisis: The Decrease in Creative Thinking Scores on the Torrance Tests of Creative Thinking*, 23 CREATIVITY RSCH. J. 285, 285 (2011); *see also* KIM, *supra* note 45, at 13.

161. KIM, *supra* note 45, at 12.

162. Kim, *supra* note 160, at 287.

163. *Id.* at 293.

164. Kyung Hee Kim, *Creativity Crisis Update: America Follows Asia in Pursuing High Test Scores over Learning*, 43 ROEPER REV. 21, 21 (2021).

165. Van der Zanden et al., *supra* note 3, at 2.

166. Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCH. 469, 470–76 (2000); Larry J. Nelson & Laura M. Padilla-Walker, *Flourishing and Floundering in Emerging Adult College Students*, EMERGING ADULTHOOD, 2013, at 67, 67–68; Stephen J. Dollinger, Stephanie M. Clancy Dollinger & Leslie Centeno, *Identity and Creativity*,

creativity is an “innate quest for originality” that is “the unique and defining trait of our species; and its ultimate goal, self-understanding.”<sup>167</sup> During this period, young people are “susceptible to social, emotional, and relational experiences” that “can help support or potentially suppress creative identity development.”<sup>168</sup> Young people’s neuroplasticity also encourages their creativity.<sup>169</sup>

Moreover, creativity supports problem-solving, adaptability, and resilience, all essential traits for young people’s development.<sup>170</sup> Creativity enables young people to “approach problems insightfully” and to maintain a positive outlook on life even amidst adversity.<sup>171</sup> It encourages one to be flexible in confronting changes and opportunities.<sup>172</sup> It enhances resilience, which is defined as “the process of, capacity for, or outcome of successful adaptation despite challenging or threatening circumstances.”<sup>173</sup> Resilience gives young people the “ability to bounce back from risks or failures and to adapt to dynamics and success.”<sup>174</sup> One reason that creativity and resilience are linked is that creative acts “provide a ‘safe haven,’ ” especially in times of hardship and stress.<sup>175</sup> For example, one study showed a strong correlation between unhoused youths who attended a drop-in art center and their increased resilience.<sup>176</sup>

Another study underscored that the interdependent relationship between resilience and creativity is also apparent in group settings. An experiment involving undergraduate students found that a group’s resilience is “significantly correlated” with the group’s creativity.<sup>177</sup> Resilience positively increases creativity because resilience positively influences two mediating variables: a group’s belief in their ability to produce creative

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5 IDENTITY: INT’L J. THEORY & RSCH. 315, 317–18, 332–33 (2005).

167. EDWARD O. WILSON, *THE ORIGINS OF CREATIVITY* 3 (2017).

168. Van der Zanden et al., *supra* note 3, at 2.

169. *See supra* notes 118–20 and accompanying text.

170. Margaret V. Prescott, Banu Sekendur, Bryce Bailey & Janice Hoshino, *Art Making As a Component and Facilitator of Resiliency with Homeless Youth*, 25 *ART THERAPY: J. AM. ART THERAPY ASS’N* 156, 157 (2008); *A Guide to Resilience*, CTR. DEVELOPING CHILD: HARV. UNIV., <https://developingchild.harvard.edu/science/key-concepts/resilience> [<https://perma.cc/3PMD-KJXB>].

171. Robert J. Sternberg, *Enhancing Creativity*, in *CREATIVITY: AN INTRODUCTION*, *supra* note 3, at 272, 272.

172. RUNCO, *supra* note 11, at xii.

173. Ann S. Masten, Karin M. Best & Norman Garnezy, *Resilience and Development: Contributions from the Study of Children Who Overcome Adversity*, 2 *DEV. & PSYCHOPATHOLOGY* 425, 425 (1990).

174. Mudan Fan, Wenjing Cai & Lin Jiang, *Can Team Resilience Boost Team Creativity Among Undergraduate Students? A Sequential Mediation Model of Team Creative Efficacy and Team Trust*, *FRONTIERS PSYCH.*, June 2021, at 1, 2.

175. Prescott et al., *supra* note 170, at 157.

176. *Id.*

177. Fan et al., *supra* note 174, at 6.

outcomes (i.e., creative efficacy) and trust amongst group members.<sup>178</sup> This finding is also significant because young people are highly influenced by peer pressure,<sup>179</sup> and creativity can serve as a constructive form of peer influence.

Creativity also enhances enjoyment and overall well-being for young people. Creative activities often induce “flow,” or an “exhilarating, pleasurable moment of complete absorption.”<sup>180</sup> Engaging in creative pursuits boosts self-esteem.<sup>181</sup> These effects are important for the well-being of young people.

In summary, creativity is not just an outward expression of young people’s development—it also shapes it. By facilitating identity formation, problem-solving, resilience, self-esteem, and enjoyment, creativity plays a critical role in their overall well-being. This developmental basis for young people’s heightened connections to creativity and crime underscores the need for the developmental framework to recognize and prioritize creativity as a key developmental goal.

### C. THE DEVELOPMENTAL FRAMEWORK

The developmental framework provides that developmental and neuroscience research related to young people should guide the creation, interpretation, and application of laws, regulations, and policies that affect them. While the state has long accounted for differences in the age and maturity of young people, this modern iteration is distinct because rather than relying on “simplistic views of childhood,”<sup>182</sup> state actors are now increasingly relying on a much more reliable “body of psychological and biological research on child and adolescent development” and emerging adulthood development, as well as evidence on the “effectiveness of these policies.”<sup>183</sup> This framework has grown in scope and significance since its creation in the early 2000s.

This modern developmental framework emerged in the early 2000s when the Supreme Court issued a series of four landmark decisions under the Eighth Amendment that incorporated developmental research to interpret the constitutional rights of youth under eighteen in sentencing.<sup>184</sup> Each case

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178. *Id.* at 1–7, 10, 11.

179. Chester et al., *supra* note 141, at 17–18.

180. Kaufman & Glăveanu, *supra* note 3, at 20.

181. Prescott et al., *supra* note 170, at 156.

182. Huntington & Scott, *supra* note 37, at 1398.

183. *Id.*

184. *Roper v. Simmons*, 543 U.S. 551, 569–74 (2005); *Graham v. Florida*, 560 U.S. 48, 68–75 (2010); *Miller v. Alabama*, 567 U.S. 460, 470–80 (2012); *Montgomery v. Louisiana*, 577 U.S. 190, 206–

produced a noteworthy change, such as a prohibition on the death penalty and limitations on life imprisonment without parole sentences for youths who committed crimes before the age of eighteen.<sup>185</sup> However, collectively, these cases are viewed as revolutionary,<sup>186</sup> creating a seismic shift in the legal landscape for youth under eighteen, and more recently, for emerging adults aged eighteen to twenty-five.

The developmental framework's most significant impact has been on juvenile and criminal laws and policies for those under eighteen.<sup>187</sup> However, the framework has since expanded in two major ways. First, developmental and neuroscience research is shaping areas of the law beyond juvenile and criminal law for youth under eighteen. Second, this research is increasingly impacting emerging adults, or those aged eighteen to twenty-five. These two expansions will be described in turn.

The first expansion of the developmental framework has been the growing incorporation of developmental and neuroscience research beyond just the juvenile and criminal systems. Emily Buss articulated a broad theory of "developmental jurisprudence," which calls for the law to be a "developmental agent" that "shapes how children grow up."<sup>188</sup> Buss stated that the "law should aim to minimize the developmental harm it imposes and maximize the developmental benefit it provides."<sup>189</sup>

Consistent and "compatible" with Buss's theory, Clare Huntington and Elizabeth Scott created the "Child Wellbeing framework"<sup>190</sup> to guide *all* regulations and policies affecting youth under eighteen to meet the primary goal of "promot[ing] child wellbeing."<sup>191</sup> The Child Wellbeing framework consists of three key principles, the first of which is the primacy of the developmental framework, or the "incorporation of developmental knowledge,"<sup>192</sup> which includes "psychological and biological research on

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12 (2016); *see also* Hong, *supra* note 154, at 279–80, 292–94, 297. Also, in *J.D.B. v. North Carolina*, the Court underscored the relevance of a child's age for purposes of determining whether the individual is "in custody" under *Miranda* and noted that this consideration was also consistent with developmental research. *J.D.B. v. North Carolina*, 564 U.S. 261, 271–80 (2011).

185. *Roper*, 543 U.S. 551 (banning the death penalty for sixteen- and seventeen-year-olds); *Graham*, 560 U.S. 48 (prohibiting life without parole sentences in nonhomicide cases for those under eighteen years old); *Miller*, 567 U.S. 460 (prohibiting mandatory life without parole sentences in homicide cases for those under eighteen years old); *Montgomery*, 577 U.S. 190 (finding that the holding in *Miller* is retroactive).

186. Hong, *supra* note 154, at 291–97.

187. Huntington & Scott, *supra* note 37, at 1436–38; Scott, *supra* note 39, at 282.

188. Buss, *supra* note 37, at 751.

189. *Id.* at 752.

190. Huntington & Scott, *supra* note 37, at 1398.

191. *Id.* at 1375.

192. *Id.* at 1398.

child and adolescent development, as well as growing evidence about the effectiveness of policy interventions.”<sup>193</sup> This Child Wellbeing framework applies broadly to laws and policies that affect youth under eighteen, “including systems of state intervention, parental rights, and children’s rights, as well as, to a much lesser degree, policies of state support for families.”<sup>194</sup> Healthcare and education policies have also been shaped by such research.<sup>195</sup> Further evidence of its influence is seen in the inaugural *Restatement of Children and the Law*, which is primarily guided by the developmentally centered Child Wellbeing framework.<sup>196</sup> This again underscores the broad and far-reaching impact that the developmental framework has—and will continue to have—on laws, regulations, and policies affecting youth.

The second expansion of the developmental framework has been its application to emerging adults.<sup>197</sup> Increasingly, researchers and advocates are emphasizing the developmental similarities between adolescents and emerging adults, including their shared “risk-taking, impulsivity, tendency to be overly motivated by reward-seeking behavior, and high susceptibility to peer influence.”<sup>198</sup> Like adolescents, emerging adults’ prefrontal cortexes are still developing.<sup>199</sup>

These findings have already led some lawmakers to propose or enact laws and policies that account for these developmental differences.<sup>200</sup> Advocates recognize that the developmental framework is pivotal for the

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193. *Id.* at 1375. The second element is the increasing awareness of the “social welfare advantages of promoting child wellbeing, thereby broadening support for contemporary policies.” *Id.* The third is a greater recognition of the “embedded racial and class bias in state regulation of children [that] has led to tentative steps toward reducing these pernicious influences, even if these efforts are at an early stage.” *Id.*

194. *Id.*

195. *Id.* at 1436–38; Scott, *supra* note 39, at 297.

196. Scott, *supra* note 39, at 297; Clare Huntington & Elizabeth S. Scott, *The New Restatement of Children and the Law: Legal Childhood in the Twenty-First Century*, 54 *FAM. L.Q.* 91, 92 (2020).

197. This Article focuses on the developmental framework, but it also addresses arguments that pertain to the other two parts of the Child Wellbeing framework: the “convergence of adolescent [as well as emerging adult] wellbeing and social welfare” and “recognition of the pernicious role of racial bias.” Huntington & Scott, *supra* note 37, at 1398. However, given that the current Child Wellbeing framework does not account specifically for emerging adults, and a new or extended version of the Child Wellbeing framework has not yet been articulated for emerging adults, the Article will continue to rely on the developmental framework. *See supra* note 37 and accompanying text.

198. Chester et al., *supra* note 141, at 17–18.

199. Arain et al., *supra* note 152, at 451–54; STEINBERG, *supra* note 51, at 17; Chester & Barkin, *supra* note 152.

200. *See, e.g.*, Francis X. Shen, Fenella McLuskie, Erin Shortell, Mariah Bellamoroso, Elizabeth Escalante, Brenna Evans, Ian Hayes, Clarissa Kimmey, Sarah Lagan, Madeleine Muller, Jennifer Near, Kailey Nicholson, Job Okeri, Ifeoma Okoli, Emily Rehmet, Nancy Gertner & Robert Kinscherff, *Justice for Emerging Adults After Jones: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older*, 97 *N.Y.U. L. REV.* 101, 118–21 (2022).

“burgeoning field of Emerging Adult Justice.”<sup>201</sup> If the legal landscape for emerging adults were to follow the progression for adolescents—since they share similar developmental traits—then the developmental framework is poised to have an even greater influence on the laws, policies, and regulations that impact emerging adults in the criminal system and beyond.

Thus, at this pivotal inflection point, as the developmental framework expands its influence, creativity should become a central focus and priority given its importance to young people’s development. The following Parts explore how prioritizing young people’s creativity should reshape policies and practices in areas in which creativity and crime overlap and intersect—namely, in the prosecution and punishment of crime, as well as in education. These normative proposals also further illustrate the close ties between creativity and crime.

### III. THE PROSECUTION AND PUNISHMENT OF CRIME

Implementing a developmental framework that prioritizes young people’s creativity demands meaningful changes in the prosecution and punishment of crime for young people. These proposals not only center and protect young people’s creativity to foster their healthy development, but they also provide further evidence of the deep connections between creativity and crime.

#### A. PROSECUTING CRIME

If, as Durkheim posits, creativity and crime coexist,<sup>202</sup> then the line dividing creative and criminal acts may not always be clear-cut. Durkheim himself recognized this ambiguity when he intertwined the creative person with the criminal. He wrote, “[S]o that the originality of the idealist who dreams of transcending his era may display itself, that of the criminal, which falls short of the age, must also be possible. One does not go without the other.”<sup>203</sup> Durkheim’s discussion of Socrates further underscores the blurriness between the two and how one can be misconstrued for the other. Although Socrates represented an innovative way of thinking and a new philosophy that Durkheim clearly valued since he said that it prepared the Athenians for the future,<sup>204</sup> he also observed that in the society and time Socrates lived in, “his condemnation” as a criminal “was entirely just” under the prevailing laws.<sup>205</sup>

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201. Chester et al., *supra* note 141, at 17.

202. DURKHEIM, *supra* note 23, at 101.

203. *Id.*

204. *Id.* at 102.

205. *Id.*

This blurring between creativity and crime is not merely confined to the past. Creative acts continue to be misconstrued as crimes or as evidence of one's criminality, particularly for young people of color. While criminalizing creativity is harmful in general, it is especially damaging for young people because it harms their development in multiple ways. It unjustly labels them as criminal or dangerous; increases their exposure to arrest, prosecution, and punishment for crimes or offenses; and suppresses their creativity.

To be clear, not all crimes and offenses committed by young people should be reframed as acts of creativity. But recognizing the substantial overlap between the two and working to reduce their mischaracterization is crucial. As the deviance spectrum introduced in Part I illustrates, this problem is most acute in the middle of the spectrum, in which the distinction between creative and criminal behavior is less clear. The concern, however, also extends to clearly criminal conduct at the end of the spectrum, in which a young person's creative acts may be treated as evidence of general criminality or even as proof that the person committed an alleged, clearly criminal offense. When young people engage in nonconforming behavior or challenge societal norms and expectations, discretion and biases—particularly those based on race and class—impact whether their actions are interpreted as creative or criminal, or as indicative of heightened criminality. Confronting and eliminating these biases, as well as implementing innovative solutions that directly limit the criminalization of creativity, are all essential.

### 1. The Significance of Discretion and Bias

Discretion and bias can tip the scales between creativity and crime. Even with established frameworks in place to help distinguish between criminal and creative acts, discretion and bias can drive the criminalization of creative expressions and the mislabeling of creativity as evidence of criminality, especially for young people of color.

Most people can agree that certain actions—no matter how creatively executed—should be considered crimes. For example, Paul Butler's reliance on traditional categorizations and grading of actions (albeit in a different context of jury nullification<sup>206</sup>), such as *malum in se* versus *malum prohibitum*,<sup>207</sup> or violent versus nonviolent offenses, provides an initial way

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206. Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995). While Paul Butler relied on these categories to examine the allowance of race based-jury nullification, his reasoning for grading different categories of crimes is relevant here.

207. *Malum in se* refers to "a crime or an act that is inherently immoral, such as murder, arson, or rape." *Malum in Se*, BLACK'S LAW DICTIONARY (11th ed. 2019). *Malum prohibitum* refers to "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily

for separating creative acts from criminal ones, even though these categories are far from perfect.<sup>208</sup> As Butler recognizes, the most serious offenses, or “violent *malum in se* crimes like murder, rape, and assault,” warrant no allowance from their criminalization.<sup>209</sup> In this context, this means that violent *malum in se* actions should be viewed as crimes, regardless of whether the acts were committed in an original or creative way. Such acts reside at the end of the deviance spectrum reserved for clearly criminal conduct. Meanwhile, nonviolent *malum in se* actions, such as perjury,<sup>210</sup> as well as nonviolent or victimless *malum prohibitum* actions,<sup>211</sup> warrant closer examination. The latter category demands the most scrutiny, as questions about their criminalization are most vexing and difficult to resolve.

Yet these categorizations are only a starting point. This is because the determination of what is creative or criminal, as well as the seriousness of the crime, frequently rests on the discretion of those within the juvenile and criminal systems, such as police officers, prosecutors, and juries charged with fact-finding. Law enforcement exercises “tremendous discretion” over which “laws to enforce and against whom.”<sup>212</sup> Prosecutors, too, wield “vast discretion” to decide “whether and when to charge a person with a crime.”<sup>213</sup> Discretion is at its peak in the context of disorderly conduct crimes<sup>214</sup> “[w]hen broadly worded statutes intersect with minor misconduct.”<sup>215</sup> Biases, particularly “racial and economic biases,” infuse the enforcement of such laws,<sup>216</sup> and there is much more wiggle room for such conduct to be characterized as either criminal or creative.

Bias and discretion do not merely shape how acts are categorized in the middle of the deviance spectrum, they also skew and distort perceptions of creative behavior. For young people, especially young people of color and those from lower socioeconomic classes, creative expression risks being interpreted as evidence of their criminality and dangerousness, making it appear more likely that they are guilty of clearly criminal conduct.

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immoral.” *Malum Prohibitum*, BLACK’S LAW DICTIONARY (11th ed. 2019). For example, “misdemeanors such as jaywalking and running a stoplight are *mala prohibita*, as are many regulatory violations.” *Id.*

208. See, e.g., Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899, 940–41 (2023); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 582–84 (2011); Rollin M. Perkins, *The Civil Offense*, 100 U. PA. L. REV. 832, 832–33 (1952).

209. Butler, *supra* note 206, at 715.

210. *Id.* at 679.

211. *Id.*

212. Rachel Moran, *Doing Away with Disorderly Conduct*, 63 B.C. L. REV. 65, 88 (2022).

213. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1337 (2012).

214. Ari Ezra Waldman, *Disorderly Content*, 97 WASH. L. REV. 907, 937 (2022); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1683 (2021).

215. Moran, *supra* note 212, at 88.

216. *Id.* at 104.

Recognizing the effects of bias and discretion is an important first step toward eliminating them. The next Section explains how bias and discretion influence how one determines individuals' associations with criminality or creativity, and the following Section examines how bias and discretion affect whether a given act is interpreted as creative or criminal.

## 2. Associations with Criminality or Creativity

In the late 1990s, the meteoric rise of McKinley “Mac” Phipps Jr.’s rap career abruptly ended after a jury found him responsible for the fatal shooting of a fan during his concert in Louisiana.<sup>217</sup> At just 22,<sup>218</sup> Phipps was charged with first-degree murder, and eventually convicted of manslaughter by a 10-2 jury vote.<sup>219</sup> His conviction, widely viewed as a wrongful conviction,<sup>220</sup> was controversial for the heavy use of Phipps’s own rap lyrics during his criminal trial. Prosecutors cherry-picked lyrics from his songs, took them out of context, and strung together lyrics from different songs to portray him “as the brutal character in his songs.”<sup>221</sup> The jury foreman later shared that Phipps’s music and rap lyrics helped secure the guilty verdict.<sup>222</sup> He stated that “rap got his mind all messed up” and Phipps was “living a life that he thought he was a gangsta,”<sup>223</sup> thus making it more likely that Phipps was the kind of person who would “shoot somebody in a public place on the dance floor.”<sup>224</sup> Phipps served 21 years of his 30-year sentence before the governor of Louisiana granted him clemency in 2021.<sup>225</sup>

Phipps’s case is sadly not an anomaly. Scholars studying traditional expressions of creativity—music, fashion, and art—have found that biases and stereotypes distort the creativity of young people of color and lower socioeconomic classes as proof of their criminality and dangerousness.

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217. ERIK NIELSON & ANDREA L. DENNIS, *RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA* 4 (2019).

218. Ramon Antonio Vargas, *Ex-No Limit Rapper Mac Phipps Paroled from Manslaughter Conviction: ‘Thank You for This Opportunity’*, NOLA (June 22, 2021), [https://www.nola.com/news/courts/ex-no-limit-rapper-mac-hipps-paroled-from-manslaughter-conviction-thank-you-for-this-opportunity/article\\_02d2e36e-d37c-11eb-961d-9fdd7fab2dae.html](https://www.nola.com/news/courts/ex-no-limit-rapper-mac-hipps-paroled-from-manslaughter-conviction-thank-you-for-this-opportunity/article_02d2e36e-d37c-11eb-961d-9fdd7fab2dae.html) [<https://perma.cc/BQV4-C2YG>].

219. NIELSON & DENNIS, *supra* note 217, at 4. This conviction would now be unconstitutional under the Sixth Amendment since jury verdicts for serious offenses must be unanimous. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

220. NIELSON & DENNIS, *supra* note 217, at 2; David Lohr, *Witnesses: DA Bullied Testimony That Put Rapper Away for 30 Years*, HUFFINGTON POST (July 10, 2020, at 09:18 ET), [https://www.huffpost.com/entry/mckinley-mac-hipps-wrongful-conviction\\_n\\_6612074](https://www.huffpost.com/entry/mckinley-mac-hipps-wrongful-conviction_n_6612074) [<https://perma.cc/XS65-6KSR>].

221. NIELSON & DENNIS, *supra* note 217, at 5.

222. *Id.* at 6.

223. *Id.*

224. *Id.*

225. Charlie Kollath Wells, *No Limit Rapper McKinley ‘Mac’ Phipps Granted Clemency by John Bel Edwards: ‘We Are Grateful’*, NOLA (Apr. 9, 2021), [https://nola.com/news/crime\\_police/.../article\\_2896517c-9947-11eb-b4ec-d70df042488c.html](https://nola.com/news/crime_police/.../article_2896517c-9947-11eb-b4ec-d70df042488c.html) [<https://perma.cc/BQV4-C2YG>].

As a prime example, rap music has been prominently used to establish a narrative of criminality against young men of color. They have been introduced in criminal cases to establish motive, intent, or proof of confessions.<sup>226</sup> As Andrea Dennis and Erik Nelson observed from their study of cases from 2009 to 2019 in which rap lyrics were introduced as evidence, the defendant was “almost always a young man of color.”<sup>227</sup> More specifically, nearly 95% of the defendants in the approximately 500 cases who had rap lyrics used in their criminal cases were Black or Latino young men.<sup>228</sup> Dennis and Nelson described this association between rap music and crime as a modern iteration of a historical practice, in which “[B]lack art and expression” were often viewed “as a threat” and “criminally regulated.”<sup>229</sup> This includes “slave drumming and songs[,] . . . Jim Crow–era ballads,” and creative acts expressed “in cabarets and jook joints, and during the civil rights and [B]lack nationalist eras.”<sup>230</sup> The criminal system was used to “control [B]lack speech and creative endeavors.”<sup>231</sup> They also found that “[n]o other fictionalized form, musical or otherwise,” faced similar treatment in court.<sup>232</sup> This includes country music, which “has many of the same themes” as rap music.<sup>233</sup>

That juries and prosecutors may associate rap music or music from minority artists with criminality has also been found in research experiments. Carrie Fried conducted a series of experiments to test whether the label of rap music or the race of the artist produced different reactions.<sup>234</sup> She took lyrics from a folk song about a young man who “hunts down and kills a police officer”<sup>235</sup> and found that a majority of the respondents found the folk

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226. *Prosecutors Hear Evidence in Songs*, N.Y. TIMES (Mar. 26, 2014), <https://www.nytimes.com/interactive/2014/03/27/arts/music/rap-lyrics.html> [<https://perma.cc/X3NX-UNRV>].

227. NIELSON & DENNIS, *supra* note 217, at 18.

228. *Id.* at 18–19.

229. *Id.* at 22.

230. *Id.*

231. *Id.*

232. *Id.* at 7.

233. *Id.* at 18. For example, Rolling Stone compiled a top ten list of the “creepiest country murder ballads” in which modern country artists “[got] away with the unspeakable” in their lyrics and music videos, such as murders, domestic violence, and disposing of human remains as food. Chelsea Crowell, *Killer Songs: The 10 Creepiest Country Murder Ballads*, ROLLING STONE (Nov. 16, 2019), <https://www.rollingstone.com/music/music-lists/killer-songs-the-10-creepiest-country-murder-ballads-151986/lefty-frizzell-long-black-veil-2-88528> [<https://perma.cc/FU5S-M6ZJ>]. Dolly Parton also described the influence of murder ballads on her music and shared how her early music described incidents of abuse and violence that occurred in her own family. *Sad Ass Songs*, WYNC STUDIOS (Oct. 15, 2019), <https://www.wyncstudios.org/podcasts/dolly-partons-america/episodes/sad-ass-songs> [<https://perma.cc/NWB5-QH2E>].

234. Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCH. 2135 (1996).

235. *Id.* at 2136. The lyrics were slightly modified to change the verb tense. *Id.*

song to be more offensive than rapper Ice T's "Cop Killer."<sup>236</sup> She then presented these folk lyrics to three groups and identified the lyrics as either folk, rap, or country.<sup>237</sup> Those who were told that the lyrics were from a rap song reacted more negatively, including finding the lyrics to be more offensive, more of a threat to society, and more in need of regulation.<sup>238</sup> In a subsequent experiment, she presented the same folk lyrics and, without identifying the genre of music, presented one group with a picture of a Black singer and another group with a picture of a White singer.<sup>239</sup> Those who were told that the artist was Black had a stronger negative reaction, such as finding it more offensive, more of a threat to society, and more in need of regulation.<sup>240</sup> Fried observed that "[t]he exact same lyrical passage, which is acceptable as a country song or when associated with a White artist, becomes a dangerous, offensive song in need of government regulation when it is a rap song or associated with a Black artist."<sup>241</sup>

Biases have also led to fashion being associated with criminality, especially against young people from marginalized backgrounds. When young people dressed in ways that departed from what was expected, their fashion choices were interpreted as evidence of their criminality. Zoot suits are an example from the past, while in modern times, streetwear such as hoodies and sagging pants has been directly criminalized or presented as proof of criminality and dangerousness.

The iconic zoot suits of the 1930s and 1940s departed from the traditional suit with their "high-waisted pants with baggy, pegged legs and a long coat with wide lapels"<sup>242</sup> that exaggerated one's shoulders, torsos, and limbs.<sup>243</sup> They originated in Harlem in the 1930s and were initially worn by African American young men.<sup>244</sup> While people of various cultures and class eventually adopted the style,<sup>245</sup> zoot suits were most commonly associated with the "youth subcultures" of Mexican Americans and African

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236. *Id.* at 2137.

237. *Id.* at 2138.

238. *Id.* at 2139, 2141.

239. *Id.* at 2138.

240. *Id.* at 2141.

241. *Id.*

242. *The Zoot Suit Riots and Wartime Los Angeles*, NAT'L WWII MUSEUM (June 1, 2023), <https://www.nationalww2museum.org/war/articles/zoot-suit-riots-and-wartime-los-angeles> [https://perma.cc/FWY3-TBAL].

243. KATHY PEISS, *ZOOT SUIT: THE ENIGMATIC CAREER OF AN EXTREME STYLE* 17 (2011).

244. *The Zoot Suit: An All-American Fashion That Changed History*, PENN TODAY (Apr. 7, 2011), <https://penntoday.upenn.edu/2011-04-07/research/zoot-suit-all-american-fashion-changed-history> [https://perma.cc/ST44-KXQU].

245. Zoot suits had broad appeal and were also worn by Asian, Jewish, and Italian Americans, as well as women, and boys from the middle class. PEISS, *supra* note 243, at 13.

Americans.<sup>246</sup> Young people had various motivations for wearing zoot suits, ranging from pure style to activism.<sup>247</sup> However, as historian and professor Kathy Peiss documented, the zoot suit eventually became associated with criminals and gang members during the war, with some people seeing the suit as symbolizing dangerousness.<sup>248</sup> The narrative took on such force that in June 1943, a group of roughly 50 Navy servicemen and other civilians looked for, attacked, and stripped those wearing zoot suits, particularly Mexican American youth.<sup>249</sup> The Zoot Suits Riots in Los Angeles lasted for 5 days and, in a bewildering result, led to the arrest of approximately 600 Mexican American young men, far outnumbering the arrests of the servicemen or people who initiated the riots.<sup>250</sup> While efforts to pass an ordinance that banned the zoot suit did not succeed in the Los Angeles city council as widely believed, public officials in general discouraged their wear.<sup>251</sup> The zoot suit became “the exception to the government’s policy of shoring up fashion and style” during the war.<sup>252</sup> Peiss holds the state responsible for the criminal and unpatriotic narratives associated with the suit. She explained, “[I]t was the police and governmental authorities that created the political meaning of the zoot suit, as they sought a threatening symbol to describe and encapsulate an array of behaviors and demeanors that to them made little sense.”<sup>253</sup>

The modern iteration of this phenomenon involves streetwear. For many Black and Brown youth, their nonconforming, creative wear is interpreted as a criminal marker. Sagging pants have been associated with crime for decades<sup>254</sup> and, in some jurisdictions, is actually a crime to wear.<sup>255</sup> Hoodies, too, have signaled criminality. As criminologist Richard Moran observed, “Over the last 25 years, the hoodie has been associated with street crime.”<sup>256</sup> It was the “uniform of MCs, stickup kids, graffiti artists, and b-

246. *Id.* at 14.

247. *The Zoot Suit Riots and Wartime Los Angeles*, *supra* note 242.

248. *Id.*

249. *Id.*

250. *Id.*

251. PEISS, *supra* note 243, at 37.

252. *Id.*

253. *Id.* at 13.

254. Gene Demby, *Sagging Pants and the Long History of ‘Dangerous’ Street Fashion*, NPR: CODE SW!TCH (Sep. 11, 2014, at 08:18 ET), <https://www.npr.org/sections/codeswitch/2014/09/11/347143588> [<https://perma.cc/Z9TB-UHEL>]; Emily Spivack, *Sagging Pants Butt Up Against the Law*, SMITHSONIAN MAG. (Apr. 1, 2013), <https://www.smithsonianmag.com/arts-culture/sagging-pants-butt-up-against-the-law-12699804> [<https://web.archive.org/web/20251101203328/https://www.smithsonianmag.com/arts-culture/sagging-pants-butt-up-against-the-law-12699804>].

255. Spivack, *supra* note 254.

256. Amy Kuperinsky, *Hoodies: Danger or Fashion?*, NJ.COM (Apr. 6, 2012, at 14:11 ET), [https://www.nj.com/entertainment/2012/04/trayvon\\_martin\\_hoodie\\_march.html](https://www.nj.com/entertainment/2012/04/trayvon_martin_hoodie_march.html) [<https://perma.cc/A9YK-KE LX>].

boys” and a “staple of hip-hop culture.”<sup>257</sup> The adoption of hoodies amongst “skateboard kids” and “punk-rockers” further made it a “symbol of disruption.”<sup>258</sup> This association between hoodies and criminality received national attention with the killing of Trayvon Martin. George Zimmerman called 911 on Martin, describing him as a “suspicious guy” who was wearing a “dark hoodie, a gray hoodie.”<sup>259</sup> A conservative commentator opined that the hoodie could not be rehabilitated and conveyed “a sinister signal.”<sup>260</sup> The commentator advised that parents stop their children from wearing it, except in situations in which it was presumably more expected, such as when it rained or “at a track-and-field event.”<sup>261</sup> Meanwhile, when start-up founders and techies departed from the typical professional dress code and began wearing hoodies and casual streetwear, their nonconforming fashion choice conveyed a different message—one of creativity and innovation.<sup>262</sup> As Margaret O’Mara observed, from early in our country’s history, an innovator’s disheveled dress and appearance signaled their brilliance.<sup>263</sup> It implied that they did not have enough time to care about their clothing.<sup>264</sup> While both groups wore similar clothing in a counter-cultural manner, one was associated with criminality, while the other with creativity.

Street art provides yet another example of how opposing messages of criminality or creativity can be shaped by the biases that society has toward those who create the art. As Jessica Silbey wrote, “Street art is a form of artistic expression that has existed throughout human civilizations . . . .”<sup>265</sup> Graffiti, which has been associated with young people from marginalized backgrounds, has long been weaponized to create a strong narrative of their criminality. From the 1970s to 1990s, New York City officials used racist stereotypes against Black and Latino young men to implement a criminal

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257. Emil Wilbekin, *The Fear of the Hoodie*, CUT (Jan. 31, 2022), <https://www.thecut.com/2022/01/trayvon-martin-hoodie-fear.html> [<https://web.archive.org/web/20250429134423/https://www.thecut.com/2022/01/trayvon-martin-hoodie-fear.html>].

258. *Id.*

259. Linton Weeks, *Tragedy Gives the Hoodie a Whole New Meaning*, NPR (Mar. 24, 2012, at 05:44 ET), <https://www.npr.org/2012/03/24/149245834> [<https://perma.cc/F4HG-4ALB>].

260. *Id.*

261. *Id.*

262. Matthew Hutson, *The Power of the Hoodie-Wearing C.E.O.*, NEW YORKER (Dec. 17, 2013), <https://www.newyorker.com/business/currency/the-power-of-the-hoodie-wearing-c-e-o> [<https://perma.cc/4WWV-ZMDN>]; Adriana Lee, *The Evolution of Silicon Valley Chic*, WWD (Dec. 31, 2018, at 09:00 PT), <https://wwd.com/feature/evolution-of-silicon-valley-style-facebook-google-mark-zuckerberg-hoodie-sundar-pichai-1202938656> [<https://perma.cc/LP7Z-6DP3>].

263. Margaret O’Mara, Opinion, *Why Did We Put So Much Faith in the Crypto Whiz Kid?*, N.Y. TIMES (Nov. 15, 2022), <https://www.nytimes.com/2022/11/15/opinion/sam-bankman-fried-ftx.html> [<https://perma.cc/25WB-ANLK>].

264. *Id.*

265. Jessica Silbey, *Foreword to COPYRIGHT IN THE STREET: AN ORAL HISTORY OF CREATIVE PROCESSES IN STREET ART AND GRAFFITI SUBCULTURES* vii (Enrico Bonadio ed., 2023).

response against graffiti that was marked by its “brutality and intolerance.”<sup>266</sup> In the 1970s, Mayor Ed Koch took advantage of the growing public sentiment against stereotypical “poor [B]lack and Latino communities” to carry out his war on graffiti, mostly on subway trains.<sup>267</sup> Mayor Rudy Giuliani continued the graffiti war in spaces beyond the subway, relying again on narratives about the connections between crime and marginalized youth from poor neighborhoods.<sup>268</sup>

In contrast, the act of “yarn bombing”—or affixing knitted messages or drawings in public spaces—which also technically violates many criminal statutes that prohibit public vandalism,<sup>269</sup> has been presented as a purely creative act. It has been covered in the media with headlines such as *Dallas Yarn Bombers Brings Joy to Community*<sup>270</sup> or *‘Knotty Harts’ Yarn Bombs Spread Anonymous Color, Positivity Throughout Gulf Coast*.<sup>271</sup> One news story described yarn bombing as “[a] crafty kind of graffiti,”<sup>272</sup> and while it noted that “[c]ritics of graffiti in general might call it vandalism,” it presented the act as an entirely positive expression of art and creativity.<sup>273</sup> The possibility of arrest or criminal consequences for yarn bombing was made entirely in jest.<sup>274</sup> Scholars have observed that yarn bombing is most often carried out by “[W]hite, middle-class women.”<sup>275</sup> The “public imagery” is that “yarn bombers” are described “as either mysterious but harmless urban knitters, or friendly-faced nannas.”<sup>276</sup>

266. Maggie Dickinson, *The Making of Space, Race and Place*, 28 CRITIQUE ANTHROPOLOGY 27, 34–35 (2008).

267. *Id.*

268. *Id.*

269. See, e.g., ARIZ. REV. STAT. ANN. § 13-1602 (2025) (prohibiting “[r]ecklessly defacing . . . property of another person,” as well as “[r]ecklessly drawing or inscribing a message, slogan, sign or symbol that is made on any public or private building, structure or surface, except the ground, and that is made without permission of the owner”); *id.* § 13-1601 (2025) (defining *defacing* to include “any act of putting up, affixing, fastening, printing or painting any notice on any structure, without permission from the owner”).

270. Noelle Walker, *Dallas Yarn Bombers Brings Joy to Community*, NBC-DFW (Sep. 26, 2022, at 19:00 PT), <https://www.nbcdfw.com/news/local/dallas-yarn-bombers-wraps-communities-in-joy/3081826> [<https://perma.cc/W8TW-NYX2>].

271. Flora Dedeaux, *‘Knotty Harts’ Yarn Bombs Spread Anonymous Color, Positivity Throughout Gulf Coast*, WLOX (Sep. 3, 2023, at 05:39 PT), <https://www.wlox.com/2023/05/18/knotty-harts-yarn-bombs-spread-anonymous-color-positivity-throughout-gulf-coast> [<https://perma.cc/24G6-7VKK>].

272. “Yarn Bomber” Hopes to Bring New Perspective to Street Art, CBS NEWS (Jan. 25, 2017, at 12:23 ET), <https://www.cbsnews.com/news/yarn-bombing-street-art-graffiti-london-kaye> [<https://perma.cc/69CV-WR72>].

273. *Id.*

274. Walker, *supra* note 270.

275. ALYCE MCGOVERN, CRAFTIVISM AND YARN BOMBING: A CRIMINOLOGICAL EXPLORATION 96 (Reece Walters & Deborah H. Drake eds., 2019).

276. *Id.*

While yarn bombing and graffiti may violate the same vandalism laws, there is an immediate association of yarn bombing with creativity, art, and joy, while, in general, graffiti carries an aura of criminality. And even though differences exist between yarn bombing and graffiti, such as the difficulty in removing the latter or the messages that they display, they do not fully account for the immediate and almost knee-jerk association of one form of vandalism with crime and the other with creativity. To further underscore that graffiti is not inherently criminal, its growing commodification has altered its reception and messaging. The works of certain graffiti artists, such as Banksy and Jean-Michel Basquiat,<sup>277</sup> sell for millions. Landlords, developers, brands, and government employees worldwide are increasingly using the counter-cultural message behind graffiti to market and sell their products and properties.<sup>278</sup>

Biases rooted in race and class against young people affect how their creative endeavors—even traditional ones in music, fashion, and art—are interpreted. For young people of color from lower socioeconomic classes, their creative expressions, such as rap, streetwear, and graffiti, have signaled their dangerousness and criminality. Meanwhile, other forms of music with violent lyrics, street art that invaded public spaces without permission, or similar counter-cultural casual wear relayed creativity. As discussed in the next Section, biases also impact whether nonconforming or unexpected actions are labeled as creative or criminal.

### 3. Labeling Acts As Creative or Criminal

Ahmed Mohamed and Kiera Wilmot met for the first time at the White House's Astronomy Night.<sup>279</sup> Though from different states and backgrounds, they shared an unlikely bond: both had been arrested and criminally charged for science experiments.<sup>280</sup> Mohamed, a fourteen-year-old Muslim student from Texas, built a homemade clock to impress his high school engineering

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277. See, e.g., Angelica Villa, *The Most Expensive Jean-Michel Basquiat Works Ever Sold at Auction*, ARTNEWS (Mar. 8, 2021, at 15:32 PT), <https://www.artnews.com/list/art-news/artists/jean-michel-basquiat-most-expensive-works-1234585981> [<https://perma.cc/HQ5F-APFU>]; *Banksy Value: Top Prices Paid at Auction*, MYARTBROKER (Jan. 8, 2026), <https://www.myartbroker.com/artist-banksy/record-prices/banksy-record-prices#> [<https://web.archive.org/web/20250514183927/https://www.myartbroker.com/artist-banksy/record-prices/banksy-record-prices>].

278. Isabella Kwai, *As Graffiti Moves from Eyesore to Amenity, Landlords Try to Cash In*, N.Y. TIMES (Apr. 6, 2024), <https://www.nytimes.com/2024/03/31/business/graffiti-real-estate-gentrification.html> [<https://web.archive.org/web/20250706130039/https://www.nytimes.com/2024/03/31/business/graffiti-real-estate-gentrification.html>].

279. Avianne Tan, *Ahmed Mohamed Meets Florida Engineering Student Arrested Under Similar Circumstances*, ABC NEWS (Oct. 20, 2015, at 13:25 PT), <https://abcnews.go.com/US/ahmed-mohamed-meets-florida-engineering-student-arrested-similar/story?id=34603292> [<https://perma.cc/GSF4-J3TX>].

280. *Id.*

teacher.<sup>281</sup> But when the clock beeped in a different classroom, that teacher mistook it for a bomb and the school called the police.<sup>282</sup> Mohamed was arrested, charged with making a hoax bomb, and suspended from school.<sup>283</sup> Wilmot, a sixteen-year-old Black honors student from Florida, had a similar experience. After her science project unexpectedly exploded in class, she was arrested, charged with two felonies, and expelled from school.<sup>284</sup>

For both teens, their stories went viral and led to their criminal charges eventually being dropped. Their arrests, criminal charges, and school disciplinary actions were widely condemned as acts of Islamophobia and anti-Muslim bigotry in Mohamed's case,<sup>285</sup> and as racism in Wilmot's case.<sup>286</sup> By recognizing and addressing the racial and religious biases that had led school officials and police officers to view both acts as crimes, the teenagers' actions were later described in traditional and social media as acts of creativity and innovation that had been inappropriately criminalized.<sup>287</sup>

281. Gardiner Harris, *Ahmed Mohamed, Student Clockmaker, Visits White House*, N.Y. TIMES (Oct. 19, 2015), <https://www.nytimes.com/2015/10/20/us/politics/ahmed-mohamed-student-clockmaker-visits-white-house.html> [<https://web.archive.org/web/20250906072712/https://www.nytimes.com/2015/10/20/us/politics/ahmed-mohamed-student-clockmaker-visits-white-house.html>].

282. Manny Fernandez & Christine Hauser, *Handcuffed for Making Clock, Ahmed Mohamed, 14, Wins Time with Obama*, N.Y. TIMES (Sep. 16, 2015), <https://www.nytimes.com/2015/09/17/us/texas-student-is-under-police-investigation-for-building-a-clock.html> [<https://web.archive.org/web/20160325221439/https://www.nytimes.com/2015/09/17/us/texas-student-is-under-police-investigation-for-building-a-clock.html>].

283. Elvia Limón, *'Clock Boy' Ahmed Mohamed's Lawsuit Against Irving ISD, City Dismissed*, DALL. MORNING NEWS (Mar. 14, 2018, at 17:30 PT), <https://www.dallasnews.com/news/2018/03/15/clock-boy-ahmed-mohamed-s-lawsuit-against-irving-isd-city-dismissed> [<https://web.archive.org/web/20191007130147/https://www.dallasnews.com/news/2018/03/15/clock-boy-ahmed-mohamed-s-lawsuit-against-irving-isd-city-dismissed>].

284. Emma Brown, *Before Ahmed and His Clock, There Was Kiera and Her Science Project*, WASH. POST (Oct. 20, 2015), <https://www.washingtonpost.com/news/education/wp/2015/10/20/before-ahmed-and-his-clock-there-was-kiera-and-her-science-project> [<https://perma.cc/7N3C-6JRX>]; Judy Stone, *The Ahmed Mohamed Story Shows How the U.S. Stifles Innovation*, FORBES (Sep. 17, 2015, at 11:10 ET), <https://www.forbes.com/sites/judystone/2015/09/16/how-to-stifle-curiosity-and-innovation-why-u-s-lags-in-science-and-math> [<https://perma.cc/MSG9-E2ZG>].

285. See, e.g., Goleen Samari, *Islamophobia and Public Health in the United States*, 106 AM. J. PUB. HEALTH 1920, 1920 (2016); Elahe Izadi & Lindsey Bever, *The History of Anti-Islam Controversy in Ahmed Mohamed's Texas City*, WASH. POST (Sep. 16, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/09/16/the-history-of-anti-islam-controversy-in-ahmed-mohameds-texas-city> [<https://perma.cc/HG65-RDCQ>].

286. Brown, *supra* note 284; Stone, *supra* note 284.

287. See, e.g., Brown, *supra* note 284; Stone, *supra* note 284; Amanda Taub, *The Message Ahmed Mohamed's School Just Sent: Creativity Isn't for Muslim Kids*, VOX (Sep. 16, 2015, at 10:40 PT), <https://www.vox.com/2015/9/16/9338557> [<https://perma.cc/3WS9-EXS7>]; John Bacon, *Muslim Student's Creative Clock Draws Police—and White House Invitation*, RELIGION NEWS SERV. (Sep. 17, 2015), <https://religionnews.com/2015/09/17/students-creative-clock-draws-police-white-house-invitation> [<https://web.archive.org/web/20240229203624/https://religionnews.com/2015/09/17/students-creative-clock-draws-police-white-house-invitation>]; Ramy Zabarah, *Why We Need More Ahmed Mohameds*, POPULAR MECHS. (Sep. 16, 2015), <https://www.popularmechanics.com/culture/web/a17367/ahmed-mohamed-the-power-of-diy> [<https://web.archive.org/web/20230327101727/https://www.popularmechanics.com/culture/web/a17367/ahmed-mohamed-the-power-of-diy>].

While Mohamed's and Wilmot's stories received national attention, similar stories have fallen under the radar, especially when the exercise of discretion resulted in a favorable reaction that was not newsworthy. After Mohamed's and Wilmot's stories went viral, many shared how they or their children engaged in similar acts that could have been criminalized but were instead rewarded for their creativity or merely received light reprimands.<sup>288</sup> In Wilmot's case, numerous "scientists and science fans" on Twitter shared how they also had blown things up, but were "congratulated on their curiosity" or received a "slap[] on the wrist."<sup>289</sup>

This double standard has been observed by Kristin Henning who spent decades defending indigent children. She recounted the story of a thirteen-year-old Black student who, inspired by a movie, made a fake Molotov cocktail at home.<sup>290</sup> While it was not functional—as the household materials would never have caught on fire—when the teen mistakenly took it to school after leaving it in his backpack, he was arrested, charged with multiple offenses, detained, suspended from school and extracurriculars, and required to meet with a probation officer, attend anger management classes, and undergo urine testing for drugs.<sup>291</sup> While his case was eventually dismissed, he endured months of school and court officials treating him as a criminal.<sup>292</sup>

Initially, Henning attributed the teen's harsh treatment to the increased sensitivity to violence in schools.<sup>293</sup> But her perspective changed after she learned of a nearly identical case involving a White student from another district. There, the student's mother shared that her son's consequence was a positive one: enrollment in the chemistry class to further explore his interest in the sciences.<sup>294</sup> Henning ultimately described her client's experience as a classic manifestation of the criminalization of Black youth.<sup>295</sup> School administrators, police officers, the prosecutor, and the judge all viewed the Black teen's act as dangerous, harmful, and criminal, when they could have viewed it as Henning described it—as an act in which the youth "was just being creative."<sup>296</sup> This experience is consistent with her

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288. See, e.g., Stone, *supra* note 284.

289. Tim Elfrink, *Scientists Back Kiera Wilmot by Tweeting About All the Stuff They've Blown Up*, MIA. NEW TIMES (May 2, 2013), <https://www.miaminewtimes.com/news/scientists-back-kiera-wilmot> [<https://perma.cc/L6XU-DFZB>].

290. KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* xiii (2021).

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

research that “typical adolescent behaviors” are increasingly characterized as crimes, especially for youth of color.<sup>297</sup>

It is necessary to recognize that bias also plays a powerful role in influencing which young people are encouraged to take risks and break rules in the pursuit of creativity and innovation. The contrast is evident in tech, in which risk-takers and rule breakers are revered and in high demand. Paul Graham, co-founder of the Y Combinator start-up accelerator, famously wrote in 2005 that investors “should be funding hackers instead of suits.”<sup>298</sup> This revolutionary mindset that the “best founders were hackers” transformed the venture-capital industry.<sup>299</sup> Called “Silicon Valley’s Start-Up Machine,”<sup>300</sup> Y Combinator’s first cohort included the founders of Reddit and Sam Altman (now CEO of OpenAI), and has been credited with “chang[ing] the world” for the start-ups it supported, including Airbnb, Dropbox, Instacart, Stripe, and Substack.<sup>301</sup>

In tech, acts that are unethical, or even outright illegal, have been overlooked because they were framed as innovative and creative. For instance, Sean Parker and Shawn Fanning were teenagers when they created a peer-to-peer music-sharing program Napster that upended the music industry.<sup>302</sup> Even as investors questioned whether the technology was “legal or not,” they still gave Napster multiple investment offers.<sup>303</sup> Meanwhile, Elizabeth Holmes was long hailed as a genius for a technology that proved nonexistent. At the age of nineteen, she dropped out of Stanford University and founded Theranos to detect health conditions from a few drops of blood.<sup>304</sup> Her “creative disruption” brought in large investments and wide acclaim, and she eventually defrauded investors and regulators and harmed

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297. Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORN. L. REV. 383, 386 (2013).

298. *How Y Combinator Started*, PAUL GRAHAM (Mar. 2012), <http://www.paulgraham.com/ycstart.html> [<https://perma.cc/BPD3-D729>].

299. Steven Levy, *How Y Combinator Changed the World*, WIRED (Dec. 21, 2021, at 07:00 PT), <https://www.wired.com/story/how-y-combinator-changed-the-world> [<https://web.archive.org/web/20250226095634/https://www.wired.com/story/how-y-combinator-changed-the-world>].

300. Nathaniel Rich, *Silicon Valley’s Start-Up Machine*, N.Y. TIMES: MAG. (May 2, 2013), <https://www.nytimes.com/2013/05/05/magazine/y-combinator-silicon-valleys-start-up-machine.html> [<https://web.archive.org/web/20251004183309/https://www.nytimes.com/2013/05/05/magazine/y-combinator-silicon-valleys-start-up-machine.html>].

301. Levy, *supra* note 299.

302. Eamonn Forde, *Oversharing: How Napster Nearly Killed the Music Industry*, GUARDIAN (May 31, 2019, at 05:00 ET), <https://www.theguardian.com/music/2019/may/31/napster-twenty-years-music-revolution> [<https://perma.cc/F967-2HW7>].

303. *Id.*

304. Daniel Thomas, *Theranos Scandal: Who Is Elizabeth Holmes and Why Was She on Trial?*, BBC (Nov. 18, 2022), <https://www.bbc.com/news/business-58336998> [<https://perma.cc/XV5M-YYCF>].

patients.<sup>305</sup> While she was eventually convicted of multiple crimes, it took an in-depth investigation by a journalist to shatter the illusion.<sup>306</sup>

Mark Zuckerberg and Facebook's rise to power have also been shrouded with allegations of unlawful behavior. While working for his classmates at Harvard on a similar concept, Zuckerberg allegedly stalled their project and launched Facebook instead.<sup>307</sup> The classmates later created their own site, ConnectU, but evidence showed that Zuckerberg hacked into ConnectU's website and altered user information to make the "site less useful,"<sup>308</sup> including changing the privacy settings to make them less visible and deactivating twenty accounts.<sup>309</sup> Credible allegations also support that he took users' private login data from Facebook to hack into their private email accounts and read emails.<sup>310</sup> Even before Zuckerberg's foray into Facebook, he faced Harvard's Administrative Board to address charges for "breaching security, violating copyrights and violating individual privacy" for "his unauthorized use of on-line facebook photographs" for a website that ranked students' attractiveness.<sup>311</sup> Zuckerberg declined to disclose the board's eventual actions, but shared that he was not required to withdraw or leave school.<sup>312</sup> Zuckerberg did not face criminal prosecution for any of these actions.

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305. *Id.*; Eric J. Topol, *Creative Disruption? She's 29 and Set to Reboot Lab Medicine*, MEDSCAPE: NEUROLOGY (Nov. 18, 2013), <https://www.medscape.com/viewarticle/814233> [[https://web.archive.org/web/20140309222349/http://www.medscape.com/viewarticle/814233\\_1](https://web.archive.org/web/20140309222349/http://www.medscape.com/viewarticle/814233_1)].

306. Press Release, U.S. Att'y's Off., N. Dist. of Cal., Elizabeth Holmes Sentenced to More Than 11 Years for Defrauding Theranos Investors of Hundreds of Millions (Nov. 18, 2022), <https://www.justice.gov/usao-ndca/pr/elizabeth-holmes-sentenced-more-11-years-defrauding-theranos-investors-hundreds> [<https://perma.cc/5VYX-TE6F>]; Lydia Ramsey Pflanzler, *The Reporter Who Broke the Theranos Saga Wide Open Pinpoints the Moment He Knew He Had a Big Story on His Hands*, BUS. INSIDER (Mar. 14, 2019, at 07:44 PT), <https://www.businessinsider.com/john-carreyrou-theranos-2018-5> [<https://web.archive.org/web/20250919015652/https://www.businessinsider.com/john-carreyrou-theranos-2018-5>]; John Carreyrou, *Hot Startup Theranos Has Struggled with Its Blood-Test Technology*, WALL ST. J. (Oct. 16, 2015), <https://www.wsj.com/articles/theranos-has-struggled-with-blood-tests-1444881901> [<https://web.archive.org/web/20211120020606/https://www.wsj.com/articles/theranos-has-struggled-with-blood-tests-1444881901>]; John Carreyrou, *At Theranos, Many Strategies and Snags*, WALL ST. J. (Dec. 27, 2015, at 18:40 ET), <https://www.wsj.com/articles/at-theranos-many-strategies-and-snags-1451259629> [<https://web.archive.org/web/20221129172352/https://www.wsj.com/articles/at-theranos-many-strategies-and-snags-1451259629>].

307. Nicholas Carlson, *At Last—The Full Story of How Facebook Was Founded*, BUS. INSIDER (Mar. 3, 2010, at 11:18 PT), <https://www.businessinsider.com/how-facebook-was-founded-2010-3> [<https://web.archive.org/web/20250922224502/https://www.businessinsider.com/how-facebook-was-founded-2010-3>].

308. *Id.*

309. *Id.*

310. *Id.*

311. Katharine A. Kaplan, *Facemash Creator Survives Ad Board*, HARV. CRIMSON (Nov. 19, 2003), <https://www.thecrimson.com/article/2003/11/19/facemash-creator-survives-ad-board-the> [<https://perma.cc/N97F-62EN>].

312. *Id.*

Similarly, the young executives and inner circle of FTX (a cryptocurrency exchange),<sup>313</sup> who all graduated from elite universities, benefited from an aura of creativity that enabled them to defraud investors and customers of billions of dollars for years before they were finally prosecuted.<sup>314</sup> The image of the founder as an “eccentric genius” and “wonder child” distracted from the misuse of funds and financial crimes.<sup>315</sup> Biases again played a significant role in construing these actions that broke norms and rules as creative and innovative. As O’Mara observed, the “whiz kids” are “almost exclusively, male, [W]hite and young.”<sup>316</sup> They benefit from their class and prestige from elite universities like Harvard, Stanford, and MIT. Society is “still fixated on the idea of the eccentric genius accomplishing extraordinary things.”<sup>317</sup>

Notably, tech experts have not responded to these high-profile incidents by calling for stricter criminal laws or increased criminal prosecutions. Instead, some even caution against new regulations, arguing they are not “only costly and potentially harmful for innovation, but also limited in its effectiveness.”<sup>318</sup> Proposed solutions instead focus on changing business practices, such as insisting on a work culture of experimentation, failure, and honesty,<sup>319</sup> requiring more information to confirm claims and research that are being presented;<sup>320</sup> and either relying on technology or creating new ones

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313. Tracy Wang & Coindesk, *Sam Bankman-Fried’s Crypto Empire ‘Was Run by a Gang of Kids in the Bahamas’ Who All Dated Each Other*, FORTUNE (Nov. 11, 2022, at 06:14 ET), <https://fortune.com/2022/11/11/sam-bankman-fried-crypto-empire-ftx-alameda-run-gang-kids-bahamas-who-all-dated-each-other> [<https://perma.cc/HJX5-ZJ8A>].

314. Andrew Ross Sorkin, Ravi Mattu, Bernhard Warner, Sarah Kessler, Stephen Gandel, Michael J. de la Merced, Lauren Hirsh & Ephrat Livni, *Losses Pile Up in FTX Bankruptcy Turmoil*, N.Y. TIMES (Nov. 23, 2022), <https://www.nytimes.com/2022/11/23/business/dealbook/sbf-ftx-bankruptcy-turmoil.html> [<https://perma.cc/7GJS-3GEA>]; Ken Sweet & Larry Neumeister, *Fallen Crypto Mogul Sam Bankman-Fried Sentenced to 25 Years in Prison*, ASSOCIATED PRESS (Mar. 28, 2024, at 16:50 PT), <https://apnews.com/article/sam-bankman-fried-ftx-cryptocurrency-sentencing-sbf-d7bb1a5e94b4c22039d74dfeab1a2ff1> [<https://perma.cc/YB5M-TMWQ>].

315. David Gerard, *Sam Bankman-Fried Was Hailed As a Crypto Wonder Child. What Happened?*, GUARDIAN (Nov. 15, 2022, at 06:08 ET), <https://www.theguardian.com/commentisfree/2022/nov/15/ftx-cryptocurrency-sam-bankman-fried> [<https://perma.cc/3PRZ-5H2U>].

316. O’Mara, *supra* note 263; Vinamrata Chaturvedi, *Meet the Crypto ‘Gals’ of the 2023 Forbes 50 Over 50*, FORBES (Aug. 2, 2023, at 19:59 ET), <https://www.forbes.com/sites/forbeswomensvoices/2023/08/01/meet-the-crypto-gals-of-the-2023-forbes-50-over-50> [<https://perma.cc/S775-BS36>].

317. Lauren Goode, *Why the World Fell for Sam Bankman-Fried*, WIRED (Dec. 2, 2022, at 09:00 PT), <https://www.wired.com/story/plaintext-why-the-world-fell-for-sam-bankman-fried-ftx> [<https://perma.cc/84Z4-7A55>].

318. Shlomit Azgad-Tromer & Matthew Green, Opinion, *How Crypto Can Avoid the Next FTX, COINDESK* (June 14, 2024, at 11:21 PT), <https://www.coindesk.com/opinion/2022/12/13/ftx-collapse-cryptocurrency-failures> [<https://perma.cc/S7LV-ED7B>].

319. Jay Steinfeld, *2 Insights to Prevent Your Company from Unknowingly Becoming Another Theranos, INC.* (Jan. 17, 2022), <https://www.inc.com/jay-steinfeld/two-insights-to-prevent-your-company-from-unknowingly-becoming-another-theranos.html> [<https://perma.cc/M38Q-UCZK>].

320. Mathew McCoee, *Opinion: How Investors Can Prevent Another Theranos from Blowing Up Their Portfolio*, MARKETWATCH (Apr. 17, 2018, at 13:56 ET), <https://www.marketwatch.com/story/how>

to allow for transparency and confirmation of data.<sup>321</sup> Similarly, leaders in the cryptocurrency industry, despite several prominent criminal prosecutions,<sup>322</sup> are also not advocating for more criminal laws or prosecutions. Instead, they actively seek clarification on what is legal, arguing that it is essential for continued innovation in the crypto space.<sup>323</sup> These requests may, themselves, signal the inadequacies in our current laws and a need for new legal frameworks to accommodate this new technology.<sup>324</sup>

In the gray space in which creativity and criminality coexist, and actions and behaviors are by definition deviant and unexpected, biases can determine whether the coin lands on the side of creativity or crime. Recognizing that bias profoundly affects the labeling of creativity or crime, and working to eliminate these biases, is an important and necessary step to prevent the criminalization of creativity.

#### 4. New Laws and Policies

In addition to addressing biases, creating specific laws and policies that prevent the criminalization of creativity, and that reduce reliance on criminal prosecutions overall, could foster and protect the creativity and healthy development of young people, ultimately benefiting the criminal and juvenile systems, as well as society as a whole.

First, new laws can directly limit how creative expressions are used in criminal prosecutions. For instance, California's Decriminalizing Artistic Expression Act from 2022 limits when "creative expressions," including

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-investors-can-prevent-another-theranos-from-blowing-up-their-portfolio-2018-04-17 [https://web.archive.org/web/20230419224838/https://www.marketwatch.com/story/how-investors-can-prevent-another-theranos-from-blowing-up-their-portfolio-2018-04-17].

321. Azgad-Tromer & Green, *supra* note 318.

322. Allison Morrow, *Crypto's 2023 Was Marred by Fraud and Scandal. It May Have Been Its Best Year Ever*, CNN: BUSINESS (Dec. 24, 2023, at 08:00 ET), https://www.cnn.com/2023/12/24/tech/crypto-2023-bitcoin-sbf/index.html [https://web.archive.org/web/20251009133036/https://www.cnn.com/2023/12/24/tech/crypto-2023-bitcoin-sbf]; Olga Kharif & Anna Irrera, *SBF Tops a Long List of Crypto Hot Shots Facing Legal Reckoning*, BLOOMBERG (Nov. 3, 2023, at 07:32 PT), https://www.bloomberg.com/news/articles/2023-11-03/here-are-the-other-former-crypto-leaders-facing-a-legal-reckoning?embedded-checkout=true [https://perma.cc/AL78-JG45].

323. Nikolaus R. Fahrner & Anne M. Coughlan, *The (Somewhat Lively) State of Crypto Regulation*, THOMSON REUTERS (June 1, 2023), https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/crypto-regulation [https://perma.cc/DRR8-38TD]; Paul Grewal, *Coinbase Takes Another Formal Step to Seek Regulatory Clarity from SEC for the Crypto Industry*, COINBASE (Apr. 24, 2023), https://www.coinbase.com/blog/coinbase-takes-another-formal-step-to-seek-regulatory-clarity-from-sec-for [https://web.archive.org/web/20250804155352/https://www.coinbase.com/blog/coinbase-takes-another-formal-step-to-seek-regulatory-clarity-from-sec-for]; *US House Passes Crypto Bill Despite Warnings from SEC*, REUTERS (May 22, 2024, at 18:06 PT), https://www.reuters.com/world/us/us-securities-regulator-urges-against-crypto-bill-adoption-2024-05-22 [https://perma.cc/EV9M-BYMV].

324. See *supra* Section I.A.

“music, dance, performance art, visual art, poetry, literature, [and] film,” may be introduced as evidence in criminal trials.<sup>325</sup> In assessing the probative value of the evidence against the “substantial danger of undue prejudice,” there are explicit protections for creativity and prohibitions against their misuse.<sup>326</sup> In August 2023, Louisiana became the second state to pass similar legislation to prohibit or limit the use of creative works, such as rap lyrics, in criminal prosecutions.<sup>327</sup> Congress is also considering such restrictions through the Restoring Artistic Protection Act,<sup>328</sup> and there are similar measures in other states, such as New York and Missouri.<sup>329</sup> These limitations are necessary especially since the First Amendment has offered insufficient protection to stem the use of rap lyrics in criminal trials.<sup>330</sup>

In addition, new policies should be implemented to increase opportunities for young people to engage in positive risk-taking through creative outlets. Risk-taking is a natural part of youth development, and channeling it into constructive outlets minimizes the likelihood of engaging in negative risks.<sup>331</sup> Rather than resorting immediately to criminal prosecutions to address unexpected or nonconforming behavior in young people, creative alternatives should be explored. For instance, some cities have countered the harms associated with graffiti by establishing designated public spaces or “permission walls,”<sup>332</sup> offering a constructive outlet for

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325. CAL. EVID. CODE § 352.2 (West 2024); August Brown, *Gov. Newsom Signs Bill Restricting Use of Rap Lyrics in Criminal Trials*, L.A. TIMES (Sep. 30, 2022, at 16:24 PT), <https://www.latimes.com/entertainment-arts/music/story/2022-09-30/rap-lyrics-bill-governor-newsom-decriminalizing-artistic-expression-act> [<https://perma.cc/FH9F-LTMD>].

326. CAL. EVID. CODE § 352.2. Specifically, the law provides that the probative value of the creative expression for its truth should be considered minimal unless certain conditions apply, such as the expression having a “sufficient level of similarity” to the crimes at issue. *Id.* It also provides explicit examples of undue prejudice, including the potential that the creative expression will show the defendant’s “propensity for violence or general criminal disposition” and “the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.” *Id.* If the creative expression is admitted, there is guidance on the types of evidence that may be introduced to minimize bias, such as evidence regarding the “genre of creative expression as to the social or cultural context,” as well as “[e]xperimental or social science research” that shows that the creative expression may “introduce[] racial bias into the proceedings.” *Id.*

327. Montana Miller, *The Restoring Artistic Protection (RAP) Act Takes Effect in Louisiana*, RECORDING ACADEMY (Aug. 2, 2023, at 13:25 PT), <https://www.recordingacademy.com/advocacy/news/restoring-artistic-protection-act-enacted-in-louisiana> [<https://perma.cc/ZXT7-G7V4>].

328. Eden Villalovas, *Congress to Reconsider RAP Act That Would Limit Using Lyrics As Court Evidence*, WASH. EXAM’R (Apr. 28, 2023, at 18:23 PT), <https://www.washingtonexaminer.com/news/2256078/congress-to-reconsider-rap-act-that-would-limit-using-lyrics-as-court-evidence> [<https://perma.cc/QG3Z-2UVT>]; Press Release, Congressman André Carson, Reps. Hank Johnson and Sydney Kamlager-Dove Introduce Bill to Protect Artists’ 1st Amendment Rights (July 24, 2025), [https://carson.house.gov/media/press-releases/rep-hank-johnson-and-sydney-kamlager-dove-introduce-bill-protect-artists-1st?utm\\_s](https://carson.house.gov/media/press-releases/rep-hank-johnson-and-sydney-kamlager-dove-introduce-bill-protect-artists-1st?utm_s) [<https://perma.cc/6SL4-NSGH>].

329. Villalovas, *supra* note 328.

330. NIELSON & DENNIS, *supra* note 217, at 108–09.

331. See *supra* notes 48, 146–49 and accompanying text.

332. Bryan Stalder, *Graffiti Artists Seek “Permission Walls” for Legal Spaces to Showcase Their*

creative expression. Expanding such initiatives can provide more avenues for young people to engage in healthy risk-taking through creative activities.

This approach could also extend to fields like technology and start-ups, in which creativity and innovation are at the forefront. This is especially critical for Black founders who “face far more difficulty raising money than their [W]hite competitors.”<sup>333</sup> Programs and initiatives that provide training, networking opportunities, and access to capital are some ways to ensure that young people from all backgrounds are engaging in positive risk-taking, thereby reducing negative risk-taking endeavors.

Overall, promoting inclusive creative opportunities and preventing the criminalization of creativity will require original, bold, and unconventional thinking. Importantly, young people should actively participate in shaping and implementing these policies and initiatives. Their innate creativity and insight into what motivates them and their peers can help develop effective and impactful laws and policies.

## B. PUNISHING CRIME

Next, applying a developmental framework that prioritizes and protects young people’s creativity should also reshape punishment. While the developmental framework has already led to significant progress in limiting how young people are punished,<sup>334</sup> further measures are necessary to safeguard and cultivate their creativity, even after a criminal conviction or juvenile delinquency adjudication. These changes also pave the way for broader systemic reforms for all people.

Our current system of punishment, especially incarceration and confinement, crushes and stifles creativity. In general, there is “widespread acceptance of boredom as punishment,”<sup>335</sup> and the American prison system is particularly adept at implementing a “long-term boredom.”<sup>336</sup> This

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*Work*, NE. NEWS (Apr. 6, 2022), <https://northeastnews.net/pages/graffiti-artists-seek-permission-walls-for-legal-spaces-to-showcase-their-work> [<https://perma.cc/2V89-R5HH>]; Carol Robidoux, *Only in Nashua: NH’s Only ‘Legal’ Graffiti Wall/Urban Paint Shop*, PATCH (Jan. 22, 2013, at 02:27 ET), <https://patch.com/new-hampshire/nashua/only-in-nashua-nh-s-only-free-graffiti-wall-urban-paint-shop> [<https://perma.cc/FM3F-SWEH>].

333. Emily Flitter, *A Black Venture Capitalist Sees Challenges As an Investing Edge*, N.Y. TIMES (Sep. 10, 2020), <https://www.nytimes.com/2020/09/10/business/black-venture-capital.html> [<https://perma.cc/3XYR-3D2Y>]. For example, a study of more than 500 founders revealed that only 1.5% of Black founders’ funding came from investors, compared with 17% of funding for White founders. *Id.*

334. See *supra* Section II.C.

335. Saida Grundy, *Why Boredom Affects Us So Much*, ATL. (Apr. 17, 2020), <https://www.theatlantic.com/culture/archive/2020/04/why-boredom-affects-us-so-much/610114> [<https://web.archive.org/web/20250906070015/https://www.theatlantic.com/culture/archive/2020/04/why-boredom-affects-us-so-much/610114>].

336. Weeks, *supra* note 259.

boredom may be overshadowed by other harsh realities of prison life, such as violence or abuse, that impose long-term trauma.<sup>337</sup> It may also be obscured by prominent creative works produced during incarceration,<sup>338</sup> or feel-good accounts of arts programming or creative breakthroughs in prison.<sup>339</sup> However, these stories of creativity and innovation are the exception, not the norm.<sup>340</sup> Rather, “the central realities of incarceration for inmates” include its “crushing routine and relentless boredom.”<sup>341</sup>

Nearly every aspect of American prisons—from their architecture to their lack of programming—imposes a controlled and dull existence for those imprisoned. “By their very design and aesthetics, the physical buildings and layout of American prisons cultivate feelings of institutionalization, immobilization, and lack of control . . .”<sup>342</sup> Additionally, “[a]s prison life has become more restricted and punitive, it has simultaneously become more monotonous.”<sup>343</sup> Although some jurisdictions have expanded postsecondary-educational opportunities, there has been an overall decline in “opportunities for paid work, as well as rehabilitative, vocational, and postsecondary programming.”<sup>344</sup> Opportunities for creativity and innovation are severely lacking,<sup>345</sup> and the prison experience is one of “too much drudgery.”<sup>346</sup>

337. Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *Reimagining Prison*, VERA INST. JUST., Oct. 2018, at 1, 26, [https://www.vera.org/downloads/publications/Reimagining-Prison\\_FINAL3\\_digital.pdf](https://www.vera.org/downloads/publications/Reimagining-Prison_FINAL3_digital.pdf) [<https://perma.cc/C3ST-C5KG>].

338. These include Miguel de Cervantes’s *Don Quixote*, Oskar Wilde’s *De Profundis*, Martin Luther King, Jr.’s *Letter from Birmingham Jail*, which were all written during the authors’ incarceration. John Mullan, *Ten of the Best Books Written in Prison*, GUARDIAN (Sep. 18, 2009, at 19:01 ET), <https://www.theguardian.com/books/2009/sep/19/books-written-in-prison> [<https://perma.cc/3B5K-ZEZR>]; Martin Luther King, Jr., *Letter from Birmingham Jail*, BILL RTS. INST. (Apr. 16, 1963), <https://billofrightsinstitute.org/primary-sources/letter-from-birmingham-jail> [<https://perma.cc/X677-35ZV>]. The imprisonment of “moral innovators and political prisoners” like Nelson Mandela, Mahatma Gandhi, and Martin Luther King, Jr., also brought attention to the injustices in their society that then spurred changes in their respective society’s law and culture. Jennie Kaufman Singer, *Creativity in Confinement*, in THE DARK SIDE OF CREATIVITY, *supra* note 4, at 177, 178.

339. Singer, *supra* note 338, at 189; Elena L. Grigorenko, *Twice Exceptional Students: Gifts and Talents, the Performing Arts, and Juvenile Delinquency*, NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV., Jan. 2020, at 59, 63.

340. Singer, *supra* note 338, at 178.

341. Richard A. Wright, *Prisons: Prisoners*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 1182, 1182 (Joshua Dressler et al. eds., 2d ed. 2002).

342. Delaney et al., *supra* note 337, at 20.

343. *Id.* at 24.

344. *Id.* at 25.

345. *Id.*

346. Leah Wang, *The State Prison Experience: Too Much Drudgery, Not Enough Opportunity*, PRISON POL’Y INITIATIVE (Sep. 2, 2022), [https://www.prisonpolicy.org/blog/2022/09/02/prison\\_opportunities](https://www.prisonpolicy.org/blog/2022/09/02/prison_opportunities) [<https://perma.cc/NU56-5SM3>].

The harshest and most severe forms of punishment are worse. Maximum-security prisons are “usually monotonous and boring.”<sup>347</sup> To the extent that the dullness is interrupted, it is due to “outbursts of violence.”<sup>348</sup> The “threat of violence is real enough in maximum security prisons to produce a constant undercurrent of tension, fear, and wariness among inmates and staff.”<sup>349</sup> Solitary confinement, one of the harshest punishments, also incorporates extreme boredom. As Saida Grundy observed, solitary confinement is “specifically designed to numb all of one’s senses and maximize suffering.”<sup>350</sup> In essence, “boredom is an essential quality of one of the most *severe* forms of punishment.”<sup>351</sup> It is unsurprising then that solitary confinement causes such severe developmental harm.<sup>352</sup> The acknowledgment of this harm has substantially decreased its use against children<sup>353</sup> and should be expanded to others as well, especially emerging adults.

Creative outlets in confinement are essential, particularly for young people who require creative outlets for healthy development. Creativity can be transformative, even lifesaving, for those who are incarcerated. For instance, Reginald Dwayne Betts, a lawyer, scholar, poet, and MacArthur Fellow, was sentenced to a nine-year prison term at the age of sixteen for much of his adolescence and early adulthood.<sup>354</sup> Betts recounted that during his time in prison and solitary confinement,<sup>355</sup> “reading is where [he] found freedom, and writing is where [he] was able to express [his] individual thought, imagination and creativity.”<sup>356</sup> After serving his sentence and then attending law school, Betts helped create the Million Book Project to send “a curated 500-book collection to 1,000 medium and maximum security prisons” and “at least one juvenile detention center” in every state.<sup>357</sup> This

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347. Wright, *supra* note 341, at 1184.

348. *Id.*

349. *Id.*

350. Grundy, *supra* note 335.

351. *Id.* (emphasis added).

352. Tiana Herring, *The Research Is Clear: Solitary Confinement Causes Long-Lasting Harm*, PRISON POL’Y INITIATIVE (Dec. 8, 2020), [https://www.prisonpolicy.org/blog/2020/12/08/solitary\\_symposium](https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium) [<https://perma.cc/33GL-GUTA>].

353. Anne Teigen, *Shackling of Juveniles During Court Appearances*, NAT’L CONF. ST. LEGISLATURES (Apr. 28, 2025), <https://www.ncsl.org/research/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement635572628.aspx> [<https://web.archive.org/web/20250906132846/https://www.ncsl.org/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement>].

354. *About*, FREEDOM READS, <https://freedomreads.org/about> [<https://perma.cc/8QYA-2M2H>].

355. *Id.*

356. Mellon Foundation, *Justice Collaboratory Announce Million Book Project*, YALE L. SCH. (June 30, 2020), <https://law.yale.edu/yls-today/news/mellon-foundation-justice-collaboratory-announce-million-book-project> [<https://perma.cc/E3ES-LPQP>].

357. *Id.*

mission continues through the nonprofit organization Freedom Reads, which Betts cofounded and serves as executive director.<sup>358</sup>

Studies support Betts's experience. Art programs in prisons improve individuals' well-being and reduce recidivism when people leave prison.<sup>359</sup> Participants in art therapy "improved socialization skills, had improved attitudes, and were less depressed."<sup>360</sup> Additionally, these programs contributed to a safer prison environment by reducing "prison incidents," "rules violations," and violence.<sup>361</sup>

These opportunities for creativity should not detract from efforts to prevent sending people to prison in the first place. Prisons damage the well-being of those who are incarcerated, and the experience of incarceration in the United States is criminogenic.<sup>362</sup> The damage to the developmental health of young people is even more serious. Even short periods of incarceration cause long-term damage to adolescents' development.<sup>363</sup> Rather, creative expressions and programs can assist with efforts to end mass incarceration and the incarceration of young people. For example, the sale of Roy Lichtenstein *Masterpiece* led to an endowment of \$100 million for Ford Foundation's Art for Justice Fund, which has the mission to provide art-based grants to reduce mass incarceration.<sup>364</sup> The organization has funded

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358. *About, supra* note 354.

359. Singer, *supra* note 338, at 198.

360. *Id.*

361. Grigorenko, *supra* note 339, at 66. Increasing creative opportunities in prison should not detract from efforts to prevent incarceration in the first place. Prisons damage the well-being of those who are incarcerated and are deemed criminogenic. Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. OF JUST., July 2017, at 1, 2, [https://www.vera.org/downloads/publications/for-the-record-prison-paradox\\_02.pdf](https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf) [<https://perma.cc/BC7R-LQFA>]. The damage to the developmental health of young people is even more serious. Even short periods of incarceration cause long-term damage to adolescents' development. *Studies Highlight Long Term Health Harms of Juvenile Justice System*, AM. ACAD. PEDIATRICS (Jan. 23, 2017), <https://services.aap.org/en/news-room/news-releases/pediatrics2/2017/studies-highlight-long-term-health-harms-of-juvenile-justice-system> [<https://web.archive.org/web/20220618073755/https://www.aap.org/en/news-room/news-releases/pediatrics2/2017/studies-highlight-long-term-health-harms-of-juvenile-justice-system>]; Elizabeth S. Barnert, Rebecca Dudovitz, Bergen B. Nelson, Tumaini R. Coker, Christopher Biely, Ning Li & Paul J. Chung, *How Does Incarcerating Young People Affect Their Adult Health Outcomes?*, PEDIATRICS, Feb. 2017, at 1, 7–8 [hereinafter Barnert et al., *Incarcerating Young People*]; Elizabeth S. Barnert, Laura S. Abrams, Lello Tesema, Rebecca Dudovitz, Bergen B. Nelson, Tumaini Coker, Eraka Bath, Christopher Biely, Ning Li & Paul J. Chung, *Child Incarceration and Long-Term Adult Health Outcomes: A Longitudinal Study*, 14 INT'L J. PRISONER HEALTH 26, 30–31 (2018) [hereinafter Barnert et al., *A Longitudinal Study*].

362. Stemen, *supra* note 361, at 2.

363. *Studies Highlight Long Term Health Harms of Juvenile Justice System, supra* note 361; Barnert et al., *Incarcerating Young People, supra* note 361, at 7–8; Barnert et al., *A Longitudinal Study, supra* note 361, at 30–31.

364. Robin Pogrebin, *Agnes Gund Sells a Lichtenstein to Start Criminal Justice Fund*, N.Y. TIMES (June 11, 2017), <https://www.nytimes.com/2017/06/11/arts/design/agnes-gund-sells-a-lichtenstein-to-start-criminal-justice-fund.html> [<https://perma.cc/98N9-43FC>].

programs, such as the one between Los Angeles County and its Arts Commissions to create the Arts and Youth Development Project.<sup>365</sup> The project sponsors art programs for youth who are at risk of entering the juvenile system, as well as programs for youth who are already incarcerated or in a prediversion program.<sup>366</sup>

Additionally, protecting young people's creativity should be prioritized in other forms of carceral control, such as probation, parole, and supervised release. There are approximately 3.7 million people under some form of community supervision.<sup>367</sup> Probation is the most common juvenile delinquency disposition.<sup>368</sup> According to the latest data, 188,200 juvenile delinquency cases had a disposition of probation in 2022.<sup>369</sup> Community supervision imposes numerous and wide-reaching restrictions and controls over individuals' lives.<sup>370</sup> These restrictions also limit one's creativity, as they can dictate who an individual associates with or what type of activity the individual engages in. For example, in one recent federal criminal case, a defendant was arrested for violating the terms of his supervised release for working with people with prior felony convictions to produce and perform rap music that allegedly "promot[ed] and glorifi[ed] future gun violence/murder."<sup>371</sup> While the court modified the terms to be less restrictive than the prosecutors' request, it still ordered the defendant to submit his rap lyrics to the government for pre-approval before promoting or producing his songs to ensure that they are not "inconsistent with the goals of rehabilitation."<sup>372</sup> These types of conditions directly target and limit one's creativity and may actually hinder rehabilitation.

Alternatively, as an example of a probation condition that recognizes the importance of youth creativity, one can turn to the program by Creative Justice. This organization, while advocating for the abolition of prisons,<sup>373</sup>

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365. Sara Tiano, *L.A. County Using Arts to Paint New Picture of Juvenile Justice Reform*, IMPRINT (Dec. 21, 2018, at 08:00 PT), <https://imprintnews.org/justice/juvenile-justice-2/1-a-county-using-arts-to-paint-new-picture-of-juvenile-justice-reform/33200> [<https://perma.cc/VLQ3-EBPG>].

366. *Id.*

367. *Probation and Parole*, PRISON POL'Y INITIATIVE, [https://www.prisonpolicy.org/research/probation\\_and\\_parole](https://www.prisonpolicy.org/research/probation_and_parole) [<https://perma.cc/P8CH-3SG7>].

368. *Easy Access to Juvenile Court Statistics (EZAJCS)*, OFF. JUV. JUST. & DELINQ. PREVENTION, <https://ojjdp.ojp.gov/statistical-briefing-book/data-analysis-tools/ezajcs/case-processing> [<https://perma.cc/DD4E-PS6E>].

369. *Id.*

370. Kate Weisburd, *Rights Violations As Punishment*, 111 CALIF. L. REV. 1305, 1316 (2023) (summarizing restrictions).

371. Ramon Antonio Vargas, *Rapper BG Ordered to Have All Future Songs Approved by US Government*, GUARDIAN (July 2, 2024, at 06:00 ET), <https://www.theguardian.com/music/article/2024/jul/02/rapper-bg-government-song-approval> [<https://perma.cc/SLJ7-SUR4>].

372. *Id.*

373. *Keeping it 100*, CREATIVE JUST., <https://www.creativejusticenw.org/keepin-it-100> [<https://perma.cc/SLJ7-SUR4>].

works within the juvenile system to provide “arts-based healing engaged spaces” for young people such that their “time and creative work can be used in mitigating any active court cases or other systemic burdens they may be facing.”<sup>374</sup> In collaboration with mentor artists, these youth “explore the root causes of incarceration, weaving together art, creativity, and restorative justice” for personal and societal change.<sup>375</sup> Programs like this demonstrate the need for innovative solutions to foster young people’s creativity even while under carceral control. The “window of opportunity” during this life stage can lead to long-lasting changes that contribute to the well-being of individuals and their communities.<sup>376</sup> Efforts with a focus on creativity should lead to broader systemic reforms across the entire criminal system.

#### IV. CREATIVITY AND CRIME IN SCHOOLS

Another significant space in which creativity and crime collide for young people is the education system. Applying a developmental framework that prioritizes creativity should expand opportunities in schools for young people to develop and express their creativity. Yet schools are moving in the opposite direction. Alongside a pervasive educational culture marked by widespread boredom and a broader creativity crisis among our youth,<sup>377</sup> schools are increasingly adopting criminal processes and entrenching the school-to-prison pipeline, particularly for marginalized youth from poor communities.

This Part first describes this problematic culture of criminalization that has taken hold in the educational system and then proposes ways that schools can instead cultivate a culture of creativity. Expanding students’ creativity not only increases engagement in their education and enhances young people’s well-being, but it also reduces the likelihood of negative risk-taking<sup>378</sup> and becoming entangled in the juvenile or criminal systems. These normative proposals also continue to highlight the close connections between crime and creativity.

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perma.cc/4GA6-SHYE]; *Creative Justice: Mentor Artist Search*, CREATIVE JUST., <https://www.creativejusticenw.org/join-the-team> [<https://perma.cc/YK6L-WTJD>].

374. *About Us*, CREATIVE JUST., <https://www.creativejusticenw.org/aboutus> [<https://perma.cc/WQM8-EQ7M>].

375. *Id.*

376. STEINBERG, *supra* note 51, at 17.

377. KIM, *supra* note 45, at 13; Kim, *supra* note 164, at 21.

378. *See supra* notes 48, 148–51 and accompanying text.

## A. CULTURE OF CRIMINALIZATION

A pervasive culture of criminalization characterizes our current educational system, exemplified by the school-to-prison pipeline. This pipeline refers to “policies and practices that systemically push at-risk youth out of mainstream public schools and into the juvenile or criminal justice systems.”<sup>379</sup> This includes “the trend of referring students directly to law enforcement for committing offenses at school or creating conditions that increase the probability of students eventually becoming incarcerated, such as suspending or expelling them.”<sup>380</sup>

The relationship between schools and the juvenile and criminal systems has “tightened significantly” over the recent decades.<sup>381</sup> There is more reliance on criminal tools and processes, such as the increased usage of surveillance, school resource officers (“SROs”) or police officers, and school disciplinary processes that heighten the risk of youth involvement in the criminal or juvenile systems.<sup>382</sup> Furthermore, the expanding creation and enforcement of “disturbing school statutes” are being used to criminalize or harshly discipline “common adolescent misbehavior, such as texting and refusing to hand over a cell phone, burping, using perfume, throwing a paper airplane, stealing a beef patty, [and] writing on desks.”<sup>383</sup> These offenses and crimes such as “insubordination” or “willful defiance” are inherently difficult to define.<sup>384</sup>

Such statutes are also the common reason for punitive actions. For example, 40% of all school suspensions during the 2010 to 2011 school year in California were for “willful defiance,” which is defined in part as “any behavior that disrupts a classroom.”<sup>385</sup> In New York City public schools, “insubordination” was the most cited reason for suspensions in the 2013 to 2014 school year.<sup>386</sup> Again, it is these “tough-to-define”<sup>387</sup> offenses that,

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379. Catherine Y. Kim, *Procedures for Public Law Remediation in School-to-Prison Pipeline Litigation: Lessons Learned from Antoine v. Winner School District*, 54 N.Y.L. SCH. L. REV. 955, 956 (2010).

380. Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 923 (2016).

381. Michael Heise & Jason P. Nance, “Defund the (School) Police”? *Bringing Data to Key School-to-Prison Pipeline Claims*, 111 J. CRIM. L. & CRIMINOLOGY 717, 724 (2021).

382. *Id.* at 725–26.

383. Jason P. Nance & Michael Heise, *Law Enforcement Officers, Students, and the School-to-Prison Pipeline: A Longitudinal Perspective*, 54 ARIZ. ST. L.J. 527, 537 (2022).

384. Libby Nelson & Dara Lind, *The School-To-Prison Pipeline, Explained*, VOX (Oct. 27, 2015, at 08:05 PT), <https://www.vox.com/2015/2/24/8101289> [<https://web.archive.org/web/20260215165048/https://www.vox.com/2015/2/24/8101289/school-discipline-race>].

385. *Id.*

386. *Id.*

387. *Id.*

consistent with other disorderly conduct offenses, give wide latitude to decisionmakers,<sup>388</sup> like school administrators or SROs, to determine if young people's actions are creative or criminal.

Moreover, zero-tolerance policies, which were ushered in by the national Gun-Free Schools Act of 1994,<sup>389</sup> also create an "extreme category of exclusionary discipline."<sup>390</sup> Under this Act, as a condition for receiving federal funds, states were required to pass laws that mandated schools to expel students for at least one year if they brought guns to school.<sup>391</sup> The enforcement of this Act, however, was inconsistent, with students being expelled or sent to authorities for bringing "butter knives (for sandwiches), plastic toy guns, or Swiss Army knives, and for swearing or engaging in any behavior considered disruptive by school officials."<sup>392</sup> This federal policy then spurred local and state zero-tolerance policies that mandated expulsion or discipline for other actions, such as "possession of drugs, alcohol, or tobacco; fighting; dress-code violations; truancy; and tardiness."<sup>393</sup>

It is sadly ironic that, as Bettina L. Love opined, the very creativity that young Black students expressed through hip-hop was used against them to create stereotypes that helped justify and spur these punitive school reforms in the 1980s and 1990s that then continue to restrict their creativity and enable its continued criminalization.<sup>394</sup> The Black children who helped make hip-hop a celebrated worldwide "cultural phenomenon" were contemporaneously "punished . . . for the very creativity they expressed in hip-hop."<sup>395</sup> They were called "super predators," "crack babies," and "thugs," and their "youth culture" was upended "to reinforce these labels, not just outside of school but, more perniciously, inside school."<sup>396</sup> The very stereotypes that supported police brutality in their communities also justified such practices in their schools.<sup>397</sup> They "were no longer children but pre-criminals. Schools were no longer schools but pipelines to prison."<sup>398</sup>

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388. Moran, *supra* note 212, at 88.

389. Gun-Free Schools Act of 1994, Pub. L. No. 103-382, sec. 14601, § 101, 108 Stat. 3907, 3907-08 (codified at 20 U.S.C. § 8921 (2001)).

390. Heise & Nance, *supra* note 381, at 727; Nance, *supra* note 380, at 933.

391. Nance, *supra* note 380, at 933.

392. BETTINA L. LOVE, PUNISHED FOR DREAMING: HOW SCHOOL REFORM HARMS BLACK CHILDREN AND HOW WE HEAL 157-58. (2023).

393. Nance, *supra* note 380, at 933.

394. Bettina Love, *How Public Education Nearly Killed Hip-Hop in the Cradle*, DAILY BEAST (Sep. 22, 2023, at 21:02 ET), <https://www.thedailybeast.com/how-public-education-nearly-killed-hip-hop-in-the-cradle> [<https://web.archive.org/web/20251017035901/https://www.thedailybeast.com/how-public-education-nearly-killed-hip-hop-in-the-cradle>]; *see also* LOVE, *supra* note 392, at 157-58.

395. Love, *supra* note 394.

396. *Id.*

397. *Id.*

398. *Id.*

Together, these laws, policies, and practices have made it easier and more common for students to be directly referred to the juvenile or criminal systems. For example, there is evidence “that a school’s SRO/police presence corresponds with an increased likelihood that the school will report student incidents to law enforcement agencies.”<sup>399</sup> One study showed that schools with police officers or SROs have had “five times as many arrests for ‘disorderly conduct’ as schools without them.”<sup>400</sup> Even if they are not directly referred, internal school disciplinary proceedings, such as suspensions or expulsions, increase the risk that youth will eventually become part of the juvenile or criminal system.<sup>401</sup> Merely attending a middle school with more suspensions—even if the students themselves are not suspended—increases the likelihood that they will be involved in adult crime, arrested, and incarcerated, and less likely that they will finish high school and attend college.<sup>402</sup> Moreover, some contend that these processes themselves “contribute to a quasi-prison-like environment” directly within schools.<sup>403</sup>

The school-to-prison pipeline also disproportionately impacts youth of color. There is “[a]bundant empirical evidence” that shows that youth of color are “disproportionately represented throughout every stage” of this pipeline.<sup>404</sup> This includes more frequent and more severe disciplinary actions within schools and high rates of arrest and convictions in the juvenile and criminal systems.<sup>405</sup> Schools with a larger proportion of marginalized students also have higher rates of surveillance, even after controlling for other factors such as “student poverty, . . . [performance] . . . on academic assessments, school crime, school disorder and disciplinary problems, and school administrators’ perceptions of the level of criminal activity in the surrounding neighborhoods.”<sup>406</sup> Racial disparities are also present in suspending and expelling students, even after “controlling for factors such as student misbehavior, poverty, academic achievement, neighborhood context, and district and school characteristics.”<sup>407</sup> Other empirical research has shown more nuance, with studies showing no racial disparity against Black students “for more serious and objectively defined offenses, especially when discipline is mandated for engaging in such offenses,” but racial

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399. Heise & Nance, *supra* note 381, at 718.

400. Nelson & Lind, *supra* note 384.

401. *Id.*

402. Andrew Bacher-Hicks, Stephen B. Billings & David J. Deming, *Proving the School-to-Prison Pipeline*, EDUC. NEXT, Fall 2021, at 52, 52.

403. Heise & Nance, *supra* note 381, at 725.

404. Nance, *supra* note 380, at 924; *see also* Kim, *supra* note 379, at 957.

405. Nance, *supra* note 380, at 925.

406. Heise & Nance, *supra* note 381, at 728–29.

407. *Id.* at 729.

disparities manifesting when the offense is less serious or when “discipline is discretionary.”<sup>408</sup> This study is consistent with scholars’ observations about the heightened discretion inherent in disorderly conduct offenses that enhances the effects of biases.<sup>409</sup>

Significant changes are required as education remains one of the most effective ways for youth to avoid engaging in adult crime or becoming enmeshed in the juvenile or criminal systems. Attending a “higher-quality school” and completing high school lessen the risk of future criminal activity.<sup>410</sup> For Black youth, those who do not graduate high school have an approximately “70 percent cumulative risk of imprisonment.”<sup>411</sup> Merely increasing the minimum dropout age, such as raising the age from sixteen to eighteen, has “a significant and negative effect on juvenile crime.”<sup>412</sup> It particularly reduces property and violent crimes for those in high school.<sup>413</sup> Studies show that those in prison also generally have less education.<sup>414</sup> Meanwhile, youths who experience juvenile detention or incarceration are less likely to attend high school, and they experience higher risk of being imprisoned as an adult,<sup>415</sup> again highlighting another close connection between schools and crime.

Therefore, applying a developmental framework that prioritizes young people’s creativity involves not only dismantling the school-to-prison pipeline, but also encouraging their engagement in schools and supporting their eventual graduation. One effective approach is to create more opportunities for creative expression in their education.

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408. *Id.* at 729–30.

409. Moran, *supra* note 212, at 88.

410. Bacher-Hicks et al., *supra* note 402, at 52.

411. Melissa S. Kearney, Benjamin H. Harris, Elisa Jácome & Lucie Parker, *Ten Economic Facts About Crime and Incarceration in the United States*, HAMILTON PROJECT, May 2014, at 1, 11, [https://www.hamiltonproject.org/assets/legacy/files/downloads\\_and\\_links/v8\\_THP\\_10CrimeFacts.pdf](https://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/v8_THP_10CrimeFacts.pdf) [<https://perma.cc/D6ST-3HQM>].

412. D. Mark Anderson, *In School and Out of Trouble? The Minimum Dropout Age and Juvenile Crime*, 96 REV. ECON. & STAT. 318, 329 (2014).

413. *Id.* at 318, 329.

414. LOIS M. DAVIS, JENNIFER L. STEELE, ROBERT BOZICK, MALCOLM V. WILLIAMS, SUSAN TURNER, JEREMY N.V. MILES, JESSICA SAUNDERS & PAUL S. STEINBERG, *HOW EFFECTIVE IS CORRECTIONAL EDUCATION, AND WHERE DO WE GO FROM HERE?* 1 (2014).

415. Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges*, 130 Q.J. ECON. 759, 759 (2015).

## B. CREATING A CULTURE OF CREATIVITY

Schools not only influence young people's paths toward or away from crime, but schools also play a crucial role in guiding their creativity. Education is, in fact, "essential to creativity."<sup>416</sup> Since creativity "requires a high degree of domain knowledge," schools are vital in facilitating this attainment.<sup>417</sup> Transforming schools into more creative spaces can motivate students to care about their education, remain in school, and also reduce the likelihood that they will enter the criminal or juvenile systems.

Many scholars, however, hold the current educational system largely responsible for contributing to the "creativity crisis" among youth in America.<sup>418</sup> In both secondary and higher education, creativity is generally not prioritized and, at times, is actively undermined. Kim, who has documented the decline in creative thinking among K-12 students, points to an overemphasis on standardized testing and test-taking skills in classrooms as a major contributing factor to this decline.<sup>419</sup> She is not alone in her critique.

Regarding high schools, Steinberg observed that except for the "very best American students—the ones in [Advanced Placement] classes who are bound for the nation's most selective colleges and universities—high school is tedious and unchallenging."<sup>420</sup> Research shows that adolescents are most bored when they are in school, and that their "moods improve dramatically around 3:00 p.m. and toward the end of the week, as the weekend approaches."<sup>421</sup> According to surveys, most high schoolers shared that "they are just going through the motions at school, calibrating their level of effort to ensure that they do well enough to stay out of academic trouble," while one-third responded "that they have little interest in school and get through the day by fooling around with their friends."<sup>422</sup> Compared with other countries, American schools are generally "more boring."<sup>423</sup> In one study, more than 80% of international students who studied in American high schools found them less challenging than schools in their home countries.<sup>424</sup> This issue persists in higher education. Overall, colleges and universities

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416. R. KEITH SAWYER, EXPLAINING CREATIVITY: THE SCIENCE OF HUMAN INNOVATION 390 (2d ed. 2012).

417. *Id.*

418. KIM, *supra* note 45, at 13.

419. *Id.* at 17–21.

420. STEINBERG, *supra* note 51, at 143.

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.*

provide “little support for creative students.”<sup>425</sup> The admissions criteria for college also do not adequately assess students’ creativity and, therefore, miss opportunities to admit and enroll “daring [and] imaginative thinkers.”<sup>426</sup>

Increasing creativity in schools is a challenge when the very model and structure of the American educational system were not designed with this goal in mind. Instead, this system is based on an industrial model. The “[s]ystems of mass education were designed to mold students to certain requirements.”<sup>427</sup> Like “typical factories, high schools and higher education in particular are organized around the division of labor.”<sup>428</sup> The typical school day is “segmented into regular chunks of time” and teachers “specialize in particular subjects.”<sup>429</sup> Similarly, “[i]ndustrial processes demand compliance with specific rules and standards.”<sup>430</sup> This is echoed in the “standards movement” in education, which requires “compliance in curriculum, teaching, and assessment.”<sup>431</sup>

Moreover, in most K-12 classrooms, students are placed in small classrooms, “often are required to work quietly and individually,” and work on “problems that have already been solved” or have “one correct or expected way of completing them.”<sup>432</sup> There is “continuous monitoring and assessment of students and teachers,” which reinforces conformity and monotony.<sup>433</sup> Although teachers may claim to value creativity and creative students, they often “dislike characteristics associated with creativity” such as nonconformity.<sup>434</sup> As a result, many creative students find the standardized methods of teaching not only unhelpful, but also “distracting.”<sup>435</sup> These issues are even more pronounced in schools in poor, marginalized communities. Students contend with minimal resources, violence, and chronic disengagement. Such schools not only function as

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425. Arthur J. Cropley, *Creativity in the Classroom: The Dark Side*, in *THE DARK SIDE OF CREATIVITY*, *supra* note 4, at 297, 300.

426. Colin Poitras, *Creativity Found Lacking in College Admissions Process*, UCONN TODAY (Jan. 20, 2016), <https://today.uconn.edu/2016/01/creativity-found-lacking-in-college-admissions-process> [https://perma.cc/QY9M-PCSX]; Jean E. Pretz & James C. Kaufman, *Do Traditional Admissions Criteria Reflect Applicant Creativity?*, 51 J. CREATIVE BEHAV. 240 (2015).

427. ROBINSON & ARONICA, *supra* note 16, at 35.

428. *Id.*

429. *Id.* at 35–36.

430. *Id.* at 35.

431. *Id.*

432. Ronald A. Beghetto, *Creativity in K-12 Schools*, in *CREATIVITY: AN INTRODUCTION*, *supra* note 3, at 224, 225.

433. *Id.*

434. Cropley, *supra* note 425, at 297.

435. Nancy C. Andreasen, *Secrets of the Creative Brain*, ATL. (July/Aug. 2014), <https://www.theatlantic.com/magazine/archive/2014/07/secrets-of-the-creative-brain/372299> [https://web.archive.org/web/20250925103459/https://www.theatlantic.com/magazine/archive/2014/07/secrets-of-the-creative-brain/372299].

pipelines to prison but also increasingly mirror prison-like environments, characterized by disorder, apathy, and lack of meaningful opportunities for growth.<sup>436</sup>

An increasing number of students and their families are opting to leave traditional schooling.<sup>437</sup> Families from diverse backgrounds and regions of the country are turning to homeschooling, now recognized as the “fastest-growing form of education.”<sup>438</sup> While motivations for homeschooling vary—ranging from educational and religious reasons, to minimizing racism<sup>439</sup>—there is evidence that homeschooling fosters creativity in youth, both in the United States and abroad.<sup>440</sup> Other nontraditional schools take different approaches, such as incorporating a “democratic process” in which students decide what they want to learn, changing the educational environment into “one of adventure and discovery rather than stricture.”<sup>441</sup> Meanwhile, the “Slow Education” model emphasizes giving students the “space and the time to discover their passions and their strengths.”<sup>442</sup> The model was developed by Joe Harrison while working for Creative Partnerships, a government program in the United Kingdom designed to increase creativity in schools.<sup>443</sup>

However, access to nontraditional and alternative educational models is limited. Schools that adopt a democratic process are mostly private schools.<sup>444</sup> Similarly, the Slow Education model requires that the “school

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436. Jyoti Nanda, *Web of Incarceration: School-Based Probation*, 21 NEV. L.J. 1117, 1124–31 (2021); LaToya Baldwin Clark, *Barbed Wire Fences: The Structural Violence of Education Law*, 89 U. CHI. L. REV. 499, 508 (2022); see also Kerry Dixon & Hilary Janks, *Location and Dislocation: Spatiality and Transformation in Higher Education*, in TRANSFORMING TRANSFORMATION IN RESEARCH AND TEACHING AT SOUTH AFRICAN UNIVERSITIES 89, 91 (Rob Pattman & Ronelle Carolissen eds., 2018) (stating Michel Foucault’s theory that “schools serve the same social functions as prisons” in that they also “define, classify, control and regulate people”).

437. Peter Jamison, Laura Meckler, Prayag Gordy, Clara Ence Morse & Chris Alcantara, *Home Schooling’s Rise from Fringe to Fastest-Growing Form of Education*, WASH. POST (Oct. 31, 2023, at 07:00 PT), <https://www.washingtonpost.com/education/interactive/2023/homeschooling-growth-data-by-district/> [<https://perma.cc/VGG6-9H9E>].

438. *Id.*

439. Brian D. Ray, *Home Schooling: The Ameliorator of Negative Influences on Learning?*, 75 PEABODY J. EDUC. 71, 95–99 (2000); Char Adams, *Black Families Are Changing the Educational Landscape Through Communal Home-Schooling*, NBC NEWS (Feb. 8, 2023, at 09:53 PT), <https://www.nbcnews.com/news/nbcblk/black-families-are-challenging-educations-status-quo-home-schooling-rcna69027> [<https://perma.cc/78CD-MXTV>].

440. Ray, *supra* note 439, at 96; Richard G. Medlin, *Creativity in Home Schooled Children*, NAT’L HOME EDUC. RSCH. INST. (Jan. 10, 1996), <https://nheri.org/home-school-researcher-creativity-in-home-schooled-children/> [<https://perma.cc/P3GY-5YTM>]; Michal Unger Madar & Iri BenDavid-Hadar, *Does Home Schooling Improve Creative Thinking and Social Competencies Among Children? Home Schooling in Israel*, 16 J. SCH. CHOICE 136 (2022).

441. ROBINSON & ARONICA, *supra* note 16, at 154–55.

442. *Id.* at 93.

443. *Id.* at 91.

444. *Id.* at 153.

and community devote[] time to learn who each individual student [is] and what they [are] about, and to create programs geared to specific interests, and capacities.”<sup>445</sup> Unfortunately, many schools lack the resources and time to implement these approaches, and many families cannot afford private schools or homeschooling.

Incremental changes, however, can be introduced in both secondary and higher education. Increasing creativity in schools does not mean eliminating standards or encouraging “antisocial behavior.”<sup>446</sup> Instead, the singular focus on conformity—or “judg[ing] students by a single standard of ability”—should be reduced.<sup>447</sup> To do so, schools should celebrate the diversity of “individual talents” among their students.<sup>448</sup>

Also, while there is a movement toward teachers using scripted materials, they can also reduce “improvised, creative, collaborative learning.”<sup>449</sup> As creativity expert and professor Keith Sawyer recommended, while teachers should be experts in their subject matters and can use scripted materials, they must also create space for improvisation—both among students and between the teacher and students.<sup>450</sup>

As “[t]he real driver of creativity is an appetite for discovery and a passion for the work itself,” teachers and schools should explore creative ways to motivate students to learn.<sup>451</sup> A meta-analysis of adolescent creativity found that key educational factors that best support creativity include “balancing freedom and necessary guidance; flexible, open-ended activities with clear learning expectations; openness to and encouragement of student ideas; an atmosphere of trust and respect; and varied learning resources.”<sup>452</sup> Implementing the “seven habits of mind”—“posing questions, play, immersion, innovation, risk taking, being imaginative, and self-determination”—also increases creativity.<sup>453</sup>

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445. *Id.* at 92–93.

446. *Id.* at 36.

447. *Id.*

448. *Id.*

449. R. Keith Sawyer, *What Makes Good Teachers Great? The Artful Balance of Structure and Improvisation*, in *STRUCTURE AND IMPROVISATION IN CREATIVE TEACHING* 1, 3, 21 (R. Keith Sawyer ed., 2011).

450. *Id.* at 10.

451. ROBINSON & ARONICA, *supra* note 16, at 120.

452. Van der Zanden et al., *supra* note 3, at 1. The paper also identified individual, parental, and social contextual factors. *Id.* For example, individual factors include “openness to experience, intrinsic motivation, creative self-efficacy, attributing adversity to external factors, and academic achievement.” *Id.* Parental factors include “parental support and autonomous motivation with maternal involvement.” *Id.* Social contextual factors include “providing interactions that encourage expression or challenging of ideas; and encouraging adolescents to view issues from multiple global and temporal perspectives.” *Id.*

453. Sawyer, *supra* note 449, at 10.

High schools and colleges can also foster creativity by “role model[ing] creativity.”<sup>454</sup> The “most compelling way” to inspire creativity is to model it.<sup>455</sup> Additionally, “teaching students to cross-fertilize their thinking across various disciplines” and to connect these ideas to personal interests are important.<sup>456</sup> Projects and assignments that provide students time to be creative, work with others to be in “creative collaboration,” assess and reward creativity, are also effective.<sup>457</sup>

Prioritizing creativity in young people’s educational environments can inspire positive risk-taking, reduce negative risk-taking, and enhance their overall well-being. It encourages them to remain in school and graduate, thereby decreasing their risk of entering the juvenile and criminal systems. In addition to dismantling the school-to-prison pipeline and eliminating biases that mischaracterize students’ creativity as criminality, schools should make intentional efforts to prioritize and cultivate creativity among their students.

#### CONCLUSION

The significant overlap between creativity and crime presents both a challenge and an opportunity. As the two are deeply intertwined, they can easily be mischaracterized, with creative actions labeled as criminal ones or construed as evidence of one’s criminality. This issue is particularly salient for young people, whose developmental traits heighten both types of behaviors and who are at a critical stage for cultivating their creative identity.

As the developmental framework increasingly shapes laws and policies affecting adolescents and emerging adults, prioritizing creativity is imperative. This Article examined how centering creativity should change how young people are prosecuted and punished for crimes or offenses, as well as how they are educated. Addressing biases and adopting laws, policies, and practices that deter the criminalization of creativity and recognize creativity as an integral factor of young people’s development will not only advance the main goal of the developmental framework—the well-being of adolescents and emerging adults—but also lay the groundwork for broader systemic changes that benefit society as a whole.

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454. Sternberg, *supra* note 171, at 282.

455. *Id.*

456. *Id.* at 282–83.

457. *Id.* at 283–84.