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Robin Walker Sterling

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INTRODUCTION

The juvenile justice system swallows children of color at a shockingly disproportionate rate. The data is uncontroverted and bears repeating. In 2008, children of color comprised 22% of the country's youth population, but constituted 54% of children arrested for violent crimes and 35% of children arrested for property crimes.[1] When a white juvenile and a black juvenile with similar backgrounds are each charged with the same drug offense, the black juvenile is nine times more likely to be detained.[2] Finally, one in three black juveniles can expect to go to prison in his lifetime.[3]

Explanations focusing on demographics, arrest rates, and rates of offending fail to account for the disparity.[4] Moreover, data gathered using modern self-report methods[5] suggest that the rates of juvenile drug offending are static across races. This conclusion undermines the hypothesis that African American children are more involved with the

* Assistant Professor, University of Denver Sturm College of Law; J.D., New York University School of Law; B.A., Yale College. Former staff attorney with the Public Defender Services for the District of Columbia; supervising attorney at the Children's Law Center; special counsel with the National Juvenile Defender Center in Washington D.C.

[1] CRYSTAL KNOLL & MELISSA SICKMUND, Delinquency Cases in Juvenile Court, 2008, Office of Juvenile Justice & Delinquency Prevention Fact Sheet, 2 (Dec. 2011), *available at* http://www.ojjdp.gov/pubs/236479.pdf. In 2008, white youth accounted for 78% of the U.S. juvenile population, black youth 16%, Asian youth (including Native Hawaiian and Other Pacific Islander) 5%, and American Indian youth (including Alaska Native) 1%. Id.

[2] W. Haywood Burns Inst. for Juvenile Justice Fairness and Equity, *Disproportionate Minority Confinement/Contact (DMC)*, http://www.burnsinstitute.org/downloads/FACT%20SHEET%20BI.doc (last visited Oct. 13, 2013).

[3] Id.

[4] Robin Walker Sterling, *Fundamental Unfairness: In Re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 661 (2013) (arguing that rates of offending are static across racial and ethnic groups and that it is more likely that the acknowledged conscious and unconscious bias account for the disproportionate minority contact).

[5] Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 415 (2013) (detailing modern methods that ensure that self-report surveys are "as reliable, if not more reliable than, most social science measures").

juvenile justice system simply because they commit a disproportionate share of crimes.[6]

A probable explanation is conscious and unconscious bias.[7] This bias takes hold at all points of discretion in the juvenile justice system.[8] As one noted scholar wrote, "individualized discretion is often synonymous with racial disparities in sentencing."[9] The numbers reinforce this belief. Between 2002 and 2004, black juveniles—16% of the youth population — had the misfortune of accounting for 28% of juvenile arrests, 30% of court referrals, 37% of detained youth, 38% of youth placed out of their home, 34% of youth waived to adult court, and 58% of youth locked in adult prisons.[10]

The juvenile justice system poses a singular threat to children of color because the juvenile justice procedure lacks formality. In the place of formality is discretion, and every point of discretion functions as another foothold for implicit bias. This informality is enshrined in Supreme Court doctrine that was built on the late-nineteenth century "Child Savers" narrative. The "Child Savers" founded the early juvenile court according to rehabilitative principles of "fairness, of concern, of sympathy, and of paternal attention."[11] This dominant narrative informed the Court's decision in *In re Gault*.[12] *In re Gault* grounded the procedural rights of juvenile defendants in the

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[6] *See id. at* 414–15 (arguing that there is a disparity between self-reported drug use and drug arrests for African American and Hispanic children, which could be explained by "increased police presence" in their neighborhoods and communities, as well as police racial and ethnic bias).

[7] *See generally* Geoff Ward, Aaron Kupchik, Laurin Parker & Brian Chad Starks, *Racial Politics of Juvenile Justice Policy Support: Juvenile Court Worker Orientations Toward Disproportionate Minority Confinement*, RACE & JUSTICE, 154, 158–59, 175 (2011) (noting studies showing white probation officers were more likely to make "negative internal attributions about Black youth delinquency," and explaining their studies findings that race effects are relevant to differential treatment within the juvenile justice system).

[8] Walker Sterling, *supra* note 4, at 661.

[9] Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 714.

[10] Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 360 (2011).

[11] McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).

[12] 387 U.S. 1, 14-19 (1967) (discussing the history of the Child Savers movement and the refusal to grant juveniles the same rights as adults in criminal proceedings because children were viewed as innocent and incarcerating them with adults did not rehabilitate or protect them, which is what they believed should have been happening).

minimalistic due process concept of "fundamental fairness" rather than in the full fundamental rights afforded to adult criminal defendants under the United States Constitution.[13]

Uncritically relying on the Child Savers narrative suppresses the alternative narrative detailing the experience of children of color.[14] Had the Court recognized this alternative narrative, the Court might have seen that people of color did not experience "disillusionment"[15] by the juvenile justice system at some point long ago; the Court would have found that there was no such illusion to begin with. People of color have received "the worst of both worlds"—a lack of rehabilitative treatment and a lack of procedural protections—since the start of the juvenile justice system.[16]

Gault, along with the other juvenile cases from the Warren Court, is widely considered to be the apex of the juvenile due process movement. *Gault* was the first case to extend many procedural rights to juveniles, not least among them the right to counsel, by grounding those rights in the limited doctrine of fundamental fairness. [17] But *Gault* also splintered juvenile justice from the rest of the civil rights movement and stunted its growth. The ramifications of this became all too apparent in *McKeiver v. Pennsylvania*, in which the Court refused to recognize a juvenile right to trial by jury as part of the fundamental

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[13] Walker Sterling, *supra* note 4, at 646 (in an effort to maintain certain benefits of the juvenile proceedings such as "confidentiality and rehabilitative services" the Court in *In re Gault* refused to determine "that juvenile delinquency proceedings were completely analogous to criminal trials," thus expanding the Fourteenth Amendment fundamental fairness balancing test as opposed to "the same constitutional protections that check the government's power in [adult] criminal proceedings.").

[14] *See generally* Walker Sterling, *supra* note 4, Part IB (claiming children of color were excluded from rehabilitative services, had fewer resources, and experienced disproportionate contact with the justice system because of "racist attitudes towards black children and their capabilities").

[15] *See McKeiver*, 403 U.S. at 551 (the ultimate disillusionment occurs when superimposing the criminal adjudicative process on the juvenile court system, thereby eliminating the need for the juvenile court system if it is equivalent to the adult system).

[16] Kent v. United States, 383 U.S. 541, 556 (1966).

[17] In re Gault, 387 U.S. 1, 21, 29–31 (1967) (holding juveniles are guaranteed similar protections given to adults in criminal proceedings in accordance with Due Process rights).

fairness rubric.[18] This holding has had disastrous implications for children of color, who require procedural formalities as a shield against the discriminatory impact of unfettered discretion.[19]

I previously discussed the topic of *Gault*'s failings in *Fundamental Unfairness*.[20] The purpose of this brief piece, written as a companion to a talk I delivered at the University of Maryland "Children at Risk" Symposium on November 9, 2012, is to expound further on this topic. The past several terms demonstrate that the Supreme Court has the constitutional rights of children accused of crimes in sight.[21] This opportunity to push for a realignment of juvenile justice toward a full recognition of fundamental rights must not be wasted. The need is urgent and the time is ripe.

Part I briefly reiterates the history of the juvenile justice system, contrasting the dominant narrative of a progressive, rehabilitative system with the true experience of children of color. With that context set, I outline the major doctrines set forth in *Gault* and the related juvenile cases of its era. I then go further than I did in *Fundamental Unfairness* and discuss how the experiences of white and minority youths continued to diverge after *McKeiver*. In Part II, I explain how *Gault* and its progeny have left children of color exposed to the implicit racial bias that permeates the system. Finally, in Part III, I prescribe strategies to begin the overdue dismantling of the machinery that imprisons, stigmatizes, and damages the lives of children of color at a grossly disproportionate rate.

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[18] *McKeiver*, 403 U.S. at 543–45. (holding a "jury is [not] a necessary component of accurate fact finding," and the juvenile standard of fundamental fairness does not require one).

[19] *Id.* at 528.

[20] *See generally* Walker Sterling, *supra* note 4, Part II (arguing the Court's failure to note the disparate treatment of minority juveniles in the *In re Gault* decision led to their flawed reasoning for basing their decision in the Fourteenth Amendment as opposed to the Bill of Rights).

[21] *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that the execution of a juvenile offender younger than 18 years of age at the time of the commission of a capital offense violated the Eighth Amendment); Graham v. Florida, 130 S. Ct. 2011, 2033–34 (2010) (holding that the imposition of life without the possibility of parole not guilty of homicide violates the Eighth Amendment); Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (holding that mandatory life without the possibility of parole for those who were under 18 at the commission of their crime violates the Eighth Amendment).

I. HOW WE GOT HERE: HISTORY AND DOCTRINE

The racial history of the juvenile justice system and the Supreme Court's misstep in *Gault* work together to create a system that is hostile and discriminatory towards children of color.[22] The legacies of slavery, Jim Crow, and the modern criminal justice system have embedded stereotypes and bias deeply into the American consciousness.[23] The doctrinal underpinnings of the juvenile justice system create discretion points at which these lurking racial assumptions can express themselves in the form of harsher punishment for children of color. This exposure to arbitrary treatment is disguised in the sheep's clothing of an informal, rehabilitative process.

A. *Origins of the Juvenile Court*

I begin with the juvenile court's origins.[24] Examining the history of the juvenile court provides insight into the evolution of the doctrine upon which modern-day juvenile jurisprudence rests. One strand woven into this account is the well-known narrative of the Child Savers' campaign for a specialized juvenile court. It is on this narrative that the Supreme Court would build a jurisprudence that denies juvenile defendants refuge in the criminal procedure amendments of the Bill of Rights.[25] Justice Harlan instead nested juvenile due process rights on the weaker footing of "fundamental fairness."[26] Parallel to this narrative, I excavate the much-ignored but

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[22] *See* discussion *infra* Parts I. and II.

[23] James Bell & Laura John Ridolfi, *Adoration of the Question: Reflections on the Failure to Reduce Racial and Ethnic Disparities in the Juvenile Justice System*, W. Haywood Burns Institute, 8 (Dec. 2008), available at http://www.burnsinstitute.org/downloads/BI%20Adoration%20of%20the%20Question_2.pdf (noting historically unequal treatment was blatant and intentional resulting in harsh conditions for juveniles of color, while comparing current juvenile polices and finding that while they are race-neutral they have a discriminatory effect that we have embraced by it being unchanged).

[24] *See generally* Sanford Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1188–92 (stating a call for the "rescue of children from future crime and degradation" began a movement to discipline children who were on a path to criminal conduct).

[25] *See generally* Walker Sterling, *supra* note 4, Part II.

[26] *See* Kent v. United States, 383 U.S. 541, 562 (1966) (holding that due process requirements apply to transfer proceedings); *Gault*, 387 U.S. 1, 59–60, 12 (1965)(holding that juveniles have right to notice of charges, right to counsel,

all too real narrative of children of color in the juvenile justice system. It is this narrative for which later doctrinal developments would fail to account, thus embedding disproportionate minority contact (DMC) into the juvenile justice system.[27]

The precursors to the juvenile court system were the Houses of Refuge.[28] In 1824, the New York legislature granted the Society for the Reformation of Juvenile Delinquents the authority to build the New York House of Refuge, which opened in 1825.[29] The House of Refuge's purpose was to "offer food, shelter, and education to the homeless and destitute youth of New York, by and removing juvenile offenders from the prison company of adult convicts[.]"[30] By the terms of its charter, only "proper objects" could be admitted to the House of Refuge.[31] "Proper objects" were generally poor white boys who were deemed amenable to being saved from future criminality by residence in the House.[32]

Black children were not admitted to the New York House of refuge until 1834, reflecting racist attitudes regarding their salvageability.[33] Once admitted, black children were nevertheless denied rehabilitation services to avoid "a waste of resources and a debasement of [w]hites."[34] Similar patterns emerged in houses of refuge opening elsewhere in the country. Philadelphia's House of Refuge, while teaching white boys agriculture and academics,

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privilege against self-incrimination, and right to confrontation and cross-examination in adjudicatory hearings in delinquency cases under the idea of "due process and fairness"); *Id.* at 76 (Harlan, J., concurring in part and dissenting in part) (arguing "prudence and principles of the Fourteenth Amendment alike require that the Court should now impose no more procedural restrictions than are imperative to assure fundamental fairness…"); *See also* In re Winship, 397 U.S. 358, 363, 368 (1970) (holding that fundamental fairness requires proof beyond a reasonable doubt in delinquency adjudications).

[27] *Disproportionate Minority Contact*, OJJDP IN FOCUS, Nov. 2012, at 1, *available at* http://www.ojjdp.gov/pubs/239457.pdf.

[28] Sanford Fox, *see supra* note 24, at 1187.

[29] *Id.* at 1187, 1189–90.

[30] *Id.* at 1189.

[31] *Id.* at 1190 ("Only 'proper objects' were to be sent to the House, not every vagrant and criminal child"); *See infra* text accompanying note 32.

[32] *Id.*; GEOFF K. WARD, THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE 73 (2012) (noting poor white and immigrant European youths had access to reformatories first and even when accessed by black children they held "deep investments in white supremacist ideology").

[33] *See* Bell & Ridolfi *supra* note 23, at 3.

[34] *Id.*

consigned black boys to perform manual labor, and black girls to vocational training as cooks, maids, and seamstresses.[35] The impetus for segregation was so strong that black children were locked away in adult prisons in jurisdictions where houses of refuge only possessed facilities for white children.[36]

Houses of Refuge did not open in the South until 1847, and no reformatory for black youths existed in the South until 1873.[37] A primary motivation for opening the first black youth reformatory, the Baltimore House of Reformation for Black Children, was "the need for agricultural labor through [the] State, as well as the great want of competent house servants" that arose once the South no longer had access to slaves as a source of labor.[38] Convict leasing—the practice of leasing prisoners to private parties for forced labor—was widely used to draw black people and children back into slavery.[39] Both black adults and black children were re-enslaved through the "convict labor machine."[40]

In Chicago, Illinois in 1899, a group of progressive reformers known as the Child Savers successfully advocated for the creation of the nation's first separate juvenile court.[41] The Child Savers were animated by a "Rehabilitative Ideal" having three tenets: 1) children are capable of rehabilitation; 2) proper intervention is sufficient for rehabilitation, and; 3) rehabilitation was directed toward the end that

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[35] WARD, *supra* note 32, at 57-60 (claiming white youth were taught while at the House of Refuge because they could assured of jobs upon release, whereas convincing black youth to study was absurd because they were going to end up a part of the servile pool and should instead be trained, not educated).

[36] *See* Walker Sterling, *supra* note 4 at 624 ("in places that did not have separate black juvenile facilities, black youth were often placed in adult prisons instead of in white juvenile facilities with white youth").

[37] *Id.* at 625 (*"*Maryland opened the first and only southern reformatory for black youths in 1873, almost fifty years after the New York House of Refuge opened its doors").

[38] *Id.*; *see also* Cecile P. Frey, *The House of Refuge for Colored Children*, THE JOURNAL OF NEGRO HISTORY Spring, 1981, at 10, 17–18 ("noting that the Board of Managers of the House of Refuge for Colored Children in Philadelphia desired to send the black children to a small farm in the country so that they could learn agriculture and horticulture"). (citation omitted)

[39] DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE, 37, 41–47 (1994).

[40] *Id.* at 40–42, 46–47.

[41] *See* WARD *supra* note 32 (noting that Progressive Era reformers can be credited with developing the modern juvenile court, which is focused on preventing delinquency through rehabilitation).

"[a]ll Americans . . . become middle class Americans."[42] The Child Savers were focused on the assimilation of poor white and European immigrant youths.[43]

With its rehabilitative aim, the juvenile court "shun[ned] the burdensome formalities of criminal procedures," like rules of evidence and jury trials.[44] The informality was deemed conducive to rehabilitation.[45] This vision of juvenile justice proved so popular that by 1925, juvenile courts had expanded to all but two states and inspired laws across Europe, South America, and Asia.[46]

Black children did not receive the benefit of the rehabilitative ideal. Unlike the poor, white, immigrant youth with whom white Americans felt an affinity, black people were not deemed amenable to rehabilitative efforts.[47] Where white children received disproportionate rehabilitative resources, black children received whippings.[48] Mass migration to the North in the early twentieth century did not spare black children from disproportionately harsh sanctions. In 1926, Detroit juvenile court complaints against black children were filed more than twice as often as such complaints were filed against white children.[49] Between 1917 and 1928 in Detroit, black children accounted for 12% of the population in custody there even though they comprised merely 3.3% of the general population.[50] Between 1900 and 1959, 70% of executions of people age eighteen and younger in the United States were black.[51]

The narrative of progressive reform and individualized,

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[42] Barry C. Feld, *The Constitutional Tension between Apprendi and McKeiver: Sentence Enhancements based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOR. L. REV. 1111, fn. 76 (2003).
[43] WARD, *supra* note 32, at 87.
[44] James E. Starrs, *A Sense of Irony in Southern Juvenile Courts*, 1 HARV. C.R.-C.L. L. REV. 129, 134 (1966).
[45] Janet E. Ainsworth, *Re-Imaging Childhood and Reconstructing the Legal Order: the Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1100 (1990)..
[46] Tamar R. Brickhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y, 53, 64 (2012).
[47] *See* WARD, *supra* note 32, at 86–87.
[48] See WARD, supra note 32, at 115.
[49] DAVID B. WOLCOTT, COPS AND KIDS: POLICING JUVENILE DELINQUENCY IN URBAN AMERICA, 1890-1940 98 (2005)..
[50] *Id.*
[51] Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 407 (2013).

rehabilitative treatment in the juvenile justice system did not apply to black children. The rehabilitative function of the juvenile courts was envisioned as a means to integrate white immigrant youth into middle class American society.[52] Black children, who did not fit into that paradigm, were subjected to social control through a quasi-criminal process that retained the punitive consequences of adult court yet lacked the formal protections afforded to adult defendants.

B. Due Process Comes to Juvenile Court: In re Gault *and* McKeiver v. Pennsylvania

In re Gault concerned Gerald Gault, a minor who was arrested and taken into custody for making a lewd phone call to a neighbor.[53] One day later, a hearing was held in the judge's chambers.[54] The juvenile court judge questioned Gerald directly.[55] Neither Gerald nor his parents received a copy of the petition to notify them of the specific allegations.[56] No defense attorneys or witnesses were present, not even the witness to whom Gerald was alleged to have made the lewd call.[57] After a second, similar hearing,[58] Gerald was adjudicated delinquent and committed to the State Industrial School "for the period of his minority."[59] For fifteen-year-old Gerald, that meant six years.[60]

The United States Supreme Court could not abide such appallingly cursory procedure. *In re Gault* granted youths in delinquency proceedings the rights to counsel, notice, confrontation, and the privilege against compelled self-incrimination.[61]

Gault was handed down during a decade in which racial equality proved a dominant theme in Supreme Court jurisprudence.[62]

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[52] See WARD, *supra* note 32 at 87.
[53] In re Gault, 387 U.S. 1, 4 (1967).
[54] *Id.* at 4–5
[55] *Id.* at 6.
[56] *Id.* at 9.
[57] *Id.* at 5.
[58] *Id.* at 8.
[59] *Id.* at 7.
[60] *Id.* at 7–8.
[61] *Id.* at 33, 41, 55–57.
[62] Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L. J. 1035, 1037 (1977); *see also* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 1484, 1494 (1991) (discussing the Warren Court's "perceived . . . need to protect . . . minority offenders" and desire to make its own contribution to the Civil Rights Movement by

During this era, the Court extended many federal rights to the states through the Fourteenth Amendment, including the right to counsel in *Gideon v. Wainwright*.[63] However, *Gault* is distinct from its adult criminal procedural counterpart in that, rather than rooting the rights of juveniles in the Bill of Rights like it had for adult defendants,[64] the *Gault* Court rested juvenile procedure on Fourteenth Amendment "fundamental fairness."[65] The most critical difference between these doctrinal routes is that, unlike "fundamental rights" under the Bill of Rights, "fundamental fairness" is subject to a balancing of equities.[66] Specifically, the balancing test at play in *Gault* involved weighing the value of a particular due process protection against the need for informality, flexibility, and efficiency of juvenile court hearings.[67]

This framing of the issue embraces the Child Savers' origin story but ignores the actual experience of children of color. The Court recounted that the early reformers were "appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals" and were "profoundly convinced that society's duty to the child could not be confined by the concept of justice alone."[68] The Court went so far as to say that the juvenile court was built upon "the highest motives and most enlightened impulses . . . ."[69] Such rhetoric makes it unsurprising that the Court uncritically accepted the notion of a rehabilitative, non-punitive juvenile court where the need for paternalistic informality and freedom from procedural trappings played a strong enough role that it could conceivably outweigh the due process protections afforded to adults in criminal court.[70]

"focus[ing] on procedural rights" as an answer to the country's profound "concern about racial inequality").

[63] Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

[64] *Id.*

[65] *See supra* note 27 and accompanying text.

[66] Walker Sterling, *supra* note 4, at 640.

[67] *See Gault*, 387 U.S. at 13–14 ("The problem is to ascertain the precise impact of the due process requirement upon such proceedings.").

[68] *Gault*, 387 U.S. at 15.

[69] *Id.* at 17.

[70] *Compare Gault*, 387 U.S at 15 ("The early reformers were appalled by adult procedures and penalties . . . ."); *and Id.* at 15–16 ("The apparent rigidities, technicalities, and harshness which [early reformers] observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be

The *Gault* Court blatantly ignored the fact that, for children of color, juvenile proceedings were criminal trials under a different name and that rehabilitative services were never provided evenly among the races.[71] If the Court had been willing to confront that reality, it may have properly extended the full slate of fundamental criminal procedure rights to juvenile court.

Fundamental fairness and fundamental rights analyses lead to different outcomes. In *Duncan v. Louisiana*, the Court applied the Sixth Amendment to the states through the Fourteenth Amendment and found that, under a fundamental rights analysis, all adults charged with serious crimes were entitled to a trial by jury.[72] On the other hand in *McKeiver v. Pennsylvania*, the Court employed the fundamental fairness analysis to find that juveniles in delinquency proceedings have no right to a trial by jury.[73]

McKeiver consolidated a relatively typical juvenile case from Pennsylvania[74] with an extraordinary one from North Carolina.[75] The North Carolina case, *In re Burrus*, concerned approximately 45 black schoolchildren, ages 11 to 15 years old, who were charged in juvenile court with willfully impeding traffic while gathering to protest their school district's discriminatory policies.[76] In both *McKeiver* and *Burrus*, the trial court denied the defense's request for a jury trial and each of the children were found delinquent.[77]

Although the petitioner's brief in *Burrus* underscored the case's racial overtones, the Court practically ignored that aspect of the case.[78] The *McKeiver* plurality deployed the amorphous *Gault*

'clinical' rather than punitive."); *with Id.* at 22 ("the commendable principles relating to the processing and treatment of juveniles separately from adults [under the idea of *parens patrie*] are in no way involved or affected by the procedural rights of [adult offenders]").

[71] Walker Sterling, supra note 4, at 627–628.

[72] Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[73] McKeiver v. Pennsylvania, 403 U.S. 528, 543, 545 (1971).

[74] *Id.* at 534–536.

[75] *Id.* at 536–37.

[76] *Id.* at 536; *see also In re Burrus*, 167 S.E.2d 454, 457 (N.C. Ct. App. 1969).

[77] *McKeiver*, 403 U.S. at 537.

[78] *Compare Burrus*, 4 S.E.2d at 457 (calling the cases "a concentrated demonstration by Negroes of Hyde County to assert their defiance of law and order and to disrupt the normal economic and social life of Hyde County . . . ."), *with* Brief for Petitioner at 32, *In re Burrus*, 4 S.E.2d 454 (N.C. Ct. App. 1969), No. 128, 1970 WL 121988 (stating "the hard won right of blacks to a trier of fact representative of the entire community is surely as significant a protection to black youth as black adults").

balancing test, weighing various equities such as the importance of the interest at stake, the risk of an erroneous deprivation of the interest because of the procedures used, the probable value of additional procedural safeguards, the adequacy of available substitutes for the requirement, costs, and other administrative concerns.[79] Many of these considerations could not be considered under a fundamental rights approach, such as the substitute procedure of judicial fact-finding and the administrative burden of jury trials.[80]

Although the plurality paid lip service to the juvenile system's failure to reach the rehabilitative ideal, it nevertheless refused to eschew the Child Savers narrative.[81] Couching its rhetoric in the juvenile court's ideal of "fairness, of concern, of sympathy, and of paternal attention,"[82] and showing fear that the juvenile court might become a "fully adversary process,"[83] the Court refused to succumb to "disillusionment" with basing the informal juvenile system on the ideal that youths are uniquely amenable to rehabilitation.[84]

But people of color were already disillusioned. The Child Savers ideal that the Court embraced wholesale was a device to assimilate white immigrant youth, not to provide rehabilitative services to all children, regardless of color. The *McKeiver* Court stood willfully blind to the reality that children of color were not afforded "fairness, concern, sympathy, and paternal attention."[85] If the Court had confronted the radicalized nature of the case before it, the DMC landscape might look very different today.

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[79] *Matthews*, 424 U.S. 319, 335 (1976).

[80] In re Gault, 387 U.S. at 36; *See also supra* note 4, at 649–648 (highlighting that "the Court [in *Gault*] discussed the applicable… history of [the] jury trial…the Court also considered "whether bench trials are an adequate substitute for jury trials, or even the administrative costs of jury trials."); *see also id.* at 657 (explaining the [*McKeiver* plurality] "considered whether there was an adequate substitute for juries [and] expressed its unqualified endorsement of the adequacy of judicial factfinding without support").

[81] *See McKeiver*, 403 U.S at 550; *See also* Feld, *supra* note 42, at 1137 n.76.

[82] *McKeiver*, 403 U.S. at 550.

[83] *Id.* at 545.

[84] *Id.* at 550–51.

[85] *Id.* at 550.

C. *The Experience after* Gault–McKeiver

It took less than a decade after *McKeiver* for state courts to begin explicitly endorsing punitive goals in juvenile justice, contrary to *McKeiver*'s premise that juvenile proceedings were of a fundamentally different nature than criminal proceedings. For example, in *State v. Lawly*,[86] the Supreme Court of Washington noted the possibility "that the accountability for criminal behavior, the prior criminal activity and punishment commensurate with age, crime and criminal history does as much to rehabilitate, correct and direct an errant youth as does the prior philosophy of focusing upon the particular characteristics of the individual juvenile."[87] In *In re Seven Minors*,[88] the Supreme Court of Nevada opined that "[b]y formally recognizing the legitimacy of punitive and deterrent sanctions for criminal offenses[,] juvenile courts will be properly and somewhat belatedly expressing society's firm disapproval of juvenile crime and will be clearly issuing a threat of punishment for criminal acts to the juvenile population."[89]

The 1990s saw a boom in juvenile punishment when politicians, the media, and academics began stoking moral panic with prognostication of an oncoming generation of juvenile "super–predators."[90] The term "super–predator" was coined by Professor John DiIulio, who predicted a new breed of animalistic youngsters willing to "kill, rape, maim, and steal without remorse."[91] DiIulio's predictions were explicitly racist, positing that "as many as half of these juvenile super-predators could be young black males" due to "moral poverty" in the black community.[92] "My black crime problem, and ours," opined DiIulio, "is that for most Americans, especially for

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[86] 591 P.2d 772 (Wash. 1979).
[87] *Id.* at 773.
[88] 664 P.2d 947 (Nev. 1983).
[89] *Id.* at 950.
[90] Robin Walker Sterling, *All Children Are Different*; LOYOLA L.A. L. REV. (forthcoming 2014); *see also* Heather Cobb, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. C.R.-C.L. L. REV. 581, 583 (2009).
[91] John J. Dilulio, Jr., *My Black Crime, and Ours*, CITY JOURNAL (Spring 1996), http://www.city-journal.org/printable.php?id=62; JAMES C. HOWELL, PREVENTING AND REDUCING JUVENILE DELINQUENCY: A COMPREHENSIVE FRAMEWORK, 4 (2nd ed. 2009).
[92] *Id.*; *see also* John J. Dilulio, Jr, *The Coming of the Super—Predators*, WEEKLY STANDARD, November 27, 1995, at 23.

average white Americans, the distance is not merely great but almost unfathomable, the fear is enormous and largely justifiable, and the black kids who inspire the fear seem not merely unrecognizable but alien."[93]

Although there was no actual increasing pattern of youth violence in the 1980s and 1990s,[94] the perception flourished that violent attacks against white victims by youthful, nonwhite assailants were rampant.[95] The rhetoric sparked a "get tough" response to juvenile delinquency.[96] This new orientation toward juvenile punishment was targeted squarely at youth of color. Four out of every five new children detained in 1983 to 1987 were children of color.[97] There was a 41% overall increase in cases involving detained youth in the period from 1985 to 2008. For African American youth, this number increased to 85%.[98] For white youth, incidents of detention increased only 19%.[99]

This war on youth also prompted massive increases in police presence in schools, disproportionately so in communities of color.[100] The proliferation of police on school grounds resulted in a more punitive approach to normal adolescent behavior.[101] Where once school officials dealt with school misbehavior, children were increasingly confronted by school resource officers for even minor misconduct.[102] The consequence was a spike in referrals of children from school to the juvenile justice system, which disproportionately syphoned students of color out of school and into court.[103] In jurisdictions across geographic regions, African American children

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[93] *Id.*
[94] Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality*, 33 WAKE FOREST L. REV. 727, 728 (1998).
[95] *See* Walker Sterling, *supra* note 4, at 660 (showing the disparity between arrest rates and rates of crime commission); *see also* DiIulio, Jr., *supra* note 92.
[96] Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST., 2000, 1, 54.
[97] Cobb, *supra* note 91, at 583–84 (quoting Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, NEW DIRECTIONS FOR YOUTH DEVELOPMENT, Fall 2003, at 9, 10.
[98] Henning, *supra* note 5, at 409.
[99] *Id.* at 409.
[100] Cobb, *supra* note 91, at 582–83.
[101] *Id.* at 583.
[102] Henning, *supra* note 5, at 410–11.
[103] *Id.* at 411.

were 2 to 3.5 times more likely than white children to be referred from school to the juvenile justice system.[104]

II. THE CONSEQUENCES OF INFORMALITY

In light of the disparate experience of children of color in the juvenile justice system, the stunted framework for procedural rights under *Gault* poses a particularized threat to children of color. "Fundamental fairness" affords children of color inadequate protection against the implicit bias that pervades the juvenile system. Every procedural right withheld from children under the *Gault* rubric creates a pocket of discretion through which bias can seep into the system.

One unique way in which implicit bias affects children is that it influences the way adults perceive the inherent characteristics of adolescents. Adolescent development research finds that youth are more impetuous, susceptible to negative influence, and have a more difficult time weighing the consequences of their actions than adults.[105] These characteristics of youth are stable across ethnicities.[106] However, a string of studies indicates that the intrinsic characteristics of youth are weighted differently by observers depending on the race of the child in question.

First, a 1998 study of probation reports suggested that probation officers' attribution of causes of crime to character traits of the defendant rather than external factors increased when the defendant was black, resulting in harsher recommended sentences.[107] Second, a pair of 2004 studies of police officers and probation officers found that the subjects were more likely to rate hypothetical child offenders as less immature, more morally culpable, and more deserving of punishment if the subjects were primed to believe that the child was African American.[108] And third, a 2012 study concluded that members of the general population are more likely to attribute blameworthiness to a juvenile defendant when primed to believe the

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[104] *Id.*
[105] *Id.* at 385.
[106] *Id.* at 412.
[107] George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes As Mediating Mechanisms*, 63 AM. SOC. REV. 554, 563–67 (1998).
[108] Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 493–499 (2004).

defendant is black than they are if given the same set of facts pertaining to a white defendant.[109]

It appears that individuals, including key decision makers in the justice system, have a more difficult time viewing black youths as children who have all the diminished culpability attendant to minority, than they do white youths.[110] The result is that black children are punished more and to a greater degree.[111]

The procedural protections that were withheld under the *Gault–McKeiver* line of cases could have been used to shield children against the threat of bias. For instance, the right to a public trial, explicitly rejected in *McKeiver*, would allow for more public accountability of courtroom actors and improved scrutiny of discretion exercises. Public trials play a role in reducing government oppression and corruption, especially in cases containing a racial dimension.[112] In his *McKeiver* dissent,[113] Justice Brennan acknowledged the racial nature of the *Burrus* facts and stated frankly that the case presented "a paradigm of the circumstances in which there may be a substantial 'temptation to use the courts for political ends.'"[114]

Of course, *McKeiver* also denied juveniles in delinquency proceedings the right to a jury trial, and the detrimental impact of that on children of color may be severe. Juries play many important functions beyond mere fact-finding. For instance, a jury may give more careful consideration to each case than would a judge who has seen similar cases countless times before.[115] Thus, rather than relying on stereotypes formed through mass exposure and desensitization to juvenile defendants, juries can offer individualized attention to each individual child. Furthermore, judges are exposed to facts such as suppressed evidence and the juvenile respondent's prior record throughout the proceedings, increasing the risk that an impermissible inference will be made, consciously or subconsciously, in the course

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[109] Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, PLOS ONE, May 2012, at 1–4.
[110] Henning, *supra* note 5, at 420.
[111] *Id.* at 423–24.
[112] *McKeiver v. Pennsylvania*, 403 U.S. 528, 554–55 (1971) (Brennan, J., concurring in part and dissenting in part)..
[113] *Id.* at 553–57 (Brennan, J., concurring in part and dissenting in part).
[114] *Id.* at 556 (Brennan, J., concurring in part and dissenting in part).
[115] Harvard Law Review, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 113, 118 (1971).

of adjudication.[116] As a consequence of its embrace of the Child Savers narrative and refusal to consider the experience of children of color, the *McKeiver* plurality brushed aside these concerns on the ground that they were arguments better directed at criminal proceedings and ignored the rehabilitative purpose of the juvenile system.[117]

Another drawback to denying juveniles a jury right is that procedural informality may actually hinder the rehabilitative process by decreasing youth confidence in the fairness of the juvenile justice system. [118] Juvenile respondents have a better perception of juvenile proceedings when a jury is involved.[119] Failure to provide the trappings of a formal process causes confusion and resentment in juvenile respondents.[120] This effect is especially pronounced in nonwhite juvenile respondents.[121] *Gault* itself cited a study warning that when children perceive lax procedural protections they may be more likely to resist rehabilitative efforts.[122] By using lenient procedures, we are hindering the rehabilitative task by communicating to children that the process is unfair and that there is no value in participating in it.

The unfairness is compounded in sentencing outcomes. Juvenile convictions are not just used to determine the punishment of the present charge, but may also be used to increase penalties for later convictions.[123] Much of the racial disparity in juvenile sentencing that

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[116] Walker Sterling, *supra* note 4, at 672.
[117] *McKeiver*, 403 U.S. at 550–51 (arguing if the formalities of the criminal adjudicative process are to be imposed on juvenile proceedings, then there is no need to separate the two systems).
[118] Feld, *supra* note 42, at 1194.
[119] Susan E. Brooks, *Juvenile Injustice: The Ban of Jury Trials for Juveniles in the District of Columbia*, 33 J. FAM. L., 875, 894 (1994).
[120] Sandra M. Ko, Comment, *Why Do They Continue To Get The Worst of Both Worlds? The Case for Providing Louisiana's Juveniles With the Right to a Jury in Delinquency Adjudications*, 12 AM. U. J. GENDER, SOC. POL'Y, & L. 161, 182–83 (2004).
[121] Sharrolyn Jackson Miles, *The Administration of Justice: Disparate Treatment and Effect on Black Male Youth in Louisiana's Juvenile Justice System*, 30 S. U. L. REV. 373, 374, 378–80, 382–83 (2003).
[122] In re Gault, 387 U.S. 1, 26 (1967) (citing STANTON WHEELER & LEONARD S. COTTRELL JR., JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL, 33 (Russell Stage Foundation, 1966)).
[123] Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 711 (1991).

is not explained through racial bias is accounted for by differences in prior records.[124] But when one considers that those prior records were themselves likely tainted by racially biased juvenile proceedings in which the respondent was not afforded his or her full fundamental rights, the power of that rationalization loses its luster.

Finally, withholding juries deprives juvenile respondents of the potential to benefit from jury nullification when a law is unjust or is applied unjustly to that particular youth. Jury nullification refers to a jury's ability to acquit the accused based on equities rather than the legal elements of the crime.[125] Jury nullification takes on a particularly important role when the criminal law intersects with race. Jury nullification was, for instance, used to allow violators of the Fugitive Slave Act to circumvent conviction.[126] Furthermore, Paul Butler famously advocated for black jurors to nullify convictions against certain nonviolent black defendants.[127] Butler's premise is that black jurors may rationally find that the social cost of removing one of their own from the community and into prison outweighs the law enforcement interest in reaching a verdict of guilty.[128] In the same way, a jury should have the opportunity to decide whether removing a child from the positive influences of the community and placing that child into a state institution imposes higher costs than benefits.

III. SOLUTIONS

One necessary solution would be for the Supreme Court to augment *Gault*'s "fundamental fairness" protections with the full protections of the Bill of Rights. *Gideon* accomplished a similar task in the adult context when it applied the Sixth Amendment to broaden the right to counsel on top of the Fourteenth Amendment due process right to counsel in capital cases upheld under *Powell v. Alabama*.[129]

However, it would be naive to believe that this first step would accomplish racial parity in the juvenile justice system. After all, the

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[124] *Id.* at 714.
[125] Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995).
[126] *Id.* at 703 & n. 137.
[127] *Id.* at 679, 715–16, 718.
[128] *Id.* at 716–17.
[129] 287 U.S. 45, 71 (1932).

adult racial disparities in the criminal justice system survive despite the recognition of fundamental rights.[130]

Part of the responsibility falls in the lap of defense attorneys. Through first hand experience, defense attorneys are the actors in the court system most aware of the problem of DMC. It affects our clients on a daily basis. Because defense attorneys have a duty to advocate for the stated interest of their clients, they are the actors in the court system with the strongest motivation and the best position to push for a change. There are several tactics defense attorneys can use to bring race into open discussion so that the narrative of people of color will no longer be subsumed. These tactics are as applicable in juvenile court as they are in the broader criminal system.

First, defense attorneys should engage in local data collection. Ideally, the public defenders office should track the race of every defendant that comes through their office and the decisions made by court actors at every discretion point. It is much easier to raise the issue of race to the court with statistical backing than with hunch-based accusations. Second, defense attorneys should also participate to whatever extent possible in governmental DMC task forces so that the perspective of the defendant can have weight in these bodies. Third, defense attorneys should engage in community outreach activities to garner community support for DMC alleviation efforts. Defense attorneys should also seek out community leaders who can testify as cultural experts when appropriate.

Finally, defense attorneys should exercise their own discretion in litigation in a way that brings the race issue firmly into the court's crosshairs. Motions to dismiss in the interest of justice, motions raising disparate treatment on the basis of race, and motions challenging the reliability of cross-racial eyewitness identification are valuable tools for making sure the racial dimensions of cases are not ignored.

IV. CONCLUSION

The experience of black children in the juvenile justice system in the wake of both the initial reforms near the turn of the twentieth century and the Supreme Court's *Gault–McKeiver* line of cases demonstrate that the gains from progressive reforms are not distributed evenly. When a subjugated group's narrative becomes overpowered by

[130] WADE J. HENDERSON, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM, 185 (2000).

the narrative espoused by the dominant group, the excluded story becomes synonymous with the excluded and oppressed people. Suppressing a narrative results in erroneous assumptions becoming embedded in doctrine, as the assumption of a benevolent, rehabilitative juvenile system became embedded in *Gault*. This structural flaw in the constitutional doctrine itself combined with racial bias, excessive discretion in the wrong hands, and the weight of history to perpetuate DMC in the juvenile justice system. We cannot change history, but we can change the law and direct our behavior to promote awareness of bias, to advocate compassion for all children, and to ensure that all viewpoints can be heard, acknowledged, and taken into account on an equal footing.