Maryland Law Review

Volume 72 | Issue 3 Article 1

Fundamental Unfairness: In re Gault and the Road Not Taken

Robin Walker Sterling

MARYLAND LAW REVIEW

VOLUME 72 2013 NUMBER 3

Articles

FUNDAMENTAL UNFAIRNESS: *IN RE GAULT* AND THE ROAD NOT TAKEN

ROBIN WALKER STERLING*

ABSTRACT

The data are shocking and familiar. A grossly disproportionate number of youth in the juvenile justice system are children of color, and black youth, at only sixteen percent of the population, are the group most overrepresented at every stage. An African-American boy is nine times more likely to be detained for a drug offense as a white

*Assistant Professor, University of Denver Sturm College of Law; J.D., New York University School of Law; B.A., Yale College. For his trenchant edits and unfailing support, I owe Christopher Lasch my abiding gratitude. I am especially indebted to my colleagues at the University of Denver Sturm College of Law, as I benefitted greatly from the comments and perspectives of members of the University of Denver Sturm College of Law's Rocky Mountain Collective on Race, Place and Law, including Patience Crowder, Nancy Ehrenreich, Rashmi Goel, Tom Romero, and Catherine Smith. Diane Burkhardt's persistence in finding sources was invaluable. I owe Anthony Amsterdam, Kristin Henning, Randy Hertz, and Melissa Murray special thanks for their comprehensive and insightful comments. Thanks also to Annecoos Wiersema, Violeta Chapin, Alison Flaum, Alison Siegler, Barbara Butterworth, and Jennifer DiToro for their comments. Quinn Girrens provided superlative research assistance. Finally, heartfelt thanks to the participants at the 2011 Lutie Lytle conference, who provided me with excellent suggestions for improving this Article.

boy charged with the exact same offense, and has a one in three chance of being sent to prison during his lifetime. These statistics stand despite widespread acknowledgment that the overrepresentation of youth of color in the juvenile justice system cannot be explained by offense rates, which are static across racial and ethnic groups; arrest rates, which hover near an all-time low; or demographics, which yield this pattern of overrepresentation even in states with very small populations of people of color.

The often overlooked history of the treatment of black system-involved children begins to give these statistics dimension. In its 1967 decision, In re Gault*, the Court gave youths in delinquency proceedings the right to counsel as an extension of Fourteenth Amendment fundamental fairness instead of applying the procedural protections of the Bill of Rights. The* Gault *Court did this because it failed to fold the realities of the treatment of system-involved black children into its calculus of the process due in juvenile delinquency proceedings.*

In this way, Gault *splintered juvenile justice reform off from the Civil Rights Movement. The conventional narrative relates that the Civil Rights Movement demanded an end to racial discrimination in the criminal justice system, and that the Supreme Court responded with an array of constitutional protections that form the basis of our modern system of criminal procedure. But curiously, the Court stopped short of extending these reforms to another area of the criminal justice system that leaders of the Civil Rights Movement believed required reform: the juvenile justice system. Civil rights leaders understood the juvenile justice system as a symbol of racial subordination to be torn down, like public schools, voting discrimination, and segregated places of public accommodation.*

This Article argues that if the Court had been more attentive to the disparate treatment of black children in the juvenile justice system, then it would have been more likely to root juvenile court protections in the Bill of Rights because the Court would have recognized the disparate treatment as a form of racism—the same kind of racism that the Court had been addressing in its criminal procedure reforms rooted in the Bill of Rights. An example of the abiding effect of the Court's jurisprudential miscalculation can be found in a comparison of the Court's holdings in two cases that considered provision of the jury trial right. In Duncan v. Louisiana*, the Court extended the Sixth Amendment jury trial right to defendants in state criminal proceedings. But in* McKeiver v. Pennsylvania*, the Court held that juveniles do not have the right to a jury trial under the Fourteenth Amendment.*

Gault*'s great deficiency is that it erected a flawed prototype that allowed future courts to turn a blind eye to race disparities in juvenile delinquency proceedings. Replacing that prototype with a better one will not itself cure juvenile courts' deficiencies, but it will create an institutional environment in which a wide range of players can work more effectively toward a wide range of cures for many of the problems.*

TABLE OF CONTENTS

INTRODUCTION

On July 3, 1899 in Chicago, Illinois, the country's first juvenile court heard its first case.[1] Henry Campbell, an eleven-year-old boy, stood accused of larceny.[2] White, poor, and, according to his tearful mother, a boy who was "not a 'bad boy at heart'" but who had been "led into trouble by others,"[3] Henry was exactly the kind of child that motivated the Child Savers, a group of Progressive reformers, to campaign for the establishment of a separate juvenile system dedicated to rehabilitation instead of punishment.[4] The Child Savers envisioned the juvenile judge as a child welfare expert who would, like a benevolent, firm-handed parent, fashion individualized sentences to rehabilitate the wayward children who appeared before him.[5] In Henry's case, Judge Richard Tuthill, a Civil War veteran, was happy to oblige. After Henry's mother spoke in his defense, the judge sent Henry to

1. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 93 (2006), *available at* http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf; *see also* DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 23 (2004).

2. TANENHAUS, *supra* note 1, at 23–24.

3. *Id.* at 24.

4. *See id.* at 24–25 (explaining that the judge in the Campbell case had discretion to order the boy into the custody of his grandmother rather than send him to a juvenile reformatory); GEOFF K. WARD, THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE 77–78 (2012) (noting that Progressive Era reformers can be credited with developing the modern juvenile court, focused on preventing delinquency through rehabilitation).

5. WARD, *supra* note 4, at 78.

live with his grandmother in Rome, New York, where he could have a fresh start.[6]

Fourteen-year-old James Robinson did not fare as well. History does not reveal James's crime, but it does reveal his punishment: In 1902, the black teenager was leased to a Georgia plantation called Kinderlou.[7] James's sister Carrie Kinsey wrote a letter to President Theodore Roosevelt asking for the government's assistance when local authorities would not help her retrieve her brother.[8] "Mr. Prassident," wrote Mrs. Kinsey, "They wont let me have him. . . . He hase not don nothing for them to have him in chanes so I rite to you for your help."[9] The nascent juvenile justice system contemplated starkly different treatment for white children and children of color, because the Child Savers' vision did not include providing individualized rehabilitative services for children of color.[10] Simply put, black children were black before they were children, and therefore exempt from the presumption that they were amenable to rehabilitation.[11] In 1903, just four years after Henry was sent to live with his grandmother, James was allowed to escape the plantation when the McRees, the family that owned Kinderlou, learned that the United States Department of Justice was about to begin investigating allegations of "extreme cruelty" at the plantation.[12]

Half a century later, the Civil Rights Movement presented the promise of reconciling these differences so that black children ac-

6. TANENHAUS, *supra* note 1, at 23–24.

7. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II at 8, 252 (2008). For an explanation of convict leasing, see *infra* Section I.B.2.

8. BLACKMON, *supra* note 7, at 8–9.

9. *Id.*

10. *See* WARD, *supra* note 4, at 73–74 (noting that reformers focused on white children, and that black children remained subject to institutionalization with adults); NAT'L COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 1 (2007), *available at* http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf.

11. *See id.* (explaining that reformation "for white children came first" and that black children were often incarcerated with adults).

12. The conditions were indeed cruel: "The men slept each night in the same clothes they wore in the fields, on rotting mattresses infested with pests. Many were chained to their beds. Food was crude and minimal. Punishment for the disobedient was to be strapped onto a log lying on their backs, while a guard spanked their bare feet with a plank of wood." BLACKMON, *supra* note 7, at 251–52.

cused of crime might receive the nuanced, benevolent attention that the juvenile justice system promised to white youth.[13] The Supreme Court responded to the pressures of the Civil Rights Movement by extending, via the Due Process Clause, the protections of the Bill of Rights to all adult defendants in state criminal proceedings.[14] But in *In re Gault*,[15] the seminal case that gave youths in delinquency proceedings the right to counsel, the Court set juvenile court jurisprudence on a different path. Instead of applying the procedural protections of the Bill of Rights, the Court extended juvenile delinquency respondents only Fourteenth Amendment due process protections.[16]

In this way, *Gault* splintered juvenile justice reform off from the Civil Rights Movement. An example of the abiding effect of the Court's jurisprudential miscalculation can be found in a comparison of the Court's holdings in two cases that considered provision of the jury trial right. In *Duncan v. Louisiana*,[17] the Court extended the Sixth Amendment jury trial right to defendants in state criminal proceedings.[18] But in *McKeiver v. Pennsylvania*,[19] the Court held that juveniles do not have the right to a jury trial under the Fourteenth Amendment.[20] Commentators have attacked *McKeiver* since it was announced,[21] criticizing it as "ripe for overruling,"[22] and "suspect and

13. WARD, *supra* note 4, at 200.

14. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149–50 (1968) (incorporating the Sixth Amendment right to an impartial jury to the states), Malloy v. Hogan, 378 U.S. 1, 8 (1964) (incorporating the Fifth Amendment protection against self-incrimination to the states), Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating the Fourth Amendment Right to be free from unreasonable search and seizure to the states).

15. 387 U.S. 1 (1967).

16. *Id.* at 41.

17. 391 U.S. 145 (1968).

18. *Id.* at 149–50.

19. 403 U.S. 528 (1971).

20. *Id.* at 545.

21. *See, e.g.*, *Jury Trials in Juvenile Proceedings*, 85 HARV. L. REV. 113, 118 (1971) (calling the Court's consideration of the jury's role "incomplete," and listing the "other functions" that a jury can "serve . . . in the juvenile process that cannot be subsumed under the fact-finding rubric"); Orman W. Ketcham, McKeiver v. Pennsylvania*: the Last Word on Juvenile Court Adjudications?*, 57 CORNELL L. REV. 560, 568–701 (1972) (discussing the impact *McKeiver* may have on the juvenile justice system); Comment, *Juvenile Right to Jury Trial—Post McKeiver*, 1971 WASH. U. L.Q. 605, 606 (1971) (discussing the possible "constitutional infirmities" of *McKeiver*); Note, McKeiver v. Pennsylvania*: A Retreat in Juvenile Justice*, 38 BROOK. L. REV. 650, 651 (1972) (calling the *McKeiver* decision "unsound"). In *R.L.R. v.*

outdated."[23] The critics have several grounds, including the Court's anemic due process analysis,[24] the tension between the denial of the juvenile jury trial right and the United States Supreme Court's rulings in *Apprendi v. New Jersey*[25] and its progeny, the increase in challenges to *McKeiver*'s continuing validity in light of recent procrustean punishments for juvenile delinquents,[26] and the re-examination of the scope

State, 487 P.2d 27 (Alaska, 1971), the Alaska Supreme Court rejected the Court's holding in *McKeiver* and granted juvenile defendants the right to jury trial. *Id.* at 35.

22. *See* 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 FOREST L. REV. 1111, 1224 (2003) (stating that "[a]s every commentator and many courts have noted, *McKeiver*'s uncritical and out-dated plurality decision is ripe for overruling"); *see also In re* Javier A., 206 Cal. Rptr. 386, 424 (Cal. Ct. App. 1984) (commenting that the continued denial of the constitutional right to a jury trial in juvenile proceedings "is not just ripe for Supreme Court reconsideration, it is overripe").

23. *See* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 306 (2007) (commenting that "[d]ecades of case law and studies on jury versus judicial factfinding make the *McKeiver* plurality opinion seem even more suspect and out-dated").

24. Some have gone so far as to suggest that juveniles should have the right to a jury trial in juvenile proceedings, that juvenile court should be abolished entirely because of the absence of the jury trial right, or that the juvenile court does not actually protect children at all and that minors might see better outcomes and receive better protection in criminal court. *See* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1118–20 (1991) (stating that the juvenile courts should be abolished as the costs associated with the "procedural informality" of juvenile court may be more harmful to children than if they face charges in criminal court); Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Rights*, 16 J. CONTEMP. L. 23, 49–50 (1990) (noting that children could receive more rights and protections in criminal court and still be eligible for treatment and rehabilitation rather than punishment if the juvenile courts were abolished); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 723 (1991) (arguing that the abolishment of the juvenile court would allow for criminal court proceedings to provide minor defendants with the same protections as adult defendants).

25. The Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), has been a catalyst in the recent resurgence of interest in the juvenile jury trial right. In *Apprendi*, the Court held that any fact that increases the penalty for a crime "[o]ther than the fact of a prior conviction" must be proven beyond a reasonable doubt and submitted to a jury. *Id.* at 490. Subsequent cases have held firm to this bright-line rule.

26. These include, most notably, lifetime sex offender registration for juveniles adjudicated guilty of serious, often consensual, sex offenses. *See In re* Richard A., 946 A.2d 204,

of the rehabilitative function of juvenile court proceedings attendant to the recent series of juvenile Eighth Amendment cases before the United States Supreme Court.[27] But the problem is not *McKeiver*. The problem is *Gault*.

This Article will argue that *Gault*'s reliance on a fundamental fairness analysis based in Fourteenth Amendment due process analysis, instead of on a fundamental rights analysis based in the Bill of

214 (R.I. 2008) (finding that "the nature of the juvenile-justice system is not significantly compromised by a sex-offender-registration requirement" and upholding Rhode Island's Sex Offender Registration and Community Notification Act as constitutional as applied to juveniles, but cautioning that "perhaps the better rule with respect to juveniles would be to provide the trial justice with the discretion to determine whether a respondent who has reached twenty-one years of age should be required to register as a sex offender"); *In re* Jeremy P., 692 N.W.2d 311, 319 (Wis. Ct. App. 2004) (holding that sex offender registration was not criminal punishment and, therefore, the respondent had no right to a jury trial under either the federal or Wisconsin state constitution); *see In re* Alva, 92 P.3d 311, 325 (Cal. 2004) (noting that "[r]egistration has not historically been viewed as punishment, imposes no direct disability or restraint beyond the inconvenience of compliance, and has a legitimate nonpenal objective" and that the incidental retributive effects of registration "are not sufficient to outweigh the statute's regulatory nature"); People *ex rel.* J.T., 13 P.3d 321, 323 (Colo. App. 2000) (holding that a juvenile respondent facing registration did not have the right to a jury trial because the statutory duty to register as a sex offender did not constitute criminal punishment). Other punishments for juvenile delinquents include: potential enhancement of future criminal sentences, ineligibility for student loans, disqualification from public benefits, including housing and other assistance, and ineligibility to enlist in the military. *See* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 570 (2004) (discussing examples of housing authorities that check juvenile records); Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1114–15 (2006); Robert E. Shepherd, *Collateral Consequences of Juvenile Proceedings: Part II*, 15 CRIM. JUST. 41, 41–42 (2000) (describing how juvenile adjudications negatively impact eligibility for military enlistment).

27. *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (holding that mandatory life without the possibility of parole for those who were under eighteen at the commission of their crime violates the Eight Amendment); Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (holding that the imposition of life without the possibility of parole sentences in juvenile non-homicide cases violates the Eight Amendment); Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that the execution of a juvenile offender younger than eighteen years of age at the time of the commission of a capital offense violates the Eight Amendment).

Rights, was a critical misstep.[28] This was a misstep rooted in the conventional narrative depicting the juvenile justice system as a benevolent vehicle for the rehabilitation of children.[29] What this conventional narrative overlooked was the starkly different experiences that children of color had in the juvenile justice system.[30] The Court attended only to the dominant narrative, which pertained to white children.[31] In so doing, and in failing to understand the unique position of children of color in the system, it further marginalized these constituents.[32] This misstep was the first of two points forming a straight line between the Child Savers' story and *Gault*'s adoption of fundamental fairness.[33] The Court's attention to the dominant narrative split juvenile rights from the Court's criminal procedure revolution.[34] This critical mistake would serve to perpetuate, rather than redress, the legacy of disparate treatment of black system-involved children.[35]

Part I will briefly recount the Child Savers' juvenile court origin story, and an alternate origin story focusing on the treatment of black children, who are the most disproportionately represented youth population in juvenile court. Part II will discuss the United States Supreme Court's reasoning in *Gault* and the divergent paths the Court took in criminal and juvenile cases during the Court's due process revolution and the Civil Rights Movement. Part III will juxtapose *McKeiver* and *Duncan*, to illustrate that *Gault*'s reliance on Fourteenth Amendment due process has allowed juvenile justice jurisprudence to take a back seat to adult criminal protections. Part IV will conclude with a discussion of the world that *Gault* created, and how this legacy of discrimination continues to operate in modern-day juvenile court.

I. JUVENILE COURT: ORIGINS

Examining the history of the juvenile court provides insight into the evolution of the doctrine upon which the modern-day juvenile court rests. History reveals that the story of the Child Savers and their successful campaign for a separate juvenile court does not encompass

28. *See infra* Part IV.
29. *See infra* Part I.
30. *See infra* Part I.
31. *See infra* Part I.
32. *See infra* Part I.
33. *See infra* Part II.
34. *See infra* Part III.
35. *See infra* Part IV.

the lowered expectations for and harsher treatment of black children accused of crimes.[36] Given the history of how black children fared in the juvenile justice system, it is no wonder that a legacy of minority overrepresentation and disparate provision of services continues to vex the system today.[37]

A. The Child Savers and the Origins of the Juvenile Justice System

The story of how the Child Savers campaigned for a specialized juvenile court is well known.[38] The beginnings of the juvenile court movement can be traced to the 1822 Report on the Penitentiary System in the United States by the Society for the Prevention of Pauperism.[39] The Society was comprised of a group of Quaker reformers focused on "alleviat[ing] the suffering of the poor in their communities."[40] Targeting the areas of education and criminal justice, they established schools for "the poorer classes" and introduced reform legislation that reduced the number of capital offenses.[41] The Society's Report condemned the practice of incarcerating children with adults.[42] The same group of reformers followed that first report with an 1823 report that "called for the rescue of children from a future of crime and degradation."[43]

In response, in 1824 the New York legislature granted to the Society, now called the Society for the Reformation of Juvenile Delinquents, authority to build the New York House of Refuge, which

36. *See infra* Part I.A.

37. *See infra* Part IV.

38. For discussion on the Child Savers, see generally BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT (1999) ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 3 (1969) (discussing the "child savers" role in the creation of the juvenile court); GEOFF K. WARD, THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY & JUVENILE JUSTICE 6 (2012) (discussing the Progressive Era's "child saving movement" from the perspective of black juveniles); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 694–95 (1991) (discussing the "child-savers" view of the juvenile court).

39. Sanford Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1189 (1970).

40. *Id.* at 1188–89.

41. *Id.* at 1188.

42. *Id.* at 1189.

43. *Id.*

opened in 1825.[44] Dubbed "the first great event in child welfare,"[45] the House of Refuge was the country's first dedicated juvenile treatment facility. The House of Refuge "offer[ed] food, shelter, and education to the homeless and destitute youth of New York, and . . . remov[ed] juvenile offenders from the prison company of adult convicts."[46] The charter for the House of Refuge was clear that only "proper objects"—boys who were deemed salvageable—were to be admitted.[47] The Society's overarching goal was to save their young charges from a future of criminal involvement by diagnosing and curing symptoms of predelinquency.[48] Considered more victims than offenders, youth would be able to cast off the influence of their parents' "indolen[t]"[49] examples and armor their vulnerability to the caprice of the city by internalizing the Society's counterexample of law-abiding citizenship.[50]

Enter the Child Savers. The Child Savers were a group of Progressive reformers who successfully advocated for the creation of the nation's first separate juvenile court in Chicago, Illinois in 1899.[51] Motivated by enlightened ideals concerning the reconstruction of childhood, appalled by the treatment youths suffered in adult jails and prisons, and convinced that youth misbehavior could be diagnosed and treated as easily as physical pathology, the Child Savers led a crusade on behalf of wayward, indigent children.[52] Reduced to its

44. *Id.* at 1187, 1189–90.

45. *Id.* at 1187.

46. *Id.* at 1189.

47. *Id.* at 1190.

48. *Id.* at 1190–91.

49. *Id.* at 1189.

50. *Id.* at 1190–91. An 1823 report noted:

> Many of these are young people on whom the charge of crime cannot be fastened, and whose only fault is, that they have no one on earth to take care of them, and that they are incapable of providing for themselves. Hundreds, it is believed, thus circumstanced, eventually have recourse to petty thefts; or, if females, they descend to practices of infamy, in order to save themselves from the pinching assaults of cold and hunger.

Id. at 1191 n.25 (citation omitted) (internal quotation marks omitted).

51. *See supra* note 4 and accompanying text.

52. *See* Ainsworth, *supra* note 24, at 1097–1101 (discussing Progressive ideology and its effect on the juvenile court movement). A similar movement caused a shift in criminal cases "from punishment as a localized practice to an enterprise that focused less on public

component parts, the Progressives' "Rehabilitative Ideal" had three tenets: first, children are capable of rehabilitation; second, all that rehabilitation requires is the proper intervention; and third, the appropriate goal of rehabilitation was for "[a]ll Americans . . . to become middle class Americans."[53] These "proper objects" of the Child Savers' solicitous care and concern were generally understood to be poor white and European immigrant youths,[54] who were able to take advantage of an unspoken "cross-class alliance" that prioritized their needs over those of black children.[55] "North or South, the basic pattern was that upper-middle-class, native stock, urban whites would try to reform poorer whites" to help them assimilate into American society.[56]

The Child Savers believed that youth misbehavior was the reflection of an "unwholesome environment, especially the baneful influence of squalid urban life,"[57] and that the behavioral and social sciences could correct misbehavior with suitable state intervention.[58] In other words, if the child's undisciplined home life was the ailment, then state intervention was the cure. Accordingly, "[c]hildren who

spectacle and more on the internalization of discipline, order, and law-abidingness." *See* Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 26 (2012). In fact, the "warden's role was analogized to that of a parent," and "[i]n this way, the penitentiary provided a substitute for familial discipline when the family failed." *Id.* at 27–28.

53. *See* 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 FOREST L. REV. 1111, 1137 n.76 (2003) (describing the "Rehabilitative Ideal" and the Progressives' views on how behavior could be changed) (internal quotation marks omitted).

54. *See* WARD, *supra* note 4, at 73 (noting that poor white and immigrant European youths had access to "early juvenile institutions" that "reflected racial privileges").

55. *Id.* at 73, 86 (stating that "[p]rior historical research stresses that poor and foreign-born white youths were a primary target of early child-saving initiatives. Most accounts overlook how this focus disguised the way in which racial privilege was based on a shared white or potentially white racial status, despite distinctions.").

56. *Id.* at 73.

57. Ainsworth, *supra* note 24, at 1097; *see also* Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 62 (2012) (noting that "[f]or those within the House of Refuge movement, poverty and crime were virtually synonymous").

58. *See* Ainsworth, *supra* note 24, at 1097 (explaining that "[j]uvenile misbehavior was seen as merely the overt manifestation of underlying social pathology" and that "[w]ith proper diagnosis and treatment . . . social pathology was considered as susceptible to cure as physical ailments").

violated the law were not to be regarded as criminals but as wards of the state who should receive nearly the same 'care, custody, and discipline' as that given to neglected and dependent children."[59] Because of the Rehabilitative Ideal, the major "criminal justice reforms [of this period]—probation, parole, indeterminate sentences, and the juvenile court—all emphasized open-ended, informal, and flexible policies"[60] to reform offenders.

From its inception, juvenile court was more of a social welfare agency than a court system.[61] The Child Savers imagined the juvenile court as a separate, specialized court, in which the judge would ascertain not whether the child was "guilty" or "innocent," but "[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."[62] Using this information about the child's background and virtually unfettered discretion, the judge, acting as the parent the ungovernable child needed,[63] would fashion an individualized sentence aimed to rehabilitate the child.[64] The entire hearing was geared towards a successful disposition in the child's best interests.

Because the juvenile court's aim was rehabilitation instead of punishment, generally, the juvenile court "shun[ned] the burdensome formalities of criminal procedures."[65] In many jurisdictions, the criminal rules of evidence and procedure did not apply in juvenile court.[66] Hearings were confidential.[67] Records were sealed so that sys-

59. Birckhead, *supra* note 57, at 64.

60. Feld, *Constitutional Tension*, *supra* note 22, at 1137.

61. *In re* Gault, 387 U.S. 1, 15–16 (1967) (describing how "[t]he child was to be 'treated' and 'rehabilitated'" and that "the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive").

62. Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909). Judge Mack's article about the juvenile court is one of the most-cited law review articles published in or before 1960. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1497–98 (2012).

63. *See* Mack, *supra* note 62, at 117 (explaining that the child needed "not so much the power, as the friendly interest of the state"); *see also* WARD, *supra* note 4, at 78 (noting that a judge in Cook County, Illinois described the separate juvenile court as acting as a "kind and just parent ought to treat his children").

64. Ainsworth, *supra* note 24, at 1099.

65. James E. Starrs, *A Sense of Irony in Southern Juvenile Courts*, 1 HARV. C.R.-C.L. L. REV. 129, 134 (1966).

66. *See Gault*, 387 U.S. at 15 (explaining that, under the views of the early reformers, the "rules of criminal procedure were . . . altogether inapplicable" in juvenile court).

tem-involved youths could avoid the stigma of a criminal conviction.[68] In most jurisdictions, children were tried by judges, and did not have the right to trial by jury.[69] As the Pennsylvania Supreme Court opined, "[w]hether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it."[70] The informality was "deemed a part of the rehabilitative process."[71] The state derived its power to act from the doctrine of parens patriae,[72] making the proceedings ostensibly informal, nonadversarial and civil, instead of rigid, technical, harsh, and criminal.[73]

The case of fourteen-year-old Thomas Majcheski, an example of one of the "poorer whites" who needed help assimilating into American society[74] and an early case in Chicago's new juvenile court, presents a typical example of the informal procedure and rehabilitative bent of juvenile court.[75] In 1899, just a few weeks after Henry Campbell's case, Thomas was accused of stealing grain from a freight car in a railroad yard.[76] The arresting officer told the court that Thomas's father was dead, that he had eight brothers and sisters, and that his mother, a washerwoman, could not leave work to come to court. The officer also told the court that Thomas had committed similar thefts previously, but had never been arrested. Thomas admitted he had stolen the grain. The judge then turned to the people in the courtroom, who may have numbered as many as 300, and asked if they had anything to say about what should happen to Thomas. The judge was

67. ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 137–63 (1977) (describing the philosophy behind the creation of juvenile court).

68. *Id.*

69. Ainsworth, *supra* note 24, at 1100–01.

70. Commonwealth v. Fisher, 62 A. 198, 200 (Pa. 1905).

71. Ainsworth, *supra* note 24, at 1100.

72. Literally, "parent of the country." For a discussion of the parens patriae doctrine and its applicability to family court proceedings, see Jyoti Nanda, *Blind Discretion: Girls of Color and Delinquency in the Juvenile System*, 59 UCLA L. REV. 1502, 1511–13 (2012).

73. *See In re* Gault, 387 U.S. 1, 15–16 (1967) ("The apparent rigidities, technicalities, and harshness which [the 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 'clinical' rather than punitive.").

74. WARD, *supra* note 4, at 73.

75. *See* TANNEHAUS, *supra* note 1, at 26–28 (giving an account of the *Majcheski* case).

76. *Id.* at 27.

about to incarcerate Thomas in the state reformatory, where Thomas would "have [had] the benefit of schooling," when a young man in the audience stood up and told the judge that the sentence was too harsh. Accounts indicate that the young man took up Thomas's cause, persuading the judge that Thomas was just trying to get food for his family. The judge then asked the objector to take Thomas and help Thomas become a better citizen. The young man agreed. On the way out of the courtroom, a reporter asked the young man how he would help Thomas reform. The young man said he was going to "[c]lean him up and get him some clothes and then take him to my mother. She'll know what to do with him."[77]

The absence of procedural protections, as in Thomas Majcheski's case, over the years led juvenile court opponents to criticize the very discretion that the Progressives promoted. For example, in 1927, Herbert Lou, borrowing a phrase from Dean Pound, asserted that "the powers of the Star Chamber were a bagatelle" compared to the broad discretion afforded to juvenile courts.[78] In 1949, Paul Tappan impugned juvenile court practices that abrogated "the presumption of innocence, such as the dissemination of probation reports prior to adjudication."[79] In a 1961 law review article, Chester J. Antieau argued that children in juvenile court are entitled to the same constitutional due process safeguards that protect adults in criminal proceedings.[80] In a 1966 law review article, James E. Starrs warned that "[i]nformality and compassion are not necessary running mates. In the wrong hands or in the wrong place, the Juvenile Court might merely 'clothe (its) naked villainy, with odd old ends stol'n of holy writ, [a]nd seem a saint when most (it) play(s) the devil.'"[81] In that same year, the *Harvard Law Review* published an empirical study concluding that "the rehabilitative ideal was either fundamentally flawed or imperfectly implemented."[82]

Despite these critiques, the idea of a separate juvenile court with the goal of rehabilitating ungovernable youths into law-abiding citi-

77. *Id.* at 29.

78. Birckhead, *supra* note 57, at 65; *see also* Matthew Beemsterboer, *The Juvenile Court—Benevolence in the Star Chamber*, 50 J. CRIM. L.J. & CRIMINOLOGY. 464, 475 (1960) (arguing that the informality of the juvenile court "is merely a euphemism for the *star chamber*").

79. Birckhead, *supra* note 57, at 65–66.

80. Chester J. Antieau, *Constitutional Rights in Juvenile Court*, 46 CORNELL L.Q. 387, 414–15 (1961).

81. Starrs, *supra* note 65, at 130 (citation omitted).

82. Birckhead, *supra* note 57, at 66 (citation omitted) (quotation marks omitted).

zens proved very popular.[83] By 1925, there was a juvenile court in all but two states, and countries in Europe, South America, and Asia had crafted laws based on the Illinois Juvenile Court Act.[84]

B. The Experience of Black Children: An Alternate Origin Story

The treatment of black children accused of crime was vastly different. The violence against black children in the antebellum South—convict leasing, Jim Crow juvenile justice and the racial discrimination of the houses of refuge—all combine to paint a picture very different from that of the juvenile justice system the Child Savers championed. Themes that dominate the history of system-involved black children—social control, disparate expectations and inadequate services—persist today.[85] Just as importantly, examination of this history reveals how juvenile justice reform emerged as a critical symbolic battleground in the struggle for civil rights,[86] and why the Court should have taken this struggle into account in its consideration of whether juvenile rights would be based in Fourteenth Amendment due process or in the Bill of Rights.

---

83. *See* Miriam Stohs, *Racism in the Juvenile Justice System: A Critical Perspective*, 2 WHITTIER J. CHILD & FAM. ADVOC. 97, 99 (2003) (noting that all states had established a separate juvenile justice system, based upon the Illinois juvenile system, by 1945).

84. Birckhead, *supra* note 57, at 64.

85. Some important studies of the racial history of juvenile justice include: GEOFF K. WARD, THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE (2012); WILEY BRITTON SANDERS, NEGRO CHILD WELFARE IN NORTH CAROLINA (1933); ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE (1972); Alexander W. Pisciotta, *Race, Sex and Rehabilitation: A Study of Differential Treatment in the Juvenile Reformatory, 1825–1900*, 29 CRIME & DELINQUENCY 254 (1983). For examples of histories written largely from the perspective of the majority racial group, see generally ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971); STEVEN L. SCHLOSSMAN, LOVE & THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825–1920 (1977); ROBERT M. MENNEL, THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1825–1940 (1973); THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE (1992).

86. *See* WARD, *supra* note 4, at 72 ("For black civic leaders in the American South, juvenile justice reform was a forward-looking venture in black community reparation and freedom . . . . The earliest black child-savers were greatly concerned with eventually enhancing the progress of black America through equal protection of black youths in relation to rehabilitative ideals.").

1. *"No use trying to reform a Negro"*[87]*: Black Children in the Houses of Refuge*

Of course, when the Houses of Refuge were being built, slavery was legal and racism was freely expressed. The Civil War was decades away; passage of the Thirteenth Amendment was even more remote.[88] Predictably, black children accused of crime in the South faced harsh, sometimes violent treatment, usually within slavery. But even in the North, the belief that children were amenable to rehabilitation was reserved for white children. In part because of the historical disregard for the slave family, for many black civic leaders it was critically important to fulfill the promise of a juvenile court responsive to the needs of black children and families.[89]

Houses of Refuge accommodated racist attitudes towards black children and their capabilities. For example, it was clear that New York's black children were not "proper objects" when the New York House of Refuge opened its doors in 1825, because the "colored" section was not opened until 1834. And, even when the New York House of Refuge established the "colored" section, black children were still excluded from rehabilitation services to avoid "a waste of resources and a debasement of [w]hites."[90] In a pattern that would be mimicked at the turn of the century with the spread of juvenile courts, other states followed suit, opening houses of refuge and allocating

87. DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 47 (1997).

88. When the New York House of Refuge was founded in 1825, slavery was the law of the land. Two cases are generally considered to be the Court's most important pronouncements on the subject of slavery during the antebellum period. Both cases involved the treatment of slaves and their children. In *Prigg v. Pennsylvania*, 41 U.S. 539, 608, 616–18 (1842), the United States Supreme Court held that the federal Fugitive Slave Act preempted a Pennsylvania state law that extended procedural protections to suspected escaped slaves. In *Dred Scott v. Sandford*, 60 U.S. 393, 406 (1857), the Court ruled that neither citizenship nor protection under the United States Constitution was available to African slaves and their descendants. The Court also held that Congress could not prohibit slavery in federal territories, and that slaves could not vindicate any rights in federal court. *Id.* at 449–50, 452.

89. WARD, *supra* note 4, at 78.

90. JAMES BELL & LAURA JOHN RIDOLFI, W. HAYWOOD BURNS INSTITUTE, ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM, 3 (2008), *available at* http://www.burnsinstitute.org/downloads/BI%20Adoration%20of%20the%20Question_2.pdf.

fewer resources to black children. The superintendent of the Philadelphia House of Refuge justified excluding black children from rehabilitation programs because "[i]t would be degrading to the white children to associate them with beings given up to public scorn."[91] In Philadelphia's House of Refuge,[92] the "proper education" meant teaching black boys to perform manual labor, teaching black girls to be cooks, maids, and seamstresses, and steering all black children away from academic pursuits.[93] 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. For example, in 1850, in spite of the cities' predominantly white populations, approximately 50% of youth under fifteen in the Providence, Rhode Island, jail were black, 60% of youth at the Maryland penitentiary in Baltimore were black, and all youth in the Washington, D.C., penitentiary were black.[94]

Houses of refuge came late to the southern states; houses of refuge for southern black children came even later.[95] In the southern states, "[p]lantation discipline," which included all manner of corporal and other kinds of punishment, "took care of the disobedient Negro child."[96] Southerners simply did not think of a slave child accused of a crime "as a juvenile delinquent in need of special care;"[97] slaves were laborers who were taught "that theirs was a glorified place among the chickens and the pigs."[98] When a Mississippi legislator proposed a juvenile reform school in the late nineteenth century, as a compromise with opponents who did not want to squander resources on trying to rehabilitate black children because "it was no use trying to reform a Negro,"[99] he "proposed that 'schooling and moral instruc-

91. MENNEL, *supra* note 85, at 17.

92. In 1892, the black and white Philadelphia Houses of Refuge were moved to the Glen Mills Farm, which continues to operate as a residential home for system-involved youths today. WARD, *supra* note 4, at 59; THE GLEN MILLS SCHOOLS, http://glenmillsschool.org (last visited Nov. 11, 2012).

93. WARD, *supra* note 4, at 56. In contrast, white boys "were trained as farmers and skilled artisans and provided with academic instruction." *Id.*

94. LEONARD P. CURRY, THE FREE BLACK IN URBAN AMERICA, 1800–1850: THE SHADOW OF THE DREAM 115–16 (1981).

95. WARD, *supra* note 4, at 62.

96. MENNEL, *supra* note 85, at 75.

97. *Id.*

98. BLACKMON, *supra* note 7, at 13.

99. WARD, *supra* note 4, at 82–83.

tion' be limited to the evenings, after '10 or twelve hours of work' had been performed in the fields."[100] The first southern house of refuge, which opened its doors only to white boys, was built in New Orleans in 1847.[101] 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.[102] Even in that instance, one of the main reasons for opening the Baltimore House of Reformation for Colored Children was "the need for agricultural labor through the state, as well as the great want of competent house servants."[103]

There were some studies that documented the early racial inequality of juvenile courts. In 1913, the Juvenile Protective Association of Chicago did a study of the boys in the county jail, and were "startled" to find that "[a]lthough the colored people of Chicago approximate one-fortieth of the entire population, . . . one-eighth of the boys and young men, and nearly one-third of the girls and young women, who had been confined in the jail during the year, were Negroes."[104] In New York in 1925, the National Urban League did a study that revealed that "[t]o an extent evidenced by probably no other group in the city, . . . the Negro finds himself with inadequate facilities in the recreation field and in the field of care of dependent and delinquent children."[105]

It should also be noted that the experiences of black youths in houses of refuge were anomalous, because most blacks still lived in the South during this time period,[106] and where black children accused of crime faced far harsher, often violent, treatment, including convict leasing, whipping, and lynching.[107]

---

100. OSHINSKY, *supra* note 87, at 47. The legislator's bill would eventually fail. *Id.*

101. WARD, *supra* note 4, at 60.

102. *Id.* at 60.

103. *Id.* at 74. At the House of Reformation, black boys learned "how to handle the hoe, shovel and spade; to manage horses, mules and cattle, to plow, to sow, and to reap," and black girls learned "to scrub, wash, and iron, to bake and cook [and] to wait upon the family." *Id.*; *see also* Cecile P. Frey, *The House of Refuge for Colored Children*, 66 J. NEGRO HIST. 10, 17–18 (1981) (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).

104. WARD, *supra* note 4, at 111.

105. *Id.* at 113–14.

106. *Id.* at 83.

107. *Id.* at 59, 67–68, 114–15.

2. "One Dies, Get Another"[108]: Convict Leasing and Black Youths

Convict leasing quickly emerged to fill the labor void left by the abolition of the "peculiar institution." Until the late 1920s and the Great Migration, 80% of black Americans lived in the South.[109] To satisfy the South's acute labor need, the criminal justice system was "retooled to provide cheap forced labor to mines, farms, timber camps, turpentine makers, railroad builders and entrepreneurs large and small. Tens of thousands of men, the vast majority of them black, found themselves pulled back into slavery."[110] A common arrangement might look like this: A business owner in need of labor might "ma[k]e up a list of some eighty negroes known to both [the sheriff and the business owner] as good husky fellows, capable of a fair day's work," give that list to the local sheriff, and promise the sheriff five dollars plus expenses for each man he arrested.[111] Charges ranged from vagrancy, defined as not being able to prove employment, to more serious crimes.[112] Terms ranged from a year and a day for burglary to life imprisonment for murder.[113]

Black children were swept up in this "convict labor machine"[114] as easily as black adults were. In 1868, of the 222 convicts in the Louisiana penitentiary, forty-three were between the ages of ten and twenty years old.[115] By 1880, at least 25% of Mississippi's convicts were under the age of eighteen.[116] By 1890, according to a census analysis by

108. LEON F. LITWACK, TROUBLE IN MIND 273 (1998); WARD, *supra* note 4, at 69; MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH: 1866–1928 (1996).

109. WARD, *supra* note 4, at 106.

110. BLACKMON, supra note 7, at 7.

111. OSHINSKY, *supra* note 87, at 71.

112. BLACKMON, supra note 7, at 7.

113. *Id.* at 327.

114. OSHINSKY, *supra* note 87, at 46–48. The convict leasing system persists. As *New York Times* columnist Charles M. Blow discussed in his eight-part series about how Louisiana's private prison system thrives on high incarceration rates and harsh sentences, the convict leasing system is alive and well. The series offered the following description of Louisiana's private prison system: "A prison system that leased its convicts as plantation labor in the 1800s has come full circle and is again a nexus for profit." Charles M. Blow, *Plantations, Prisons and Profits*, N.Y. TIMES, May 26, 2012, at A21; Cindy Chang, *How We Built the World's Prison Capital*, TIMES-PICAYUNE, May 13, 2012, at A-1.

115. WARD, *supra* note 4, at 67.

116. OSHINSKY, *supra* note 87, at 46–47.

W.E.B. Du Bois, more than 18% of all black prisoners were juveniles.[117] The rolls of a slave mine in Birmingham, Alabama, list the death of a sixteen-year-old farmhand, sentenced to 729 days in the mines for "an unrecorded theft," just before Thanksgiving of 1910.[118] No black child was too young to be incarcerated. In the 1880s, the roster at Mississippi's infamous Parchman Farm included six-year-old Mary Gay of Vicksburg, who was sentenced to thirty days incarceration plus court costs for stealing a hat.[119] In 1901, it housed eight-year-old Will Evans, convicted and imprisoned for stealing some change from the counter of a dry goods store.[120] The City of Memphis, at one point, held a four-year-old black child convicted of burglary.[121]

3. "The most effective way of handling delinquent Negro boys"[122]: The Effects of Jim Crow, Lynching, and Social Control on Black System-Involved Youths

The juvenile court movement grew up under the watchful gaze of Jim Crow. Accordingly, "[r]ehabilitative efforts were often reserved for native-born and immigrant Anglo Americans in white-dominated juvenile court communities, where common European ancestry and white skin rendered them less threatening, distinctly 'salvageable,' and ultimately more assimilable—culturally, economically, and politically—than black and other nonwhite youth."[123]

Black children were overrepresented in juvenile court proceedings, and underrepresented in rehabilitative agencies and services.[124] From the deep South to Chicago and New York, "white civic leaders

117. BELL & RIDOLFI, *supra* note 90, at 5. Prison conditions were brutal. A report by journalist Ida B. Wells on the convict leasing system revealed that starvation, disease, rape and whippings were common occurrences in prison. IDA B. WELLS ET AL., THE REASON WHY THE COLORED AMERICAN IS NOT IN THE WORLD'S COLUMBIAN EXPOSITION 23–28 (Robert W. Rydell ed., University of Illinois Press 1999) (1893).

118. BLACKMON, *supra* note 7, at 328–29.

119. OSHINSKY, *supra* note 87, at 47.

120. *Id.* at 47–48. Evans' crime was listed as "grand larceny." *Id.*

121. Florence Kelley, *A Burglar Four Years Old in the Memphis Juvenile Court*, 32 SURVEY 318, 318–19 (1914); BELL & RIDOLFI, *supra* note 90, at 6.

122. WARD, *supra* note 4, at 115.

123. Geoff Ward, *The "Other" Child Savers: Racial Politics of the Parental State*, *in* THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 225, 228 (Anthony M. Platt, Rutgers University Press 40th ed. 2009).

124. BELL & RIDOLFI, *supra* note 90, at 6.

were similarly inclined to prioritize the provision of care and limit their influence to white youth . . . in segregated juvenile justice systems."[125] In the North, "this oppression typically manifested as institutionalized neglect or subtle exploitation."[126] One chief probation officer in Illinois identified "the difficulty of providing adequate care for the dependent and neglected colored children" as "one of the greatest problems with which the court has to deal."[127] He went on to lay the problem at the feet of Jim Crow laws, explaining, "[t]he situation is complicated by a lack of resources in the community comparable with those available for white children in the same circumstances. Practically no institutions are to be found in the community to which this group of children may be admitted."[128]

In the South, the oppression of the black youth population was overt and socially endorsed.[129] In 1905, Arkansas governor Jeff Davis pressed for a reform school "where white boys might be taught some useful occupation and the negro boys compelled to work and support the institution while it is being done."[130] In 1914, Florence Kelley, director of the Chicago NAACP, sent W.E.B. Du Bois a photographic essay that documented the Jim Crow juvenile justice in Memphis.[131] Kelley wrote that "[t]he city of Memphis . . . gives its white juvenile offenders six teachers, and establishes their Juvenile Court in a beautiful building once a school house," with separate detention rooms for delinquent and dependent children, a gymnasium, a cottage, and a well-equipped shop for vocational training, while black children were afforded "a shabby six-room wooden cottage . . . badly equipped, [with just] its sewer connection in the back yard" and no teacher.[132] Memphis's white juvenile court judge refused to serve the black juvenile court.[133]

125. WARD, *supra* note 4, at 228–29.

126. *Id.* at 105.

127. BELL & RIDOLFI, *supra* note 90, at 6.

128. *Id.* Around the time of the passage of the Illinois Juvenile Court Act, Jim Crow was the law of the land. In *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), the Supreme Court created the "separate but equal" doctrine. This doctrine would not be overturned until *Brown v. Board of Education*, 347 U.S. 483, 483 (1954), almost six decades later.

129. WARD, *supra* note 4, at 105.

130. *Id.* at 114.

131. *Id.* at 234.

132. *Id.* at 141 (internal quotation marks omitted).

133. WARD, *supra* note 4, at 234.

In addition to being denied their fair share of rehabilitative services, corporal punishment, in the form of whippings, was reserved for black children. For example, 159 youths in North Carolina's juvenile justice system were whipped in 1933; 134, or over 80%, of them, were black.[134] White North Carolina juvenile court judges professed "a widespread feeling . . . that whipping is the most effective way of handling delinquent Negro boys."[135]

Like whippings, lynching was integral to social control in the Jim Crow era, and black children were not exempt from this terrorization. Well into the first half of the twentieth century, black youth were victims of extrajudicial mob executions. In 1903, just four years after the juvenile court had come to Chicago, a mob murdered the sheriff of Scottsboro, Alabama when he refused to turn over a black teenager accused of "attempted criminal assault" against a nineteen-year-old white girl.[136] After the mob killed the sheriff, it moved on to the youth, taking him from his cell and hanging him from a telephone pole.[137] In 1908, a black teenager in Dallas, Texas, accused of raping a white woman was burned to death.[138] In 1916, seventeen-year-old Jesse Washington was lynched and burned alive by a mob in Waco, Texas.[139] In his study of black life in a Mississippi Delta town in the 1930s, sociologist John Dollard found that the threat of lynching was ever-present in the minds of even very young children.[140]

134. *Id.* at 115.

135. *Id.*

136. BLACKMON, *supra* note 7, at 234.

137. *Id.* at 234.

138. *Id.* at 324–25.

139. BELL & RIDOLFI, *supra* note 90, at 6–7. For a detailed recounting of this tragedy, see PATRICIA BERNSTEIN, THE FIRST WACO HORROR: THE LYNCHING OF JESSE WASHINGTON AND THE RISE OF THE NAACP (2006).

140. PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 83 (2002). It should be noted that black children were also executed by the state. One famous case involved fifteen-year-old James Lewis and sixteen-year-old Charles Trudell, who were accused of robbery and murder of their employer, a white farmer. WARD, *supra* note 4, at 118. They were convicted by an all-white jury and executed in 1947. *Id.* at 119. The case triggered an international outcry against "juvenile murder" and "white justice." *Id.* Pointing out that the boys would be too short to fit the electric chair, a newspaper writer suggested that the boys be propped up on the United States Constitution, the Bible, The Age of Reason, and The Rise of Democracy, "so that Mississippi can destroy them all at the same time." *Id.* at 120. Their federal appeals lawyer, Thurgood Marshall, compared them to the Scottsboro Boys. *Id.* at 119–20.

Around the turn of the century, black civic leaders spearheaded their own child-saving movement. Black leaders rejected this disparate treatment, as modern ideas of childhood and the import of children as the center of the family and hope of the next generation[141] "combined with black liberation agendas, informed the development of a specific oppositional consciousness to Jim Crow juvenile justice."[142] The leadership was centered in the National Council of Colored Women's Clubs, which installed juvenile justice reform as a high priority at its first national meeting in 1898.[143] These reformers worked on local levels "to establish largely voluntary self-help initiatives, including modest black reformatories across the South."[144]

Many facets of the black community were engaged in the pursuit of getting justice for system-involved black children. For example, at the 1920 convention of Marcus Garvey's United Negro Improvement Association, attendees endorsed a Declaration of Rights of the Negro Peoples of the World, which included juvenile justice reform as a means to lift the race.[145] Article 44 stated: "We deplore and protest against the practice of confining juvenile prisoners in prisons with adults, . . . and we recommend that such youthful prisoners be taught gainful trades under humane supervision."[146] The NAACP, founded in 1909,[147] consistently reported on juvenile justice issues in its periodical, *The Crisis: A Record of the Dark Races*, which sold nearly 100,000 copies monthly by 1919.[148] *The Crisis* featured prominent stories about a proposal for a reformatory for black children in North Carolina; the 1912 execution of Virginia Christian, a sixteen-year-old black girl convicted of murdering her employer; and the 1912 conviction, in Montgomery, Alabama, of sixteen-year-old Daisy Bell for fighting, and her sentence of a year and six months on a chain gang.[149] In each of these instances, the newspaper offered coverage of the individual story as

141. WARD, *supra* note 4, at 230–31. In a 1916 issue of *Crisis*, W.E.B. Du Bois stated that "in the hands of dark children lies the fate of the dark world." *Id.* at 231.

142. *Id.* at 230–31.

143. *Id.* at 235.

144. *Id.*

145. WARD, *supra* note 4, at 167–69.

146. *Id.* at 169.

147. *NAACP: 100 Years of History*, NAACP, http://www.naacp.org/pages/naacp-history (last visited Mar. 21, 2012).

148. WARD, *supra* note 4, at 173. According to historian David Levering Lewis, "[i]n middle class [black] families" at this time, *The Crisis* "lay next to the bible." *Id.*

149. *Id.* at 173–74.

part of a larger narrative of injustice against black society.[150] Several other civil rights organizations also took up the cause of juvenile justice, including the Joint Committee on Negro Child Study in New York City, which issued a report called *A Study of the Delinquent and Neglected Negro Children Before the New York City Children's Court in 1927*, and an interracial committee in North Carolina, which conducted a study of Jim Crow juvenile justice "to advance social change."[151]

4. "Disproportionality" Documented: The Great Migration and the Treatment of Black Youth in Northern Courts

As the United States gained prominence as an industrial power, cities sprinted to keep pace with the social problems attendant to rapid urban growth. The eye of the juvenile court movement was initially centered in cities and coincided with the first wave of the "Great Migration." During the Great Migration, thousands of blacks from the rural South flooded Midwest, Western, and Northeast urban centers looking for industrial jobs. The Great Migration "literally delivered thousands of black youth and families in need to newly established juvenile court jurisdictions, where they expected greater opportunity than was common in the South, yet still encountered exclusion on the basis of race."[152]

Detroit provides an instructive example. Juvenile court involvement of African-American children, reflective of "a perceived lack of family structure and the difficulty of the transition from the rural South to the urban North,"[153] was disproportionate from the earliest years of Detroit's juvenile court. Detroit's juvenile court opened on July 25, 1907.[154] Detroit's black population grew rapidly in the first half of the twentieth century. In 1910, Detroit's black population was 5,000, or 1.2% of Detroit's population. By 1920, it was 40,000, or 4% Of Detroit's population. Blacks made up almost 8% of the city's population by 1930, 9% by 1940, 16% by 1950, and 29% by 1960.[155] Similarly, blacks were 3.3% of Pennsylvania's population in 1920, but

150. *Id.* at 173, 175.

151. *Id.* at 176–77.

152. WARD, *supra* note 4, at 230.

153. DAVID B. WOLCOTT, COPS AND KIDS: POLICING JUVENILE DELINQUENCY IN URBAN AMERICA, 1890–1940, at 98 (2005).

154. *Id.* at 78.

155. *Id.* at 97.

made up 30% of the mid-teens sent to prison,[156] even though the offense patterns for black and whites were very similar.[157] The same patterns can be found in other cities whose demographics changed in the Great Migration, including Chicago,[158] New York[159] and Washington, D.C.[160]

Coeval with this change in the city's racial demographics was the growth of the city's police force, which expanded in size and in influence, but remained predominantly white. Police officers were given broad discretion regarding referrals to juvenile justice systems, as their role transitioned from "community protection to crime suppression."[161] Subjective factors like the child's attitude and cooperativeness became part of the arrest decision.[162] In 1926, juvenile court complaints against black children were filed more than twice as often as such complaints were filed against white children.[163] Although black children comprised only 3.3% of Detroit's juvenile population in 1920, they comprised 12% of youths held in custody between 1917 and 1928.[164]

The phenomenon of "disproportionality" in juvenile courts was first identified on a national scale by researcher Mary Huff Diggs in the 1940s, towards the end of the Great Migration.[165] Diggs reviewed fifty-three courts across the country.[166] She found "that Negro children are represented in a much larger proportion of the delinquency cases than they are in the general population. . . . An appreciably larger percent of the Negro children came in contact with the courts

156. WARD, *supra* note 4, at 101.

157. *Id.*

158. WOLCOTT, *supra* note 153, at 118–19.

159. WARD, *supra* note 4, at 113.

160. WOLCOTT, *supra* note 153, at 162–63, 166.

161. BELL & RIDOLFI, *supra* note 90, at 7; *see also* David B. Wolcott, *"The Cop Will Get You": The Police and Discretionary Juvenile Justice, 1890–1940*, 35 J. SOC. HIST. 349, 356–57 (2001) ("On the other hand, police departments professionalized themselves by downplaying their traditional function of maintaining public order and instead devoting their primary efforts to efficiently fighting crime.").

162. BELL & RIDOLFI, *supra* note 90, at 7.

163. *See* WOLCOTT, *supra* note 153, at 98.

164. *Id.*

165. BELL & RIDOLFI, *supra* note 90, at 8.

166. *Id.*

at an earlier age than was true with the white children."[167] She further found that "[c]ases of Negro boys were less frequently dismissed than were white boys. Besides, they were committed to an institution or referred to an agency or individual much more frequently than were white boys."[168]

II. JUVENILE JURISPRUDENCE AT THE CROSSROADS: FUNDAMENTAL FAIRNESS VERSUS FUNDAMENTAL RIGHTS

In the latter half of the twentieth century, black children were involved in the Civil Rights Movement along with adults. Just as black leaders who were lynched or killed became powerful symbols in the Civil Rights Movement, so too were children who were lynched or killed adopted as important symbols of the fight for racial justice.[169] The brutal murder of fourteen-year-old Emmett Till in 1955 for whistling suggestively at a white woman on a dare captured the world's attention because of his young age, "the innocence of his alleged offense, . . . the fact that he was a Northerner killed in the South," and his mother's insistence on having an open casket at his funeral so that everyone could, in her words, "see what they did to my boy."[170] Youth also led the way in civil rights demonstrations,[171] which spread across the South.[172] For example, there were two such demonstrations in Mississippi: one in 1963 in Natchez, involving over 600 black youths and one in 1965 in Jackson, involving over 400 young people.[173] In *In*

167. *Id.*

168. *Id.*

169. *See* DRAY, *supra* note 140, at 425 (recounting the murder of Emmett Till, a young black child, and stating that "Emmett Till's [murder] was destined to be a very unquiet death").

170. *See id.*, at 424–26 ("An estimated ten thousand people filed by the casket in the days before Till's funeral. . . . People thousands of miles away wept upon seeing it. [Emmett's mother] Mamie Till Bradley herself said of the photograph's disturbing power, 'It just looked as though all the hatred and all the scorn [the world] ever had for a Negro was taken out on that child.'").

171. *See* Starrs, *supra* note 65, at 130–31 ("It has become a commonplace phenomenon of civil rights activity to find large numbers of children directly involved in all kinds of demonstrations.").

172. *See id.* at 133 ("Those perplexities in the use of the child demonstrator have appeared on a broad front throughout the South.").

173. *Id.* at 133, 143–44. Youths in these demonstrations faced heavy penalties. Some of the young people participating in the Natchez demonstrations were incarcerated at the

re Burrus,[174] the companion to the *McKeiver* case,[175] black children charged with impeding traffic as part of a demonstration protesting school segregation asked for and were denied jury trials.

A. In re Gault *and the Pyrrhic Victory of "Fundamental Fairness" over "Fundamental Rights"*

1. The Supreme Court's "Due Process Revolution"[176]

Beginning in 1961, in the midst of the Civil Rights Movement, the "dominant theme" of the Court's jurisprudence was racial equality.[177] The Court was not immune to the zeitgeist that characterized this extraordinary time in the nation's history. Far from it—in word and deed, in civil and criminal cases, the Court disassembled the legal scaffolding of American apartheid, one indignity at a time.[178] As Professor Burt Neuborne argues,

---

Parchman State Penitentiary "where they were exposed to unimaginable indignities and cruelties." *Id.*

174. 167 S.E.2d 454 (N.C. Ct. App. 1969).

175. *In re Burrus* will be discussed in depth in Part III, *infra*.

176. Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1494 (2003) [hereinafter Feld, *Race*].

177. Robert M. Cover and T. Alexander Aleinikoff, *Dialectical Federalism*, 86 YALE L.J. 1035, 1037 (1977); *see also* Feld, *Race*, *supra* note 176, at 1484, 1494 (discussing the Warren Court's "perceived . . . need . . . to protect minority offenders" and desire to make its own contribution to the Civil Rights Movement by "focus on procedural rights" as an answer to the country's profound "concern about racial inequality").

178. Lee v. Washington, 390 U.S. 333, 333–34 (1968) (striking down racial segregation in prisons); Loving v. Virginia., 388 U.S. 1, 12 (1967) (striking down laws banning interracial marriage); Brown v. Louisiana., 383 U.S. 131, 143 (1966) (integrating public libraries); Anderson v. Martin, 375 U.S. 399, 401–02 (1964) (outlawing racial designations on the ballot); Va. Bd. of Elections v. Hamm, 379 U.S. 19, 19 (1964) (banning separate voting and property tax records); Johnson v. Virginia, 373 U.S. 61, 62 (1963) (prohibiting segregated courtrooms); Turner v. Memphis, 369 U.S. 350, 351, 354 (1962) (striking down segregation in airport restaurants); State Athletic Comm'n v. Dorsey, 359 U.S. 533, 533 (1959) (striking down laws banning interracial boxing); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54, 54 (1958) (outlawing segregated parks and playgrounds); Gayle v. Browder, 352 U.S. 903, 903 (1956) (ending racial segregation in public transportation in Montgomery, Alabama and banning laws that required blacks to ride in the back of public buses); Mayor of Balt. v. Dawson, 350 U.S. 877, 877 (1955) (banning segregated public beaches).

> [the Court's] concern over racial injustice and state institutional failure was so intense during the . . . 'Warren years' that it played a significant role in shaping many of the most important constitutional decisions of the Supreme Court in areas as diverse as federalism; separation of powers; criminal law and procedure; freedom of speech, association, and religion; procedural due process of law; and democracy.[179]

The Court's concern over racial injustice is threaded throughout the fabric of the Court's decisions. For example, in *Miranda v. Arizona*,[180] Chief Justice Warren, in reference to an earlier case, "stressed the impact of private interrogation" on "an indigent Los Angeles Negro who had dropped out of school in the sixth grade."[181] And, in *Duncan v. Louisiana*,[182] the Court reversed an assault prosecution and bench-trial conviction that "bore hallmark indicia of Jim Crow injustice."[183] As the Court would proclaim in *Green v. County School Board for New Kent County*,[184] the mission of the post-*Brown* cases was to eliminate race discrimination "root and branch."[185]

The steady introduction into adult criminal proceedings of the fundamental protections enumerated in the Bill of Rights was a cornerstone of what has been called the Court's "due process revolution."[186] The protections of the federal Fourth,[187] Fifth,[188] Sixth,[189] and

---

179. Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 60.

180. 384 U.S. 436 (1966).

181. Cover and Aleinikoff, *supra* note 177, at 1037.

182. 391 U.S. 145 (1968).

183. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1691–92 (2010). For an in-depth discussion of *Duncan*, see Part III.A., *infra*.

184. 391 U.S. 430 (1968).

185. *Id.* at 437–38.

186. Sacha M. Coupet, *What To Do With the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Other Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1304 n.8 (2000); *see also* Feld, *Race*, *supra* 176; Cover and Aleinikoff, *supra* note 177, at 1035–36 (stating that "[t]he innovations of the Warren Court in the area of criminal procedure constituted the most ambitious attempt in our constitutional history to illuminate th[e] dark underside" of the "Dickensian netherworld of mass criminal adjudication," describing the criminal justice system as "a world steeped in the failings of human beings and the institutions created to control them," and "reflect[ing] the place of the furies in the temple of Justice").

Eighth Amendments[190] were incorporated and applied to the states by way of the Due Process Clause of the Fourteenth Amendment.[191] These protections included the Sixth Amendment when the Court found that "lawyers in criminal courts are necessities, not luxuries,"[192] and extended the right to counsel to indigent adults charged with felonies in the landmark case of *Gideon v. Wainwright*.[193]

Juvenile delinquency proceedings underwent a concomitant, but not coextensive, due process revolution. Beginning with *Kent v. United States*[194] in 1966, the Court began to limit discretion in juvenile court in the face of mounting evidence that the juvenile court experiment was a failure.[195] The most far-reaching of these cases was *In re*

187. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 660 (1961) (applying the Fourth Amendment's exclusionary rule for unlawful searches and seizures to the states by way of the Due Process Clause of the Fourteenth Amendment).

188. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that the government may not use statements stemming from custodial interrogation of the defendant without first demonstrating the use of procedural safeguards effective to secure the privilege against self-incrimination); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (extending the Fifth Amendment privilege against compelled self-incrimination to the states).

189. Klopfer v. North Carolina, 386 U.S. 213, 226 (1967) (incorporating the Sixth Amendment right to a speedy trial); Pointer v. Texas, 380 U.S. 400, 407–08 (1965) (incorporating the Sixth Amendment right to confrontation); Escobedo v. Illinois, 378 U.S. 478, 492 (1964) (holding that suspects have the right to counsel under the Sixth Amendment during the pre-indictment stage "when the [criminal] process shifts from investigatory to accusatory"); Gideon v. Wainwright, 372 U.S. 335, 342, 345 (1963) (incorporating the Sixth Amendment right to counsel).

190. *See, e.g.*, Robinson v. California, 370 U.S. 660, 667 (1962) (holding unconstitutional a state law that "inflict[ed] cruel and unusual punishment in violation of the Fourteenth Amendment").

191. *See* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 557 (1998) ("The issue in such cases was whether a particular guarantee of the Bill of Rights . . . should be extended to state court prosecutions via the Due Process Clause of the Fourteenth Amendment.").

192. *Gideon*, 372 U.S. at 344.

193. *Id.*

194. 383 U.S. 541 (1966).

195. *Id.* at 556; *see also In re* Gault, 387 U.S. 1, 77 (1967) (Harlan, J., concurring in part and dissenting in part) (recognizing that "imposing . . . rigid procedural requirements . . . may . . . hamper enlightened development of the systems of juvenile courts"); *In re* Winship, 397 U.S. 358, 368 (1970) (determining that "the constitutional safeguard of proof

Gault,[196] which granted youths in delinquency proceedings the rights to counsel, notice, and confrontation, and the privilege against compelled self-incrimination.[197] *Gault* is commonly considered the juvenile analog to *Gideon*, but the two cases have one very important difference. In contrast to its elevation of the "fundamental rights" as they are enumerated in the Bill of Rights in adult criminal proceedings, the *Gault* Court installed Fourteenth Amendment "fundamental fairness" as the touchstone for analysis of the minimum due process protections required in juvenile proceedings.[198] Although the Court declared that "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[199] *Gault* reserved the Bill of Rights for adult criminal defendants.

2. Fundamental Fairness Versus Fundamental Rights

But *Gideon* was not the first adult criminal right-to-counsel case, and *Gault* was not the first Fourteenth Amendment right-to-counsel case. *Powell v. State of Alabama*[200] was a racially charged case in which three black men were accused of raping two white women.[201] In *Powell*, the Court reversed the men's capital convictions because the Court determined that the men had not received effective assistance of counsel.[202] Unlike *Gideon*, in which the defendant represented himself, the *Powell* defendants had been assigned attorneys; in fact,

---

beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*—notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination). For an in-depth discussion of these cases, see Part II.A, *infra*.

196. 387 U.S. 1 (1967).

197. *Id.* at 33, 41, 55–56.

198. *See Kent*, 383 U.S. at 554 (holding that due process requirements apply to transfer proceedings); *see Gault*, 387 U.S. at 76 (Harlan, J., concurring in part and dissenting in part) ("[P]rudence and the 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, 361 (1970) (holding that fundamental fairness requires proof beyond a reasonable doubt in delinquency adjudications).

199. *Gault*, 387 U.S. at 13.

200. Powell v. Alabama, 287 U.S. 45 (1932).

201. *Id.* at 49.

202. *Id.* at 58.

the court had assigned every attorney in the courtroom.[203] The Court found that the defendants were entitled to effective assistance, in the form of counsel who would offer zealous representation instead of merely being present in the courtroom.[204] Although *Powell*'s holding provided the defendant with effective assistance of counsel in a capital case, the Court took pains to note that the "United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him," and that "[i]n most states the rule applies broadly to all criminal prosecutions."[205] *Powell* is important because the Court would later extend the right to counsel as a fundamental right pursuant to the Sixth Amendment in *Gideon*, despite *Powell*'s holding, which relied on Fourteenth Amendment fundamental fairness.[206] The progression from *Powell* to *Gideon* illustrates an instance in which the Court chose to augment Fourteenth Amendment due process protections as a vehicle for the provision of a critical right.

Accordingly, when the Court was confronted with the issue of extending constitutional protections to children accused of crimes, it had two paths from which to choose. One path was grounded in Fourteenth Amendment fundamental fairness; the other, in the protections found in the fundamental rights guaranteed in the Bill of Rights. In *In re Gault*, the Court chose the former, and consigned the juvenile justice system to second-class status.

The *Gault* Court's reasoning presaged, in key ways, application of the Fourteenth Amendment due process balancing test that the Court would announce nine years later in *Mathews v. Eldridge*.[207] In *Mathews*,

203. *See id.* at 59 (noting that "the trial judge, in response to a question, said that he had appointed all the members of the bar—for the purpose of arraigning the defendants and then of course anticipated that the members of the bar would continue to help the defendants if no counsel appeared").

204. *See id.* at 57–58 (stating that "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial . . . the defendants did not have the aid of counsel in any real sense" and finding the defendants "were not accorded the right of counsel in any substantial sense").

205. *Id.* at 73.

206. *See id.* at 60 ("The question . . . is whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the federal Constitution.").

207. 424 U.S. 319 (1976).

an administrative law case that involved a due process challenge to the adequacy of the procedures provided to claimants whose Social Security disability benefits have been terminated, the Court announced a three-part test for considering procedural due process claims. Under the *Mathews* balancing test, a court must consider the following: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[208]

The *Mathews* test is squarely grounded in Fourteenth Amendment procedural due process. And although it arose in an administrative law context, the *Mathews* test has since been employed as "a general approach for testing challenged state procedures under a due process claim."[209] Accordingly, this test has been applied in several contexts, including: *Santosky v. Kramer*,[210] which adopted a clear and convincing evidence standard of proof in contested hearings for the termination of parental rights; *Addington v. Texas*,[211] which set the standard of proof required for indefinite involuntary civil commitment at clear and convincing evidence; and *Schall v. Martin*,[212] which upheld the constitutionality of juvenile preventive detention.

But not in the criminal context.[213] There is no balancing of the equities for Bill of Rights protections. Explaining that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process,"[214] the Court has refrained from applying the *Mathews* test in criminal cases. As recently as 1992 in *Medina v. California*,[215] the Court reaffirmed a long line of cases that held that the

208. *Id.* at 335.

209. Parham v. J.R., 442 U.S. 584, 599–600 (1979).

210. 455 U.S. 745 (1982).

211. 441 U.S. 418 (1979).

212. 467 U.S. 253 (1984).

213. The Court has applied the *Mathews* test in two criminal cases, *United States v. Raddatz*, 447 U.S. 667 (1980), and *Ake v. Oklahoma*, 470 U.S. 68 (1985), but in *Medina* states that it is not at all clear that the *Mathews* test was necessary to the holdings in those cases. Medina v. California, 505 U.S. 437, 443 (1992).

214. *Medina*, 505 U.S. at 443.

215. 505 U.S. 437 (1992).

application of the Due Process Clause to most criminal procedure issues is measured by the specific, usually heightened protections of the relevant Bill of Rights guaranty.[216] Or, as the *Medina* Court observed:

> The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.[217]

In other words, *Medina* demarcates a categorical distinction between the Bill-of-Rights-bound criminal procedure sector and the due-process-bound remainder of the legal universe. The application of the chameleon-like balancing test is a hallmark difference between a Bill of Rights fundamental rights analysis and a Fourteenth Amendment fundamental fairness analysis.[218] The categorical approach ordinarily results in criminal defendants enjoying greater protections than constitutional claimants in the rest of the universe. In criminal cases, clad in the protections enumerated in the Bill of Rights, the Court does not try to divine what process is due, because the Bill of Rights prescribes it plainly enough.

The language of these two lines of reasoning, Fourteenth Amendment fundamental fairness on the one hand and fundamental rights as they are enumerated in the Bill of Rights on the other, is very similar. In one, the Court used a "fundamental rights" test; in the other, the Court observed the strictures of "fundamental fairness."[219] In one, the Court granted that it would confer a right after finding that it was "essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants;"[220] in the other, the Court framed the inquiry as an evaluation of whether the right was one of "the essentials of due process and fair treatment."[221]

---

216. *Id.* at 440, 442 (holding that a state statute requiring the defendant to prove her own incompetency by a preponderance of the evidence did not contravene due process).

217. *Id.* at 443.

218. *See* Mark Sblendorio, Note, *Due Process-Fundamental Fairness*, 27 SETON HALL L. REV. 735, 737–38 n.9 (1997) ("The second and distinct prong of fundamental fairness advocates that the Bill of Rights is distinct from the Due Process Clause of the Fourteenth Amendment.").

219. *See supra* text accompanying notes 15–16.

220. Duncan v. Louisiana, 391 U.S. 145, 157–58 (1967).

221. Kent v. United States, 383 U.S. 541, 562 (1967).

But the doctrinal foundations of these two lines of cases could not be more different. Realizing "a vision of constitutional criminal procedure developed by the Framers of the Bill of Rights,"[222] the "fundamental rights" cases were firmly anchored in rights that were already "well-defined in federal prosecutions."[223] The practical differences perhaps might seem inconsequential; for example, whether it is based in the Sixth Amendment or the Fourteenth, the right to counsel requires the state to provide the accused a lawyer at the government's expense. But the doctrinal difference between the Court's treatment of adult criminal defendants and juvenile delinquency respondents is profound. Constitutional protections for adult criminal defendants are affixed to the Bill of Rights, while protections for juvenile respondents seesaw on the Fourteenth Amendment's due process balancing test.

For the *Gault* case, the guiding principle of the Court's due process balancing test consisted of weighing the protection afforded by a particular due process protection against its potential for jeopardizing the informality, flexibility, and efficiency of juvenile court hearings.[224] In other words, the due process calculus calibrated a balance between the system's lack of due process protections and the rehabilitative advantages of the juvenile system.[225] The more punitive the system, the Court reasoned, the more process it requires. Subsequent juvenile cases would reaffirm this theme.[226] But close examination of the *Gault* Court's application of its nascent Fourteenth Amendment fundamental fairness balancing test reveals a glaring shortcoming endemic to

222. *See* Guggenheim & Hertz, *supra* note 191, at 557.

223. *Id.*

224. *See In re* Gault, 387 U.S. 1, 13–14 (1966) ("The problem is to ascertain the precise impact of the due process requirement upon such proceedings.").

225. *See id.* at 28–29 (recognizing that "[t]he traditional ideas of Juvenile Court procedure . . . contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it—was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected" and arguing that "[i]f he had been over 18 . . . the Constitution of the United States would guarantee him rights and protections with respect to arrest, search and seizure, and pretrial interrogation.").

226. *Cf.* Stephan E. Oestreicher Jr., *Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings*, 11 VAND. L. REV. 1751, 1767 (2001) (recognizing "the Court's repeated emphasis on a juvenile's loss of liberty highlights the crucial role that due process plays in the juvenile context" in cases following *Gault*).

balancing tests: all the factors of the Court's due process test are subjective, unquantifiable, and difficult to prioritize.[227]

3. In re Gault

The facts of *Gault* were compelling. On June 8, 1964, fifteen-year-old Gerald Gault was accused of making lewd phone calls to his neighbor, arrested, and taken to a juvenile detention facility.[228] Only after Mrs. Gault asked Gerald's brother to look for Gerald did his family learn that Gerald had been taken to the detention facility.[229] Although a petition was filed, neither Gerald nor his parents received a copy of the petition stating the allegations against him.[230] The hearing was held the next day in the judge's chambers.[231] The neighbor who reported the allegedly lewd telephone calls was not present.[232] No defense attorney was present.[233] No record was made.[234] No one was sworn in at the hearing.[235] The judge questioned Gerald directly, and then Gerald was taken back to the detention facility.[236] After an additional hearing,[237] at which Gerald was again questioned by the juvenile court judge, Gerald was adjudicated delinquent and committed to the State Industrial School "for the period of his minority"—in other words, for the next six years, until he reached twenty-one years old.[238]

Handed down in the wake of *Gideon*, *Gault* stands as the Court's clearest pronouncement on the process due to juveniles accused of crime. *Gault* extended the right to counsel to juveniles in delinquency proceedings under the Due Process Clause of the United States

227. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 944–45 (1987) (acknowledging the "serious problems in the mechanics" of balancing tests).

228. *Gault*, 387 U.S. at 4, 5.

229. *Id.* at 5.

230. *Id.*

231. *Id.*

232. *Id.*

233. *See id.* (listing the persons present as Gault, his mother, his brother, probation officers, and the judge).

234. *Id.* at 5.

235. *Id.*

236. *Id.* at 5, 6.

237. *Id.* at 6–7.

238. *Id.* at 7–8.

Constitution.[239] In addition to the right to counsel, *Gault* also extended to youth the right to notice of the charges against them, the right to confront adverse witnesses,[240] and the Fifth Amendment's privilege against compelled self-incrimination.[241] *Gault* and its progeny affirmed that the Fourteenth Amendment required juvenile delinquency proceedings to comport with "the essentials of due process and fair treatment."[242]

The doctrinal foundation of the *Gault* decision circumscribed juvenile justice reform in the Court's due process revolution and perpetuated racial disparity in the juvenile justice system in a number of ways. First, *Gault*, more than any previous case, grounded its reasoning in a discussion of the history of juvenile court, adopting wholesale the Child Savers' origin story.[243] The *Gault* opinion contains a summary of the history of juvenile court, starting with the 1899 Illinois Juvenile Court Act.[244] The opinion recounts that 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."[245] The Court ratified the animating spirit of juvenile court, stating that juvenile court was built upon "the highest motives and most enlightened impulses."[246] In fact, this history omitted any recognition of the disparate treatment of youths of color during a period when the Court's cynosure was racial equality.

Second, although the *Gault* Court, by its own description, "candidly appraised" the juvenile court and lambasted the juvenile court's effectiveness,[247] the fact that the Court stopped short of fully equating juvenile and criminal proceedings shows that the appraisal was not quite candid enough. The Court recognized that "[t]he absence of substantive standards has not necessarily meant that children receive

239. *Id.* at 41.

240. *Id.* at 33, 56–57.

241. *Id.* at 55.

242. Kent v. United States, 383 U.S. 541, 562 (1967).

243. *See Gault*, 387 U.S. at 14–15 (discussing the origins of the juvenile court system).

244. *Id.*

245. *Id.* at 15.

246. *Id.* at 17.

247. *See id.* at 21, 26 (suggesting that recent studies had "with surprising unanimity, entered sharp dissent as to the validity" and effectiveness of the juvenile court system).

careful, compassionate, individualized treatment,"[248] but it stopped there. The Court listed recidivism statistics that showed that the separate juvenile system had not significantly reduced juvenile crime.[249] It cited sociological studies that found that "the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process"—might make more of an impact on a juvenile respondent than the "fatherly judge" and "benevolent and wise institutions of the State" conspiring "to save [the youth] from a downward career."[250] It is likely that the numbers the Court cited, if not the studies, implicated the racial demographics of juvenile court; but if they did, they did not do so explicitly.

Third, *Gault* is notable because of its Janus-faced treatment of the Child Savers origin story. On the one hand, the Court assailed the then-current juvenile system as a "kangaroo court,"[251] and famously reiterated deep concern that youths in juvenile court were receiving "the worst of both worlds: . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[252] On the other hand, despite the Court's full-throated rebuke, the Child Savers' rehabilitation story remained critical to the Court's determination that Fourteenth Amendment fundamental fairness, and not fundamental rights enumerated in the Bill of Rights, provides enough protection for youths accused in delinquency court.[253] The Court rejected the idea of equivalency with criminal court, clung to the hope that the Child Savers' original vision could be realized, and declared that the introduction of due process rights was a route to that goal.[254]

Finally, in a preview of *Mathews*, the *Gault* Court balanced several factors as it created a new juvenile court.[255] The *Gault* Court examined the risk of an erroneous deprivation of the child's liberty interest through the juvenile court's lack of procedures used by comparing

248. *Id.* at 18.

249. *Id.* at 22.

250. *Id.* at 26 (citation omitted).

251. *Id.* at 28.

252. *Id.* at 18 n.23 (citation omitted) (internal quotation marks omitted); Kent v. United States, 383 U.S. 541, 556 (1967).

253. *See Gault*, 387 U.S. at 29–30 (explaining how Gault would have been afforded more protections under constitutional due process than he was under the existing juvenile court system).

254. *Id.* at 30–31.

255. *Id.* at 29–30.

what happened in Gerald's case to what would have happened if Gerald had been an adult, to conclude that the risk of an erroneous deprivation of Gerald's liberty interest was too high without the right to counsel.[256] The Court addressed whether addition of defense counsel and other procedural protections would derail the intimate, informal, rehabilitative vision of juvenile court, to conclude that it would not.[257] The Court considered the administrative cost of extending each proposed protection to juvenile court, including consideration of what, if any, ancillary protections would have to be extended to support the due process protection at issue.[258] The Court considered whether a particular proposed protection might remedy more than one short-

256. *Id.* The Court observed that if Gerald had been eighteen, and beyond the juvenile court's jurisdiction, he would have faced a maximum punishment of a fine of $5 to $50, or imprisonment in jail for up to two months; he would have been entitled to the full panoply of constitutional rights, including the right to counsel, and protection against search and seizure, and pretrial interrogation; he would have received specific notice of the charges, and time and counsel to consider his goals for the case; and he would have had the right to confront the complainant on the record. *Id.*

257. *Id.* at 38 n.64 (citing Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 324–327 (1967)). The Court addressed this specific issue explicitly in a footnote, in which it cited a *Columbia Law Review* note for the proposition that "[r]ecognition of the right to counsel involves no necessary interference with the special purposes of juvenile court procedures; indeed, it seems that counsel can play an important role in the process of rehabilitation." *Id.* The Court buttressed its position that the extension of the right to counsel would not impede juvenile court's rehabilitative goals by remarking that, at the time the Court considered Gault's case, the majority of state "court decisions, experts, . . . legislatures," and court rules—a calculation which included at least one-third of the states—"ha[d] demonstrated increasing recognition" of the view that youths facing delinquency proceedings had the right to representation by retained counsel, notice of the right, assignment of counsel, or a combination of these. *Gault*, 387 U.S. at 37–38 (footnotes omitted). With respect to the privilege against self-incrimination, the Court also took pains to note that the privilege against self-incrimination is "broader and deeper" than simple exclusion of confessions that may be unreliable because they are the product of coercion; a crucial purpose of the privilege "is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction." *Id.* at 47.

258. *See id.* at 30 (explaining that juvenile proceedings need not conform to all the requirements of an administrative or criminal trial, but mandating that "the essentials of due process and fair treatment" be provided).

coming of juvenile court.[259] And, the Court discussed whether there was an adequate substitute for the right to counsel, to conclude that there was none.[260] All these factors tipped the *Gault* Court's scale in favor of extending the right to counsel pursuant to the Fourteenth Amendment.[261]

Had the Court jettisoned the Child Savers' origin story, it might have determined that juvenile delinquency proceedings were completely analogous to criminal trials, and applied to juvenile delinquency proceedings the same constitutional protections that check the government's power in criminal proceedings. Instead, the Court set out to map the "gossamer" contours of due process[262] using the amorphous principle of Fourteenth Amendment fundamental fairness as its compass.[263] The Court's goal was to import due process standards, so that the states would not have "to abandon or displace any of the substantive benefits of the juvenile process,"[264] like confidentiality and rehabilitative services.[265] In this way, the Fourteenth Amendment fundamental fairness balancing test broke new ground, as a hybrid, quasi-criminal juvenile justice system sprang, fully formed,

259. *See id.* at 29–30 (implying that Gault's trial might have gone differently had due process been observed, since many aspects—like the right to notice and the right to confront witnesses—would have come into play).

260. *Id.* at 36 (stating "[t]he probation officer cannot act as counsel for the child. His role . . . is as arresting officer and witness against the child. Nor can the judge represent the child.").

261. *Id.* at 41.

262. Haley v. Ohio, 332 U.S. 596, 602 (1948) (Frankfurter, J., joining in reversal of judgment).

263. *Gault*, 387 U.S. at 19–20.

264. *Id.* at 21.

265. *Id.* at 25 ("[T]here is no reason why, consistently with due process, a State cannot continue, if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles."); *see also id.* at 27–28 (noting that given the deprivation of liberty at stake in a juvenile delinquency trial, "our Constitution . . . require[s] the procedural regularity and the exercise of care implied in the phrase 'due process,'" but such injection of "due process requirements [to] introduce a degree of order and regularity to Juvenile Court proceedings [and] some elements of the adversary system [does not] require that the conception of the kindly juvenile judge be replaced by its opposite").

from the Court's collective faith in the unrealized promise of the Child Savers' origin story.[266]

III. *MCKEIVER V. PENNSYLVANIA*: THE RESULT OF *GAULT*'S MISSTEP

In *Gault*, the Court reached the same result as it had in *Gideon* by a divergent doctrinal path. The Court's jury-trial-right jurisprudence provides an example of an instance in which fundamental fairness and fundamental rights led to different outcomes. In 1968, in *Duncan v. Louisiana*,[267] the Court held that state criminal defendants charged with felonies had a right to a jury trial under the Sixth Amendment, applied to the states through the Fourteenth Amendment.[268] In stark contrast, consideration of the jury trial question stopped the momentum of the juvenile procedural due process revolution in its tracks. In 1971, hewing faithfully to the Child Savers' rehabilitative vision, the Court held, in *McKeiver v. Pennsylvania*,[269] that juveniles facing delinquency proceedings do not have a federal constitutional right to a jury trial under either the Sixth or Fourteenth Amendments.[270] In this way, the two jury cases that the Court considered during this time illuminate the Court's jurisprudential misstep.

A. Duncan v. Louisiana

On May 20, 1968, a year after the *Gault* decision and just five months before the protests of appellants in *In re Burrus*, *McKeiver*'s companion case, the Court swept the Sixth Amendment right to a jury trial into its revolution. In *Duncan*, the Court held that the Sixth Amendment right to trial by jury in serious criminal prosecutions was incorporated through the Due Process Clause of the Fourteenth Amendment and applied to the states.[271]

Nineteen-year-old Gary Duncan was charged with simple battery, a misdemeanor punishable by a maximum penalty of two years' im-

266. *See* Guggenheim & Hertz, *supra* note 191, at 559 ("[T]he *Gault* Court cast itself loose of the Constitutional Framers' vision of a code of criminal procedure and assumed the task of identifying the core components of a fundamentally just system of criminal prosecutions of youth.").

267. 391 U.S. 145 (1968).

268. *Id.* at 149.

269. 403 U.S. 528 (1971).

270. *Id.* at 553.

271. *Id.* at 157–58.

prisonment and a fine of $300.[272] The incident "bore hallmark indicia of Jim Crow injustice."[273] Driving along Highway 23 in Plaquemines Parish, Duncan, who was black, saw two of his cousins involved in a "conversation by the side of the road with four white boys"[274] and feared the worst because his cousins had told him about racial incidents at the all-white high school to which they had recently transferred.[275] While the trial testimony that Duncan encouraged his cousins to "break off the encounter and enter his car" was uncontested, the facts of the assault were in dispute.[276] The white witnesses testified that Duncan slapped the complainant, Herman Landry, on the elbow just before Duncan got back in his car, while the black witnesses testified that Duncan just touched Landry's elbow.[277] Duncan's timely request for a jury trial was denied because the Louisiana constitution allowed for jury trials only in cases where capital punishment or imprisonment at hard labor could be imposed.[278] Duncan was convicted and sentenced to sixty days in jail and a fine of $150.[279]

The Court applied the fundamental rights test and concluded that a jury trial is indeed a fundamental right, "essential for preventing miscarriages of justice and for assuring that fair trials are provided

---

272. *Id.* at 146–47.

273. *See* Bowers, *supra* note 183, at 1692. The opinion in *Sobol v. Perez*, 289 F. Supp. 392 (E.D. La. 1968) provides additional context. The *Sobol* opinion details the retaliatory prosecution of Gary Duncan's trial lawyer, Dick Sobol, by Leander Perez, Jr., the Plaquemines Parish District Attorney. *Sobol*, 289 F. Supp. at 393. Sobol was accused of practicing law without a license. *Id.* The court stated:

> The circumstances surrounding the arrest and charge against Sobol, and the course of the Duncan case, convince us that Sobol was prosecuted only because he was a civil rights lawyer forcefully representing a Negro in a case growing out of the desegregation of the Plaquemines Parish school system. The attitude in this parish toward realization by Negroes of their civil rights is well known to this court. . . . District Attorney Leander Perez, Jr., stated publicly in 1965 that, if any known agitator were to appear in Plaquemines Parish, his mere presence would amount to a disturbance of the peace, since he was an outsider.

Id. at 401.

274. *Duncan*, 391 U.S. at 147.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 146.

279. *Id.*

for all defendants,"[280] as "the common-sense judgment of a jury" is substituted for "the more tutored but perhaps less sympathetic reaction of the single judge."[281] Even though it was clear that Duncan was guilty of at least simple battery, since both sides agreed that Landry was the victim of an unwanted touching,[282] the Court opined that a jury may have offered better protection against the "unfounded criminal charges."[283] Relying on then-current social science research on jurors as fact finders,[284] the Court tempered its acknowledgement of the government's argument that trained professionals might do a better job of applying law to facts and make more accurate factual findings[285] with the observation that "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."[286] As in *Gault*, the Court discussed the applicable history, in this case, the history of the jury trial right.[287] But there was no measured consideration of whether adding juries might remedy any perceived shortcomings of state criminal proceedings, of whether bench trials are an adequate substitute for jury trials,[288] or

280. *Id.* at 157–58.

281. *Id.* at 156.

282. *Id.* at 146 n.1, 147 (defining simple battery as "battery, without the consent of the victim, committed without a dangerous weapon" and stating that "appellant slapped Herman Landry, one of the white boys, on the elbow" (quoting LA. REV. STAT. ANN. § 14:35 (1950))); *see also* State v. J.L., 945 So.2d 884, 889 (La. Ct. App. 2006) (finding that a nonconsensual touching established the "essential elements of simple battery . . . beyond a reasonable doubt").

283. *Duncan*, 391 U.S. at 156.

284. *Id.* at 157.

285. Bowers, *supra* note 183, at 1692; *see Duncan*, 391 U.S. at 157 (acknowledging criticisms "as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings").

286. *Duncan*, 391 U.S. at 157.

287. *Id.* at 151–54.

288. The Court does make cursory note that:

> [T]he fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court. Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely.

Id. at 158.

even of the administrative costs of jury trials. Because the Court's extension of the jury trial right was based in the Sixth Amendment, there did not have to be.[289]

B. DeBacker v. Brainard*: Setting the Stage for* McKeiver

DeBacker v. Brainard[290] provided the most insight the Court would give on the juvenile jury trial right until *McKeiver*. *DeBacker* presented the two issues that the Court would later take up in *McKeiver* and *In re Winship*[291]: whether juveniles facing delinquency proceedings are entitled to a jury trial under the Sixth and Fourteenth Amendments,[292] and to adjudication under the proof beyond a reasonable doubt standard.[293]

Seventeen-year-old Clarence DeBacker was charged with forgery of a bank check.[294] At trial, he moved, unsuccessfully, for a jury trial.[295] He was convicted at trial by the county judge.[296]

DeBacker's juvenile court hearing was held March 28, 1968—seven weeks prior to the Court's ruling in *Duncan*.[297] That seven weeks made the difference between considering and sidestepping the merits: the Court determined that, since DeBacker's trial occurred seven weeks before the *Duncan* decision was handed down and because of anti-retroactivity doctrine,[298] DeBacker's case did not properly present

289. *See id.* at 149 (finding the right to a jury trial under the Sixth Amendment to be fundamental).

290. 396 U.S. 28 (1969).

291. 397 U.S. 358.

292. *Id.* at 30.

293. *Id.* at 31.

294. DeBacker v. Brainard, 161 N.W.2d 508, 509 (Neb. 1968), *appeal dismissed*, 396 U.S. 28 (1969).

295. *Id.*

296. *Id.*

297. *DeBacker*, 396 U.S. at 30.

298. For a discussion of retroactivity doctrine, see Christopher N. Lasch, *The Future of Teague Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 3 (2009) ("[R]etroactivity avoids the unfairness inevitably attendant to non-retroactive application of judicial decisions, ensuring that similarly situated litigants are treated equally.").

the issue of whether juveniles facing delinquency proceedings are entitled to jury trials.[299]

Besides the fact that it was a precursor for *McKeiver*, *DeBacker* is notable for its dissents. Justices Black and Douglas dissented in a rights-based opinion.[300] Justice Black made his intentions plain: "I can see no basis whatsoever in the language of the Constitution for allowing persons like appellant the benefit of [the due process rights extended in *Gault*] and yet denying them a jury trial, a right which is surely one of the fundamental aspects of criminal justice in the English-speaking world."[301] He continued, foreshadowing what would emerge as the central tension identified two years later in *McKeiver*: "[t]he balancing of the rehabilitative purpose of the juvenile proceeding with the due process requirement of a jury trial is a matter for a future Constitutional Convention,"[302] for "[w]here there is a criminal trial charging a criminal offense, whether in conventional terms or in the language of delinquency, all of the procedural requirements of the Constitution and Bill of Rights come into play."[303]

Save the rights to "a speedy and public trial" and to a jury trial, by the time the Court considered *McKeiver*, juveniles enjoyed all the protections of the Sixth Amendment. Moreover, by the time the Court considered *McKeiver*, the Court had decided one of the two *DeBacker* issues—the accused's right to have each element proven beyond a reasonable doubt—in *In re Winship*, deciding in favor of granting juveniles more due process protection.[304]

---

299. *DeBacker*, 396 U.S. at 30. The Court also passed on the question of whether the preponderance of the evidence standard was properly applied to juvenile proceedings, ruling that this case was not an appropriate vehicle for consideration of the standard of proof the government must meet for juvenile delinquency adjudications because the issue had been effectively waived by juvenile defense counsel. *Id.* at 31. Juvenile defense counsel had neither objected to the lower court's application of the preponderance of the evidence standard, nor moved the lower court for application of the beyond a reasonable doubt standard. *Id.* At oral argument before the Supreme Court, counsel even went so far as to concede the point, admitting that "even under a reasonable doubt standard" the government's evidence would have been "sufficient to sustain a conviction." *Id.*

300. *Id.* at 33 (Black, J., dissenting); *Id.* at 35 (Douglas, J., dissenting).

301. *Id.* at 34 (Black, J., dissenting).

302. *Id.* at 38.

303. *Id.*

304. *See id.* at 368 (holding that the beyond a reasonable doubt standard of proof was required in juvenile cases).

C. McKeiver v. Pennsylvania

The Court's three major juvenile rights decisions prior to *McKeiver*—*Kent v. United States*, *In re Gault*, and *In re Winship*—had established fundamental fairness as the touchstone for Fourteenth Amendment analysis of the minimum due process protections required in juvenile proceedings.[305] This line of cases affirmed that due process required juvenile delinquency proceedings to comport with "the essentials of due process and fair treatment."[306] But, coming as it did during the Civil Rights Movement and featuring a challenge to the absence of the right to a public trial by jury for black children protesting school segregation,[307] *McKeiver* also fell squarely in the heart of the Supreme Court's due process revolution. Accordingly, *McKeiver* sat uneasily at the intersection of fundamental fairness and fundamental rights.

McKeiver was a consolidation of two sets of cases, one set from Pennsylvania[308] and the other from North Carolina.[309] The Pennsylvania cases presented typical juvenile delinquency matters.[310] The North

305. *See Kent*, 383 U.S. at 554 (holding that due process requirements apply to transfer proceedings); *Gault*, 387 U.S. at 29–30 (holding that juveniles have right to notice of charges, right to counsel, privilege against self-incrimination, and right to confrontation and cross-examination in adjudicatory hearings in delinquency cases); *Winship*, 397 U.S. at 368 (holding that fundamental fairness requires proof beyond a reasonable doubt in delinquency adjudications).

306. *Kent*, 383 U.S. at 562.

307. *McKeiver*, 403 U.S. at 536–37.

308. *Id.* at 535.

309. *Id.* at 538.

310. *Id.* at 534–35. The Pennsylvania cases arose from the appeals of two boys, sixteen-year-old Joseph McKeiver and fifteen-year-old Edward Terry. *Id.* at 534–35. The allegations against McKeiver were that, as part of a group of twenty or thirty other youths, he chased three young teenagers and took twenty-five cents from them. *Id.* at 536. McKeiver was charged with robbery, larceny, and receiving stolen goods. *Id.* at 534. The allegations against Terry were that he hit a police officer with his fists and with a stick when the officer broke up a fight that he and other youths were watching. *Id.* at 536. Terry was charged with assault and battery on a police officer and conspiracy. *Id.* at 535. At their respective trials, the boys' attorneys moved for, but were denied, jury trials. *Id.* Both boys were convicted after bench trials, even though, at the close of McKeiver's bench trial, the court described the evidence against him as "weak," and noted that McKeiver had a steady job and that this case was his first involvement with the juvenile justice system. *Id.* at 535–36.

It is worth discussing how extremely weak the evidence in McKeiver's case was. McKeiver was charged with robbery, larceny and receiving stolen goods in a juvenile de-

Carolina facts presented a very different scenario. In *In re Burrus*,[311] one of the North Carolina cases, Barbara Burrus and approximately forty-five other black schoolchildren, ranging in age between eleven and fifteen years old, were charged in juvenile court with willfully impeding traffic.[312] The allegations were that the children interfered with traffic as they participated in a demonstration protesting school assignments and a school consolidation plan in Hyde County.[313] The demonstrators believed that the Hyde County "school system unlawfully discriminated against black schoolchildren."[314] The lower court found that, "on various occasions the juveniles . . . were observed walking along Highway 64 singing, shouting, clapping, and playing basketball."[315] At trial, a lone highway patrolman testified that the children refused to leave the paved portion of the highway when asked.[316] The cases were consolidated into groups, and James E. Ferguson, II, a prominent civil rights attorney in North Carolina and a cooperating attorney with the NAACP Legal Defense and Education

linquency petition. *Id.* at 534–35. Two alleged victims testified at trial. *Id.* at 536. One testified he was robbed by a gang, while the other testified that he was robbed by a lone thief. *In re* Edward Terry, 265 A.2d 350, 351 n.1 (Pa. 1970). One testified that he rode a bicycle away from the robbery, and was riding one when arrested, while the other testified that he identified the robber by his distinctive walk. *Id.* Both testified that the robber was not wearing glasses, but McKeiver had worn them since childhood. *Id.*

311. 167 S.E.2d 454, (N.C. Ct. App. 1969).

312. *McKeiver*, 403 U.S. at 536.

313. *Id.*

314. *Id.* at 556.

315. *Id.* at 537. The racism of the lower court is all too apparent. As the court related the underlying facts:

> All of the cases stem from what may be classified as a concerted demonstration by Negroes of Hyde County to assert their definance [sic] of law and order and to disrupt the normal economic and social life of Hyde County by a wilful, intentional and flagrant disregard and violation of laws duly enacted by the governing bodies of the State for the public welfare and orderly conduct of human affairs for all citizens of the State.

Burrus, 167 S.E.2d at 457. The court's overt discussion of "defiance," "disrupt[ion]," and "wilful, intentional and flagrant disregard" by the "Negroes of Hyde County" reveals how completely the state appellate court's view of the evidence and the case were shaped by racism.

316. *McKeiver*, 403 U.S. at 537.

Fund,[317] represented all of the children.[318] In each case, counsel objected to the exclusion of the general public and requested a jury trial.[319] In each case, the general public was excluded,[320] and the request for a jury trial was denied.[321] Each of the children was found delinquent, and placed on probation for either one or two years.[322] Each child was ordered to comply with the conditions of probation, which included not violating any North Carolina laws.[323]

There is a direct connection between the *McKeiver* litigation and the African-American community's early-twentieth-century concerns about the racially disparate treatment of black juveniles as compared to their white counterparts. *In re Burrus* was a NAACP Legal Defense Fund ("LDF") case, brought under the auspices of LDF's National Office for the Rights of the Indigent ("NORI") Project.[324] A comparison between the petitioner's briefs in *McKeiver* and *Burrus*[325] reveal that the LDF saw *Burrus* and the possibility of importing jury trials into juvenile delinquency court as an avenue to prevent African-American children from receiving disparate and oppressive treatment by the juvenile courts.[326] While the *McKeiver* brief did not develop the racial dimension of the issue, the LDF brief in *Burrus* paid careful attention to it. For example, the *Burrus* brief specifically noted that African-

317. *See generally, James E. Ferguson, II*, FERGUSON CHAMBERS & SUMPTER, P.A., http://fergusonstein.com/attorneys.php?attorneyId=3 (last visited Mar. 12, 2013) (providing more information about James Ferguson II).

318. *McKeiver*, 403 U.S. at 530.

319. *Id.* at 537.

320. While the "public trial" right of the Sixth Amendment is beyond the scope of this Article, examination of that right in juvenile trials might raise similar questions.

321. *McKeiver*, 403 U.S. at 537.

322. *Id.* at 537–38.

323. *Id.* at 538.

324. For a brief description of NORI and its background, see JACK GREENBERG, CRUSADERS IN THE COURTS 430–60 (1994); MICHAEL MELTSNER, THE MAKING OF A CIVIL RIGHTS LAWYER 156–58 (2006).

325. *See* Brief for Petitioners, *In re* Burrus, 403 U.S. 528 (1971) (No. 128), 1970 WL 121988 [hereinafter *Burrus* Brief]; Brief for Petitioners, McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (No. 322), 1970 WL 136804 [hereinafter *McKeiver* Brief].

326. *See Burrus* Brief, *supra* note 325, at 10 ("A jury trial can play an important role to protect youth against the commonly observed abuses of the enormous discretion granted those administering juvenile courts—a discretion which often has been employed to the detriment of racially . . . disadvantaged groups.").

American children were particularly vulnerable to unjust and unequal treatment in juvenile court,[327] and it named the protection of jury trial as a safeguard against this.[328] The Court's near-total refusal to acknowledge the significance of the disparity in the juvenile court's treatment of black youths is all the more striking in light of the LDF's explicit and repeated invocation of the issue.

The *McKeiver* opinion is a plurality, authored by Justice Blackmun, and joined by Chief Justice Burger and Justices White and Stewart.[329] Justice Harlan concurred in the judgment and filed a separate opinion.[330] Justice White also concurred and filed a separate opinion.[331] Justice Douglas, joined by Justices Black and Marshall, dissented.[332] Focusing on the issue of the provision of a public trial or

327. Burrus Brief, *supra* note 325, at 23–24.

328. *Id.* at 10, 24, 32.

329. *McKeiver*, 403 U.S. at 530.

330. *Id.* at 557. Justice Harlan's concurrence provided a fifth vote for the plurality's ruling, "on a ground that was both narrower in its implications for juvenile law and much broader in its implications for criminal procedure." Guggenheim & Hertz, *supra* note 191, at 561 n.35. Justice Harlan, steadfast in his conviction that *Duncan v. Louisiana* wrongly extended the right to trial by jury to state proceedings, asserted that due process did not require jury trials in either criminal or delinquency trials. *McKeiver*, 403 U.S. at 557 (Harlan, J., concurring). It is notable, however, that Justice Harlan explained that if he were to accept *Duncan* as good law, then he "d[id] not see why, given *Duncan*, juveniles as well as adults would not be constitutionally entitled to jury trials, so long as juvenile delinquency systems are not restructured to fit their original purpose." *Id.*

331. *McKeiver*, 403 U.S. at 551–53 (White, J., concurring). Justice White agreed that juries were not constitutionally required in delinquency proceedings. *Id.* at 551. Justice White based his ruling on the fact that the rehabilitative nature of the juvenile court stems from the important distinction between "blameworthy" adult criminals, and juvenile offenders whose acts were "not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control." *Id.* at 552. To Justice White, the "deterministic assumptions" of the juvenile justice system meant that the system did not "stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others." *Id.* at 551–52. He also based his ruling on his understanding that "the consequences of adjudication [in juvenile court were] less severe than those flowing from verdicts of criminal guilt," and that the primary objective of the juvenile justice system was treatment, not punishment, of children. *Id.* at 552–53.

332. *Id.* at 557–72 (Douglas, J., dissenting). Justice Douglas's dissent argued that because the distinction between "delinquent" juvenile proceedings and "criminal" adult proceedings was meaningless, *Duncan* established a right to a jury trial for "any person," not

trial by jury, Justice Brennan concurred in the judgment concerning the Pennsylvania cases, but dissented from the plurality's judgment for the North Carolina cases.[333]

1. Plurality by Justice Blackmun

Justice Blackmun expressly declined to reach for the most facile answer to the question—that the "civil" label applied to juvenile court proceedings meant that *Duncan*, which extended the jury trial right to "criminal" cases, was not controlling—with the qualification that "the Court carefully has avoided this wooden approach."[334] Instead, he set out to apply the amorphous due process standard that the Court used in *Kent* and *Gault*, setting the Court's task as "ascertain[ing] the precise impact of the due process requirement,"[335] with Fourteenth Amendment fundamental fairness balancing and what would later become its traditional considerations, 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, whether there is an adequate substitute for the requirement, and costs and other administrative concerns,[336] as a guide.

The plurality's analysis incorporates many considerations that could not be taken into account in a fundamental rights analysis. For example, just as the *Gault* majority considered whether there was an adequate substitute for the right to counsel,[337] the *McKeiver* plurality

"any adult person . . . ." *Id.* at 560. The dissenters answered the argument that juvenile dispositions are not as serious as adult sentences with the observation that, in the North Carolina cases, the youngest child faced imprisonment of up to ten years, and all of the children faced imprisonment of up to five years. *Id.* at 557–59. Because it is clear that an adult facing imprisonment for that long would have been entitled to a jury trial, the dissent argued, it is clear that that right should have been extended to the juveniles in the instant case. *Id.* at 560.

333. *Id.* at 553–57.

334. *Id.* at 540–41 (majority opinion).

335. *Id.* at 541.

336. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (setting out the factors to be considered in a due process analysis).

337. *See In re* Gault, 387 U.S. 1, 36 (1967) (finding the probation officer and the judge inadequate substitutes for counsel).

considered whether there was an adequate substitute for juries.[338] Reasoning that juries are not required in several types of cases, including equity, worker's compensation, probate, or deportation cases, Justice Blackmun summarily concluded that the jury is not "a necessary component of accurate factfinding."[339] The plurality expressed its unqualified endorsement of the adequacy of judicial factfinding without support. The plurality also dismissed out of hand the appellants' concerns about the unfairness of: "the inapplicability of exclusionary and other rules of evidence;" "the juvenile court judge's possible awareness of the juvenile's prior record and . . . the contents of the social file;" and "repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers."[340] The plurality even went so far as to intimate that raising the specter of unfairness flouted "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates."[341]

Justice Blackmun further acknowledged that the reality of juvenile court fell far short of its ideal, enumerating a litany of the juvenile justice system's profound shortcomings, including a dearth of professional help and resources; a surfeit of apathy and an "unwillingness to . . . be concerned" from the community; and a paucity of dispositional alternatives.[342] Far from the white-coated experts the Court described in *In re Winship*,[343] the grim reality was that, at the time that *McKeiver* was decided, half of juvenile court judges—the very factfinders whose skills were at issue in *McKeiver*—had not received undergraduate degrees, and a fifth had received no college education

338. *See McKeiver*, 403 U.S. at 541–42 (outlining Pennsylvania and North Carolina's arguments that jury trials were not necessary in juvenile proceedings, given the other safeguards in place).

339. *Id.* at 543. Paul Bator has written what is arguably the seminal article on what "truth" or "accuracy" mean in criminal proceedings. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 441–42 (1963). In a nutshell, the argument is that there is no "truth" in criminal proceedings, only process. *Id.* The old adage that 100 guilty people should go free before convicting one innocent person is of course a great example.

340. *McKeiver*, 403 U.S. at 550.

341. *Id.*

342. *Id.* at 544.

343. *See In re* Winship, 397 U.S. 358, 375 (1969) (Harlan, J., concurring) (noting the essential purposes behind juvenile courts included rehabilitation, avoiding stigmatization, and overly burdensome procedural requirements).

at all.[344] But, even in the face of "all these disappointments, all these failures, and all these shortcomings," the plurality concluded that the system was not so damaged as to require the Court to jettison the ideal of the informal, rehabilitative juvenile justice system altogether.[345]

The plurality opinion detailed misgivings about the formality that attends jury trials and how that formality might interrupt the intimate, individualized, rehabilitative—and aspirational—vision of juvenile court.[346] It noted that jury trials might remake juvenile court into a "fully adversary process."[347] It also lodged an administrative objection, not available in a substantive due process analysis, predicting that extending jury trials to juvenile proceedings "would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial."[348]

Just as important, however, is what the plurality failed to consider. The plurality was silent on the racial failings of the juvenile system. While the Court catalogued the juvenile court's many deficiencies, it did so without consideration that the Child Savers' ideal itself might have been corrupt, to the extent that it was a white ideal not meant to apply to youth of color.[349] Confronting that reality might have made the Court choose a rights-based analysis rather than a fairness-based analysis, as it had in so many other cases.

2. Justice Brennan and the Right to a Public Trial

Justice Brennan filed an opinion concurring in part and dissenting in part.[350] Justice Brennan agreed that juvenile proceedings do not constitute criminal proceedings under the aegis of the Sixth Amendment.[351] The issues that most concerned Justice Brennan were (1) the reasons the jury process is needed, and (2) whether there is an adequate substitute for the process.[352] With respect to the first issue, Justice Brennan considered "whether [the] jury trial is among the

344. *Id.* at 544 n.4.

345. *Id.* at 545.

346. *Id.*

347. *Id.*

348. *Id.* at 550.

349. *See supra* Part II.B.1.

350. *McKeiver*, 403 U.S. at 553.

351. *Id.* at 553.

352. *Id.* at 553–57.

'essentials of due process and fair treatment.'"[353] In a quintessential fundamental fairness analysis that makes room for a substitute for a fundamental right, he concluded that the right to a jury trial was not such a right, so long as the state's procedure "protect[s] the juvenile from oppression by the Government" and the "compliant, biased, or eccentric judge."[354] He found that a public trial grants protection against "possible oppression by what is in essence an appeal to the community conscience"[355] as much as a jury does, and so concluded that a juvenile's jury trial depended on whether that juvenile was afforded the right to a public trial.[356]

Justice Brennan's concurrence diverged from the rationale of the plurality, by considering the advantages of a jury beyond its role as simple fact finder in his analysis of whether there is an adequate substitute for a jury trial.[357] Accordingly, Justice Brennan concurred with the judgment as to the Pennsylvania case (as Pennsylvania law at that time could be read to afford juveniles the right to a public trial), and dissented with the judgment as to the North Carolina case (because North Carolina required closed proceedings).[358]

The difference between the plurality's understanding of the jury's role and Justice Brennan's conceptualization of the jury's role is of particular moment. The plurality reduced the role of the jury to that of a mere factfinder,[359] and ignored the jury's critical function as a representation of the community's conscience, which the Court elevated in *Duncan* when it stated that "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."[360]

McKeiver resulted because the Court did not go far enough in *Gault*, and *Duncan*, the adult criminal analog to *McKeiver*, brings this failure into stark relief. Had the Court based youths' due process

353. *Id.* at 553 (quoting *In re* Gault, 387 U.S. 1, 30 (1967)).

354. *Id.* at 554–55.

355. *Id.*

356. *Id.* at 555.

357. *See id.* at 555–56 (discussing how public trials could serve the same functions as jury trials, including protecting against "misuse of the judicial process").

358. *Id.* at 554–57.

359. *Id.* at 543.

360. Duncan v. Louisiana, 391 U.S. 145, 157 (1968).

rights in the Bill of Rights and not in Fourteenth Amendment fundamental fairness, *McKeiver* would have had a very different result.

IV. THE WORLD THAT *GAULT* MADE: CURRENT JUVENILE COURT AND DISPROPORTIONATE MINORITY CONTACT

A. Disproportionate Minority Contact

The Supreme Court's embrace of fundamental fairness as the basis of juvenile procedural protections rather than fundamental rights, coupled with the long history of racialized treatment of black children, exacerbated disparate treatment of children of color in the juvenile justice system.

The data are shocking and familiar. A grossly disproportionate majority of youth in the juvenile justice system are children of color.[361] In 2008, juvenile courts handled 1.7 million delinquency cases.[362] The Department of Justice reported that in 2008, although children of color comprised only 22% of the country's youth population, and although rates of commission of crime were static across racial groups, children of color accounted for at least 54% of arrests for violent crime, and 36% of arrests for property crimes.[363] Black youth, at only 16% of the population, were most overrepresented in juvenile arrests.[364] Between 2002 and 2004, for example, African Americans

361. NAT'L COUNCIL ON CRIME AND DELINQUENCY, *supra* note 11, at 1; *see also* JEFF ARMOUR & SARAH HAMMOND, NAT'L CONFERENCE OF STATE LEGISLATURES, MINORITY YOUTH IN THE JUVENILE SYSTEM 4 (2009), *available at* http://www.ncsl.org/print/cj/minoritiesinjj.pdf (stating that "[m]inority juveniles are confined and sentenced for longer periods and are less likely to receive alternative sentences or probation compared to white juveniles").

362. CRYSTAL KNOLL & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DEP'T OF JUSTICE, FACT SHEET: DELINQUENCY CASES IN JUVENILE COURT, 2008, at 1 (2011), *available at* http://www.ojjdp.gov/pubs/236479.pdf.

363. *Id.* In 2008, the population of children in the United States between the ages of ten to seventeen was 78% white, 16% black, 5% Asian/Pacific Islander, and 1% American Indian. *Id.*

364. CHARLES PUZZANCHERA, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DEP'T OF JUSTICE, JUVENILE JUSTICE BULLETIN: JUVENILE ARRESTS 2008, at 9 (2009), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf. For violent crime arrests, 47% involved white and Latino youth, 52% involved black youth, 1% involved Asian youth, and 1% involved American Indian youth. *Id.* For property crime arrests, the proportions were 65% white and Latino youth, 33% black youth, 2% Asian youth, and 1% American Indian youth. *Id.*

comprised 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.[365] An African-American boy is nine times more likely to be detained for a drug offense as a white boy charged with the exact same offense.[366] An African-American boy has a one-in-three chance of being sent to prison.[367]

The disparate treatment only begins at arrest. Youth of color are disproportionately represented and receive worse outcomes compared to their white counterparts at every decision-making point in the juvenile justice system.[368] And, it is widely acknowledged that overrepresentation of youth of color in the juvenile justice system cannot be explained by rates of offending, which are static across racial and ethnic groups;[369] arrest rates, which hover near an all-time low;[370] or demographics, as disproportionate minority contact exists in nearly every state—even states with very small populations of people of color.[371] It is also widely acknowledged that the possible causes include conscious or unconscious racial bias[372] in combination with the enormous discretion that the juvenile justice system affords its actors.

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

366. W. HAYWOOD BURNS INSTITUTE FOR JUVENILE JUSTICE FAIRNESS AND EQUITY, DISPROPORTIONATE MINORITY CONFINEMENT/CONTACT (DMC) FACT SHEET, *available at* http://www.burnsinstitute.org/downloads/FACT%20SHEET%20BI.doc (last visited Mar. 13, 2013).

367. *Id.*; ACT 4 JUVENILE JUSTICE FACT SHEET: DISPROPORTIONATE MINORITY CONTACT (DMC), *available at* http://www.cclp.org/documents/JJDPA/DMC_Fact_Sheet.pdf.

368. NAT'L COUNCIL ON CRIME AND DELINQUENCY, *supra* note 11; ARMOUR & HAMMOND, *supra* note 361.

369. *See* KNOLL & SICKMUND, *supra* note 362, at 2 (reporting the trends of delinquency cases in juvenile court).

370. *Id.* at 1.

371. *See* BELL & RIDOLFI, *supra* note 90, at 2, 8, 10 (explaining that children of color "comprise 35 percent of the total U.S. youth population, yet make up 65 percent of all youth who are securely detained pre-adjudication").

372. Geoff Ward et al., *Racial Politics of Juvenile Justice Policy Support: Juvenile Court Worker Orientations Toward Disproportionate Minority Confinement*, 1 RACE & JUSTICE 154, 158–59, 175 (2011); *see also* BELL & RIDOLFI, *supra* note 90, at 10 (explaining that thirty-two of forty-four states found "evidence of ethnic or racial differences in juvenile justice system decision-making that was unaccounted for by differential criminal activity").

This phenomenon, the overrepresentation and disparate treatment of children of color in the juvenile justice system, has been named disproportionate minority contact ("DMC"), and has been extensively documented in every state.[373]

B. Modern-Day Juvenile Court Practice

The history of the treatment of black system-involved children begins to give these numbers dimension; the Court's misstep in *Gault* completes the explanation. Chronicling the life of a typical juvenile case illuminates how the current juvenile justice system, ostensibly race-neutral, allows system actor discretion and its consequence, disparate treatment of youth of color, to flourish in juvenile proceedings.[374] The legal process that contributes to this overrepresentation can be laid at the feet of the *Gault* decision.

1. Citation or Arrest

A juvenile case usually starts with an encounter with the police.[375] In 2009, 83% of cases referred to juvenile court came from law enforcement agencies.[376] Black youth, at only 16% of the population, were most overrepresented in juvenile arrests.[377] At arrest, the police officer, who most often does not live in the child's neighborhood, has broad discretion to determine the direction the child's case will take.[378] On one end of the spectrum of police intervention, the officer can choose to divert the arrest, allowing the youth to avoid juve-

373. *See* ACT 4 JUVENILE JUSTICE, *supra* note 367, at 1 (explaining that the Juvenile Justice and Delinquency Prevention Act requires States to "address" DMC within the juvenile justice system and jurisdictions need to "approach this work with focused, informed, and data-driven strategies").

374. *See infra* Parts IV.B.1–2.

375. *See* Birckhead, *supra* note 57, at 70–80 for a comprehensive discussion of the most common points of entry into juvenile delinquency court—the child welfare and status offender systems, public schools, retail stores, and neighborhood police presence.

376. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DEP'T OF JUSTICE, STATISTICAL BRIEFING BOOK: CASE FLOW DIAGRAM, *available at* http://www.ojjdp.gov/ojstatbb/structure_process/case.html (last visited Nov. 28, 2012).

377. *See supra* text accompanying note 364.

378. *Cf.* SARAH LIVSEY, OFFICE OF JUVENILE JUSTICE'S DELINQUENCY PREVENTION, DEP'T OF JUSTICE, FACT SHEET: JUVENILE DELINQUENCY PROBATION CASELOAD, 2007, at 1 (2010), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/230170.pdf ("Probation supervision was the most severe disposition in 34% (561,600) of all delinquency cases.").

nile court altogether.[379] The officer might decide to counsel the child and release him, simply return him to his parents, or offer the child the option of some voluntary sanction.[380] Of the 1.7 million delinquency cases in 2008, 423,400 cases, or 25%, were addressed informally, with the youth agreeing to a community-based sanction like performing community service, paying restitution, writing a letter of apology, or taking a class aimed at deterring the child from committing the specific offense in the future.[381] On the other end of the spectrum, the officer might choose to arrest the child and detain him until his initial court appearance, where a judge will decide where the child will be placed pending trial.[382]

The opportunities for discretion between these two points are limitless. For example, almost 70% of juvenile arrests are referred to juvenile court.[383] But a case can be referred through a formal arrest, after which the officer might release the child with a date to appear in court, or through a ticket or citation, after which the officer might release the child with a court date.[384] The officer often makes this critical, early-stage determination after talking to the complaining witness, the youth, and the youth's parents, evaluating the demeanor and reaction of the youth and of the youth's parents, and reviewing the youth's prior contacts with the juvenile justice and child welfare systems.[385]

In addition to the initial decision about diversion or referral, the officer also makes a recommendation as to what the child's charges should be. The vast majority of juvenile referrals involve minor crimes, like disorderly conduct, disturbing the peace, minor assaults

379. *Id.* at 3.

380. *Id.*

381. *See* KNOLL & SICKMUND, *supra* note 362, at 3 (explaining the statistics on intake decisions and decisions of authorities).

382. *See id.* (explaining that over half of the delinquency cases in 2008 were handled formally).

383. *See* PUZZANCHERA, *supra* note 364, at 5 (showing that, in 2008, most arrested juveniles were referred to court, whereas the others were referred to a welfare agency or to another police agency).

384. *See* KNOLL & SICKMUND, *supra* note 362, at 3 (explaining that in 56% of cases (or in 924,400 cases), authorities filed a petition and the case was handled formally).

385. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DEP'T OF JUSTICE, JUVENILE JUSTICE SYSTEM STRUCTURE & PROCESS [hereinafter STRUCTURE'S PROCESS], *available at* http://www.ojjdp.gov/ojstatbb/structure_process/case.html (last visited Mar. 22, 2012).

over school-related issues, and violating curfew. Since these are the kinds of crimes that label typically defiant youthful behavior, the officer has a great deal of discretion at this point in the process.[386] For example, if a child refuses to show her school identification to a hall monitor, the officer can choose to see the child's reaction as mouthing off, or charge the child with resisting arrest.[387]

2. Intake and Detention

Once the child has been referred to juvenile court, the child undergoes the intake process.[388] Intake usually involves the child being evaluated by a juvenile probation officer.[389] Here too, the decision maker has a great deal of discretion that wreaks an unfairness.[390] As part of intake, the probation officer investigates the child's background to make a recommendation to the court about whether the child should be detained, released, or placed in a community-based group home pending trial.[391] If the child has been detained, this investigation has to happen in the few short hours—usually less than twenty-four hours—between the arrest and the youth's first court appearance.[392] If the child has been released, the investigation usually takes place on the morning of the court appearance.[393]

386. *See* KNOLL & SICKMUND, *supra* note 362, at 3 (explaining that authorities can decide at intake which track to take with a case); *see also* WARD, *supra* note 4, at 159 (noting that unconscious bias of authority figures influences whether they see juvenile behavior as culpable or not).

387. *See* WARD, *supra* note 4, at 159 (explaining that authority figures choose, often subliminally, whether to see juvenile conduct as culpable or not).

388. STRUCTURE'S PROCESS, *supra* note 385.

389. *Id.*

390. *See id.* (noting that the court decides if it is in the "best interests" of the child or community to keep the juvenile in detention, and that the prosecutor has discretion to try the juvenile in the criminal or juvenile system).

391. *Id.*

392. *Id.*

393. *Cf.* Eugene H. Czajkoski, *Exposing the Quasi-Judicial Role of the Probation Officer*, 37 FED. PROBATION 9, 9–11 (1973) (noting that the probation officer has taken on a quasi-judicial role and is given a high degree of discretion in making the juvenile's placement recommendations). The fact that the police have already made the determination that the youth should be released, and that the youth has returned to court, usually combine to amount to continued release, making the intake interview less urgent. *Cf.* Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325,

In many jurisdictions, the probation officer will rely on a form that assigns values to different parts of the child's background.[394] At the end of the investigation, the probation officer calculates the child's score, which determines the probation officer's placement recommendation.[395] Usually, the higher the score, the more likely it is that the probation officer will ask that the child be detained or placed in a group home.[396] Some of the things that probation officers take into account include: the youth's prior criminal involvement; reports from school officials about the youth's attendance, grades, and behavior; reports from the youth's parent or guardian about the youth's behavior at home; other features of the youth's home environment, like whether the youth has family members who are involved in the juvenile or criminal justice systems; the demeanor of the youth; and the demeanor—and, more specifically, the level of cooperation—of the youth's parent or guardian.[397] Ostensibly race-neutral, these criteria adversely affect youths whose parents or guardians question the child's involvement in the juvenile justice system; whose parents or guardians are not easily reachable by telephone; who do not have a fixed address; who do not participate in extracurricular activities like church, Boy Scouts, Girl Scouts, or sports teams, which require money for uniforms and other participation-related costs; and parents or guardians with flexible schedules to ferry the youths to and from activities.[398]

The probation officer's range of recommendations might include some kind of deferred prosecution, where the youth's case is

326–27 (1994) (describing the injustice and harm that results when criminal defendants are forced to remain in pretrial detention before a hearing).

394. *See, e.g.*, Robert D. Hoge, *Standardized Instruments for Assessing Need and Risk in Youthful Offenders*, 29 CRIM. JUST. & BEHAV. 380, 387–91 (2002) (providing examples of several instruments used to evaluate risk and need factors).

395. *See id.* at 381 (explaining factors a probation officer may consider in making his recommendation).

396. *See* George S. Bridges & Sara Steen, *Racial Disparities in Official Assessment of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 557 (1998) ("[O]fficials' judgments about the causes of crime along with relevant characteristics of a youth's case and criminal history will influence assessment of risk . . . .").

397. *See id.* at 559; Hoge, *supra* note 394, at 387–91 (describing the factors considered).

398. *See* Bridges & Steen, *supra* note 396, at 557–58, 566 (explaining that officials often view minority offenders differently, and noting that factors considered in whether the youth may reoffend include race, assessment of the youth's family, and the youth's "social history").

postponed for several months, and if the youth does not get rearrested in that time period, the case is dismissed; probation before judgment, where the youth enters a guilty plea, the case is postponed for several months, and if the youth complies with certain release conditions during that time period, like clean drug tests, satisfactory school attendance, and checking in with the probation officer, the guilty plea is withdrawn and the case is dismissed; pretrial release with conditions; detention in a group home; or detention in a maximum security juvenile facility.[399] In some jurisdictions, probation can entail explicitly recommended conditions for the youth's parents, like enrollment in parenting classes.[400] Even where such recommendations are not expressly given, in practice, any condition placed on the youth necessarily involves the time or resources of the youth's parent or guardian, who has to help ensure the youth's compliance.[401]

3. Prosecutorial Charging Decision

With the police reports and the probation officer's recommendation in hand, the juvenile prosecutor makes the charging decision.[402] In juvenile court, the prosecutor enjoys full discretion to decide whether and what charges to bring, without the check of a grand jury.[403]

399. *See* Stephen J. Rackmill, *Printzlien's Legacy, the "Brooklyn Plan," A.K.A. Deferred Prosecution*, 60 FED. PROBATION 8, 8–9 (1996) (explaining that "deferred prosecution" for juveniles occurs when the "prosecutor would hold the charges in abeyance for a specific timeframe contingent upon good behavior. If the youngster did well on supervision, the case was closed. In the event the supervision term was unsatisfactory, the prosecutor would process the original complaint").

400. *See* George W. Smyth, *The Juvenile Court and Delinquent Parents*, 13 FED. PROBATION 12, 12 (1949) (explaining that there are "modifications which are desirable in home surroundings and parental attitudes" that will help children experience "better example and guidance").

401. *See id.* at 12–13 ("No problem of a neglected or delinquent child can be treated successfully without also considering the attitude and actions of the parents.").

402. *See* Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 397 (1998) (noting the prosecutor's "largely unchecked" discretion in charging).

403. Bowers, *supra* note 183, at 1659.

The pressure for convictions, however, is no less present than in adult criminal court.[404] While there are no studies of the exercise of prosecutorial discretion in juvenile delinquency court,[405] reference to a study of prosecutorial charging decisions in misdemeanor criminal cases, also considered low-stakes court, is instructive.[406] As revealed by a recent investigation of charging decisions in New York and Iowa criminal courts, prosecutors charge misdemeanor, low-stakes offenses at higher rates than serious, high-stakes felony offenses.[407] Iowa's 2008 declination rates show that prosecutors declined to prosecute violent

404. *See* Klein, *supra* note 402, at 397 (explaining that prosecutors may feel pressure to prosecute children as adults, to avoid public outcry).

405. There are, however, several studies examining the transfer of juvenile cases for prosecution in adult criminal court. *See generally* Klein, *supra* note 402.

In a November 2007 report, the Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System, an independent task force of the Centers for Disease Control and Prevention

> conducted a systematic review of published scientific evidence concerning the effectiveness of laws and policies that facilitate the transfer of juveniles to the adult criminal justice system to determine whether these transfers prevent or reduce violence among youth who have been transferred and among the juvenile population as a whole. . . . [T]he Task Force recommends against laws or policies facilitating the transfer of juveniles to the adult criminal justice system for the purpose of reducing violence.

ROBERT HAHN ET AL., TASK FORCE ON CMTY. PREVENTIVE SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, EFFECTS OF VIOLENCE OF LAWS AND POLICIES FACILITATING THE TRANSFER OF YOUTH FROM THE JUVENILE TO THE ADULT JUSTICE SYSTEM (2007), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm.

406. Other similarities between juvenile court practice and misdemeanor practice make the comparison useful. In both courts, the possible exposure is not considered as severe as the exposure in criminal court. In misdemeanor court, defendants generally cannot be sentenced to longer than six months incarceration for each offense charged. In juvenile court, a youth cannot be under the court's supervision past the upper age of juvenile court jurisdiction, and even if the youth is committed and detained, the youth theoretically receives rehabilitative services, like education, drug treatment, vocational training and health care. In addition, the most serious cases are weeded out of both courts. By definition, serious felonies are not tried in misdemeanor courts. Similarly, the most serious juvenile cases are often transferred for prosecution in adult criminal court, so that the only cases processed in juvenile court are petty offenses, like assault or disorderly conduct cases from schoolyard fights, marijuana drug possession cases, prostitution cases, and petty theft charges.

407. Bowers, *supra* note 183, at 1715–17.

felonies and misdemeanors almost three times as often as petty public order felonies and misdemeanors.[408] In addition, "all felonies were declined over fourteen times as often as all simple misdemeanors."[409] The New York data yielded similar results: In charging decisions from 2005 to 2008, New York prosecutors charged petty public order crimes far more frequently than felonies.[410] "[P]rosecutors even declined homicide at more than twice the rate (5.01%) that they declined turnstile hops or prostitution."[411]

This study supports anecdotal evidence that juvenile court prosecutors overcharge.[412] Even in jurisdictions where the number of charges would make no difference in the sentence, juvenile prosecutors charge the most serious possible offense (the better to plea bargain with); the highest number of charges; and a higher number of youths than circumstances might warrant.[413] This charging practice is ill-fitted for juvenile court particularly in light of the fact that the overwhelming majority of youths grow out of law-offending behavior without any intervention from the court.[414]

4. Detention Decision

Though states' statutes can vary, "[p]re-trial detention of juveniles has two general purposes: (1) to protect public safety and (2) to ensure the youth's appearance at future hearings."[415] Juvenile jurisprudence allows preventive detention of juveniles accused of crimes, and statutory descriptions of factors to be considered by a court in

408. *Id.* at 1716–17.

409. *Id.* at 1716 (emphasis omitted).

410. *Id.* at 1718–19.

411. *Id.* at 1719.

412. *See id.* at 1712–20 (describing reasons why "disposable" cases are charged much more frequently than serious felonies).

413. *See* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 847–50 (1988) [hereinafter Feld, *Principle of Offense*] (noting that juvenile sentences are "characteristically indeterminate" and that juvenile judges have "virtually unrestricted" authority to sentence).

414. *See id.* at 896–902 (noting that most youths are still forming their legal, moral, and cognitive reasoning until the age of fourteen and before this time are not fully culpable for their decisions).

415. ELIZABETH CALVIN, NAT'L JUVENILE DEFENDER CENTER, ADVOCACY AND TRAINING GUIDE: LEGAL STRATEGIES TO REDUCE THE UNNECESSARY DETENTION OF CHILDREN 10 (2004), *available at* http://www.njdc.info/pdf/detention_guide.pdf.

deciding whether to detain a youth vary. "Some state laws require a 'substantial' likelihood of failure to appear."[416] "Many state juvenile justice statutes define 'danger to the public' to include danger to self. Other states consider contempt of court or violation of a previous probation order as factors in detention decisions."[417] In most jurisdictions, the judge who makes the initial pretrial detention decision will preside over the trial.[418] In the name of being fully informed to make this decision, the judge is exposed to a range of social information—such "broad and expansive access" that, in the opinion of one commentator, "may move the justice system dangerously close to a breach of due process."[419]

The detention decision is integral because it impacts the youth's ability to prepare for trial.[420] A detained youth cannot assist as well in preparing for trial as a youth released into the community, who can take an active role in case investigation.[421] A detained youth also does not have the opportunity to make a good impression on the court that a youth in the community has.[422] Each day that a youth is in the community and does not reoffend is conclusive proof of the youth's

416. *Id.* at 10 ("Some states, like Florida, define danger to the public narrowly, requiring a 'substantial risk of bodily harm as evidenced by recent behavior.'").

417. *Id.*

418. *See* Guggenheim & Hertz, *supra* note 191, at 571–73 (explaining that judges often preside over pretrial hearings and bench trials in the same case).

419. Gary Solomon, *I Got the Post-*McKeiver *Blues*, 60 RUTGERS L. REV. 105, 107 (2007); *see also* Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171 (2005). Eisenberg and his team studied judge-jury agreement rates in a sample of 300 criminal trials across four jurisdictions. *Id.* at 173. Judges filled out two questionnaires, one pre-jury verdict and another post-jury verdict. *Id.* at 175–76. The agreement rates confirmed the agreement rates in an earlier study performed by Kalven and Zeisel: Judges and the jury agreed to convict 75% of the time. *Id.* at 180–83. In 6% of the cases, the jury convicted when the judge would have acquitted; in 19% of the cases, the jury acquitted when the judge would have convicted. *Id.* at 181. Eisenberg found no correlation between the rate of disagreement and the complexity of the trial. *Id.* at 190–91. Instead, the juries seemed to apply a higher standard for finding guilt beyond a reasonable doubt. *Id.* at 185; *see also* Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 478–79 (2005) (citing a similar study that found a consistent judge-jury agreement rate around 73%).

420. Calvin, *supra* note 415, at 3.

421. *Id.*

422. *Id.*

potential to be a law-abiding member of the community. In addition, detention halls are often crowded, dangerous,[423] and unhygienic.[424] Studies show that time spent in detention increases the likelihood that a child will recidivate, in part because detention is a one-two punch: not only is the child likely to make negative peer connections,[425] but also any positive, community-based relationships (in particular, with the child's family) are interrupted. In fact, detention, as a predictor of future criminality, is more reliable than gang affiliation, weapons possession, or family dysfunction.[426] Indeed, detention is a demonstrated gateway into the juvenile delinquency system.[427] Not only are children from ethnic and racial minority groups disproportionately confined at detention hearings, but they also suffer the effects of detention more acutely than other children.[428]

5. Pretrial Hearings

On the theory that trial court judges can do the "mental gymnastics"[429] necessary to consider, but not be unduly influenced by, inad-

423. BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST. THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES, JUSTICE POLICY INSTITUTE REPORT 2 (2006), *available at* http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf.

424. *See* CALVIN, *supra* note 415, at 58–61.

425. *Id.* at 4–6.

426. *Id.* at 4.

427. *Id.* at 1; *see also* NAT'L JUVENILE DEFENDER CTR., ACHIEVING EXCELLENCE IN DETENTION ADVOCACY: GUIDELINES FOR JUVENILE DEFENDERS TO PROVIDE ZEALOUS ADVOCACY AT DETENTION HEARINGS, *available at* http://www.njdc.info/pdf/njdc_tools/Guidelines.pdf (last visited Mar.13, 2013) (providing advocacy tips for representatives acting on behalf of juveniles).

428. *See* CALVIN, *supra* note 415, at 49–50, 65–69.

429. For example, many jurisdictions allow juvenile court judges to incorporate the pretrial suppression hearing testimony and the trial testimony in bench trials, and to preside over the pleas of co-respondents. *See, e.g.*, United States v. Abanatha, 999 F.2d 1246, 1250 (8th Cir. 1993) ("Someone has to decide what facts to consider and what facts to ignore. We trust that decision-making responsibility to the trial judge. Sometimes this responsibility requires difficult mental gymnastics—as in a bench trial where the judge decides both what facts to admit into evidence and how to weigh that evidence—but trial judges manage such feats of objectivity all the time."). The *McKeiver* appellants expressed "[c]oncern" that "the inapplicability of exclusionary and other rules of evidence[;] . . . the juvenile court judge's possible awareness of the juvenile's prior record and the contents of the so-

missible evidence, many jurisdictions allow juvenile court judges to be exposed to such evidence and still make the guilt or innocence determination.[430]

The potential prejudice begins just after arrest, and touches every stage of the case. The same judge who presides over the detention hearing often also handles pretrial status hearings, at which discovery and scheduling matters are discussed; pretrial motions and motions hearings; and any co-respondents' matters.[431] So, for example, if the juvenile defense attorney files an ex parte motion for expert funds but then does not call the expert, the judge might make a kind of impermissible missing witness inference, assuming that the expert was not called because the expert's testimony would have damaged the defense's case. The judge might also preside over other matters, like entry of a guilty plea from co-respondents consideration of the circumstances of the juvenile's confession, or possession of contraband in a suppression hearing.[432]

At each of these hearings, the court engages in a searching inquiry of how the child is faring in the community.[433] The parent or guardian, who, in many jurisdictions, is required to come to court with the child, is questioned about the child's behavior at home and school performance. The parent or guardian is also often encouraged to contact the court if the child misbehaves, as a way of getting help to control the child's behavior.[434] So long as the court has made a probable cause determination, at any sign that the child's behavior

---

cial file; [and the] repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers" created "the likelihood of prejudgment." McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).

430. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 231–41 (1984).

431. *Id.* at 232–38.

432. *See id.* at 229–38 (explaining that the juvenile judge often presides over evidentiary hearings or has information that would not be available to a jury, like a coconspirator's confession or evidence presented at a suppression hearing).

433. *See* Mary V. Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393, 402–03 (1970) (noting that the judge may dispose of the case based on how well the child might do if released into the community).

434. *Cf. id.* at 400 (noting that many juvenile systems "request that parents utilize community agencies" to help control a child who has been released into the community before trial).

is taking a turn for the worse, the court can change its detention decision.[435]

6. Plea or Adjudication

In juvenile court, at the guilt or innocence determination—called a fact finding or an adjudication—the judge must determine whether the elements in the petition were proved beyond a reasonable doubt.[436] There is still room for the exercise of a great deal of discretion in this ostensibly straightforward and discrete task.[437]

Several facets of juvenile court practice conspire to imperil the integrity of the judge's verdict at the fact finding. First, the fact that, in most jurisdictions, the judge has an obligation to serve the child's "best interests"[438] can compromise the judge's role as the fact finder, as the judge "may inappropriately lean in favor of conviction in order to ensure youths in need of rehabilitative services will receive them as a condition of probation or placement."[439] All the information to which the judge has been exposed, through pretrial litigation, co-respondents' hearings, and other sources might enable the judge to unconsciously fail to hold the government to the beyond the reasonable doubt standard in its presentation of evidence,[440] or observe the presumption of innocence less scrupulously, because the judge is less receptive to listening to defense counsel's counterarguments.[441]

Second, familiarity breeds possible contravention of youths' rights at trial. The familiarity threatens to corrupt the verdict in at least two ways. First, judges, who hear literally hundreds of cases each

435. *See id.* at 399–403 (stating that the child may be released to his parents if it appears the parents can control the child, but that if the child does not respond well to being in the community the probation officer will take this into account in a report to the court).

436. *In re* Winship, 379 U.S. 358, 368 (1970).

437. *See* Feld, *Principle of Offense*, *supra* note 413, at 176 (noting that any time a judge is given a standard lacking in guidelines, such as the totality of the circumstances test, it results in virtually unlimited judicial discretion).

438. *Cf.* Guggenheim & Hertz, *supra* note 191, at 569–70 (arguing that "[j]udges who conduct . . . delinquency cases . . . may over-convict in close cases out of a misguided notion that the best way to protect the community . . . is to err on the side of conviction").

439. *Id.* at 570.

440. *See id.* at 564–67 (arguing that juvenile judges, when confronted with all the information available, frequently convict juveniles on very scant evidence).

441. *See* Guggenheim & Hertz, *supra* note 191, at 564–71 (discussing the kinds of cases in which juvenile judges convict youths on the scantest of evidence).

year, "may become less careful in weighing the evidence[,] . . . more cynical in evaluating the credibility of the juveniles who appear before them,"[442] and more trusting of the police officers whose testimony they credit again and again.[443] Second, the familiarity encourages a kind of informality that may allow for consideration of evidence that has no bearing on the determination of guilt or innocence,[444] and a relaxation of the rules of evidence.[445] And, since jury instructions often provide fecund grounds for appeal, and one of the efficiencies of bench trials is that judges do not instruct themselves on the record, juveniles tried without juries are forced to forfeit a common avenue for post-adjudication relief.[446]

7. Disposition

With the most serious crimes culled from juvenile court, the public perceives juvenile court sanctions as, at worst, a slap on the wrist, and at best, an opportunity for the state to provide a wayward child with needed services.[447] The public's perception is that the length of

442. Janet E. Ainsworth, *The Court's Effectiveness in Protecting the Rights of Juveniles in Delinquency Cases*, 6 JUVENILE COURT 64, 68 (1996), *available at* http://futureofchildren.org/futureofchildren/publications/docs/06_03_04.pdf.

443. *See* Guggenheim & Hertz, *supra* note 191, at 574 (explaining that "judges who sit in a criminal or juvenile court for years come to know the police officers of the jurisdiction. If the judge knows that a particular officer is a 'good cop' and particularly if the judge has found that the officer testified truthfully in previous cases, the natural tendency is to presume that the officer would not lie. As a result, the judge is less likely to subject the officer's testimony to the kind of critical evaluation that would expose untruths. In cases in which an officer's testimony is contradicted by previous statements or other officers' testimony, the judge is likely to presume that the inconsistency stems from a mistake or misunderstanding, rather than from fabrication.").

444. Miriam Stohs, *Racism in the Juvenile Justice System: A Critical Perspective*, 2 WHITTIER J. CHILD & FAM. ADVOC. 97, 106 (2003); *see also* Birckhead, *supra* note 57.

445. Stohs, *supra* note 444; Birckhead, *supra* note 57.

446. Ainsworth, *supra* note 24, at 1125–26.

447. *Cf.* PATRICIA PURITZ & CATHRYN CRAWFORD, NAT'L JUVENILE DEFENDER CTR., FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY COURT 53 (2006), *available at* http://www.njdc.info/pdf/Florida%20Assessment.pdf (stating that "[e]ven the senior staff and managers of some public defender offices harbor thoughts that juvenile defenders are less than 'real lawyers' and view delinquency cases as 'kiddie court.'"); GABRIELLA CELESTE & PATRICIA PURITZ, NAT'L JUVENILE DEFENDER CTR., THE CHILDREN LEFT BEHIND: AN ASSESSMENT OF ACCESS TO

exposure is generally shorter than exposure in criminal court, because in most jurisdictions, a youth cannot be under the court's supervision past the upper age of the juvenile court's jurisdiction.[448] The fact is that, in all but one state,[449] sentencing in juvenile court is indeterminate, and can be extended by the court in the name of the youth's rehabilitation, so that a youth often winds up serving a harsher sentence than an adult convicted of the same offense.[450] Another myth is that the nature of the exposure is also not as severe as the exposure in criminal court, since, even if the youth is detained, the youth theoretically receives rehabilitative services, like education, drug treatment, vocational training, and health care.[451] Studies document that many juvenile system stakeholders involve youths in the system for the express purpose of getting troubled youths services that they would not otherwise be able to access in the community.[452] The fact is that there is a severe shortage of services available for system-

COUNSEL AND QUALITY OF REPRESENTATION IN LOUISIANA 58 (2001), *available at* http://www.njdc.info/pdf/LAreport.pdf (stating that "[a] misguided perception continues to fester in the legal community that defending delinquent youth is for inexperienced and/or lazy lawyers who are not 'real' criminal defense attorneys").

448. *See* Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 54 (2000) (noting the public perception that the juvenile system is not tough enough on juvenile offenders).

449. WASH. REV. CODE § 13.40.0357 (2011) (setting out sentencing standards that must be used in the state of Washington, or, alternatively, providing for suspended disposition alternatives, chemical dependency disposition alternatives, or "manifest injustice").

450. In *Gault*, perhaps the most famous example, fifteen-year-old Gerald Gault was removed from his home and detained in a group home for six years for making an obscene phone call; if he had been an adult, his sentence could not have exceeded sixty days incarceration. *See supra* Part II.A.3; Irene Marker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 169 n.34 (1993).

451. *See* Cullen, *supra* note 448, at 54–55 (noting that the public perception is that juveniles are treated "leniently" in the juvenile system).

452. *See, e.g.*, PATRICIA PURITZ & ROBIN WALKER STERLING, NAT'L JUVENILE DEFENDER CTR., WEST VIRGINIA: ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION 61 (2010), *available at* http://www.njdc.info/pdf/West_Virginia_Assessment.pdf ("For some children, involvement in the juvenile justice system is the only way the family can access services."); JESSIE BECK, PATRICIA PURITZ & ROBIN WALKER STERLING, NAT'L JUVENILE DEFENDER CTR., NEBRASKA: A STUDY OF JUVENILE DELINQUENCY COURT 67 (2009), *available at* http://www.njdc.info/pdf/nebraska_assessment.pdf (explaining that "families often come to the county attorney's office" and ask that charges be filed against the child "so that the youth can receive services").

involved youths, whether they are placed in the community or in a detention facility.[453] As several commentators have documented, the collateral consequences for juvenile court involvement can have a profound and enduring impact on the lives of system-involved youth.[454]

8. Society's Misperception of Juvenile Court

Two popular misperceptions of juvenile court allow discretion to flourish unchecked. The first misconception is that any given state's juvenile court system, from its juvenile code to its dispositions, is geared primarily to support the rehabilitation of a system-involved youth.[455] While this was perhaps true in the first decades of juvenile court's existence, as of 1997, seventeen states had changed the purpose clauses of their juvenile codes to incorporate goals of punishment, accountability, and public safety—goals traditionally reserved for the criminal justice system.[456] And "[a]lthough many jurisdictions still retain language suggesting rehabilitation as a goal, only three states emphasize the best interests of the child as the primary purpose of the juvenile court."[457]

The second misperception, a corollary to the first, is that because the primary goal of juvenile court is rehabilitation, juvenile court is low-stakes court, the junior varsity to the adult criminal court's varsity league.[458] The most serious cases are often transferred for prosecu-

453. *See* BECK, PURITZ, WALKER STERLING, *supra* note 452, at 68 (explaining that middle class families in the community cannot afford services, like insurance, for their childen); *see also* Mark Soler, *Health Issues for Adolescents in the Justice System*, 31 J. ADOLESCENT HEALTH 321, 321, 324 (2002) (describing the "endemic" problem of overcrowding and lack of youth resources in the juvenile justice system).

454. *See, e.g.*, *In re* Richard A., 946 A.2d 204, 212–14 (R.I. 2008) (discussing the impacts of requiring juveniles to register as sex-offenders).

455. *But see* Cullen, *supra* note 448, at 54–55 (noting the trend in the juvenile court system to "get tough" on juvenile offenders charged with violent crimes, and concluding that punishment has also been integral to the corrections system).

456. *See Purpose Clause*, NAT'L CENTER FOR JUVENILE JUSTICE, http://www.ncjj.org/Topic/Purpose-Clause.aspx (last visited Mar. 22, 2012) (excerpting various states' purpose clauses including Alabama, Alaska, California, the Washington, D.C., Florida, Idaho, Illinois, Indiana, Kansas, Maryland, Minnesota, Montana, New Jersey, Oregon, Pennsylvania, Washington, and Wisconsin).

457. Katherine Hunt Federle, *Blended Sentencing and the Sixth Amendment*, 11 A.B.A. CHILD. RIGHTS LITIG. COMMITTEE NEWSLETTER, Summer 2009.

458. *See supra* note 405 and accompanying text.

tion in adult criminal court, so the cases that remain to be processed in juvenile court are mostly petty offenses, like assault or disorderly conduct cases from schoolyard fights, marijuana drug possession cases, and petty theft charges.[459]

C. Modern-Day Juvenile Court Case Study

Malcolm Smith,[460] a fifteen-year-old African-American boy, is charged in juvenile court with one count of assault with a dangerous weapon, and one count of misdemeanor disorderly conduct. The allegations are that Malcolm had a fight with a boy at school after that boy started a disrespectful rumor about a girl who was Malcolm's friend. There is a physical altercation involving several boys on each side, during which Malcolm is alleged to have kicked the other boy. When the police arrive on the scene, Malcolm is arrested and questioned, and gives a statement to police that he "just got mad," that the boy "didn't have to say anything about [his] friend" who had lived next door to him since he was very young and was "like a play sister," and that "he should know that he shouldn't disrespect females." Using their discretion at arrest, the police hold him in juvenile detention based on several factors, including Malcolm's crime and his yelling at the scene, which are perceived by the police as indications that Malcolm has anger management problems and represents a danger to the community; his prior court history; and the fact that, when the police called Malcolm's home, they could not locate his mother, who was not at home at the time.

The prosecutor charges the case as assault with a dangerous weapon, listing the weapon as Malcolm's shoe. Because of Malcolm's prior offense history, the prosecutor goes forward with Malcolm's case. Malcolm has a prior history of two misdemeanor juvenile arrests for disorderly conduct at school: one for wearing the wrong school

459. *See* PATRICK GRIFFIN ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIM: NATIONAL REPORT SERIES: TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 6–10 (2011), *available at* http://www.ncjj.org/pdf/Transfer_232434.pdf (providing examples of what kinds of juvenile cases are transferred in different states).

460. This is an amalgam of juvenile cases that the author handled during the five years that she represented indigent youth as a defense attorney, and studied during the four years that she helped assess the juvenile indigent defense systems of several different states for the National Juvenile Defender Center. This is an "every case," and does not represent any specific client, client's family, judge, prosecutor, probation officer, police officer, or jurisdiction.

uniform, and the other for getting into a shouting match with a member of a rival basketball team after a recent game. He also has a previous adjudication for one count of unauthorized use of a vehicle as a passenger (also known as joyriding). The prosecutor can see from Malcolm's court record that, although the police department has a diversion program for first-time joyriding offenders, the police department made the decision not to divert Malcolm's case.

Early that morning, at the juvenile lockup at the courthouse, a juvenile supervision officer interviews Malcolm. The probation officer notes her impressions of Malcolm as "hostile" and "needing strict supervision."

The next morning, the detention hearing judge, who will later preside over Malcolm's trial, reads the police report, which includes Malcolm's statement. At the detention hearing, the judge releases Malcolm pending trial with an admonishment that the judge is expecting Malcolm to comply with the court-ordered release conditions, which include attending school, obeying his mother, and staying at least 100 yards away from the boy he allegedly kicked at all times.

Between the detention hearing and trial, Malcolm's judge handled matters related to Malcolm's case two additional times. The first time, the judge held a hearing at which Malcolm's probation officer moved to have Malcolm's release condition changed to detention in a youth shelter home, because Malcolm was not complying with his release conditions. The trial court judge placed Malcolm in a group home. The second time the judge considered Malcolm's case was when the co-respondent pleaded guilty.

On the day of trial, Malcolm's mother is allowed into the courtroom; his pastor, coach, and friends from school are not. At the pretrial motions hearing concerning suppression of Malcolm's statement, which is incorporated into Malcolm's trial, the judge finds the arresting officer credible, and deems the statement admissible.[461] At trial, the complaining witness testifies that he did not know Malcolm per-

461. Many jurisdictions allow incorporation of the pretrial suppression hearing testimony and the trial testimony in bench trials, on the theory that trial court judges can do the "mental gymnastics" necessary to consider, but not be unduly influenced by, inadmissible evidence. *See, e.g.*, United States v. Abanatha, 999 F.2d 1246, 1250 (8th Cir. 1993) ("Someone has to decide what facts to consider and what facts to ignore. We trust that decision-making responsibility to the trial judge. Sometimes this responsibility requires difficult mental gymnastics—as in a bench trial where the judge decides both what facts to admit into evidence and how to weigh that evidence—but trial judges manage such feats of objectivity all the time.").

sonally though he had seen Malcolm around school, that Malcolm yelled at him about starting a rumor about his friend, and that he was "75% sure" that Malcolm was the one who kicked him, even though he was curled up in a ball on the ground, and there were other boys involved. The judge denies defense counsel's motion for a judgment of acquittal.

The defense does not put on any witnesses. Instead, the defense argues, in accordance with Malcolm's statement—which the judge had admitted into evidence after the suppression hearing—that although Malcolm got angry, the co-defendant, and not Malcolm, kicked the boy. Juvenile defense counsel argues that there is no eyewitness testimony showing Malcolm kicked the complainant, and that Malcolm's behavior after the police were called is completely consistent with innocence.

The judge finds Malcolm delinquent of assault with a dangerous weapon, a felony, and misdemeanor disorderly conduct. The court rules that it found the state's two witnesses credible, and that the court believes Malcolm was very angry, so it was "reasonable to infer," from his statement that Malcolm kicked the boy, though the court did have "a doubt because no one testified that they actually saw him kick the complainant." The court then goes on to lecture Malcolm, saying, "I know you feel protective of your friend, but that's no excuse to start a fight. You and your brother have both been in trouble enough to know better." When Malcolm started to speak up and say that he did not kick the boy, the judge interrupted him, saying "you had your chance, now it's my turn. I've found that you committed this assault, so, according to the law, you did it." Malcolm stands and silently cries through the rest of the hearing. Outside the courtroom, he tells his attorney, "the judge just could not see that I didn't do it. He just couldn't see it."

The salient themes in this typical modern day narrative take on a stark meaning in light of the social and legal histories of juvenile court jurisprudence. Social control, lack of parental empowerment, reservation of resources for other children, and the presumption of criminality all have deep roots in the juvenile court's historical treatment of black children.

At first blush, it might seem that overruling *Gault* and applying a model of constitutional jurisprudence built on Bill of Rights protections in juvenile court proceedings would not address juvenile courts' deficiencies.[462] But the jurisprudential reach of *Gault*, as the case that

462. *See supra* Part IV.A.

created the modern-day juvenile court system, extends far beyond its practical effects.[463] Like other landmark Supreme Court decisions, such as *Plessy v. Ferguson*,[464] *Gideon v. Wainwright*,[465] *Brown v. Board of Education*,[466] *Bowers v. Hardwick*,[467] and *McCleskey v. Kemp*,[468] the Supreme Court's opinion in *Gault* is more than a simple pronouncement of jurisprudential rules of decision for specific issues. It transcends its circumscribed holdings to stand as a prototype of ideals regarding how the juvenile justice system should run and what cultural values the system will reflect.[469] This prototype affects how all of the players in the system view their goals and roles, duties and limitations; and it affects what the public and the public's legislative and administrative representatives think that the system should be about.[470] *Gault*'s great failing is that it erects a deficient prototype.[471] Replacing that prototype with a better one will not itself cure juvenile court's deficiencies, but it will create an institutional environment in which a wide range of players can work more effectively toward a wide range of cures for many of the problems.

V. CONCLUSION

The relationship between the history of the treatment of system-involved black children and the doctrine that evolved because of the Court's omission of that history lays bare several important realizations.[472] The first is that the absence of one narrative can have as much of an impact as inclusion of another narrative.[473] This kind of narrative privileging led to the Court's failure to recognize the potential for civil rights reforms in juvenile court in *In re Gault*, and instead focus on the admittedly rehabilitative, informal nature of juvenile

463. *See supra* Part IV.A.

464. 163 U.S. 537 (1896).

465. 372 U.S. 335 (1963).

466. 347 U.S. 483 (1954).

467. 478 U.S. 186 (1986).

468. 481 U.S. 279 (1987).

469. *Cf.* Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of the United States Supreme Court Justices*, 40 AM. J POL. SCI. 971, 975–76 (1996) (noting that landmark decisions often impose tests or standards to be followed).

470. *See supra* Part IV.A.

471. *See supra* Part IV.

472. *See supra* Part I.B.

473. *See supra* Part II.A.

court allowed the Court to continue to sidestep that narrative aside in *McKeiver*—even though *McKeiver* presented the *Burrus* narrative for the Court's fair consideration.[474]

The second is that the history and the doctrine collude to perpetuate the problem of disproportionate minority contact in the juvenile system.[475] Interlocked in the cells of the juvenile justice system—like complimentary strands of DNA—each makes its own contributions to modern-day disproportionate minority contact.[476] The history contributes the weight of decades of stereotypes and bias; the doctrine contributes pockets of discretion, like the guise of "best interests," making youths vulnerable to exploitation by these stereotypes and bias.[477] Neither, standing alone, is the cause. The result is a seemingly intractable, systemic problem that has no head and no tail, so it is unclear where to strike first.

Accordingly, augmenting *Gault*'s protections with a case that extends the Bill of Rights to juvenile court—the way the Court augmented *Powell* with its decision in *Gideon*—as this Article suggests, is only part of the solution.[478] After all, black adults are overrepresented in the criminal justice system, and they enjoy the due process protections of the Bill of Rights.[479] But, cultural solutions that address the historical dimension of disproportionate minority contact can and must be undertaken as well.[480]

The third is that examining the evolution of the doctrine, in light of the overlooked history, is a methodology that has implications beyond the jury trial question in juvenile court. This methodology is, in effect, a look at the flip side of interest convergence,[481] and it links juvenile justice to other social movements in which the experience of a subset of an oppressed group are subsumed by the narrative of the

474. *See supra* Parts II–III.

475. *See supra* Parts I.B.4, IV.A.

476. *See supra* Parts I.B.4, IV.A.

477. *See supra* Parts II–III.

478. *See supra* Part II.A.

479. *See supra* notes 142–149 and accompanying text.

480. *See supra* Part IV.A.

481. Professor Derrick Bell's theory of "interest convergence" holds that white people will support racial justice only to the extent that there is a "convergence" between the interests of the white people and racial justice. Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

dominant voice in the group.[482] If the needs of the subsumed group (here, black system-involved children) are not taken into account during the reform period, there is a risk that the subsumed group will not profit from the jurisprudential, social, and other gains the way the dominant group (white system-involved children) might.[483] While the "children are different" argument is being so prominently used to argue the severity of penalties for juveniles tried as adults for very serious crimes, it is important to remember that when the Child Savers championed their version of the "children are different" argument, they did not mean black children.[484]

The fact is that it feels as though the juvenile justice system has taken on a life of its own, evolving into more than the sum of the millions of prosecutors, judges, defense attorneys, and probation officers who make up its parts, and accomplish with almost unassailable efficiency the kind of disparate treatment that would have made Governor George Wallace proud. This situation could not be so unless the law allows it to be so; this situation could not be so unless the culture allows it to be so. This methodology allows full consideration of both why and how this phenomenon has come about, and development of a complete solution to address it.

482. *See supra* Parts I, II.A.

483. *Cf.* Phyllis M. Palmer, *White Women/Black Women: The Dualism of Female Identity and Experience in the United States*, 9 FEMINIST STUD, 151, 151–54 (1983) (describing the trend in the women's movement of black women's narrative being subsumed by the larger reform movement and the overall "invisibility" of black women in this period of American history).

484. *See supra* notes 3–4 and accompanying text. In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), a case that recently came before the Court and held that mandatory life without parole sentences for juveniles were unconstitutional, racial issues were explicitly raised by the NAACP, which filed an amicus brief. Brief for NAACP as Amici Curiae Supporting Petitioners at 2, *Miller*, 132 S. Ct. 2455 (Nos. 10-9646 & 10-9647), 2012 WL 135045, at *30 (arguing that "race critically and inappropriately influences the assessment of blameworthiness in the context of juvenile life without parole sentencing"); *see also* Robin Walker Sterling, *"Children are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 Loy. L.A. L. Rev. (forthcoming 2013).