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## Delinquent by Reason of Poverty

Tamar R. Birckhead

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## Delinquent by Reason of Poverty

Tamar R. Birckhead\*

### ABSTRACT

*This Article, written for the 12th Annual Access to Equal Justice Colloquium, explores the disproportionate representation of low-income children in the U.S. juvenile justice system. It examines the structural and institutional causes of this development, beginning with the most common points of entry into delinquency court—the child welfare system, public schools, retail stores, and neighborhood police presence. It introduces the concept of needs-based delinquency, a theory that challenges basic presuppositions about the method by which children are adjudicated delinquent. It argues that at each stage of the process—from intake through adjudication to disposition and probation—the court gives as much or more weight to the perceived “needs” of the child and her family than to the quality of the evidence against her or the ability of the state to prove its case. Typical features of the juvenile code, including the procedures for intake and diversion and the use of bench rather than jury trials, combine to shift the system’s emphasis from an evaluation of a child’s criminal responsibility to an assessment of a family’s social service needs. The standard of proof, therefore, is determined in large part by the socioeconomic class of the accused rather than the nature of the forum, an orientation that lowers the state’s burden for indigent juveniles while heightening it for affluent youth. The result is that in all but the most serious of cases, children from low-income homes do not have to be as “guilty” as those from families of*

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*means in order to enter and remain in the system, thereby widening the net of court intervention for poor children.*

*The Article establishes that the juvenile court's traditional focus on the needs of destitute youth continues to be reflected in the system's practices and procedures, despite the modern court's shift in dispositional philosophy from rehabilitation to youth accountability and public safety. It argues that the emphasis on families' needs when adjudicating delinquency has a disproportionate effect on low-income children, resulting in high rates of recidivism and perpetuates negative stereotypes based on class. It offers strategies for confronting and reversing this trend, including data collection that records the income-level of juveniles' parents; initiatives that raise awareness of needs-based delinquency among police, prosecutors, defenders, judges, and agency personnel; diversion programs that reduce the high rate of juvenile court adjudications for minor offenses; cross-agency mental health treatment plans for children and adolescents; and the adoption of international juvenile justice models that are preventative and diversionary rather than penal and punitive. The Article challenges the view that in tight budgetary times, court involvement is the only way for poor children to access services. It concludes by calling for lawmakers and system players to end the practice of needs-based delinquency, with the goal of increasing fairness for all youth in the juvenile justice system.*

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*Two days before Christmas, an eleven-year-old boy named Marcus<sup>1</sup> entered Macy's Department Store in Durham, North Carolina. Thirty minutes later, a security officer watched as Marcus carried a Macy's bag containing a pair of jeans and two Polo shirts out of the store; he suspected that the child had not paid for the items. The security officer followed Marcus and stopped him on the sidewalk. The officer searched him and found a sock in each of his front pants pockets, which he believed were also the property of Macy's. The officer brought Marcus to the back of the store, handcuffed and questioned him. He did not offer to contact the eleven-year-old boy's parents. Marcus quickly admitted to taking the merchandise.*

*Later, when Marcus's uncle arrived to take him home, the security officer explained that if the family paid the store \$150, then Macy's would "settle" the claim and would not report the incident to the police. However, the uncle, unemployed and in debt, had no savings and little cash, and was unable to pay. The security officer warned that if Marcus returned to Macy's during the next five years, he*

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1. This portrait is loosely based on a case adjudicated in juvenile delinquency court in Durham, North Carolina, in 2011. All identifying information has been changed. See notes of author (Mar. 2, 2011) (on file with author).

would be charged with trespass. Marcus was then released. That afternoon a Durham County police officer swore out a complaint for a juvenile delinquency petition that alleged misdemeanor larceny against Marcus and filed it with the juvenile division of the probation office.

Because of the minor nature of the offense and the fact that Marcus had no prior delinquency record, the intake probation officer who evaluated the case believed that a diversion plan<sup>2</sup> might be appropriate but first, she needed to meet with Marcus and his family. In January, she sent a letter to the address that Marcus had given to the police, but it was not received. At the end of December, Marcus's uncle had been unable to pay the rent, so they had moved in with friends. Not hearing from the family, the intake officer followed the policy of the probation department, which required that complaints be filed as delinquency petitions whenever juveniles failed to appear for intake.

The case was scheduled for a hearing in March. In the interim, Marcus was located and served with the larceny petition, and counsel was appointed to represent him. On the court date, Marcus and his uncle, who relied on public transportation, appeared twenty minutes late for the morning docket call. Consistent with the practice of her office to penalize juveniles who failed to appear on time for court, the prosecutor made a note to call the case last. Marcus's lawyer, a court-appointed solo practitioner, met with him for the first and last time in the hallway, explaining only that "the plea" would be quick. He gave Marcus a form to sign and returned to the courtroom. Marcus, who had no breakfast, waited with his uncle until noon when his case was finally called. The judge asked him a series of questions, to which Marcus quietly answered "yes" or "no," depending on whether his lawyer was nodding or shaking his head. Without looking up, the judge determined that Marcus was entering the admission

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2. See N.C. GEN. STAT. §§ 7B-1706(a), (b), (c) (2010) (allowing a juvenile to enter into a diversion contract for up to six months with the probation department, in which the juvenile is referred to such resources as community service, victim-offender mediation, counseling, and teen court, in lieu of filing a delinquency petition); 7B-1706(b) (2010) (allowing the probation department to reconsider the decision to divert and authorize the filing of the complaint as a petition if at any point during the time period of the contract, the juvenile and her parent or guardian fail to comply with the terms of the plan).

*“knowingly and voluntarily” and adjudicated him delinquent. Marcus was placed on Level One probation for twelve months with a long list of conditions that included the completion of one hundred hours of community service, participation in a sixteen-week intervention program on “life skills” and “the promotion of personal growth and development,” and an evaluation for drug and alcohol abuse.*

*Ten months later when Marcus’s case was formally reviewed, the judge found him in violation of the terms and conditions of probation for having failed to complete his community service hours (he completed only fifteen of the one hundred hours ordered) and the intervention program (he attended only the first two sessions). Marcus’s lawyer said little during the review hearing, and the child was given no opportunity to explain that he could not get to the thrift store to do his community service or to the life skills program meetings, because his family lacked transportation and he did not have money for the city bus. The judge placed Marcus on a second year of probation, this time at Level Two, meaning that he was one step closer to being removed from his family and placed in a group home for delinquent youth or—if he committed more serious offenses—a juvenile prison.<sup>3</sup>*

## I. INTRODUCTION

This chain of events—from arrest to formal issuance of a juvenile petition, to adjudication as a delinquent, to probation supervision—is repeated hundreds of thousands of times each year in the juvenile delinquency courts of the United States.<sup>4</sup> In 2008, courts with

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3. State juvenile codes utilize Orwellian terms, such as “youth development center” and “training school,” to refer to the institutions that house incarcerated juveniles. *See, e.g.*, N.C. GEN. STAT. § 7B-1501(29) (2010) (defining “youth development center” as a “secure residential facility”). Most of these facilities, however, have more in common with adult prisons than educational or treatment centers.

4. Sarah Livsey, *Juvenile Delinquency Probation Caseload, 2008*, OJJDP FACT SHEET 1, 1 (Dec. 2011) (finding that in 2008, probation supervision was the most severe disposition in 34 percent or 556,300 of all delinquency cases), available at <http://www.ojjdp.gov/pubs/236478.pdf>.

juvenile jurisdiction handled 1.7 million delinquency cases.<sup>5</sup> More than 500,000 of these cases resulted in children being placed on probation supervision.<sup>6</sup> Approximately 80,000 youth were confined in juvenile facilities.<sup>7</sup> Meanwhile, over 300,000 cases (18% of all delinquency cases) were dismissed at intake, and an additional 423,400 cases (25%) were handled informally, with the juvenile agreeing to a voluntary sanction, such as community service or restitution.<sup>8</sup> In other words, police officers, civilians, probation officers, judges, and lawyers (both prosecutors and defense attorneys) make decisions that cumulatively ensure that some children enter and remain in the juvenile court system, while others are diverted out of it or manage to avoid it completely. Research in the area of disproportionate minority contact (DMC) shows that the race and ethnicity of the child partially explains this result.<sup>9</sup> What has not been fully analyzed and explored is the critical role of the child's socioeconomic status, separate and discrete from race and ethnicity.

Juvenile courts have traditionally been considered the courts of the poor and impoverished. While there are, of course, juvenile courts located in suburban, middle-class, or wealthier jurisdictions, these tend to be the exception rather than the rule.<sup>10</sup> Although few juvenile courts formally keep track of the income-level of a youth's family, jurisdictions that do so have confirmed that nearly sixty percent were either on public assistance or had annual incomes of less than twenty

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5. Crystal Knoll & Melissa Sickmund, *Delinquency Cases in Juvenile Court, 2008*, OJJDP FACT SHEET 1, 1 (Dec. 2011), available at <http://www.ojjdp.gov/pubs/236479.pdf>.

6. Livsey, *supra* note 4, at 1.

7. Melissa Sickmund, *Juveniles in Residential Placement, 1997–2008*, OJJDP FACT SHEET 1, 1 (Feb. 2010) (defining “juvenile facilities” as including a wide range of housing types, including secure and nonsecure; public (state or local), private, and tribal; and long-term and short-term).

8. Knoll & Sickmund, *supra* note 5, at 3.

9. See, e.g., JAMES BELL & LAURA JOHN RIDOLFI, ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 10 (Shadi Rahimi ed., 2008), available at [http://burnsinstitute.org/downloads/BI%20Adoration%20of%20the%20Question\\_2.pdf](http://burnsinstitute.org/downloads/BI%20Adoration%20of%20the%20Question_2.pdf) (“32 of 44 states found evidence of ethnic or racial differences in juvenile justice system decision-making that was unaccounted for by differential criminal activity.”).

10. See H. Ted Rubin, *Impoverished Youth and the Juvenile Court: A Call for Pre-Court Diversion*, 16 JUV. JUST. UPDATE 2 (Dec.–Jan. 2011).

thousand dollars.<sup>11</sup> Another twenty percent had incomes of less than thirty thousand dollars.<sup>12</sup> Court officials acknowledge that they consciously and affirmatively take steps to direct low-income families into the juvenile justice system, because they believe that the court will “help the youth and facilitate the services, accountability, and discipline” needed to become a productive adult.<sup>13</sup> Unfortunately, as this Article will argue, this common perspective must be “reoriented,” as such hopes all too often fail to be realized.<sup>14</sup>

Empirical data repeatedly confirms that children born into poor families suffer a lifetime of negative consequences, and children of color are more than twice as likely to be impoverished than their white counterparts.<sup>15</sup> These disparities are seen as early as age two, when children of color have been shown to lag behind their white and Asian peers on standard child development tests.<sup>16</sup> Such differences become more pronounced as children enter school, with data revealing a significant variance in math skills tests at entry into kindergarten.<sup>17</sup> Similar income and racial disparities are also seen in regard to quality of health.<sup>18</sup> For instance, starting at age two, black children have “much higher rates” of asthma than white children; “higher incidence of asthma leads to higher health costs, [rates of] hospitalization, and . . . school [absences], which can continue to

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11. *Id.* at 1 (discussing the 2008 annual report of the Juvenile Court of Memphis and Shelby County, Tennessee).

12. *Id.*

13. *Id.* at 2.

14. *Id.*

15. TRINA SHANKS ET AL., *DIVERGING PATHWAYS: HOW WEALTH SHAPES OPPORTUNITY FOR CHILDREN 2* (2011), available at <http://insightcced.org/uploads/CRWG/DivergingPathways.pdf>; Rubin, *supra* note 10, at 2 (finding that “61% of Black children and 62% of Hispanic children in [the U.S.] live in low-income families, compared to 27% of white children”).

16. SHANKS ET AL., *supra* note 15, at 6 (“Child development skills include acquisition of object constancy; memory learning and problem solving; vocalization and beginning of verbal communication; basis of abstract thinking; mental mapping; complex language; and mathematical concept formation.”).

17. *Id.* at 6–7; see also Rubin, *supra* note 10, at 6 (finding that “80% of children of parents who [lack] a high-school degree live in poverty, as do 60% of children of parents with only a high school degree”).

18. Rubin, *supra* note 10, at 6 (“Children living in poverty often experience numerous physical and mental health problems along with difficulty accessing immediate and appropriate health care interventions.”).



have enduring consequences, especially if the condition is not well-managed.”<sup>19</sup>

Given that the population of African-American, Latino, Asian, Native American, and Pacific Islander youth is expected to “collectively outpace” the number of Caucasian children in the United States by 2024,<sup>20</sup> the population of children living in poverty will continue to expand,<sup>21</sup> and—as this Article shows—the number of low-income youth channeled into the juvenile and criminal justice systems will correspondingly grow. Although the current economic downturn provides fodder for arguing that court involvement is the most efficient way for poor children and their families to access needed services, this is a cycle of disadvantage that must be broken, as it will perpetuate a permanent underclass.

This Article, written for the 12th Annual *Access to Equal Justice Colloquium*, seeks to address the gap in legal scholarship in this area by exploring the disproportionate representation of low-income children in the U.S. juvenile justice system. Part II establishes that the traditional juvenile court’s focus was on the needs of destitute youth, a focus that continues to be reflected in the modern system’s practices and procedures, despite the shift in the court’s dispositional philosophy from the rehabilitative ideal to one of retribution. Part III

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19. SHANKS ET AL., *supra* note 15, at 7.

20. Janell Ross, *Minority Children Four Times More Likely to Start Poor, Stay Poor*, HUFFINGTON POST, Apr. 7, 2011, [http://www.huffingtonpost.com/2011/04/06/minority-children-start-poor-stay-poor\\_n\\_845866.html](http://www.huffingtonpost.com/2011/04/06/minority-children-start-poor-stay-poor_n_845866.html).

21. See MARYBETH J. MATTINGLY ET AL., ONE MILLION ADDITIONAL CHILDREN IN POVERTY SINCE 2009: 2010 DATA REVEAL NEARLY ONE IN FOUR SOUTHERN CHILDREN NOW LIVE IN POVERTY 1 (2011) (“Between 2009 and 2010 an additional one million children joined the ranks of those in poverty. This brings the total to an estimated 15.7 poor children in 2010, an increase of 2.6 million since the Great Recession began in 2007.”), available at <http://www.carseyinstitute.unh.edu/publications/IB-Bean-Same-Day-Poverty.pdf>; Jillian Berman, *One in Four Young U.S. Children Living in Poverty, Study Finds*, HUFFINGTON POST, Sept. 23, 2011, [http://www.huffingtonpost.com/2011/09/22/children-in-poverty-us\\_n\\_976868.html?view=screen](http://www.huffingtonpost.com/2011/09/22/children-in-poverty-us_n_976868.html?view=screen) (stating that child poverty in the U.S. has been growing over the past decade, and quoting the report: “children who are poor before age six have been shown to experience educational deficits, and health problems, with effects that span the life course”); Sabrina Tavernise, *2010 Data Show Surge in Poor Young Families*, N.Y. TIMES, Sept. 20, 2011 (finding that “more than one in three young families with children were living in poverty [in 2010]”); Sabrina Tavernise, *Soaring Poverty Casts Spotlight on ‘Lost Decade,’* N.Y. TIMES, Sept. 13, 2011 (“Poverty has swallowed more children, with about 16.4 million in its ranks last year, the highest numbers since 1962 . . . That means 22 percent of children are in poverty, the highest percentage since 1993.”).

examines the structural and institutional causes of this development, beginning with the most common points of entry into juvenile delinquency court—the child welfare system, public schools, retail stores, and neighborhood police presence. It introduces the concept of needs-based delinquency, analyzing the juvenile code provisions and court practices that sustain it and the individual perceptions and biases of system actors that perpetuate it. Challenging basic presuppositions about the way in which children are adjudicated delinquent in the United States, the Article argues that at each stage of the process, the court often gives as much or more weight to the perceived “needs” of the child than to the strength of the evidence against her. It demonstrates that in all but the most serious of cases, the standard of proof applied depends more upon the social service requirements of the juvenile’s family than the nature of the forum. Part IV argues that juvenile courts’ resulting orientation negatively impacts youth and ultimately increases the risk of recidivism. Children from low-income homes do not have to be as “guilty” as those from families of means to enter and remain in the juvenile system, effectively widening the net of court intervention for the poor. Part V suggests strategies for confronting and reversing this trend, while acknowledging the challenges that are likely to be encountered.

## II. DEVELOPMENT OF THE MODERN JUVENILE COURT

The modern juvenile court, in which the socioeconomic status of the child serves as a thumb on the scale at each stage of the adjudicatory process, is a product of its history. In order to appreciate how and why the juvenile court continues to adjudicate a disproportionate number of poor children delinquent, it is crucial to examine the court’s development.

### *A. The Traditional Court*

The founders of the juvenile court were part of a nineteenth century humanitarian movement that helped elevate the status of children from that of property to a dependent class in need of

protection by the state.<sup>22</sup> In 1825, reformers established the New York House of Refuge, which provided food, shelter, and education to homeless and impoverished youth, many of whom were children of recent immigrants.<sup>23</sup> They made few distinctions between children who were paupers and those who committed minor crimes.<sup>24</sup> Instead, their objective was to identify those who were still “innocent,” to remove them from the corrupting influence of “mature criminals,” and to impose appropriate “atonement and punishment.”<sup>25</sup> For those within the House of Refuge movement, poverty and crime were virtually synonymous: “Unattended pauperism was thought to ripen into criminality, and uncontrolled criminality—particularly vagrancy, beggary and minor thefts—swelled the ranks of paupers who had to be supported in public institutions.”<sup>26</sup> The reformers of this era conceived of both of these conditions in moral terms.<sup>27</sup> Philanthropists as well as public officials believed that immorality *caused* poverty and that the poor, by virtue of their socioeconomic status, posed a threat to lawful society.<sup>28</sup>

In the early 1880s, Florence Kelley, a college undergraduate who became an internationally-known child welfare expert based in Chicago, wrote her thesis on the child’s changing legal status.<sup>29</sup> Citing recently-drafted legislation explicitly designed to protect children, she declared that the child was becoming an individual in the eyes of the law, separate and discrete from his or her role in the

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22. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in A CENTURY OF JUVENILE JUSTICE 42, 46 (Margaret K. Rosenheim et al. eds., 2002).

23. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187, 1201–02 (1970) (finding that in the first year of the House, 41 percent of the youth were offspring of immigrants, and by the fourth year it was 58 percent).

24. *Id.* at 1192–93 (quoting a noted English penal reformer as stating that all children under fourteen “may be classed together . . . for there is no distinction between pauper, vagrant, and criminal children, which would require a different system of treatment”).

25. *Id.* at 1189–92, 1194.

26. *Id.* at 1199.

27. See BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 53 (1999) (citing STEVEN SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF “PROGRESSIVE” JUVENILE JUSTICE 17 (1977)); Fox, *supra* note 23, at 1199.

28. Fox, *supra* note 23, at 1199–1200.

29. Tanenhaus, *supra* note 22, at 46 (citing Florence Kelley, *On Some Changes in the Legal Status of the Child Since Blackstone*, INT’L REV. 7, 13 (1882)).

family.<sup>30</sup> In this way, Kelley and other reformers believed they had both a “legal opening as well as the social responsibility” to carry forward the doctrine of *parens patriae*, in which the state serves as a surrogate parent to the child when the family fails to meet its obligations.<sup>31</sup> By the early 1890s, developments in nineteenth century corrections systems helped further this notion. The reform school movement utilized innovations that later formed the basis for the juvenile court, including an age-based distinction between juvenile and adult offenders, indeterminate commitments, and a broadened legal authority that encompassed children convicted of crimes as well as those adjudicated neglected and incorrigible.<sup>32</sup> In addition, the Massachusetts probation system required criminal courts to appoint probation officers in juvenile cases and provided for the placement of children in foster homes.<sup>33</sup>

The first juvenile court was established in 1899 in Chicago through the work of Lucy Flower, a philanthropist; Julia Lathrop, a child-welfare expert;<sup>34</sup> and Jane Addams, the founder of the pioneering settlement, Hull House, where college-educated men and women who sought to work with the poor could live.<sup>35</sup> Flower, who herself had been orphaned as a child, married a prominent attorney and served on the boards of several of Chicago’s charitable institutions, including orphan asylums.<sup>36</sup> Distressed by the punitive treatment of young offenders who were tried and incarcerated alongside their adult counterparts, and by the increasing inability of working families to supervise their children, she called for the creation of a “parental court” to hear the cases of dependent and delinquent children under sixteen.<sup>37</sup> Addams, too, through her

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30. *Id.*

31. *Id.* The Latin term *parens patriae* translates literally as “parent of his or her country.” BLACK’S LAW DICTIONARY 1144 (8th ed. 2004).

32. FELD, *supra* note 27, at 51.

33. Tanenhaus, *supra* note 22, at 47; *see also* 2 GRACE ABBOTT, *THE CHILD AND THE STATE* 330 (1938).

34. Tanenhaus, *supra* note 22, at 42.

35. CHRISTOPHER P. MANFREDI, *THE SUPREME COURT AND JUVENILE JUSTICE* 26 (1998); *see also* JANE ADDAMS, *TWENTY YEARS AT HULL-HOUSE WITH AUTOBIOGRAPHICAL NOTES* 129–53 (1945).

36. DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* 4–5 (2004).

37. *See id.* at 4.

observations of children living in the neighborhood served by Hull House, became convinced that “society’s existing response to crime was virtually irrelevant to the vast majority of offenders, who were young.”<sup>38</sup> Through their benevolent work, Flower and Addams each formed a bond with Lathrop, a social worker who herself lived at Hull House,<sup>39</sup> which had become an impromptu kindergarten, infirmary, meeting place, night school, and arts and social center for the city’s impoverished West Side.<sup>40</sup>

The “moral crusade” that these women spearheaded on behalf of indigent children took more than a decade and culminated in the world’s first juvenile court act.<sup>41</sup> The law represented the merging of concerns about poverty and child welfare with those regarding crime control and high recidivism rates.<sup>42</sup> As David S. Tanenhaus has written, Chicago’s juvenile court movement constituted “a local manifestation of a transatlantic social movement in the 1880s and 1890s to solve the problems of crime and poverty, which were often conceived of and discussed in similar terms.”<sup>43</sup> Reformers of this period focused on the “environmental causes” of delinquency, deemphasizing the specific misconduct of the child in favor of evaluating the broader needs—social, physical, and educational—of the family.<sup>44</sup> Children who 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.<sup>45</sup> The Illinois law served as the model for most of the other states and for nations in Europe, South America, and Asia.<sup>46</sup> By 1925, all but two states had a juvenile court, and there was one operating in every city with a population greater than one hundred thousand.<sup>47</sup>

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38. MANFREDI, *supra* note 35, at 26.

39. *Id.* at 25–26; *see also* TANENHAUS, *supra* note 36, at 4–5.

40. *See* MARGARET TIMS, *JANE ADDAMS OF HULL HOUSE: 1860–1935*, at 49–52 (1961).

41. TANENHAUS, *supra* note 36, at 4.

42. *Id.* at 4–5.

43. *Id.* at 5.

44. DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 205–07*, 210 (1980).

45. HERBERT H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 20 (1927).

46. TANENHAUS, *supra* note 36, at 4.

47. Tanenhaus, *supra* note 22, at 45.

For its first fifty or sixty years, juvenile court jurisdiction was broad and extended over all types of conduct by and circumstances affecting children. The law did not differentiate among children who were dependent, neglected, or delinquent, for in many instances a child could be placed in more than one of these categories.<sup>48</sup> Instead, a “delinquent child” was generally defined as “incorrigible,” “growing up in idleness or crime,” or “whose conduct and environment seems to point to a criminal career.”<sup>49</sup> A few states did not determine jurisdiction based on the status of the child but instead enumerated the specific *conditions* under which a child could be brought into juvenile court, including conditions typically covered by the definitions of dependency, neglect, delinquency, and “mental defect.”<sup>50</sup> The child would then be adjudicated “as a ward of the juvenile court in need of care and protection rather than as a delinquent or a dependent child.”<sup>51</sup>

As early as the 1920s, there were serious critics of the juvenile court. For instance, in 1927, Herbert Lou acknowledged the dangers inherent in the virtually unfettered discretion wielded by juvenile court judges, writing that “[t]he ‘blanket’ provisions of the statutes, if unwisely construed, would give to the juvenile courts so wide and such arbitrary powers that, compared to them, as Dean Pound has said, ‘the powers of the court of Star Chamber were a bagatelle.’”<sup>52</sup> In 1949, Paul Tappan questioned the juvenile court movement’s interpretation and use of the concept of *parens patriae*, emphasizing the importance of “sav[ing] the child from his saviors.”<sup>53</sup> Tappan contended that the doctrine neither required nor justified the procedural informality that characterized most juvenile courts.<sup>54</sup> He called for an end to traditional practices that violated the presumption

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48. LOU, *supra* note 45, at 52; *see also* Fox, *supra* note 23, at 1193.

49. *See, e.g.*, Illinois Revised Statutes, ch. 23 ILL. COMP. STAT.; § 169 (1907); *see also* LOU, *supra* note 45, at 65.

50. LOU, *supra* note 45, at 53 (citing the Laws of California, 1915, ch. 631).

51. *Id.*

52. LOU, *supra* note 45, at 68 (citations omitted).

53. PAUL TAPPAN, JUVENILE DELINQUENCY 208 (1949); *see also* MANFREDI, *supra* note 35, at 37.

54. TAPPAN, *supra* note 53, at 204–07 (“Children are adjudicated in this way every day without visible manifestations of due process. They are incarcerated. They become adult criminals, too, in thankless disregard of the state’s good intentions as *parens patriae*.”).

of innocence, such as the dissemination of probation reports prior to adjudication;<sup>55</sup> and he suggested practical reforms that included limiting juvenile court's jurisdiction, employing more consistent adjudicative procedures, and imposing fewer institutional commitments at disposition.<sup>56</sup> Growing critiques of traditional juvenile court practices culminated in a "comprehensive and influential" study published in 1966 in the *Harvard Law Review*, which relied on empirical evidence to conclude that the role of law enforcement agencies in the juvenile court system had expanded far beyond their discretionary arrest powers;<sup>57</sup> that judges in effect discouraged juveniles from retaining counsel, such that attorneys appeared on behalf of juveniles in only five percent of cases;<sup>58</sup> and that some judges reflexively imposed punitive incarceration at disposition.<sup>59</sup> In short, the survey of juvenile court practices "offered additional evidence that the rehabilitative ideal was either fundamentally flawed or imperfectly implemented."<sup>60</sup> Such scholarship set the stage for the 1967 Supreme Court decision, *In re Gault*.<sup>61</sup>

### B. *The Worst of Both Worlds*

In mandating that juveniles have basic Constitutional rights, including the right to counsel, the privilege against self-incrimination, and the right to cross-examine witnesses,<sup>62</sup> the landmark case of *In re Gault* called for "radical changes" to be made in delinquency courts

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55. *Id.* at 212–15.

56. *Id.* at 209–12, 254–55, 264–74.

57. Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 776–87 (1966) (discussing the wide discretion given to police during the screening process, the fact that the majority of juvenile cases are referred to the court by the police, and that half of all police contacts with youth are settled informally without court referral).

58. *Id.* at 796–99.

59. *Id.* at 807–08, 810 ("Where institutional facilities are not truly therapeutic but simply a penal institution separate from that provided for 'hardened' adult criminals, they should not be available as a dispositional alternative to the juvenile court judge; if the security needs of society demand confinement, the juvenile's case should be waived to an ordinary court for trial."); see also MANFREDI, *supra* note 35, at 40–42.

60. MANFREDI, *supra* note 35, at 41.

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

62. *Id.* at 57.

across the United States.<sup>63</sup> The decision represented a recognition by the Court that juveniles were being summarily adjudicated delinquent and sentenced to long terms of incarceration without the benefit of either due process protections on the front end or effective rehabilitative services on the back end, creating a forum in which youth were receiving “the worst of both worlds.”<sup>64</sup> Given that the *Harvard Law Review*’s juvenile court study was cited by the *Gault* majority numerous times,<sup>65</sup> it is not implausible to suggest that the Court’s decision was—in some important respects—a direct response to the legal community’s increasingly vocal critiques.<sup>66</sup>

*Gault* also paved the way for a critical reinterpretation of traditional juvenile court history. In 1969 and 1970, prominent scholars argued that the founders intended for the procedural informality of the court to serve not as a means for providing treatment and services but as a method of social control.<sup>67</sup> These revisionists challenged *Gault*’s characterization of the juvenile court as a benevolent institution, which was created to “save” wayward youth and merely missed the mark.<sup>68</sup> They asserted that the standards set by the court for “family propriety” were so high that few parents could meet them, but that “only lower-class families were evaluated as to their competence, whereas the propriety of middle-class families was exempt from investigation and recrimination.”<sup>69</sup> From this perspective, the juvenile court was—from the outset—an instrument

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63. Fred P. Graham, *High Court Rules Adult Code Holds in Juvenile Trials*, N.Y. TIMES, May 16, 1967, at A1.

64. See FELD, *supra* note 27, at 162; see also *Kent v. United States*, 383 U.S. 541, 555–56 (stating that because juvenile court proceedings are neither wholly civil nor criminal in nature, a juvenile “gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children”).

65. See, e.g., *Gault*, 387 U.S. at 11 n.7, 13 n.11, 15 n.14, 18 n.23, 24 n.31.

66. MANFREDI, *supra* note 35, at 42.

67. See, e.g., ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 126, 134–36, 176–81 (Rutgers U. Press 2d ed. 2009) (1969) (stating that the juvenile court movement depicted “delinquents” as “needing firm control and restraint if their reform was to be successful” and that the founders of the court were motivated by an authoritarian impulse, which called for imprisonment to remove delinquents from “corrupting influences”); Fox, *supra* note 23, at 1229–30; see also FELD, *supra* note 27, at 55–56.

68. See PLATT, *supra* note 67, at 134–36, 176–81 (“The ‘invention’ of delinquency consolidated the inferior social status and dependency of lower-class youth.”); Fox, *supra* note 23, at 1229–30; see also *Gault*, 387 U.S. at 21, 22; MANFREDI, *supra* note 35, at 43.

69. PLATT, *supra* note 67, at 135.



of “social coercion” designed to dominate the urban poor, perpetuate existing class structures, and routinize state control over children’s behavior.<sup>70</sup>

Despite *Gault*’s introduction of basic due process rights and procedures into the juvenile court model, the decision has its critics.<sup>71</sup> Through the 1980s and 90s, the argument that juveniles received the “worst of both worlds” continued to resonate, as ever greater numbers of young offenders were tried as adults and as the punitive ethos eclipsed the rehabilitative ideal.<sup>72</sup> In recent years, Emily Buss has argued that by modeling juvenile court solely on adult criminal court, *Gault* missed the opportunity to fashion an adjudicative system that responded to the very specific needs and developmental posture of youth.<sup>73</sup> Barry Feld has suggested that *Gault*, as well as other Supreme Court decisions that extended procedural protections to juveniles, failed to take into account whether young offenders are, in fact, developmentally capable of exercising rights such as the privilege against self-incrimination.<sup>74</sup> The social science research of Feld and others indicates that contrary to *Gault*, juveniles require

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70. See *id.* at 134–40, 176–81; see also Fox, *supra* note 23, at 122–30; FELD, *supra* note 27, at 56.

71. See, e.g., PLATT, *supra* note 67, at 174–75 (“The *Gault* decision will not in itself enhance the bargaining power or autonomy of young offenders. The participation of lawyers in juvenile court is likely to make the system more efficient and orderly, but not substantially more fair or benevolent.”).

72. See Elizabeth S. Scott, *The Legal Construction of Childhood*, in A CENTURY OF JUVENILE JUSTICE 113, 132–33 (Margaret K. Rosenheim et al. eds., 2002) (“Responding to an increase in violent juvenile crime (particularly homicide) in the 1980s and 1990s, reformers advocate policies under which juveniles (at least those who commit serious crimes) are tried in adult courts and sentenced in adult prisons. The goals of modern criminal justice reform are public protection and punishment, and in service of these goals, reform rhetoric has obliterated any distinctions between youthful offenders and adults.”).

73. Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39, 41–43 (2003) (“In failing to consider what procedural adaptations were demanded by the special context of juvenile court, *Gault* reduced the analysis of children’s due process rights to the simple-minded question of adult rights or no rights. And in the many states considering accused juveniles’ due process rights since *Gault*, the Court has adhered to this narrow and nonsensical framing.”).

74. FELD, *supra* note 27, at 162–63; see also Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFFALO L. REV. 1447, 1479–83 (2009) (discussing social science research suggesting that when juveniles perceive that they have been treated fairly by police and the courts, a judgment shown *not* to be dependent upon the outcome of the case, they are less likely to recidivate). *But see* J.D.B. v. North Carolina, 564 U.S. \_\_\_ (2011) (holding that a juvenile’s youth may be a factor in determining whether a suspect was in custody, such that Miranda warnings should have been given).

more—not the same or fewer—procedural safeguards than adults in order to “achieve procedural equality and to enable them to exercise those rights they theoretically possess.”<sup>75</sup> Further, state assessments of access to counsel and quality of representation in delinquency proceedings, coordinated by the National Juvenile Defender Center, revealed that many juvenile court judges persist in focusing on the needs of the youth without first objectively determining whether a criminal offense has even been committed.<sup>76</sup> These empirical studies have confirmed that judges, prosecutors, police officers, and lawyers continue to adhere to the notion that the juvenile court requires complete procedural informality and wide judicial discretion to function.<sup>77</sup> Moreover, the assumption and belief that delinquency

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75. FELD, *supra* note 27, at 163; *see, e.g.*, Steven A. Drizin & Richard A. Leo, *The Problem of False Confession in the Post-DNA World*, 82 N.C. L. REV. 891, 945 (2004) (showing that out of 125 proven false confessions, 62 percent were under the age of 25 and 35 percent were under 18); Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26 (2006) (analyzing quantitative and qualitative data that questions adolescents' adjudicative competence and their capacity to exercise or waive *Miranda* rights); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219 (2006) (analyzing data on police interrogations of juveniles who waived their *Miranda* rights, and arguing that such interrogations be recorded in their entirety, that the length of the interrogation be limited, and that the use of deceit and false evidence to elicit confessions be prohibited); Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 356–57 (2003) (noting that children 15 years of age or younger are more likely than older teens to comply with authority and confess to an offense); *see also* Allison Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 952 (2010) (finding that police officers routinely interrogate juveniles using the same tactics that they use on adult suspects).

76. *See, e.g.*, ELIZABETH M. CALVIN ET AL., ABA JUVENILE JUSTICE CTR. ET AL., WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS 23–24 (2003) [hereinafter WASHINGTON ASSESSMENT], <http://www.njdc.info/pdf/wareport.pdf> (noting that some juvenile court judges have personal biases in favor of a *parens patriae* or surrogate parent approach to young offenders, making it difficult for them to maintain objectivity as neutral fact-finders during adjudication); *see also* Tamar R. Birckhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959, 970–79 (2010) (describing the ways in which the attitudes and decisions of each of the principal players in the juvenile courtroom combine to undermine the duty to provide juveniles with zealous, client-centered representation).

77. *See, e.g.*, ABA JUVENILE JUSTICE CTR. & S. CTR. FOR HUMAN RIGHTS, GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 24 (2001), <http://www.njdc.info/pdf/georgia.pdf> (“Overall, there is a general sense of futility among defense attorneys about preparing juvenile cases for adjudication because courts are less interested in inquiring into the guilt or innocence of a child, and more intent on dispensing treatment or punishment to the child.”); TEXAS APPLESEED FAIR DEF.

court is the ideal vehicle for indigent children to receive social services still persists, nearly forty-five years after *Gault*.<sup>78</sup> Part III examines the causes of this development.

### III. DISPROPORTIONATE REPRESENTATION OF LOW-INCOME CHILDREN: STRUCTURAL AND INSTITUTIONAL CAUSES

Although the concept of needs-based delinquency is rooted in the early history of juvenile court, the phenomenon continues to be perpetuated through the structure and culture of the modern juvenile court. In order to illustrate the ways in which both law and practice privilege consideration of juveniles' needs over the weight of the evidence against them, this Part examines the system's most common points of entry, its governing laws and policies, and the attitudes and assumptions of those who operate within it.

#### A. Points of Entry

##### 1. Child Welfare System

Adolescents who are exposed to traumatic events, including those who are victims of abuse, neglect, or other maltreatment, cross over from the child welfare to the juvenile delinquency system at high percentages.<sup>79</sup> Studies indicate that youth in out-of-home placement

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PROJECT ON INDIGENT DEF. PRACTICE IN TEX.—JUVENILE CHAPTER, SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS 16–17 (2000) [hereinafter TEXAS ASSESSMENT], <http://www.njdc.info/pdf/TexasAssess.pdf> (finding that defense attorneys have little, if any, contact with prosecutors prior to court hearings, all such hearings are informal, and motions for discovery are uncommon); Birckhead, *supra* note 76, at 970–79.

78. See, e.g., ROBIN WALKER STERLING, NAT'L JUV. DEFENDER CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 5 (2009), available at [http://www.njdc.info/pdf/njdc\\_role\\_of\\_counsel\\_book.pdf](http://www.njdc.info/pdf/njdc_role_of_counsel_book.pdf) (“[I]n some jurisdictions, because they view juvenile court first and foremost as an opportunity to ‘help a child,’ judges and other system participants undermine attorneys’ efforts to challenge the government’s evidence and provide zealous, client-centered representation, considering such advocacy an impediment to the smooth function of the court.”); see also Birckhead, *supra* note 76, at 970 (quoting a juvenile court judge in North Carolina as stating, “We don’t pay much attention to the fact-portion of the case. We just want to get these kids help.”).

79. FED. ADVISORY COMM. JUV. JUST., ANNUAL REPORT 2010, at 3–4 (Nov. 2010), available at <http://www.facjj.org/annualreports/00-FACJJ%20Annual%20Report-FINAL%20508.pdf>; SHAY BILCHIK & MICHAEL NASH, CHILD WELFARE AND JUVENILE JUSTICE: TWO SIDES OF THE SAME COIN, JUV. & FAMILY JUST. TODAY 16, 17 (Fall 2008), available at <http://cjjr>

and group homes for purposes of foster care, mental health treatment, or drug and alcohol addiction are twice as likely to commit delinquent acts as youth who receive in-home or community-based services.<sup>80</sup> Crossover youth are also twice as likely as juvenile justice-only youth to recidivate.<sup>81</sup> Research has shown that although children of color are not at greater risk of being neglected or abused, they are more likely to be placed in foster care, remain there longer, and receive fewer services than white children, and they are less likely to be reunited with their families of origin.<sup>82</sup> Children of color in the child welfare system are twice as likely to be arrested as are similarly-situated white children.<sup>83</sup>

Similarly, young people who enter the juvenile justice system as “status offenders,”<sup>84</sup> as a result of having been adjudicated as runaways, truants, or “incorrigible,”<sup>85</sup> also crossover into delinquency court at high percentages.<sup>86</sup> Often this happens seamlessly: a child who is already under the jurisdiction of the juvenile court as a result of not attending school, for instance, is more likely to be charged with a delinquent act, such as disorderly conduct at school, than a child who is not already in the system. Because of state and federal

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.georgetown.edu/pdfs/Fall%2008%20NCJFCJ%20Today%20feature.pdf. Children known to both the child welfare and juvenile justice system are also referred to as “crossover youth,” “dual-jurisdiction cases,” “cross-system cases,” and “dually adjudicated youth.” FED. ADVISORY COMM. JUV. JUST., *supra*, at 3.

80. FED. ADVISORY COMM. JUV. JUST., *supra* note 79, at 4.

81. Bilchik & Nash, *supra* note 79, at 19.

82. FED. ADVISORY COMM. JUV. JUST., *supra* note 79, at 4.

83. Bilchik & Nash, *supra* note 79, at 17.

84. “The 2011 Code of Federal Regulations for the Juvenile Justice and Delinquency Prevention Act (JJDP) defines ‘status’ offenders” as: a juvenile offender who has been charged with or adjudicated for conduct which would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult.” See Linda A. Szymanski, *What is the Valid Court Order Exception to Secure Detention for Status Offenders?*, NCJJ SNAPSHOT 1, 1 (May 2011), available at [http://new.ncjj.org/pdf/Snapshots/2011/vol16\\_no5\\_What%20is%20the%20Valid%20Court%20Order%20Exception%20to%20Secure%20Detention%20for%20Status%20Offenders.pdf](http://new.ncjj.org/pdf/Snapshots/2011/vol16_no5_What%20is%20the%20Valid%20Court%20Order%20Exception%20to%20Secure%20Detention%20for%20Status%20Offenders.pdf).

85. See HANNAH BENTON ET AL., REPRESENTING JUVENILE STATUS OFFENDERS 23–24 (2010) (stating that behaviors in this category range from a child physically abusing a parent to consistently violating a curfew to repeated verbal fighting among family members).

86. See *id.* at 130 (stating that “parents often attempt to deal with family conflicts or adolescent mental illness or substance abuse by urging that their child be charged with a crime”).

statutory limits on the length of commitments<sup>87</sup> as well as post-detention safeguards for status offenders,<sup>88</sup> juvenile court judges and probation officers have added incentives to pursue the filing of delinquency petitions against “undisciplined” youth.<sup>89</sup> In fact, anecdotal evidence reveals instances in which judges and other court officials have explicitly urged parents of status offenders to file delinquency petitions against their children for minor crimes so that the court could provide a wider range of services and impose more punitive sanctions.<sup>90</sup>

Despite the fact that crossover youth frequently move back and forth between child welfare and delinquency court, there has been little “integration and coordination” between the two systems.<sup>91</sup> Child welfare agencies often close the files of children who become involved in the juvenile justice system; the two systems do not share data; and there is no continuity of care in the form of staff,

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87. *See, e.g., id.* at 2 (stating that federal regulations “prohibit detention [of status offenders] beyond a limited time period before and after an initial court appearance”); Szymanski, *supra* note 84, at 1 (finding that currently sixteen states prohibit secure detention for *all* status offenders, including those who have violated court orders).

88. *See* BENTON ET AL., *supra* note 85, at 2 (discussing the requirements under the JJDPa that a status offender be interviewed within 24 hours of being detained by someone who is not a part of the court or law enforcement agency, that the interviewer submit a report to the court that assesses whether less-restrictive settings had been considered, and that the court release the youth from detention pending a violation hearing unless it was shown that continued detention was necessary for protective purposes or to assure the juvenile’s appearance in court).

89. *Compare* Szymanski, *supra* note 84, at 1 (stating that to be eligible for federal funding under the JJDPa, states are only allowed to hold status offenders in secure detention for violations of a valid court order but are otherwise required to remove them from detention and provide prevention, diversion, and treatment services), with Andrea J. Sedlak & Carol Bruce, Office of Justice Programs, U.S. Department of Justice, *Youth’s Characteristics and Backgrounds: Findings from the Survey of Youth in Residential Placement*, JUV. JUST. BULL. 1, 2 (Dec. 2010), <https://www.ncjrs.gov/pdffiles1/ojjdp/227730.pdf> (finding that in 2003, more than one hundred thousand youth ages ten through twenty were in residential placement in the U.S. because they were arrested for, charged with, or adjudicated for an offense).

90. *See, e.g.,* BENTON ET AL., *supra* note 85, at 130 (stating that parents are told that “status offense proceedings lack substantial service options for youth” and that “the only way to access . . . services is through the delinquency system”); *see* notes of author (Sept. 7, 2005) (on file with author).

91. FED. ADVISORY COMM. JUV. JUST., *supra* note 79, at 3. *But see, e.g.,* E-mail from Marcia Morey, Chief District Court Judge Durham County, N.C., to author (Sept. 20, 2011) (on file with author) (describing the recently-established dual-jurisdiction court in Durham for children in both the child welfare and delinquency systems, and stating that “[w]e are trying to bridge the two systems to have a common order, plan and purpose”).

caseworkers, or treatment providers.<sup>92</sup> Data shows that many crossover children are racial and ethnic minorities, female, and have mental health and substance abuse problems that are left untreated by both systems.<sup>93</sup> Further, crossover girls are more likely to become pregnant than juvenile justice-only females.<sup>94</sup> Once adolescents age out of the child welfare system or are discharged by juvenile delinquency court, agencies and insurers typically discontinue their access to services.<sup>95</sup> All of these factors place crossover youth at greater risk of reoffending.<sup>96</sup>

Furthermore, research indicates that child protective service agencies (CPS) serve low-income and indigent families at higher percentages than families of means.<sup>97</sup> Data also shows that poverty, especially in combination with parental depression, substance abuse, and social isolation, is strongly associated with child maltreatment, particularly neglect.<sup>98</sup> There are a number of theories for these correlations, including the suggestion that unemployment and underemployment create significant stress within families, which in turn, leads to higher rates of maltreatment in these households.<sup>99</sup> Other studies demonstrate that rates of child abuse and neglect are, in fact, similar across socioeconomic lines but that suspected child maltreatment in low-income families is reported more frequently to CPS because the poor have “more contact with and are under greater scrutiny” from individuals who are legally mandated reporters.<sup>100</sup>

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92. FED. ADVISORY COMM. JUV. JUST., *supra* note 79, at 3–4.

93. *Id.*; Bilchik & Nash, *supra* note 79, at 17–18.

94. Bilchik & Nash, *supra* note 79, at 18.

95. See FEDERAL ADVISORY COMM. JUV. JUSTICE, *supra* note 79, at 4.

96. *Id.* at 4.

97. See JILL GOLDMAN ET AL., A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE 33 (2003), available at <http://www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf> (“In 1999, 85 percent of States identified poverty and substance abuse as the top two problems challenging families reported to child protective service (CPS) agencies.”); Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 898–99 (2009).

98. GOLDMAN ET AL., *supra* note 97, at 33.

99. *Id.*

100. See, e.g., *id.* at 33–34 (citing Rod Plotnik, *Economic Security for Families with Children*, in THE CHILD WELFARE CHALLENGE: POLICY, PRACTICE, AND RESEARCH 95, 103–04 (P.J. Pecora et al. eds., 2d ed. 2000)). *But see* Bartholet, *supra* note 97, at 910–20 (debunking this claim).

Likewise, families whose children have been adjudicated for status offenses are also frequently indigent,<sup>101</sup> as parents may turn to the court because they lack the resources to secure private assistance for their children who have run away, stopped attending school, or are “ungovernable.”<sup>102</sup> As a result, both the child welfare and status offender systems are common points of entry into delinquency court, illustrating that juvenile court continues to make few meaningful distinctions between poor and guilty children.

## 2. Public Schools

Children in indigent families are more likely to attend low quality schools, perform poorly on standardized tests, and complete fewer years of formal education.<sup>103</sup> Low-income children are less likely to have parents who can serve as effective advocates for them, ensure that their educational needs are met, and provide appropriate supervision and support for them outside of school hours.<sup>104</sup> Moreover, school administrators often fail to identify poor and minority children as having special education needs and impose punitive sanctions for misbehavior that is a manifestation of their disability, rather than implement an individualized behavior management plan.<sup>105</sup> As a result of these factors, economically

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101. See BENTON ET AL., *supra* note 85, at vii (stating that status offenders face “insurmountable obstacles,” including “desperately poor and violent neighborhoods”).

102. See *id.* at 130; see also *Families Shifting from Private to Public Health Insurance for Children*, 30 CHILD L. PRACTICE 81, 96 (2011) (finding that families, particularly in rural and inner-city areas, are increasingly relying on public health insurance plans to provide coverage for their children, a “growing trend” that researchers say is tied to job losses and coverage changes to private health insurance plans).

103. Rod Plotnik, *supra* note 100, at 103; Rubin, *supra* note 10, at 6 (finding that schools in low-income neighborhoods struggle to attract top teachers and rely on those who have been rejected by more wealthy school districts).

104. See Rubin, *supra* note 10, at 2; see also Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing*, in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 23, 63–64 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) (discussing lack of access to resources, including health insurance, academic tutoring, and legal assistance, because of low socioeconomic status).

105. Marsha L. Levick & Robert G. Schwartz, *Changing the Narrative: Convincing Courts to Distinguish between Misbehavior and Criminal Conduct in School Referral Cases*, 9 D.C. L. REV. 53, 53–54 n.3 (2007); Morgan Smith & Ari Auber, *Report Questions How Schools Mete Out Discipline*, TEXAS TRIB., July 19, 2011 (reporting that “minorities and special education

disadvantaged children are more likely to receive out-of-school suspensions and to be expelled than their middle- and upper-middle class counterparts, particularly if they are children of color.<sup>106</sup>

The vast majority of low-income children attend public elementary, middle, and high schools in which disciplinary policies criminalize the same behavior that is addressed internally at private schools.<sup>107</sup> Since the mid-1990s, “zero-tolerance” has been invoked to justify the punishment of public school students for everything from profanity, to running in the hall, to doodling on a desk.<sup>108</sup> Acts that may have resulted in an adolescent being sent to the principal’s office now end up in juvenile court charged as disorderly conduct or vandalism.<sup>109</sup> In numerous jurisdictions, campus police officers have issued criminal citations to students as young as six for minor offenses that carry fines of as much as five-hundred dollars, the

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students who caused ‘emotional disturbances’ were more likely than white students to be disciplined”).

106. See CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 78 (2010) (“Black children are more than three times more likely than whites to be suspended today. . . . [S]chools in recent years have begun exercising their disciplinary authority to suspend and expel students more frequently and in far more questionable circumstances.”); Rubin, *supra* note 10, at 6 (finding that schools in low-income neighborhoods “may be home to higher percentages of children who are ill prepared to learn,” resulting in more classroom disruptions, more referrals to the principal, and more suspensions and expulsions); Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 1016 (2009–10) (finding that students who have low socioeconomic status are more likely to be arrested and have higher rates of referrals by school officials to police).

107. Compare JAMES BELL, FOUNDER AND EXEC. DIR., W. HAYWOOD BURNS INST., ADDRESS AT THE TENTH ANNUAL ZEALOUS ADVOCACY CONFERENCE AT THE UNIVERSITY OF HOUSTON LAW CENTER: DISPROPORTIONATE MINORITY CONTACT (May 20, 2011) (notes on file with author); with SIMONE ROBERS ET AL., U.S. DEPT. OF EDUC., NAT’L CENTER EDUC. STAT. 2011-002, INDICATORS OF SCHOOL CRIME AND SAFETY: 2010 46–48 (2010), available at <http://nces.ed.gov/pubs2011/2011002.pdf> (finding that a greater percentage of public school teachers than private school teachers reported that student misbehavior interfered with their teaching).

108. See KIM ET AL., *supra* note 106, at 122–27; Chauncey D. Smith, Note, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1013 (2009); Donna St. George, *In Texas Schools, a Criminal Response to Misbehavior*, WASH. POST, Aug. 21, 2011 (reporting that Connecticut officials began more closely screening cases referred to juvenile court from the schools after students were charged with violations “such as having soda, running in the hall and dressing improperly”).

109. See Levick & Schwartz, *supra* note 105, at 75.



payment of which places a particular burden on poor families.<sup>110</sup> In fact, it is commonplace in some states such as Texas for students to be arrested and sentenced to jail when they reach age seventeen for failure to pay these fines.<sup>111</sup> In short, increased police presence and use of surveillance technology in low-income schools have altered the institutional atmosphere, creating a more punitive climate.<sup>112</sup>

Moreover, public school “tracking” policies, in which students are sorted according to academic ability, also feed the pipeline. Statistics confirm that schools in poor neighborhoods provide students with more vocational tracks and fewer “college gateway classes.”<sup>113</sup> Research shows that as a result, tracking fosters low self-esteem and exacerbates under-performing students’ self-perceptions.<sup>114</sup> Further, research indicates that children who are suspended or otherwise excluded from school are more likely to perform poorly on standardized tests and to drop out; if they do, they are eight times more likely to be incarcerated as those who graduate from high school.<sup>115</sup> In these ways, the “school-to-prison pipeline” channels disproportionately large numbers of at-risk youth out of classrooms and into juvenile courtrooms each year.<sup>116</sup>

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110. See St. George, *supra* note 108.

111. See, e.g., Brian Thevenot, *ACLU Sues Hidalgo for Jailing Teens over Unpaid Tickets*, TRIBBLOG, TEXAS TRIB. (July 27, 2010), <http://www.texastribune.org/texas-dept-criminal-justice/texas-department-of-criminal-justice/aclu-sues-hidalgo-for-jailing-teens-unpaid-tickets/>.

112. Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 360–61, 366–69 (2010–11) (finding that law enforcement officers stationed permanently at schools are “more likely to be found in schools in urban neighborhoods with high poverty”).

113. See JUDITH A. BROWNE, *DERAILED: THE SCHOOLHOUSE TO JAILHOUSE TRACK 9* (2003) (“[P]oor children are disproportionately slow-tracked into ‘less demanding’ or vocational courses, a track away from college and toward low-paying and low-skilled jobs.”); Smith, *supra* note 108, at 1036–37.

114. BROWNE, *supra* note 113, at 9; Smith, *supra* note 108, at 1036–37.

115. ADVANCEMENT PROJECT, *TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE* 29 (2010), [http://www.advancementproject.org/sites/default/files/publications/rev\\_fin.pdf](http://www.advancementproject.org/sites/default/files/publications/rev_fin.pdf); Donald H. Stone & Linda S. Stone, *Dangerous and Disruptive or Simply Cutting Class: When Should Schools Kick Kids to the Curb?: An Empirical Study of School Suspension and Due Process Rights*, 13 J.L. & FAM. STUD. 1, 15–17 (2011).

116. See ADVANCEMENT PROJECT, *supra* note 115, at 5; KIM ET AL., *supra* note 106, at 1; see also Kelly Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25, 25 (2010) (finding that schools with a large percentage of black students are not only “more likely to use punitive disciplinary responses, but also more likely to use extremely punitive discipline and to implement zero tolerance policies”).

### 3. Retail Stores

In 2008, law enforcement agencies in the United States arrested an estimated 2.11 million youth under the age of eighteen.<sup>117</sup> Over three hundred thousand of these juveniles<sup>118</sup> were arrested for larceny or theft crimes.<sup>119</sup> Seventy-four percent of all juvenile arrests for property crimes were for larceny or theft, with shoplifting the most common.<sup>120</sup> After declining significantly between 1997 and 2006, the juvenile arrest rate for larceny offenses increased 17 percent from 2006 to 2008.<sup>121</sup>

Merchants, whether from small independently-owned local stores or franchises affiliated with national corporations, traditionally have enormous discretion when handling cases of suspected shoplifting or larceny.<sup>122</sup> When the suspects are minors, this discretion tends to be wielded even more freely, as store managers and loss prevention associates recognize the potential stigma and harm that can attach when cases are referred to juvenile court.<sup>123</sup> They also appreciate the costs involved when store personnel must coordinate with police and prosecutors and take time off from work to appear in court.<sup>124</sup> As a result, many acknowledge that as long as the youth's parents seem "sufficiently concerned," referring the case to law enforcement would be "counterproductive."<sup>125</sup> Because decisions and judgments must be made quickly and with limited information, however, personal biases

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117. Charles Puzzanchera, *Juvenile Arrests 2008*, JUV. JUST. BULL. 1 1 (Dec. 2009), <https://www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf>.

118. The term "juvenile" as it is used here refers to youth younger than eighteen years of age.

119. CHARLES PUZZANCHERA ET AL., EASY ACCESS TO FBI ARREST STATISTICS 1994–2007, <http://www.ojjdp.gov/ojstatbb/ezaucr/> (indicating that in 2007, there was an estimated 300,300 juveniles arrested for larceny-theft crimes in the U.S.). Juveniles accounted for twenty-six percent of all property crime arrests and eighteen percent of all property crimes that were cleared (or "closed") by arrest or otherwise. Puzzanchera, *supra* note 117, at 1, 2.

120. Puzzanchera, *supra* note 117, at 7.

121. *Id.*

122. See KERRY SEGRAVE, SHOPLIFTING: A SOCIAL HISTORY 125–26 (2001); see, e.g., Alan D. Axelrod & Thomas Elkind, Note, *Merchants' Responses to Shoplifting: An Empirical Study*, 28 STAN. L. REV. 589, 594 (1976).

123. Axelrod & Elkind, *supra* note 122, at 604; see also SEGRAVE, *supra* note 122, at 125–26.

124. Axelrod & Elkind, *supra* note 122, at 604; see also SEGRAVE, *supra* note 122, at 152.

125. Axelrod & Elkind, *supra* note 122, at 604.

and stereotyping can enter into the calculus; store representatives admit that the child's demeanor, degree of remorse, and parental attitude are among the most important factors.<sup>126</sup>

Many businesses have adopted theft policies that explicitly favor those of means over low-income individuals. Researchers have found that "private corporate police help create and sustain the link between social class and street crime by skimming the advantaged for civil recovery and sending larger numbers of poor people into the embrace of the public criminal justice system."<sup>127</sup> For example, anecdotal evidence reveals that at more than one national "big box" store, parents of children who have shoplifted are led to believe that if they "settle" the store's civil claim for the costs of recovering the stolen merchandise, the store will not report the incident to the police.<sup>128</sup> The settlement amount varies, as it may be governed by state statute or store policy,<sup>129</sup> but it can be as much as \$200.<sup>130</sup> The offer is typically made to the parent or guardian when the child is in the custody of store personnel, raising possible claims of extortion.<sup>131</sup> Although the store's offer to release the child and forego juvenile court prosecution in exchange for payment is not always explicit, many parents wrongly assume that a proposal to "settle" is the equivalent of an agreement not to pursue formal charges.<sup>132</sup>

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126. *Id.*; see also SEGRAVE, *supra* note 122, at 126 ("Analysis revealed . . . that retail value of the item taken, neighborhood social class, and physical resistance were among the factors determining private corporate justice for shoplifters in a civil recovery state.").

127. SEGRAVE, *supra* note 122, at 127.

128. See Richard C. Halverson, *Civil Recovery Helps Chains Stem Losses from Shoplifting*, CBS INTERACTIVE BUSINESS NETWORK RESOURCE LIBRARY (Sept. 26, 1988), [http://find.articles.com/p/articles/mi\\_m3092/is\\_n19\\_v27/ai\\_6680648/](http://find.articles.com/p/articles/mi_m3092/is_n19_v27/ai_6680648/); notes of author (May 2, 2011) (on file with author); E-mail from Lisa H. Thurau, Strategies for Youth, Boston, Ma., to author (Aug. 24, 2011) (on file with author); E-mail from Roger Starcher, Investigator, Council for Children's Rights, Charlotte, N.C., to author (Aug. 24, 2011) (on file with author).

129. See, e.g., N.C. GEN. STAT. § 1.538.2 (2010), available at <http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=1-538.2> (enumerating the civil penalties for shoplifting, larceny, and related offenses).

130. See E-mail from Tobie J. Smith, Legal Aid Society of Birmingham, Ala., to author (Aug. 24, 2011) (on file with author); E-mail from Jennie Wingad, Assistant Public Defender, Miami, Fla., to author (Aug. 24, 2011) (on file with author).

131. See CHARLES A. SENNEWALD ET AL., RETAIL CRIME, SECURITY, AND LOSS PREVENTION: AN ENCYCLOPEDIA REFERENCE 51 (2008).

132. E-mail from Jacqueline Boulos, to author (Aug. 24, 2011) (on file with author); E-mail from Barbara L. Krier, Sr. Assistant Public Defender, York, Pa., to author (Aug. 24, 2011) (on file with author); E-mail from Tobie J. Smith, *supra* note 130.

Moreover, the retailer's corporate office may decide to pursue civil damages against the child's parents regardless of the representations made by store personnel, creating yet another distressing scenario for low-income juveniles and their families.<sup>133</sup> Such policies are compounded by the fact that, according to various studies, department store security officers are generally more likely to accuse those who appear to be poor and are less likely to release them from custody.<sup>134</sup>

#### 4. Neighborhood Police Presence

"Broken Windows" policing, or the concept that correcting visible signs of social disorder fosters the creation of a safe and stable community, was first articulated by James Q. Wilson and George L. Kelling in 1982.<sup>135</sup> The strategy called for increased policing of minor offenses, such as graffiti, vandalism, and public drinking, in order to reduce serious crime.<sup>136</sup> Partially as a function of this theory, beginning in the 1990s, higher concentrations of police officers were assigned to low-income urban neighborhoods,<sup>137</sup> a practice that has persisted in many cities.<sup>138</sup>

There is much legal scholarship that challenges Broken Windows theory by asserting, inter alia, that police presence is itself a

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133. See Marisa McIntyre, *Civil vs. Criminal: What is the Difference?*, LP MAGAZINE (Aug. 10, 2011), <http://www.lpportal.com/legal-briefs/item/1075-civil-vs-criminal-what-is-the-difference?.html>.

134. SEGRAVE, *supra* note 122, at 147.

135. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29 (setting out the Broken Windows theory).

136. *Id.*

137. See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 457, 461–63 (2000) ("Beginning in 1994, officials altered the police strategies in New York City to address low-level disorder problems that might invite more serious crime problems. These signs of disorder often are more prevalent in urban neighborhoods with elevated rates of poverty and social fragmentation."); Solomon J. Greene, Note, *Vicious Streets: The Crisis of the Industrial City and the Invention of Juvenile Justice*, 15 YALE J.L. & HUMAN. 135, 164–65 (2003).

138. See Henry G. Sontheimer, *From the Literature: Study Finds Race and Class have Both Main and Interaction Effects on Juvenile Arrests*, 17 JUV. JUST. UPDATE 9 (Aug.–Sept. 2011) ("Research shows that police organize their patrols areas according to race and class divisions and that most police believe minority neighborhoods are more likely to experience crime.").

criminogenic factor in poor neighborhoods.<sup>139</sup> Empirical research has suggested that because of stereotypes linked to race and class, police officers place lesser value on residents of impoverished areas, particularly those with high minority concentrations.<sup>140</sup> In contrast, police attitudes toward those who live in wealthier areas tend to be lax and forgiving, and officers are less inclined to proceed with criminal charges against upper-income youth because of displays of parental “outrage” and “investment” in their children.<sup>141</sup> As a result, criminal charges are brought more frequently against children in low-income communities than in more affluent ones.<sup>142</sup>

In recent years a burgeoning literature has developed that questions the traditional approach of law enforcement toward young people.<sup>143</sup> The critique asserts that little effort is made institutionally to prepare the police for interactions with teens or young suspects.<sup>144</sup> Research confirms that officers wrongly assume that youth will respond no differently than, and pose the same risks as, adults.<sup>145</sup> They are ill-equipped to determine whether young offenders should be brought to the police station upon arrest or to the emergency room for treatment of mental illness or drug addiction.<sup>146</sup> They are not trained to view conflict between adolescents as an opportunity to model such strategies as mediation and peaceful discussion, and they are given few tools for avoiding the classic pattern of confrontation,

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139. See, e.g., BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 73, 76, 77, 79–81 (2001); RALPH B. TAYLOR, *BREAKING AWAY FROM BROKEN WINDOWS: BALTIMORE NEIGHBORHOODS AND THE FIGHT AGAINST CRIME, GRIME, FEAR, AND DECLINE* 371–74 (2001); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 276 (2009).

140. Bishop, *supra* note 104, at 45.

141. Lisa H. Thureau, *Rethinking How We Police Youth: Incorporating Knowledge of Adolescence into Policing Teens*, 29 CHILD. LEGAL RTS. J. 30, 35–36 (2009).

142. Bishop, *supra* note 104, at 165–66; Sontheimer, *supra* note 138, at 9 (reporting on a longitudinal study finding that low socio-economic status significantly increased arrest risk for juveniles).

143. See, e.g., James Forman, Jr., *Children, Cops and Citizenship: Why Conservatives Should Oppose Racial Profiling*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 150, 151 (Marc Mauer & Meda Chesnet-Lind eds., 2002); Thureau, *supra* note 141, at 30–31.

144. E.g., Thureau, *supra* note 141, at 30–31.

145. See *id.*

146. See *id.* at 34.

escalation, and arrest when encountering youth on the street or in their homes.<sup>147</sup> Also, there is minimal review of or accountability for many decisions made by police in the field, and records of encounters with juveniles are “seldom maintained.”<sup>148</sup> Similarly, little effort is made by local communities to educate young people as to what constitutes criminal conduct or to teach them the most appropriate ways to engage with police.<sup>149</sup> As a result, interactions between law enforcement and low-income youth are often characterized by the use of force, which leads to high rates of arrest, incarceration, and court involvement.<sup>150</sup>

### *B. Needs-Based Delinquency*

Because of the traditional philosophy of juvenile court,<sup>151</sup> the potential for class status to impact decision-making within the system has always been great.<sup>152</sup> The first juvenile codes provided court officials with enormous discretionary authority. Judgments had to be made quickly, often based on very limited information, and court actors generally lacked “substantive criteria” to guide them in determining what factors should be considered and what weight they should be given.<sup>153</sup> These characteristics of the original delinquency system continue to be reflected in the laws and policies of the twenty-first century juvenile court. The legislation that governs juvenile court practice in each state commonly contains provisions that explicitly call for consideration of the child’s needs and the family’s socioeconomic status. Court policies give decision-makers wide discretion to consider these factors at critical stages in the case. As a result, typical features of juvenile court laws and practices combine to shift the system’s emphasis from an evaluation of a child’s culpability to an assessment of the family’s class status. In this way, needs-based delinquency becomes the norm.

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147. *Id.* at 31, 38–39.

148. Bishop, *supra* note 104, at 35.

149. Thureau, *supra* note 141, at 39.

150. *See id.* at 30.

151. *See supra* notes 22–61 and accompanying text.

152. Bishop, *supra* note 104, at 46.

153. *Id.* at 46.

### 1. Intake and Detention Decisions

State juvenile codes typically use very general language to describe the screening process and the evaluation of a juvenile delinquency complaint in order to determine whether it should be filed as a petition.<sup>154</sup> Many codes require that “legal sufficiency” be found before any further action is taken.<sup>155</sup> This requires that the intake officer determine whether there are “reasonable grounds” to believe that the facts alleged are true, whether the facts as alleged constitute a delinquent offense within the jurisdiction of the court, and whether the facts alleged are “sufficiently serious” to warrant court action.<sup>156</sup> Typically the code contains no definition, description or explanatory criteria for the terms setting out the purpose and procedures of the intake process.<sup>157</sup> Upon a finding of legal sufficiency, the code calls for the intake officer to consider additional criteria set forth by the probation department, which may “if practicable” include interviews with the complainant, juvenile, juvenile’s parent, and “persons known to have relevant information” about the juvenile or her family.<sup>158</sup> Generally, state juvenile codes provide little additional guidance.

Some codes require that the juvenile delinquency petition not only establish reasonable cause to believe that the juvenile committed the crimes alleged but also include a statement that the juvenile “requires supervision, treatment or confinement.”<sup>159</sup> In other words, only the complaints against children who *need* the services of the probation department may be filed as delinquency petitions. In these systems, there are two explicit tracks: one for middle- and upper-class families who are able to secure private services for their children, such as drug or alcohol treatment and mental health counseling, and the other for

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154. *See, e.g.*, FLA. STAT. ANN. § 985.145 (1)(a)-(c)2 (West 2010) (stating that the juvenile probation officer shall make a “preliminary determination” as to whether the complaint is “complete,” and stating that the officer shall “screen each child” in order to determine such factors as “the presence of . . . educational, or vocational problems, or other conditions that may have caused the child to come to the attention of law enforcement. . . .”).

155. *See, e.g.*, N.C. GEN. STAT. § 7B-1702 (2011).

156. *Id.* § 7B-1700.

157. *See, e.g., id.* §§ 7B-1501, 1700-06.

158. *Id.* § 7B-1702.

159. *See, e.g.*, N.Y. FAM. CT. ACT § 311.1-2 (2008).

low-income (often minority and single-parent) families who can only access these resources through a court order following a juvenile delinquency adjudication.<sup>160</sup> In this way, the family's ability to obtain services is a critical factor in the determination of whether a child will face formal delinquency charges.<sup>161</sup>

Empirical research by Donna Bishop, among others, on the negative impact of race on juvenile court processing also supports a finding that poor children are less likely to be diverted from the system and more likely to be detained than children of means.<sup>162</sup> Although the policies and regulations that Bishop analyzed were not developed with an explicit intent to discriminate against low-income families (or families of color), they nevertheless have a "negative and differential impact" on this population.<sup>163</sup> For example, in many jurisdictions it is a policy of the juvenile court probation department that if a child's parents cannot be readily contacted and if they do not appear for an initial interview, the juvenile is ineligible for diversion.<sup>164</sup> In some jurisdictions, the policy calls for automatic detention of the child under these circumstances.<sup>165</sup> Further, most juvenile codes prohibit the release of a child from detention if the parent cannot provide "suitable supervision, care, or protection,"<sup>166</sup> which could be interpreted to include parents or guardians who work unpredictable hours, nights, or weekends. Release on electronic monitoring generally is contingent upon having a residential land-line, which increasing numbers of low-income families lack, and it

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160. Bishop, *supra* note 104, at 50; Rubin, *supra* note 10, at 2 ("[M]iddle- or upper-class parents often have the resources to successfully delay or short-circuit court action while they get their sons or daughters into mental health or drug treatment.").

161. See Tina L. Freiburger & Kareem L. Jordan, *A Multilevel Analysis of Race on the Decision to Petition a Case in the Juvenile Court*, 1 RACE & JUST. 185, 198 (2011) ("Prior research also has suggested that court officials may refer youths to juvenile court to provide access to needed services.").

162. Bishop, *supra* note 104, at 48–50; Freiburger & Jordan, *supra* note 161, at 198 (finding that in areas with higher rates of poverty, youth are more likely to be petitioned into juvenile delinquency court).

163. Bishop, *supra* note 104, at 48.

164. *Id.* at 48–49; see also Rubin, *supra* note 10, at 2 ("The parents of low-income youth often do not contest an arrest as vigorously as more affluent middle-income parents might."); *supra* note 2 and accompanying text (defining juvenile court diversion plans).

165. Bishop, *supra* note 104, at 48–49.

166. See TEX. FAM. CODE ANN. § 54.01(e)(2) (West 2011).



can include an installation fee and a daily charge for equipment use.<sup>167</sup> Therefore, families without home phone lines or who have inconsistent access to transportation, unreliable child care, or inflexible work schedules will inevitably have difficulty complying with these policies.

Similarly, diversion to informal probation or community-based sanctions or services often requires that the child admit guilt at the first point of contact with the juvenile court, premised on the belief that an admission signals a child's openness to treatment.<sup>168</sup> While there is little research on whether class status impacts the likelihood that a juvenile will acknowledge guilt to a probation officer at intake,<sup>169</sup> studies on race have shown that white children admit guilt more frequently at this early stage than do children of color.<sup>170</sup> Again, whether this is a function of the fact that children of color are more likely than whites to be arrested and therefore more likely to be innocent of criminal charges, is unclear. Reluctance to admit one's guilt prior to the filing of formal charges may also result from distrust of court officials or the system itself, feelings that economically disadvantaged youth experience at similar rates as minority youth. Nonetheless, many juvenile probation officers perceive that children who initially refuse to admit guilt lack sufficient remorse, providing an additional reason for court officials to not recommend diversion.<sup>171</sup> In all these ways the intake process is highly subjective and serves to cast a wider net around poor children and their families.

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167. See AM. BAR ASS'N, RES. 104D 4-6 (Feb. 14, 2011), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/house\\_of\\_delegates/104d\\_2011\\_my.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/house_of_delegates/104d_2011_my.authcheckdam.pdf); STACEY L. SKLAVER, THE PROS AND CONS OF USING ELECTRONIC MONITORING PROGRAMS IN JUVENILE CASES 2, 3 <http://www2.americanbar.org/sections/criminaljustice/.../jjSklover.doc>. <http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/jjSklover.doc> (last visited Nov. 1, 2011).

168. Bishop, *supra* note 104, at 49.

169. A search of social science databases revealed no studies that directly explored this question.

170. Bishop, *supra* note 104, at 49.

171. *Id.*

## 2. Right to Counsel

Although *In re Gault* established the right to counsel for children in juvenile court in 1967,<sup>172</sup> the Supreme Court indicated in dicta that counsel may be waived if both the child and parent agree.<sup>173</sup> Forty-five years later, “very few states require mandatory appointment of counsel . . . with no option for waiver.<sup>174</sup> In some cases, waiver may occur under limited circumstances.<sup>175</sup> In the majority of jurisdictions, children are allowed to waive counsel at any stage of the proceeding, as long as it is determined to be “knowing, intelligent and voluntary.”<sup>176</sup> Empirical evidence shows, however, that few juveniles are cognitively or developmentally capable of comprehending and executing a valid waiver of the right to counsel.<sup>177</sup>

For low-income families, this state of affairs is particularly troubling.<sup>178</sup> Many states require parents to pay indigence or application fees as well as other surcharges when they apply for legal representation, encouraging the waiver of counsel from the very

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172. *In re Gault*, 387 U.S. 1, 41 (1967).

173. *Id.* at 41–42.

174. See Birkhead, *supra* note 74, at 1489.

175. See RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT 54–55 (2d ed. 2008) (stating that some state legislatures prohibit juveniles from waiving counsel, while others permit them but only after the youth has been fully advised of the consequences of waiver by an attorney); Tory J. Caeti et al., *Juvenile Right to Counsel: A National Comparison of State Legal Codes*, 23 AM. J. CRIM. L. 611, 622–23 (finding that seventeen states have very strict waiver requirements).

176. See Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 316–18 (2003).

177. THOMAS GRISSO, JUVENILES’ WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 193–94 (Bruce Dennis Sales ed., 1981).

178. See AM. BAR ASS’N JUVENILE JUSTICE CTR. & MID-ATLANTIC JUVENILE DEFENDER CTR., MARYLAND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 1–2, 28 (Elizabeth Cumming et al. eds., 2003), <http://www.njdc.info/pdf/mdreport.pdf> (showing that poor and minority children are most affected by unchecked policies and practices that allow for uneven access to counsel and insufficient representation.”); AM. BAR ASS’N JUVENILE JUSTICE CTR. & S. JUVENILE DEFENDER CTR., NORTH CAROLINA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 1 (Lynn Grindall ed., 2003), <http://www.njdc.info/pdf/ncreport.pdf> (“The [juvenile defense] system as it is presently structured is, at best, uneven, and clearly has had a disproportionate impact on poor and minority children.”); TEXAS ASSESSMENT, *supra* note 77, at 5 (“Too many young people are churned through the system and are often left literally defenseless. More often than not, these youngsters are low income, children of color.”).

beginning of the process.<sup>179</sup> When juveniles lack legal representation, they face systemic pressures to admit rather than contest the charges.<sup>180</sup> Even when lawyers have been retained, parents may not agree to the hiring of experts or investigators in order to avoid incurring additional fees—or they may encourage their children to forego evidentiary hearings or time-intensive defenses.<sup>181</sup> Further, when the family bears the cost of representation, an attorney is more likely to defer to the juvenile's parents with respect to the direction of the litigation, creating a potential conflict of interest.<sup>182</sup> This situation can be compounded when the parent or other family member is the complaining witness in the case.<sup>183</sup> Moreover, in most jurisdictions—

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179. See, e.g., PATRICIA PURITZ, NATIONAL JUVENILE DEFENDER CENTER & CATHRYN CRAWFORD, CHILDREN AND FAMILY JUSTICE CENTER, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 2, 5, 33 (2006) [hereinafter FLORIDA ASSESSMENT], <http://www.njdc.info/pdf/Florida%20Assessment.pdf> (“Statutory provisions requiring parents to pay fees to apply for and then access lawyers deter youth from exercising the right to counsel. On the basis of frequently slipshod indigence determinations, families are forced to choose between incurring costs that they cannot afford and acquiring representation for their children.”); AM. BAR ASS’N JUVENILE JUSTICE CENTER, JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO 1 (Kim Brooks & Darlene Kamine eds., 2003), [http://www.njdc.info/pdf/Ohio\\_Assessment.pdf](http://www.njdc.info/pdf/Ohio_Assessment.pdf) (“Numerous obstacles exist for Ohio’s poor children to obtain lawyers in the juvenile justice system. It has become a tolerated if not accepted practice that large numbers of poor youth waive their right to an attorney in Ohio, even during the most critical stages of proceedings, without proper colloquies from judges and magistrates.”); WASHINGTON ASSESSMENT, *supra* note 76, at 28 (“Defenders surveyed believe that in 43% percent of cases where a child proceeds without counsel, it is because parents insist on it. This is likely due to parents’ concerns over cost, since many counties charge a fee for public defense services. An alarming 38% of attorneys said that the waiver often occurs before a child has had a chance to consult with an attorney.”).

180. CATHRYN CRAWFORD ET AL., CHILDREN AND FAMILY JUSTICE CENTER, NORTHWESTERN UNIVERSITY SCHOOL OF LAW & NATIONAL JUVENILE DEFENDER CENTER, ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 35 (2007) [hereinafter ILLINOIS ASSESSMENT], [http://www.njdc.info/pdf/illinois\\_assessment.pdf](http://www.njdc.info/pdf/illinois_assessment.pdf) (“The requirement that poor parents pay legal fees may put undue pressure on a child to enter an early admission in a case and compromise his attorney’s ability to fully explore a defense and/or dispositional alternative.”).

181. *Id.*

182. *Id.*; Janet R. Fink, *Who Decides: The Role of Parent or Guardian in Juvenile Delinquency Representation*, in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 119, 122–23 (Rodney J. Uphoff ed., 1995); Kristin Henning, *Defining the Lawyer-Self: Using Therapeutic Jurisprudence to Define the Lawyer’s Role and Build Alliances that Aid the Child Client*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 411, 424 (Marjorie A. Silver ed., 2007).

183. See, e.g., MARY ANN SCALI ET AL., THE NATIONAL JUVENILE DEFENDER CENTER,

including those few in which juveniles are presumed to be indigent and waiver of counsel is prohibited by statute<sup>184</sup>—the quality of representation in delinquency court is substandard.<sup>185</sup> Low-income families, however, have no recourse, as they lack the ability to retain private counsel of their own choosing.

### 3. Adjudication

In 1971, the Supreme Court held in *McKeiver v. Pennsylvania* that juveniles do not possess a federal constitutional right to trial by jury, under either the Sixth Amendment or the Due Process Clause.<sup>186</sup> The decision was premised on the notion that accurate fact-finding could be accomplished without juries, and that the imposition of juries into the system would convert “intimate, informal protective proceeding[s]” into “a fully adversary process.”<sup>187</sup> Forty years later, most state juvenile codes allow only for bench—and not jury—trials for juveniles who do not admit guilt.<sup>188</sup> Approximately ten states have

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SOUTH CAROLINA: JUVENILE INDIGENT DEFENSE: A REPORT ON ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 27–28 (2010), [http://www.njdc.info/pdf/south\\_carolina\\_assessment.pdf](http://www.njdc.info/pdf/south_carolina_assessment.pdf).

184. See, e.g., N.C. GEN. STAT. § 7B-2000(a) (2011) (“Counsel for the juvenile *shall* be appointed . . . in any proceeding in which the juvenile is alleged to be . . . delinquent.”) (emphasis added); N.C. GEN. STAT. § 7B-2000(b) (2011) (“All juveniles *shall* be conclusively presumed to be indigent, and it *shall not* be necessary for the court to receive from any juvenile an affidavit of indigency.”) (emphasis added).

185. See, e.g., Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 289–92 (2007) (“[M]any juvenile defendants are victims of ineffective assistance of counsel.”); Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 791–92 (2010) (stating that assessments of juvenile defender systems demonstrate that performance standards and ethical rules “appear to be honored mostly in the breach”); see also AM BAR ASS’N JUVENILE JUSTICE CENTER, MONTANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 28 (Brock Albin et al. eds., 2003), <http://www.njdc.info/pdf/mtreport.pdf> (“The fact that most juvenile defendants come from poor families—and thus have very limited resources to assist the defender—significantly increases the burden placed on the defender to provide adequate representation.”).

186. *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971).

187. *Id.* at 543–47.

188. See Linda A. Szymanski, *Juveniles’ Right to a Jury Trial (2007 Update)*, NCJJ SNAPSHOT 1, Feb. 2008 (stating that thirty states and the District of Columbia have statutory or case law denying juveniles the right to a jury trial).

enacted statutes allowing jury trials in juvenile cases,<sup>189</sup> while another ten provide for them under limited special circumstances.<sup>190</sup> In 2008, when holding that juveniles have the right to trial by jury, the Kansas Supreme Court found that *McKeiver* was no longer binding; its decision was premised on the view that punitive legislation passed in the intervening quarter-century had so eroded the distinctions between the juvenile and criminal justice systems that the juvenile court's "benevolent, *parens patriae* character" had been irrevocably compromised.<sup>191</sup>

Advocates and legal scholars argue that jury trials should be made available to juveniles in delinquency court based on notions of fairness and the quality of judicial fact-finding.<sup>192</sup> Their arguments are often grounded in procedural justice theory, the concept that adolescents are less likely to reoffend if they perceive the court process as fair.<sup>193</sup> Reviewing appellate case law in bench trials, legal scholars have found that judges are more likely than jurors to weigh evidence in favor of the prosecution and less likely to assess the credibility of the accused with an open mind, particularly in juvenile court.<sup>194</sup> It has been conceded, however, that the jury trial right can be a mere "chip to be used in the poker game of plea bargaining," the loss of which is hardly "catastrophic," given that the penalties available in juvenile court generally are not as punitive as in adult criminal court.<sup>195</sup> Regardless of one's view, the reality is that in the

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189. See HERTZ ET AL., *supra* note 175, at 365.

190. Birkhead, *supra* note 74, at 1451 n.20.

191. *In re L.M.*, 186 P.3d 164, 170 (Kan. 2008).

192. See, e.g., Gerald P. Hill, II, *Revisiting Juvenile Justice: The Requirement for Jury Trials in Juvenile Proceedings Under the Sixth Amendment*, 9 FLA. COASTAL L. REV. 143, 172–75 (2008); Ellen Marrus, "That Isn't Fair, Judge": *The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 HOUS. L. REV. 1323, 1350–51 (2003–04); Steven A. Drizin, Op-Ed., *Juveniles Deserve Jury Trials*, CHI. TRIB., Dec. 22, 1999, at 31.

193. See, e.g., Susan E. Brooks, *Juvenile Injustice: The Ban on Jury Trials for Juveniles in the District of Columbia*, 33 U. LOUISVILLE J. FAM. L. 875, 894 (1994–95); see also Birkhead, *supra* note 74, at 1484–88.

194. See, e.g., Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 562–71 (1998) ("The case law suggests that judges often convict on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt.").

195. See, e.g., Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the*

vast majority of jurisdictions, juveniles who contest the validity of the charges against them have no option but to rely on an individual judge to make an assessment of whether the state has proven its case.

The lack of a jury trial right and the reliance on juvenile court judges to be objective fact-finders has a disproportionate effect on poor children and their families. In many jurisdictions, there is a single judge who presides over juvenile court, and delinquency sessions are held only two or three times per month.<sup>196</sup> As a result, the judge who presides over a bench trial is often the same judge who determined whether the family was indigent and qualified for appointed counsel, reviewed the child's personal history and prior delinquency record, and decided whether the child should be detained.<sup>197</sup> It may also be the same judge who presides over the jurisdiction's abuse and neglect cases.<sup>198</sup> This judge typically has long-established relationships and rapport with the prosecutor, arresting officer, and probation officer—each of whom may be the only one from their respective offices assigned to juvenile court in that district.<sup>199</sup> Therefore, the judge presiding over a juvenile court bench trial likely has preconceived notions regarding the child's guilt or—at the very least—an opinion as to whether the family has “needs” that the system should address.<sup>200</sup>

Empirical research on the adjudicatory stage, which has focused on the impact of race but has not addressed the influence of socioeconomic class, has mixed results. Several studies found that race has no effect, while findings of minority disadvantage are less common.<sup>201</sup> Somewhat surprisingly, most empirical researchers have found that whites are “considerably more likely” to be adjudicated delinquent than minorities.<sup>202</sup> Donna Bishop has surmised that

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*Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 169.

196. See Birkhead, *supra* note 76, at 971–73.

197. See Guggenheim & Hertz, *supra* note 194, at 570 n.64.

198. See *id.*

199. See *id.* at 568.

200. *Id.* at 570 (stating that juvenile court judges “may inappropriately lean in favor of conviction in order to ensure that youths in need of rehabilitative services receive them as a condition of probation or placement”).

201. Bishop, *supra* note 104, at 53.

202. *Id.*; Devon J. Green & Megan S. Shafer, *The Faces Within: An Examination of the Disparate Treatment of Minority Youth Throughout the North Carolina Juvenile Justice System*,

because of the “extralegal variables” at the arrest and referral stages that *disadvantage* poor and minority children, these cases “may on the whole be weaker” for the prosecution than those of non-minorities and children of means.<sup>203</sup> As a result, judges will more readily introduce a “correction” when the decision calls for a “singular focus” on whether the state has met its burden of proof.<sup>204</sup> Whether judges are, in fact, more likely to make objective determinations at adjudication than at other stages of the case remains an open question. Bishop acknowledges that tests of this hypothesis require measures of the strength of the state’s evidence, which are “difficult to construct.”<sup>205</sup>

#### 4. Disposition and Probation

The dispositional phase of juvenile delinquency cases differs from adult criminal court more than any other stage.<sup>206</sup> The juvenile codes of most states place few evidentiary limits on the information that is admissible at disposition; in fact, some statutes explicitly state that the court may consider *any evidence*, including hearsay, that it considers to be “relevant, reliable, and necessary” to determine the juvenile’s needs.<sup>207</sup> Further, when entering the dispositional order, judges have wide discretion to impose whatever terms and conditions they deem appropriate.<sup>208</sup> The range of alternative dispositions available to the court is extremely broad, and in most jurisdictions there are no formulas requiring specific sentences for particular crimes.<sup>209</sup> Moreover, defense counsel are often unfamiliar with the resources and programs available to their clients and lack the assessment expertise (or the funds to hire a psychologist, psychiatrist,

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40 WAKE FOREST L. REV. 727, 737–38 (2005) (finding that across North Carolina, minorities were “slightly less likely to be found delinquent” during adjudicatory hearings than white juveniles, and that Hispanic youth were “considerably less likely” than white youth to be found delinquent).

203. Bishop, *supra* note 104, at 53.

204. *Id.*

205. *Id.*

206. HERTZ ET AL., *supra* note 175, at 689.

207. *See, e.g.*, N.C. GEN. STAT. § 7B-2501(a) (2011).

208. HERTZ ET AL., *supra* note 175, at 691.

209. *Id.* at 690–91.

or social worker) to offer a persuasive counterweight to the recommendations of the probation officer, placing the juvenile at a distinct disadvantage.<sup>210</sup>

Similar to other stages of delinquency cases, children of limited means are negatively impacted by the laws and policies that prevail at disposition and during probation. For instance, the judge or probation officer often assesses fees and costs that parents have not anticipated, which can serve as an added stressor for families already struggling with the issues that originally placed their children under juvenile court jurisdiction.<sup>211</sup> Likewise, it is not uncommon for youth on probation to complete all of their conditions except for the payment of fees, leading to an extension of probation and the assessment of additional fees, and so “the vicious cycle continues.”<sup>212</sup> The failure to pay fees while on probation can also lead to its revocation, resulting in commitment of the juvenile to a detention center or training school.<sup>213</sup> In addition, low-income families may lack reliable transportation, making it more difficult for the child to complete court-ordered programs, or they may have a transient living situation, impacting the provision of services while serving as a factor that favors removing the child from the home.<sup>214</sup>

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210. Birkhead, *supra* note 76, at 976–77.

211. *See, e.g.*, FLORIDA ASSESSMENT, *supra* note 179, at 34.

212. *See, e.g.*, ELIZABETH GLADDEN KEHOE, NAT’L JUVENILE DEFENDER CTR. & KIM BROOKS TANDY, CENT. JUVENILE DEFENDER CTR. & CHILDREN’S LAW CTR., INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 45 (2006), available at <http://www.njdc.info/pdf/Indiana%20Assessment.pdf>.

213. *See, e.g.*, JESSIE BECK, PATRICIA PURITZ & ROBIN WALKER STERLING, NAT’L JUVENILE DEFENDER CTR., NEBRASKA: JUVENILE LEGAL DEFENSE: A REPORT ON ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION FOR CHILDREN IN NEBRASKA 68 (2009) [hereinafter NEBRASKA ASSESSMENT], available at [http://www.njdc.info/pdf/nebraska\\_assessment.pdf](http://www.njdc.info/pdf/nebraska_assessment.pdf) (“As one contract attorney observed, since youth need to have money to last on probation, poor children are more likely to end up committed and in detention.”); *see also supra* note 3 (discussing the terminology for juvenile prisons).

214. *See* BELL, *supra* note 9, at 9; *see also* SCOTT W. ALLARD, OUT OF REACH: PLACE, POVERTY, AND THE NEW AMERICAN WELFARE STATE (2009) (discussing “how place matters to the safety net,” and finding that “[l]imitations of public transportation in many high-poverty areas and low rates of automobile ownership among low-income households make it even more critical that providers be located nearby”).



### *C. Perceptions and Attitudes*

In addition to the points of entry and the provisions within state juvenile codes that allow for an emphasis on families' needs when adjudicating delinquency, the "orientations and concerns" of the decision-makers at each stage of the process also contribute to the over-representation of poor children in delinquency court.<sup>215</sup> For decades it has been well-documented that children of color are disproportionately represented in the juvenile justice system.<sup>216</sup> As early as 1973, empirical studies have indicated that socioeconomic status also impacts decision-making, demonstrating—for instance—that poor children are more likely to receive severe dispositions than children of means.<sup>217</sup> The explanation for this unequal treatment centers on the theory that because of limited time and information, judges and other decision-makers develop a "perceptual shorthand"<sup>218</sup> that relies on common stereotypes associated with offender characteristics, such as race and class, as well as legal factors, such as the seriousness of the offense and the juvenile's criminal history.<sup>219</sup> Thus, actors within the system make assessments about juveniles' culpability, dangerousness, and treatment needs based on contextual and extralegal factors, including socioeconomic status, employment status, and education level of the child's parents or guardians.<sup>220</sup>

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215. Donna M. Bishop et al., *Contexts of Decision Making in the Juvenile Justice System: An Organizational Approach to Understanding Minority Overrepresentation*, 8 *YOUTH VIOLENCE & JUV. JUST.* 213, 214 (2010).

216. See, e.g., Kimberly Kempf-Leonard, *Minority Youths and Juvenile Justice: Disproportionate Minority Contact After Nearly 20 Years of Reform Efforts*, 5 *YOUTH VIOLENCE & JUV. JUST.* 71, 72–74 (2007) (finding that for 2002, black youth represented 16 percent of the juvenile population in the U.S. but comprised 29 percent of cases referred to juvenile court, 36 percent of those detained, 32 percent of those processed formally, 29 percent of those adjudicated delinquent, 33 percent of those given out-of-home dispositions, and 35 percent of those waived into adult criminal court).

217. Terence P. Thornberry, *Race, Socioeconomic Status and Sentencing in the Juvenile Justice System*, 64 *J. CRIM. L. & CRIMINOLOGY* 90, 97 (1973).

218. Darnell F. Hawkins, *Causal Attribution and Punishment for Crime*, 2 *DEVIANT BEHAV.* 207, 207–08 (1981).

219. Bishop et al., *supra* note 215, at 214; Alan J. Tomkins et al., *Subtle Discrimination in Juvenile Justice Decisionmaking: Social Scientific Perspectives and Explanations*, 29 *CREIGHTON L. REV.* 1619, 1649–50 (1996).

220. Bishop et al., *supra* note 215, at 215.

Although the juvenile court has shifted its emphasis since the 1960s and 1970s from rehabilitation to that of punishment, accountability, and community safety, the processing of juveniles continues to be affected by the biases of decision-makers at all stages of the case. Moreover, there is little review of or accountability for decisions made within the system, contributing to the potential for discrimination on the basis of socioeconomic status.<sup>221</sup> The trend is evidenced through state assessments of access to and quality of counsel that have examined the perceptions and attitudes of the various actors in the system.

For instance, probation officers in juvenile court wield tremendous power at both the front and back ends of the process.<sup>222</sup> They are often the “best informed people in the courtroom and have the most sustained contact with the child[ren]” themselves.<sup>223</sup> During intake, they determine whom to divert and whom to petition.<sup>224</sup> Their detention recommendations are readily accepted by the court, and they have great sway over the judge at disposition.<sup>225</sup> Because of the resource-strapped budgets of most juvenile courts, probation officers often seek some form of incarceration for those with “serious emotional, addiction, or behavioral problems,” as they believe that these juveniles are unlikely to receive necessary community-based services or comply with treatment while on probation.<sup>226</sup> Thus, when probation officers internalize the facile clichés and negative stereotypes about “bad kids,” children from poor families (and children of color) are disproportionately harmed.<sup>227</sup>

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221. *Id.* at 247.

222. *See, e.g.*, LAVAL S. MILLER-WILSON ET AL., JUVENILE LAW CENTER, & PATRICIA PURITZ, AM. BAR ASS'N, JUVENILE JUSTICE CENTER, PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 45 (2003), available at <http://www.njdc.info/pdf/pareport.pdf> (describing instances in which judicial deference to probation officers results in their “almost complete influence over youths’ fates”).

223. *See* Birkhead, *supra* note 76, at 975–77.

224. *See id.* n.82.

225. *See id.*

226. *See, e.g.*, WASHINGTON ASSESSMENT, *supra* note 76, at 38 (“Often the probation officer or prosecutor will seek a higher sentence because the offender has serious emotional, addiction or behavioral problems, and community-based resources have not been secured.”).

227. *See, e.g.*, George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV.

Similarly, judges and prosecutors have significant influence over who enters the juvenile justice system, what happens to them when they are in it, and who is transferred into adult criminal court for prosecution. In most jurisdictions, there is no check on prosecutorial discretion regarding whom to charge, what to charge, and whom to transfer to criminal court.<sup>228</sup> In fact, it is documented that in some states, county level prosecutors have financial incentives to transfer young offenders into adult court, allowing them to pass on the costs of often-expensive individualized treatment to the state.<sup>229</sup> Moreover, the statutory criteria for judicial waiver from juvenile to adult criminal court, which are framed in terms of “amenability to treatment” or “dangerousness,” typically give judges “broad, standardless discretion.”<sup>230</sup> Likewise, as discussed earlier, most

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554, 567 (1998) (finding that probation officers more frequently attribute black youths’ delinquency to “negative attitudinal and personality traits,” judge black youths to be more dangerous than white youths, and recommend more severe sentences to black youths than whites, because they attribute their crimes to “negative personality traits”); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 499 (2004) (finding that racial disparities in the juvenile justice system might be due to the “unconscious racial stereotypes of those who determine the fate of offending youth,” including police and probation officers, and that “[e]ven decision makers with good intentions are susceptible”).

228. See, e.g., Sara Sun Beale, *You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.–C.L. L. REV. 511, 515 (2009).

229. See, e.g., SELENA TEJI & MIKE MALES, CNTR. ON JUVENILE & CRIMINAL JUST., AN ANALYSIS OF DIRECT ADULT CRIMINAL COURT FILING 2003–2009: WHAT HAS BEEN THE EFFECT OF PROPOSITION 21? 1 (2011), available at [http://thecrimereport.s3.amazonaws.com/2/ed/1/1174/what\\_has\\_been\\_the\\_effect\\_of\\_prop\\_21.pdf](http://thecrimereport.s3.amazonaws.com/2/ed/1/1174/what_has_been_the_effect_of_prop_21.pdf) (studying prosecutorial use of direct adult criminal court filing in California, and finding that Ventura and Orange County prosecutors disproportionately targeted younger offenders who, if convicted and sentenced to confinement, served their time in state-run youth correctional facilities, rather than older youth who would have served time in county-run adult facilities); Celeste Fremon, *Is Ventura Trying More Kids as Adults than Any Other County . . . for the Money?*, WITNESS L.A., Aug. 26, 2011, <http://witnessla.com/juvenile-justice/2011/admin/is-ventura-county-trying-kids-as-adults-mainly-for-the-money/> (reporting on a possible financial incentive for the disproportionate number of transfers of younger juveniles to the adult system, despite evidence that crime rates did not decrease, and arguing that county prosecutors were passing on the costs of incarcerating juveniles to the state, regardless of whether transfer was warranted); see also Craig R. McCoy, *Former Pa. Judge Gets 28 Years in “Kids for Cash” Case*, PHILADELPHIA INQUIRER, Aug. 11, 2011, [http://articles.philly.com/2011-08-11/news/29876628\\_1\\_ciavarella-michael-t-conahan-juvenile-court](http://articles.philly.com/2011-08-11/news/29876628_1_ciavarella-michael-t-conahan-juvenile-court) (reporting on corruption scandal in which juvenile court judges sentenced children to privately-run youth detention centers in exchange for kickbacks from the owner of the facilities).

230. See Barry C. Feld, *Juvenile and Criminal Justice Systems’ Responses to Youth Violence*, 24 CRIME & JUST. 189, 190, 199 (1998).

juveniles remaining in delinquency court who contest the charges must have a trial in which a judge, and not a jury, serves as the sole finder of fact.<sup>231</sup> As a result, the perceptions and biases of these actors are another critical factor in determining whether children of low socioeconomic status are overrepresented in juvenile court.<sup>232</sup>

Furthermore, as previous scholarship has demonstrated, attorneys representing juveniles are not immune to the negative attitudes towards low-income youth and their families.<sup>233</sup> Whether they work for public defender offices or serve as appointed counsel, juvenile defenders are often underpaid and lack administrative support and litigation resources.<sup>234</sup> They are also equally susceptible to the view that having a child adjudicated delinquent is the best way for a poor family to access needed services. As a result, defense attorneys may advise indigent youth to admit guilt and to waive their right to a trial, regardless of the weight of the state's evidence.<sup>235</sup> Or they may argue for a punitive disposition that they believe is in their young client's "best interest,"<sup>236</sup> in direct opposition to the American Bar

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231. See Szymanski, *supra* note 84, at 1; see also Birkhead, *supra* note 74, at 1451 n.20 (discussing the jury trial right for juveniles and delineating the policies of various state juvenile codes).

232. See STERLING, *supra* note 78, at 5 (finding that juvenile court judges view zealous advocacy by defense attorneys as an "impediment to the smooth function of the court," as "they consider juvenile court first and foremost an opportunity to 'help a child'"); PATRICIA PURITZ, AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 27 (1995) ("In some courts, attorneys are subtly reminded by the court, the prosecutor, and other court personnel that zealous advocacy is considered inappropriate and counter-productive.").

233. See Birkhead, *supra* note 76, at 982; Graham & Lowery, *supra* note 227, at 502 ("Although we chose to study police officers and probation officers in these studies, we are not singling out those decision makers as more prone to or vulnerable to unconscious racial bias. We could just as well have studied juvenile defense attorneys. . . .").

234. See, e.g., H. Ted Rubin, *The Legal Defense of Juveniles: Struggling but Pushing Forward*, JUV. JUST. UPDATE, June–July 2010, at 1 (reporting that more local resources are committed to juvenile prosecution than defense and that prosecutors are better paid and their offices better staffed).

235. See, e.g., NEBRASKA ASSESSMENT, *supra* note 213, at 36–37 (reporting that "in most cases, the defense attorney would negotiate the plea agreement without talking to the client, discuss it with the client in the five minutes before the court hearing, and then walk into court and enter the plea"); Birkhead, *supra* note 76, at 979.

236. See, e.g., PATRICIA PURITZ & ROBIN WALKER, NAT'L JUVENILE DEFENDER CTR., JENNIFER RILEY-COLLINS & SHIELA A. BEDI, MISSISSIPPI YOUTH JUSTICE PROJECT, S. POVERTY LAW CNTR., MISSISSIPPI: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN YOUTH COURT PROCEEDINGS 42 (2007), <http://www.njdc.info/pdf/>

Association and other practice standards that call for juvenile defenders to advocate for the child's "expressed interest."<sup>237</sup> In short, there are many ways in which a juvenile's own lawyer may contribute to the creation of a system in which children from low-income homes do not need to be as "guilty" as those from families of means in order to be found delinquent.<sup>238</sup>

#### IV. RESULTING IMPACT ON YOUTH

Research indicates that when children are processed through the juvenile court system and adjudicated delinquent, the impact is not benign—even when the disposition is arguably beneficial. Potential negative consequences of juvenile delinquency adjudications implicate such areas as housing, employment, immigration, and education as well as enhanced penalties for future offenses.<sup>239</sup> Further, longitudinal studies show that children exposed to juvenile court reoffend at higher rates and are stigmatized in the process.<sup>240</sup> Part IV argues that the system's overemphasis on the "needs" of children results in high rates of recidivism and perpetuates harmful stereotypes based on class.

##### A. Recidivism

Researchers found that exposure to delinquency court negatively affects youth, particularly when detention or incarceration is imposed.<sup>241</sup> Placing children in detention disrupts education, family

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mississippi\_assessment.pdf ("I don't always listen to what [my juvenile clients] say . . . [m]ine is not the role of the typical defense attorney; I must consider what is best for the child, and I do not take the position that I must 'get the child off at all costs.'").

237. See Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 257–59 (2005) (stating that the expressed interest advocacy model has become the standard by which delinquency lawyers are judged).

238. See Birkhead, *supra* note 76, at 977–79, 981–82.

239. HERTZ, *supra* note 175, at 276–78; Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1114–18 (2006).

240. See *infra* notes 244–51 and accompanying text.

241. See Mark Soler, *Missed Opportunity: Waiver, Race, Data, and Policy Reform*, 71 LA. L. REV. 17, 25 (2010).

cohesion, and the provision of services.<sup>242</sup> It exposes young people to the risk of physical and sexual assault as well as to psychological stress.<sup>243</sup> Further, detention has been found to exacerbate the conditions of those with pre-existing behavioral or mental health problems, which includes a significant subgroup of youth who appear in juvenile court.<sup>244</sup> Moreover, a substantial percentage of confined youth do not have histories of violence and pose “minimal risk to public safety.”<sup>245</sup> Likewise, data suggests that reducing the rate of juvenile incarceration does not cause any increase in juvenile crime or violence.<sup>246</sup>

Longitudinal studies demonstrate that arresting children and placing them in the juvenile justice system increases the likelihood of their continued involvement in the courts both as youth and as adults.<sup>247</sup> For instance, a twenty-year study of seven hundred low-income boys described as “impulsive, poorly supervised by their parents, and exposed to deviant friends” was conducted in Montreal, Canada.<sup>248</sup> The youths were charged with relatively minor crimes, including fighting, shoplifting, and possession of marijuana.<sup>249</sup> The researchers found that the iatrogenic and criminogenic effects of juvenile court intervention were measured at a rate *seven times higher* than that of youths who were not subjected to police-initiated juvenile

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242. See BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2–3 (2006), [http://www.justicepolicy.org/images/upload/06-11\\_REP\\_DangersOfDetention\\_JJ.pdf](http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf); RICHARD A. MENDEL, NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 2–3 (2011), [http://www.aecf.org/OurWork/JuvenileJustice/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JDAI\\_DeepEnd\\_Embargoed.pdf](http://www.aecf.org/OurWork/JuvenileJustice/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JDAI_DeepEnd_Embargoed.pdf).

243. See, e.g., MENDEL, *supra* note 242, at 5–6; Soler, *supra* note 241, at 25.

244. See HOLMAN & ZIEDENBERG, *supra* note 242, at 8–9; MENDEL, *supra* note 242, at 12; Soler, *supra* note 241, at 25; see also Thomas Grisso, *Adolescent Offenders with Mental Disorders*, in 18 FUTURE OF CHILD.: JUV. JUST. 143, 144 (2008) (finding a “heavy presence” of youth with mental disorders in the juvenile justice system, and suggesting that the most effective treatment methods are community-based).

245. MENDEL, *supra* note 242, at 13.

246. *Id.* at 9–12.

247. *Id.* at 10–12.

248. Uberto Gatti et al., *Iatrogenic Effect of Juvenile Justice*, J. CHILD PSYCHOL. & PSYCHIATRY 991, 991–92 (2009).

249. *Id.* at 993.

court intervention.<sup>250</sup> In other words, not only does “mere intervention” by the juvenile justice system have a negative effect, but its impact increases as the intervention becomes “more intense and constrictive.”<sup>251</sup> Another study, following thirteen hundred serious juvenile offenders ages fourteen through eighteen for seven years after conviction, was conducted in urban areas in Arizona and Pennsylvania.<sup>252</sup> Based on multiple interviews and analyses of official records, researchers found that longer stays in juvenile institutions did not reduce recidivism and that even those youth with the lowest offending levels *increased* their levels of offending upon release from juvenile institutions.<sup>253</sup> Such findings are consistently corroborated.<sup>254</sup>

For youth in the juvenile justice system, the experience of being placed in detention is rapidly becoming the norm, not the exception.<sup>255</sup> A recent survey by the federal Office of Juvenile Justice and Delinquency Prevention found that 28 percent of youth in juvenile delinquency court who are committed to out-of-home placements are ordered into detention.<sup>256</sup> It is estimated that approximately five hundred thousand youth are brought to juvenile detention centers each year, and that on any given day, more than twenty-six thousand are detained.<sup>257</sup> Despite findings such as those described above, sentences to detention facilities have become increasingly popular in juvenile court.<sup>258</sup> Thirty-two states allow for

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250. See Thureau, *supra* note 128, at 36; Gatti et al., *supra* note 248, at 996.

251. Gatti et al., *supra* note 248, at 996.

252. Edward P. Mulvey, *Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders, Juvenile Justice Fact Sheet*, OFF. JUV. JUST. DELINQUENCY PREV. 1, 2 (Mar. 2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf>.

253. *Id.* at 2.

254. See, e.g., HOLMAN & ZIEDENBERG, *supra* note 242, at 4–8 (citing studies confirming that detention can increase recidivism among youth, that alternatives to detention can curb crime and recidivism more effectively, and that there is little relationship between detention and overall crime in a community); MENDEL, *supra* note 242, at 10–12; Anthony Petrosino et al., *Formal System Processing of Juveniles: Effects on Delinquency*, CAMPBELL SYSTEMATIC REVIEWS (2010), available at <http://www.campbellcollaboration.org/lib/download/761/> (finding in a comprehensive meta-analysis that juvenile system processing appears not to have a crime control effect and, in fact, appears to increase delinquency across all measures).

255. Sedlak & Bruce, *supra* note 89, at 6; HOLMAN & ZIEDENBERG, *supra* note 242, at 2.

256. Sedlak & Bruce, *supra* note 89, at 6.

257. HOLMAN & ZIEDENBERG, *supra* note 242, at 2–3.

258. *Id.* at 2; Sedlak & Bruce, *supra* note 89, at 6.

detention to be imposed as a disposition, and forty states use detention as a sanction for probation violations.<sup>259</sup> Meanwhile, nearly 70 percent of youth are detained for non-violent offenses.<sup>260</sup> The data reveals that the risk of being taken into custody is “significantly greater” for juveniles who live with a single parent or no parent than for juveniles living in two-parent households, a statistic that favors upper-income youth.<sup>261</sup> It also indicates that the majority of incarcerated youth have been suspended from school during the previous year, almost half perform below grade level, and 30 percent have been diagnosed with a learning disability.<sup>262</sup> Ironically, given the struggling U.S. economy, most states are spending “vast sums” of taxpayer money and “devoting the bulk” of their juvenile justice budgets to correctional institutions and out-of-home placements, despite the fact that “non-residential programming options can deliver equal or better results for a fraction of the cost.”<sup>263</sup>

### *B. Stigma*

One of the original catalysts for the founding of a separate children’s court in the 1890s was the notion that information about the juveniles as well as the proceedings themselves should be shielded from public view.<sup>264</sup> This was premised on a desire to avoid stigmatizing young people for impulsive choices and indiscretions committed during childhood and adolescence.<sup>265</sup> As a result, many juvenile court hearings and records were kept confidential.<sup>266</sup> Procedures were informal, and hearings were routinely held in the private chambers of the judge without witnesses, lawyers, or a written

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259. See HOLMAN & ZIEDENBERG, *supra* note 242, at 2; Sedlak & Bruce, *supra* note 89, at 6; 2006 *Juvenile Justice Profiles*, NAT’L CTR. JUV. JUST. (2006), [http://www.ncjj.org/Research\\_Resources/State\\_Profiles.aspx](http://www.ncjj.org/Research_Resources/State_Profiles.aspx).

260. HOLMAN & ZIEDENBERG, *supra* note 242, at 2.

261. Sedlak & Bruce, *supra* note 89, at 6–7.

262. *Id.* at 7.

263. MENDEL, *supra* note 242, at 19.

264. See Tanenhaus, *supra* note 22, at 44, 61.

265. See *id.*

266. See *id.* at 61–65.



record.<sup>267</sup> Most states had statutes that prohibited or placed restrictions on public proceedings and access to case files.<sup>268</sup>

By the 1970s, perspectives changed. As juveniles' dispositions became more punitive, advocates called for openness in delinquency court, believing that public exposure would bring oversight and accountability.<sup>269</sup> At the same time, court officials and politicians concerned about the advent of teen "super predators" pushed for open hearings to "stem the tide of juvenile crime."<sup>270</sup> Through the 1980s and 1990s, increasing numbers of state and local jurisdictions re-examined their juvenile court laws and policies relating to confidentiality.<sup>271</sup> The trend toward more openness of juvenile court proceedings has continued into the twenty-first century, although the range of state laws on the issue remains broad.<sup>272</sup>

Meanwhile, as discussed above, juvenile court involvement and intervention has been found to exacerbate the problems of youth.<sup>273</sup> This concern draws on the sociological literature on "labeling theory," the concept that attaching a label to a behavior creates further "deviance."<sup>274</sup> Once the label of "juvenile delinquent" is formally imposed, it is readily accepted by both the child and the community, and the child is defined and perceived by others through the lens of this label.<sup>275</sup> Community members, police officers, teachers, and potential employers then interact with and judge the child according to that description.<sup>276</sup> In this way, children can be stigmatized by even the most minimal contact with the juvenile court system.

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267. *See id.* at 64–65.

268. *See* Janet Mason, *Confidentiality in Juvenile Delinquency Proceedings*, 1 JUV. L. BULL. 2 (2011).

269. *Id.* at 2–3.

270. *Id.* at 3.

271. *See, e.g.*, Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors be Open or Closed?*, 18 YALE L. & POL'Y REV. 155 (1999).

272. Mason, *supra* note 268, at 3.

273. *See supra* note 248 and accompanying text.

274. *See* Gatti, *supra* note 248, at 991, 996–97; Lee E. Teitelbaum, *Juvenile Status Offenders*, 3 ENCYCLOPEDIA OF CRIME & JUST. 983, 984–88 (1983).

275. *See* Gatti, *supra* note 248, at 996–97 (discussing the "stigma attached to the [juvenile] justice system"); Teitelbaum, *supra* note 274, at 984.

276. Teitelbaum, *supra* note 274, at 984.

## V. STRATEGIES FOR REVERSING THE TREND

Many of the strategies for addressing the overrepresentation of low-income children in delinquency court are modeled on those that have been developed for confronting the problem of disproportionate minority contact (DMC). This is explained, at least in part, by the fact that the two are related and often interwoven. There is value, however, in distinguishing between them and in addressing each separately, as they impact distinct populations: low-income children who are adjudicated delinquent come from all racial and ethnic groups, both majority and minority, just as racial and ethnic minorities processed in the juvenile justice system come from all socioeconomic groups. Part V examines several of the most effective means of reducing the pervasive problem of disparities in local juvenile courts, which apply to racial and ethnic minorities as well as to indigent youth. It also offers examples of international juvenile justice models that are preventative and diversionary rather than penal and punitive.

### *A. Data Collection and Raising Awareness*

Few juvenile court systems collect data on the income levels of children and their families as they are processed through the system. Although some entities, such as public defender offices and probation departments, may gather this information at discrete stages of the process, they do not typically share it with other institutional actors. Moreover, jurisdictions in which counsel is provided without regard to income are not likely to maintain any documentation related to the juvenile's class status. Yet, reliable data is critical for accurate analysis of the problem and for development of solutions to reduce income disparities.<sup>277</sup> Modeled on efforts to reduce DMC, states could gather income data at critical processing points in the system, such as arrest, intake, appointment of counsel, adjudication, and

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277. See JEFF ARMOUR & SARAH HAMMOND, NAT'L CONF. STATE LEGISLATORS, MINORITY YOUTH IN THE JUVENILE JUSTICE SYSTEM: DISPROPORTIONATE MINORITY CONTACT 8 (2009), available at <http://www.ncsl.org/print/cj/minoritiesinjj.pdf>.

disposition.<sup>278</sup> An advisory body could then determine where income disparities exist, identify instances of unnecessary juvenile justice system involvement, and monitor implementation of reforms to address the issue.<sup>279</sup>

Awareness of the problem is another critical aspect of reducing individual and institutional biases, with perhaps the best model again found in the movement to reduce DMC.<sup>280</sup> Various national initiatives exist to raise awareness of DMC among judges, prosecutors, and agency personnel as well as community leaders, educators, and parents, with admittedly mixed success.<sup>281</sup> The MacArthur Foundation's *Models for Change* initiative, established in 2004, is one of the best organized and well-funded.<sup>282</sup> It aims to achieve racial fairness in the juvenile justice system by emphasizing local reforms that can be expanded statewide, such as increasing the language abilities and cultural diversity of agency personnel who serve juveniles and their families.<sup>283</sup> Another is the Juvenile Detention Alternatives Initiative, launched in 1992 by the Annie E. Casey Foundation, which works to reduce DMC by focusing on pretrial detention, a "critical processing point" within the delinquency system.<sup>284</sup> Similarly, the W. Haywood Burns Institute targets local sites to ensure that neighborhood representatives directly supervise DMC reduction within their own communities; the Institute has successfully worked in over thirty jurisdictions.<sup>285</sup> In addition, several

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278. *Id.*; Emily R. Cabaniss et al., *Reducing Disproportionate Minority Contact in the Juvenile Justice System: Promising Practices*, 12 *AGGRESSIVE & VIOLENT BEHAV.* 393, 399–400 (2007).

279. ARMOUR & HAMMOND, *supra* note 277, at 8.

280. *Id.* at 9.

281. See BELL ET AL., *supra* note 9, at 11–16 (discussing failed federal efforts to reduce DMC, and calling for federal legislation to be strengthened to provide necessary guidance to states and localities in their efforts to reduce disparities in the juvenile justice system).

282. *Racial and Ethnic Fairness/DMC, MODELS FOR CHANGE: SYSTEMS REFORM IN JUVENILE JUSTICE*, <http://www.modelsforchange.net/about/Issues-for-change/Racial-fairness.html> (last visited Nov. 4, 2011); ARMOUR & HAMMOND, *supra* note 277, at 5.

283. ARMOUR & HAMMOND, *supra* note 277, at 5.

284. *Juvenile Detention Alternatives Initiative*, THE ANNIE E. CASEY FOUND., <http://www.aecf.org/majorinitiatives/juveniledetentionalternativesinitiative.aspx> (last visited Nov. 4, 2011); ARMOUR & HAMMOND, *supra* note 277, at 6.

285. THE W. HAYWOOD BURNS INSTITUTE FOR JUVENILE JUSTICE FAIRNESS AND EQUITY: OUR WORK, <http://www.burnsinstitute.org/article.php?id=56> (last visited Oct. 26, 2011); ARMOUR & HAMMOND, *supra* note 277, at 7.

states have enacted formal policies that prescribe methods for curbing DMC, including Connecticut, Missouri, North Carolina, Oregon, South Dakota, and Washington.<sup>286</sup>

### *B. Diversion and Collaborative Mental Health Treatment*

A further strategy for confronting and reversing needs-based delinquency is for law enforcement agencies and schools to take steps to avoid indiscriminately directing low-income minor offenders into the juvenile justice system.<sup>287</sup> Between 1985 and 2008, the number of adjudicated cases that resulted in court-ordered probation increased by 67 percent, while those that were resolved by informal probation decreased 13 percent.<sup>288</sup> The trend toward more formal processing of delinquency cases flies in the face of evidence that diversion programs can be extraordinarily effective. For instance, such programs have been shown to develop accountability among young offenders, keep less serious offenders from moving deeper into the system, and reduce the workload and costs of police departments and courts.<sup>289</sup> At a time when states are dramatically reducing the budgets of juvenile justice agencies, fewer court referrals would also help offset cuts.<sup>290</sup> In response to such data, at least one state has amended its juvenile diversion law to mandate that prior to filing a delinquency petition, the police officer or prosecutor must “identify why juvenile court diversion was *not* an appropriate disposition.”<sup>291</sup> Similarly, a variety of diversion programs—including teen courts, mediation, victim restitution, and restorative justice—have been created for first-time offenders, and could be replicated across the United States to help keep low-income youth out of delinquency court.<sup>292</sup>

A related strategy has been recommended in the context of mental health treatment. As discussed earlier, adolescent offenders with

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286. ARMOUR & HAMMOND, *supra* note 277, at 7.

287. Rubin, *supra* note 10, at 6.

288. Livsey, *supra* note 4, at 2.

289. FED. ADVISORY COMM. JUV. JUSTICE, *supra* note 79, at 20.

290. *Id.* (finding that diversion programs are cost effective); Rubin, *supra* note 10, at 6.

291. Rubin, *supra* note 10, at 7–8 (citing N.H. REV. STAT. ANN. § 169-B:10) (emphasis added).

292. *Id.* at 8; FEDERAL ADVISORY COMM. JUV. JUSTICE, *supra* note 79, at 19–20.

psychological and behavioral disorders—many of whom are low-income—comprise a “significant subgroup” of youth in the juvenile justice system.<sup>293</sup> Thomas Grisso suggests that rather than place greater emphasis on providing mental health treatment for this population *within* the juvenile court system, a network of services could be created that cuts across public child welfare agency boundaries.<sup>294</sup> Through the establishment of “community systems of care,” services could be coordinated among mental health, child protection, education, and juvenile justice agencies.<sup>295</sup> This approach would improve cross-agency referrals and collaboration, encourage cost-sharing, and reduce the “conflict, inefficiency, and frustration” that families typically experience when services are provided by several different agencies.<sup>296</sup> As a result, mentally ill low-income youth would no longer need to be adjudicated delinquent and institutionalized in order to receive appropriate treatment.<sup>297</sup> Instead, they would be treated while living at home with their families, a strategy shown to be more effective than treatment programs outside the community.<sup>298</sup> Such systems of care would enable the delinquency system to play a more focused and limited role: mental health services would be necessary only for juveniles already in secure custody and for a smaller percentage that could not be safely treated in the community.<sup>299</sup>

### *C. International Care and Protection Models*

On the international level, there are significant differences among juvenile justice systems. Like the United States, the majority of English-speaking countries use traditional punitive methods of reducing juvenile crime.<sup>300</sup> However, several countries in Europe and

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293. See *infra* notes 300–06 and accompanying text.

294. Grisso, *supra* note 244, at 154–55.

295. *Id.*

296. *Id.*

297. *Id.* at 154 (“[Y]outh must carry the burden of a delinquency record to get basic mental health services, and that burden increases the likelihood of their future delinquency, criminal behavior, and arrest as adults.”).

298. *Id.* at 153.

299. *Id.* at 155, 157.

300. See PETER MURPHY ET AL., REVIEW OF EFFECTIVE PRACTICE IN JUVENILE JUSTICE:

elsewhere have demonstrated that combining preventative programs with therapeutic services offers the most effective model for keeping all but the most serious young offenders out of the juvenile justice systems.<sup>301</sup> Successful approaches utilize home, school, and community-based therapies to reduce risk factors, such as family dysfunction, delinquent peer groups, truancy, and alcohol and drug abuse, while strengthening protective factors, including parenting skills, mentors and role models, and positive extra-curricular activities.<sup>302</sup> Promising models are found in the youth justice systems of Scotland,<sup>303</sup> Italy,<sup>304</sup> and Scandinavia.<sup>305</sup> Although each of these countries operates under a slightly different framework, they all recognize that children in trouble—whether the result of “deeds or needs”—are fundamentally similar; that institutional divisions and legal distinctions between the two groups are not meaningful; and that offending is often “symptomatic of deeper psychological or social malaise.”<sup>306</sup>

Scotland, for instance, utilizes an informal process called “Children’s Hearing Systems” that are managed by “panels” of trained volunteers from the local community.<sup>307</sup> Operating like a welfare tribunal, each panel is composed of three lay leaders (aged

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REPORT FOR THE MINISTER FOR JUVENILE JUSTICE 3 (2010), [http://www.djj.nsw.gov.au/pdf\\_hm/publications/general/Juvenile%20Justice%20Effective%20Practice%20Review%20FINAL.pdf](http://www.djj.nsw.gov.au/pdf_hm/publications/general/Juvenile%20Justice%20Effective%20Practice%20Review%20FINAL.pdf).

301. *Id.* at 3–4.

302. *Id.* at IV.

303. *Id.* at 5–6.

304. See Vincenzo Scalia, *A Lesson in Tolerance? Juvenile Justice in Italy*, 5 YOUTH JUSTICE 33, 41 (2005) (describing Italy’s juvenile justice system as one characterized by “diversion, decriminalization, and decarceration,” and stating that its culture of “refusal of punishment” depends less on the offenses committed than on professional forensic evaluations of the offenders); see also David Nelken, *Italian Juvenile Justice: Tolerance, Leniency, or Indulgence?*, 6 YOUTH JUSTICE 107, 108–20 (2006) (finding that the Italian juvenile justice system is relatively lenient compared with many others, but cautions against drawing too many lessons from Italian practice).

305. See MURPHY ET AL., *supra* note 300, at 7–8 (describing the system found in Scandinavian countries, where the age of criminal responsibility starts at fifteen, the rate of youth incarceration is very low, and the approach to juvenile justice involves systematic collaboration among schools, local social welfare agencies, and police).

306. See *id.* at 5–6 (discussing Scotland), 7–8 (discussing Scandinavia); Nelken, *supra* note 304, at 109–10 (discussing Italy, Scotland, and Scandinavia).

307. See Michele Burman et al., *The End of an Era?—Youth Justice in Scotland*, in INTERNATIONAL HANDBOOK OF JUVENILE JUSTICE 439, 441–42 (J. Junger-Tas et al. eds., 2008).

eighteen to sixty) and a professional “reporter” with a social work or legal background.<sup>308</sup> The parent or child, who is between ages eight and eighteen, can bring a representative to the hearing, such as a friend, family member, or legal adviser.<sup>309</sup> The Scottish system, which includes over two thousand panel members, separates the function of examining the child’s needs from the establishment of guilt.<sup>310</sup> Panels may order supervision in the community as well as out-of-home placement in schools, residential care, or secure facilities.<sup>311</sup> As a result, a much lower number of children are incarcerated in Scotland than in the jurisdictions of England and Wales, which have similar demographics and social problems.<sup>312</sup> The number of children referred to the Hearings System has increased dramatically in recent years, with the vast majority referred on grounds of care and protection rather than for alleged offenses.<sup>313</sup> It is estimated that Scotland prosecutes just 0.5 percent of young people under sixteen who have committed an offense.<sup>314</sup>

## VI. CONCLUSION

Walk into almost any delinquency courtroom in the United States, and you will find that the vast majority of children in the system are living at or below the poverty level.<sup>315</sup> One or both of their parents are unemployed. If their family members have jobs, they earn minimum wage. Their homes are in low-income neighborhoods. There are no book stores, libraries, or playgrounds within walking distance. They qualify for food stamps. They attend low performing public schools. They are chronically absent or have developmental delays, learning disorders, or mental illnesses. They have minimal health care coverage and rely on visits to the emergency room for routine treatment. They are sad, angry, or completely lack affect.

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308. *Id.* at 442.

309. *Id.*

310. *Id.*

311. *Id.* at 443.

312. *Id.* at 439; MURPHY ET AL., *supra* note 300, at 6.

313. Burman et al., *supra* note 307, at 450–53.

314. *Id.* at 458.

315. See THE 2011 HHS POVERTY GUIDELINES, <http://aspe.hhs.gov/poverty/11poverty.shtml> (indicating that a family of four earning less than \$22,350 is living in poverty).

If you spend enough time in these courtrooms, you begin to ask why. Why is it that poor children are arrested, charged, and prosecuted at higher rates than children of means? Why are fewer poor children diverted from the system than wealthy children? Why does the standard of proof seem to depend on the socioeconomic level of the child's family? Why do so many poor children violate the terms and conditions of their probation? Why are so few middle- and upper-class children sent to detention?

This Article has begun the project of attempting to answer some of these questions. As with the legacy of DMC, it is "considerably easier for system stakeholders to blame youth than to do the hard work of examining and transforming the practices and policies that may be contributing to disparities."<sup>316</sup> Law makers and politicians argue that the current budget crisis forecloses any possibility for reform. Yet, the claim that juvenile court involvement is the only viable avenue for many low-income families to access needed services is no longer acceptable. Given the negative impact that juvenile court processing has on youth and their families, adjudicating children delinquent by reason of poverty is an inherently unfair method. Marcus,<sup>317</sup> like all our children, deserve better.

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316. BELL ET AL., *supra* note 9, at 15.

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