LEAD ARTICLE

RACE, RIGHTS, AND THE REPRESENTATION OF CHILDREN

BARRY C. FELD* AND PERRY L. MORIEARTY**

Fifty years ago, the Supreme Court issued what is arguably the most consequential decision in the history of the American juvenile court. In re Gault *imported to the juvenile court some of the criminal court's core constitutional protections, including, most notably, the right to counsel. Two of the Court's primary objectives in* Gault *were to enhance procedural fairness and alleviate racial injustice in the juvenile court. Yet, a half century later, neither of these objectives has been realized.* Gault*'s procedural deficits are well-documented and the subject of numerous publications commemorating the decision's 50th Anniversary. This Article examines the second objective. We claim that* Gault *did not just fail to alleviate racial injustice in the juvenile court; it may have exacerbated it. By endorsing a formal and adversarial court process for children, but failing to confer the full panoply of constitutional rights afforded adults,* Gault *helped transform the juvenile court from a quasi-social welfare agency into a second-class criminal court that metes out the punishment but lacks the protection of its adult counterpart. Compounding*

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* Centennial Professor of Law Emeritus, *University of Minnesota Law School*. J.D., *University of Minnesota Law School*; B.A., *University of Pennsylvania*; Ph.D. (Sociology), *Harvard University*.

** Associate Professor, *University of Minnesota Law School*, and co-director of the Child Advocacy and Juvenile Justice Clinic. J.D., *New York University*; B.A., *Brown University*. We are grateful to Professors Kristin Henning and Robin Walker Sterling for their critical feedback on this Article. We also thank University of Minnesota Law School students Katherine Manuel, Melanie Johnson, Eve Byron, and Hannah Hughes for their stellar research and comments at various phases of this project. Any errors are our own.

the toll of this institutional reorientation was a corresponding political backlash that produced a series of exceptionally harsh juvenile laws and policies. Juveniles of color bore the brunt of these developments.

The juvenile court is once again at a constitutional crossroads. Catalyzed by a series of recent Supreme Court decisions recognizing that children are constitutionally different from adults for purposes of punishment, legislatures and courts are engaged in reform. Gault*'s racial legacy deserves attention. While buttressing* Gault*'s procedural protections remains important, even the best-trained and best-funded defense lawyers cannot prevent the primary causes of racial injustice in the juvenile court: the over-criminalization, over-policing, over-punishment, and long-standing demonizing of youth of color and the pervasiveness of implicit racial biases among those who determine their fates. These substantive inequities require substantive policy reforms. This may be one of* Gault*'s most significant lessons.*

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INTRODUCTION

For the first two-thirds of the twentieth century, the juvenile court avoided sustained judicial scrutiny. Established in 1899 by Progressive reformers as a rehabilitative alternative to the criminal justice system, the juvenile court was to "take [each child] in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."[1] Procedural protections were eschewed in favor of nearly unfettered discretion, which, proponents believed, would best enable courts to diagnose and treat each child's delinquent behavior.[2]

By the 1920s, however, evidence was mounting that juvenile court decision making was often arbitrary and its outcomes unduly harsh.[3] Maltreatment was especially pronounced for Black[4] children, who were routinely denied the juvenile court's promised solicitude and

1. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

2. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 695 (1991).

3. *See* HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 68 (1927).

4. Throughout this Article, the authors capitalize the word "Black" when it is used to reference census-defined Black or African American people. In doing so, the authors follow the lead of organizations such as the Brookings Institute, which recently adopted what it calls "a long-overdue policy to properly recognize the identity of Black Americans and other people of ethnic and indigenous descent in [its] research and writings," David Lanham & Amy Liu, *Not Just a Typographical Change: Why Brookings Is Capitalizing Black*, BROOKINGS (Sept. 23, 2019), https://www.brookings.edu/research/brookingscapitalizesblack [https://perma.cc/3YYV-XE7R], and authors such as Kimberlé Crenshaw and Catharine MacKinnon, who have long recognized the significance of capitalizing a term that denotes cultural or ethnicity identity. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) ("When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun."); Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 515, 516 (1982) (noting that "Black" should not be regarded "as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity"). Because the term "white" is generally used in this Article to reference a socially constructed racial category and not a specific cultural or ethnic identity, it is not capitalized.

services in the North, and in the Jim Crow South, were "leased," whipped, imprisoned with adults, and executed.[5] Yet, even as prominent advocates and academics began to call for greater oversight and accountability,[6] the juvenile court continued to languish in a legal backwater that insulated it from systematic examination.[7]

This changed abruptly with the Supreme Court's 1967 decision in *In re Gault*.[8] A component of the Warren Court's reported efforts to enhance procedural fairness, expand civil rights, and combat racial injustice,[9] *Gault* engrafted on to juvenile court proceedings a number

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5. *See* JAMES BELL & LAURA JOHN RIDOLFI, W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 3–4 (Shadi Rahimi ed., 2008), https://www.burnsinstitute.org/wp-content/uploads/2013/12/Adoration-of-the-Question.pdf [https://perma.cc/95YQ-L6GR] (discussing imprisoned black children being held with adults and "convict leasing"); GEOFF K. WARD, THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY & JUVENILE JUSTICE 111, 113–16 (2012) (discussing Black children being disproportionately imprisoned with adults, whipped, and executed); Miriam Stohs, *Racism in the Juvenile Justice System: A Critical Perspective*, 2 WHITTIER J. CHILD & FAM. ADVOC. 97, 100 (2003) (explaining that segregated prisons often forced Black children to be housed in prisons meant for adults).

6. *See, e.g.*, LOU, *supra* note 3, at 68 (acknowledging the dangers of unfettered discretion and "arbitrary powers"); Roscoe Pound, *Foreword to the First Edition* of PAULINE V. YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY, at xv (2d ed. 1952) (likening juvenile courts to the "Star Chamber"); Paul W. Tappan, *Treatment Without Trial*, 24 SOC. FORCES 306, 307–08 (1946) (condemning juvenile courts as "treatment without trial"); Matthew J. Beemsterboer, Note, *The Juvenile Court—Benevolence in the Star Chamber*, 50 J. CRIM. L., CRIMINOLOGY & POL. SCI. 464, 475 (1960) (arguing that the juvenile court "is merely a euphemism for the star chamber").

7. Courts rarely heard appeals from delinquency proceedings and legal scholars failed to address juvenile courts' systemic failures. Barry C. Feld, *My Life in Crime: An Intellectual History of the Juvenile Court*, 17 NEV. L.J. 299, 303 (2017) ("[F]ew law schools offered courses on juvenile justice because, prior to *Gault* there was no "law" of juvenile justice. Generic state statutes creating juvenile courts provided vague substantive goals—treatment and rehabilitation—and minimal procedural limitations on judges' discretion. Psychology, criminology, and sociology departments focused more on delinquency—why do adolescents commit crimes—than on justice administration—how states process young offenders. Schools of social work focused primarily on intervention and treatment rather than juvenile justice administration." (footnote omitted)).

8. 387 U.S. 1 (1967).

9. *See, e.g.*, Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1484, 1494 (2003) (documenting the Warren Court's concern about racial inequality); Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 86 (2010) (noting that the right to counsel cases were driven by concerns about racial inequity); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1805 (2005) (arguing that "criminal procedure in the Warren Court era was famously preoccupied with issues of illegitimate inequality, particularly those associated with race").

of the constitutional protections afforded adult defendants. "[H]istory has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure," Justice Abe Fortas lamented.[10] Chief among the rights conferred upon juvenile defendants was "the guiding hand of counsel."[11] *Gault* was hailed as revolutionary.[12] "It will be known as the Magna Carta for juveniles," Chief Justice Warren exclaimed in a note to Fortas.[13]

Yet, if two of the Court's main objectives in *Gault* were to improve procedural fairness and address systemic racial disproportionality in the juvenile court, it has not succeeded. In recognition of *Gault*'s 50th Anniversary in 2017, a number of scholars and advocates have documented the decision's procedural shortfalls, exploring *Gault*'s legal context,[14] disappointing implementation,[15] limited scope,[16] and the role

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10. *Gault*, 387 U.S. at 18.

11. *Id.* at 36 (citing Powell v. Alabama, 287 U.S. 45, 69 (1932)); *see also* Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 185 n.146 (1984) (discussing the right to counsel in juvenile cases).

12. *See, e.g.*, William J. Baumol & Alfred G. Walton, Parens Patriae *and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745, 750 & n.36 (1973) (calling *Gault* "revolutionary" (quoting Monrad Paulsen, *Children's Court: Gateway or Last Resort?*, 10 COLUM. U.F. 4 (1967))); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187 (1970) (predicting that *Gault* would yield "drastic changes in the design and function of juvenile courts"); Murray M. Milton, *Post-*Gault*: A New Prospectus for the Juvenile Court*, 16 N.Y. L.F. 57, 59 (1970) (noting support of *Gault* led to an upheaval in the juvenile court system).

13. DAVID S. TANENHAUS, THE CONSTITUTIONAL RIGHTS OF CHILDREN: In re Gault AND JUVENILE JUSTICE 89 (2017).

14. *See, e.g.*, Zawadi Baharanyi & Randy Hertz, *The Many Stories of* In re Gault, *in* RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM 3, 4–5 (Kristin Henning et al. eds., 2018) (examining the Supreme Court's civil rights era juvenile justice jurisprudence and the background of Gerald Gault's counsel, Norman Dorsen); Ellen Marrus & Chris Phillis, *Arizona Before and After* In re Gault*: Has Arizona Realized the Promises of* In re Gault*?*, *in* RIGHTS, RACE, AND REFORM, *supra*, at 20, 22–25 (describing Arizona's juvenile rights landscape both before and after *Gault*); David S. Tanenhaus & Eric C. Nystrom, *Pursuing* Gault, 17 NEV. L.J. 351 (2017) (tracing the decision's impact on the evolution of constitutional jurisprudence and historical accounts of the evolution of the juvenile court).

15. *See* NAT'L JUVENILE DEF. CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL 10 (2017) (documenting youths' limited access to counsel in the juvenile court); Jay D. Blitzman, Gault*'s Promise Revisited: The Search for Due Process*, 69 JUV. & FAM. CT. J. 49 (2018) (examining whether *Gault*'s efforts to engraft due process protections into the juvenile court have been realized); Laura Cohen, *The Still-Elusive Promise of* In re Gault, 32 CRIM. JUST. 57 (2018) (arguing that the modern juvenile court does not fulfill *Gault*'s promise of counsel); *see also* Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. POVERTY L. & POL'Y 543, 543 (2009)

of the juvenile defender.[17] This Article builds upon the work of the smaller group of scholars who have contributed to what, until relatively recently, was a limited account of race and the juvenile court,[18]

(examining the "structural, cultural, and systemic barriers that impede access to counsel and quality of legal representation for low-income youth").

16. *See* Laura Cohen & Sandra Simkins, *No More "Desert Devil's Island": The Right to Counsel for Incarcerated Children*, *in* RIGHTS, RACE, AND REFORM, *supra* note 15, at 227, 231–36 (arguing that *Gault* should extend to post-conviction); Casey McGowan et al., *Moving Forward from* Gault, CHAMPION, Apr. 2017, at 22, 24 (arguing that *Gault* should extend to pre-trial proceedings); *see also* Sandra Simkins & Laura Cohen, *The Critical Role of Post-Disposition Representation in Addressing the Needs of Incarcerated Youth*, 8 JOHN MARSHALL L.J. 313 (2015) (arguing that "post-dispositional" legal representation for youth in long-term custody is a constitutional requirement).

17. Nancy Ginsburg, *Raising the Bar: Improving the Model of Defense Representation for Adolescents Prosecuted in Adult Courts*, *in* RIGHTS, RACE, AND REFORM, *supra* note 15, at 154, 156–65 (discussing the Legal Aid Society of New York Adolescent, Intervention and Diversion Project's (AID) approach to the representation of youth prosecuted as adults); Kristin Henning & Erin Keith, *Pride and Prejudice: Juvenile Defenders for Racial Justice 50 Years After* Gault, *in* RIGHTS, RACE, AND REFORM, *supra* note 15, at 199 (chronicling the disparate treatment of non-white youth in the juvenile justice system and urging juvenile defenders to explore the roles they may play both in perpetuating disparities and promoting meaningful reform); Liz Ryan & Carmen Daugherty, Gault *at 50: What Juvenile Defenders Can Do to Dismantle the Youth Prison Model*, *in* RIGHTS, RACE, AND REFORM, *supra* note 15, at 252 (describing the origins and current features of the "youth prison model" and advocating for juvenile defenders to play a role in their dismantling); Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649 (2017) (exploring the ways in which "implicit racial bias contributes to paternalism and undermines zealous legal representation of children in the juvenile justice system").

18. Until Geoff Ward's seminal account of the juvenile court's racialized history, THE BLACK CHILD-SAVERS, *supra* note 5, only a handful of scholars had explored the evolution of the juvenile court through the prism of race. *See, e.g.*, BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 162–65 (1999) (arguing that procedural reforms helped to legitimate more punitive interventions); 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, 525 (2009) (arguing that "the Warren Court reforms have little to offer if the problem is—as critics charge—the comparatively harsh treatment of [B]lack as opposed to white defendants"); Barry C. Feld, *Race and the Jurisprudence of Juvenile Justice: A Tale in Two Parts, 1950–2000*, *in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 122, 123 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) (arguing that "race has had two distinct and contradictory influences on the juvenile court during the second half of the twentieth century"); Feld, *supra* note 9, at 1484, 1494 (discussing the Warren Court's "perceived . . . need . . . to protect minority offenders" and desire to make its own contribution to the civil rights movement by "focus on procedural rights" as an answer to the country's profound "concern about racial inequality"); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98

documenting the juvenile court's history of racially disparate treatment,[19] *Gault*'s response,[20] and the decision's racial implications.[21]

We do not minimize the positive impact that *Gault* did have on juvenile court proceedings: *Gault* initiated the regulation of juvenile court decision making, subjected the juvenile court to badly needed scrutiny, and most critically, gave children the right to be heard and confront the evidence against them in delinquency proceedings. But this Article argues that, to the extent *Gault* was also intended to improve juvenile court outcomes for children of color, *Gault* has not just failed; it may have made things worse in three respects.

First, *Gault*'s endorsement of a formal and adversarial court process for children had the unintended effect of criminalizing both the juvenile court and the children who came before it. During the 1970s and 1980s, the juvenile court underwent an ideological, jurisprudential, procedural, and jurisdictional transformation from a quasi-social welfare agency focused on the "best interests" of the child to a second-class

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CORNELL L. REV. 383 (2013) (arguing that contemporary narratives of Black and Hispanic youth as dangerous and irredeemable lead prosecutors to disproportionately reject youth as a mitigating factor for their delinquent behavior).

19. *See* Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform*, 86 GEO. WASH. L. REV. 1604, 1614, 1616–17 (2018) (discussing the racialized origins of the juvenile court and the disparate treatment of non-white youth); *see also* WARD, *supra* note 5, at 105, 124 (documenting Jim Crow juvenile justice and the role that Black reformers played in its dismantling and the broader evolution of the American juvenile justice system); Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379 (2017) (calling for the diversification of the juvenile court bench and bar to enhance fairness and combat the harms of historical and contemporary structural racism); Kristin Henning et al., *Toward Equal Recognition, Authority, and Protection: Legal and Extra-Legal Advocacy for Black Youth in the Juvenile Justice System*, *in* RIGHTS, RACE, AND REFORM, *supra* note 15, at 30 (documenting the fight for racial equity in the juvenile court in the years before and immediately after *Gault*).

20. Robin Walker Sterling, *Fundamental Unfairness:* In re Gault *and the Road Not Taken*, 72 MD. L. REV. 607 (2013) (arguing that "if the Court had been more attentive to the disparate treatment of [B]lack children in the juvenile justice system, then it would have been more likely to root [*Gault]* in the Bill of Rights" as it had its other criminal procedure reforms).

21. BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE 137–44 (2017); *see also* FELD, *supra* note 18, at 162–65 (arguing that procedural reforms helped to legitimate punishment that fell disproportionately heavily on minority youth); Feld, *supra* note 9, at 1484, 1494 (discussing the Warren Court's "perceived . . . need . . . to protect minority offenders" and desire to make its own contribution to the civil rights movement by "focus on procedural rights" as an answer to the country's profound "concern about racial inequality"); Sterling, *supra* note 20 (arguing that *Gault* exacerbated the disparate treatment of youth of color).

criminal court focused on the gravity of the child's offense.[22] By the 1990s, many states had formally redefined their juvenile courts' purpose clauses, processes, and facilities to deemphasize rehabilitation and emphasize public safety and punishment.[23]

Second, even as *Gault* challenged the juvenile court's compassion, fairness, effectiveness, and constitutional vacuity, the Court nonetheless declined to consider "the totality of the relationship of the juvenile and the state"[24] and opted instead for a ruling that was constitutionally tepid, paternalistic, and race neutral. Rather than base *Gault*'s core protections in the Sixth Amendment right to counsel, as it had done for adult criminal defendants in *Gideon v. Wainwright*,[25] the Court relied on the less rigorous Fourteenth Amendment "fundamental fairness" requirement.[26] It also declined to address whether *Gault*'s protections should extend to the pre-judicial, dispositional, post-adjudicative, or appellate stages of juvenile proceedings.[27] The net result was a set of constitutional protections that were comparatively weaker than those granted criminal defendants. Studies conducted during the 1970s, 1980s, and 1990s confirmed that, despite *Gault*'s mandates, juveniles in many states remained unrepresented in delinquency proceedings.[28] This remains true today. Hundreds of thousands of children appear in juvenile court each year without counsel, or with lawyers who are undertrained, undersupervised, underpaid, and overworked.[29]

Gault's constitutional timidity also set the stage for the Court's refusal in the decades following *Gault* to afford youth the full panoply of constitutional rights it had granted adults. Just four years after

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22. *See* FELD, *supra* note 18, at 162–65 (demonstrating the shift in juvenile rights and explaining that in that context, "procedural reforms cannot compensate for the highly discretionary substantive standards—'best interests of the child' or a 'serious risk' of future crime—that preclude evenhanded enforcement and lend themselves to discriminatory applications"); Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 877 n.282 (1988).

23. *See infra* Section II.A.

24. *In re* Gault, 387 U.S. 1, 13 (1967).

25. 372 U.S. 335 (1963).

26. *Gault*, 387 U.S. at 74 (Harlan, J., concurring); CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE 125 (1998); *see also* Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189 (2007) (analyzing procedural deficiencies of juvenile courts); Feld, *supra* note 11 (comparing and contrasting delinquency and criminal procedural safeguards); Sterling, *supra* note 20, at 633–38.

27. *Gault*, 387 U.S. at 13, 58.

28. *See infra* Section II.B.

29. FELD, *supra* note 21, at 246–48 (reporting that many, if not most, delinquents appeared in juvenile court without counsel); NAT'L JUVENILE DEF. CTR., *supra* note 15, at 10.

Gault, the Court held in *McKeiver v. Pennsylvania*[30] that juvenile defendants do not have the right to what is arguably the justice system's most important check on state power—trial by jury.[31]

Given the Warren Court's reported concerns about the juvenile court's procedural vacuity and racial inequity, it is also remarkable that the decision embraces elements of the "Child Savers'" rehabilitation narrative and wholly avoids discussing race.[32] Whether this is a function of the Court's efforts to justify its less rigorous constitutional standard, a calculated compromise to avoid the type of political fallout generated by its school desegregation cases, or the Court's less-than-complete commitment to racial equality in the administration of criminal and juvenile justice, *Gault*'s failure to reject outright the juvenile court's paternalistic and discriminatory history left a "significant gap in the fight for racial equality in the juvenile justice system."[33]

Finally, one of *Gault*'s tragic ironies is that even its tepid expansion of juvenile court rights was enough to trigger a political backlash that legitimated a series of increasingly punitive juvenile laws and policies.[34] As violent youth crime rates spiked in the late 1970s and 1980s, calls to "get tough" on juvenile defendants reverberated across the country. Branding adolescent lawbreakers "super-predators,"[35] nearly every state in the country enacted laws making it easier to prosecute children as adults, expanding criminal court jurisdiction

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30. 403 U.S. 528 (1971).

31. *Id.* at 545.

32. *See, e.g.*, ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 3–4 (1969) ("The child savers viewed themselves as altruists and humanitarians dedicated to rescuing those who were less fortunately placed in the social order . . . . The child savers went beyond mere humanitarian reforms of existing institutions. They brought attention to—and, in doing so, invented—new categories of youthful misbehavior which had been hitherto unappreciated."). The child savers who founded the Cook County, Illinois juvenile court were upper and upper-middle class women who extended their traditional domestic roles as child-rearers, caretakers, and carriers of moral virtue into the public realm. *Id.* at 75–78; *see also* FELD, *supra* note 18, at 31–42 (describing the role of women during the Progressive era in fostering compulsory education, child labor, and juvenile court reforms to construct the new legal institutions of childhood).

33. Henning et al., *supra* note 19, at 33.

34. *See, e.g.*, Feld, *supra* note 22, at 826–28; Feld, *supra* note 9, at 1484, 1494.

35. John J. DiIulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 25, 1995, at 25–26; *see also* Gene Koprowski, *The Rise of the Teen Super-Predator*, WASH. TIMES, Oct. 23, 1996, at A17 (explaining that "drug use and violence among 'super-predators' are actually caused by moral poverty—that is, the poverty of growing up without a loving, responsible parent who can teach right from wrong").

over juvenile cases, weakening confidentiality laws, toughening gang laws, and imposing mandatory minimum sentences.[36] The number of juveniles confined in adult jails and prisons soared.[37]

All of these developments hit Black children the hardest. Though racial disparities in arrest, charging, detention, disposition, and adult court transfer had long been present in the juvenile justice system, they spiked in the 1980s and 1990s.[38] By the late 1990s, Black youth made up 15% of those under eighteen in this country, but nearly 60% of the youth sentenced to adult prisons.[39] The numbers remain bleak today.[40] There is also evidence that children of color are

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36. *See* PATRICIA TORBET & LINDA SZYMANSKI, U.S. DEP'T OF JUSTICE, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996–97 UPDATE (1998), https://www.ncjrs.gov/pdffiles/172835.pdf [https://perma.cc/8PZ4-QCVK]; Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189 (1998); Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from an Ideological Battleground*, 11 FED. SENT'G REP. 260, 260 (1999).

37. According to the National Council on Crime and Delinquency, the number of youth incarcerated in adult jails increased by 208% between 1990 and 2004. CHRISTOPHER HARTNEY, NAT'L COUNCIL ON CRIME & DELINQUENCY, FACT SHEET: YOUTH UNDER AGE 18 IN THE ADULT CRIMINAL JUSTICE SYSTEM 3 (2006), http://nccdglobal.org/sites/default/files/publication_pdf/factsheet-youth-in-adult-system.pdf [https://perma.cc/2ERJ-XHSA]; *see also* FELD, *supra* note 21, at 132–44 (2017) (describing various indicators of greater punitiveness in juvenile court sentencing and disparate impact on youths of color); ASHLEY NELLIS, A RETURN TO JUSTICE: RETHINKING OUR APPROACH TO JUVENILES IN THE SYSTEM 51 (2016); MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 73, 75 (2011) (discussing mandatory sentencing laws and how they bring about racial disparities in the prison system).

38. *See, e.g.*, ELEANOR HINTON HOYTT ET AL., 8 PATHWAYS TO JUVENILE DETENTION REFORM: REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION 10 (2001), http://www.justicepolicy.org/uploads/justicepolicy/documents/reducing_race.pdf [https://perma.cc/G4VV-98E7] (documenting the significant increases in racial disproportionality in juvenile detention facilities during the 1990s); JOLANTA JUSZKIEWICZ, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED? (2000), http://www.njjn.org/uploads/digital-library/resource_127.pdf [https://perma.cc/A44J-U42W] (providing a study of more than 2500 cases filed in eighteen of the largest jurisdictions in the country demonstrated that Black youth were disproportionately charged in adult court and were more likely than white or Latino youth to receive a sentence of incarceration).

39. EILEEN POE-YAMAGATA & MICHAEL A. JONES, NAT'L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 28 (2000), https://eric.ed.gov/?id=ED442882 [https://perma.cc/NQ4S-J5S4].

40. FELD, *supra* note 21, at 112 ("In the seventy-five largest counties in the United States, racial minorities comprised more than two-thirds of juveniles tried in criminal court and the vast majority of those sentenced to prison.").

disproportionately denied access to counsel and other basic due process protections in the juvenile court.[41]

We do not claim, of course, that *Gault* was solely or even primarily responsible for these developments in the juvenile court. But we argue that, to the extent *Gault*'s procedural rights framework was intended to serve as a panacea for systemic racial disproportionality in the juvenile court, the Warren Court's seminal juvenile justice decision was as misguided as many of its constitutional criminal procedure decisions. The primary sources of racial injustice in the juvenile court were then what they continue to be today: the over-criminalization, over-policing, and over-punishment of juveniles of color;[42] the pervasiveness of long-standing "narratives casting [Black youth] as violent, immoral, degenerate, and undeserving of child welfare and social services";[43] and the presence of overt and implicit racial biases that drive juvenile court decision makers to invoke these narratives when they assess the youth who come before them.[44] As important as procedural rights

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41. Mary Ann Scali, *Being David: The Future of Juvenile Defense and the Goliath of Youth Injustice*, *in* RIGHTS, RACE, AND REFORM, *supra* note 15, at 187, 188–89 (documenting recent Department of Justice efforts in Memphis, Georgia, and St. Louis to ensure legal representation for juvenile defendants of color). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 84–85 (2012) (stating that every year tens of thousands of poor defendants go to jail without seeing a lawyer); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 63–65, 71, 94 (1999) (explaining the inadequacies of *Gideon*); Rebecca Marcus, Note, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219, 219–20, 223 (1994) (arguing that underfunding of public defender offices results violates the Sixth Amendment right to counsel).

42. FELD, *supra* note 21, at 137–44; *see also* Donna M. Bishop & Michael J. Leiber, *Racial and Ethnic Differences in Delinquency and Justice System Responses*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 445, 445 (Barry C. Feld & Donna M. Bishop eds., 2012); 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, 23 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

43. Henning et al., *supra* note 19, at 31. *See generally* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010).

44. *See* George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 567 (1998) (stating that court officials rely on internal attributes rather than severity of crime or criminal history); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 499 (2004) (explaining that disparities in sentencing may be attributable to implicit racial bias and stereotypes).

may be to institutional fairness and accuracy, even the presence of the best-trained, best-funded defense lawyers cannot overcome these systemic inequities and pervasive stereotypes. Instead, we argue these substantive inequities require substantive policy reforms.

Part I traces the social, political, and legal contexts within which the Warren Court's constitutional criminal procedure jurisprudence emerged, beginning with the Great Migration of Black southerners from the rural South to the northern and western United States, through the early Civil Rights Movement, and culminating in the Supreme Court's efforts to redress racial injustice through the expansion of procedural rights.[45] It then traces the evolution of the American juvenile court over the same period with a focus on the nascent system's paternalistic orientation and its disparate treatment of Black youth. Part I concludes with a dissection of *Gault* itself.

Part II makes the case that, in an effort to alleviate the juvenile court's racial inequities, the Court unwittingly compounded them. We argue that infusing the juvenile court with some, but not all, of the criminal procedural rights afforded adults and failing to confront directly the juvenile court's paternalistic and racially discriminatory history, triggered the juvenile court's ideological, jurisprudential, procedural, and jurisdictional transformation into a second-class criminal court for youth that meted out punishment without the protection of its criminal counterpart. It also legitimated a political backlash that led to exceptionally punitive juvenile laws and policies. Youth of color bore the brunt of these changes.

Finally, Part III is prescriptive. Triggered by a series of recent Supreme Court decisions recognizing that children are constitutionally different from adults for purposes of punishment, the juvenile court is once again at a pivotal moment. As legislatures and courts across the country contemplate reform,[46] *Gault*'s racial legacy is instructive. While we agree that shoring up the procedural protections that do exist in the juvenile

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45. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA (1991); WARD, *supra* note 5, at 165; Sterling, *supra* note 20, at 631–34; Joe William Trotter, Jr., *Introduction* to THE GREAT MIGRATION IN HISTORICAL PERSPECTIVE: NEW DIMENSIONS OF RACE, CLASS, AND GENDER (Joe William Trotter, Jr. ed., 1991).

46. *See, e.g.*, CONG. RES. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 10, 12, 13, 21 (2019) (stating that the First Step Act provides more procedural safeguards for juveniles in the justice system); JUST. POL'Y INST., RAISE THE AGE 2, 4 (2017) (discussing state legislatures' decision to raise the age requirement for being in adult court).

court remains an important mission, we also contend that reformers—and especially those focused on racial equity—should not lose sight of the forest for the trees. Improving outcomes for juvenile defendants of color will be best achieved both through added procedural protections and especially through substantive policy reforms such as the legalization of non-violent adolescent behavior and status offenses, alteration of policing policies and increased opportunities for diversion away from the juvenile court, mitigated punishment for youths in juvenile and criminal courts, and measures to reduce implicit racial bias.

I. RACE AND THE ROAD TO *GAULT*

The traditional narrative about the Warren Court's 1967 decision in *In re Gault* is that it was a decision driven by the judiciary's growing disillusion with Progressivism, the rehabilitative ideal, and the benevolence of the State.[47] While this is true, *Gault*, like many of the Warren Court's constitutional criminal procedure decisions, was also animated by concerns about racial injustice. Issued at the end of the Great Migration, in the heart of the Civil Rights Movement, and in the shadow of the Court's seminal decision in *Brown v. Board of Education*,[48] *Gault* was a component of the Court's broader efforts to promote racial equality through the expansion of civil rights and due process. Curiously, however, the decision itself says nothing about race.

A. Race, Civil Rights, and the Supreme Court

The Great Migration of Black Americans from southern states to the northern and western United States during the first two-thirds of the twentieth century profoundly changed American society, politics, and law. These sociopolitical and legal reverberations were critical components of the Court's decision in *Gault*.

1. The Great Migration

The Great Migration began shortly after the turn of twentieth century and took place over the course of three distinct waves. Drawn by enhanced employment, education, and housing opportunities, and looking to leave behind the Jim Crow laws, extreme segregation, overt racial hostility, and white vigilante violence of the rural South, more than a million Black Americans left the South in the years after

47. *See generally* FELD, *supra* note 21.
48. 347 U.S. 483 (1953).

World War I in what would become the first wave of migration.[49] The country's entry into World War II, a boom in war production industries, widespread labor shortages, and an increased willingness by defense contractors to hire Black workers induced a second wave in the 1930s and 1940s,[50] and a final wave of nearly five million Black Americans took place between the end of World War II and 1960.[51] The extent of the demographic shift was extraordinary: in 1910, 90% of Black Americans lived in southern states; by 1960, just 50% did.[52]

The majority of Black southerners migrated to urban areas in the North and the West.[53] What they encountered, however, can hardly be described as hospitable. While the infamous "Red Summer" of 1919, in which white mobs laid siege to Black communities throughout both the South and North, was the most overt and violent manifestation of northern white resistance,[54] racial discrimination permeated daily life. As Black populations in northern cities began to grow in the years after World War II, white people flocked to the suburbs.[55] The combination of federal housing and highway policies further contributed to "white flight" and served to isolate Black residents within the major cities.[56] During the 1950s and 1960s, urban planners fortified residential racial segregation in northern cities by consciously locating public housing projects in urban areas and steering Black families in their direction.[57] Yet, the Great Migration also placed the issue of racial inequality on the national political agenda, confronted the racist ideology of segregation, and contested

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49. ALEXANDER, *supra* note 41, at 30–40; FELD, *supra* note 18, at 84; KLARMAN, *supra* note 45, at 100; LEMANN, *supra* note 45, at 15; DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 28–29 (1993); ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 9, 533–34 (2010).

50. FELD, *supra* note 18, at 83–85; *cf.* LEMANN, *supra* note 45, at 21.

51. *Cf.* MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 131 (1989); MASSEY & DENTON, *supra* note 49, at 18.

52. Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 898 (1998).

53. In 1870, 80% of Black Americans lived in the rural south; by 1970, 80% resided in cities, half in the North, Midwest, and West. *See* MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTI-POVERTY POLICY 104–05 (1999); MASSEY & DENTON, *supra* note 49, at 18; WARD, *supra* note 5, at 107.

54. Genna Rae McNeil, *Before* Brown*: Reflections on Historical Context and Vision*, 52 AM. U. L. REV. 1431, 1435–36 (2003).

55. KATZ, *supra* note 51, at 133–37; MASSEY & DENTON, *supra* note 49, at 45, 49–52.

56. KATZ, *supra* note 51, at 134–35; MASSEY & DENTON, *supra* note 49, at 45–46.

57. Feld, *supra* note 9, at 1513 & n.288.

the social construction of racial inferiority,[58] which set the stage for the emergence of the Civil Rights Movement.[59]

2. The emerging Civil Rights Movement

Even as much of the United States enjoyed post-War affluence and growth, Black Americans continued to endure laws and policies that sabotaged their economic, educational, and social mobility. During the 1940s and 1950s, however, resistance began to mount. As Black Americans acquired better jobs, higher incomes, and resources with which to challenge the racial status quo, a more assertive civil rights movement began to emerge to confront the overtly racist Jim Crow ideology of the South and the more passive racial hostility of the North.[60]

As Black northerners became a more potent political force in key states, the constituencies of the respective political parties began to reconfigure.[61] Divisions within the Democratic Party—between racial and social policy liberals and conservatives, and between northerners and southerners—emerged.[62] In 1948, the Democratic Party convention platform for the first time included a strong civil rights plank.[63] In reaction, then-Democrat South Carolina Governor Strom Thurmond left the party, ran for president on the States Rights Party—the "Dixiecrats"—and foretold the political realignment of the South.[64]

In the 1950s, duly enacted Jim Crow laws forced Black southerners to attend segregated schools, ride segregated buses, use segregated bathrooms, eat at segregated restaurants, and stay at segregated hotels.[65] Black Americans were also systematically disenfranchised

58. KLARMAN, *supra* note 45, at 100, 107–08.

59. Feld, *supra* note 9, at 1461–62.

60. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 98 (2d ed. 1994).

61. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 44–45 (2000); *see also* KLARMAN, *supra* note 45, at 100–01.

62. KLARMAN, *supra* note 45, at 111, 114.

63. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 40 (1997); THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 33 (1991); KLARMAN, *supra* note 42, at 180–81; OMI & WINANT, *supra* note 57, at 98.

64. BECKETT, *supra* note 63, at 40; EDSALL & EDSALL, *supra* note 63, at 34.

65. GILENS, *supra* note 53, at 107. *See generally* WILKERSON, *supra* note 49.

and excluded from juries.[66] Violent extra-legal terrorism reinforced racial domination and subordination.[67]

Yet, conservative southern Democrats in Congress forcefully resisted anti-discrimination laws, voting rights laws, open housing laws, federal aid to education, and national health insurance.[68] Because a number of these were long-serving Democrats who chaired pivotal congressional committees, they were able to block laws aimed at reducing racial inequality.[69]

3. "Discrete and insular minorities"

As the Civil Rights Movement was emerging, the Supreme Court was forced by legislative default to fill the policy void. In 1896, the Court had held in *Plessy v. Ferguson*[70] that "separate but equal" facilities did not deny Black Americans equal protection of the law and remitted racial issues to the states.[71] For the next half-century, *Plessy* provided the constitutional foundation for segregated public facilities and Jim Crow laws.[72]

The Great Migration increased the visibility of racial discrimination and highlighted the magnitude of America's racial dilemma.[73] Racial segregation and legally enforced inequality were grounded in historical theories of racial inferiority that conflicted with American ideals of democracy, equality, and justice. Many legislators and jurists believed that resolving this hypocrisy required racial integration.[74]

During the 1937 to 1938 Term, the Court reviewed the constitutionality of New Deal laws and distinguished the scope of review it would apply to economic legislation—where it gave Congress and states broad regulatory authority—from its scrutiny of laws that affected individual rights. In the famous Footnote Four of *United States*

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66. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 17–18 (1992); Thomas Ward Frampton, *The Jim Crow Jury*, 71. VAND. L. REV. 1593, 1595 (2018).

67. HACKER, *supra* note 66, at 17–18; *see, e.g.*, Frampton, *supra* note 66, at 1613–14 (discussing Southern views of extralegal violence in relation to the criminal justice system).

68. *See* FELD, *supra* note 18, at 87.

69. FELD, *supra* note 18, at 87; LEMANN, *supra* note 45, at 111.

70. 163 U.S. 537 (1896).

71. *Id.* at 552 (Harlan, J., dissenting); KLARMAN, *supra* note 45, at 17–28.

72. *See* KLARMAN, *supra* note 45, at 10–13.

73. *See* ALEXANDER, *supra* note 41, at 35–36; LEMANN, *supra* note 45, at 7; GUNNAR MYRDAL, 1 AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 191–92 (1996).

74. *See* MYRDAL, *supra* note 73, at 1008–11.

v. Carolene Products,[75] the Court announced that it would review more closely state laws that affected political rights and those protections enumerated in the Bill of Rights.[76] The Court proposed using the Equal Protection Clause to strictly scrutinize laws that affected the political process and racial minorities—"discrete and insular minorities"[77]—whose rights might suffer continually from majoritarian domination.[78]

4. The Warren Court

In 1953, Earl Warren became Chief Justice of the Court and quickly began a campaign to end de jure segregation.[79] The National Association for the Advancement of Colored People (NAACP) battled segregation on many fronts, but the most crucial fight was to desegregate schools.[80] In 1954, in *Brown v. Board of Education*, the Warren Court concluded that separate no longer could be equal.[81]

Although *Brown* ordered states to desegregate schools with "all deliberate speed," southern political leaders denigrated the Court's decision and urged "massive resistance" to judicial usurpation.[82] In the aftermath of *Brown*, southern racial moderates virtually disappeared as southern politics moved even farther to the right.[83] Southern resistance to desegregation in the 1950s, Senator Barry Goldwater's Republican presidential campaign in 1964, and George Wallace and Richard Nixon's presidential campaigns in 1968 demonstrated the political

75. 304 U.S. 144 (1938).

76. *Id.* at 152 n.4.

77. *Id.* at 152–53 n.4 ("Nor need we enquire whether similar considerations [of deference] enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." (internal citations omitted)).

78. *See* KLARMAN, *supra* note 45, at 195–96; POWE, *supra* note 61, at 214–15; Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1300 (1982).

79. POWE, *supra* note 61, at 490–91.

80. FELD, *supra* note 21, at 52–54.

81. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); *see also* KLARMAN, *supra* note 45, at 292–312 (reconstructing the deliberations between the justices during the *Brown* decision and discussing the internal decision-making of the Court).

82. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955); The Honorable Linwood Holton, *A Former Governor's Reflection on Massive Resistance in Virginia*, 49 WASH. & LEE L. REV. 15, 19–20 (1992).

83. KLARMAN, *supra* note 45, at 343.

salience of a racialized Southern Strategy.[84] Nonetheless, *Brown* provided strong impetus to pursue other avenues of racial justice.

By the early 1960s, the Civil Rights Movement was generating political momentum. Nationally televised violent attacks on Black protesters and Freedom Riders led Congress to pass the Civil Rights Act of 1964,[85] banning discrimination in schools, employment, and public accommodations, and the Voting Rights Act of 1965,[86] prohibiting procedures designed to impede Black voters' exercise of the franchise.[87] The laws created a national norm—formal legal equality—on matters of race to which 70% of the members of Congress and the unanimous Supreme Court required the South to conform.

Concomitant with the Warren Court's efforts to enforce equality norms was its attempt to address racial injustice in the criminal justice system.[88] Beginning in the 1920s and 1930s, Supreme Court cases like *Moore v. Dempsey*,[89] *Powell v. Alabama*,[90] and *Brown v. Mississippi*[91] sporadically used the Fourteenth Amendment Due Process Clause to review states' systems of criminal justice administration and protect Black Americans against southern injustice.[92] Those early decisions involved egregious injustices—confessions extracted by torture, mob-dominated proceedings, sham trials, and the death penalty.[93] The Court's oversight of southern states' criminal proceedings became especially important in cases that challenged white supremacy or that heightened national visibility of the injustices endured by Black

84. EDSALL & EDSALL, *supra* note 63, at 76–79; POWE, *supra* note 61, at 60–62.

85. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

86. Pub. L. No. 89–110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

87. *See* GILENS, *supra* note 53, at 108; POWE, *supra* note 61, at 260.

88. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 107 (Jeremy Travis et al. eds., 2014).

89. 261 U.S. 86 (1923).

90. 287 U.S. 45 (1932).

91. 297 U.S. 278 (1936).

92. *Brown*, 297 U.S. at 286 (exclusion of coerced confessions extracted by torture); Norris v. Alabama, 294 U.S. 587, 597–99 (1935) (exclusion of Black jurors from *venire*); *Powell*, 287 U.S. at 71 ("Scottsboro Boys" case using Fourteenth Amendment due process clause to grant limited right to counsel); *Moore*, 261 U.S. at 86 (1923) (state criminal conviction obtained through mob-dominated sham trials); DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 161 (2007).

93. Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From* Brown *to* Miranda, Furman *and Beyond*, 54 VAND. L. REV. 359, 377 (2001).

defendants and marked its initial efforts to eradicate regional deviation from elementary procedural expectations.[94]

During Warren's tenure as Chief Justice, the Court decided close to 600 criminal cases.[95] Several themes animated its jurisprudence: an emphasis on individual liberty and equality, distrust of state power, an unwillingness to rely on officials' benevolent motives, and recognition that discretionary decisions in the administration of justice adversely affected racial minorities.[96] The Court used three strategies—incorporation, reinterpretation, and equal protection—to decide state criminal procedure cases.[97] First, it used the Fourteenth Amendment Due Process Clause to incorporate specific provisions of the Bill of Rights and apply them to the states, which allowed the Court to establish a minimum requirement of fairness in criminal trials.[98] Second, it reinterpreted those provisions broadly to expand constitutional rights and exercise greater oversight over state officials.[99] Finally, it used the Equal Protection Clause to redress imbalances between white and non-white and rich and poor defendants in states' criminal justice systems.[100]

Decisions such as *Mapp v. Ohio*,[101] establishing the exclusionary rule, and *Miranda v. Arizona*,[102] mandating warning prior to custodial interrogation, expanded defendants' rights, restricted police power, and provided a remedy for constitutional violations. These decisions elicited hostile criticism from law enforcement officials, conservative politicians, and the public.[103] While earlier criminal decisions like *Powell*, *Moore*, and *Brown* involved egregious injustice and veiled

94. *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48, 71, 75 (2000).

95. Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 519.

96. *See generally* FRED P. GRAHAM, THE SELF-INFLICTED WOUND (1970); EDSALL & EDSALL, *supra* note 63, at 110–11.

97. GRAHAM, *supra* note 96, at 41–66; G. Edward White, *Warren Court (1953–1969), in* AMERICAN CONSTITUTIONAL HISTORY 279, 287 (Leonard W. Levy et al. eds., 1989); Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1324–27 (1977).

98. *See* POWE, *supra* note 61, at 412.

99. *See* David Cuban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 27 (1999) (discussing the Warren Court's creation of rights as a reaction to institutional threats that infringe on individual rights).

100. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 19 (1956) (using Equal Protection rationale to provide indigent appellants with a trial transcript).

101. 367 U.S. 643 (1961).

102. 384 U.S. 436 (1966).

103. *See* EDSALL & EDSALL, *supra* note 63, at 111.

discussions of race, by the mid-1960s, many whites viewed the Court's decisions as overtly racial because of their concurrence with urban conflicts and rising crime rates.[104]

Yet, it is notable that the signature cases of the Warren Court's criminal procedure revolution contain virtually no discussion of racial issues.[105] Even *Duncan v. Louisiana*,[106] which involved a Black defendant who was sentenced to sixty days in jail for touching a white youth on the arm as the defendant attempted to prevent a fight, held that the Sixth Amendment right to trial by jury applied to defendants in state proceedings without mentioning the underlying racial components of the case.[107]

B. Race, Paternalism, and the Juvenile Court

In parallel with the Great Migration and the emerging Civil Rights Movement, the American juvenile court became a fixture in all fifty states. Despite its nominally benevolent purposes, however, it quickly became evident that juvenile court decisions were often arbitrary and harsh, especially for Black children. By the 1960s, disillusionment with the juvenile court's unbridled discretion and lack of procedural safeguards became widespread.

1. The rehabilitative ideal

The nation's first juvenile court was established in Cook County, Illinois in 1899, a decade before the start of the Great Migration.[108] Prompted by the prevailing Progressive philosophy that children were vulnerable and dependent beings in need of special care and protection, the juvenile justice system was created as a social welfare alternative to the criminal justice system.[109] The juvenile court eschewed criminal elements, characterized its proceedings as civil,

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104. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Powell v. Alabama, 287 U.S. 42, 71 (1932); Moore v. Dempsey, 261 U.S. 86 (1923); EDSALL & EDSALL, *supra* note 63, at 74–77; GILENS, *supra* note 53, at 107–10.

105. Beale, *supra* note 18, at 527.

106. 391 U.S. 145 (1968).

107. *Duncan*, 391 U.S. at 146, 147, 162. *See generally* Nancy J. King, Duncan v. Louisiana*: How Bigotry in the Bayou Led to the Federal Regulation of State Juries*, *in* CRIMINAL PROCEDURE STORIES 272 (Carol S. Steiker ed., 2006).

108. *See* C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 667 (2005).

109. *See* FELD, *supra* note 18, at 60–67; *see also* Clarke, *supra* note 108, at 662–65 (observing that the Progressives' approach to juvenile delinquency represented a departure from the Colonial belief that parents and educators "were free to use whatever means they deemed appropriate to correct misbehaving children").

and replaced lawyers and juries with social service personnel, probation officers, and clinicians.[110] Courtroom vocabulary shifted accordingly: a petition in the welfare of the child commenced a proceeding rather than a criminal charge; judges adjudicated a youth to be delinquent rather than criminal; and they imposed dispositions rather than sentences.[111] Court proceedings abandoned formal rules of evidence and procedure in favor of broad judicial discretion.[112] Maximum flexibility and informality, it was thought, would best enable the states to carry out their role as *parens patriae*.[113]

From its Progressive origins until the early 1970s, the Rehabilitative Ideal emphasized treatment to promote juveniles' well-being and provided the intellectual framework, cultural vocabulary, and shared understandings that animated criminal and juvenile justice professionals.[114] The rehabilitative enterprise focused on the individual child and relied on judges and professionals to make welfare-oriented decisions in the child's "best interests."[115] While traditional accounts of the juvenile court's early years attribute benevolent motives to its founders, most modern accounts portray Progressives as wealthy Anglo-Protestants who envisioned the juvenile court as a vehicle through which to exercise social control over Black and immigrant youth.[116]

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110. *See* FELD, *supra* note 18, at 62, 68–69; Feld, *supra* note 9, at 1458–59.

111. *See* FELD, *supra* note 18, at 68.

112. *See* Clarke, *supra* note 108, at 668 (noting that "courts were given maximum discretion to allow for flexibility in diagnosis and treatment").

113. *See* FELD, *supra* note 18, at 52 (noting that *parens patriae*, a legal doctrine with origins in English chancery courts to protect the Crown's interests in feudal succession, provided the rationale for the state to substitute its own control over children if their parents failed to meet their responsibilities); Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae"*, 22 S.C. L. REV. 147, 147 (1970); George B. Curtis, *The Checkered Career of* Parens Patriae*: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 895 (1976); Douglas R. Rendleman, Parens Patriae*: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 205 (1971).

114. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 27 (2001).

115. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 53–61 (1980); FRANCIS A. ALLEN, *Legal Values and the Rehabilitative Ideal*, *in* THE BORDERLAND OF THE CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY 25, 26–29, 35–39, 41 (1964).

116. *See, e.g.*, Henning et al., *supra* note 19, at 30, 32–34 (documenting the fight for racial equity in the juvenile court in the years before and immediately after *Gault*); ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 3, 6, 10–11, 13 (2d ed. 1977).

2. Jim Crow juvenile justice

From its earliest days, Black children were overpunished and underserved in the juvenile court.[117] Northern Progressive reformers were simply not focused on the rehabilitation of "Negro" youth, Geoff Ward notes.[118] Black youth were a "perennial 'lost cause[]' . . . lacking the physical, moral, and intellectual capacity on which normalization would depend."[119]

In Chicago's nascent juvenile court, data suggests that while Black and white children committed similar offenses, Black youth were sent to the more punitive state-run reformatory, St. Charles School for Boys, "sooner than [they] would have in the cases of Jewish, Italian, or Polish children."[120] Within child welfare facilities and correctional institutions, racial segregation was pervasive. Black children were routinely excluded from refuge homes in northern cities, and those that did allow Black youth, often relegated them to the "colored section."[121] While white youth in juvenile court placements received academic instruction and vocational training, Black children received little, if any, education and were trained exclusively for manual labor or low-level service jobs.[122]

In the Jim Crow South, Black youth fared far worse. "Southern governments were generally slow to embrace juvenile justice reforms and were especially disinclined to recognize [B]lack youths or community interests in citizen-building narratives, during or after slavery."[123] Most southern states tried Black children in criminal courts, committed them to prisons, subjected them to chain gangs, and leased them as "convicts."[124] In 1910, over 80% of Black youths charged with offenses in the South were committed to adult correctional facilities.[125]

By the 1960s, racial disparities in the juvenile court became part of the national dialogue. A survey conducted contemporaneously with *Gault* by the President's Commission on Law Enforcement and the

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117. Sterling, *supra* note 20, at 627–28.

118. *See* WARD, *supra* note 5, at 113–14.

119. *Id.* at 39.

120. Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 400 (2017) (*quoting* DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 38 (2004)).

121. WARD, *supra* note 5, at 53.

122. *Id.* at 52–53.

123. *Id.* at 60.

124. *Id.* at 11.

125. *Id.* at 98.

Administration of Justice reported that in the vast majority of juvenile courts in the country, non-white juveniles comprised 40% of the youth who came before them.[126] Separate studies found that Black youth brought before the juvenile court were younger, had fewer prior appearances, committed fewer and less serious crimes, but received probation less often than their white counterparts.[127]

3. Progressive disillusion

By the 1920s, the juvenile court's absence of procedural protections was raising concern among advocates and academics. In 1913, Roscoe Pound lamented that "the powers of the Star Chamber were a bagatelle" compared to the juvenile courts,[128] a phrase that was repeated by Professor Herbert Lou a decade later.[129] In 1946, Paul Tappan condemned the juvenile courts as "treatment without trial."[130] Despite these calls for reform, juvenile courts evaded serious scrutiny until the 1960s.[131]

In 1964, Chief Justice Earl Warren addressed the National Council of Juvenile Court Judges and identified several procedural protections that juvenile courts lacked—lawyers, a fair hearing, and a framework of law to provide a check on unbridled caprice.[132] In 1966, the Warren Court stepped in for the first time, holding in *Kent v. United States*[133] that juvenile courts must provide procedural safeguards in transfer hearings.[134] "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of

126. PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 80 (1967) [hereinafter TASK FORCE REPORT].

127. *See, e.g.*, Sidney Axelrad, *Negro and White Male Institutionalized Delinquents*, 57 AM. J. SOC. 569, 569–71 (1952); Sterling, *supra* note 20, at 632–33.

128. Roscoe Pound, *The Administration of Justice in a Modern City*, 26 HARV. L. REV. 302, 322 (1913).

129. LOU, *supra* note 3, at 68 (quoting Pound, *supra* note 128, at 322).

130. Tappan, *supra* note 6, at 307–08; *see also* Beemsterboer, *supra* note 6, at 475 (arguing that the juvenile court when it relies on informal observations "is merely a euphemism for the *star chamber*").

131. NELLIS, *supra* note 37, at 21; PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 55 (1967); TASK FORCE REPORT, *supra* note 126, at 1; Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 12–26 (1965); Monrad G. Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233, 233; David R. Barrett et al., Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 775–76 (1966).

132. FELD, *supra* note 18, at 99.

133. 383 U.S. 541 (1966).

134. *Id.* at 556–57; Paulsen, *supra* note 131, at 252.

both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children," the Court lamented.[135]

At the same time, the politics of race and crime were precipitating a shift in criminal justice policies from the belief that penal measures should rehabilitate and promote positive change to an increasingly punitive orientation.[136] Liberal critics continued to characterize individualized treatment in the juvenile court as a paternalistic veneer that masked coercive social control and oppressed the poor, the young, and minorities.[137] They also criticized judges and social workers whose discretionary decisions resulted in unequal treatment of similarly situated defendants and questioned the State's ability to deal justly with its most vulnerable citizens.[138] Conservative critics perceived a crisis in rising crime rates, civil rights protests, and urban race rebellions; advocated for law and order; and favored repression over rehabilitation.[139] These developments laid the groundwork for *Gault*.

C. In re Gault

In re Gault was reportedly a product of the Warren Court's efforts to enhance the juvenile court's procedural safeguards and curb what had become overwhelming evidence of racial injustice. Curiously, however, the *Gault* Court said nothing about race. Nor did it fully reject the juvenile court's Progressive origins.

1. Procedural formality

The underlying facts of *In re Gault* were central to the Court's decision. In 1964, police in Globe, Arizona took a white fifteen-year-old named Gerald Gault into custody for allegedly making a telephone call of the "irritatingly offensive, adolescent, sex variety."[140] Police held him overnight without notifying his parents, and the next day, a juvenile court judge held an informal hearing to consider a

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135. *Kent*, 383 U.S. at 556.

136. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 25–30 (1981); GARLAND, *supra* note 114, at 13; MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 146 (2015).

137. GARLAND, *supra* note 114, at 55.

138. ALLEN, *supra* note 136, at 87–88; GARLAND, *supra* note 114, at 36.

139. EDSALL & EDSALL, *supra* note 63, at 49–52.

140. *In re* Gault, 387 U.S. 1, 4 (1967). The offending words allegedly included: "Are your cherries ripe? Do you have big bombers? Do you give any away?" TANENHAUS, *supra* note 13, at 32.

delinquency petition that simply alleged Gault needed care and custody.[141] The judge questioned Gault about the telephone call, which he admitted dialing, but insisted a companion spoke the offending words.[142] No witnesses testified, and there was no transcript or record of the proceeding.[143] No steps were taken to advise Gault or his parents of his right to remain silent or to counsel, and the court did not provide an attorney.[144] A week later, the judge committed Gault to the State Industrial School "for the period of his minority [that is, until 21], unless sooner discharged by due process of law."[145] A judge could have sentenced an adult convicted of the same crime to a $50 fine or two months' imprisonment, rather than confinement of up to six years.[146]

In its 1967 decision, the Supreme Court identified two fatal disjunctions between juvenile justice rhetoric and reality: the theory versus practice of rehabilitation and the expanded procedural safeguards afforded criminal defendants compared with the meager protections juveniles received. Although juvenile courts' Progressive founders and Dean Roscoe Pound aspired to exceptionally well-qualified judges—mature, wise, sophisticated, and versed in law and social sciences—the President's Crime Commission reported that "half had not received undergraduate degrees; a fifth had received no college education at all; a fifth were not members of the bar . . . . and judicial hearings often are little more than attenuated interviews of 10 or 15 minutes' duration."[147] In addition, nearly all juveniles appeared before judges without counsel. A survey of 207 juvenile courts serving populations of 100,000 or more reported that lawyers accompanied juveniles in 40% or more of cases in only 5% of courts, and that counsel appeared in more than 20% of delinquency cases only 15% of the time.[148]

Gault reviewed the juvenile court's historical justifications for omitting procedural safeguards: the proceedings were civil rather than criminal; juveniles received treatment rather than punishment; and when the State acted as *parens patriae*, the child was entitled to

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141. *Gault*, 387 U.S. at 5–6.
142. *Id.* at 6.
143. *Id.* at 5–6.
144. *Id.* at 5–7.
145. *Id.* at 7–8 (alterations in original).
146. *Id.* at 29.
147. TASK FORCE REPORT, *supra* note 126, at 7.
148. TASK FORCE REPORT, *supra* note 126, at 82; BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 54–56 (1993).

custody rather than liberty.[149] It noted that absence of procedures often resulted in judicial arbitrariness rather than "careful, compassionate, individualized treatment."[150] Youths could not challenge judges' discretion even when they imposed punitive sanctions because most juvenile court statutes did not authorize appeals.[151] *Gault* did not reject juvenile courts' rehabilitative goals, but emphasized their high rates of recidivism; the stigma of a delinquency label; access to court records granted to military, law enforcement, and employers; and arbitrary decision making as reasons to require procedural safeguards.[152] The Court also examined the institutions in which states purported to treat juveniles, described them as quasi-penal places of confinement, and concluded that "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court."[153]

Gault ruled that juvenile courts must conduct fundamentally fair proceedings, which necessarily include notice of charges, an impartial hearing, the opportunity to confront and cross-examine witnesses, the privilege against self-incrimination, and, perhaps most importantly, the assistance of counsel.[154] However, the Court did not address juveniles' rights prior to trial—at intake and detention—or after trial—at disposition and post-disposition—but rather focused exclusively on the adjudication of guilt or innocence.[155] The Court also declined to address whether *Gault*'s protections extended to the appellate stages of juvenile proceedings.[156] "We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state," Justice Fortas

149. *Gault*, 387 U.S. at 17–18.

150. *Id.* at 14–17.

151. MANFREDI, *supra* note 26, at 3–33; NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 36 (2013) [hereinafter NAT'L RESEARCH COUNCIL 2013]. *See generally* Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 271, 276 (Thomas Grisso & Robert G. Schwartz eds., 2000).

152. *Gault*, 387 U.S. at 18–19, 22–25, 22 n.30.

153. *Id.* at 27–28; *see also* BARRY C. FELD, NEUTRALIZING INMATE VIOLENCE: JUVENILE OFFENDERS IN INSTITUTIONS 4–8 (1977) (describing conditions of confinement in delinquency institutions).

154. *Gault*, 387 U.S. at 31–57; Feld, *supra* note 11, at 154–57; Francis Barry McCarthy, *Pre-Adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457, 459–60 (1981); Irene M. Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 662–63 (1980).

155. *Gault*, 387 U.S. at 13, 31 n.48; McCarthy, *supra* note 154, at 459–60.

156. *Gault*, 387 U.S. at 13, 58.

noted.[157] "We do not even consider the entire process relating to juvenile 'delinquents.'"[158]

As in several of its other constitutional criminal procedure decisions, the Warren Court endorsed adversarial procedures both to ensure the factual accuracy of court proceedings and to limit the state's power to punish.[159] One of the purposes of the privilege against self-incrimination, the Court noted, "is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction."[160] The Warren Court's commitment to "revitaliz[ing] the adversary process in those parts of the system in which it was supposed to flourish" and "extend[ing] the adversary process into areas of the system in which, theretofore, adversary proceedings were unknown or rarely employed" was one of its most distinctive tendencies.[161]

2. Fundamental fairness

However, unlike its 1963 decision in *Gideon v. Wainwright*, in which the Court held that the Sixth Amendment guarantees the accused the right to the assistance of counsel in all criminal prosecutions and requires courts to provide counsel for defendants unable to hire counsel unless the right was knowingly, intelligently, and voluntarily waived,[162] *Gault* based the rights to notice, counsel, and confrontation not on the Sixth Amendment, but on the Fourteenth Amendment's due process requirement of fundamental fairness.[163] The Arizona Supreme Court had used the same fundamental fairness approach when it rejected Gerald Gault's pleas for procedural protections.[164]

The distinctions between the Fourteenth Amendment fundamental fairness standard and Sixth Amendment fundamental rights standard are marked. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a *speedy and public trial*, by an *impartial jury* . . . and to be *informed* of the nature and cause of the accusation; to be *confronted* with the witnesses against him; . . .

157. *Id.* at 13.
158. *Id.*
159. Allen, *supra* note 95, at 518–22; Feld, *supra* note 11, at 154–57.
160. *Gault*, 387 U.S. at 47.
161. Allen, *supra* note 95, at 530–31.
162. 372 U.S. 335, 339–40 (1963).
163. MANFREDI, *supra* note 26, at 21; Sterling, *supra* note 20, at 633–42.
164. *Gault*, 387 U.S. at 4; *see also* MANFREDI, *supra* note 26, at 101–07 (discussing the drafting of amicus briefs in *Gault*).

and to have the Assistance of *Counsel* for his defence."[165] By contrast, Fourteenth Amendment "[d]ue process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding."[166] Although *Gault* deemed delinquency proceedings "comparable in seriousness to a felony prosecution," it nonetheless afforded juveniles fewer procedural protections than adults.[167]

Justice Hugo Black concurred in *Gault*, but argued that juveniles should receive the same criminal procedural safeguards that the Bill of Rights guarantees for adults, rather than what he called a "watered-down" judicial version of fairness embodied in generic notions of due process.[168] Importantly, both the *Gault* majority and Black's concurring opinion assumed that juveniles were competent to exercise their newly-granted rights in conjunction with counsel.[169] The Court recognized that providing counsel and other safeguards could make proceedings more adversarial and complex, but concluded that juveniles needed "advocates to speak for them and guard their interests."[170]

3. Paternalism and racial neutrality

As a number of scholars have noted, there is considerable evidence that the Warren Court's 1967 decision in *In re Gault*, like the Court's other criminal procedure cases of the era, was intended to address institutional racism in the juvenile court.[171] Decided at "the peak of

165. U.S. CONST. amend. VI. (emphasis added).

166. *Gault*, 387 U.S. at 33.

167. *Id.* at 36. The Court did, however, afford juveniles the Fifth Amendment privilege against self-incrimination. It held that "juvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination . . . . It is incarceration against one's will whether it is called 'criminal' or 'civil.'" *Id.* at 49–50. Granting the privilege against self-incrimination negated claims that delinquency hearings were civil non-adversarial proceedings and rejected a core principle of traditional juvenile jurisprudence that admissions of wrongdoing are an indispensable element of the rehabilitation process. MANFREDI, *supra* note 26, at 105.

168. *Gault*, 387 U.S. at 61.

169. *See* NAT'L RESEARCH COUNCIL 2013, *supra* note 151, at 37.

170. *Gault*, 387 U.S. at 39 n.65 (quoting PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 131, at 86).

171. *See, e.g.*, Neuborne, *supra* note 9, at 86 ("[T]he right to counsel cases from *Gideon* to *Argersinger* were driven, in part, by concern over a criminal justice system where white judges and prosecutors processed poor, unrepresented [B]lacks and Hispanics."); Sklansky, *supra* note 9, at 1805 ("[C]riminal procedure in the Warren Court era was famously preoccupied with issues of illegitimate inequality, particularly those

the civil rights period," both *Gideon* and *Gault* "arguably served as an important legal corollary to the civil rights struggle against racial discrimination as they appeared to be concerned about the way [B]lack defendants were being treated in the criminal and juvenile justice systems."[172]

It is surprising, then, that *Gault* is entirely race-neutral. Gerald Gault was a white juvenile living in the southwestern United States. In theory, the Court could have, but did not, select as its vehicle to reshape the juvenile court one of any number of cases involving the arbitrary and cruel treatment of a Black juvenile in the South. Indeed, despite the Warren Court's reported and apparent concern about racial injustice, race was almost never explicitly discussed in its criminal procedure and juvenile justice opinions.[173]

It is also curious that, despite its disenchantment with Progressivism, the Court embraced aspects of the traditional "Child Savers" narrative. Progressives were "appalled by adult procedures and penalties," the Court noted, and "profoundly convinced that society's duty to the child could not be confined by the concept of justice alone."[174] "On the one hand, the Court assailed the then-current juvenile system as a 'kangaroo court,'" Robin Walker Sterling writes, while "[o]n the other hand, despite the Court's full-throated rebuke," the Court adopted the Child Savers' rehabilitation story as a basis to rely on Fourteenth Amendment fundamental fairness, and not fundamental rights enumerated in the Bill of Rights.[175] Whether the Warren Court's reluctance to reject the juvenile court's paternalistic and racially discriminatory history in its seminal juvenile justice decision was driven by fear of another *Brown*-type political backlash, a strategic commitment to employing a less rigorous constitutional standard than it had in *Gideon*, or a waning commitment to achieving racial equality in the administration of criminal and juvenile justice, these omissions would prove consequential.

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associated with race."); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) ("The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating [B]lack suspects and defendants much worse than white ones. Warren-era constitutional criminal procedure began as a kind of antidiscrimination law.").

172. Henning et al., *supra* note 19, at 32.

173. Beale, *supra* note 18, at 524; Henning et al., *supra* note 19, at 32.

174. *Gault*, 387 U.S. at 15.

175. Sterling, *supra* note 20, at 644.

II. RACE AND PUNISHMENT IN THE POST-*GAULT* ERA

One of *Gault*'s great ironies may be that, in an effort to alleviate the juvenile court's racial inequities, the Court may have unwittingly compounded them. By endorsing an adversarial court process for children and engrafting into the juvenile court some, but not all, of the procedural rights afforded to adults, the Court unwittingly triggered the juvenile court's ideological, jurisprudential, procedural, jurisdictional, and penal transformation into a second-class criminal court for youth that meted out punishment without the protection of its criminal counterpart. By any measure, these changes disproportionately disadvantaged youth of color.

A. Procedural Formality and Institutional Convergence

When it was established in 1899, the purpose of the juvenile court was "to secure for each minor . . . such care and guidance . . . as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community."[176] By the early 1990s, however, about one-quarter of the states had redefined their juvenile courts' purpose clauses to deemphasize rehabilitation and emphasize public safety,[177] children's obligations to society,[178] retributive sanctions,[179] and punishment.[180]

These changes were the product of a broader ideological shift that took place in the 1970s and 1980s.[181] In 1979, for example, the

176. 705 ILL. COMP. STAT. ANN. 405/1–2 (West 2019).

177. *See* CAL. WELF. & INST. CODE § 202 (West 2008) (stating that the purpose of the chapter is to "provide for the protection and safety of the public"); *see also* Feld, *supra* note 22, at 842–47.

178. IND. CODE § 31-6-1-1 (1990), *repealed by* P.L.268-1995, Sec. 17 & P.L.1-1997, Sec. 157 (claiming that the state wishes to "provide a juvenile justice system that protects the public by enforcing the legal obligations children have to society").

179. FLA. STAT. ANN. § 39.001(2)(a) (West 1988), *amended by* 2019 Fla. Sess. Law Serv. 128 (West) ("[P]rotect society . . . [while] recognizing that the application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases.").

180. HAW. REV. STAT. § 571-1 (1985); *see also* Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 Crime & Just. 189, 222 (1998) ("[S]tates have revised their juvenile codes' statement of legislative purpose, deemphasized rehabilitation and the child's best interest, and asserted the importance of public safety, punishment, and accountability in the juvenile justice system." (internal citation omitted)).

181. *See, e.g.*, *In re* D.F.B., 430 N.W.2d 475, 478 (Minn. Ct. App. 1988), *aff'd*, 433 N.W.2d 79 (Minn. 1988); State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401, 408–09 (W. Va. 1980).

Washington Supreme Court rationalized a newly retributive purpose clause on the grounds that "accountability for criminal behavior, the prior criminal activity and punishment commensurate with age, crime and criminal history does as much to rehabilitate . . . an errant youth as does the prior philosophy of focusing upon . . . characteristics of the individual juvenile."[182] Four years later, the Nevada Supreme Court explicitly embraced punishment as a valid objective of the juvenile court, explaining that "[b]y formally recognizing the legitimacy of punitive and deterrent sanctions for criminal offenses[,] juvenile courts will be properly and somewhat belatedly expressing society's firm disapproval of juvenile crime and will be clearly issuing a threat of punishment for criminal acts to the juvenile population."[183]

Gault also opened the door for additional Supreme Court decisions that further increased juvenile courts' procedural formality. In 1970, in *In re Winship*,[184] the Court held that the State must prove delinquency by the criminal standard—beyond a reasonable doubt—rather than by the lower civil standard of proof—preponderance of the evidence.[185] Five years later in *Breed v. Jones*,[186] the Court held that the double jeopardy protection of the Fifth Amendment barred criminal prosecution of a youth whom a juvenile court previously found delinquent for the same crime.[187] *Breed* found that policies that underlay the double jeopardy prohibition applied equally to delinquency and criminal prosecutions.[188]

While *Winship* and *Breed* plainly brought important procedural protections to the juvenile court, this jurisprudence, in combination with subsequent Court decisions and federal and state legislation, had the cumulative effect of criminalizing the juvenile court's day-to-day practices. Prior to *Gault*, for example, probation officers presented juveniles' cases in court and recommended dispositions; after *Gault*, juveniles were given the right to counsel, and states introduced prosecutors to off-set defense lawyers' presence.[189] Since prosecutors

182. State v. Lawley, 591 P.2d 772, 773 (Wash. 1979) (en banc); *see also* State v. Schaaf, 743 P.2d 240, 242 (Wash. 1987) (en banc) (detailing that changes in the Juvenile Justice Act did not require recognition of the right to a jury trial).

183. *In re* Seven Minors, 664 P.2d 947, 950 (Nev. 1983).

184. 397 U.S. 358 (1970).

185. *Id.* at 368.

186. 421 U.S. 519 (1975).

187. *Id.* at 541.

188. *Id.* at 531.

189. Franklin E. Zimring & David S. Tanenhaus, *On Strategy and Tactics for Contemporary Reforms*, *in* CHOOSING FOR THE FUTURE OF THE AMERICAN JUVENILE JUSTICE 216, 232 (Franklin E. Zimring & David S. Tanenhaus eds., 2014); *see also* FELD, *supra* note 21.

had been socialized in criminal courts to maximize convictions and sentences, they began to import those norms into juvenile courts.[190] These changes also made the juvenile court more hospitable to the "get tough" laws that followed.

Finally, the juvenile court also underwent two significant jurisdictional changes in the years after *Gault*. Status offenses, such as truancy or incorrigibility, were removed from juvenile court jurisdiction in a number of states, and, as discussed later, an increasingly large number of youth and offenses were subjected to criminal court jurisdiction.[191] Historically, the juvenile court maintained jurisdiction over status offenses to prevent low-level misconduct from escalating into criminality.[192] Children adjudicated delinquent as status offenders were detained and incarcerated in the same institutions as those adjudicated for criminal offenses.[193] During the 1970s and 1980s, federal legislation along with three state-level, administrative trends—diversion, deinstitutionalization, and decriminalization—led to the removal of many so-called "status offenders" from the juvenile court.[194] While plainly warranted,[195] this shift had the effect of limiting the juvenile court's jurisdictional authority to children who committed crimes and "privatizing" the treatment of middle-class status offenders.[196]

Even more significant were the jurisdictional shifts that took hold during 1980s and 1990s. During this era, the juvenile court relinquished jurisdiction over thousands of youth, not to facilitate rehabilitation and protection, but to exact retribution and punishment.[197]

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190. Zimring & Tanenhaus, *supra* note 189, at 232.

191. *See infra* Section II.C; *see also* Feld, *supra* note 2, at 696–708 (explaining juvenile court jurisdiction over noncriminal status offenses post-*Gault*).

192. *Id.* at 697.

193. IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD 4 (1989) (discussing the Juvenile Justice and Delinquency Prevention Act, which proposed to remove juveniles from adult facilities).

194. Feld, *supra* note 191, at 697; *see also* FELD, *supra* note 18, at 173–79 (describing reforms of status jurisdiction).

195. For information on treatment of status offenses by juvenile courts, see generally BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT (Lee E. Teitelbaum & Aidan R. Gough eds., 1977); FELD, *supra* note 18, at 166–88; STATUS OFFENDERS AND THE JUVENILE JUSTICE SYSTEM: AN ANTHOLOGY (Richard Allinson ed., 1978).

196. SCHWARTZ, *supra* note 193, at 131; Lois A. Weithorn, Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 820–26 (1988) (discussing the trend of rising inpatient hospital treatment for children for behaviors that had traditionally been categorized as criminal).

197. *See infra* Section II.C.

B. Fundamental Fairness and Illusory Protection

One of *Gault*'s great paradoxes is that, even as it decried the juvenile court's procedural vacuity, it opted for a tepid constitutional framework that undermined its own mandates in several ways. First, *Gault*'s failure to create a Sixth Amendment right to counsel for children opened the door for the Court's 1971 decision in *McKeiver v. Pennsylvania*, which held that juveniles do not have the constitutional right to a jury trial.[198] Despite a ruling in 1968 in *Duncan v. Louisiana*,[199] which held the Sixth Amendment guaranteed adults the right to a jury trial in state criminal proceedings,[200] *McKeiver* held that Fourteenth Amendment due process required only accurate fact-finding, which, the Court believed a juvenile court judge could do as well as a jury. The Court did not articulate its rationale for rejecting the approach it had used in *Duncan* beyond asserting that juvenile court cases were not criminal prosecutions.[201] Granting juveniles a jury trial "will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding," the Court cautioned.[202] As several scholars have noted, *McKeiver* denied juveniles what is arguably the most important check against prosecutorial overreach.[203]

Second, *Gault*'s failure to confer a constitutional right to appellate review insulated juvenile court judges from oversight.[204] Evidence suggests that adult defense lawyers appeal criminal cases about ten times more often than juvenile defenders.[205] There are myriad explanations: juvenile court culture, even among public defenders, may discourage appeals as an impediment to a youth assuming

198. McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *see also* Sterling, *supra* note 20, at 647–60 (discussing the misstep taken by the Court in *McKeiver* decision).

199. 391 U.S. 145 (1968).

200. *Id.* at 162.

201. *McKeiver*, 403 U.S. at 541.

202. *Id.* at 545.

203. Barry C. Feld, *The Constitutional Tension between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1150 (2003). *See generally* Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-*McKeiver *World*, 91 NEB. L. REV. 1 (2012) (asserting that the *McKeiver* decision misunderstood the distinction between punitive and rehabilitative dispositions).

204. *See* Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 633 (2002) (arguing that the low appeal rate of juvenile convictions is due in part to the waivers of counsel at trial).

205. Donald J. Harris, *Due Process v. Helping Kids in Trouble: Implementing the Right to Appeal for Adjudications of Delinquency in Pennsylvania*, 98 DICK. L. REV. 209, 220 (1994).

responsibility; overwhelming caseloads make specialized appellate divisions a luxury few defender offices can afford; the vast majority of juveniles enter guilty pleas, which waive the right to appeal and further precludes appellate review; juveniles who waived counsel at trial will be less aware of or able to pursue an appeal; and the short length of most juvenile dispositions renders many appealed cases moot if the child is released before a court reviews the case.[206] As one troubled state Supreme Court observed, "We cannot help but notice that the children's cases appealed to this court have often shown much more extensive and fundamental error than is generally found in adult criminal cases . . . ."[207]

The lack of appeals from juvenile courts also retards the development of substantive law. Appellate courts can only rule if parties present issues to them. If defense counsel does not challenge judges' decisions, then appellate courts cannot develop a body of case law. The dearth of substantive law undermines attorneys' views of juvenile courts as courts of law, discourages their presence, and limits the arguments available to creative advocates.[208]

Third, given the relative impotence of the Fourteenth Amendment standard and the absence of two of the justice system's most fundamental checks on state power—trial by jury and appeal—it is not surprising that *Gault*'s right to counsel is woefully underenforced. When the Court decided *Gault*, lawyers appeared in fewer than 5% of delinquency cases.[209] A study attributed the absence of counsel to "juvenile court judges' actively discouraging juveniles from retaining counsel and . . . [to] the inability of attorneys to perform their traditional role in juvenile courts."[210] Although states amended their juvenile codes to comply with *Gault*, evaluations of initial compliance found that most judges did not advise juveniles of their rights, and the vast majority did not appoint counsel.[211] Research in Minnesota in

206. *See* Megan Annitto, *Juvenile Justice Appeals*, 66 U. MIAMI L. REV. 671 (2012).

207. RLR. v. State, 487 P.2d 27, 38 (Alaska 1971).

208. FELD, *supra* note 18, at 136.

209. MANFREDI, *supra* note 26, at 40–41.

210. *Id.* at 41.

211. *See, e.g.*, M. A. BORTNER, INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE 139 (1982); David P. Aday, Jr., *Court Structure, Defense Attorney Use, and Juvenile Court Decisions*, 27 SOC. Q. 107, 114 (1986); Bradley C. Canon & Kenneth Kolson, *Rural Compliance with* Gault*: Kentucky, a Case Study*, 10 J. FAM. L. 300, 306 (1971); Stevens H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 L. & SOC'Y REV. 263, 297 (1980); Elyce Z. Ferster et al., *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375, 376–77 (1971); Norman Lefstein et al., *In Search of Juvenile Justice:* Gault *and Its*

the mid-1980s, for example, reported that most youths appeared without counsel, that rates of representation varied widely in urban, suburban, and rural counties, and that one-third of youths removed from home and one-quarter of those in institutions were unrepresented.[212] Similarly, a 1988 study of delivery of legal services in six states reported that only three of them appointed counsel for a substantial majority of juveniles,[213] and in 1995, the General Accounting Office confirmed that rates of representation varied widely among and within states and that judges tried and sentenced many unrepresented youths.[214]

In the mid-1990s, the American Bar Association (ABA) published two reports on juveniles' legal needs. One report, *America's Children at Risk*, illustrated that many children appeared without counsel and that lawyers who represented youth lacked adequate training and often failed to provide effective assistance.[215] The other report, *A Call for Justice*, focusing on the quality of defense lawyers, again reported that many youths appeared without counsel, and that many attorneys failed to appreciate the challenges of representing young clients.[216]

Since the late 1990s, the ABA and the National Juvenile Defender Center (NJDC) have conducted more than twenty state-by-state

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Implementation, 3 L. & SOC'Y REV. 491, 517–24, 530–37 (1969). *See generally* WILLIAM VAUGHAN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS (1972) (examining the impact of lawyers representing juveniles and positing that a lawyer's effectiveness is dependent on hearing structure and court personnel).

212. Feld, *supra* note 22, at 871–75; Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1199–200 (1989); *see also* FELD, *supra* note 148, at 54–56; Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156 (1991).

213. Barry C. Feld, In re Gault *Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393, 400–01 (1988) (reporting that only three of six states studied appointed counsel for a majority of youths).

214. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-95-139, JUVENILE JUSTICE: REPRESENTATION RATES VARIED AS DID COUNSEL'S IMPACT ON COURT OUTCOMES (1995).

215. AM. BAR ASS'N, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 60 (1993); *see also* Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In re Gault, 60 RUTGERS L. REV. 125, 142–47, 142 n.105 (2007) (discussing the right to counsel and the difficulties of understanding court processes without a lawyer).

216. PATRICIA PURITZ ET AL., AM. BAR ASS'N JUV. JUST. CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY REPRESENTATION IN DELINQUENCY PROCEEDINGS 52–56 (1995) [hereinafter A CALL FOR JUSTICE], https://static.prisonpolicy.org/scans/aba/cfjfull.pdf [https://perma.cc/7TJB-URBW.

assessments of access to and quality of counsel.[217] The NJDC's 2017 study reports that, though every state has a basic structure to provide attorneys for children at the adjudication phase of delinquency proceedings, few juvenile defendants actually have meaningful access to counsel.[218] Recent research reveals that only eleven states provide a court-appointed lawyer to every child charged with a delinquency defense regardless of financial status,[219] just one state provides lawyers for some children arrested for serious crimes during interrogation,[220] only eleven provide meaningful access to lawyers at post-adjudication,[221] thirty-six states charge fees for court-appointed lawyers,[222] and forty-three states allow children to waive their right to counsel without first consulting with an attorney.[223]

Several factors account for lack of representation in juvenile court. Public defender services may be less available in non-urban areas.[224] Judges may give cursory advisories of the right to counsel, imply that waivers are just legal technicalities, and readily find waivers to ease

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217. *See, e.g.*, AM. BAR ASS'N JUV. JUST. CTR. ET AL., JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO 15–16, 25 (Kim Brooks & Darlene Kamine eds., 2003); AM. BAR ASS'N JUV. JUST. CTR. ET AL., KENTUCKY: ADVANCING JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 29 (Patricia Puritz & Kim Brooks eds., 2002); AM. BAR ASS'N JUV. JUST. CTR. ET AL., THE CHILDREN LEFT BEHIND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN LOUISIANA 59–62 (Gabriella Celeste & Patricia Puritz eds., 2001); AM. BAR ASS'N JUV. JUST. CTR. ET AL., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 24–25 (Patricia Puritz et al. eds., 2002); *see also* Susanne M. Bookser, *Making* Gault *Meaningful: Access to Counsel and Quality of Representation in Delinquency Proceedings for Indigent Youth*, 3 WHITTIER J. CHILD & FAM. ADVOC. 297 (2004); Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?* 34 N. KY. L. REV. 275 (2007).

218. Feld, *supra* note 213, at 400–01 (reporting that only three of six states studied appointed counsel for a majority of youths); FELD, *supra* note 21, at 245–48 (reporting that many, if not most, delinquents appeared in juvenile court without counsel).

219. NAT'L JUVENILE DEFENDER CTR., *supra* note 15, at 10.

220. *Id.* at 16 (citing 705 Ill. Comp. Stat. § 405 / 5-170 (2017)) (providing that any child younger than 15 and accused of enumerated serious offenses must be represented by counsel during the entire custodial interrogation).

221. *Id.* at 31–32.

222. *Id.* at 22.

223. *Id.* at 25–26.

224. A CALL FOR JUSTICE, *supra* note 216, at 52–56.

their administrative burdens.[225] If judges expect to impose non-custodial sentences, then they may dispense with counsel.[226] Some jurisdictions charge fees to determine a youth's eligibility for a public defender, and others base youths' eligibility on their parents' income.[227] Parents may be reluctant to retain or accept an attorney if, as in many states, they may be required to reimburse attorney fees if they can afford them.[228]

By far, the most common explanation for underrepresentation, however, is waiver of counsel.[229] *Gault* required judges to advise juveniles and their parents of the right to have a lawyer appointed if they were indigent, but also held that juveniles could waive counsel.[230] In 2013, the National Academy of Sciences reported that "[i]n Louisiana, as many as 90 percent of youth waived their right to counsel . . . , and in many other states, including Florida, Georgia, and Kentucky, more than 50 percent of youth waived that right."[231] Despite this, most states do not use special procedural safeguards—mandatory nonwaivable appointment or prewaiver consultation with a lawyer, for example—to protect juveniles from improvident waiver decisions.[232] Instead, they use the adult waiver standard—knowing, intelligent, and voluntary—to gauge juveniles' relinquishment of counsel. Because this is also the standard that the Court in *Fare v. Michael C.*[233] endorsed to gauge juveniles' *Miranda* waivers of counsel,[234] criminological studies and developmental research on *Miranda* waivers generalize to juveniles' counsel waivers as well.[235] As

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225. *Id.* at 44–45; NAT'L RESEARCH COUNCIL 2013, *supra* note 151, at 199; Berkheiser, *supra* note 204; Bookser, *supra* note 217; N. Lee Cooper et al., *Fulfilling the Promise of* In re Gault*: Advancing the Role of Lawyers for Children*, 33 WAKE FOREST L. REV. 651, 654–60 (1998).

226. *See* Feld, *supra* note 11, at 189–90; Feld, *supra* note 212, at 1256–57; Lefstein et al., *supra* note 211, at 530–33; *see also* George W. Burrus, Jr. & Kimberly Kempf-Leonard, *The Questionable Advantage of Defense Counsel in Juvenile Court*, 19 JUST. Q. 37 (2002) (comparing the efficacy of legal counsel on case outcomes in juvenile delinquency matters).

227. NAT'L RESEARCH COUNCIL 2013, *supra* note 151, at 199.

228. FELD, *supra* note 18, at 127; NAT'L RESEARCH COUNCIL 2013, *supra* note 151, at 199; Feld, *supra* note 212, at 1200 & n.64.

229. A CALL FOR JUSTICE, *supra* note 216; FELD, *supra* note 148, at 29; Berkheiser, *The Fiction of Juvenile Right to Counsel*, *supra* note 203, at 649–50.

230. *In re* Gault, 387 U.S. 1, 41–42 (1967).

231. NAT'L RESEARCH COUNCIL 2013, *supra* note 151, at 199–200 (internal citation omitted).

232. FELD, *supra* note 148, at 290–91; NAT'L JUVENILE DEF. CTR., *supra* note 15, at 26–28; Feld, *supra* note 11, at 169–90.

233. 442 U.S. 707 (1979).

234. *Id.* at 725–27.

235. *See, e.g.*, BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 82–85 (2013).

with *Miranda*, formal equality between juveniles and adults results in practical inequality—lawyers represent juveniles at much lower rates than they do criminal defendants.[236]

Moreover, many juveniles do not understand their rights or the role of lawyers and waive counsel without consulting with either a parent or an attorney.[237] And even youths who understand the counsel advisory's words may be unable to exercise rights in a meaningful way[238] because they do not appreciate the function or importance of rights as well as adults.[239] Although judges are supposed to conduct a dialogue with youth to determine whether a child can understand rights and represent herself in juvenile court, they frequently fail to give delinquents any counsel advisory, often neglect to create a record, and readily accept waivers from manifestly incompetent children.[240] Juveniles' diminished competence, inability to understand proceedings, and judicial encouragement to waive counsel result in larger proportions of juveniles adjudicated without lawyers than adult defendants.[241]

In addition, like adult criminal defendants, the overwhelming majority of juvenile defendants admit to charges.[242] Because most states deny juveniles the right to a jury trial, they have very little plea

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236. *See, e.g.*, FELD, *supra* note 148; CAROLINE W. HARLOW, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES (2000); JUDITH B. JONES, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, ACCESS TO COUNSEL (2004); Burrus & Kempf-Leonard, *supra* note 226; Feld, *Juvenile Court Meets the Principle of Offense*, *supra* note 22.

237. Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 139, 247 (Thomas Grisso & Robert G. Schwarz eds., 2000). *See generally* Berkheiser, *supra* note 204 (discussing juvenile waiver of counsel).

238. Thomas Grisso & C. Pomiciter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 L. & HUM. BEHAV. 321, 339 (1977); *see also* Marty Beyer, *Immaturity, Culpability, and Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26 (2000) (examining how immaturity affects juveniles' ability to participate in the justice system).

239. *See, e.g.*, THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 130 (1981); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL., PUB. POL'Y, & L. 3, 11 (1997); Kimberly Larson, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of* Miranda, 48 VILL. L. REV. 629, 649–53 (2003).

240. *See, e.g.*, *In re Manuel R.*, 543 A.2d 719 (Conn. 1988); *In re Christopher H.*, 596 S.E.2d 500 (S.C. Ct. App. 2004). *See generally* Berkheiser, *supra* note 204.

241. Feld, *supra* note 22.

242. FELD, *supra* note 235, at 13; Joseph B. Sanborn, Jr., *Pleading Guilty in Juvenile Court: Minimal Ado About Something Very Important to Young Defendants*, 9 JUST. Q. 127 (1992); NAT'L RESEARCH COUNCIL 2013, *supra* note 151, at 201–02.

bargaining leverage.[243] Even though admitting to a charge is perhaps the most critical decision a juvenile defendant makes, states use adult standards to evaluate their competence to enter a plea.[244] Because appellate courts seldom review juveniles' waivers of counsel, pleas made without counsel receive even less judicial scrutiny.[245]

Finally, it is worth noting that some studies have found that juveniles appearing with counsel fare worse at disposition in certain situations than those without.[246] A recent meta-analysis evaluating the impact of counsel on dispositions, for example, concluded that youth represented by attorneys were more than twice as likely to receive out-of-home placements as those without counsel.[247] There are myriad explanations for these findings: judges may be more likely to appoint attorneys when they anticipate more severe sentences;[248] juveniles' developmental limitations and incomplete understanding of a lawyer's role may undermine the lawyer's ability to represent them effectively;[249] lawyers assigned to juvenile court may not be fully trained to litigate juvenile court cases and make dispositional arguments;[250] a lack of adequate funding for defender services may

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243. Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 169–70 (1993).

244. Sanborn, *supra* note 242, at 127–28; Lacey Cole Singleton, Note, *Say "Pleas": Juveniles' Competence to Enter Plea Agreements*, 9 J.L. & FAM. STUD. 439, 445 (2007).

245. Berkheiser, *supra* note 204, at 633; Sanborn, *supra* note 242, at 131; *see also* Harris, *supra* note 205, at 221–22 (discussing the statistical difficulties of measuring appellate oversight of guilty pleas because appeals from guilty pleas are included with appeals from trials).

246. Burruss & Kempf-Leonard, *supra* note 226, at 60; Feld, *supra* note 212, at 1236–38; George W. Burruss et al., *Fifty Years Post* Gault*: A Meta-Analysis of the Impact of Attorney Representation on Delinquency Outcomes*, J. CRIM. JUST. (forthcoming) (reporting that represented youths are twice as likely to receive out of home placement as unrepresented youths); *see also* Feld, *supra* note 212, at 190, 208 (noting that judges imposed harsher sentences in urban areas, which are the same areas where juveniles experience higher rates of representation).

247. Burrus et al., *supra* note 246 ("[T]he lawyer penalty was robust over time, across analysis type (bivariate or multivariate when both were included in the final analysis), and whether individual-level or state-level court data were used . . . . [T]hese studies suggest that represented juveniles in the U.S. juvenile justice system are twice as likely to be removed from their home and/or placed in an institution than those not represented.").

248. Canon & Kolson, *supra* note 211, at 319–20.

249. Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 151, at 243, 248.

250. *See* JANE KNITZER & MERRIL SOBIE, LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN 116 (1984); Cooper et al., *supra* note 225,

preclude investigations, which increases the risk of wrongful convictions;[251] and juvenile courts' *parens patriae* ideology may discourage "zealous advocacy" and engender adverse consequences for attorneys who "rock the boat."[252]

There is also the reality that many defense attorneys work under conditions that create structural impediments to quality representation.[253] Observations and qualitative assessments in dozens of states report derisory working conditions—crushing caseloads, penurious compensation, scant support services, inexperienced attorneys and inadequate supervision—that detract from or preclude effective representation.[254] Not surprisingly, ineffective assistance of counsel correlates with heightened risks of false confessions,[255] wrongful convictions,[256] placement in secure detention,[257] and the imposition of collateral consequences.[258] None of this is to say that

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at 656–57 (noting that many juvenile defenders lack experience in juvenile cases and devote little time for their preparation).

251. Drizin & Luloff, *supra* note 217, at 284, 290.

252. NAT'L RESEARCH COUNCIL 2013, *supra* note 151, at 201; Drizin & Luloff, *supra* note 217, at 291–92; *see also* Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1122 n.263, 1129 (1991).

253. A CALL FOR JUSTICE, *supra* note 216, at 24; *see also* Cooper et al., *supra* note 225, at 656–57 (explaining that many defense lawyers devote little time to preparing for juvenile cases and that many lacked prior experience in juvenile cases).

254. CELESTE & PURITZ, *supra* note 217, at 54–55, 57; NAT'L RESEARCH COUNCIL 2013, *supra* note 151, at 58; PURITZ & BROOKS, *supra* note 217, at 27, 32; PURITZ ET AL., *supra* note 217, at 19–21, 29–30.

255. *See* FELD, *supra* note 235, at 230 (explaining that youths are uniquely prone to give false confessions).

256. Drizin & Luloff, *supra* note 217, at 283–84; *see also* FELD, *supra* note 21, at 272 (noting that underfunded public defenders routinely fail to provide effective counsel).

257. WILLIAM ECENBARGER, KIDS FOR CASH: TWO JUDGES, THOUSANDS OF CHILDREN, AND A $2.8 MILLION KICKBACK SCHEME 248–49 (2012); *see also* Robert G. Schwartz & Marsha Levick, *When a "Right" Is Not Enough: Implementation of the Right to Counsel in an Age of Ambivalence*, 9 CRIMINOLOGY & PUB. POL'Y 365, 367 (2010) (citing data from the Juvenile Law Center showing that lack of counsel correlates with out-of-home detention).

258. *See* FELD, *supra* note 21, at 268–70 (noting that delinquency convictions can result in extensive collateral consequences that can affect housing, education, and professional licensure and employment opportunities; record sharing with other government agencies; loss of driving privilege; sex offender registration; and other similar repercussions); JOSHUA ROVNER, SENTENCING PROJECT, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 7 (2014), https://www.sentencingproject.org/publications/disproportionate-minority-contact-in-the-juvenile-justice-system [https://perma.cc/CZ5L-8A5B]; MELISSA SICKMUND & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 157–59, 214 (2014), https://www.ojjdp.gov/ojstatbb/

counsel should not be appointed for juveniles facing delinquency charges. On the contrary, these studies suggest that juvenile defenders must be better funded, better trained, better resourced, more experienced, and appointed not in just the most serious cases.

C. Rights, Politics, and Compensatory Punishment

If it is true that the Warren Court omitted race and opted for a comparatively weak constitutional framework in *Gault*, in an effort to avoid political fallout, its strategy did not work. A punitive backlash was already percolating.

The political rhetoric of "law and order" first emerged in the late 1950s. Angered by the Supreme Court's decision in *Brown v. Board of Education*, southern politicians called for a crackdown on the "'hoodlums' and 'agitators' . . . who challenged segregation and African American disenfranchisement."[259] A decade later, Barry Goldwater's "crime in the streets" condemnation of American society brought criminal justice into the national political discourse. "History shows us . . . that . . . nothing prepares the way for tyranny . . . more than the failure of public offices to keep the streets safe from bullies and marauders," Goldwater warned during his acceptance speech at the 1964 Republican convention.[260] Goldwater's message resonated. By 1968, 80% of the public agreed that crime was increasing, "law and order had broken down" in the United States, and that "Negroes who start riots" were the source of the problem.[261] Being "tough on crime" provided a political opportunity to use race as a wedge issue for electoral advantage.[262]

Over the next three decades, lawmakers enacted a series of increasingly harsh tough-on-crime measures. In 1968, for example, in

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nr2014/downloads/NR2014.pdf [https://perma.cc/7BU5-4AU8] (noting that more than half of juveniles in detention did not have a lawyer).

259. Katherine Beckett & Theodore Sasson, *The Origins of the Current Conservative Discourse on Law and Order*, *in* CONSERVATIVE AGENDAS AND CAMPAIGNS: THE RISE OF THE MODERN "TOUGH ON CRIME" MOVEMENT 44, 44 (2005), http://www.publiceye.org/defendingjustice/pdfs/chapters/toughcrime.pdf [https://perma.cc/4QDN-6YWT].

260. Barry Goldwater, Acceptance Address at the 1964 Republican National Convention (July 16, 1964) (transcript available at http://www.4president.org/speeches/1964/barrygoldwater1964acceptance.htm [https://perma.cc/2DXX-FRBY]).

261. BECKETT, *supra* note 63, at 38.

262. *See* Beckett & Sasson, *supra* note 259, at 43–44; *see, e.g.*, Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1396 tbl.1 (2006) (noting that the 1968 election saw both parties devote higher percentages of their political platforms to criminal justice than in previous presidential elections).

an attempt to assure the public that he was tough on crime, President Johnson signed the Omnibus Crime Control and Safe Streets Act of 1968,[263] which increased funding for law enforcement and provided for expanded use of wiretaps and *Miranda*-less confessions.[264] The Omnibus Bill's eventual successor, the now infamous Violent Crime Control and Law Enforcement Act of 1994,[265] authorized more than $30 billion for crime-prevention efforts, law enforcement, and state prison construction.[266] In parallel, individual states enacted measures like California's three-strikes law,[267] which mandates twenty-five years to life sentences following conviction for any third felony, and New Jersey's Megan's Law,[268] which requires sex offender registration and public notification.[269] Multiple states also adopted truth-in-sentencing laws, mandatory minimum sentencing laws, and zero-tolerance practices, which resulted in harsher penalties and the virtual elimination of rehabilitation programs.[270]

Comparable laws and policies were enacted in the juvenile justice system during what would come to be known as the "get tough" era.[271] As juvenile crime rates climbed between the mid-1980s and 1990s,[272] calls for stiffer penalties for adolescent lawbreakers became louder.

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263. Pub. L. No. 90-351, 82 Stat. 197 (1968).

264. Omnibus Crime Control and Safe Streets Act of 1968 §§ 201-406 (codified at 42 U.S.C. § 3711 (2006)).

265. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

266. Violent Crime Control and Law Enforcement Act of 1994 §§ 20109, 30104, 30202, 30403, 30702, 30802, 31132, 31707, 31904, 40414, 40422, 40603, 90206, 200112, 200210, 210306, 250005, 270009, 310003, 310004 (cataloguing various appropriations provisions within the Act) (codified at 42 U.S.C. §§ 13071–14223).

267. *See* CAL. PENAL CODE § 667(a)(1), (e)(2)(A) (West 2019) (providing for a five-year enhancement for each prior felony and an indeterminate life sentence of at least twenty-five years for a third felony).

268. N.J. STAT. ANN. §§ 2C:7-12, 7-13(a)–(b) to -19 (West 2019).

269. N.J. STAT. ANN. §§ 2C:7-12, 7-13(a)–(b). Congress enacted a federal version of Megan's Law in 1996, which requires states to form registries of offenders convicted of either sexually violent offenses or offenses against children. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub L. No. 103-322, 108 Stat. 2038 (1994), amended by Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. §§ 16901, 16902, 16912, 16913 (2012)) (maintaining earlier version).

270. MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 124 (2011).

271. *See* Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. GENDER, RACE & JUST. 281, 299–300 (2012).

272. *See* FELD, *supra* note 18, at 201 ("[T]he juvenile arrest rate for all violent crimes increased 67.3% . . . between 1986 and 1995.").

Conservative politicians branded them "super-predators."[273] If lawmakers did not do more to incapacitate them, then, as former Princeton Professor John DiIulio predicted in 1996, there would be 270,000 more super-predators on the streets by 2010.[274] "Unless we act today, we're going to have a bloodbath when these kids grow up," criminologist James Fox warned.[275]

Lawmakers responded. Between 1992 and 1997 alone, legislatures in forty-five states enacted or enhanced statutes that made it easier to punish children like adults.[276] Thirty-one states gave both juvenile and criminal courts expanded sentencing authority over juveniles, forty-seven states enacted laws that modified or removed traditional juvenile court confidentiality provisions by making records and proceedings more open, and twenty-two states expanded the role of juvenile crime victims in the juvenile justice process.[277] Laws like California's Proposition 21,[278] which required adult trials for juveniles as young as fourteen, transferred discretion from judges to prosecutors, weakened confidentiality laws, toughened gang laws, and expanded California's three-strikes law for both juveniles and adults, became the norm.[279]

The net effect of these laws was extraordinary. Between 1985 and 1994, the number of delinquency cases judicially waived to criminal

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273. DiIulio, *supra* note 35, at 25–26; *see also* John DiIulio, *Defining Criminality Up*, WALL STREET J., July 3, 1996, at A10; Suzanne Fields, *The Super-Predator*, WASH. TIMES, Oct. 17, 1996, at A23 ("The super-predator is upon us"); Gene Koprowski, *The Rise of the Teen Super-Predator*, WASH. TIMES, Oct. 23, 1996, at A17. *See generally* Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 864–68 (2010) (discussing the "super-predator" era of juvenile justice).

274. *The Superpredator Myth, 20 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later [https://perma.cc/H4QX-TAA7]; *see also* WILLIAM J. BENNETT ET AL., BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 26 (1996) (charting the projected increase in the United States juvenile population between 1990 and 2010).

275. Laurie Garrett, *Murders by Teens Soaring*, NEWSDAY, Feb. 18, 1995, at A11.

276. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 96 (2006), http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf [https://perma.cc/6VJ4-RCQK]; PATRICIA TORBET ET AL., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT 3–4 (1996).

277. *See* SNYDER & SICKMUND, *supra* note 276, at 96–97.

278. Gang Violence and Juvenile Crime Prevention Act of 1998, § (2), Ballot Measure 4, 1999–2000 Legis. Sess. (Cal. 1999) (codified at CAL. WELF. & INST. CODE § 707(d) (West 2019)).

279. *See Proposition 21*, CAL. LEGIS. ANALYST'S OFF., https://lao.ca.gov/ballot/2000/21_03_2000.html [https://perma.cc/P9HM-4KYL].

court climbed to 83%, from 7200 to 13,200.[280] In 1988, approximately 1600 juveniles were confined in adult jails; by 1997, there were more than 9000.[281] More than 2000 of these youth were serving sentences of life without the possibility of parole[282]—a punishment to which no other country in the Western world subscribed.

D. Racialized Juvenile Justice

All of these post-*Gault* dynamics, such as the criminalization of the juvenile court, lack of access to well-trained, well-funded counsel, and the extraordinary punitiveness of the "get tough" era, had the harshest impact on youth of color. While social scientists had known for decades that adolescents of color, and Black youth in particular, were more likely than their white counterparts to be arrested, detained, formally charged in juvenile court, transferred to adult court, and confined to secure residential facilities,[283] these disparities grew exponentially during the 1980s and 1990s. Between 1983 and 1997, four out of five youth newly held in detention were children of color,[284] and the disparities in the transfer of juveniles of color were even greater. A 2000 study, for example, showed that 82% of youth charged in adult court in eighteen of the largest jurisdictions in the country were youth of

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280. Snyder & Sickmund, *supra* note 276, at 186. The combined effects of judicial waiver, prosecutorial direct file, offense exclusion, and age of majority laws result in more than 200,000 chronological juveniles tried in criminal courts annually. Barry C. Feld & Donna M. Bishop, *Transfer of Juveniles to Criminal Court*, *in* OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 42, at 801, 815.

281. JAMES AUSTIN ET AL., BUREAU JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 5, tbl.2 (2000), https://www.ncjrs.gov/pdffiles1/bja/182503.pdf [https://perma.cc/L6E5-RRBN].

282. *State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*, HUM. RTS. WATCH (Oct. 2, 2009), https://www.hrw.org/news/2009/10/02/state-distribution-youth-offenders-serving-juvenile-life-without-parole-jlwop [https://perma.cc/C75M-EJNQ].

283. Indeed, the problem of racial disparities in the juvenile justice system is so long-standing, wide-spread, and entrenched that it has earned its own acronym—Disproportionate Minority Contact or "DMC." POE-YAMAGATA & JONES, *supra* note 39, at 5–6 (explaining the meaning of disproportionate minority contact); *see also* CARL E. POPE ET AL., U.S. DEP'T OF JUSTICE, DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001 10 n.1 (2002) (describing "race effects" within the juvenile justice system and suggesting these effects impact minority juveniles); Michael J. Leiber, *Disproportionate Minority Confinement (DMC) of Youth: An Analysis of State and Federal Efforts to Address the Issue*, 48 CRIME & DELINQ. 3, 4–5 (2002) (describing how states enact methods to address the effects of disproportionate minority confinement).

284. HINTON HOYTT ET AL., *supra* note 38, at 10 (documenting the significant increases in racial disproportionality in juvenile detention facilities during the 1990s).

color. Moreover, Black and Latino youth were much more likely than white youth to receive a sentence of incarceration.[285]

Racial disparities remain extreme today. In 2014, white youth comprised 70% of those ages ten to seventeen in the United States, but only 35% of arrested youth, 41% of adjudicated youth, and 33% of youth waived into the adult system.[286] Conversely, Black youth comprised just 16% of those ages ten to seventeen nationally, but were 42% of arrested youth, 37% of adjudicated youth, and 53% of youth waived into the adult system.[287] Youth of color currently comprise approximately 45% of the general youth population, but they are almost 70% of the youth being held in residential facilities by juvenile courts.[288] When youth of color violate a technical condition of probation—failure to meet with a probation officer or pay restitution—they are significantly more likely to be committed to an out-of-home placement than are white youths.[289]

Critically, studies have repeatedly shown that any statistical differences in offending patterns are simply not great enough to account for the racial disparities observed at any of the processing points in the U.S. juvenile justice system.[290] Instead, research suggests that the primary sources of these disparities are the over-criminalization, over-policing, and over-punishment of juveniles of color, and the implicit racial biases that drive decision makers to rationalize their disparate treatment.[291]

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285. JUSZKIEWICZ, *supra* note 38, at 3, 5, 9 (providing a study of more than 2500 cases filed in eighteen of the largest jurisdictions in the country demonstrated that African-American youth were disproportionately charged in adult court and were more likely than white or Latino youth to receive a sentence of incarceration).

286. *Easy Access to Juvenile Court Statistics: 1985–2017*, NAT'L CTR. JUV. JUST., https://www.ojjdp.gov/ojstatbb/ezajcs/asp/selection.asp [https://perma.cc/4GD9-S7Q3] (last updated Apr. 23, 2019); *Easy Access to Juvenile Populations: 1990–2018*, *supra* note 40.

287. *See Easy Access to Juvenile Court Statistics: 1985–2017*, *supra* note 286; *Easy Access to Juvenile Populations: 1990–2018*, *supra* note 40.

288. *Easy Access to the Census Data of Juveniles in Residential Placement: 1997–2017*, NAT'L CTR. JUV. JUST., https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/display.asp [https://perma.cc/U8KV-YPQ4] (last updated Apr. 23, 2019).

289. BURNS INST., STEMMING THE RISING TIDE: RACIAL & ETHNIC DISPARITIES IN YOUTH INCARCERATION & STRATEGIES FOR CHANGE 10 (2016), https://www.burnsinstitute.org/wp-content/uploads/2016/05/Stemming-the-Rising-Tide_FINAL.pdf [https://perma.cc/77GK-Y2JB].

290. *See* HINTON HOYTT ET AL., *supra* note 284, at 20–22 (explaining that white youths admit to various offenses at higher rates than Black youths, but that Black youths are arrested at significantly higher rates than white youths for these same offenses).

291. While research suggests that Black youth commit "slightly more violent crime" than white youth, they commit "about the same amount of property crime,

Research has consistently shown that racial disparities in juvenile processing are most pronounced at the point of arrest. Black youth are twice as likely as white youth to be arrested for the same conduct,[292] and these disparities have remained even as overall levels of arrests have decreased.[293] Research also finds that law enforcement tend to arrest youth of color for all levels of offenses, but, on average, arrest white youth only for medium- or high-level offenses.[294] In other words, youth of color are more likely to be arrested for low-level, non-violent behavior than their white counterparts. More troubling still, these front-end disparities grow into larger disparities as youth move through juvenile and criminal legal processing,[295] which disproportionately subjects youth of color to the well-documented harms of detention and secure confinement.[296]

When it comes to disposition, studies show that Black youth are 4.1 times as likely to be committed to secure placements as white youth, Indigenous youth are 3.1 times as likely, and Latino/Hispanic youth

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and *less* drug crime than white youth," and "[i]n no category can the marginal differences in white and African-American behavior explain the huge disparity in arrest or incarceration rates." *Id.* at 19. Black youth are arrested at twice the rate of white youth for drug offenses and 2.5 times the rate of white youth for weapons offenses, even though white youth report substantially higher levels of drug use and commission of weapons crimes. *Id.* at 20–21; *see also* FELD, *supra* note 21, at 138 (noting that a "consistent finding of delinquency sentencing research is that after statistical controls for legal variables, juveniles' race affects dispositions").

292. Michael Leiber & Nancy Rodriguez, *The Implementation of the Disproportionate Minority Confinement/Contact (DMC) Mandate: A Failure or Success?*, 1 RACE & JUST. 103, 105 (2011).

293. *Easy Access to Juvenile Populations: 1990–2018*, *supra* note 286; *Statistical Briefing Book: Law Enforcement & Juvenile Crime*, OFF. JUV. JUST. & DELINQ. PREVENTION (Jan. 1, 2019), https://www.ojjdp.gov/ojstatbb/crime/ucr_trend.asp?table_in=2 [https://perma.cc/7T6E-C2YR].

294. *Arrests*, CHI. YOUTH JUST. DATA PROJECT (2010), http://www.chicagoyouthjustice.com/Project_NIA_Arrests_page_v2.html [https://perma.cc/US2H-HQEC]; *see also* JOSHUA ROVNER, SENTENCING PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS (2016), https://www.sentencingproject.org/wp-content/uploads/2016/04/Racial-Disparities-in-Youth-Commitments-and-Arrests.pdf [https://perma.cc/9KAA-969B].

295. *See* John Wooldredge et al., *Is the Impact of Cumulative Disadvantage on Sentencing Greater for Black Defendants?*, 14 CRIMINOLOGY & PUB. POL'Y 187, 189 (2015) (recognizing that "less desirable outcomes at later decision points" may be attributable to "less desirable dispositions at earlier decision points").

296. These can include high levels of violence, including the use of excessive force and restraints by staff, sexual assault, and isolation. RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 5 (2011), https://files.eric.ed.gov/fulltext/ED527944.pdf [https://perma.cc/3PQG-4V3H].

are 1.5 times as likely.[297] Even as levels of youth confinement have declined overall, the racial gap between Black and Indigenous youth versus white youth has increased.[298]

To date, hundreds of multiple regression studies have been conducted on disparities in the juvenile court, and nearly two-thirds have documented a statistically significant "race effect" on decision making, which suggests that race-neutral criteria cannot, by themselves, account for these disparate outcomes.[299] In other words, but for the presence of racial bias, juveniles of color would not be overrepresented to the degree that they are.

Multiple studies have detected the presence of racial bias in decision making among justice system stakeholders, including police officers,[300] judges,[301] probation officers,[302] and defense attorneys.[303] A

297. *Easy Access to the Census of Juveniles in Residential Placement: 1997–2017*, NAT'L CTR. JUV. JUST., https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Age_Race.asp [https://perma.cc/KP6Y-A9VV] (last updated Apr. 23, 2019).

298. ROVNER, *supra* note 294, at 1.

299. *See, e.g.*, CARL E. POPE & WILLIAM FEYERHERM, MINORITIES AND THE JUVENILE JUSTICE SYSTEM: RESEARCH SUMMARY 2, 13–14 (1995) (confirming the overrepresentation of minorities in the juvenile justice system); Bishop, *supra* note 42, at 61–62 (providing empirical demonstration of racial disparities in juvenile justice); Rodney L. Engen et al., *Racial Disparities in the Punishment of Youth: A Theoretical and Empirical Assessment of the Literature*, 49 SOC. PROBS. 194, 195 (2002) ("review[ing] . . . theoretical perspectives on racial disparity . . . [and] highlighting the central predictions of each perspective"); Leiber, *supra* note 283, at 3 (identifying "the extent of minority overrepresentation in states' juvenile justice systems and assessment of the causes of DMC"); *see also* Carl E. Pope & Michael J. Leiber, *Disproportionate Minority Confinement/Contact (DMC): The Federal Initiative*, *in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 351, 352 (providing "a historical overview of the activities employed to address disproportionate minority youth confinement/contact").

300. *See, e.g.*, Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1009–13, 1015–17 (2007) (finding that police officers were more likely to shoot a Black person than a white person in a video-game simulation in which they were instructed to shoot if the person was armed); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 499 (2004) (documenting the impact of written racial cues on police and probation officers' judgments about the "culpability, likely recidivism, and deserved punishment" of hypothetical offenders).

301. *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) (reporting on a study of 167 federal magistrate judges, which revealed that they are susceptible to "heuristics" and biases when making decisions); Michael J. Leiber & Kristan C. Fox, *Race and the Impact of Detention on Juvenile Justice Decision Making*, 51 CRIME & DELINQ. 470, 489–90 (2005) (attributing observed negative race

study of juvenile probation officers conducted more than twenty years ago continues to be illuminating. In 1998, in an attempt to determine why Black youth in three Washington State counties were receiving harsher sentencing recommendations than white youth charged with the same crimes, sociologists George Bridges and Sara Steen examined more than 200 county probation reports.[304] After controlling for factors such as age, gender, and offense history, Bridges and Steen found that the officers were more likely to attribute the criminal behavior of Black youth to "internal attributions," such as personal failure, inadequate moral character, and personality, but saw the criminal behavior of white youth as a product of "external attributions," such as poor home life, lack of appropriate role models, and environment.[305] These perceptions, in turn, led the officers to recommend state intervention for minority youth at greater rates.[306] This and other similar studies demonstrate the nefarious role that racial bias can play in juvenile court outcomes for children of color.

Finally, there is a limited body of research examining the relationship between race and representation and lawyers' impact on juveniles' dispositions.[307] One study reported that prosecutors charged

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effects in outcomes to "racial stereotyping of African Americans as delinquent, prone to drug offenses, dangerous, and unsuitable for treatment").

302. *See, e.g.*, Bridges & Steen, *supra* note 44, at 567 (concluding that probation officers' written rationales for sentencing recommendations indicated that they were more likely to attribute the criminal behavior of minority youth to internal forces, such as personal failure, inadequate moral character, and personality, and the criminal behavior of white youth to external forces, such as environment, even when the objective risk factors associated with the youth were similar).

303. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1553 (2004) (finding that capital defense attorneys exhibit the same levels of implicit bias as the rest of the population).

304. Bridges & Steen, *supra* note 44, at 557–58; *see also* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 529–35 (2014) (explaining the findings of a study that suggested that individuals perceive Black youths to be less innocent than white youths after turning ten years old).

305. Bridges & Steen, *supra* note 44, at 561, 564, 566–67 (emphasis omitted).

306. Bridges & Steen, *supra* note 44, at 564–67.

307. *See, e.g.*, Gaylene S. Armstrong & Bitna Kim, *Juvenile Penalties for "Lawyering Up": The Role of Counsel and Extralegal Case Characteristics*, 57 CRIME & DELINQ. 827, 832 (2011) (noting few studies address the impact of counsel on juvenile minorities); Barry C. Feld, *The Social Context of Juvenile Justice Administration: Racial Disparities in an Urban Juvenile Court*, *in* MINORITIES IN JUVENILE JUSTICE 66 (Kimberly Kempf-Leonard et al., eds., 1995) (describing racial disparities in sentencing across studies); Lori Guevara et al., *Race, Gender, and Legal Counsel: Differential Outcomes in Two Juvenile Courts*, 6 YOUTH VIOLENCE & JUV. JUST. 83, 83–84, 97, 99 (2008) (describing the

Black youths with more serious crimes than white youths, which increased their likelihood of representation.[308] Higher rates of representation and a youth's minority status may expose her to higher rates of more severe dispositions.[309] Yet, again, these findings may be as easily attributed to disparities in charging and a lack of training, funding, experience and resources for lawyers who represent juveniles of color. The stark reality remains that while youth of color are no longer subjected to Jim Crow juvenile justice as it was administered in the first half of the twentieth century, compared with white youths, they have fared worse in every other way during the post-*Gault* era.

III. RACE, RIGHTS, AND REPRESENTATION IN THE JUVENILE COURT

Much of the scholarship generated in connection with *Gault*'s 50th Anniversary has explored ways to buttress the right to counsel in juvenile court.[310] We agree that, within the juvenile court's current framework, many of these proposed procedural reforms are important. Yet, as described in Section II.D, the primary sources of racial injustice in the juvenile court are not a lack of procedural safeguards, but the over-criminalization, over-policing, and over-punishment of juveniles of color, and the narratives and implicit racial biases that allow decision makers continually to rationalize these choices.[311] Even the best lawyers and most robust procedures will not cure these substantive inequities. Evidence suggests that they will be most effectively addressed not through additional procedure, but through substantive reforms that target their sources.

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impact of race and counsel on outcomes); Lori Guevara et al., *Race, Legal Representation, and Juvenile Justice: Issues and Concerns*, 50 CRIME & DELINQ. 344, 344–45, 367 (2004) (discussing research on the impact of counsel on juvenile outcomes); Jennifer H. Peck & Maude Beaudry-Cyr, *Does Who Appears Before the Juvenile Court Matter on Adjudication and Disposition Outcomes? The Interaction Between Client Race and Lawyer Type*, 39 J. CRIME & JUSTICE 131, 131–32 (2016) (reporting the impact of counsel on juvenile outcomes is rarely considered or explained adequately).

308. *See* Feld, *supra* note 307, at 78 (reporting that Black youth are charged with more serious crimes and are more likely to be represented).

309. *See id.* at 92–93 (finding the presence of counsel may aggravate outcomes for a charged juvenile).

310. *See supra* notes 14–17 and accompanying text.

311. Within the criminal context, Paul Butler and others have linked the over-incarceration of "poor people" and people of color to over-policing, the failure of lawmakers to account for conditions that "breed some forms of law-breaking," "explicit and implicit bias by key actors in the criminal justice system, including police, prosecutors, and judges," the "crime control system of criminal justice, in which guilt is presumed," and, cumulatively, the creation of a "criminal caste." Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights,* 122 YALE L.J. 2176, 2183–85 (2013) (footnotes omitted).

A. Buttressing Gault

A number of recent reports and articles have lamented *Gault*'s unrealized promises and have detailed how,[312] why[313] and the extent to which[314] juveniles are denied access to counsel in the juvenile court. Several of these commentators have also proposed responses. We endorse several of these.

First and foremost, state legislatures must appropriate the funds necessary for a fully functioning juvenile defense bar.[315] For decades, the legislative inclination to be "tough on crime" and avoid the appearance of "coddling criminals" has contributed to underfunded public defender systems, which in many instances provide the appearance but not the reality of effective assistance of counsel. As criminologist Kimberly Kempf-Leonard has observed:

> [T]he real difficulty is not who should assist youths in delinquency proceedings. The problem for any advocate is how to be effective in a system that does not have much political clout, operates via informal directives and procedures, and is administered by officials who rarely are held accountable.[316]

Second, developmental psychologists have argued for decades that most juveniles lack competence to exercise or waive legal rights.[317]

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312. Several commentators have argued that counsel is appointed both too late, *see, e.g.*, Laura Cohen & Sandra Simkins, *No More "Desert Devil's Island": The Right to Counsel for Incarcerated Children*, *in* RIGHTS, RACE, AND REFORM, *supra* note 15, at 227, 227, 231–32, 245 (arguing that *Gault* should extend to post-conviction proceedings); Casey McGowan et al., *Moving Forward from* Gault, CHAMPION, Apr. 2017, at 22, 22, 24, 26 (arguing that *Gault* should extend to pre-trial proceedings), and removed too early in the juvenile court process, *see, e.g.*, Sandra Simkins & Laura Cohen, *The Critical Role of Post-Disposition Representation in Addressing the Needs of Incarcerated Youth*, 8 J. MARSHALL L.J. 312, 315 (2015) (arguing that "post-dispositional" legal representation for youth in extended custody is a constitutional requirement).

313. *See, e.g.*, JESSICA FEIERMAN ET AL., JUVENILE LAW CTR., THE PRICE OF JUSTICE: THE HIGH COST OF "FREE" COUNSEL FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM 5–6, 14 (2018), https://jlc.org/sites/default/files/attachments/2018-07/Paying-For-Justice-2018FINAL.pdf [https://perma.cc/WQ5T-PHGP] (presenting evidence that stringent financial eligibility requirements and hidden fees undermine juveniles' access to counsel in jurisdictions across the country).

314. *See generally* NAT'L JUVENILE DEF. CTR., *supra* note 15 (describing obstacles to a juvenile's ability to get representation).

315. *See* Schwartz & Levick, *supra* note 257, at 368–70 (implying the legislature needs to allot funds for public defense attorneys).

316. Kimberly Kempf-Leonard, *Does Having an Attorney Provide a Better Outcome?: The Right to Counsel Does Not Mean Attorney Help Youths* 9 CRIM. & PUB. POL'Y 357, 361–62 (2010).

317. *See* Thomas Grisso, *Juveniles' Capacity to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1166 (1980) (asserting the juvenile comprehension of *Miranda* rights is deficient).

Differences in age and competence would suggest that youths should receive more, rather than fewer, procedural safeguards than adults to protect them from punitive delinquency adjudications and their own improvident decisions and developmental limitations. Legislatures should recognize the developmental limitations of juveniles and mandate consultation with counsel before waiver or stand-by counsel for all juveniles charged with felonies, serious misdemeanors, or juveniles who face out-of-home placement.[318] While this would impose substantial costs and burdens on legal services delivery in many states, it is consistent with *Gault*'s promise.

Third, lawyers who represent juveniles must be well-trained and skilled in juvenile law and practice. Law schools typically offer only a single elective substantive course or clinic on juvenile justice, and these often focus on family, adoption, or dependency procedures.[319] Most juvenile defenders receive little training "in adolescent development or the range and relative effectiveness of various juvenile dispositions and treatments."[320] The training of juvenile defenders, both during and after law school, must be enhanced.

Fourth, eligibility for public defender services must be based on a child's resources rather than on parents' income or their willingness to hire a lawyer.[321] Fees and court costs must also be eliminated.[322] California did this in 2017. California Senate Bill 190 eliminates public defender fees and administrative costs previously charged for juvenile detention, probation supervision, electronic monitoring, and drug testing.[323] It also provides that parents must receive notice that they "shall not be liable for the cost of counsel or legal assistance furnished by the court for purposes of representing the minor."[324] Other states should follow suit.

Fifth, because of the rapidity of delinquency case-processing, appointment of counsel should occur at the initial arraignment or detention hearing, if not before, to allow sufficient time for investigation

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318. *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (prohibiting incarceration without representation); FELD, *supra* note 148, at 248–49 (recommending a prohibition against incarceration or removal from home without counsel).

319. Kempf-Leonard, *supra* note 316, at 360.

320. *Id.* at 360.

321. *Cf.* FELD, *supra* note 148, at 103–06 (discussing public defenders' representation of juveniles).

322. Schwartz & Levick, *supra* note 257, at 369 (asserting the "appointment of counsel should not depend on the income of the parents or their willingness to hire a lawyer").

323. S.B. 190, 2017–18 Reg. Sess. (Cal. 2017) (signed into law on October 11, 2017).

324. *Id.* § 12.

and case preparation. Youth should also be guaranteed postdispositional legal representation. Not only is there a strong argument that it is constitutionally guaranteed,[325] but it is also one of the only ways to subject juvenile facilities to consistent observation and scrutiny.

Sixth, advocates have long claimed that "opening juvenile court to public scrutiny . . . . increases the chances that courts will appoint lawyers and that lawyers will do their jobs."[326] While we do not advocate opening the doors to media and the general public, expanding appellate review provides one of the most important means of increasing the transparency and accountability of delinquency proceedings and ensuring that juveniles' right to counsel is respected.[327]

Finally, a state supreme court or other criminal justice agency should require data on appointment of counsel to be collected in real time with administrative oversight to immediately flag and rectify cases in which youths appeared without counsel.[328] Data collection must include both a youth's race and representation status.

B. A Critique of Procedural Rights

A number of scholars have focused on what they see as the inherent limitations and unintended consequences of an overreliance on procedural rights. According to William Stuntz, it is nearly impossible to improve the justice system through criminal procedure reforms alone because the legislative and executive branches of government have myriad ways to compensate for and evade compliance with the Court's mandates.[329]

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325. Simkins & Cohen, *supra* note 312, at 342 ("[A]lthough *Gault* addressed only 'proceedings to determine delinquency,' . . . subsequent federal appellate court decisions have assumed that the more expansive guarantee of the Sixth Amendment applies with full force to youth charged with delinquency." (footnote omitted)).

326. Schwartz & Levick, *supra* note 257, at 370.

327. *See* Harris, *supra* note 205, at 228–29 (asserting accountability in juvenile courts is improved with appellate review); Schwartz & Levick, *supra* note 257, at 370 (asserting appellate review is a method of accountability present when juveniles have counsel).

328. Schwartz & Levick, *supra* note 257, at 371.

329. *See* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 561–62 (1992) ("[O]vercriminalization is an easy way to get around Fourth Amendment restrictions."); Stuntz, *supra* note 171, at 70–71, 76 (asserting countermajoritarian criminal procedure can lead to overbroad criminal statutes and underfunded defense counsel); *see also* Richard A. Posner, *The Most Punitive Nation*, TIMES LITERARY SUPPLEMENT, Sept. 1, 1995, at 3, 4 (arguing that legislatures have responded to increased constitutional rights for criminals by making punishments more severe).

> In a legislatively funded system with state-paid prosecutors and defense attorneys, judge-made procedural rights are bound to have some perverse effects, pushing prosecutors and defense attorneys and legislators and even the judges themselves in uncomfortable directions.[330]

Other commentators have argued that an overreliance on procedural rights can also serve to legitimate institutions that might otherwise become unstable by creating the illusion that the problem is fixed[331] or risk of "entrenching" and "legitimating" the infirmities in question.[332] Carol and Jordan Steiker have argued, for example, that the Court's imposition of procedural constraints on capital punishment instilled a false sense of "faith among justice system participants and the general public in the reliability and fairness of the process" and had the unintended effect of further entrenching the punishment itself.[333]

Paul Butler and Gabriel Chin have extended these procedural rights critiques to *Gideon*. *Gideon* "demonstrates the critique of rights" by "divert[ing] attention from economic and racial critiques of the criminal justice system" and "provid[ing] legitimation of the status quo," Butler writes.[334] Chin argues that *Gideon* "has not been and likely cannot be a remedy for systematic racial disproportionality in the criminal justice system" because, despite the Warren Court's concern about institutional racism, *Gideon* was not designed to address it.[335] Paradoxically, he claims, *Gideon* and its progeny may have made racial disproportionality worse by improving outcomes for white defendants.[336] "At the same time," Chin notes, *Gideon* "formally and perhaps more broadly legitimates these racially disparate results because convictions obtained against defendants who had counsel are presumptively valid."[337]

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330. Stuntz, *supra* note 171, at 5.

331. *See, e.g.*, Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 719, 721, 746 (1992) (arguing that *Brown v. Board of Education* and *Miranda v. Arizona* "traded the promise of substantial reform implicit in prior doctrine for a political symbol").

332. Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 748–49 (2014) (defining entrench as incremental reform that diminishes the need for larger reform and defining legitimate as incremental reform that creates an illusion of reliability).

333. CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 4, 155–56 (2016).

334. Butler, *supra* note 311, at 2178, 2196–97.

335. Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2238–39 (2013).

336. *Id.* at 2238, 2254–55.

337. *Id.* at 2258.

The same can be said about *Gault*. Despite its well-documented concern about racial inequality, the Warren Court chose a case involving a white juvenile as the vehicle to address fairness and inequality in the juvenile court. And in doing so, it relied exclusively on a series of race-neutral procedural rules. As critical as the rights to counsel, notice, and confrontation may be to the accuracy and regularity of juvenile court proceedings, they are unlikely to alleviate the profound racial inequities that were pervasive in the juvenile court at the time of *Gault* and which remain so today. Indeed, these inequities have only increased since *Gault* was decided, not least because the legislative and executive branches of government have compensated for and evaded compliance with *Gault*'s mandates.[338] By creating the illusion that the juvenile court had somehow been fixed, *Gault* may also have removed the impetus for substantive reforms that may benefit juveniles of color. We discuss some of these below.

C. Toward Substantive Reform

Even if *Gault*'s protections were fully buttressed, however, its procedural mandates would not fundamentally alter the primary sources of systemic disproportionality in the juvenile court. Instead, we argue, the substantive problem of racial disproportionality in the juvenile court requires substantive policy reforms. We identify three.

This analysis is timely. In the wake of a series of recent Supreme Court decisions recognizing that children are constitutionally different from adults for purposes of punishment, legislatures and courts across the country are engaged in juvenile court reform.[339] *Gault*'s racial legacy should be instructive. As important as procedural rights may be to institutional fairness and accuracy, we contend that substantive policy reform should be the priority.

1. Decriminalizing non-violent youthful behavior

Since *Gault* was decided, nearly every state has dramatically expanded its criminal code.[340] When it comes to youth, the impact of

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338. *See* Stuntz, *supra* note 329, at 561–62 ("[O]vercriminalization is an easy way to get around Fourth Amendment restrictions."); Stuntz, *supra* note 171, at 54, 70–71, 76; *see also* Posner, *supra* note 329, at 4 (arguing that legislatures have responded to increased constitutional rights for criminals by making punishments more severe).

339. *See generally* Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539 (2017) (examining state legislatures' reactions to the Court's decisions in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*).

340. *See generally* Andrea L. Dennis, *Decriminalizing Childhood*, 45 FORDHAM URB. L.J. 1, 5, 8–9 (2017) (citing NAT'L RESEARCH COUNCIL 2013, *supra* note 151); Roger A. Fairfax,

this "over-criminalization" trend has been compounded by the concomitant criminalization of behavior that is non-criminal for adults, such as truancy, curfew violations, alcohol consumption, and consensual sexual activity.[341] The statistics are alarming: of the nearly 55,000 youth confined in juvenile facilities on a given day in 2013, 5000 were placed out of home for a technical violation, such as failure to appear for a probation meeting or drug test.[342] More troubling still, 67% were youth of color.[343] Black and Native American youth were almost four times as likely as white youth to be placed out of home on this basis.[344]

Legislatively converting most criminal misdemeanors to civil infractions and/or reducing criminal penalties to noncustodial intervention for nonviolent, youthful conduct and status offenses would have an immediate impact on these racial inequities. Over the last several years, lawmakers in Texas, Ohio, Massachusetts, Michigan, Idaho, and California have taken steps to decriminalize status offenses such as truancy, alcohol possession, and transit fare evasion to great effect.[345] These efforts should be expanded.

2. Expanding diversion

Beyond the wholesale reorientation of local law enforcement policies, an obvious response to the over-policing of juveniles of color is increased reliance on diversion—both informal, pre-charge diversion without mandated requirements for low-level behavior and formal diversion with community-based programming and services for more serious conduct.[346] Diversion programs exist in jurisdictions

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Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597 (2011) ("emphasiz[ing] fairness and accuracy in the administration of criminal justice"); Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529 (2012) (introducing the fight against overcriminalization after 1966).

341. Dennis, *supra* note 340, at 8–9.

342. BURNS INST., *supra* note 289, at 10, 17.

343. *Id.* at 10.

344. *Id.* at 4.

345. Dennis, *supra* note 340, at 30–31, 33; Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1067–69 (2015) (asserting decriminalization can be enacted by legislature, courts, or law enforcement).

346. *See* Stephanie Béchard et al., *Arbitrary Arbitration: Diverting Juveniles into the Justice System—A Reexamination after 22 Years*, 55 INT'L J. OFFENDER THERAPY & COMPAR. CRIM. 605, 606, 621–22 (2011).

throughout the country.[347] While critical questions remain about how to determine which youth should be diverted and the risk of "net widening," there is evidence that increased reliance on diversion could substantially benefit youth of color.[348]

3. Constraining juvenile punishment

In a trilogy of cases beginning in 2005, the Court issued three decisions imposing substantive constraints on the harshest forms of juvenile punishment: banning the execution of individuals under eighteen in *Roper v. Simmons*,[349] banning life sentences without the possibility of parole for juveniles who had not committed homicide in *Graham v. Florida*,[350] and banning life without parole for all juveniles when imposed mandatorily in *Miller v. Alabama*.[351] In each case, the Court applied the Eighth Amendment prohibition on cruel and unusual punishment to juveniles, emphasizing their reduced culpability and impaired competence to exercise procedural rights.[352]

All three decisions emphasized that juveniles' immature judgment and limited self-control causes them to act impulsively and without adequate appreciation of consequences;[353] their susceptibility to negative peers and inability to escape criminogenic environments reduce their responsibility;[354] and their transitory personality provides less reliable

347. Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 241 (2015) (recommending diversion programs to reduce racial disparity in incarceration).

348. *See* Traci Schlesinger, *Decriminalizing Racialized Youth through Juvenile Diversion*, 28 FUTURE CHILD. 59, 60, 66, 68–70 (2018) (asserting youth of color are excluded from diversion programs).

349. 543 U.S. 551 (2005).

350. 560 U.S. 48 (2010).

351. 567 U.S. 460 (2012).

352. *See, e.g.*, Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 L. & INEQ. 263, 263–64 (2013) (explaining these cases' impact on juvenile criminal law); Barry C. Feld, *Competence and Culpability: Delinquents in Juvenile Court, Youths in Criminal Court*, 102 MINN. L. REV. 473, 549–69 (2017); Barry C. Feld, *The Youth Discount: Old Enough To Do the Crime, Too Young To Do the Time*, 11 OHIO ST. J. CRIM. L. 107 (2013) (tracing the effects of these three cases).

353. *Roper*, 543 U.S. at 569 ("[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))).

354. *Id.* at 569 ("[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." (citing Eddings v Oklahoma, 455 U.S. 104, 115 (1982))). The Court explained: "Their own vulnerability and comparative lack of control over their immediate surroundings

evidence of enduring blameworthiness.[355] The Court in *Graham* also noted that developmental characteristics impaired juveniles' defenses and increased the likelihood of improvident waivers of counsel:[356]

> [T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant's representation.[357]

The reaction to this trilogy of cases was akin to the reaction to *Gault*. Scholars believed that not only might this jurisprudence impact other juvenile processing[358] and sentencing decisions[359] and extend to other vulnerable populations;[360] it had the potential to transform the regulation of sentencing in the United States.[361]

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mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.* at 570.

355. *Id.* at 570 ("[T]he character of a juvenile is not as well formed as that of an adult."). Because juveniles' character is transitional, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

356. The Supreme Court in *Graham v. Florida* emphasized juveniles' inability to work with counsel. "[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense." 560 U.S. 48, 78 (2010).

357. *Id.* at 78 (citations omitted).

358. *See generally* Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010) (suggesting that lawyers use *Graham* to ensure that all children under eighteen are given a change to atone for their crimes as well as establish a constitutional right to rehabilitation).

359. *See, e.g.*, Jennifer S. Breen & John R. Mills, *Mandating Discretion: Juvenile Sentencing Schemes After* Miller v. Alabama, 52 AM. CRIM. L. REV. 293, 307–09 (2015) (describing reasons for the individualized sentencing of juveniles).

360. *See, e.g.*, Helen Shin, *Is the Death of the Death Penalty Near?: The Impact of* Atkins *and* Roper *on the Future of Capital Punishment for Mentally Ill Defendants*, 76 FORDHAM L. REV. 465, 477–78, 480–81 (2007) (discussing how excessive punishments are judged by currently prevailing standards and how defendants with diminished capacity are not likely to be deterred); Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 819–20 (2009) (analyzing how

Though a number of commentators have lamented the slow, uneven and, in some cases, non-existent implementation of these decisions,[362] it is indisputable that they have had a meaningful impact on juvenile sentencing in this country. Since 2012, more than twenty states have abolished juvenile life without parole,[363] more than 2200 sentences rendered unconstitutional by *Roper*, *Graham*, and *Miller* have been vacated,[364] and hundreds of individuals sentenced to death or life without parole for crimes committed as juveniles have been resentenced.[365]

Beyond its application to juvenile life without parole itself, the Court's developmental framework is likely to influence numerous juvenile sentencing policies and practices, including mandatory minimum

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the death penalty is a disproportionate punishment for defendants with mental illness because it does not meet the penological goals of retribution and deterrence).

361. *See, e.g.*, Rachel Barkow, *Categorizing* Graham, 23 FED. SENT'G REP. 49, 49 (2010) ("It would be hard to overstate the significance of the Supreme Court's decision in *Graham v. Florida*."); Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787, 1788 (2016) (arguing that Miller was revolutionary in logic and scope); Scott E. Sundby, *The True Legacy of* Atkins *and* Roper*: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WM. & MARY BILL RTS. J. 487, 487 (2014) (arguing that "the cases have a far more revolutionary reach than their conventional understanding").

362. *See* Robert S. Chang et al., *Evading* Miller, 39 SEATTLE U. L. REV. 85, 86–92, 105–06 (2015) (examining the implementation of *Miller*); Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 CARDOZO L. REV. 1031, 1087 (2014) (proposing substantial changes in juvenile sentencing to implement changes from *Graham* and *Miller*); Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51, 64–82 (2012) (analyzing the implementation of *Graham*); Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIS L. REV. 961, 1028 (2017) (arguing the Court needs to provide guidance on defining the population of intellectually disabled and juvenile person for proportional sentencing relief); Moriearty, *supra* note 339, at 540 (noting difficulty in implementing the juvenile sentencing reform following *Roper*, *Graham*, and *Miller*).

363. *States That Ban Life Without Parole for Children*, CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life [https://perma.cc/TWA6-ULJ4].

364. The *Miller* Court estimated that approximately 2000 inmates in the United States were serving mandatory life without parole sentences for offenses they committed as juveniles, Miller v. Alabama, 567 U.S. 460, 493–94 (2012) (Roberts, C.J., dissenting), the *Graham* Court identified 123 inmates who were sentenced as juveniles to life without parole for offenses other than homicide, Graham v. Florida, 560 U.S. 48, 64 (2010), and 72 inmates were impacted by Roper. *See* DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2004: YEAR END REPORT 2 (2004), http://www.deathpenaltyinfo.org/files/pdf/DPICyer04.pdf [https://perma.cc/F7YL-V5N7].

365. CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, RIGHTING WRONGS: THE FIVE-YEAR GROUNDSWELL OF STATE BANS ON LIFE WITHOUT PAROLE FOR CHILDREN 7 (2016), https://juvenilesentencingproject.org/righting-wrongs [https://perma.cc/AV55-38AG].

sentencing laws, automatic transfer statutes, sexual offender registration requirements, and any other laws that purport to treat juveniles and adults identically.[366] As Justice Roberts lamented in his dissent in *Miller*, "[t]here is no clear reason that [the] principle [that children and adults are different for purposes of sentencing] would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive."[367] Indeed, if juveniles are inherently less culpable than their adult counterparts when it comes to homicide, they are less culpable when it comes to other offenses as well. In fact, in the wake of *Miller*, several states have amended their laws to make adult court transfer more difficult.[368] Plainly, this jurisprudence has begun to shape, and is likely to continue to shape, juvenile punishment and crime regulation in areas beyond homicide sentencing.[369] Because the vast majority of juveniles subjected to this country's harshest sentences are youth of color, they stand to benefit most from these constraints.[370]

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366. *See id.* at 3, 7.

367. *Miller*, 567 U.S. at 501 (Roberts, C.J., dissenting).

368. In the wake of Miller, several states have made adult court transfer more difficult. *See* Anne Teigen, *2013 Juvenile Justice State Legislation*, NAT'L CONF. ST. LEGISLATURES (Jan. 13, 2014), http://www.ncsl.org/research/civil-and-criminal-justice/2013-juvenile-justice-state-legislation.aspx#1 [https://perma.cc/KB4K-RDR3].

369. For example, a number of scholars and policy groups have advocated for a legislatively enacted "Youth Discount" in sentencing that uses age as a proxy for diminished criminal responsibility that would impose shorter sentences for youths than adults convicted of similar crimes. *See, e.g.*, MODEL PENAL CODE: SENTENCING § 6.11A reporter's note a (AM. L. INST., Tentative Draft No. 2, 2011) (acknowledging that the framework for "specialized sentencing rules and mitigated treatment of juvenile offenders sentenced in adult courts, owes" much to [Feld's" proposal for a Youth Discount]—a sliding scale of developmental and criminal responsibility"); FELD, *supra* note 18, at 315–20 (discussing the youth discount concept as a mitigating factor in juvenile sentencing); FELD, *supra* note 21, at 220–23; ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 246 (2008) (agreeing that "[p]roportionality supports imposing statutory limits on the maximum duration of adult sentences impose[d] on juveniles—a 'youth discount,' to use Feld's term"); James C. Howell et al., *Young Offenders and an Effective Justice System Response*, *in* FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION 213 (Rolf Loeber & David P. Farrington eds., 2012) (concluding that "[y]ouths' diminished responsibility required mitigated sanctions to avoid permanently life-changing penalties and provide room to reform"); David S. Tanenhaus & Steven A. Drizin, *Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide*, 92, J. CRIM. L.& CRIMINOLOGY 641, 697–98 (2003) (endorsing "Feld's proposals [for a youth discount] because they respect the notion that juveniles are developmentally different than adults and that these differences make juveniles both less culpable for their crimes and less deserving of the harsh sanctions, which now must be imposed on serious and violent adults offenders").

370. *See supra* Section II.D.

4. Reducing implicit racial bias

Finally, studies suggest that cognitive biases are not inevitable, and stereotypes are not immutable. Research shows that the automaticity of biases can be neutralized through repeated negation of stereotypic associations, affirmation of positive associations with the cohort in question,[371] and "social tuning,"[372] which can be accomplished through relationship building with the target.[373] When decision makers are made aware of their biases and are motivated to self-correct, they have the capacity to reduce their reliance on stereotypes.[374] A relatively simple initial step would be the initiation of trainings to educate stakeholders about the pervasiveness and effects of implicit racial biases and to encourage them to self-examine.

CONCLUSION

The 50th Anniversary of *In re Gault* generated enormous interest and attention for good reason. The 1967 decision fundamentally altered the arc of juvenile justice in the United States. It took what until then had been an insulated, legal backwater system and subjected it to legal and eventually public scrutiny. In doing so, the Court brought to the juvenile court a measure of regularity and accountability that it badly needed. But if part of the Court's mission was to improve outcomes for Black children, who, over the course of the juvenile court's first fifty years were subjected to unequal and, in some cases, outright horrific treatment, *Gault* has not been a success. In fact, there is considerable evidence that the decision has made things worse. In part, this is a function of the Court's decision to endorse procedural formality in the juvenile court while simultaneously rejecting a constitutional framework that might have given teeth to its procedural mandates. The net effect of these decisions was unintended and multifarious; it ushered in the transformation of the juvenile court from a quasi-social welfare agency to a formal legal institution that was as adversarial as its adult counterpart but lacked many of its core

371. *See* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 248–49 (2002) (discussing suppression of stereotypes and the promotion of opposing counter-stereotypes).

372. *See* Graham & Lowery, *supra* note 44, at 501 (promoting "social tuning" as a means to counter unconscious bias in the juvenile justice system); Brian S. Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842, 851–52 (2001) (reporting experimental data supporting the same conclusion).

373. Graham & Lowery, *supra* note 44, at 501.

374. Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267 (2012).

protections. In doing so, the Court also unwittingly prompted the juvenile court's ideological reorientation from the "best interests" of the child to the gravity of the child's offense[375]—one that has proved especially pernicious for the very defendants whose plight animated the Warren Court's jurisprudence: Black children.

Finally, we argue, the Court's error was also conceptual. The primary source of racial injustice in the juvenile court was then what it is now—social-structural inequality, too many crimes, too much punishment, and too many arrests and prosecutions of juveniles of color. These systemic disparities will not be reduced by additional or enhanced procedures. Because they are substantive problems, they must be addressed through substantive remedies. *Gault* did not and cannot do this.

375. *See* FELD, *supra* note 18, at 162–65 (demonstrating the shift in juvenile rights and explaining that in that context, "procedural reforms cannot compensate for the highly discretionary substantive standards—'best interests of the child' or a 'serious risk' of future crime—that preclude evenhanded enforcement and lend themselves to discriminatory applications").