

Gault's Promise Revisited: The Search For Due Process

By Jay D. Blitzman

ABSTRACT

Fifty years ago, due process was introduced into the juvenile courts, but today children still do not have the guiding hand of counsel at every stage of the proceedings. In assessing the pre-*Gault* world, Chief Justice Fortas observed that “[a] child receives the worst of both worlds: . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”¹ Fortas opined that “Then as now good will and compassion were admirably prevalent. But recent studies have entered with surprising unanimity, sharp dissent to the vitality of this gentle conception. They suggest that the appearance as well as the actuality of fairness- impartiality and orderliness- in short the essentials of due process may be a more therapeutic attitude so far as the juvenile is concerned.”² The prescience of his observation has found resonance and reinforcement with the 2013 publication of *Reforming Juvenile Justice: A Developmental Approach*³ which was commissioned by the Office of Juvenile Justice Delinquency and Prevention (OJJDP).

Reforming Juvenile Justice’s emphasis on encouraging not only the perception but the actuality of fairness in all domains⁴ connects directly to the essence of *Gault*’s

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“The child requires the guiding hand of counsel at every stage of the proceedings against him.” *In Re Gault*, 387 U.S. 1, 36 (1967)

¹ *In Re Gault*, 387 U.S. 1, 18 n. 23 (1967) (quoting *Kent v. U.S.*, 383 U.S. 541, 556 (1966) (applying principles of fundamental fairness to transfer hearings pursuant to the Fourteenth Amendment).

² *Id.* at 24-25.

³ See generally, Richard Bonnie et al., *Reforming Juvenile Justice: A Developmental Approach* (National Academies Press, D.C. 2013)

⁴ *Id.* See e.g. Summary at 3, 4 & Ch. 7, Accountability and Fairness, at 183, 186-194.

message. “Treating youth fairly and ensuring that they perceive that have been treated fairly and with dignity contribute to positive outcomes in the normal processes of social learning, moral development, and legal socialization adolescence.”⁵ The research also demonstrates that public health oriented alternatives to traditional court processing promote social connection and positive youth development.⁶ The OJJDP report provides a road map for promoting positive youth development and social engagement by demonstrating that supporting such policies improves public safety outcomes by reducing recidivism. In exploring whether *Gault’s* promise of due process has been realized or is still aspirational, this article suggests that our inquiry requires us to think contextually by considering how children and families are treated in and out of the courtroom. This entails consideration of educational, child welfare and mental health services, as well as the scope of legal entitlements. Equity and fundamental fairness, euphemisms for due process, are what will truly effectuate *Gault’s* promise and should be the benchmark for all courts and systems that engage with children.

Key words: Juvenile Justice, Child Welfare, Due Process, Fundamental Fairness, *De facto* and *De Jure* Segregation, Cradle/ School-To-Prison-Pipeline, Social Justice.

INTRODUCTION AND FRAMING THE ISSUES

Gault is often cited as heralding the beginning of a due process revolution but in spite of its seminal importance in signaling a radical departure from prior practice, the case has not proved to be the juvenile justice system’s equivalent of *Gideon v. Wainwright*.⁷ In creating the right to counsel for indigent youth, *Gault’s* holding was explicitly limited to the scope of fundamental fairness during the adjudicatory hearing. Pre-adjudicatory proceedings, including the right to bail and dispositional issues were not addressed.⁸ Since *Gault* was decided in 1967, the Supreme Court has only extended procedural due process rights relying again on principles of fundamental fairness on two occasions; *In Re Winship*⁹ in 1970 applying reasonable doubt to delinquency cases, and *Breed v. Jones*¹⁰ in 1975, applying double jeopardy principles to juvenile proceedings. In *McKeiver v. Pennsylvania*,¹¹ in 1971, only four years after *Gault* was decided, a reconstituted Supreme Court declined to extend the right to trial by jury as a matter of constitutional right to juveniles. The failure, or decision, to “constitutionalize” all of the due process protections afforded adults through the incorporation clause of the Fourteenth

⁵ *Id.* Summary at 6.

⁶ See generally, Francine Sherman & Francine Jacobs, ed., *Juvenile Justice: Advancing Research, Policy, and Practice*, (Wiley & Sons 2011).

⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (providing for the right to counsel for indigent criminal defendants and incorporating all due process rights into criminal proceedings via the Fourteenth Amendment)

⁸ *Gault*, 387 U.S. at 14 (“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. [F]or example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process.”).

⁹ *In Re Winship*, 397 U.S. 358 (1970).

¹⁰ *Breed v. Jones*, 421 U.S. 519 (1975).

¹¹ *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

Amendment has given license to each state to design the contours of its own system and create a world of justice by geography.

The *Gault* debate concerns differing narratives concerning the nature of childhood. Thomas Grisso and Elizabeth Scott have described what they characterize as “the changing accounts” of legal policies through a “developmental lens.”¹² They employ a methodology that assesses the progressive reform period in the embryonic stages of the system, the post-*Gault* period of the 1970’s and 1980’s which featured tough on crime attitudes, and recent jurisprudence. They conclude that modern developmental psychology provides substantial, if indirect, evidence that cognitive immaturity is an important factor in the legal process.¹³ Their view has been validated by the Supreme Court jurisprudence which has revived hopes for a more balanced regime of proportional accountability.

The Supreme Court has abolished the juvenile death penalty,¹⁴ mandatory juvenile life without parole in all cases, and ruled that a child’s age is a relevant factor in other contexts.¹⁵ Relying in part on psychological research regarding the maturational arc of adolescence and brain imaging science the court has established that while youth are accountable they are, in a constitutional sense, different from adults. This acknowledgment has corroborated what the founders believed of the juvenile court at the dawn of the twentieth century intuitively knew- children are not little adults. Practitioners across the country are considering the implications of proportional accountability in a variety of contexts, including revisiting zero tolerance constructs, collateral consequences, capacity to form legal intent or *mens rea*,¹⁶ and mandatory sentencing regimes.¹⁷ However, this landscape has been complicated by a disturbing and counter-intuitive narrative- the re-criminalization of status offense conduct that was decriminalized in the aftermath of *Gault* and the enactment of the Juvenile Justice Delinquency and Prevention Act (JJDP) in 1974.¹⁸ This process has threatened the very nature of adolescence and has adversely affected our most vulnerable populations. While detention rates have declined recently, in part because of the Annie E. Casey Foundation’s Juvenile Detention Alternatives Initiative (JDAI) and OJJDP, and Models for Change programs, “75% of all youth incarcerated in the U.S. are locked up for non-violent offenses.”¹⁹

¹² Elizabeth Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997) at 138.

¹³ *Id.* at 138.

¹⁴ *Roper v. Simons*, 543 U.S. 551 (2005).

¹⁵ *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 540 (2012) (abolishing juvenile life without parole in capital cases); *Montgomery v. Louisiana*, 577 U.S. ___ (more), 136 S.Ct. 718 (2016) (retroactive application of *Miller*);

¹⁶ See e.g. *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (age a relevant factor in determining whether a child, aged thirteen, would believe that he was free to go while being questioned in the presence of a school official and police).

¹⁷ See e.g. Laurence Steinberg, *Should the Science of Adolescent Brain Development Affect Juvenile Justice Policy and Practice?*, Keynote Address at the 2014 MacArthur Models for Change Cross Action Network Meeting, Nat’l Ctr for Mental Health & Juvenile Justice (May 20, 2014), available at <http://tinyurl.com/qgxybyww>.

¹⁸ Jay D. Blitzman, *Are We Criminalizing Adolescence?*, 30 ABA CRIMINAL JUSTICE 22, 23 (May 2015).

¹⁹ Henrick Karolizsyn, *Juvenile Justice 40 Years On: Unfinished Business*, CRIME REP. (Sept. 7, 2014) available at <http://tinyurl.com/15ywu81>.

Although juvenile detention rates have declined, racial and ethnic disparities in juvenile justice and child welfare have increased dramatically. James Bell and Raquel Mariscal suggest that the “trend in the United States has been to criminalize the very nature of adolescence in the name of social welfare, with youth of color bearing the brunt of what is actually social control.”²⁰ While comprising approximately 38% of the population eligible for detention, the overall representation of youth of color in secure treatment has increased to almost 70% over the past decade. These startling increases in disparities for youth of color have occurred while arrests for serious and violent crimes declined by 45%.²¹ L.G.B.T.Q – Gender Non-Conforming youth comprise 5% of the nation’s youth population but 20% of those held in detentions, and 85% of that number are youth of color.²² In November of 2017, the Sentencing Project reported that African-American youth are five times more likely to be held than whites,²³ that Latino youth are 65% more likely to be held than white youth,²⁴ and that Native American youth were three times more likely to be detained.²⁵

The increase of school referrals was in large part due to the expansion of zero tolerance and the wide scale deployment of police in schools without first thinking about their relationship with educators and their scope of authority. Zero tolerance, which became widespread in the 1990’s, was initially a response to guns and drugs in schools. The National Center for Education Statistics data indicates that reported incidents of violent acts in school reached their high water-mark in the 1993-1994 school year.²⁶ This pattern parallels declining national juvenile arraignments in all contexts which peaked in 1994.²⁷ The 1999 school shooting in Columbine, Colorado had a dramatic impact. Deploying police in schools might have seemed like a logical response to protect children from external threats but the process has resulted in ostensibly unintended consequences. While the majority of the publicized school shootings have occurred at suburban or rural schools, police presence has been featured in urban settings with high percentages of youth of color. Sixty years ago, only Flint, Michigan employed police officers on a city wide basis.²⁸ According to the National Association of School Resource Officers, school-based policing is the fastest growing area of law enforcement.²⁹ By

²⁰ James Bell & Raquel Mariscal, *Race, Ethnicity & Ancestry in Juvenile Justice*, in JUVENILE JUSTICE: Advancing Research, Policy and Practice, 111, 115, Francine Sherman & Francine Jacobs, eds. (Wiley & Sons 2011).

²¹ *Race, Ethnicity and Ancestry in Juvenile Justice*, *id.* at 111.

²² Angela Irvine & Aisha Caufield, *The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Non-Conforming & Transgender Youth Within the Child Welfare to Juvenile Crossover Population*, 24 Gender Soc. Poly & I. 243, 248 (2016).

²³ *Black Disparities in Youth Incarceration*, The Sentencing Project (sentencingproject.org 2017).

²⁴ *Id.*

²⁵ *Id.*

²⁶ National Center for Education Statistics Indicators of School Crime and Safety (2010), <http://bjs.ojjp.usdoj.gov/content/pub/pd/iscs10pdf>.

²⁷ Charles Puzzanchera and Benjamin Adams, *Juvenile Arrests 2009*, Juvenile Offenders and Victims: National Report Series, Office of Juvenile Justice and Delinquency Prevention, 5 (2011), <https://www.ojjdp.gov/pubs/236477.pdf>

²⁸ Robin L. Dahlberg, *Arrested Futures: The Criminalization Of School Discipline In Massachusetts’ Three Largest School Districts*, ACLU, 5 (2012), <http://tinyurl.com/m56a7fl>.

²⁹ *Id.* at 9.

2005, 48% of school districts surveyed by a U.S. Department of Justice study reported that they had police in schools; today there are over 17,000 school police.³⁰

African-American students represent 16% of school enrollment, but 31% of school based arrests.³¹ During the 2009-2010 school year, African American students were more than 3.5 times likely to be suspended than white students; 20% of African American students were suspended during that period.³² Disciplinary data reveals the mythology of race neutral applications of zero tolerance as African American and Latino students routinely receive harsher punishments for similar behavior to their white peers.³³ Disruption of school continuity as the result of suspension or arrests increases school failure which in turn becomes a public safety concern as the research demonstrates that youth who do not graduate high school are eight times more likely to later be arrested than students who do graduate.³⁴

This picture has also included an over-reliance on courts as a default social services provider as during the last two decades, increasing numbers of youth have come to the attention of the juvenile justice system from child welfare agencies and the mental health system.³⁵ James Bell and Raquel Mariscal state that the "The juvenile justice system has become the default system- the warehouse for low risk, high need youth."³⁶ The re-criminalization process has also affected adolescents in the child welfare system as a significant percentage of youth who are status offenders or involved with child protective agencies as abused children become involved in juvenile justice. *Missed Opportunities*, a Massachusetts study, notes that between 2010 and 2012, 72% of the youth committed to the state's juvenile correctional system, the Department of Youth Services (DYS), had also been involved with the Department of Children and Families.³⁷

A review of the history and evolution of the court is instructive in understanding how we have arrived at this juncture.

THE ORIGINAL JUVENILE COURT AND GAULT

On June 8, 1964, Gerald Francis Gault, fifteen years of age, was arrested with a friend based on a complaint by a neighbor about telephone calls made by one or more

³⁰ *Id.*

³¹ *Policy Brief: Disproportionate Minority Contact in the Juvenile Justice System* 6, Sentencing Project, (May 2014), <http://tinyurl.com/kbvt96c>

³² Donna St. George, *Federal Data Shows Racial Gaps in School Arrests*, WASH. POST (Mar. 6, 2012), <http://tinyurl.com/qeztcqp>.

³³ See generally, *Race, Ethnicity and Ancestry in Juvenile Justice*, supra n.15, at 111-113, 119; Russell Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 Ind. Sch. Psychol. Rev. 85 (2011).

³⁴ Robin Dahlberg, *Arrested Futures: The Criminalization of School Discipline in Massachusetts' Three Largest School Districts*, ACLU, Citizens for Juvenile Justice (Spring 2012) at 5.

³⁵ *Reforming Juvenile Justice*, supra n.3 at 3.

³⁶ Bell & Mariscal, *Race, Ethnicity and Ancestry in Juvenile Justice*, *Id.* at 124.

³⁷ *Missed Opportunities: Preventing Youth in the Child Welfare System from Entering the Juvenile Justice System*, Executive Summary 1 (Citizens for Juvenile Justice, 2015).

persons that were of the “irritatingly offensive, adolescent, sex variety.”³⁸ When Gault was apprehended, his mother and father were both at work; no notice was provided that he had been arrested, nor was any message left at the home. A hearing was held the following day in the judge’s chambers, and the petition filed that day was not even seen by the parents until the habeas corpus hearing on August 17, 1964. The petition contained no factual allegations of misconduct; it merely alleged that the minor was under eighteen and in need of protection of the court. During the hearing in chambers on June 9th, the judge was the inquisitor. Gerald, his mother and his older brother appeared, as did two probation officers. The complainant was not there, no transcript or recording was made, no witnesses were sworn to testify and no memorandum or finding was made.

On June 15, 1964, Gault was sentenced to the Arizona state industrial school for an indeterminate period until his twenty-first birthday, this was the functional equivalent of a six-year prison term. ‘Industrial school’ in this context was an oxymoron, as no schooling or treatment took place in ‘industrial schools’ or ‘training’ or ‘reform schools.’ Gerald Gault had been sentenced to what the Supreme Court acknowledged was “in all but name a penitentiary or jail.”³⁹ An adult accused of comparable conduct would have received a fine of five to fifty dollars, or a jail term of not more than two months. More importantly, said adult would have been entitled to the benefit of due process. Justice Fortas, writing for the majority, noted, “So wide a gulf between the State’s treatment of the adult and the child requires a bridge sturdier than... cliché can provide... ‘The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines.’”⁴⁰ This disparity of treatment, which was the hallmark of the pre-*Gault* world, underlines the dangers of net-widening in the name of rehabilitation and treatment. These concerns were exacerbated by the fact that children convicted of serious crimes, and those who today would be characterized as status offenders, were housed together.

The United States Supreme Court in *Gault* held for the first time that an indigent youth has the right to counsel. Under the Due Process Clause of the Fourteenth Amendment, when a juvenile is at risk of commitment to an institution, “the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.”⁴¹ The *Gault* court, concluded that,

“There is no material difference [...] between adult and juvenile proceedings...A proceeding where the issue of whether the child will be found ‘delinquent’ and subjected to the loss of liberty [...] is comparable in seriousness to a felony prosecution...The child requires the guiding hand of counsel at every step in the proceedings against him.”⁴²

³⁸ *Gault*, 387 U.S. at 4.

³⁹ *Id.* at 61 (Black, J. concurring).

⁴⁰ *Id.* at 11.

⁴¹ *Id.* at 41.

⁴² *Id.* at 36.

The introduction of due process into the juvenile justice system was a seminal event, as it constituted a radical departure from prior culture and practice. *Gault's* emphasis on due process was exemplified by Justice Felix Frankfurter's observation that, "The history of American Freedom is, in no small measure, the history of procedure."⁴³ Justice Frankfurter continued, writing, "Procedure is to law what scientific method is to science."⁴⁴ The court's decision was based on the belief that "[d]ue process is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."⁴⁵

Reviewing the disagreements between the *Gault* justices is relevant, as their debate has resonance today. Justice Black forcefully observed in his concurrence that as it relates to a child, "I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment."⁴⁶ Justice Harlan, dissenting in part, believed that the due process protections for youth should be limited to notice, appointment of counsel if indigent, and maintenance of a written record. Justice Stewart, echoing in part the voices of the original juvenile court, wrote that "[t]he inflexible restrictions of the Constitution so wisely made applicable to adversary criminal trials have no inevitable place in the proceedings of those public social agencies known, as juvenile or family courts."⁴⁷ These competing narratives reflect the debate as to whether due process and rehabilitation are irreconcilable concepts.

Gault's "call for fundamental fairness for youth resonated beyond the steps of the courthouse,"⁴⁸ but would not prove to truly herald the beginning of a due process revolution. Progressive developments included the enactment of the federal JJDPA in 1974, and the creation of the Office of Juvenile Justice Delinquency and Protection (OJJDP). Compliance with the Act's core requirements determined how federal juvenile justice dollars would be dispensed to the states. These requirements included the decriminalization of status offense conduct (e.g. run-aways, stubborn children, truancy, school disturbance), and sight-sound separation of status offenders and youth accused of crime. The legislation was amended in 1988, making it a core requirement to address practices which disproportionately applied to minorities. The act is still the primary piece of federal regulation overseeing juvenile justice.

Ultimately, in spite of its soaring rhetoric, *Gault* did not herald the beginning of a due process revolution in the courtroom. *Gault* explicitly limited its ruling to the scope of due process at the bench trial in establishing the right to notice, counsel,

⁴³ *Gault*, 387 U.S. at 9.

⁴⁴ *Id.*

⁴⁵ *Id.* at 20.

⁴⁶ *Id.* at 61 (Black, J., concurring).

⁴⁷ *Gault*, 387 U.S. at 79 (Stewart, J., dissenting).

⁴⁸ *Defend Children: A Blueprint For Effective Juvenile Defender Services*, 10 (November 2016)

confrontation, the right against self-incrimination, and the right to an adequately prepared record of the proceedings. As the majority explained,

“[w]e do not, in this opinion, consider the impact of these constitutional provisions upon the totality of the juvenile and the state. We do not even consider the entire process relating juvenile ‘delinquents.’ For example, we are not here concerned with the procedural or constitutional right applicable to the post-adjudicative or dispositional process.”⁴⁹

Nevertheless, *Gault* marks a defining moment in the history of the juvenile court by incorporating the ideals of equity and fairness into juvenile court proceedings through due process protections. *Gault’s* emphasis on fundamental fairness and proportional accountability has found resonance in the Supreme Court jurisprudence previously cited. This article reviews the evolution of the juvenile court system, and argues that realizing *Gault’s* vision requires the application of its principles of due process and proportional accountability in our courtrooms, and addressing the systemic issues which are implicated in a meaningful exploration of access to justice.

EVOLUTION OF THE JUVENILE JUSTICE SYSTEM

In assessing the intent of the nineteenth-century social reformers who helped create the first juvenile courts, juvenile law scholars Douglas Abrams, Sarah Ramsey, and Susan Mangold assert that, “The prevailing view embraced by most historians and by the Supreme Court in *Gault* is that the juvenile court legislation climaxed an essentially humanitarian movement.”⁵⁰ The rationale of the original juvenile court relied on conceptions of a special court for children in which wayward youths would be cared for and treated, while saving them from the harsh realities of traditional penal systems. The perception of children as being young and malleable was first vocalized by Judge Ben Lindsay’s statement that “the criminal prosecution of youth was an outrage against childhood.”⁵¹ The system that resulted was explicitly non-adversarial. In employing the medical model, there was virtually a non-rebuttable presumption that the patient or child was in need of fixing. Some revisionists have argued that while many reformers perceived the juvenile court as a moral imperative, “the reformers were middle class, conservative and culturally ethnocentric men and women who perceived the court as a heavy-handed vehicle for imposing traditional agrarian values on an increasingly urban nation.”⁵²

⁴⁹ *Gault*, 387 U.S. at 13.

⁵⁰ Douglas Abrams, Sarah Ramsey, Susan Mangold, *Children and the Law-Doctrine, Policy and Practice*, 989 (West 5th Edition)

⁵¹ Elizabeth Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective On Juvenile Justice Reform*, 88 J. Crim. L. & Criminology 137, (1997) at 138.

⁵² Abrams et al., *supra* n.49, at 989. (quoting Douglas Rendleman, *Parrens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. Rev. 205, 217 (1971)).

The juvenile court may have been conceived as the first type of specialty court, but analysis indicates that the only thing that was special about it was its utter lack of productive treatment or any semblance of procedural fairness. The idyllic vision of early 19th century houses of refuge and care, which aimed to provide services to homeless and wayward youth, “devolved” into juvenile prisons characterized only by cruel conditions and indeterminate periods of confinement.⁵³ It is questionable whether the original medical metaphor was apt, as any diagnosis or treatment by trained professionals was never fully entertained in concept, or realized in practice. One-third of juvenile courts had no probation or social work staff, and eighty to ninety percent had no court psychology or psychiatry staff.⁵⁴ The *Gault* court noted that, “while good will and compassion are admirably prevalent throughout the system [. . .] expertise, the keystone of the whole venture, is lacking.”⁵⁵ In ruling that “the condition of being a boy does not justify a kangaroo court”, the court quoted the observation made in *Kent v. U.S.*,⁵⁶ that in the existing juvenile system, “[a] child receives the worst of both worlds [. . .] he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”⁵⁷

The court quoted Roscoe Pound in observing that, “the Powers of the Star Chamber⁵⁸ were a trifle in comparison with those of our juvenile courts.”⁵⁹ This critique, comparing the prosecutorial arm of English monarchs to the American juvenile justice system of the early 20th century may seem hyperbolic, but the trauma inflicted upon children detained for indeterminate periods of time, and the total perversion of justice and liberty in the name of treatment makes the comparison quite appropriate. According to the National Council of Juvenile Court Judges, as of 1964, in the year of Gault’s arrest, there were 2,987 juvenile court judges, of whom 213 were full time.⁶⁰ The National Crime Commission Report indicated that half of those judges had no undergraduate degree, a fifth had no college education at all, a fifth were not members of the bar, and three quarters devoted less than one-quarter of their time to juvenile matters.⁶¹ Additionally, a 1965 study from the George Washington Center for the Behavioral Sciences indicated that a quarter of judges studied had no law school training of any kind.⁶²

⁵³ Bell and Mariscal, *supra* n.15 at 116

⁵⁴ *Gault*, 387 U.S. at n. 14 (quoting from Harvard L. Rev. Note, p. 809).

⁵⁵ *Id.*

⁵⁶ *Kent*, 383 U.S. at 556 (addressing juvenile transfers to adult courts)

⁵⁷ *Gault*, 387 U.S. at 18.

⁵⁸ The Star Chamber was an English court of law from the late 15th century to the mid-17th century and was composed of Privy Councillors and common-law judges, to supplement the judicial activities of the common-law and equity courts in civil and criminal matters. The Star Chamber was originally established to ensure the fair enforcement of laws against socially and politically prominent people so powerful that ordinary courts would probably hesitate to convict them of their crimes. However, it became synonymous with social and political oppression through the arbitrary use and abuse of the power it wielded.

⁵⁹ *Id.*; Dean Pound, *Foreword* to Young, *Social Treatment In Probation & Delinquency*, xxvii (1937).

⁶⁰ *Gault*, 387 U.S. at n. 14.

⁶¹ *Id.*

⁶² *Id.*

Some scholars believe that the court may have been moving toward extending juveniles all of the due process protections accorded to adults in *Gideon*,⁶³ but that “[t]ime ran out on Justice Fortas⁶⁴ before he could carry any further plans to fruition.”⁶⁵ The retributive post-*Gault* era, which included conflicting views of youth and the appropriate culpability for their actions, minimized *Gault*’s reach. As noted previously, while Elizabeth Scott and Thomas Grisso employed a developmental lens to understand the changing accounts of children and adolescents,⁶⁶ other commentators adopted the, ‘you do the crime, you do the time’ mantra. In 1996, William Bennett, John Dilulio, and John Walters concluded that, “America is now home to thickening ranks of juvenile super-predators: radically impulsive, brutally remorseless youngsters [and] [t]o these mean-street youngsters, the words right and wrong have no fixed moral meaning.”⁶⁷ As juvenile crime and homicide rates increased in the 1980’s, state legislatures responded to the perceptions of youth violence by facilitating the transfer and prosecution of youth to the criminal system. By 2007, every state, with the exception of Nebraska, had enacted such legislation.⁶⁸ It was during this period that criminologists and sociologists, concerned about the anticipated growth of the fourteen-to-seventeen ‘at risk’ age group, issued dire predictions of a tsunami of juvenile crime unless immediate action was taken.⁶⁹

The population projections proved to be accurate, but according to Department of Justice data, juvenile crime peaked nationally in 1996, and declined 70% by 2016.⁷⁰ Furthermore, the juvenile crime index was at the lowest point it had been in three decades, and the overwhelming majority of youth were coming to court for non-violent offenses.⁷¹ The nature of children has not changed. Indeed, brain-imaging studies indicate that adolescent development is an on-going process that extends into the mid-twenties. This research has even led us to re-think the age of juvenile court jurisdiction, and undercuts the pernicious mythology of the super-predators.

Despite the limits of its reach, *Gault*’s due process admonitions were of critical importance in transforming the juvenile justice system. In reviewing the development of

⁶³ *Gideon*, 372 U.S. at 335 (incorporation of all due process protections of the Bill of Rights via the Fourteenth Amendment).

⁶⁴ Justice Fortas also authored the majority opinions in the *Kent* transfer case, and *Tinker v. Des Moines*, 393 U.S. 503 (1969), upholding the right of students to wear black armbands protesting the war in Vietnam as a legitimate expression of First Amendment rights, and holding that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. In 1968, he was nominated to succeed Earl Warren as Chief Justice, but resigned following the revelation that he had accepted a fee from a former client who was under federal investigation for securities fraud while sitting on the court. Abrams & Ramsey, supra n.49 at 1105, note 14.

⁶⁵ Douglas E. Abrams & Sarah H. Ramsey, *Children & the Law, Doctrine, Policy and Practice*, 1105 (3d. 2007); cited in Jay Blitzman, *Access To Justice In Juvenile Court*, 230 Mass. L. Rev. 230, 231 (2010).

⁶⁶ *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, supra n. 50

⁶⁷ William J. Bennett et al., *Body Count*, 27 (1996).

⁶⁸ Howard Snyder & Melissa Sickmund, National Center for Juvenile Justice, *Juvenile Offenders And Victims; 2006 National Report* (2007).

⁶⁹ Jay Blitzman, *Gault’s Promise*, 9 Barry L. Rev. 67, 3 (2007) citing Ted Guest & Victoria Pope, *Crime Time Bomb*, U.S. NEWS & WORLD REP., Mar. 25, 1996 at 29.

⁷⁰ OJJDP Statistical Briefing Book. Online. Available: http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200. December 06, 2017

⁷¹ OJJDP BRIEFING BOOK, JUVENILE COURT CASES (2011).

the juvenile court, Justice Fortas observed that it operated under the principles of *parens patriae*, allowing the state the authority to intervene in the best interests of the child. This construct was adapted from English *patriae patriae* chancery courts. These courts were primarily concerned with property rights, but their authority was extended to cover issues of child welfare. Juveniles were subject to protective guardianship in the name of the *pater patriae*, of father of the people, of Kings.⁷² The original chancery courts in England and the United States did not have jurisdiction over delinquent behavior. Their initial focus was on issues of child welfare and neglect. In critiquing the adaptation of this model to delinquency cases, Justice Fortas wrote that, "The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historical credentials are of dubious relevance."⁷³ He noted that in spite of any benevolent intent, "the essentials of due process. . . may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."⁷⁴

This language signaled a movement away from the outdated model of advocacy focused on the best interests of the child as perceived by third parties or guardians ad litem in favor of client directed representation,⁷⁵ and empowerment of youth based on positive youth development as a critical component of scientifically informed treatment and sociological engagement.⁷⁶ In 2006, nearly one hundred experts from fields related to juvenile justice convened in Las Vegas, Nevada to explore the ethical issues related to representing children. These scholars reiterated the recommendations from a colloquium held ten years previously at Fordham Law School, New York, that "children are best served when their lawyers comport with the traditional, ethically-dictated expectations for an attorney-client relationship, and not when lawyers serve as guardians-ad-litem or otherwise substitute their own ideas of what is best for the child for the child's ideas."⁷⁷

Four years after *Gault* was decided the Supreme Court revisited the scope of due process protections accorded to children. In *McKeiver v. Pennsylvania*⁷⁸ a reconstituted court addressed the question of whether juveniles were constitutionally entitled to a jury trials. The court, while passing harsh judgement on the traditional court, looking at the same history through a different lens resurrected the image of paternalistic judge and *parens patriae* philosophy that Fortas had questioned.⁷⁹ Since *McKeiver* each state has had

⁷² See generally, D.R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971).

⁷³ *Gault*, 387 U.S., at 26.

⁷⁴ *Id.*

⁷⁵ See e.g. American Bar Association, Rules of Professional Responsibility, Rule 1.14, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity.html

⁷⁶ *Principles of Positive Youth Development: A Vision for the American Justice System*, supra n. 15 at Ch. 5.

⁷⁷ *Special Issue On The Legal Representation of Children*, 6 NEV. L.J. 574-1034 (2006) at 1.

⁷⁸ 403 U.S. 528 (1971).

⁷⁹ Jay Blitzman, *Access To Justice In Juvenile Court*, 230 MASS. L. REV. 230, 231 (2010).

the right to fashion the contours of its own legal system. As the right to be treated as a juvenile is statutorily conferred and can be statutorily abrogated,⁸⁰ each of the fifty states, the District of Columbia, and the respective territories has its own unique system.⁸¹

States that accord greater juvenile due process protections and rights to counsel than *Gault* requires do so by case law or rule, not by Constitutional mandate. Massachusetts, for example, has solved any tensions between due process and *parens patriae* doctrine by applying all of the criminal rules of procedure to juvenile session.⁸² M.G.L. c. 119, sec. 55(a) guarantees the right to trial by jury. The state's juvenile code is to be "liberally construed so that the care, custody, and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from parents, and that as far as practicable, they should be treated, not as criminal, but as children in need of aid, encouragement and guidance."⁸³ Although this statutory formulation is a classic expression of *in loco parentis* philosophy, its application in Massachusetts has allowed for relief not accorded to adults such as providing for pre-trial motions to dismiss for want of probable cause.⁸⁴

Juvenile justice consists of a patchwork quilt of different systems as each jurisdiction is free to determine the minimum and maximum ages of juvenile jurisdiction, whether there is a right to bail or jury trial, and to make decisions about transfers to adult court. Some states have full-time juvenile court judges, others rotate judges into session. The scope of the subject matter under juvenile jurisdiction is variable as well. In some states, delinquency matters may be assigned to a completely different court as care and protection and abuse matters, whereas other states may hold all three matters under the jurisdiction of a single court. Additionally, the crisis of adequately funding indigent defense is exacerbated in juvenile proceedings where the right to "[the] guiding hand of counsel at all stages of the proceedings" has yet to be constitutionally established or provided for by rule of court or case law. In addition, while there has been a relatively recent movement to 'open the doors' of juvenile proceedings, many states still require juvenile sessions to remain closed.⁸⁵

⁸⁰ See e.g. *Commonwealth v. Quincy Q.*, 434 Mass. 859, 865 (2001) ("A State that elects to commit to its judiciary the responsibility of determining whether [an individual] will be tried as a juvenile or an adult... must observe only the constitutional requirement due process right of essential fairness." quoting *Commonwealth v. Wayne W.*, 414 Mass. 218, 223 (1993); see also *Kent*, 383 U.S. at 557; *Breed v. Jones*, 421 U.S. 519, 537 (1975) ("[T]he U.S. Supreme Court has never attempted to prescribe criteria or, or the nature and quantum of evidence, that must support a decision to transfer a juvenile for trial in adult court.").

⁸¹ For analysis of each state's juvenile justice system, see National Center for Juvenile Justice, NCJJ State Juvenile Justice Profiles (2010).

⁸² Mass. R. Crim. Pro. 1(b).

⁸³ M.G.L. c. 119, sec. 53.

⁸⁴ *Commonwealth v. Humberto H.*, 466 Mass. 562 (2013).

⁸⁵ Jay Blitzman, *Access To Justice In Juvenile Court*, 230 Mass. L. Rev. 230, 242 (2010).

FULLY ACTUALIZING GAULT AND SYSTEMIC REFORM

Ten years ago, in *Gault's Promise*,⁸⁶ I wrote that my quarrel with *Gault* was not that the case had been wrongly decided, but that it had not gone far enough. While progress has been made, it has become apparent that *Gault* has not proved to be the juvenile system's equivalent of *Gideon*,⁸⁷ and its promise remains aspirational. Introducing due process into the system was a radical departure from normative practices of the pre-*Gault* era, but *Gault* only addressed fundamental fairness during the adjudicatory phase. Critical issues, including the right to counsel at pre-trial detention, disposition, and transfer hearings were not addressed. Not incorporating all of the due process protections of the Bill of Rights via the Fourteenth Amendment, as *Gideon* had done, meant that juvenile proceedings would be deemed to be quasi-criminal in nature and each state would be free to design the contours of its respective system, since the right to counsel is only constitutionally guaranteed during the adjudicatory hearing by *Gault*.

Sober analysis leads to the conclusion that *Gault's* promise has not been actualized. Fifty years after *Gault*, children still do not have "the guiding hand of counsel at every stage of the proceedings" which *Gault* promised, albeit limitedly. The National Juvenile Defense Center (NJDC) published a well-researched report which indicates that there is excessive waiver of counsel in 62% of states they have assessed to date. Access to counsel issues are exacerbated by determinations of indigence traditionally focused on the resources and income of parents and caretakers. The National Juvenile Defense Center concludes, "It is an open secret in America's justice system that countless children accused of crime are prosecuted and convicted every year without ever seeing a lawyer."⁸⁸ According to Barry Feld's research in 1993, less than half of the juveniles who were adjudicated had assistance of counsel. In 2007, Steven Drizin and Greg Luloff voiced concern about, "a juvenile court culture that frowns upon zealous advocacy."⁸⁹ The overwhelming majority of delinquency cases are resolved with admissions to alleged facts. Unrepresented youth are often exposing themselves to collateral consequences that are more profound than their original adjudication. A non-inclusive list includes school suspension and expulsion which fuels the school-to-prison pipeline, prejudice in housing opportunities, revocation of the ability to join the military or obtain loans for public education, a reduction in employment opportunities, and forced sex offender registration. Some states preclude expunging juvenile records, and there is great variation among states regarding the sealing of juvenile records. The stigmatization of adjudication can follow a youth throughout the course of their life, in the same manner as discussed in Michelle Alexander's book, *The New Jim Crow*⁹⁰.

⁸⁶ *Gault's Promise*, *supra* n. 83

⁸⁷ *Gideon*, 372 U.S. 335 (incorporation of all of the due process rights via the Fourteenth Amendment in criminal cases).

⁸⁸ *Defend Children*, *supra* n. 47 at 10.

⁸⁹ Drizin & Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions*, 34 N.Ky. L. Rev. 257, 284, 289 (2007).

⁹⁰ Alexander, Michelle. (2010). *The new Jim Crow : mass incarceration in the age of colorblindness*. New York : [Jackson, Tenn.] :New Press ; Distributed by Perseus Distribution

In limiting the right to counsel to the adjudicatory hearing, *Gault* relied on fourteenth amendment analysis. Scholars such as Mae C. Quinn believe that fourteenth amendment due process sufficiently protects a youth's rights while affording juvenile courts what is perceived as the flexibility necessary for juvenile courts to fulfill their rehabilitative and therapeutic functions.⁹¹ Marsha Levick and Neha Desai have argued persuasively that employing sixth amendment critical stage analysis, as was the case in *Gideon*, might be a fruitful avenue to pursue in expanding the scope of due process.⁹² In the criminal context the Supreme Court defined a "critical stage" as any stage of a prosecution "where substantial rights of a criminally accused may be affected."⁹³ Levick and Desai note that many courts considering the rights of children have found that Sixth Amendment safeguards apply to children and emphasize that the Fourteenth Amendment due process lens has been ineffective in protecting youth and ensuring fair hearings.⁹⁴ As discussed previously, countless numbers of youth are being adjudicated without counsel and as states design the contours of their systems, detention, bail, disposition and transfer practices vary widely. This form of justice by geography is rationalized by continuing to classify juvenile proceedings as civil or quasi-criminal in nature. This is the legacy of the post-*McKeiver* world. Critical stage analysis provides a window to revisit this landscape by considering the realities of state intervention and the potential for deprivation of liberty at all phases of a prosecution.

*Apprendi v. New Jersey*⁹⁵ provides another theory for reconsidering the right to juvenile jury trials, as juvenile adjudications can be used as predicates for enhanced criminal sentencing regimes. The court stated in *Apprendi*, that "Other than the fact finder of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury and proved beyond a reasonable doubt."⁹⁶ The Supreme Court further held in *Alleyne v. U.S.*⁹⁷ that this doctrine applies to both facts that increase the statutory maximum sentence and facts that increase only the mandatory minimum. This line of cases raises questions about whether a court may use a prior delinquency adjudication to enhance a criminal sentence in conformance with substantive due process, and invites consideration of whether states should create the right to juvenile jury trials, or preclude the use of predicate juvenile offenses in subsequent sentencing.

In understanding current patterns and what has transpired since *Gault*, it is necessary to explore the processes that threaten to bring us back to the pre-*Gault* era. In *Are We Criminalizing Adolescence*, I discussed the unintended consequences of policies and practices which have included the re-criminalization of status offense conduct and the school/cradle-to-prison pipeline. The increase of referrals from schools to juvenile justice

⁹¹ *Giving Kids Their Due: Theorizing a Modern Fourteenth Amendment Framework for Juvenile Defense Representation*: 99 Iowa L. Rev. 2185 (2014).

⁹² *The Elusive Quest to Ensure Juveniles A Right to Counsel At All Stages of the Juvenile Process*, 178 Rutgers L. Rev. 60, (2007).

⁹³ *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

⁹⁴ *Id.* at n.5.

⁹⁵ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

⁹⁶ *Id.* at 460.

⁹⁷ *Alleyne v. U.S.*, 133 S. Ct. 2151, 2155 (2013).

has featured the expansion of zero tolerance constructs and the wide scale deployment of school police without first thinking about the scope of their authority and their relationship to educators. There has also been a significant increase in referrals to juvenile courts from child welfare agencies and mental health systems.⁹⁸

The re-criminalization of status offense conduct has been highlighted by the conversion of status offenders who violate conditions of supervision into delinquency probation violators who can be securely detained.⁹⁹ The enactment of the Valid Court Order in 1980, permitting states to treat status offender as probation violators, has exacerbated systemic racial and ethnic disparities and threatens to criminalize adolescence.¹⁰⁰ There is also an excessive use of sanctioning for so-called 'technical' probation violations or violations of conditions of release not related to bail or court appearance.¹⁰¹ Alarming, this re-criminalization is occurring in a period of declining national juvenile arraignment rates.

Exploring the trends contributing to the criminalization of adolescents prompts an appreciation of the larger systems relating to access to justice for children and families. In the era of de-institutionalization, assumptions were made about resources going into robust continuums of community based care. However, as this has not occurred, there is a danger of the criminalization of mental health. Referrals from child welfare and protective agencies are reflected in the surging number of youth who are dually involved in child welfare and juvenile justice. In *Missed Opportunities*, Citizens for Juvenile Justice notes that in Massachusetts, 72% of youth who were committed to the Department of Youth Services, the state's juvenile correctional agency, from 2000-2012 were involved with the Department of Children and Families either through a status offense matter or as the subject of a care and protection petition.¹⁰²

THE CRADLE-TO-PRISON PIPELINE AND SYSTEMIC RACIAL DISPARITIES

As discussed previously, in the post-Columbine era of apprehension there has been a significant increase of referrals from schools to juvenile justice. Marian Wright Edelman and others have used the more comprehensive phrase of cradle-to-prison pipeline in lieu of the school-to-prison pipeline in order to capture the realities of children and families involved with either juvenile justice or the child welfare systems.¹⁰³ In *Baby Doe*, Jill Lepore invokes the specter of a juvenile version of the "carceral state", or a birth-prison

⁹⁸ *Are We Criminalizing Adolescence?* *supra* n.; Aaron Curtis, *Tracing the School to Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 GEORGETOWN L.J. 1251, 1258-60.

⁹⁹ *See Are We Criminalizing Adolescence?* *supra* n. 13; *see also* Aaron Curtis, *Tracing the School to Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 Georgetown L.J. 1251, 1258-60 (2014).

¹⁰⁰ *See Are We Criminalizing Adolescence?* *supra* n. 13; *see also*, Bell, J., Mariquel, R., "Race, Ethnicity and Ancestry in Juvenile Justice", Chapter 4 in JUVENILE JUSTICE: Advancing Policy, Practice and Research, Eds. Sherman, Jacobs (Wiley @ Sons, 2011).

¹⁰¹ *See Are We Criminalizing Adolescence?* *supra* n. 13

¹⁰² *Missed Opportunities*, Citizens for Juvenile Justice at 1 (2015), www.cfjj.org/missedopportunities.php.

¹⁰³ Marian Wright Edelman, *Justice for America*, Foreword to JUVENILE JUSTICE, Eds. Sherman & Jacobs, *Id.*, at xi.

pipeline which is characterized by the same racial and ethnic disparities of the juvenile and criminal justice systems.¹⁰⁴

The multifaceted factors that contribute to the pipeline implicate questions of race and class and the geographic segregation that is directly related to access to fair and adequate public education. This discussion requires consideration of implicit or unconscious bias as well as structural and systemic realities. Over sixty years after *Brown v. Board of Education*,¹⁰⁵ America's schools are largely segregated.¹⁰⁶ James Raskin, a prominent scholar of racial history in the United States has noted that, "More than two thirds of African American and Hispanic children still go to schools having an African American and Hispanic majority; many students still go to schools with all or mainly white student bodies."¹⁰⁷ The number of high-poverty schools serving primarily black and brown students across the country more than doubled between 2001 and 2014, and the largest school district in the nation in terms of student population, New York City, may have the most segregated schools.¹⁰⁸ "While explicitly racist segregation of American schools has been outlawed, education across the country is still largely divided along racial lines."¹⁰⁹ The school or cradle-to-prison pipeline "runs through economically depressed neighborhoods and failing schools."¹¹⁰

The reality and complexity of the "pipeline" was demonstrated in 2012 when the Civil Rights Division of the Department of Justice formally accused the city of Meridian, Mississippi in federal district court of operating a school-to-prison pipeline. The named defendants included the City of Meridian, Juvenile Court judges, the State of Mississippi, and the Mississippi Departments of Human Services and the Division of Youth Services. They were collectively accused of helping "to operate a school-to-prison pipeline whereby, following referral of students by the District, Meridian Police Department, the Youth Court, and probation services (DYS), arrest adjudicate, and incarcerate children for infractions without exercising appropriate discretion and without regard for their obligations under the United States Constitution."¹¹¹

¹⁰⁴ Jill Lepore, *Baby Doe: A Political History of Tragedy*, *THE NEW YORKER* (Feb. 1, 2016) at 15, citing *Missed Opportunities*, *supra* n. 36 at n. 104, noting that fifty-percent of boys and fifty-nine percent of girls had their first involvement with DCF before the age of three and that children in both juvenile justice and child welfare are disproportionately non-white. "The problem isn't only that the kinds of families that attract DCF tend to raise children who might have trouble with the law; it's that DCF itself can increase the likelihood of future delinquent activity. The system has contributed to the establishment of a juvenile version of the carceral state, a birth-to-prison pipeline. It is outrageously expensive, devastatingly ineffective, and profoundly unjust." *Baby Doe: A Political History of Tragedy*, *supra* n. 106.

¹⁰⁵ 347 U.S. 483 (1954).

¹⁰⁶ *Are We Criminalizing Adolescence*, *supra* n. 13 at 25, citing Charles Ogletree, *With all Deliberate Speed: Reflections on the First Half-Century of Brown v. Board of Education*, xv (Norton 2004).

¹⁰⁷ James B. Raskin, *WE THE STUDENTS: SUPREME COURT CASES FOR AND ABOUT STUDENTS* 189 (3rd ed. 2008).

¹⁰⁸ *School Segregation in New York City: What The Data Shows*, *New York City School Segregation*, PATCH (Jan. 9, 2018); Valerie Strauss, *Nation's largest school district announcing efforts to diversity segregated public schools*, *WASH. POST* (June 6, 2017) (citing 2014 report by UCLA's Civil Rights Project, *New York State's Extreme School Segregation: Inequality, Inaction and a Damaged Future*).

¹⁰⁹ *Id.*

¹¹⁰ Edelman, *supra* n. 105 at xii.

¹¹¹ *United States of America v. City of Meridian et al.*, Civil No. 4:12 CV168 HTW-LRA (Filed Oct. 24, 2012), No 36, alleging that "Defendants in this Case Collectively Help to Operate a School-to-Prison Pipeline".

Where people live matters. Demographic patterns and limited social mobility, exacerbated by policy decisions regarding urban renewal, public housing, and zoning have contributed to residential segregation. In the *COLOR OF LAW*, Richard Rothstein rejects the orthodoxy of what has been described as *de facto* segregation to rationalize the reality of America's racial divide and the fact that we still live in worlds that are separate and unequal. He characterizes explicitly designed policies at all levels, including school siting, as a process of conscious *de jure* segregation.¹¹² Access to adequate schools has become a critical juvenile justice issue. In *ALL DELIBERATE SPEED*, Professor Charles Ogletree concludes that there is no escaping the reality that a high percentage of color live in impoverished school districts.¹¹³ The consequences of this reality are palpable. For example, the Brockton, MA school system was only able to spend \$1.28 per student on classroom supplies during the 2016-2017 school year, while Weston, one of the wealthiest towns in the state provided \$275.00 per student.¹¹⁴

Bell and Mariscal assert that the disparate treatment of young people of color has deep historical roots in our nation and contemporary disparities reflect conscious of *de jure* race-based policies and practices.¹¹⁵ From the earliest days of the juvenile system, structural and *de jure* race based policies have affected youth of color. As a result, according to Bell and Mariscal, "the trend in the United States has been to criminalize the very nature of adolescence itself in the name of social welfare, with youth of color bearing the brunt of what is actually social control."¹¹⁶ While the number of youth arrested overall has decreased, very little progress has been made in redressing this historic pattern of structural racism.¹¹⁷ In analyzing the urbanization that accompanied nineteenth-century industrialization, as well as the disparate impact of policies affecting the creation of the juvenile justice system, Bell and Mariscal discuss the development of the first Houses of Refuge and Shelter. The first House of Refuge was opened in New York City in 1824 by a law which empowered city officials to apprehend any child under fifteen years of age who was found "soliciting charity."¹¹⁸ The New York House of Refuge's first occupants were three white boys and three white girls. Houses of Refuge were subsequently created in other cities, including Boston and Philadelphia. Bell and Mariscal note that "immediately after the establishment of the Houses of Refuge, a pattern of racial exclusion emerged when a separate 'colored' section of the New York House of Refuge was created."¹¹⁹ Black children were excluded from access to services on the rationale that, "[it]

¹¹² See Richard Rothstein, *The Color of Law: a Forgotten History of How our Government Segregated America* (Liverlight Publishing, W.W. Norton & Co. 2017).

¹¹³ Charles Ogletree, *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF OF BROWN V. BOARD OF EDUCATION*

¹¹⁴ James Vaznis, *School aid lags, and poor pay the price: Brockton epitomizes the huge opportunity gap, may sue to force change*, BOSTON GLOBE A1, A6 (March 18, 2018).

¹¹⁵ *Race, Ethnicity and Ancestry In Juvenile Justice*, *Id.*, at 115.

¹¹⁶ *Race, Ethnicity and Ancestry In Juvenile Justice*, *supra* note 15 at 115.

¹¹⁷ Bonnie et al., *Reforming Juvenile Justice: A Developmental Approach*, *supra* note 3.

¹¹⁸ *Race, Ethnicity, and Ancestry in Juvenile Justice*, *supra* note 15 at 116.

¹¹⁹ *Id.*

would be degrading to the white children to associate with beings given up to public scorn.”¹²⁰ In general, white taxpayers refused to ‘waste’ money on the needs of persons they perceived as incorrigible.¹²¹ When these places of shelter did accept children of color, they did so reluctantly and provided insufficient resources. As a result, African-American children were disproportionately confined in adult jails and prisons.¹²² “Indeed, in just a short time, 60% of the children (under 16) being held at the Maryland penitentiary in Baltimore were African American. . .approximately 50% of the children in the Providence jail were African American, and *all* children under 16 in the Washington D.C. penitentiary were African American.”¹²³ Similar patterns emerged in institutions designed to serve Mexican American youth.

Demographic patterns and limited social mobility, exacerbated by policy decisions regarding urban renewal, public housing, and zoning, have contributed to residential segregation. These factors, coupled with the reluctance of states to adhere to the spirit of *Brown* and court rulings have returned us to the era of separate and unequal.¹²⁴ Access to adequate schools for all races has become a critical juvenile justice issue. Professor Charles Ogletree discusses this reality in *All Deliberate Speed*.¹²⁵ He notes that there is no escaping the reality that a high percentage of children of color live in impoverished school districts.¹²⁶ School failure and dropout greatly enhance the chances of future involvement in the juvenile and criminal justice systems for youth. This reality is present throughout modern American history, and across racial lines.

SOLUTIONS AND JUVENILE JUSTICE REFORM

School referrals escalated dramatically in the aftermath of Columbine. In 2000, the NAACP reported that there were over three million school suspensions, and over 97,000 school arrests.¹²⁷ According to Department of Education data, African American students were three to five times more likely to be arrested than white students, and Latino students did not fare much better.¹²⁸ A 2011 New York Civil Liberties Union study shows that youth with disabilities are four times more likely to be suspended than students without disabilities.¹²⁹ This pattern is similar for students who are LGBTQ or

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Bell & Mariscal, *Race, Ethnicity, and Ancestry in Juvenile Justice*, supra note 15 at 116 (in a short time, 60% of children under 16 were held at the Maryland penitentiary in Baltimore were African American; 50% of the children were African American and *all* of the children under 16 held in the Washington D.C. penitentiary were African American) *Id.*

¹²³ *Race, Ethnicity and Ancestry in Juvenile Justice*, *Id.* at 116.

¹²⁴ *Access to Justice in Juvenile Court*, *Id.* at 237.

¹²⁵ Charles Ogletree, *All Deliberate Speed: Reflections on the First Half of Brown v. Board of Education* (2004).

¹²⁶ *Id.* at 261.

¹²⁷ NAACP Legal Def. & Educ. Fund, *Dismantling The School-To-Prison Pipeline 2* (2005).

¹²⁸ *Id.*

¹²⁹ *Id.*

gender non-conforming.¹³⁰ Expansion of zero tolerance and the deployment of school police in the post Columbine era of apprehension, without first thinking about their scope of authority or relationship to educators, has produced unintended consequences.¹³¹ These factors, exacerbated by underfunded No Child Left Behind initiatives, have resulted in a dramatic escalation of school referrals to juvenile justice. New York has over 5,000 school police, which would make that department the ninth or tenth largest police force in the nation. While legislation has been filed to raise the age of juvenile jurisdiction in New York, as of the beginning of 2017, any student arrested in school at age sixteen went to Riker's Island.

Police were deployed in schools during the civil rights era, but in the aftermath of Columbine this process accelerated dramatically.¹³² It is important to note that according to data from the National Center for Education Statistics, *Indicators of School Crime and Safety Study* in 2010, the rate of reported instances of violence or theft in school peaked in 1993, well before Columbine, and has been declining dramatically ever since.¹³³ Yet, according to the National Association of School Resource Officers, school policing is the fastest growing area of law enforcement in the nation.¹³⁴ In the mid-1950's, only Flint, Michigan employed police in most of its schools.¹³⁵ By 2005, 48% of public schools nation-wide had on-site police officers.¹³⁶ Today there are an estimated 17,000 school-based officers.¹³⁷ Many of the school systems where school police have been deployed have never experienced a Columbine-type incident, and many of the students in these systems are children of color.¹³⁸ *Arrested Futures* indicates that the presence of police in schools contributes to significant increases in arrests for misbehavior previously addressed by educators, and do not make schools safer.¹³⁹ Increases in suspensions and school based arrests contribute to school failure.¹⁴⁰ Whether this process is characterized as dropout or push out, the results are the same. As previously noted, the research indicates that youth who do not graduate high school are much more likely to be arrested in their adult lives.

A birth or cradle-to-prison pipeline construct is a more inclusive and appropriate term than school-to-prison pipeline, as it allows for looking at the problem contextually. The data regarding dually involved youth suggests that many families are involved in both the juvenile and child welfare systems. The application of public health oriented interventions that are strength-based makes more sense than the reactive sanctioning

¹³⁰ Dahlberg, *supra* note 28.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ National Center for Education Statistics, *Indicators of School Crime and Safety Study* 2010 <https://nces.ed.gov/pubs2011/2011002.pdf>

¹³⁵ Melinda D. Anderson, *When Schooling Meets Policing*, Sep. 21, 2015, The Atlantic, <https://www.theatlantic.com/education/archive/2015/09/when-schooling-meets-policing/406348/>

¹³⁶ Dahlberg, *supra* note 28

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Dahlberg, *supra* note 28

¹⁴⁰ *Id.*

model. This also includes the application of the guiding psychological principles in schools, as well as in courtrooms including use of strength based models such as restorative justice and positive emotional support. The ABA and American Psychological Association have challenged the use of zero tolerance policies as not being consonant with what we know about adolescent development.¹⁴¹ Accountability is important, but zero tolerance policies become intolerant when sanctioning is unfair and disproportional.

As long as police are stationed in schools, it is important to address their interactions with students and teachers. Efforts to develop memoranda of understanding designed to rationalize these conversations and revisit codes of discipline are gaining traction. In this regard, encouraging work has been done through the Annie E. Casey's JDAI program, MacArthur Foundation's Models for Change initiative, OJJDP programs and the OJJDP, and the National Council of Juvenile and Family Court's School Pathways to Juvenile Justice Project. The IJA-ABA Juvenile Justice Standards endorsed in 1980 recognized the need for consideration of the effects of deployment of police in schools and their interaction with educators. IJA-ABA Standards 2.2 and 2.5B & C urge police to rely on the least restrictive measures to address minor misconduct without relying unnecessarily on the juvenile justice system. This concern was manifested more recently by enactment of ABA Criminal Justice Standard 3.3 addressing youth involved in juvenile justice and child welfare. The standard emphasizes that the primary authority responsible for school safety should be the principle. The standard states that "Police should not be deployed in schools absent a significant showing of a demonstrable, time-limited need to protect students. If police are to be deployed in schools, memoranda of understanding and guidelines regarding their interaction and the scope of their authority should be developed."¹⁴² In the aftermath of Parkland, Florida the need for these types of memoranda is more operative than ever as they provide a framework for more nuanced conversations regarding where to draw the line between conduct that can and should be addressed by schools and what type of behavior actually requires referrals to juvenile justice.

Given the complexity of the issues maximizing opportunities for collaborative problem solving outside of the context of polarizing courtroom cases is necessary. This endeavor requires the participation service providers as well as court practitioners. One of the core recommendations of REFORMING JUVENILE JUSTICE is the fostering of interagency collaborations. "The very mission of the juvenile court system requires it to be inter-organizational, cross-sector and multidisciplinary."¹⁴³

As Bell and Mariscal have observed, "The juvenile justice system has become the default system- the warehouse – for low-risk, high speed youth."¹⁴⁴ Collaborative engagement can identify community based alternatives to court and agency intervention

¹⁴¹ See e.g., APA Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. Psychologist, 852 (2008).

¹⁴² Standard 3.3. RESPONSIBILITIES OF LAW ENFORCEMENT, SCHOOLS, AND JUVENILE COURTS IN RESPONDING TO SCHOOL RELATED CONDUCT (2017).

¹⁴³ REFORMING JUVENILE JUSTICE, *MOVING FORWARD*, *Id.* at 323.

¹⁴⁴ *Race, Ethnicity, and Ancestry in Juvenile Justice*, *Id.* at 124.

hopefully redress concerns about juvenile courts becoming default social service providers.

THE RECRIMINALIZATION OF STATUS OFFENSES AND THE VALID COURT ORDER

The landscape of the juvenile justice system has been complicated by a disturbing and counterintuitive narrative of the re-criminalization of status offense conduct which was decriminalized in the aftermath of *Gault*, and the enactment of the Juvenile Justice Delinquency Prevention Act (JJDP) in 1974. Today, about 84% of arrests involving children are for non-violent offenses, such as property offenses (35%), public order offenses (26%), and drug law violations (26%).¹⁴⁵ In many instances, those arrests are related to activity which can be described as normative adolescent behavior.¹⁴⁶ It would seem that many youth are being arrested and detained for accusations of conduct similar to that of Gerard Francis Gault in 1964, namely behavior characteristic of adolescence. Of the youth who are arrested, charged, and committed to residential placements, 67% are children of color.¹⁴⁷ About one out of four youth who are detained are held for technical probation violations, as opposed to allegations for having committed a new offense. Nationally, the average number of days spent in detention for a technical violation is thirteen. The average time spent committed to a public facility and private facility for this conduct, however, is fifty-five days and one hundred and three days, respectively.¹⁴⁸

While detained or committed, a child obviously cannot attend school and is socially isolated from important connections with family and community. These key experiences are critically important to the development of pro-social attitudes and growth. The seemingly minor action of detaining or committing a juvenile for any violation, nonetheless a technical probation violation has the unintended consequence of causing children to drop out of school altogether. Research shows that youths who do not graduate high school are eight times more likely than their cohorts who get a degree to be incarcerated.¹⁴⁹ Over 50% of youth are detained for probation violations; these cases violations related to pre-trial conditions of release not necessarily related to ensuring court appearance, as well as post-adjudicatory surrenders.¹⁵⁰ These patterns are obviously concerning. Current research reveals that maintaining social connections is essential for healthy development through adolescence.¹⁵¹ The traditional sanctioning model of detention and removal from the community actually increases recidivism and

¹⁴⁵ Sarah Hockenberry and Charles Puzzanchera, National Center For Juvenile Justice, *Juvenile Court Statistics 2013*, 52 (2015).

¹⁴⁶ *Id.*

¹⁴⁷ National Center for Juvenile Justice, *Juvenile Offenders And Victims: 2014 National Report* 175-176 (2015).

¹⁴⁸ *Id.*

¹⁴⁹ Dahlberg, *supra* note 28

¹⁵⁰ Office of Juvenile Justice at Delinquency Prevention *Statistical Briefing Book, Juvenile Court Cases 2011* (2011).

¹⁵¹ *Reforming Juvenile Justice: A Developmental Approach, Id.* Summary 1-5.

compromises public safety. It is axiomatic that secure confinement is necessary, but such treatment should be imposed prudently upon a showing of real need. In addition, the perception and reality of an equitable adjudication process is essential for an adolescent to ultimately accept consequences handed down through the justice system.¹⁵² “Juv-eniles, policies and programs that are predominantly punitive neither foster pro-social development nor reduce recidivism, and are not consistent with a developmental perspective and are less likely to foster the primary objective of public safety.”¹⁵³

As discussed previously, part of the progressive movement that preceded *Gault* was the growing concern about how status offenders were being treated. Children who were not attending school or having difficulty functioning at home were being housed/detained with youth accused of crime. In 1974, the JJDPa was enacted, but in 1980, in response to perceptions that responses to status offense conduct violations were not sufficiently punitive, Congress enacted the Valid Court Order (VCO). The VCO legislation enabled states to detain status offenders for behavior that violate existing court orders. In 2013, twenty-seven states and the territories used the VCO exception to detain youth for status offenses.¹⁵⁴ A disparate number of these youth were females. Judge Brian Huff testified before a congressional committee in 2010 that nearly 40,000 status offenders pass through our detention systems annually, and that 12,000 would not have been eligible for such treatment without the VCO exception.¹⁵⁵ Use of the VCO has marginalized vulnerable youth. While females constitute 28% of petitioned delinquency cases, they comprise a significantly higher percentage of status offense classes; 53% of runaways, 45% of truants, and 43% of stubborn children. Additionally, females account for 39% of alcohol violations and 32% of curfew violations.¹⁵⁶ Similarly, 32% of girls committed to juvenile justice systems were sentenced as the result of technical probation violations or for status offenses, while only 17% of boys were committed for such offenses.¹⁵⁷ The VCO has also had an adverse racial impact as youth of color are detained at higher rates than whites. Whites and Hispanics account for the vast majority of status offenses, but according to an OJJDP Policy Brief in 2011, African Americans were 269% more likely to be arrested for truancy than their white counterparts. Action can be taken to address these disconcerting trends, but such movement requires Congressional legislation, as the JJDPa has been due for reauthorization since 2007, and legislative initiatives to abolish the VCO have not been acted on. In the meantime, federal juvenile justice spending has decreased, de-incentivizing state compliance with JJDPa mandates. Wyoming has opted out of the system altogether.¹⁵⁸

¹⁵² Bonnie Richard, *supra* note 3 see Ch. 7, *Fairness and Accountability*.

¹⁵³ *Id.* Ch. 6 at 181.

¹⁵⁴ *Use of the Valid Court Order: State-by-State Comparison*, Coalition for Juv. Just. (Feb. 18, 2015).

¹⁵⁵ *Meeting The Challenges Faced By Girls in the Juvenile Justice System: Hearing Before the House Subcommittee on Healthy Families and Communities*, 11th Cong. 2 (2010).

¹⁵⁶ Nat'l. Ctr. For JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2011, 9, 71 (2014).

¹⁵⁷ Francine Sherman, *Reframing the Response: Girls in the Juvenile Justice System and Domestic Violence*, 18 JUV. & FAM. JUST. TODAY, No. 1 (Winter 2009), at 16.

¹⁵⁸ *Are We Criminalizing Adolescence*, *Id.* at 27.

In 1980, the single Institute of Judicial Administration-ABA standard that was not adopted was a proposal to eliminate status offense conduct.¹⁵⁹ While the proposal had some merit, it also invited a 'beware what you wish for' scenario, as states could impose what are, functionally, status offense orders in other contexts, including conditions of release and conditions of probation supervision. For example, Massachusetts has enacted a version of the VCO, but allows for setting conditions release at arraignment that are often status offense like in nature, such as attending school without incident, that are not related to court appearance. Given truancy status offense jurisdiction this type of practice is concerning. In *Commonwealth v. Weston*, the Massachusetts Supreme Judicial Court concluded that application of criminal sanctions for a curfew ordinance for minors was illegal as it criminalized status offense conduct.¹⁶⁰

DIVERSION

Given the large number of property and non-violent offenses that we see in juvenile courts and the disturbing rates of racial and ethnic disparities a much more robust conversation about diversion is required. *Less Crime For Less Money*, from the Massachusetts' CfJJ, underlines the efficacy of diversion. Notably, diversion is more cost effective, reduces recidivism and avoids the maintenance of records which cannot be expunged.¹⁶¹ Research has found that the first arrest for a youth doubles his or her chances of dropping out of school, even when controlling for socioeconomic, educational and family characteristics. If a case is processed, the risk of later dropout skyrockets from five to eight times greater. In addition, the mere act of being "processed" in court actually increases the likelihood of greater delinquency involvement. The report notes that Massachusetts taxpayers spend roughly fifty million dollars each year to confine juveniles for low level offenses.¹⁶²

In designing an effective diversion program, however, it is important to realize that according to OJJDP data, over half of the young people seen in court for the first time will not reappear without any intervention.¹⁶³ There is a danger of net-widening, a process which refers to the unintentional increase of numbers in the juvenile system who actually need no intervention. Over-supervision can result in a trip down the rabbit hole of good intention, contributing to increased violation of conditions and deeper penetration into the juvenile justice system. As we learn more about the importance of trauma informed care at every level we should be aware that being in court at all is a traumatizing event.

¹⁵⁹ See e.g. Merrill Sobie & John Elliot, *The IJA-ABA Juvenile Justice Standards: Why Full Implementation Is Long Overdue*, 29 CRIM. JUST., no. 3 (Fall 2014) at 24.

¹⁶⁰ *Commonwealth v. Weston*, 913 N.E. 2d 832 (Mass. 2019).

¹⁶¹ *Less Crime for Less Money*, Citizens for Juvenile Justice, CfJJ (November 2012).

¹⁶² *Less Crime for Less Money*, *Id.* at 2.

¹⁶³ Howard Snyder, *Juvenile Arrests*, Office of Juvenile Justice and Delinquency Prevention, 1 <https://www.ncjrs.gov/pdffiles1/ojjdp/209735.pdf>

BAIL, FEES, FINES, AND PROBATION

Juvenile and criminal justice reform is now part of the national agenda. An important component of this inquiry concerns issues related to the burdens borne by individuals who are unable to post bond or bail not related to ensuring court appearance or protecting public safety or to pay fines, fees or other costs. These issues have been raised in a variety of contexts, including questioning whether prior to imposing any financial burden that there be first be consideration as to whether the cost or fee serves any purpose as well as consideration of ability to pay. These issues manifest themselves at all stages of the court process- from indigence determinations when determining access to counsel, as well as pre-trial and post-adjudicatory probation supervision fees or other assessment of costs. The NJDC has prepared a judicial bench card, which has been endorsed by the National Council of Juvenile and Family Court Judges. The card, entitled *Honoring Gault: Ensuring Access to Counsel in Delinquency Proceeding*, includes creating a presumption of indigence and ensuring the opportunity for a meaningful consultation with an attorney prior to any waiver of counsel.

Whether used in addition to bail as a condition to ensure court appearance or a separate vehicle for supervision, probation is the most common disposition imposed in the juvenile court system. Pre-trial and post-adjudicatory orders included, over 200,000 children are placed on probation annually.¹⁶⁴ As the overwhelming majority of youth in the juvenile justice system come from indigent families, the unnecessary costs and fees of probation exacerbate issues of class and race.¹⁶⁵ Traditionally, determinations of indigence are made based the assets of the child's family, which adversely affects access to counsel, bail orders, and the ordering of conditions of release not related to court appearance. This often results in class-driven pretrial detention. These concerns are amplified in states which do not have bail statutes or rules geared to court appearance, and personal recognizance based on the presumption of innocence. Probation supervision fees may be imposed on top of costs that may arise out orders to participate in specified programming such as random drug testing or counseling. A study conducted by the National Juvenile Defender Center indicates that twenty-two states have adopted such policies.¹⁶⁶ Failure to pay can constitute a probation violation. Some states offer community service as an alternative to a monetary fee, but in some instances there are limited opportunities to find meaningful options to fulfill said obligation.

Ronald P. Corbett, a former line probation officer who later became the Massachusetts Commissioner of Probation addressed the issues of probation violations and related financial penalties. In *The Burdens of Leniency: The Changing Face of Probation*,¹⁶⁷

¹⁶⁴ National Center for Juvenile Justice, JUVENILE COURT STATISTICS 2013, 50 (2015).

¹⁶⁵ Tamar Birkhead, *Delinquent by Reason of Poverty*, 38 Wash. U. J.L. & Pol'y 53 (2012).

¹⁶⁶ *The Cost of Juvenile Probation*, NAT'L JUVENILE DEFENDER CTR. Bench Card (Feb. 2017); See generally, *The Cost Of Probation: A Critical Look Into Probation Supervision Fees*, NAT'L JUVENILE DEFENDER CTR., (November 2016).

¹⁶⁷ Ronald P. Corbett, *The Burdens of Leniency*, 102 MINN. LAW. REV. 1697 (2015).

he argues that given the inordinately high number of probation violations, we should adopt a less is best model. In lieu of general conditions that are routinely imposed in most instances lead to violations. Avoiding the imposition of financial requirements or fees and incentivizing probation compliance by allowing for early termination of supervision is recommended. Probation supervision fees, or community service in lieu thereof, have been abolished in Massachusetts.¹⁶⁸

A focus of national juvenile and criminal justice reform concerns the imposition of costs that criminalize poverty. The tragic story of Kalief Browder who could not post bail illustrates the dangers of what can amount to class-driven preventive detention. Kalief was sixteen-years of age when he was arrested for allegedly stealing a backpack. At that age he would have treated as a juvenile in most states but in New York he was treated as an “adult” in terms of court jurisdiction. He was held at Riker’s Island for three years, spending two years in solitary confinement, while refusing to plea to charges he denied and could not be proven. While his case was ultimately dismissed, he committed suicide shortly after his release.¹⁶⁹

On March 14, 2006, the Department of Justice published a Dear Colleague calling for a national review of all policies that condition release and supervision on financial terms without first considering a person’s ability to pay, calling such practices “little more than punishing a person for his poverty.”¹⁷⁰ As the letter noted, while courts may sentence or detain in the first instance, “individuals may confront escalating debt; face repeated unnecessary incarceration for nonpayment despite posing no danger to the community, lose their jobs, and become trapped in cycles of poverty that can be nearly impossible to escape.”¹⁷¹ The letter cites *Bearden v. Georgia*,¹⁷² in which the United States Supreme Court held that the government may not incarcerate an individual solely because of the ability to pay a fine.

Although since rescinded, in January of 2017 the Department of Justice issued an advisory applying the principles of the Dear Colleague Letter to children.¹⁷³ The principles of the January advisory are captured in a judicial bench card, which has been endorsed by the National Council of Juvenile and Family Court Judges (NCJFCJ).¹⁷⁴ To underline the importance of the issue the NCJFCJ passed an accompanying resolution at

¹⁶⁸ Massachusetts Trial Court Fines And Fees Working Group: Report To Trial Court Chief Justice Paula M. Carey (November 17, 2016).

¹⁶⁹ Jennifer Gonnerman, *Before The Law*, THE NEW YORKER (Sept. 29, 2014); Jennifer Gonnerman, *Kalief Browder, 1993-2015*, THE NEW YORKER (June 7, 2015).

¹⁷⁰ Dear Colleague Letter From the U.S. Department of Justice (Mar. 14, 2016), <https://justice.gov.crt/file832461/download>, at 1.

¹⁷¹ *Dear Colleague Letter*, *Id.* at 2, citing to Council of Economic Advisors, Issue Brief, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor*, at 1 (Dec. 2015), available at https://www.whitehouse.gov/sites/default/files/1215_ceafine_fee_bail_issue_Brief.pdf

¹⁷² *Dear Colleague Letter*, *Id.* at 3, 461 U.S. 660, 671 (1983)

¹⁷³ U.S. Dept’t of Justice, *Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Juveniles 2* (Jan. 2017) (along with twenty-four other advisories this advisory was rescinded on Dec. 21, 2017).

¹⁷⁴ *Ensuring Young People Are Not Criminalized for Poverty: Bail, Fees, Fines, Costs, and Restitution in Juvenile Court*, NJDC (March 2018).

its annual meeting on March 2018.¹⁷⁵ These actions demonstrate an acknowledgement that the consequences related to the inability to pay fees are even more detrimental for children than who are dependent on adults. Basic precepts should include avoiding the setting or imposition of cash bail or any other cost or fee without first making a judicial determination of necessity as well as ability to pay. The Massachusetts Supreme Judicial Court recently ruled that trial sessions are required to consider a defendant's ability to pay prior to setting bail.¹⁷⁶

In August of 2017, the ABA adopted a resolution prohibiting the use of financial conditions for release in any form in juvenile cases.¹⁷⁷ The resolution parallels the position articulated in 1979, in IJA-ABA Juvenile Justice Standard 4.7, recommending that the use of bail in any form for children be abolished.¹⁷⁸ The resolution's accompanying report notes that the recommendations are premised on the findings of research indicating that detaining children for even minimal periods is traumatizing, increases recidivism by disrupting pro-social development and access to the socially connective tissue of access to family, school, and community and fuels the school-prison pipeline.¹⁷⁹ Detention, while necessary for palpable public safety issues, increases racial and ethnic disparities and fosters class-driven detention.¹⁸⁰ The research also demonstrates that given reliance on adults, youth rarely default. For example, a Massachusetts study assessing failure to appear has determined that even youth who have the highest failure to appear scores actually appear in court 75% of the time.¹⁸¹

OPEN THE DOORS

The juvenile court system has evolved dramatically since the pre-*Gault* 'Star Chamber' description by Roscoe Pound. One of these changes has been the slow movement to lift the veil of secrecy that has traditionally characterized closed proceedings. Proponents of maintaining the traditional model of secrecy fear that opening sessions to the public will stigmatize adolescents, compromise rehabilitative opportunities, adversely affect parties in abuse and neglect cases, and raise questions of access to court clinic reports and other evaluations. Proponents for opening the doors suggest that doing so will raise the level of practice by judges and lawyers, while educating the public about the complexities and realities of what occurs in juvenile sessions. Courts may address issues of

¹⁷⁵ NCJFCJ Resolution Addressing Fines, Fees, and Costs in Juvenile Courts, *available at* [http://www.ncfjcj.org/sites/default/files/FinesFeesCosts Resolution FNL 3-17-18.pdf](http://www.ncfjcj.org/sites/default/files/FinesFeesCosts%20Resolution%20FNL%203-17-18.pdf).

¹⁷⁶ *Com. Brangan*, 477 Mass. 691 (2017).

¹⁷⁷ Resolution to the Criminal Justice Section 112D, Adopted Resolution, Am. Bar. Ass'n 2 (2017); *available at* <http://www.americanbar.org/content/dam/aba/images/abanews/2017%20Resolutions/112D.pdf>.

¹⁷⁸ JUVENILE JUSTICE STANDARDS RELATING TO INTERIM STATUS, sec. 4.7 (INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N 1979).

¹⁷⁹ Report in Support of Resolution 112D *Id.* note 6 at 3.

¹⁸⁰ *Report Id.* note 6 at 3.

¹⁸¹ The Massachusetts Juvenile Probation Screening Assessment Tool (J-PAST), *Talking Points*, YOUTH ADVOCACY DIVISION (Sept. 2015) *available at* <http://publiccounsel.net/ya/wp-content/uploads/sites/2014/08/What-Every-Lawyer-Should-Know-About-the-Juvenile-Probation-Arraignment-Screening-Tool-JPAST.pdf>.

confidentiality and privilege by impounding certain material, and prohibiting access upon an adequate showing.

In many states, transfer hearing proceedings are already open to the public. Historically, the greatest resistance to open hearings has come in dependency, or abuse and neglect hearings. Despite this resistance, in July of 2005, the NCJFCJ passed a resolution in favor of presumptively open hearings in dependency cases.¹⁸² The resolution provides:

“open[ing] court proceedings will increase public awareness of the critical problems faced by juveniles and by child welfare agencies in matters involving child protection, [and] may enhance accountability in the conduct of these proceedings by lifting the veil of secrecy which surrounds them, and may ultimately increase public confidence in the work of the judges of the nation’s juvenile and family courts.”¹⁸³

As of 2010, seventeen states have varying degrees of public access to dependency cases, and fourteen states allow access to delinquency proceedings, while others allow access to transfer and youthful offender proceedings.¹⁸⁴

SPECIALTY COURTS AND DUE PROCESS

As has been discussed, the juvenile court has been viewed as the first type of specialty court, but as history as shown, the system as originally conceived provided neither treatment nor or a modicum of due process. Recently, the use of therapeutic jurisprudence has been championed, as exemplified by the development of specialty courts. In this context, drug courts are a notable example. The therapeutic justice model entails the judge acting as a de facto probation officer.¹⁸⁵ Without commenting on the efficacy of these models, I advocate for the creation of another type of specialty court- the juvenile due process court which would return us to the essence of *Gault’s* message of fundamental fairness by first focusing on fact-finding in lieu of presuming there is a need for treatment or unnecessary intervention. It should be axiomatic that training and mastery of all subject matter related to juvenile justice and child welfare should be part of continuous legal and judicial education. Learning about adverse child experiences and trauma informed care should be part of the canon. Applying research, data and being informed about evidence based practices is an important part of the endeavor.

¹⁸² *Access To Justice In Juvenile Court*, *Id.* ¶ 242. (Citing NCJFCJ 68th Annual Conference Resolution No. 9 (adopted July 20, 2005)).

¹⁸³ *Id.*

¹⁸⁴ *Access To Juvenile Justice In Juvenile Court*, *Id.* at 241, 242.

¹⁸⁵ See e.g., Anthony Thompson, *Courting Disorder: Some Thoughts on Community Court*, 10 WASH. U. J.L. & POLICY 63 (2002).

CONCLUSIONS AND RECOMMENDATION

Reforming Juvenile Justice recommends supporting approaches that support a “developmentally informed” juvenile justice system.¹⁸⁶ The report’s recommendations include having jurisdictions review the efficacy of their juvenile justice systems, engaging community partners, and supporting inter-disciplinary systemic collaboration.¹⁸⁷ Policies that encourage fairness and balanced accountability will help youth and improve public safety outcomes at less cost. *Re-Examining Juvenile Incarceration* reports, for example, that daily cost for a youth in South Carolina’s secure juvenile justice system is \$426.00 a day as contrasted by \$6.00 for community based supervision, and that Ohio data shows no correlation between detention and decreases in recidivism.¹⁸⁸ Implementing these recommendations requires embracing data, research and evidence based practices.

We have an opportunity to apply what the Supreme Court has recognized about childhood and adolescence to all areas of practice and in engagement of youth.¹⁸⁹ In *Children Are Different: Constitutional Values and Justice Policy*,¹⁹⁰ Elizabeth Scott has called for applying the principles of proportional accountability to practice. Several jurisdictions have relied, as has the Supreme Court, on the research and science regarding adolescent development in rethinking sentencing regimes. In *State v. Houston-Sconiers*¹⁹¹ the Washington Supreme Court held that if even if youth were transferred to criminal court, sentencing courts must have the discretion to impose sentences below otherwise applicable mandatory minimums or sentencing enhancements. The rationale for the holding is similar to the analysis employed by the Iowa Supreme Court in *State v. Lyle*¹⁹² which relied on the state’s prohibition on cruel and unusual punishment to bar mandatory sentencing schemes that preclude individualized consideration of youth and its attendant circumstances as a mitigating factor. Several states, including Massachusetts, Vermont and Connecticut, are considering legislation to phase in the extension of juvenile court jurisdiction or forms of youthful offender sentencing to twenty-one.¹⁹³ States such as Massachusetts are also thinking of raising the age of minimum court jurisdiction.

Practices in all contexts have to be reconsidered. This includes extending due process rights at critical stages of court progress where a child may be detained. As this

¹⁸⁶ REFORMING JUVENILE JUSTICE: A Developmental Approach, *Id.* at 5.

¹⁸⁷ *Id.* Recommendations at 10-14.

¹⁸⁸ Pew Charitable Trust (April 2015).

¹⁸⁹ See e.g., Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *The Supreme Court and The Transformation of Juvenile Sentencing*, Models for Change: Systems Reform in Juvenile Sentencing (Sep. 2015).

¹⁹⁰ Elizabeth Scott, *Children Are Different: Constitutional Values and Justice Policy*, 11 Ohio ST. J. Crim. L. 71 (2013).

¹⁹¹ 188 Wash. 2d 1 (2017).

¹⁹² *State v. Lyle*, 854 N.W. 2d 378 (2014).

¹⁹³ Stephanie Tabashneck, “Raise The Age” Legislation: Developmentally Tailored Criminal Justice, 32 CRIMINAL JUSTICE VOL. 32, No. 4, 13 (ABA Winter 2018) at 17.

discussion has demonstrated consideration of fundamental fairness requires exploration of community and school based engagement with youth. Strength based school engagement employing principles of restorative justice¹⁹⁴ instead of one size fits all zero tolerance is more consistent with proportional accountability. Developing memoranda of understanding between school police and educators will assist in making more nuanced decisions as to where to draw the line between what should be handled by educators and what type of conduct requires referral to juvenile justice. The re-criminalization of status offense based conduct can be addressed in part by congressional action to reauthorize the JJDPa and abolish the Valid Court Order.

Deconstructing the cradle-to-prison pipeline requires more than developing memoranda of understanding between school police and educators. Juvenile justice detention or out of home child welfare placement orders should be reserved for palpable concerns. Unnecessary placement in either context disrupts school continuity and leads to drop out. A thematic through line in all aspects of practice is the imperative of tackling the issues of implicit or conscious and the policies that have fueled geographic segregation and compromised access to fair and adequate public education for all youth.

As noted previously, today approximately 84% of the youth in our juvenile justice system are there for non-violent crime and drug offenses.¹⁹⁵ Many are accused of behavior of an adolescent nature that are not that different from the allegations against Francis Gerald Gault in 1964. And many are youth of color, which underlines the need for all of us, including jurists, to consider differential treatment of different youth for similar offenses.¹⁹⁶ We have made progress, but there is much work to be done if we are to truly realize *Gault's* promise.

¹⁹⁴ REFORMING JUVENILE JUSTICE, *Id.* at 5.

¹⁹⁵ *Id.* n. 155.

¹⁹⁶ See e.g. Mark Soler, *Reducing Racial and Ethnic Disparities in the Juvenile Justice System*, in Trends in State Courts (2014) (citing studies demonstrating the pervasive effects of implicit bias on judges and in the juvenile justice system).