

COMBATING THE COLOR-CODED CONFINEMENT OF KIDS: AN EQUAL PROTECTION REMEDY

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"I'm not going home today, am I?" Jason says matter-of-factly, peering through the book-sized opening of the holding cell door. Five other boys in handcuffs and leg shackles sit on a bench behind him. Jason is terse and almost expressionless, the product, his lawyer later realizes, of a bleak childhood that began when he was removed from his drug-addicted mother as a baby and shuffled in and out of ten foster homes over the course of the next fifteen years.

While he has been part of the child welfare system his entire life, Jason has only recently become involved with its punitive cousin—the juvenile justice system. His underlying charge, a trespass, wasn't serious, but he was detained at arraignment, and things went quickly downhill from there. During his two weeks in detention, Jason was cited twice for fighting and three times for obstructive behavior. "Defiant and uncooperative," he was labeled on his habeas transfer sheet.

Now Jason is back in court, ostensibly for his pre-trial conference, but in reality because state law won't allow the juvenile court to detain him for more than fifteen days without an appearance. His lawyer, who met Jason only an hour earlier, approaches the probation officer covering his case. "Unless he wants to plead out today, I'm going to recommend another fourteen days," the officer says, looking up from Jason's transfer sheet. "But it's a trespass—" his lawyer begins to argue when the probation officer interrupts him. "And it says here that he's not cooperating in the foster home either. If he's getting out, I want him supervised."

Bending to meet Jason's eyes through the holding cell door, Jason's lawyer relays his conversation with the probation officer. "So I'm not getting out today if I don't take a deal," Jason says resignedly. "The judge could ignore probation's recommendation," his lawyer offers, "but there's no guarantee." Jason pauses. "Then I'll take the deal."

It feels like a set-up, Jason's lawyer thinks to himself as he watches Jason retreat to the holding cell bench.¹

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1. This narrative, which will be woven throughout the remainder of this paper, is loosely based on the experience of a client represented by Suffolk University Law School's Juvenile Justice Center in proceedings before Massachusetts juvenile court. While the narrative captures the essence of "Jason's" experience with the Massachusetts juvenile justice system, many of the events

The juvenile justice system was created more than a century ago to assist, rather than punish, children like Jason. A product of the emerging twentieth-century concept of childhood as a period of innocence and malleability,² the system was founded on the premise that delinquent acts by children were not born of malevolence, but rather were a product of antecedent forces largely beyond their control.³ The juvenile justice system was therefore to stand apart from the criminal justice system both substantively and procedurally.⁴ "The child was to be 'treated' and 'rehabilitated,'" the Supreme Court would later reflect, "and the 'procedures,' from apprehension through institutionalization, were to be 'clinical' rather than punitive."⁵ Criminal jurisprudence was eschewed in favor of procedural informality and nearly unfettered discretion, which, reformers believed, would best enable courts to diagnose and fashion an individualized cure for each child's delinquent behavior.⁶

Over the last half century, the system inspired by these lofty and largely benevolent ideals has given way to one that is increasingly punitive and adversarial. The so-called "Due Process Revolution" of the 1960s led to the implementation of various constitutional safeguards that had the unintended effect of transforming juvenile court proceedings from informal, administrative hearings into full-blown prosecutions.⁷ "Tough on crime" legislators would subsequently

described have been altered to protect the identities of the participants and the confidentiality of the proceedings in question. In the author's experience, however, Jason's encounter with the juvenile justice system is typical of court-involved youth throughout the country.

2. See, e.g., Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 691-94 (1991) (citing LAWRENCE CREMIN, *THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION 1876-1957*, at 127-28 (1961), and JOSEPH F. KETTS, *RITES OF PASSAGE: ADOLESCENCE IN AMERICA 1790 TO THE PRESENT* (1977)) (noting that the emerging perception of children "as vulnerable, innocent, passive, and dependent beings who needed extended preparation for life" at the turn of the century reflected a shift from the pre-industrial view of children as miniature adults); SUSAN TIFFIN, *IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 14-33* (1982); WALTER I. TRATTNER, *CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA 45-47* (1970); ROBERT WIEBE, *THE SEARCH FOR ORDER 1877-1920*, at 11-75 (1967).

3. See, e.g., ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 27-30* (1978) (explaining that the Progressives saw children as pure but malleable); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 832-33 (1988) (arguing that the penal goals of treatment and punishment are fundamentally distinct and based on "markedly different assumptions about the sources of criminal or delinquent behavior").

4. "The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals," the Supreme Court noted in *In re Gault*, 387 U.S. 1, 15 (1967). "They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.'" *Id.* (citing Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909)).

5. *In re Gault*, 387 U.S. at 15-16.

6. Feld, *The Transformation of the Juvenile Court*, *supra* note 2, at 695.

7. See, e.g., Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 73 (1997) (arguing that the Supreme

rely on the enhanced procedural protections extended to juveniles by the Supreme Court as a basis for enacting laws that dramatically expanded the punitive options available to courts.⁸ In many respects, these changes have morphed the juvenile court into a quasi-criminal hybrid that bears little resemblance to its rehabilitative forebear.

Nonetheless, the juvenile justice system has not shed all the vestiges of its past. While the Supreme Court has required juvenile courts to adopt many of the procedural safeguards of criminal proceedings, it has expressly declined to extend to juveniles the full panoply of constitutional rights afforded adults.⁹ Unlike adult defendants, juvenile defendants have no constitutional right to a trial by jury,¹⁰ may be preventively detained prior to trial irrespective of the severity of the underlying offense,¹¹ and are, for the most part, charged, adjudicated, and sentenced in proceedings that are closed to the general public.¹² While the countervailing rationales of flexibility and informality may indeed be compelling, the reality is that juvenile defendants are not entitled to three of the criminal justice system's most fundamental checks against institutional bias. Compounding this procedural austerity is the fact that most juvenile courts have retained some semblance of their original "future welfare" ideology, which necessarily requires decision-makers to assess not only the elements of the child's offense, but also the attributes of the child herself.¹³ As a result, juvenile court processing decisions are often less the product of legal factors, such as the severity of the alleged offense, than they are of "social factors,"¹⁴ such as the relative stability of the child's family.¹⁵ Because these social factors often represent

Court decisions mandating the juvenile court's adoption of procedural safeguards "unintentionally, but inevitably, transformed the juvenile court system from its original Progressive conception as a social welfare agency into a wholly-owned subsidiary of the criminal justice system").

8. See, e.g., HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 102-08 (1999) (discussing legislation enacted during the last thirty years emphasizing proportionality and determinate sentencing).

9. In *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971), for example, Justice Blackmun cited the Court's historic reticence to issue "a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding" as a basis for finding that juveniles were not constitutionally entitled to a trial by jury.

10. *Id.*

11. *Schall v. Martin*, 467 U.S. 253, 264-74 (1984).

12. SNYDER & SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999, *supra* note 8, at 94-95 (noting that juvenile proceedings are "quasi-civil" and "may be confidential," while criminal proceedings are "open" and accessible to the public).

13. See BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 67 (1999) (noting that, from the beginning, "juvenile court judges directed their attention first and foremost to the 'whole' child rather than to the specific crime").

14. For purposes of this article, the term "social factors" is used to describe statutorily prescribed criteria that are extrinsic to the child's alleged offense but are a part of the socio-economic and socio-familial milieu in which the child lives.

15. While social factors plainly also play a role in criminal court decision-making, their role is, by virtue of the adult justice system's retribution-based ideology, subordinate to the role of relevant legal factors. See Allan Horwitz & Michael Wasserman, *Formal Rationality, Substantive*

socio-economic and socio-familial status variables that are inherently susceptible to speculation and normative interpretation, outcomes sometimes bear little relation to the underlying offense.¹⁶ The net result is a modern-day juvenile court that metes out all the punishment, with little of the regularity, accountability, or visibility, of its adult counterpart—a combination that many believe allots juvenile defendants the “worst of both worlds.”¹⁷

Evidence suggests that this dichotomy has particularly dire consequences for juveniles like Jason. Jason is a juvenile of color.¹⁸ For decades, studies have shown that youth of color are more likely to be arrested, detained, formally charged in juvenile court, transferred to adult court, and confined to secure residential facilities than their white counterparts.¹⁹ While there is some evidence

Justice, and Discrimination: A Study of a Juvenile Court, 4 LAW & HUM. BEHAV. 103, 103–05 (1980) (finding that juvenile courts are more likely to consider social rather than formal legal criteria when making dispositional decisions).

16. See *infra* Part I.B.

17. The use of the phrase “worst of both worlds” in the juvenile justice context was coined by Justice Fortas in *Kent v. United States*, 383 U.S. 541, 556 (1966). Weighing whether the laudable purpose of the juvenile court justified what evidence suggested was a pattern of “procedural arbitrariness” and inadequate performance, Justice Fortas lamented, “There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” *Id.* This dichotomy has led several commentators to call for the abolition of the juvenile court altogether. See, e.g., Feld, *Abolish the Juvenile Court*, *supra* note 7; Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120 (1977).

18. For purposes of this paper, the terms “children of color” and “minority youth” are defined according to their definitions under the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA), Pub. L. No. 102-586, § 2(f)(3)(A)(ii), 106 Stat. 4982, 4993–94 (codified as amended at 42 U.S.C. § 5633 (Supp. III 2005)), as African American, Native American, Latino, Pacific Islander, and Asian American. 28 C.F.R. § 31.303(j)(6) (2006).

19. See, e.g., NAT’L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF MINORITY YOUTH IN THE JUSTICE SYSTEM 3 (2007) (finding that, from 2002 to 2004, African Americans comprised 16% of all youth, 28% of juvenile arrests, 30% of referrals to juvenile court, 37% of the detained population, 34% of youth formally processed by the juvenile court, 30% of adjudicated youth, 35% of youth judicially waived to criminal court, 38% of youth in residential placement, and 58% of youth admitted to state adult prison); EILEEN POE-YAMAGATA & MICHAEL A. JONES, BUILDING BLOCKS FOR YOUTH, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF MINORITY YOUTH IN THE JUSTICE SYSTEM (2000) (from 1997 to 1998, African Americans comprised 15% of all youth, 26% of juvenile arrests, 31% of referrals to juvenile court, 44% of the detained population, 34% of youth formally processed by the juvenile court, 32% of adjudicated youth, 46% of youth judicially waived to criminal court, 40% of youth in residential placement, and 58% of youth admitted to state adult prison); Carl E. Pope & William Feyerherm, *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature*, 22 CRIM. JUST. ABSTRACTS 327, 527–42 (1990) [hereinafter *DMC: 1969–1989 Review of Research*] (finding that two-thirds of the studies of state and local juvenile justice systems reported a “race effect,” defined as a statistically significant race relationship with case outcome, at some stage of the juvenile justice process that negatively affected outcomes for youth of color); CARL E. POPE, RICK LOVELL & HEIDI M. HSIA, U.S. DEP’T OF JUSTICE, DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001 (2002) [hereinafter *DMC: 1989–2001 REVIEW OF LITERATURE*] (finding that twenty-five of thirty-four studies

that marginally differential offending patterns may contribute to this phenomenon,²⁰ differences in primary behavior simply cannot account for the significant disparities observed at any of the processing points in the juvenile justice system.²¹ Something is happening inside the system itself.

Over the last thirty years, a number of increasingly sophisticated analyses have documented a statistically significant “race effect” on juvenile justice outcomes.²² It was the early versions of these studies that prompted Congress to make the issue of “minority overrepresentation”²³ a legislative priority twenty years ago. Congress’s 1988 amendments to the Juvenile Justice and Delinquency Prevention Act (JJDP) required individual states to investigate whether children of color were overrepresented in their secure confinement facilities and, if so, to develop action plans to reduce such overrepresentation.²⁴ The so-called “DMC Mandate”²⁵ became a “core requirement” of the JJDP in 1992,²⁶ and, a

reviewed reported “race effects” in the processing of youth).

20. See, e.g., Marcy Rasmussen Podkopacz & Barry Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 LAW & INEQ. 73, 104–05 (1995) (citing sources suggesting that minority youth are disproportionately involved in violent criminal activities).

21. See ELEANOR HINTON HOYTT, VINCENT SCHIRALDI, BRENDA V. SMITH & JASON ZIEDENBERG, ANNIE E. CASEY FOUND., REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION 20–21 figs.6–7 (2002) (noting that African American youth are arrested at double the rate of white youth for drug offenses and more than twice the rate of white youth for weapons offenses, even though white youth report substantially higher levels of drug use and commission of weapons crimes); LLOYD D. JOHNSON, PATRICK M. O’MALLEY & JOHN E. SCHULENBERG, NAT’L INST. ON DRUG ABUSE, MONITORING THE FUTURE, NATIONAL SURVEY RESULTS ON DRUG USE, 1975–2006, SECONDARY SCHOOL STUDENTS 32 (2007) (“African-American 12th graders have consistently shown lower usage rates than White 12th graders for most drugs, both licit and illicit.”).

22. See, e.g., Michael J. Leiber, *Disproportionate Minority Confinement (DMC) of Youth: An Analysis of State and Federal Efforts to Address the Issue*, 48 CRIME & DELINQ. 3, 11–14 (2002) (finding that thirty-two of forty-six studies conducted by forty different states reported “race effects,” defined as “the presence of a statistically significant race relationship with a case outcome that remains once controls for legal factors have been considered”); DMC: 1989–2001 REVIEW OF LITERATURE, *supra* note 19, at 5 (finding that twenty-five of thirty-four studies reviewed reported “race effects” in the processing of youth); DMC: 1969–1989 Review of Research, *supra* note 19, at 327–35, 527–42 (finding that two-thirds of the studies of state and local juvenile justice systems reported a “race effect” at some stage of the juvenile justice process that negatively affected outcomes for youth of color).

23. The Office of Juvenile Justice and Delinquency Prevention (OJJDP), the federal agency established to administer the JJDP, defines “overrepresentation” as “a situation in which a larger proportion of a particular group is present at various stages within the juvenile justice system (such as intake, detention, adjudication, and disposition) than would be expected based on its proportion in the general population.” See HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 189–90 (2006). As discussed in Part II, *infra*, OJJDP has recently acknowledged the flaw of relying on general population statistics to calculate proportional disparities and now calculates disparities by looking at the relevant sub-populations of young people, both by race and geography.

24. Pub. L. 100-690, § 7258(c), 102 Stat. 4181, 4439–40 (codified as amended at 42 U.S.C. § 5633(a)(22) (Supp. IV 2004)).

25. The acronym “DMC” originally referred to “Disproportionate Minority Confinement,” which occurs when the percentage of minority youth confined in juvenile justice system facilities exceeds their proportion in the general population. See Pub. L. 100-690, § 7258, 102 Stat. 4439–

decade later, it was expanded to encompass not only confinement, but every processing point within the juvenile justice system.²⁷

But despite nearly two decades of federally mandated attention to the problem, the results have been mixed at best. While some states have implemented comprehensive strategies to reduce overrepresentation in their juvenile justice systems, others have not taken even the most rudimentary steps toward identifying the scope of the problem.²⁸ And although a few states have made progress, disparities nationwide have either increased or remained stagnant.²⁹ The limited success of the DMC Mandate has been attributed to everything from the vagueness of the statute itself, to lax oversight by the federal Office of Juvenile Justice and Delinquency Prevention, to technical incompetence and bureaucratic intransigence at the state level.³⁰ It has also been attributed more generally to the inherent limitations of relying on a political process to alleviate institutional race bias.³¹

To date, however, the quintessential apolitical branch, the judiciary, has played little if any role in addressing the presence of DMC in the juvenile justice system. This article considers the feasibility of such intervention. Part I discusses the history of the juvenile justice system; describes the various judicial, legislative, and administrative changes that have transformed the system from a social welfare agency into a quasi-criminal hybrid; and illustrates the nature of

40 (codified as amended at 42 U.S.C. § 5633(a)(22) (Supp. IV 2004)). In 2002, Congress expanded the concept of DMC to include any point of “contact” with the juvenile justice system at which minority youth are overrepresented. See Pub. L. 107-273, § 12209(1)(P), 116 Stat. 1873, 1878 (codified as amended at 42 U.S.C. § 5633(a)(22) (Supp. IV 2004)). The acronym “DMC” now commonly refers to “Disproportionate Minority Contact.”

26. Pub. L. No. 102-586, § 2(f)(3)(A)(ii), 106 Stat. 4982, 4993–94 (codified as amended at 42 U.S.C. § 5633(a)(22) (Supp. IV 2004)).

27. Pub. L. 107-273, § 12209(1)(P), 116 Stat. 1873, 1878 (codified as amended at 42 U.S.C. § 5633(a)(22) (Supp. IV 2004)).

28. See, e.g., Leiber, *supra* note 22, at 15; HEIDI M. HSIA, GEORGE S. BRIDGES & ROSALIE MCHALE, U.S. DEP’T OF JUSTICE, DISPROPORTIONATE MINORITY CONFINEMENT 2002 UPDATE 10–11 (2004) [hereinafter DMC 2002 UPDATE] (confirming that, as of 2002, several states had not complied with even the most basic requirements of the Mandate); ROBIN DAHLBERG, AM. CIVIL LIBERTIES UNION, DISPROPORTIONATE MINORITY CONFINEMENT IN MASSACHUSETTS: FAILURES IN ASSESSING AND ADDRESSING THE OVERREPRESENTATION OF MINORITIES IN THE MASSACHUSETTS JUVENILE JUSTICE SYSTEM 1–2 (2003) (discussing Massachusetts’ continued failure to comply with the DMC Mandate).

29. SNYDER & SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006, *supra* note 23, at 163, 169. This is discussed in detail in Part II, *infra*.

30. See, e.g., Leiber, *supra* note 22, at 14–19. See generally DAHLBERG, *supra* note 28.

31. Leiber, *supra* note 22, at 14–19 (positing that the states’ ability to “fully comply” with the DMC Mandate is “influenced by politics and the complexity of the issue”). See generally DAVID COLE, NO EQUAL JUSTICE, RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 139 (1999) (arguing that the legislative process cannot be counted on to protect the interests of minorities and accused criminals); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (positing that prejudice can distort the political process by barring minorities from the “pluralists’ bazaar” and by causing lawmakers to misapprehend the costs and benefits of their actions).

juvenile justice decision-making through an analysis of each of the five stages of the juvenile court process. Part II examines one of the system's most pervasive problems—the phenomenon of Disproportionate Minority Contact (DMC). It posits that, irrespective of the historically benevolent justifications for the juvenile justice system's make-up, the lack of important procedural safeguards, the often arbitrary nature of juvenile justice practices and decision-making, and the frequency with which administrators base processing decisions on social factors with strong racial correlates make it a particularly likely host to discrimination. Part III then discusses the relative ineffectiveness of the legislation enacted to reduce minority overrepresentation in the juvenile justice system.

Finally, Part IV considers the gains which might be achieved by an effort to reform the system through an equal protection challenge to the disproportionate pretrial detention of minority youth in the juvenile justice system. This paper focuses on the “pretrial detention” stage of juvenile justice processing for several reasons. First, as discussed in Part I, there is no single “juvenile justice system” in the United States. Juvenile justice processing varies widely from state to state, and even from community to community.³² As a result, any analysis of juvenile justice “processing” as a whole necessarily contains so many caveats as to be virtually meaningless. For the sake of simplicity and clarity, it makes sense to focus on a single processing point and to confine the analysis further to data from a handful of states. Second, as discussed in detail in Part IV, of the six primary decision points in the juvenile justice system—arrest, intake, detention, waiver to adult court, adjudication, and disposition—the nature of the detention decision makes it most susceptible to an equal protection challenge. Finally, and perhaps most importantly, the detention decision is viewed by many as the most critical processing decision made by juvenile justice professionals. From a legal perspective, research indicates that whether or not a juvenile is detained at arraignment plays a significant role in determining whether she will be committed at disposition.³³ And, from a psychological perspective, because youth are often housed in unsafe and overcrowded facilities with sub-par medical, mental health, educational, and recreational resources, secure detention—however temporary—is believed to have a profoundly negative impact on detainees.³⁴

Any such challenge would have to be predicated on a sophisticated statistical analysis showing not just that minorities fare worse than their white comparators in the juvenile justice system, but that these disparities are due to statistically significant differences in the treatment of otherwise similarly situated white youth and youth of color.³⁵ Based on the number of studies showing not

32. See SNYDER & SICKMUND, *JUVENILE OFFENDERS AND VICTIMS*: 2006, *supra* note 23, at 104.

33. See ELIZABETH CALVIN, NAT'L JUVENILE DEFENDER CTR., *LEGAL STRATEGIES TO REDUCE THE UNNECESSARY DETENTION OF CHILDREN* 56 (2004).

34. See *generally* SUE BURRELL, ANNIE E. CASEY FOUND., *IMPROVING CONDITIONS OF CONFINEMENT IN SECURE JUVENILE DETENTION CENTERS* (1999).

35. The Supreme Court spelled out this requirement in the employment context when it held

just that youth of color are overrepresented but that a statistically significant race effect underlies disadvantageous outcomes for children of color in juvenile justice systems throughout the country, this paper assumes that such a showing can be made. Even then, however, litigants face a second legal hurdle: the rigorous standard of proof of discriminatory intent first promulgated by the Supreme Court in *Washington v. Davis*³⁶ and applied to criminal justice decision-making a decade later in *McCleskey v. Kemp*,³⁷ a standard many believe has spawned a modern equal protection jurisprudence that is effectively impervious to claims of institutional discrimination in the criminal justice system.³⁸

This paper argues that *McCleskey* should not deter juvenile claimants. First, by the *McCleskey* Court's own reasoning, the nature of the pretrial detention decision places it squarely within the contours of the types of administrative decisions for which the Court has accepted statistical evidence of race bias to create an inference of discriminatory intent. Specifically, because pretrial detention decisions are generally made by repeat actors, who are increasingly required to base their decisions on statutorily prescribed, uniform criteria and who can be called upon to rebut statistical evidence of race bias, they can be distinguished from the capital sentencing decision at issue in *McCleskey* and analogized to those administrative decisions to which the Court has historically applied the less onerous, burden-shifting framework set forth a decade earlier in *Castaneda v. Partida*.³⁹ Second, an equal protection challenge to the disproportionate pretrial detention of minority youth in the juvenile justice system is less likely to run afoul of the primary pragmatic concern articulated by the *McCleskey* majority—the proverbial slippery slope. As an initial matter, as Justice Powell himself pointed out in *McCleskey*, the three features of the pretrial detention decision that render it susceptible to a statistical inference of discrimination are relatively unique. There are simply not that many administrative decisions that have the *Castaneda* characteristics. Moreover, that the juvenile justice system remains an

that statistical analyses of racial disparities in hiring must be based on the relevant subsection of qualified candidates in the local labor market. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–51 (1989).

36. *Washington v. Davis*, 426 U.S. 229 (1976).

37. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

38. See, e.g., COLE, *supra* note 31, at 132–41 (arguing that the Court's formulation of the "intent" standard is nearly impossible for criminal defendants to meet, since they are all but barred from obtaining the type of evidence necessary to make the requisite showing); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136–37 (1997) (arguing that the Supreme Court's formulation of discriminatory intent "is one that the sociological and psychological studies of racial bias suggest plaintiffs will rarely be able to prove"); Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1419–20 (1988) (discussing how the purposeful discrimination requirement "ignores the chameleon-like ability of prejudice to adapt unobtrusively to new surroundings"); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (proposing a cultural-meaning test to account for unconscious discrimination in the administration of law).

39. See *Castaneda v. Partida*, 430 U.S. 482 (1977).

autonomous entity, which is governed by independent legislation, is administered by independent agencies, and continues to be guided, at least in part, by a welfare-oriented ideology distinct from its criminal counterpart, would give courts a defensible basis for cabinining the precedential utility of a successful claim⁴⁰—a factor that plainly influenced the outcomes of both *Washington v. Davis* and *McCleskey*.

The remedial value of a successful equal protection challenge is plain. Beyond the obvious benefits to the individual petitioner, a successful equal protection challenge to the disproportionate pretrial detention of children of color has the potential to act as a catalyst for the systemic reform and accountability that, in many jurisdictions, simply have not materialized through legislation. It also has the potential to enforce a norm of racial justice in the juvenile justice system that courts are plainly reluctant to enforce in the adult justice system. In doing so, the juvenile bench would take an important step, albeit incremental, toward legitimizing itself as a guarantor of equality under the law and an adherent to its historical normative commitments—a measure that is essential to a court whose very success depends on its constituents' willingness to participate in its processes.⁴¹

I.

THE JUVENILE JUSTICE SYSTEM

A. *History of the Juvenile Court*

On November 18, 2002, at approximately 8:00 p.m., police officers descended on a house near Boston with a warrant to arrest two men they believed were trafficking cocaine out of a second-floor apartment. Instead, they found two fifteen-year-old boys sitting on the front steps. Though the boys repeatedly denied that they were there to buy drugs, they were arrested for trespassing.

"I've seen that kid around," one of the officers quipped, gesturing toward Jason in the backseat of the cruiser. "You're spending a lot of time in Roxbury for a kid who lives in Mattapan," he yelled over his shoulder as they drove toward the Area D-4 Precinct. Jason looked out the window.

40. This is not to suggest that a successful equal protection challenge to DMC in the juvenile justice system could not serve as precedent for a comparable challenge in the criminal justice system, but simply that the procedural, ideological, and administrative differences between the two systems would give courts a defensible basis for resisting a broader application.

41. Sociological studies have found a litigant's perceptions of procedural justice to have a significant impact on her overall satisfaction with the justice system irrespective of the substantive outcome of her individual case. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 61–92 (1988); Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 *LAW & SOC'Y REV.* 483, 483 (1988); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 *LAW & SOC'Y REV.* 103 (1988).

With Jason handcuffed to a chair near his desk, the officer contacted the on-duty juvenile probation officer for Suffolk County. "Hold him, or send him home?" the officer asked. "You're in luck," the officer announced, hanging up the phone. "If your mom will come get you, you can go home."

Two hours later, Jason was in the Sheriff's van on his way to the Area A-1 Precinct. His foster mother couldn't come get him, she had told the police officer when he called. And even if she could, she added, she wasn't so sure she wanted Jason back in her home. Jason spent the night of November 18th on a bare cot in a locked cell in downtown Boston.

The nation's first juvenile court was established in Cook County, Illinois, in 1899. Prompted by the prevailing Progressive philosophy that children should be treated as vulnerable and dependent beings in need of special care and protection, the juvenile justice system was created as a social welfare alternative to the criminal justice system.⁴² The system was designed to "take [each child] in charge, not so much to punish as to reform, not to degrade but uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."⁴³ The juvenile court collapsed the distinction between civil and criminal charges, deeming all violations civil infractions, and replaced lawyers and juries with social service personnel, probation officers, and clinicians.⁴⁴ Courtroom vocabulary shifted accordingly: "crimes" became "delinquent behavior," juveniles were "adjudicated" not "convicted," and judges gave "dispositions" rather than "sentences."⁴⁵ Formal rules of evidence and procedure were abandoned in favor of broad judicial discretionary powers.⁴⁶ Maximum flexibility and informality, it was thought, would best enable the states to carry out their role as *parens patriae*.⁴⁷

42. See Mary E. Spring, *Extended Jurisdiction Juvenile Prosecution: A New Approach to the Problem of Delinquency in Illinois*, 31 J. MARSHALL L. REV. 1351, 1354–55 (1998) (observing that, where "Colonial America embraced an uncomplicated view of juvenile justice" which often included the public whipping, dunking, and banishing of incorrigible children, the Industrial Revolution forced society to rethink its approach to delinquency); C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 662–65 (2005) (observing that the Progressives' approach to juvenile delinquency represented a departure from the Colonial belief that parents and educators "were free to use whatever means they deemed appropriate to correct misbehaving children").

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

44. See Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1453–59 (2003).

45. See Clarke, *supra* note 42, at 667 n.34 (citing DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 21.01 (2d ed. 1994)).

46. See Clarke, *supra* note 42, at 668 (noting that "courts were given maximum discretion to allow for flexibility in diagnosis and treatment" and citing FREDERIC L. FAUST & PAUL J. BRANTINGHAM, JUVENILE JUSTICE PHILOSOPHY 550–57 (1974), reprinted in ROBERT H. MNOOKIN & KELLY WEISBERG, CHILD, FAMILY AND STATE 988 (2d ed. 1989) (observing that judges were given broad discretion to "[take] up the burden of parenthood and [stand] between all children and the manifest dangers of parental laxness and urban temptation").

47. "*Parens patriae*" literally means "parent of the country" and refers to the role of the state as guardian of persons under legal disability, such as juveniles. BLACK'S LAW DICTIONARY 1144

By the mid twentieth century, however, it had become increasingly clear that the system was not meeting its rehabilitative goals and was depriving children of fundamental constitutional rights.⁴⁸ Characterizing dispositions as “supervision” rather than punishment, juvenile courts frequently imposed indeterminate sentences that bore little relation to the crime charged.⁴⁹ In 1966, the Supreme Court expressed concern that the historical justification for omitting procedural safeguards from the juvenile court—namely, the compensating benefit of individualized treatment—was no longer sufficient.⁵⁰ In reality, the Court worried, juveniles may receive the “worst of both worlds: . . . neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children.”⁵¹

Several key cases created the due process protections that juveniles are given today, the most sweeping of which was the Supreme Court’s 1967 decision *In re Gault*.⁵² There, the Court held that the constitutional rights to notice, to counsel, to confront and cross-examine witnesses, to a fair and impartial hearing, and to protections against self-incrimination all applied equally in juvenile court.⁵³ “Unbridled discretion, however benevolently motivated, is often a poor

(8th ed. 2004) (defining “*parens patriae*” as “the state in its capacity as provider of protection to those unable to care for themselves”). Professor Feld has argued that “Progressives situated the juvenile court on a number of cultural and criminological fault lines and institutionalized several binary conceptions for the respective juvenile and criminal justice systems: either child or adult, either determinism or free will, either treatment or punishment, either procedural informality or formality, either discretion or the rule of law.” Barry C. Feld, *Juvenile and Criminal Justice Systems’ Responses to Youth Violence*, 24 CRIME & JUST. 189, 193 (1998).

48. Instrumental to this conclusion was a report generated by the President’s Commission on Law Enforcement and Administration of Justice, which found that, while “[i]n theory the [juvenile] court’s operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child,” in reality “it frequently does nothing more nor less than deprive a child of liberty without due process of law—knowing not what else to do and needing, whether admittedly or not, to act in the community’s interest even more imperatively than the child’s”). PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9 (1967).

49. The facts of *In re Gault* are illustrative. In the case, fifteen-year-old Gerry Gault was committed to a state training facility until age twenty-one simply for making “lewd” remarks of the “irritatingly offensive, adolescent sex variety” to an adult female neighbor—an offense for which he likely would not have received jail time if he were an adult. *In re Gault*, 387 U.S. 1, 4 (1967).

50. *Kent v. United States*, 383 U.S. 541, 551–52 (1966).

51. *Id.* at 556.

52. *In re Gault*, 387 U.S. at 1.

53. *Id.* at 31–58. Professor Feld has suggested that the Court’s reconstruction of juvenile court procedures can be attributed in part to an awareness that minority offenders often failed to receive equal treatment at the hands of the court. Feld, *Race, Politics, and Juvenile Justice*, *supra* note 44, at 1448–51. Feld observes that several surveys conducted at the time *Gault* was decided indicated that minority offenders were vastly overrepresented in the nation’s largest juvenile courts. *Id.* at 1484–85 (citing PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *supra* note 48). “It is an historical irony that concern about racial inequality provided the initial impetus for the Supreme Court’s focus on procedural rights in states’ juvenile justice systems,” Feld observes, “because it was the existence of those procedural rights that rationalized increasingly punitive penalties that fall most heavily on minority juvenile offenders.” *Id.*

substitute for principle and procedure,” the Court warned.⁵⁴ Additional cases followed during the next decade which mandated that delinquency convictions be proven “beyond a reasonable doubt”⁵⁵ and deemed it unconstitutional to prosecute juveniles for the same offense in both juvenile and criminal court.⁵⁶

However, while the Court has been willing to extend certain due process protections to juvenile proceedings, it has expressly refused to grant juveniles all of the procedural rights afforded adults. In 1971, the Court held that juveniles had no constitutional right to a jury trial in state delinquency proceedings, on the grounds that adjudications rendered by a judge were sufficient to meet the “fundamental fairness” standard required under the Due Process Clause.⁵⁷ “We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young,” the Court explained in *McKeiver v. Pennsylvania*, “and we feel that we would be impeding that experimentation by imposing the jury trial.”⁵⁸

Thirteen years later, the Court held that the preventative detention of juveniles before adjudication did not violate the Constitution.⁵⁹ In *Schall v. Martin*, the Court found that a New York statute permitting “a brief pretrial detention of a youth based on a finding of a ‘serious risk’ that an arrested juvenile may commit a crime before his return date” met the due process “fundamental fairness” standard.⁶⁰ Since the procedural protections afforded detainees prior to adjudication under *Gault* and its progeny—namely, the rights to notice, a statement of the facts and reasons for detention, and a probable-cause hearing within a short time—themselves satisfied due process requirements, the juvenile’s liberty interests did not outweigh the legitimacy of the state’s interest in preventive detention, the Court concluded.⁶¹

As I discuss more fully in Part III.B, the Court’s decision in *Schall* has been roundly criticized. Implicit in the Court’s rationale for subordinating the juvenile’s liberty interest to society’s interest in preventing crime was the assumption that juvenile courts could accurately predict which defendants would be most likely to reoffend – a notion that has been consistently refuted.⁶² “In essence,”

54. *In re Gault*, 387 U.S. at 18.

55. *In re Winship*, 397 U.S. 358, 364 (1970) (holding that, even in delinquency proceedings, the Due Process Clause “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”).

56. *Breed v. Jones*, 421 U.S. 519, 543 (1975) (finding prosecution in criminal court following adjudication in juvenile court a violation of the Double Jeopardy Clause of the Fifth Amendment).

57. *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971) (reasoning that “[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function, and would, contrarily, provide an attrition of the juvenile court’s assumed ability to function in a unique manner”).

58. *Id.*

59. *Schall v. Martin*, 467 U.S. 253, 256–57 (1984).

60. *Id.* at 256–57, 263.

61. *Id.* at 274–78.

62. See FELD, *BAD KIDS*, *supra* note 13, at 141–42 (citing Jeffrey Fagan & Martin Guggen-

writes Professor Barry Feld, “*Schall* affirms judicial discretion, elevates ‘crime control’ over ‘due process’ values and the rule of law, and delegates to each judge the authority to balance the risk to the community and an individual’s liberty on an idiosyncratic and ad hoc basis.”⁶³

The impact of *McKeiver* and *Schall* has been made all the more significant by corresponding changes in legislation governing juvenile court dispositions. Fueled by the “tough on crime” movement of the 1980s and 1990s, legislatures across the country amended their juvenile codes’ purpose clauses to incorporate expressly punitive language, enacted determinate and mandatory-minimum sentencing statutes, expanded eligibility for criminal court processing and adult correctional sanctioning, and reduced confidentiality protections for a subset of juvenile offenders.⁶⁴ By the end of 2004, juvenile codes in every state allowed juvenile court records to be released to prosecutors, law enforcement, social services agencies, schools, and/or victims; permitted law enforcement agencies to fingerprint and photograph juveniles under certain circumstances; and exposed a subset of juveniles to some form of criminal sanctions. Codes in forty-five states and the District of Columbia allowed juvenile court judges to waive jurisdiction over certain cases and transfer them to criminal court. Codes in twenty-nine states contained statutory exclusion provisions exempting certain cases from juvenile court jurisdiction altogether, and fifteen states had blended sentencing laws that enabled juvenile courts to impose criminal sanctions on certain juvenile offenders.⁶⁵

Nonetheless, while today’s juvenile court looks and acts a lot more like a criminal court than it did forty years ago, it has—in part as a consequence of the Court’s refusal to engraft into juvenile court proceedings all of the protections available in adult court—retained an aura of informality and unpredictability that continues to distinguish it from its adult counterpart. Abolitionists and preservationists of the juvenile court agree that this apparent attempt to have it both ways—to pursue punishment and treatment, intervention and confinement, proportionality and rehabilitation, formality and informality—has created an entity that does none of these particularly well.⁶⁶

heim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415, 415 (1996)).

63. FELD, *BAD KIDS*, *supra* note 13, at 145.

64. See SHAY BILCHIK, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, 1999 NATIONAL REPORT SERIES, JUVENILE JUSTICE: A CENTURY OF CHANGE 19 (1999) (reporting that, from 1992 through 1997 alone, statutes requiring mandatory minimum periods of incarceration for certain violent or serious offenders were added or modified in sixteen states, statutes extending the age limit for juvenile delinquency dispositions were adopted by seventeen states, and “blended sentencing” statutes, which allow courts to impose juvenile and/or adult correctional sanctions on certain young offenders, were in place in twenty states at the end of 1997).

65. See SNYDER & SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006, *supra* note 23, at 108–16 (discussing legislation enacted during the last thirty years emphasizing proportionality and determinate sentencing).

66. Compare Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the*

B. Juvenile Court Processing and Decision-Making

At 6:30 a.m. the next morning, Jason was back in the Sheriff's van on his way to Boston Juvenile Court. The "BJC," as it is known, occupies the fifth floor of a cavernous concrete building in Boston. The van pulled up to a loading dock off of the building's basement, and four boys in leg shackles and handcuffs shuffled into the cold, gray maze of holding cells.

Jason met the woman who would become his first delinquency lawyer two hours later. He reluctantly answered her questions through the holding cell bars.

"Where do you live?" "233 Morton Street in Mattapan."

"Is it a house or an apartment?" "It's a foster home."

"So you're in DSS custody?" "Yeah."

Jason started to explain that he was about to get a new placement. That he was going to live with his biological mother for the first time in fourteen years. That she had just gotten out of rehab and was living in a studio apartment in Roxbury. That he had heard she was using again. That his social worker hadn't listened to him when he told her he was uncomfortable with the placement.

But the lawyer seemed like she was in hurry, so he decided just to answer her questions.

"Do you attend school regularly?" "Yeah."

Jason considered coming clean with her. He thought about telling her that while he was going to school everyday, he was generally leaving after first period. But what did school have to do with any of this anyway, he thought.

"All right," the lawyer concluded. "I'll go see if your social worker's outside."

"I doubt it," Jason muttered under his breath as the lawyer's heels echoed down the corridor.

Predictably, the schizophrenic orientation of the juvenile justice system directly impacts its day-to-day practices. Though processing patterns vary from

"Crack Down" on Youth Crime, 84 MINN. L. REV. 327, 331 (1999) (advocating the abolition of the juvenile court because, among other things, "[t]he juvenile court's effort to combine social welfare and criminal social control in one agency simply assures that it pursues both missions badly") and Janet E. Ainsworth, *Youth in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 928 (1995) (advocating the abolition of the juvenile court on the grounds that it is a flawed system that provides juveniles with procedurally and substantively inferior adjudication in comparison to that accorded adult defendants) with Thomas F. Geraghty, *Justice for Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190, 211-12 (1997) (advocating the preservation and revitalization of the juvenile justice system while acknowledging that it "has failed to satisfy expectations for providing procedural protection and successful interventions") and Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 165 (1993) (arguing for the preservation of the juvenile justice system, but criticizing juvenile courts for providing both inadequate procedural protections and inadequate dispositional programs).

locality to locality,⁶⁷ there are generally six principal stages of juvenile justice decision-making: arrest, intake, pretrial detention, waiver or transfer to adult court, adjudication, and disposition.⁶⁸ While these six processing points resemble their criminal counterparts in certain respects, there are discernable differences, many of which can be attributed to the juvenile court's lack of procedural safeguards. First, in addition to depriving youth of what the Supreme Court has called the fundamental "protection of life and liberty against race or color prejudice"⁶⁹ at adjudication, the absence of jury trials in most jurisdictions indirectly affects other stages of processing by minimizing the overall visibility and accountability of juvenile court actors.⁷⁰ That juvenile court proceedings are conducted, for the most part, behind closed doors only adds to this sense of immunity.⁷¹ Moreover, the regular use of preventive pretrial detention—a mechanism whose use is strictly limited in criminal court⁷²—further compromises the procedural integrity of the juvenile court by providing a comparative advantage to the state before a case even begins. The tendency for juveniles faced with the prospect of an indefinite confinement to admit to, rather than fight, the charges against them provides a tactical advantage for prosecutors, who have discretion to recommend pretrial detention irrespective of the juvenile's proclivity for "dangerousness."⁷³ Finally, the juvenile court's adherence to strains of its original *parens patriae* orientation necessarily requires administrators, often with little or no clinical training, to base processing decisions on impressionistic

67. FELD, *BAD KIDS*, *supra* note 13, at 112–13 (observing that juvenile justice administration varies significantly among the states and even within a single state).

68. See SNYDER & SICKMUND, *JUVENILE OFFENDERS AND VICTIMS: 2006*, *supra* note 23, at 104.

69. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879) (holding that a West Virginia statute barring African Americans from serving on juries violated the Fourteenth Amendment).

70. See Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1150–51 (2003) (arguing that "[t]he jury's checking function may be even more important in the highly discretionary, low-visibility juvenile justice system dealing with dependent youths who are unable effectively to protect themselves").

71. Concerns about such a lack of public accountability have driven a number of jurisdictions to open their juvenile proceedings. As of 2004, Arizona, Arkansas, Colorado, Florida, Iowa, Kansas, Maryland, Michigan, Montana, Nevada, New Mexico, North Carolina, Ohio, and Washington had all adopted presumptively open juvenile court proceedings. Kristen Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 537 n.89 (2004).

72. See *United States v. Salerno*, 481 U.S. 739, 750 (1987) (holding that a criminal defendant's liberty interest should be subordinated to the interests of public safety only "when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community").

73. See, e.g., Richard S. Frase, *Defining the Limits of Crime Control and Due Process*, 73 CAL. L. REV. 212, 233 n.43 (1985) (reviewing HANS ZEISEL, *THE LIMITS OF LAW ENFORCEMENT* (1982)) (discussing the author's contention that "[p]retrial detention . . . serves to coerce guilty pleas, testimony, and other forms of cooperation; assures the defendant's availability for interrogation or identification procedures; and results in the speedy imposition of informal punishment on defendants who may never be convicted or given a formal custody sentence").

diagnoses of not only the gravity of the offense but also the rehabilitative potential of the offender—a calculus that necessarily leads to inconsistent outcomes.⁷⁴

While there are plainly benevolent and compelling justifications for these practices, there are also significant drawbacks. From a procedural perspective, these characteristics have the effect of tipping the proverbial playing field toward the state. From an ideological perspective, they often have the effect of devaluing the rule of law for the sake of administrative efficiency and paternalistic assumptions about what is best for each child. An examination of juvenile court decision-making at each of the six processing points is illustrative; in what follows, I discuss each processing point and its differences from its criminal justice analog. While the decision to arrest a juvenile rests on many of the same factors as does the decision to arrest an adult, the intake, detention, waiver, adjudication, and, to a lesser extent, disposition decisions are distinct from their criminal equivalents in both practice and substance.

First, at the point of arrest, police officers have much the same unfettered leeway to take a juvenile into custody as they do an adult.⁷⁵ In most states, the evidentiary standard governing arrests is the same for both juveniles and adults: a suspect may lawfully be arrested if there is probable cause to believe that she has or is committing a felony or one of a specified class of misdemeanors.⁷⁶ Despite this presumptively objective standard, however, studies of police/juvenile encounters conducted over the last forty years suggest that the decision to arrest a juvenile is often influenced at least in part by the attributes of the offender. A seminal longitudinal study of the conditions influencing police interactions with juveniles, conducted by sociologists Irving Piliavin and Scott Briar in 1964, found that, aside from the juvenile's prior arrest record, the juvenile's demeanor was the single most important factor in deciding whether to make an arrest.⁷⁷ "The cues used by police to assess demeanor were fairly simple," Pi-

74. See FELD, *BAD KIDS*, *supra* note 13, at 140–45 (discussing the juvenile courts' continued reliance on discretionary clinical prediction methods which require unqualified decision-makers to make predictions about a juvenile's future behavior through an assessment of various social status factors that are beyond the youth's control).

75. For all practical purposes, the procedural nature of this processing point is essentially the same in both the juvenile and criminal justice systems. Whether exercised against juveniles or adults, it is clear that the decision to arrest is highly discretionary. See generally Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L. REV.* 543 (1960); Wayne R. LaFare, *The Police and Nonenforcement of the Law—Part I*, 1962 *WIS. L. REV.* 104 (1962); David Wolcott, "The Cop Will Get You": *The Police and Discretionary Juvenile Justice, 1890–1940*, 35 *J. SOC. HIST.* 349 (2001) (noting that law enforcement performs a filtering function in deciding which complaints against children and teenagers to handle informally).

76. See, e.g., N.Y. FAM. CT. ACT § 305.2(2) (McKinney 1999) (providing that a child under age sixteen may be taken into custody without a warrant whenever a peace or police officer could arrest an adult); TEX. FAM. CODE ANN. § 52.01 (Vernon 2006) (providing that a child may be taken into custody by law enforcement officers, including school-district peace officers, if there is probable cause to believe that the child has engaged in conduct that violates a penal law).

77. Irving Piliavin & Scott Briar, *Police Encounters with Juveniles*, 70 *AM. J. SOC.* 206, 210 (1964) (noting that "[i]n the opinion of juvenile patrolmen themselves the demeanor of appre-

lavin and Briar observed.

Juveniles who were contrite about their infractions, respectful to officers, and fearful of the sanctions that might be employed against them tended to be viewed by patrolmen as . . . “salvageable.” For these youths it was usually assumed that informal or formal reprimand would suffice In contrast, youthful offenders who were fractious, obdurate, or who appeared nonchalant in their encounters with patrolmen were likely to be viewed as “would-be tough guys” or “punks” who fully deserved the most severe sanction: arrest.⁷⁸

Piliavin and Briar’s conclusions have been supported by several more recent studies of juvenile arrests.⁷⁹ In comparison, while studies of adult arrests tend to emphasize the paramount importance of the severity of the offense, they also conclude that, as with juvenile arrests, the suspect’s behavior can be critical.⁸⁰

Once a case is referred to court,⁸¹ however, differences between juvenile and criminal justice processing begin to emerge. In juvenile court, intake officers,

hended juveniles was a major determinant of their decisions for 50 to 60 per cent of the juvenile cases they processed”).

78. *Id.* at 210–11.

79. See, e.g., Darlene J. Conley, *Adding Color to a Black and White Picture: Using Qualitative Data to Explain Racial Disproportionality in the Juvenile Justice System*, 31 J. RES. CRIME & DELINQ. 135, 136 (1994) (suggesting, in a qualitative study of nearly 1800 cases observed through “ride alongs” and 170 in-depth interviews with police officers, that “what occurs before and at the level of arrest . . . is perhaps the most important factor contributing to racial and ethnic disproportionality [because e]ncounters between police and youths of color shape perceptions and behaviors”); Richard J. Lundman, Richard E. Sykes & John P. Clark, *Police Control of Juveniles: A Replication*, 15 J. RES. CRIME & DELINQ. 74, 84 (1978) (concluding, through an empirical analysis of 200 encounters between juveniles and police derived from observations made during “ride alongs” over a fifteen-month period, that in cases where the arrest was made without a witness, “the demeanor of the juvenile is the most important determinant of whether or not formal action is taken”); Douglas A. Smith & Christy A. Visher, *Street Level Justice: Situational Determinants of Police Arrest Decisions*, 29 SOC. PROBS. 167, 168–69 (1981) (finding that the decision to arrest is often based on the manner in which the encounter is initiated (i.e., whether or not police themselves initiate the contact); the location of the encounter; the presence of bystanders or witnesses; the presence or absence of complainants; the victim/suspect relationship; and the characteristics of the suspect, such as race, age, gender, and demeanor).

80. See, e.g., Douglas A. Smith, *The Organizational Context of Legal Control*, 22 CRIMINOLOGY 19, 27 (1984) (finding in a multivariate analysis of over 1000 direct observations of police/citizen encounters that arrest decisions were “significantly more likely in encounters with antagonistic suspects”); Richard E. Sykes, James C. Fox & John P. Clarke, *A Social-Legal Theory of Police Discretion*, in THE AMBIVALENT FORCE 171, 178–79 (Arthur Niederhoffer & Abraham S. Blumberg eds., 1976) (finding in a study of 3000 police/citizen encounters that, in addition to the seriousness of the offense, several other factors correlated with the decision to arrest, including the suspect’s demeanor).

81. While the majority of delinquency cases are referred to juvenile court by law enforcement, cases may also be referred by parents, schools, or probation officers. According to OJJDP, “nearly half of all cases referred to juvenile court intake are handled informally.” SNYDER & SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006, *supra* note 23, at 104. Many informally processed cases are dismissed, while in others, “the juvenile voluntarily agrees to abide by specific conditions for a specific time period.” *Id.*

predominantly court clerks or probation officers, decide whether to handle a case informally or to proceed with one of two types of petitions: a delinquency petition documenting the allegations and requesting that the juvenile court adjudicate the youth a delinquent, or a petition requesting a waiver hearing to transfer the case to criminal court.⁸² While this decision is based in part on an assessment of whether the intake officer believes that there is sufficient evidence to prove the charges in question, it is also based on an evaluation of the socio-familial attributes of the juvenile herself. In California, for example, a social worker or probation officer performing intake must consider:

- (1) Whether there is sufficient evidence of a condition or conduct to bring the child within the jurisdiction of the court;
- (2) If the alleged condition or conduct is not considered serious, whether the child has previously presented significant problems in the home, school, or community;
- (3) Whether the matter appears to have arisen from a temporary problem within the family that has been or can be resolved;
- (4) Whether any agency or other resource in the community is available to offer services to the child and the child's family to prevent or eliminate the need to remove the child from the child's home;
- (5) The attitudes of the child, the parent or guardian, and any affected persons;
- (6) The age, maturity, and capabilities of the child;
- (7) The dependency or delinquency history, if any, of the child;
- (8) The recommendation, if any, of the referring party or agency; and
- (9) Any other circumstances that indicate that settling the matter at intake would be consistent with the welfare of the child and the protection of the public.⁸³

Significantly, in at least one study of juvenile intake decisions, intake officers actually acknowledged the strong correlation between race and the socio-familial criteria they were required to consider.⁸⁴

82. *Id.* Intake officers also decide in many jurisdictions whether to detain the juvenile pending arraignment. If a juvenile is detained, a hearing must be held within a time limit defined by state statute. PATRICIA PURITZ, AM. BAR ASS'N, JUVENILE JUSTICE CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 31 (1995).

83. CAL. CT. R. 5.516(a) (Amend. 2007).

84. In their study of juvenile-court decision-making practices in Florida, sociologists Donna Bishop and Charles Frazier characterized the following comments made by a Florida delinquency intake supervisor as "typical":

Our manual told us to interview the child and the parent prior to making a recommendation to the state's attorney. We are less able to reach poor and minority clients. They

For those youth who are detained pending arraignment, a detention hearing is then held to determine whether to continue to detain the youth pending trial.⁸⁵ Historically, pretrial detention was supposed to serve one main purpose: to ensure that the juvenile appeared for future court proceedings.⁸⁶ Today, however, the majority of states have enacted preventive detention statutes akin to the New York statute at issue in *Schall v. Martin*.⁸⁷ The reliance on preventive detention in the juvenile justice system continues to be controversial, not only because of the uncertain validity of judicial predictions of dangerousness, but also because of the type of offenders for which it is used.⁸⁸ Between 1985 and 1995 alone, the national daily juvenile detention population climbed by 72% to nearly 24,000.⁸⁹ The majority of these youth, however, were non-violent offenders. During a one-day snapshot in 1995, for instance, less than one-third of the youth in secure custody were charged with violent acts.⁹⁰

The indeterminate and subjective nature of many juvenile preventive detention statutes may add to the risk of arbitrary outcomes. In Wisconsin, for example, the court can hold a juvenile in pretrial detention if probable cause exists to believe any of the following:

- (a) That if the juvenile is not held he or she will commit injury to the person or property of others.
- (b) That the parent, guardian, or legal custodian of the juvenile or other responsible adult is neglecting, refusing, unable, or unavailable to provide adequate supervision and care and that services to ensure the juvenile's safety and well-being are not available or would be inadequate.
- (c) That the juvenile will run away or be taken away so as to be unavailable for proceedings of the court or its officers⁹¹

Thus, by statute, Wisconsin juvenile court judges are required not only to assess the juvenile's conduct, but also to base detention decisions on normative judgments about the relative "adequa[cy]" of the juvenile's "supervision and care." Arguably, the level of supervision exercised by a juvenile's family is in

are less responsive to attempts to reach them. They don't show. They don't have transportation. Then they are more likely to be recommended for formal processing. Without access to a client's family, the less severe options are closed. Once it gets to court, the case is likely to be adjudicated because it got there. It's a self fulfilling prophecy.

Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 407-08 (1996).

85. SNYDER & SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999, *supra* note 8, at 98.

86. Fagan & Guggenheim, *supra* note 62, at 415.

87. *Id.*

88. *Id.* at 416.

89. DAVID STEINHART, THE ANNIE E. CASEY FOUND., PLANNING FOR JUVENILE DETENTION REFORM: A STRUCTURED APPROACH 10 (1999).

90. *Id.* at 5.

91. WIS. STAT. ANN. § 938.205 (West 2005).

fact germane to the juvenile's proclivity for dangerousness.⁹² But because, in most courts, this calculus is made not through a comprehensive psycho-social evaluation of the juvenile and her family, but through unverified and anecdotal information presented in the course of a single, transitory appearance, it is highly susceptible to the influence of attributional stereotypes.⁹³

Conversely, while predictive decision-making plainly plays a role in the criminal justice system, it is constrained by important procedural safeguards not available in juvenile court. As an initial matter, adults are entitled to bail, while, in most states, juveniles are not.⁹⁴ The practical effect is that pretrial detention in juvenile court is an all-or-nothing proposition. Judges cannot temper their orders to account for the relative degree of risk presented, as they can in criminal court. Another major difference between the detention hearing in juvenile court and the bail hearing in criminal court is the burden of proof borne by prosecutors. Under the Bail Reform Act of 1984, a criminal defendant may not be held without bail unless a prosecutor can establish "by clear and convincing evidence" that the defendant will fail to return to court, obstruct justice, or intimidate a witness or juror, and that there are no conditions of release which could reasonably ensure the public's safety.⁹⁵ This exacting burden of proof necessarily creates a process that is adversarial and formal.

92. Anecdotal evidence supports the notion that judges often weigh extralegal criteria more heavily than legal criteria. In August 2005, for example, Boston Juvenile Court Judge Paul Lewis's decision to set a \$250,000 bail for a twelve-year-old, first-time offender found with a loaded firearm drew harsh criticism from local juvenile justice advocates. *E.g.*, Maria Cramer & John Ellement, *Boy's High Bail Concerns Youth Advocates*, BOSTON GLOBE, Aug. 25, 2005. When asked to explain his bail decision, Judge Lewis responded, "I'm looking to find out what this kid is doing, his responsibility factor, whether he's keeping the rules of the school or the home. If he isn't, then I have a right to set bail accordingly." *Id.* What Judge Lewis did not cite to, however, was the factor that advocates argued was most relevant to the bail decision: whether there is any evidence to suggest that the juvenile would not return to court. *See also* Bishop & Frazier, *supra* note 84, at 409–10 (citing a Florida state attorney's acknowledgment that "[d]etention decisions are decided on the basis of whether the home can control and supervise a child").

93. *See, e.g.*, George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 567–68 (1998); FELD, *BAD KIDS*, *supra* note 13, at 142 (arguing that judges may deprive youths of liberty simply because they "share the characteristics of a larger group of 'potentially dangerous' youths").

94. As of 2004, only sixteen states had statutes that explicitly permit bail for juveniles in pre-adjudicatory proceedings. They are: Colorado, Connecticut, Delaware, Georgia, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Oklahoma, Tennessee, Vermont, Virginia, Washington, and West Virginia. *See* L. SZYMANSKI, NAT'L CTR. FOR JUVENILE JUSTICE, *JUVENILE'S RIGHT TO BAIL IN PRE-ADJUDICATORY PROCEEDINGS* (2005). Seventeen states and the District of Columbia have case law, statutes, or court rules specifically denying juveniles the right to pre-adjudicatory bail: Alaska, California, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maryland, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, and Utah. *Id.*

95. 18 U.S.C. § 3142(e). In *United States v. Salerno*, 481 U.S. 739, 750 (1987), the Supreme Court held that a defendant's liberty interests should be subordinated to the interests of community safety only "when the government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community."

The pretrial detention hearing in juvenile court is often anything but. Apart from the comparative informality of most juvenile court proceedings, the arbitrary nature of many detention hearings can also be attributed to the absence of counsel.⁹⁶ In fact, juvenile codes in certain states do not even require courts to appoint attorneys at the detention stage. Virginia law, for example, does not specifically provide for the right to counsel at arrest, intake, or the initial detention hearing.⁹⁷ The absence of counsel, according to OJJDP, is one of the likely causes of “Virginia’s high rate of detention (nearly twice the national average).”⁹⁸ Other states have no uniform process to appoint public defenders for juvenile defendants at any point in the process and no eligibility criteria for indigency.⁹⁹ Moreover, even when state law does afford juveniles the right to counsel at the pretrial detention hearing, juveniles frequently waive counsel’s appearance. According to OJJDP, “[i]n some jurisdictions, as many as 80 to 90 percent of youth waive their right to an attorney because they do not know the meaning of the word ‘waive’ or understand its consequences.”¹⁰⁰ And finally, when attorneys do appear at detention hearings, they are frequently untrained in juvenile court procedures, inexperienced, and overburdened.¹⁰¹

What is most unsettling about this lack of protection and regularity is that modern-day detention is hardly the therapeutic respite envisioned by the Progressives. Generally speaking, the conditions of detention facilities in the United States are poor.¹⁰² By the early 1990s, 60% of youth admitted to secure detention encountered a facility that was crowded beyond its designed capacity.¹⁰³

96. See, e.g., PATRICIA PURITZ, AM. BAR ASS’N JUVENILE JUSTICE CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (1995) (finding that numerous factors deprive indigent children across the country of adequate legal services, including, among other things, the frequency with which children waive their right to counsel and under what conditions they do so, and the lack of adequate compensation, supervision, and training of juvenile defense attorneys).

97. JUDITH B. JONES, U.S. DEP’T OF JUSTICE, JUVENILE JUSTICE BULLETIN: ACCESS TO COUNSEL 6 (2004).

98. *Id.* at 7.

99. *Id.*

100. *Id.* at 2. See also PATRICIA PURITZ & CATHRYN CRAWFORD, NAT’L JUVENILE DEFENDER CTR., FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 28 (2006) (reporting that “judges and parents in Florida courts engage in practices and procedures that pressure youth, directly or indirectly, to waive the right to counsel”).

101. See JONES, *supra* note 97, at 9 (reporting that the average juvenile caseload in a national survey conducted between 2000 and 2003 by the American Bar Association (ABA) was 300 of a total caseload exceeding 500); *id.* at 11 (reporting that a 1995 ABA national study found that 78 percent of the public defender offices surveyed “said they had no budget for training juvenile defense attorneys; 50 percent did not have a training program for new attorneys, and 48 percent had no ongoing training program; 46 percent lacked a training manual for juvenile defense practice; and 32 percent had no training manual at all”).

102. See generally DALE G. PARENT, VALERIE LIETER, STEPHEN KENNEDY, LISA LIVENS, DANIEL WENTWORTH & SARAH WILCOX, CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES (1994).

103. See STEINHART, *supra* note 89, at 10.

More than just a “housekeeping problem that simply requires facility administrators to put extra mattresses in day rooms when it’s time for lights out,” overcrowding often leads to inadequate medical, mental health, safety, education, and recreation services.¹⁰⁴ Moreover, studies indicate that whether or not a juvenile is detained at arraignment has a significant impact on whether she will be committed at disposition, in part because “[t]he state’s assumption of guilt inherent in detaining before trial becomes a self-fulfilling prophecy.”¹⁰⁵ For the most part, the use of pretrial detention for juveniles in this country is at best ineffectual and at worst inequitable, coercive, and psychologically destructive—a result that could hardly be more at odds with the system’s ideological goals.

Like the intake and pretrial detention decisions, the decision to waive a juvenile to adult court is often based as much on the attributes of the offender as it is on the attributes of the offense. As of 2004, forty-five states and the District of Columbia allowed juvenile court judges to “waive jurisdiction over certain cases and transfer them to criminal court.”¹⁰⁶ According to OJJDP, “waiver provisions vary in terms of the degree of decisionmaking flexibility allowed. The decision may be entirely discretionary, there may be a rebuttable presumption in favor of waiver, or waiver may be mandatory.”¹⁰⁷ In Maryland, for example, juvenile court judges base waiver decisions on the following five criteria:

- (1) the age of the child; (2) the mental and physical condition of the child; (3) the child’s amenability to treatment in any institution, facility, or program available to delinquents; (4) the nature of the offense and the child’s alleged participation in it; and (5) the public safety.¹⁰⁸

Research suggests that these factors can lead to arbitrary outcomes. One particular study, which looked at Minnesota juvenile court cases waived to adult court during a two-year period, concluded that waiver decisions varied widely by geographic region even though the waiver statute was intended to be applied uniformly throughout the state.¹⁰⁹

Fifth, unlike adult court, adjudication in juvenile court is most often rendered through confidential and informal bench trials. While juvenile court bench

104. *Id.* at 6. See generally BURRELL, *supra* note 34.

105. Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 416 (1990). See also NAT’L RESEARCH COUNCIL & INST. OF MED., *JUVENILE CRIME, JUVENILE JUSTICE* 177 (2001) (“Research consistently shows that juveniles who have been in detention are more likely to be formally processed and receive more punitive sanctions at disposition than those not placed in detention, after controlling for demographic and legal factors, such as current offense and history of past offenses.”); FELD, *BAD KIDS*, *supra* note 13, at 138 (noting that “pretrial detention negatively affects subsequent sentences that juveniles receive; detaining a youth before trial increases the likelihood of additional post-adjudication sanctions as well”).

106. See SNYDER & SICKMUND, *JUVENILE OFFENDERS AND VICTIMS: 2006*, *supra* note 23, at 112.

107. *Id.*

108. See MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-06(e) (West 2005).

109. Barry C. Feld, *Bad Law Makes Hard Cases: Reflections on Teen-Aged Axe-Murderers, Judicial Activism, and Legislative Default*, 8 LAW & INEQ. 1 (1989).

trials share some of the features of a criminal court trial, the absence of a jury in most jurisdictions can compromise the accuracy, integrity, and the overall fairness of the process. Studies suggest that juries are more likely to acquit than judges, in part because they apply the “beyond a reasonable doubt” standard more rigorously.¹¹⁰ Moreover, a juvenile defendant’s “youthfulness” is more likely to elicit leniency from a jury than from a juvenile court judge,¹¹¹ who may be desensitized to the notion of incarcerating young people. Indeed, at least one study has concluded that “it is easier to win a conviction in the juvenile court than in the criminal court, with comparable types of cases.”¹¹² Compounding this potential for inequity is the fact that juvenile court judges operate largely under the public radar. They therefore escape both the visibility and accountability of their criminal court counterparts. All told, “McKeiver’s denial of public and jury trials places juvenile offenders at a comparative disadvantage,” Professor Feld writes, “and exposes youths to the coercive power of the state under circumstances the law does not tolerate for adults.”¹¹³

Finally, if a juvenile is adjudicated delinquent, a judge then determines the appropriate disposition. As a general matter, the judge has discretion to choose a disposition from an array of options, which include: commitment to a public or private institution or residential facility; probation; referral to a substance abuse or mental health treatment program or other type of counseling; community service, fines, or restitution; or any combination of these.¹¹⁴ In most states, courts are statutorily required to render the disposition that is “in the best interests of the juvenile.”¹¹⁵ To aid in this determination, juvenile court judges often rely on probation officers to prepare a disposition plan, which may include such things

110. See, e.g., HARRY KALVEN, JR., & HANS ZEISEL, *THE AMERICAN JURY* (1966); PETER GREENWOOD, ALBERT J. LIPSON, ALLEN ABRAHAMSE & FRANKLIN ZIMRING, *YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA* (1983) (concluding through a study comparing juvenile and adult court attrition rates that, in comparable cases, it is easier to win a conviction in juvenile court).

111. See FELD, *BAD KIDS*, *supra* note 13, at 154. See also Joseph B. Sanborn, Jr., *Remnants of Parens Patriae in the Adjudication Hearing: Is a Fair Trial Possible in Juvenile Court?*, 40 *CRIME & DELINQ.* 599, 603–04 (1994) (reporting results of a survey of probation officers and attorneys in juvenile courts; almost half “maintained that judges adjudicated juvenile delinquent even when there was not proof beyond a reasonable doubt”).

112. GREENWOOD, LIPSON, ABRAHAMSE & ZIMRING, *supra* note 110, at 30–31.

113. FELD, *BAD KIDS*, *supra* note 13, at 162.

114. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *JUVENILE DELINQUENCY GUIDELINES, IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES* 147–53 (2005).

115. For example, Massachusetts law provides: “If a child is adjudicated a delinquent child on a complaint, the court may place the case on file or may place the child in the care of a probation officer for such time and on such conditions as it deems appropriate or may commit him to the custody of the department of youth services [W]henver a court of competent jurisdiction adjudicates a child as delinquent and commits the child to the department of youth services, the court . . . shall receive evidence in order to determine whether continuation of the child in his home is contrary to his best interest, and whether reasonable efforts were made prior to the commitment of the child to the department, to prevent or eliminate the need for removal from his home.” MASS. GEN. LAWS ch. 119, § 58.

as the results of psychological assessments and interviews with the youth and his family.¹¹⁶

Ironically, it is during the dispositional phase—arguably, the point where the juvenile courts' rehabilitative orientation could best be realized—that many courts seem to abandon their social welfare ideology altogether. During the last three decades, legislatures in jurisdictions throughout the country have changed their juvenile court purpose clauses to emphasize the punitive component of juvenile court sanctions.¹¹⁷ As of 1997, nearly half of the states used determinate or mandatory minimum provisions that “base a youth's disposition on the offense she committed rather than her ‘real needs’ to regulate at least some aspects of sentence duration, institutional commitment, or release.”¹¹⁸

What is ultimately clear from a review of each of the six decision points is that, despite the juvenile justice system's gravitation toward its adult counterpart, the system is not yet its procedural or ideological equivalent. While, as in adult court, processing decisions may be tied to a written set of uniform criteria, the juvenile court's lack of fundamental procedural safeguards and its emphasis on social factors that necessitate the imposition of subjective value judgments heighten the risk that impermissible factors, such as race, will influence outcomes.¹¹⁹

116. See SNYDER & SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006, *supra* note 23, at 106.

117. *Id.* at 97–99.

118. Feld, *Abolish the Juvenile Court*, *supra* note 7, at 83–86 (noting that “[e]mpirical evaluations of juvenile court sentencing practices indicate that the present offense and prior record account for most of the explained variance in judges' disposition of delinquents, and reinforce the criminal orientation of juvenile courts”). Nonetheless, courts do account for social factors. In New York, for example, a family court judge is required by statute to consider the following factors in deciding whether to impose a custodial sentence:

- (a) the needs and best interests of the [defendant];
- (b) the record and background of the [defendant], including but not limited to information disclosed in the probation investigation and diagnostic assessment;
- (c) the nature and circumstances of the offense, including whether any injury was inflicted by the [defendant] or another participant;
- (d) the need for protection of the community; and
- (e) the age and physical condition of the victim.

N.Y. Family Court Act § 353.5. See also Allan Horwitz & Michael Wasserman, *Some Misleading Conceptions in Sentencing Research: An Example and Reformulation in the Juvenile Court*, 18 CRIMINOLOGY 411, 417 (1980) (observing that factors such as “problems in the family and at school,” in addition to legal criteria, impact sentencing).

119. See Charles E. Frazier & Donna M. Bishop, *Reflections on Race Effects in Juvenile Justice*, in MINORITIES IN JUVENILE JUSTICE 16, 35–36 (Kimberly Kempf Leonard, Carl E. Pope & William H. Feyerherm eds., 1995) (“When decisions to process juveniles formally as opposed to informally, or harshly as opposed to leniently, hinge on evaluations of the social circumstances in which juveniles live . . . [a]lmost inevitably there is a reliance on common stereotypes of the non-white community, family, and interpersonal styles”).

II.

THE PHENOMENON OF DISPROPORTIONATE MINORITY CONTACT

A. *Statistical Evidence of DMC in the Juvenile Justice System*

Jason was charged with trespassing and arraigned later that morning. Like the rest of the building, Courtroom 18 of the BJC is a vast expanse of concrete and marble. Though equipped for rows of jurors and spectators, the courtroom was virtually empty that morning, as it almost always was for juvenile proceedings, but for the clerks, probation officers, and court officers milling around the judge's bench.

As Jason stood at a table in the middle of the courtroom with his lawyer, still wearing handcuffs and shackles, the prosecutor read the police report aloud. "I know it's a trespass," the prosecutor concluded, putting down her paper, "but we're concerned about the location. The Commonwealth would be looking for a low bail."¹²⁰

"Probation, what do you say?" The judge turned to a probation officer to his immediate right. "We agree," the officer said. "We talked with his social worker, and he's not obeying the rules of the foster home. He's not attending school regularly. Foster mom doesn't know where he goes when he leaves the house."

The judge then turned to Jason's lawyer. The lawyer reminded the judge that there was no evidence that Jason was involved in any drug activity. More importantly, his lawyer added, the primary purpose of bail was to ensure that the juvenile returned to court and there was no reason to believe Jason wouldn't.

The judge paused. "I'm concerned that the young man is out at night at a known drug residence. I'm also concerned about what his social worker told probation, that he is not cooperating with the rules of the foster home," the judge added. "Let's give him some structure and keep him off the streets for a couple weeks, and if DSS wants to bail him out in the meantime, they can. A dollar bail, DSS only."

It has long been evident that the percentage of minority youth present in the United States justice system far exceeds their proportion in the general population.¹²¹ Over the last thirty years, multiple studies have shown that Disproportionate Minority Contact afflicts nearly every processing point in nearly every

120. As discussed in *supra* Part I.A, Massachusetts is one of the few states that affords juveniles the right to bail.

121. As far back as the 1920s, criminologists were attempting to identify the root causes of minority overrepresentation. See, e.g., Thornsten Sellin, *The Negro Criminal: A Statistical Note*, 140 ANNALS AM. ACAD. POL. & SOC. SCI. 52 (1928); GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

juvenile justice system in the country.¹²² Until recently, OJJDP calculated overrepresentation by simply dividing the proportion of minority youth¹²³ at a particular processing point by the proportion of minority youth in the general population.¹²⁴ If this statistic, known as the “DMC Index,” was greater than 1.0, disproportionality was said to exist.¹²⁵ According to OJJDP, however, “[p]roblems interpreting the DMC Index soon became apparent.”¹²⁶ Not only did comparing one jurisdiction’s Index with another’s prove difficult,¹²⁷ the DMC Index “provided limited guidance on where to look for the source(s) of disparity.”¹²⁸

In 2002, OJJDP acknowledged that its DMC Index was methodologically flawed and purported to improve it by adopting the DMC Relative Rate Index (RRI).¹²⁹ The RRI tests for disparity by comparing the total volume of minority youth present at a particular decision point with the corresponding percentage of white youth.¹³⁰ Though more methodologically refined than the DMC Indices, the DMC RRIs for 2002 tell largely the same story: that, with the exception of adjudication, minorities fared worse than whites at every stage of the juvenile justice process and that the effects were cumulative.¹³¹

122. See, e.g., *DMC: 1969–1989 Review of Research*, *supra* note 19; *DMC: 1989–2001 REVIEW OF LITERATURE*, *supra* note 19; POE-YAMAGATA & JONES, *supra* note 19; FRANCISCO A. VILLARRUEL & NANCY E. WALKER, *BUILDING BOCKS FOR YOUTH, ¿DÓNDE ESTÁ LA JUSTICIA?: A CALL TO ACTION ON BEHALF OF LATINO AND LATINA YOUTH IN THE U.S. JUSTICE SYSTEM* (2002).

123. Because many studies documenting the incidence of minority overrepresentation categorize Latino youth as white, they actually underreport the rates of such disparities. POE-YAMAGATA & JONES, *supra* note 19, at 5.

124. See SNYDER & SICKMUND, *JUVENILE OFFENDERS AND VICTIMS: 2006*, *supra* note 23, at 189.

125. *Id.*

126. *Id.*

127. By way of illustration, OJJDP explained: “For example, assume one community’s youth population was 3% minority and its juvenile custody population was 12% minority, resulting in a DMC Index of 4. Now assume the other community’s youth population was 50% minority and its custody population was 100% minority, resulting in a DMC Index of 2. Which community’s juvenile justice system processing is most racially disparate? Clearly, the value of the DMC Index was related in part to the proportion of minority youth in the general population. Communities with low minority proportions could have very high DMC Indexes while communities with high percentages of minority youth could not.” *Id.* at 189.

128. *Id.*

129. *Id.* at 190.

130. *Id.* The Relative Rate Index Matrix adds greater detail by comparing the RRI at each decision point with that of the previous decision point to “reveal the nature of decision disparities.” *Id.*

131. Specifically, of the approximately 26,000,000 white youth ages ten to seventeen in the United States population in 2002, 1,576,400 were arrested (6.1% of the white youth in the general population), 1,086,700 were referred to juvenile court (68.9% of the white youth arrested), 199,700 were detained (18.4% of the white youth referred), 596,800 were formally petitioned (54.9% of the white youth referred), 4,400 were waived to criminal court (0.7% of the white youth formally petitioned), 421,400 were adjudicated delinquent (70.6% of the white youth formally petitioned), and 90,400 were placed in secure facilities (21.5% of the white youth adjudicated delinquent). *Id.* at 189. Correspondingly, of the approximately 5,431,300 African American youth ages ten to seven-

The RRI is an improvement over the DMC Index, in that it provides a more sophisticated picture of the rate of disparities at various stages of the juvenile process, but it still does not get at the question that is critical to an equal protection analysis: are the disparities observed solely the product of legitimate factors, such as the nature of the offense or other aggravating or mitigating factors that are race neutral, or, rather, does race itself influence case outcomes?

B. *The Causes of DMC*

Jason spent the two weeks after his November 19th arraignment in a detention unit of the Metro Youth Services Center in Dorchester. During his stay, he received none of the special education services for which he had recently been deemed eligible and, despite what his staff described as a “depressed affect,” no psychological counseling. He shared a ten-by-ten room with another fifteen year old, who, on one occasion, was taken to the hospital for attempting to cut himself with a plastic knife. He witnessed several fights and was involved in several others. And he saw his DSS worker just once—when she came to tell him that, because DSS hadn’t yet processed his new placement, she had no place for him to go.

The hardest part about detention, however—what continued to torment Jason in the days after he was released—was something no one but Jason had considered. Jason was a chronic bed wetter. He had been for as long as he could remember. While most of the staff had been sympathetic, the residents had not. Publicly, Jason ignored their taunts each morning as he rolled up his sheets; privately, he was in agony.

Two primary theories are generally advanced to explain the causes of DMC: the first is that children of color simply commit more serious offenses than other youths, and the second is that race bias—conscious or unconscious—plays a role in juvenile justice system processing.¹³² Overall, research that “contrasts youth arrests and youth behavior” suggests that “African Americans, as teens, commit

teen in the United States population, 625,500 were arrested (11.5% of the African American youth in the general population), 473,100 were referred to juvenile court (75.6% of the African American youth arrested), 118,600 were detained (25.1% of the African American youth referred), 306,000 were formally petitioned (64.7% of the African American youth referred), 2,500 were waived to criminal court (0.8% of the African American youth petitioned), 179,000 were adjudicated delinquent (58.5% of the African American youth petitioned), and 47,500 were placed in secure facilities (26.5% of the African American youth adjudicated delinquent). *Id.* A comparison of the percentages at each decision point yields the DMC RRI for that stage: 1.9 at arrest, 1.1 at referral, 1.4 at detention, 1.2 at petitioning, 1.1 at waiver, 0.8 at adjudication, and 1.2 at placement. Put another way, the national DMC RRIs for 2002 indicate that African American youth were 1.9 times as likely to be arrested, 1.1 times as likely to be referred to juvenile court, 1.4 times as likely to be detained, 1.2 times as likely to be formally petitioned, 1.1 times as likely to be waived to adult court, 0.8 times as likely to be adjudicated delinquent, and 1.2 times as likely to be placed in a secure facility as white youth. *Id.*

132. See, e.g., POE-YAMAGATA & JONES, *supra* note 19, at 4.

... slightly more violent crime” than white youth, and they commit “about the same amount of property crime, and *less* drug crime than white youth.”¹³³ However, “in no category can the marginal differences in white and African American behavior explain the huge disparity in arrest or incarceration rates.”¹³⁴ Thus, even accepting that differential offending may have some effect on DMC, the statistical differences between the offending patterns of white youth and minority youth are simply not great enough to account for the statistical disparities observed at any of the processing points in the juvenile justice system.¹³⁵ It has become increasingly obvious that certain characteristics of the system itself contribute to the problem of DMC.

Studies over the past thirty years, which have become increasingly sophisticated, demonstrate the strong likelihood that in many jurisdictions race plays an impermissible role in how children are treated in the juvenile courts.¹³⁶ In 1990, in what is now considered a path-breaking meta-analysis, researchers Carl Pope and William Feyerherm concluded that, of the forty-six studies conducted between 1969 and 1989 regarding the relationship between race and processing in juvenile justice systems around the country, two-thirds found that race negatively affected outcomes for youth of color.¹³⁷ In 2002, Pope repeated this analysis, this time focusing on studies completed between 1989 and 2001.¹³⁸ Of the thirty-four studies reviewed, 80% of which employed multivariate analytic approaches, twenty-five reported “race effects” in the processing of youth, which resulted in poorer outcomes for youth of color; nine were inconclusive; and one

133. HOYTT, SCHIRALDI, SMITH & ZIEDENBERG, *supra* note 21, at 19–21 (noting that African American youth are arrested at twice the rate of white youth for drug offenses and 2.5 times the rate of white youth for weapons offenses, even though white youth report substantially higher levels of drug use and commission of weapons crimes). One survey found African American and Latino/a youth ages twelve to seventeen self-reported higher rates of gang involvement, property theft over \$50, and serious assault than white youth ages twelve to seventeen, but fewer instances of vandalism, property theft less than \$50, drug sales, and firearm possession. See SNYDER & SICKMUND, *JUVENILE OFFENDERS AND VICTIMS: 2006*, *supra* note 23, at 70. Similarly, a National Institute on Drug Abuse survey of high school seniors found that white youth reported using heroin and cocaine at seven times the rate of African American youth, and a National Household Survey on Drug Abuse found that white youth ages twelve to seventeen reported selling drugs a third more frequently than African American youth. HOYTT, SCHIRALDI, SMITH & ZIEDENBERG, *supra* note 21, at 21. See also Podkopacz & Feld, *supra* note 20, at 104–05 (citing several sources for the proposition that minority youth are disproportionately involved in violent criminal activities).

134. HOYTT, SCHIRALDI, SMITH & ZIEDENBERG, *supra* note 21, at 19.

135. See *id.* at 20–22.

136. See, e.g., *DMC: 1969–1989 Review of Research*, *supra* note 19, at 327–35, 527–42 (discussing how two-thirds of the studies of state and local juvenile justice systems reported a “race effect” at some stage of the juvenile justice process that negatively affected outcomes for youth of color); *DMC: 1989–2001 REVIEW OF LITERATURE*, *supra* note 19, at 5 (stating twenty-five of thirty-four studies reviewed reported “race effects” in the processing of youth); Leiber, *supra* note 22, at 11–14, 26 app. D (showing thirty-two of forty-six studies conducted by forty different states reported “race effects” in case outcomes).

137. *DMC: 1969–1989 Review of Research*, *supra* note 19.

138. *DMC: 1989–2001 REVIEW OF LITERATURE*, *supra* note 19.

found no race effects.¹³⁹ Significantly, several of these studies have found that legal and social factors cannot by themselves account for the disparities observed in processing outcomes—in other words, *but for* the presence of race bias, overrepresentation would not exist to the same degree.¹⁴⁰

Despite ample evidence that race affects juvenile justice decision-making, however, studies attempting to document tangible evidence of *intentional* discrimination have been inconclusive.¹⁴¹ Instead, many researchers have concluded that the race effects observed are likely the product of unconscious bias or the use of decision-making criteria with strong racial correlates that differentially disadvantage minority youth.¹⁴² This theory is borne out in one study in

139. See *id.* at 5. One of the studies examined by Pope—a three-year quantitative analysis of official juvenile intake records obtained from Florida’s Department of Health and Human Services conducted by sociologists Donna Bishop and Charles Frazier—is illustrative. See Bishop & Frazier, *supra* note 84. From an examination of the delinquency processing records for nearly 140,000 Florida juveniles, Bishop and Frazier developed a profile of a “typical” juvenile processed through the Florida justice system between 1985 and 1987: a fifteen-year-old male referred for a misdemeanor against a person (such as simple battery), with a delinquency history consistent with one prior referral for a misdemeanor against property (such as criminal mischief). *Id.* at 403. They then calculated the predicted probability of a particular processing decision for white and non-white youth with the values of other relevant variables, such as seriousness of current offense, at their respective means. *Id.* According to the logistic regression results for formal processing outcomes, the probability that a “typical” white juvenile would be formally processed in juvenile court was 47%, while the probability that a non-white youth with the same characteristics would be processed was 54%. *Id.* The results at other decision points were similar: the probability that a “typical” white juvenile would be detained was 12%, compared with 16% for a “typical” non-white juvenile. *Id.* A typical white juvenile adjudicated delinquent had a 9% probability of being committed to a secure facility, compared to a 16% probability for a non-white juvenile. *Id.* at 404. “While the magnitude of the race effect varies from stage to stage,” Bishop and Frazier concluded, “there is a consistent pattern of unequal treatment.” *Id.*

140. See, e.g., Michael J. Leiber & Kristan C. Fox, *Race and the Impact of Detention on Juvenile Justice Decision Making*, 51 CRIME & DELINQ. 470, 490 (2005) (finding, in a multi-regression analysis of referrals made by an Iowa juvenile court between 1980 and 2000, that African American youth were more likely to receive the more severe outcome at detention, initial appearance, and adjudication, “even controlling for relevant legal and [social] criteria and legal representation”); DMC: 1969–1989 Review of Research, *supra* note 19, at 333 (finding that two-thirds of forty-six studies reviewed reported substantial differences in the processing of minority youth within many juvenile justice systems, which could not be attributed solely to the presence of legal characteristics or other factors); DMC: 1989–2001 REVIEW OF LITERATURE, *supra* note 19, at 5 (finding that a majority of the thirty-four studies reviewed reported either direct or indirect “race effects” in the processing of youth).

141. See Alan J. Tomkins, Andrew J. Slain, Marianne N. Hallihan & Cynthia E. Willis, *Subtle Discrimination in Juvenile Justice Decisionmaking: Social Scientific Perspectives and Explanations*, 29 CREIGHTON L. REV. 1619, 1632–34 (1996) (citing numerous studies that resulted in inconclusive outcomes regarding discrimination in the juvenile justice system).

142. See *id.* at 1634–35. See also Bishop & Frazier, *supra* note 84, at 412 (concluding that “institutional racism” rather than “intentional race discrimination” likely accounted for the “clear indications of race differentials in processing” observed in their Florida study); MICHAEL J. LEIBER, THE CONTEXTS OF JUVENILE JUSTICE DECISION MAKING: WHEN RACE MATTERS (2003) (finding that, in one Iowa juvenile court, a strong emphasis on *parens patriae* coupled with an influx of multiple minority groups into the area and perceptions that such minority groups do not abide by middle-class standards of dress, demeanor, marriage, and respect for authority led to different outcomes for minority youth and white youth).

particular. In an attempt to determine why African American youth in three Washington state counties were receiving harsher sentencing recommendations than white youth who were charged with the same crimes, sociologists George Bridges and Sara Steen conducted a comprehensive analysis of 233 narrative reports written by county probation officers.¹⁴³ After controlling for factors such as age, gender, and offense history, Bridges and Steen observed that the officers' written rationales for sentencing recommendations indicated that they were more likely to attribute the criminal behavior of minority youth to "internal forces," such as personal failure, inadequate moral character, and personality, while attributing the criminal behavior of white youth to "external forces," such as poor home life, lack of appropriate role models, and environment, even when the objective risk factors associated with the youth were similar.¹⁴⁴ The officers' interpretations of subjective factors, such as the youth's level of remorse or cooperativeness, Bridges and Steen found, ultimately led them to attribute the delinquent behavior of minority youth to factors which could only be changed through state intervention.¹⁴⁵ To illustrate their point, Bridges and Steen compared the manner in which one probation officer depicted two seventeen-year-old boys, Ed and Lou. Neither had a criminal history, and both were charged with first-degree robbery.¹⁴⁶ Ed, however, was African American, while Lou was white.

This robbery was very dangerous as Ed confronted the victim with a loaded shotgun. He pointed it at the victim and demanded money be placed in a paper bag. . . . There is an adult quality to this referral. In talking with Ed, what was evident was the relaxed and open way he discussed his lifestyle. There didn't seem to be any desire to change. There was no expression of remorse from the young man. There was no moral content to his comment.

. . .

Lou is the victim of a broken home. He is trying to be his own man, but . . . is seemingly easily misled and follows other delinquents against his better judgment. Lou is a tall emaciated little boy who is terrified by his present predicament. It appears that he is in need of drug/alcohol evaluation and treatment.¹⁴⁷

Similarly, in their study of processing decisions in the Florida juvenile justice system, Bishop and Frazier observed that "in delinquency cases, black fam-

143. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998).

144. *Id.* at 561-64.

145. *Id.* at 564-67.

146. *Id.* at 564.

147. *Id.*

ily systems generally tend to be perceived in a more negative light.”¹⁴⁸ As one juvenile court judge commented: “Inadequate family correlates with race and ethnicity. It makes sense to put delinquent kids from these circumstances in residential facilities.”¹⁴⁹

According to OJJDP, individual states report that racial stereotyping has impacts on decision-making in their juvenile justice systems. In its 2002 update on states’ compliance with the DMC Mandate, OJJDP reported that eighteen states “identified racial stereotyping and cultural insensitivity—both intentional and unintentional—on the part of the police and others in the juvenile justice system . . . as important factors contributing to higher arrest rates, higher charging rates, and higher rates of detention and confinement of minority youth.”¹⁵⁰

III.

EFFORTS TO REDUCE DMC IN THE JUVENILE JUSTICE SYSTEM

A. *The Enactment of the DMC Mandate*

On December 2, 2002, Jason “admitted” to the charge of trespassing. In exchange, the probation officer and assistant district attorney handling his case that day agreed to continue his case without a finding, a “cwof” in juvenile justice parlance, for six months. Most importantly, from Jason’s perspective, he wasn’t going back to lock-up.

The judge read aloud the conditions of Jason’s probation: obey local, state, and federal laws; report to your probation officer as directed; notify your probation officer immediately of a change of residence or employment; attend school without incident; comply with a daily curfew of 7:30 p.m.; complete six days of community service; obey the rules of the home; and stay away from 455 Washington Street in Roxbury.

“Is mom here to take him home?” the judge asked when he was finished.

“He’s DSS, Judge. His worker says he’s got a shelter bed tonight and will be going to a new placement tomorrow.”

“All right. Good luck, son.”

When Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDP) in 1974, its primary purposes were to remove juveniles from adult jails and lockups, to achieve sight and sound separation of juveniles from adults in jails, to remove status offenders who were merely in need of supervision from the system altogether, and to develop a monitoring system to assure compliance

148. Bishop & Frazier, *supra* note 84, at 409.

149. *Id.* at 409–10.

150. HEIDI M. HSIA, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DISPROPORTIONATE MINORITY CONFINEMENT 2002 UPDATE, at 12 (2002).

with the objectives.¹⁵¹ The legislation also established the Office of Juvenile Justice and Delinquency Prevention and directed it to dispense monetary grants to individual states and to monitor each state's compliance with the specific mandates.¹⁵²

In 1987, the National Coalition of State Juvenile Justice Advisory Groups issued a report entitled "An Act of Empowerment," which discussed the "special problem of the treatment of minorities and American Natives caught up in the juvenile justice system" and made recommendations for addressing the problem.¹⁵³ "Black, Hispanic and Native American youth are confined in jails and institutions in numbers which far exceed their relative proportions in the general population," the report lamented, statistics which "tell an ominous and tragic story about the juvenile justice system in America."¹⁵⁴ Armed with this and other recent reports addressing minority overrepresentation,¹⁵⁵ advocates lobbied Congress to amend the JJDP. One of the 1988 amendments to the JJDP, known as the "DMC Mandate," required states receiving funding from the Title II, Part B, Formula Grants Program¹⁵⁶ to investigate the problem of "disproportionate minority confinement" in secure facilities and to develop action plans to remedy the issues identified.¹⁵⁷ Specifically, if the proportion of a given group of minority youth detained or confined in its secure detention facilities, secure correctional facilities, jails, and lockups exceeded the proportion that group represented in the general population, the state in question was required to develop and implement plans to reduce the disproportionate representation.¹⁵⁸

In 1992, presented with a series of new reports demonstrating that race played a role in juvenile justice processing (including Pope and Feyerherm's 1990 report), Congress made the DMC Mandate a core requirement of the JJDP.¹⁵⁹ Under the 1992 language, states were required to: (1) identify the

151. Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, § 102, 88 Stat. 1110-11 (codified as amended at 42 U.S.C. § 5602 (2004)).

152. *Id.* § 204(a)-(j), 88 Stat. at 1112-13, (codified as amended at 42 U.S.C. § 5614 (2004)).

153. NAT'L COALITION OF STATE JUVENILE JUSTICE ADVISORY GROUPS, AN ACT OF EMPOWERMENT 3 (1987).

154. *Id.* at 3-4.

155. See, e.g., Barry Krisberg, Ira Schwartz, Gideon Fishman, Zvi Eisikovits, Edna Guttman & Karen Joe, *The Incarceration of Minority Youth*, 33 CRIME & DELINQ. 173 (1987).

156. The Formula Grants Program makes federal funds available to states "to support State and local programs that prevent juvenile involvement in delinquent behavior." 42 U.S.C. § 5602(1) (Supp. IV 2004). Under the Program, OJJDP determines the amount for which each state is eligible using a formula based on the state's juvenile population. 28 C.F.R. § 31.301(a) (2006). To be eligible for the program, a state must submit a comprehensive, three-year plan setting forth the state's proposal for meeting the mandates and goals outlined in the JJDP. 42 U.S.C. § 5633(a) (2000). The state's plan is amended annually to reflect new programming and initiatives to be undertaken by the state and local units of government. *Id.*

157. Pub. L. No. 100-690, § 7258, 102 Stat. at 4439-40 (codified as amended at 42 U.S.C. § 5633(a)(22) (2000)).

158. *Id.*

159. Pub. L. No. 102-586, § 2(f)(3)(A)(ii), 106 Stat. 4982, 4993-94 (codified as amended at 42 U.S.C. § 5633(a)(22) (Supp. IV 2004)).

extent to which DMC exists, (2) assess the reasons for its existence, and (3) develop intervention strategies to address the causes of DMC.¹⁶⁰ If states could not “demonstrate a good faith effort to address DMC issues,” they risked losing 25% of their federal juvenile justice funding; the remaining 75% was then to be used to move them back into compliance.¹⁶¹

In 2002, Congress again amended the JJDPa to require that states participating in the Formula Grants Program “address juvenile delinquency prevention efforts and system improvement efforts designed to reduce, without establishing or requiring numerical standards or quotas, the disproportionate number of juvenile members of minority groups, who come into *contact* with the juvenile justice system.”¹⁶² This change broadened the concept of DMC from disproportionate minority “confinement” to disproportionate minority “contact” by requiring an examination of possible disproportionate representation of minority youth at all decision points along the juvenile justice system continuum. However, while Congress expanded the reach of the Mandate, it also relaxed its penalty provisions. Instead of losing 25% and putting the remaining 75% toward compliance, states would now lose just 20% and use 50% toward compliance.¹⁶³

B. *The Limited Impact of the DMC Mandate*

Jason was back in court six weeks later for violating his curfew and failing to “obey the rules of the home.” In mid-December, Jason had moved into his biological mother’s studio apartment in Roxbury. While their first week of cohabitation had been relatively uneventful, things had deteriorated rapidly since. During their most recent argument, his mother told him she wanted him out, and he believed her. When he didn’t return the next day, Jason’s mother called his probation officer, and a warrant issued for his arrest. He was picked up two days later.

A third visit to the BJC meant a third lawyer. After interviewing Jason, his lawyer pulled aside his supervising probation officer. By any measure, the probation officer was a veteran. He had spent more than a decade supervising adults before requesting a transfer to juvenile court five years earlier. He prided himself on being able to “read a kid” right away and “cut through the bullshit.” He had Jason figured out, he told Jason’s lawyer.

“Jason uses his past to try to get over,” he explained. “The stuff about foster care, the stuff with his mother, he knows that’s going to get him sympathy and he plays on it. It’s how he operates. He’s playing you right now.”

Jason’s lawyer didn’t bother to ask the probation officer what he was going to recommend at Jason’s probation violation arraignment later that morning.

160. *Id.*

161. *Id.*

162. Pub. L. No. 107-273, § 12209(1)(P), 116 Stat. 1873, 1878 (codified as amended at 42 U.S.C. § 5633(a)(22) (2004)) (emphasis added).

163. 116 Stat. at 1879.

While the DMC Mandate has played an important role in sensitizing states to the issues of minority overrepresentation and systemic bias,¹⁶⁴ its overall impact has been disappointing. Perhaps the most obvious indicator of this fact is that, nearly twenty years after the Mandate was enacted, national DMC rates have increased or remained stagnant overall. In its 2006 compilation of national juvenile justice information and statistics, OJJDP concludes that “the racial profile of delinquency cases overall was essentially the same in 1985 and 2002.”¹⁶⁵ However, the report then goes on to state that, while the delinquency case rate for white juveniles had an overall increase of 15% during this period, the delinquency case rate for African American juveniles had an overall increase of 27%.¹⁶⁶ In 2002, “the delinquency case rate for blacks was more than twice the rate for whites and just over three times the rate for youth of other races,” OJJDP confirms.¹⁶⁷ Similarly, while the detention rate for white juveniles had an overall increase of 32% between 1985 and 2002, the detention rate for African American youth had an overall increase of 64%.¹⁶⁸ What is most notable about these disparities is that they occurred during a period of overall decline in the rate of violent crime committed by juveniles of color. In 2002, the national Violent Crime Index arrest rate for white youth was roughly the same as it was in 1988.¹⁶⁹ The national Violent Crime Index arrest rate for African American youth, however, had dropped 35%, the rate for Asian youth had dropped 23%, and the rate for Native American youth had dropped 16%.¹⁷⁰

Blame for the relative ineffectiveness of the DMC Mandate can be assigned at every level. During the last decade, even as study after study concluded that DMC rates had not declined since the enactment of the Mandate, Congressional support has waned. The most radical ebb occurred in the mid-1990s when the Senate Judiciary Committee considered enacting the Violent and Repeat Juvenile Offender Act of 1997.¹⁷¹ The bill proposed multiple “get tough” measures for juvenile offenders, including a provision that lowered the minimum age for trial of capital offenses from eighteen to sixteen and a provision that would have repealed the DMC Mandate.¹⁷² The 1997 bill was never put to a vote, but the shootings at Columbine High School gave the proposal new life in 1999. The proposed Consequences for Juvenile Offenders Act of 1999 again included multiple measures to make it easier for prosecutors to try children as adults and, like

164. See Leiber, *supra* note 22, at 14.

165. SNYDER & SICKMUND, *JUVENILE OFFENDERS AND VICTIMS: 2006*, *supra* note 23, at 163.

166. *Id.* The discrepancy between these two figures might be even greater if Latino/a youth were disaggregated from white youth.

167. *Id.*

168. *Id.* at 169.

169. *Id.* at 132. The rate had seen large increases in the interim.

170. *Id.* The arrest rates for all groups increased in the mid-1990s but decreased sharply over a period of a few years.

171. S. 10, 105th Cong. (1997).

172. *Id.* §§ 103, 305.

its predecessor, sought to repeal the DMC Mandate.¹⁷³ In the summer of 1999, the bill passed in both the House and Senate.¹⁷⁴ Though it subsequently died in conference, it failed only because of an attached provision strengthening firearm laws.¹⁷⁵ In the end, while Congress was willing to abandon its commitment to the philosophy of diminished capacity and the goal of achieving racial equality in the justice system in order to get “tough on crime,” it was not willing to adopt laws that would make it more difficult for juveniles to obtain firearms.

More directly responsible for the Mandate’s limited effectiveness, however, has been OJJDP’s lack of consistent oversight. In the most recent DMC Technical Assistance Manual, published by OJJDP to assist states in their efforts to implement DMC-related programs, OJJDP reaffirms its duty to “diligently enforce this core requirement by setting uniform standards in its annual determination of states’ DMC compliance status and unfailingly administering the consequences of noncompliance as the JJDP Act specifies: i.e., by restricting the drawdown of 20 percent of that state’s Formula Grant allocation in the subsequent year.”¹⁷⁶ Since 1992, however, OJJDP has penalized states for non-compliance just three times—twice in 2004 and once in 2005.¹⁷⁷ As a result, compliance in many states has been poor. As of 2002, fourteen years after the DMC Mandate was enacted, eighteen states had yet to identify the factors contributing to DMC in their communities.¹⁷⁸ Moreover, according to OJJDP, those states that had taken steps to address DMC had invested almost exclusively in programs aimed at preventing minority delinquency, rather than initiatives to address the systemic issues contributing to DMC.¹⁷⁹

173. H.R. 1501, 106th Cong. (1999).

174. 145 CONG. REC. H4476–H4573 (daily ed. June 17, 1999); 145 CONG. REC. S9450–59 (daily ed. July 28, 1999).

175. JoAnne O’Byrant, Edith Fairman Cooper & David Teasley, *Juvenile Justice: Legislative Activity and Funding Trends for Selected Programs*, in *JUVENILE CRIME: CURRENT ISSUES AND BACKGROUND* (Lawrence V. Moore ed., 2000).

176. U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *DISPROPORTIONATE MINORITY CONFINEMENT TECHNICAL ASSISTANCE MANUAL*, at Intro-2 to Intro-3 (3d ed. 2006), available at http://www.ncjrs.gov/html/ojjdp/dmc_ta_manual/dmcfull.pdf.

177. *Id.* at 6-2. OJJDP’s “judicious approach to implementation of DMC . . . appears to follow the ‘spirit’ of the mandate and attempts to make inroads—‘to get something done’ rather than accomplishing ‘nothing at all,’” University of Iowa Professor Michael Leiber has observed. Leiber, *supra* note 22, at 16. “While the strategy may be a reasonable and wise response to the political and economic realities of the implementation of legislation, it has come at the cost of providing specific instruction, consistency in the determination of compliance, and an accurate picture of DMC and its causes.” *Id.*

178. HSIA, *supra* note 150, at 16. Until recently, two states, Maine and Vermont, were exempt from the DMC requirement because their minority juvenile population did not exceed one percent of the total state juvenile population, and South Dakota and Wyoming opted not to participate in the federal grant program. *Id.* at 11.

179. *Id.* at 17. OJJDP’s assistance to states in their efforts to comply with the DMC Mandate has plainly improved during the last few years. See Leiber, *supra* note 22, at 18. For example, OJJDP has begun to provide more specific instruction to state juvenile justice advisory groups through national and regional training conferences, technical assistance manuals, compliance

As of 2002, fifty-five states and territories receive Formula Grant funding through the JJDPA.¹⁸⁰ Though the quality of the data varied considerably from state to state, a 2002 overview of data produced by forty-three states pursuant to the "Identification Stage" of compliance indicated that minority youth were overrepresented at every decision point in every state's juvenile justice system.¹⁸¹ Significantly, thirty-two of the studies found evidence of "race differences" in juvenile justice outcomes "that are not totally accounted for by differential involvement in crime."¹⁸² Despite these findings, many states continue to insist that DMC is the product of differential offending alone.¹⁸³ They have also "exerted constant pressure on Congress to not include DMC in the reauthorization of the [JJDPA] or, at a minimum, to 'water down' the DMC requirement."¹⁸⁴

Massachusetts is one such state. In 2003, the American Civil Liberties Union issued a report entitled "Disproportionate Minority Confinement in Massachusetts: Failures in Assessing and Addressing the Overrepresentation of Minorities in the Massachusetts Juvenile Justice System" (the "ACLU Report"), which concluded that, while the state had known for a decade that youth of color were overrepresented at every decision-making point in its juvenile justice system, Massachusetts had "taken no meaningful steps to address racial disparities."¹⁸⁵ According to the report, the state's juvenile justice advisory committee (JJAC) had either failed or outright refused to comply with the Mandate, by, among other things: filling nearly two-thirds of its seats with government employees; holding infrequent and closed meetings; relying on incomplete, erroneous, and, in one case, inapposite data regarding the existence and causes of DMC; and failing to heed advice from DMC Intensive Technical Assistance trainers.¹⁸⁶ In spite of this, however, the state had continued to receive federal funds through the JJDPA.¹⁸⁷ In fact, according to the report, "OJJDP audits repeatedly have found Massachusetts to be in compliance" with the DMC Mandate, even though "almost none of the millions of federal dollars received by the Commonwealth for youth-related programs (including juvenile delinquency efforts) has been allocated to minority overrepresentation."¹⁸⁸ Thus, fifteen years after the DMC Mandate was enacted and eleven years after it became a core re-

checklists, and intensive, individualized technical assistance. *Id.* at 18–19.

180. Leiber, *supra* note 22, at 8.

181. *Id.* at 9–10.

182. *Id.* at 11.

183. *Id.* at 16.

184. *Id.*

185. DAHLBERG, *supra* note 28, at 1.

186. *Id.* at 5–13.

187. *Id.* at 12.

188. *Id.* at 1–2.

quirement, Massachusetts had effectively done little to nothing to address DMC in its juvenile justice system.¹⁸⁹

All of this is not to say that the DMC reduction measures laid out in the Mandate cannot work.¹⁹⁰ In fact, what is most frustrating about the Massachusetts example is that several other localities have demonstrated that these measures can work. Multnomah County, Oregon, and Santa Cruz County, California, for example, have seen DMC rates drop significantly since the enactment of the DMC Mandate, through a combination of research, diversification of staff, outreach to families and community organizations, implementation of objective decision-making tools, and development of new community-based alternatives to detention.¹⁹¹ The problem is simply that, except in a handful of places, there appears to be little political urgency to implement them.

The relative ineffectiveness of race-conscious accountability legislation like the DMC Mandate may be an inevitable consequence of relying on political

189. Since the publication of the ACLU Report, however, the Executive Office of Public Safety, along with a number of local advocates, has participated in a strategic campaign to address the Commonwealth's DMC problem. See Lael E.H. Chester, *The Power of Paper: The Impact of the ACLU's Report on the Overrepresentation of Minorities in Massachusetts' Juvenile Justice System*, in BUILDING BLOCKS FOR YOUTH, NO TURNING BACK: PROMISING APPROACHES TO REDUCING RACIAL AND ETHNIC DISPARITIES AFFECTING YOUTH OF COLOR IN THE JUSTICE SYSTEM 22, 27–30 (2005) (discussing the origins of the ACLU report and the efforts of local advocates to spur the state into action). The JJAC has been almost entirely reconfigured with diverse and qualified members, and the committee has made DMC reduction a “focus and priority of its work.” *Id.* at 29. Among other things, the JJAC has begun to hold regular juvenile justice detention forums around the state, which are designed to provide an opportunity for juvenile justice stakeholders (including juvenile court judges, juvenile probation officers, juvenile public defenders/bar advocates, assistant district attorneys, mental health clinicians, human service providers, advocates, police, and state youth service agencies) to discuss strategies to reduce the use of pre-adjudication detention and the overrepresentation of minority youth in the Massachusetts juvenile justice system generally. *Id.*

190. Nor is it to suggest that no one has taken a national leadership role in the fight against DMC. In the late 1990s, the Youth Law Center, in collaboration with a coalition of organizations, including the Communications Consortium Media Center, the Juvenile Law Center, Pretrial Services Resource Center, the National Council on Crime and Delinquency, the Center on Juvenile & Criminal Justice, Minorities in Law Enforcement, and the Center for Third World Organizing, developed an initiative to “protect minority youth in the justice system” and “promote fair, rational and effective juvenile justice policies.” Called “Building Blocks for Youth,” the initiative combines research on the impact of adult-court transfer legislation in the states; assessment of the legal and policy issues in privatization of juvenile justice facilities by for-profit corporations; analyses of decision-making at critical points in the justice system; direct advocacy on behalf of minority youth in the system, particularly with respect to conditions of confinement and effective legal representation; constituency-building among African American and other minority organizations, as well as religious, health, mental health, law enforcement, corrections, and business organizations at the national, state, and local levels; and development of effective communications strategies to provide timely and pertinent information to these constituencies. Building Blocks for Youth, <http://www.buildingblocksforyouth.org>. The Annie E. Casey Foundation has also made DMC reduction a priority, launching a multi-year initiative—Juvenile Detention Alternatives Initiative (JDAI)—to cultivate alternatives to the use of detention in juvenile justice systems around the country. See The Annie E. Casey Foundation, <http://www.aecf.org>.

191. See Eric Lotke & Vincent Schiraldi, *The Juvenile Detention Alternatives Initiative: The Santa Cruz and Portland Models*, in NO TURNING BACK, *supra* note 189, at 8, 9–15.

processes to remedy a problem that afflicts a traditionally disfavored minority.¹⁹² This hypothesis finds support in a 2002 analysis of the history of the DMC Mandate offered by University of Iowa Professor Michael Leiber, who notes that OJJDP has the unenviable task of pushing for change in a political environment where there are countervailing political pressures.¹⁹³ “[T]he politics of race, crime, and racial bias, coupled with state resistance and practical considerations, led OJJDP to adopt a tentative approach to DMC,” Leiber observes.¹⁹⁴ Professing agnosticism, as OJJDP seems to have done, or finessing the issue by delay or obfuscation undoubtedly provides some political and legal cover. Since the very purpose of the DMC Mandate is to root out and eradicate institutional discrimination against minorities, it may very well be that apolitical or counter-majoritarian institutions, of which courts are the obvious example, are more appropriate guardians of the interests at stake.¹⁹⁵

IV.

BRINGING AN EQUAL PROTECTION CHALLENGE TO THE DISPROPORTIONATE PRETRIAL DETENTION OF CHILDREN OF COLOR

A. *The McCleskey Hurdle*

Jason returned to Metro Youth Services, but this time for just a week. The judge had agreed to a “short date” for Jason’s probation violation hearing with the understanding that Jason’s lawyer would be prepared to address both the merits of the alleged violations and disposition.

Jason’s lawyer met with him in detention. He was subdued, but more forthcoming than he had been in court. He wasn’t sure what to do about his mother. “I barely even know her,” he reminded the lawyer. If it would help get him released, however, he would agree to try family counseling. As his lawyer stood up from the table, Jason stopped her. “It’s not like I’m trying to be committed, you know. But it’s like, if that’s what you all got planned anyway, just get it over with.”

192. The problems with the implementation of the DMC Mandate may be analogous to the difficulties disfavored minorities have protecting their rights in a democratic legislative process. See COLE, *supra* note 31, at 139; Lawrence, *supra* note 38, at 347 (noting that groups in the “body politic” may avoid coalition with blacks without a “conscious awareness of their aversion to blacks”).

193. Leiber, *supra* note 22, at 14–15. “The topic of race and, in particular, race bias generates much controversy,” Leiber writes, “especially when many people still think of discrimination only in terms of overt, blatant acts such as the Rodney King and Malice Green incidents.” *Id.* at 15.

194. *Id.* at 19.

195. “The Court, an undemocratic institution at the heart of a democracy, is at its most legitimate where it counteracts defects in the majoritarian process,” observes Cole. COLE, *supra* note 31, at 139 (citing ELY, DEMOCRACY AND DISTRUST, *supra* note 31).

The Fourteenth Amendment prohibits a state from taking action that would “deny to any person within its jurisdiction equal protection of the laws.”¹⁹⁶ Historically, this guarantee has applied equally to the enactment of laws by the legislative branches¹⁹⁷ and the enforcement of those laws by members of the executive branches.¹⁹⁸ In *Yick Wo v. Hopkins*, for example, evidence that municipal authorities had systemically denied laundry operating permits to Chinese applicants was sufficient to demonstrate a violation of the Equal Protection Clause. The Court said:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.¹⁹⁹

Whether driven by pragmatic, ideological, or perhaps even political concerns about the potential reach of this rationale, the Supreme Court has over the last thirty years taken pains to isolate *Yick Wo* as a response to an especially severe example of disparate impact. The Court has promulgated standards that have significantly limited the ability of petitioners to bring statistically based equal protection claims as a means of redressing systemic discrimination, by requiring proof that individual decision-makers *intended* to discriminate against the named claimant. In doing so, the Court has largely confined effects-based analysis to cases brought under statutory mandates, such as Title VII of the Civil Rights Act and the Voting Rights Act.²⁰⁰

The “intent” doctrine, as it has come to be known, was first articulated by the Supreme Court in 1976 in *Washington v. Davis*.²⁰¹ There, several black officers charged that the hiring and promotion policies used by the District of Columbia’s police department discriminated against them in violation of the equal protection component of the Fifth Amendment.²⁰² Specifically, they argued that a written test developed by the Civil Service Commission and used by the

196. U.S. CONST. amend. XIV, § 1.

197. See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

198. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

199. *Id.* at 373–74.

200. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (citing Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000(e) (1991), and finding that employment qualification criteria that disqualify black applicants at a substantially higher rate than white applicants and that do not have a demonstrable relationship to successful job performance are violative of Title VII, without the need to establish discriminatory motive); *Bush v. Vera*, 517 U.S. 952 (1996) (citing Voting Rights Act of 1965, 42 U.S.C. § 1973 (1982), and finding that interlocking congressional districts with majority African American and Latino populations formed in disregard of traditional redistricting criteria and with shapes that were unexplainable on any ground other than race violated the Voting Rights Act).

201. *Washington v. Davis*, 426 U.S. 229 (1976).

202. *Id.* at 232–33.

department to measure verbal ability and reading comprehension had a disproportionately adverse impact on African American applicants.²⁰³

In its opinion, the *Davis* majority announced, for the first time, that the “racially differential impact” standard for adjudicating claims of invidious racial discrimination was “not the constitutional rule.”²⁰⁴ To demonstrate an equal protection violation, the Court held, claimants would have to show not only a disparate impact but also a discriminatory purpose—something the *Davis* plaintiffs had not done.²⁰⁵ The Court’s opinion was plainly animated by its concern that, once unleashed, an effects-based analysis of executive branch decision-making would be hard to confine. Writing for the majority, Justice Stewart warned:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.²⁰⁶

One year later, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, Justice Powell applied the rationale of *Washington v. Davis*—that is, that the adverse racial impact of executive action alone is not enough to establish the requisite intent to prove a constitutional violation—to reverse a finding that a zoning change that effectively blocked the construction of integrated housing violated the Equal Protection Clause.²⁰⁷ Perhaps recognizing the *Davis* Court’s failure to delineate *how* a petitioner could demonstrate the requisite intent, the Court articulated for the first time what type of circumstantial evidence would be sufficient to prove a discriminatory purpose.²⁰⁸ A plaintiff alleging unconstitutional discrimination need not prove that the government’s action rested “solely,” or even “primarily” or “dominantly” on racially discriminatory purposes, the Court explained; she must simply show that race had been a “motivating factor in the decision.”²⁰⁹ Disproportionate impact, while not dispositive, could provide an important starting point if supplemented by other objective evidence.²¹⁰ This evidence included the historical background of the decision, the specific series of events leading up to the challenged action, departures from the normal procedural sequence and substantive policies

203. *Id.* at 234–35.

204. *Id.* at 239.

205. *Id.* at 238–41.

206. *Id.* at 248.

207. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

208. *Id.* at 265–68.

209. *Id.* at 265–66.

210. *Id.*

generally followed by the decision-maker, and the legislative and administrative history of the action.²¹¹ Justice Powell was also careful to distinguish *Yick Wo* and other cases where, he noted, the racial impact of the decision in question was particularly “stark” or pronounced.²¹²

While they did not address decision-making in the criminal justice context, *Davis* and cases adopting its rationale laid the doctrinal foundation for what has been called the most important decision on race and crime ever issued by the Court.²¹³ In 1978, Warren McCleskey was sentenced to death for killing a white police officer during an armed robbery.²¹⁴ In support of his subsequent petition for habeas corpus relief, McCleskey presented what remains one of the most comprehensive statistical analyses ever conducted on the impact of race on capital sentencing. The so-called Baldus study, a highly sophisticated multiple regression analysis of more than 2000 murder cases disposed of in the state of Georgia between 1973 and 1979, concluded that prosecutors were more likely to seek the death penalty and juries were more likely to impose the death penalty when black defendants were convicted of killing white victims.²¹⁵

Relying on the Baldus study, McCleskey argued that, because defendants who were convicted of killing white victims were substantially more likely to receive the death penalty than defendants convicted of killing black victims, Georgia’s capital sentencing system was administered in a racially discriminatory manner in violation of the Equal Protection Clause of the Fourteenth Amendment.²¹⁶ He argued that the Baldus study’s findings compelled an inference that his own death sentence was the product of racial discrimination.²¹⁷

The Court rejected McCleskey’s challenge by a five-to-four margin. Writing for the majority, Justice Powell, who joined in the opinion of the court in *Washington v. Davis* and authored the *Arlington Heights* opinion, offered multiple justifications for his ruling. First, he quickly considered and dismissed McCleskey’s argument that the Baldus study constituted proof that racial discrimination had played a role in *his* sentence.²¹⁸ Whether or not other juries had sentenced defendants to death more often for killing white victims than black victims did not prove the jury in McCleskey’s case had discriminated against him on the basis of race, Justice Powell explained.²¹⁹ Such proof would require

211. *Id.* at 267–68.

212. *Id.* at 266.

213. See COLE, *supra* note 31, at 137.

214. *McCleskey v. Kemp*, 481 U.S. 279, 279 (1987).

215. *Id.* at 286–87.

216. *Id.* at 292–93. McCleskey also argued that the Baldus study demonstrated a constitutionally impermissible *risk* that race had played a role in his death sentence in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment. *Id.* at 308.

217. *Id.* at 292–93.

218. *Id.*

219. *Id.* at 292–97.

direct evidence that either the prosecutor or jury in *McCleskey's* case was motivated by racial bias—evidence that Justice Powell believed was lacking.²²⁰

Acknowledging that the Court had accepted statistics as proof of intent to discriminate “in certain limited contexts,” Justice Powell concluded that the Baldus study was nonetheless “clearly insufficient to support an inference that any of the decision-makers in *McCleskey's* case acted with discriminatory purpose.”²²¹ While he did not dispute the validity of the study, Justice Powell explained that “the nature of the capital sentencing decision, and the relationship of the [Baldus] statistics to that decision” precluded the Court from adopting an inference that its findings could be applied to a single case.²²²

He then went on to identify three “fundamental differen[ces]” between the capital sentencing decision and the administrative decisions at issue in the two areas where the Court had inferred intentional discrimination from statistical evidence of disparate impact: jury venire cases brought under the Fourteenth Amendment and employment cases brought under Title VII of the Civil Rights Act.²²³ First, Justice Powell explained, the application of statistics to a capital sentencing decision is incomparable to the application of statistics to either a jury venire or employment decision because a capital sentencing decision is made by a petit jury that is selected from a “properly constituted venire,” “unique in its composition,” and required under the Constitution to consider “innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense.”²²⁴ In the jury venire and employment contexts, on the other hand, impact-oriented statistics reflect the decisions of “fewer entities” and “few variables are relevant to the challenged decision.”²²⁵ In effect, because jury venire and employment decisions were made by repeat actors, he reasoned, “an unexplained statistical discrepancy can

220. *Id.* Professor David Cole expands on the irony of this standard in *No Equal Justice*. COLE, *supra* note 31, at 135. Because criminal defendants are essentially barred from obtaining discovery from either prosecutors or juries, they are effectively “precluded from discovering evidence of intent from the two actors whose discriminatory intent the *McCleskey* Court required them to establish,” Cole remarks. *Id.*

221. *McCleskey*, 481 U.S. at 293, 297.

222. *Id.* at 294.

223. *Id.* at 293–97 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n.13 (1977)) (“[B]ecause of the nature of the jury-selection task . . . we have permitted a finding of constitutional violation even when the statistical pattern [of discrimination] does not approach such extremes”); *Castaneda v. Partida*, 430 U.S. 482, 495 (1977) (holding that a two-to-one disparity between the numbers of Mexican Americans in county population and those summoned for grand jury duty was sufficient to prove an equal protection violation in the absence of any rebuttal); and *Bazemore v. Friday*, 478 U.S. 385, 400–01 (1986) (Brennan, J., concurring) (holding that multiple regression analysis demonstrating a pattern of salary disparities between white and African American workers can be sufficient to prove statutory violations under Title VII).

224. *McCleskey*, 481 U.S. at 294.

225. *Id.* at 295.

be said to indicate a consistent policy of the decisionmaker.”²²⁶ Conversely, the Baldus study “seeks to deduce a state ‘policy’ by studying the combined effects of the decisions of hundreds of juries that are unique in their composition.”²²⁷

Second, Justice Powell explained, unlike the criteria considered by jury commissioners, which are “uniform for all potential jurors . . . limited and, to a great degree, objectively verifiable,” and employers, which involve a “number of relevant variables. . . [but] are to a great extent uniform for all employees,” a capital sentencing jury “may consider *any* factor relevant to the defendant’s background, character, and the offense.”²²⁸ And third, while the decision-makers in the jury venire and employment contexts have “an opportunity to explain the statistical disparity” in question, “the State has no practical opportunity to rebut the Baldus study.”²²⁹ As a practical matter, the burden-shifting framework simply would not work in the capital sentencing context, because the state could not possibly know “the motives and influences that led to [the jury’s] verdict.”²³⁰ In other words, Justice Powell asked, how could the state be expected to reconstruct and defend a decision-making process to which it was not even a party?

Justice Powell then cited four pragmatic justifications for his decision. First, he reasoned, McCleskey’s constitutional challenge to decision-making in the capital sentencing system was “antithetical to the fundamental role of discretion” in the criminal justice system.²³¹ To uphold McCleskey’s challenge, Justice Powell implied, would be tantamount to stripping both prosecutors and juries of their ability to administer individualized justice.²³² Second, he reasoned, there are statutory safeguards against the abuse of discretion in the sentencing process. Seemingly without irony, Justice Powell cited to the revamping of Georgia’s capital sentencing laws in the wake of *Furman v. Georgia*²³³ as evidence of these safeguards, without ever acknowledging that the Baldus study had shown these prophylactic measures to be less than effective.²³⁴ Justice Powell’s third justification is what Justice Brennan in dissent labeled the “fear of too much justice.”²³⁵ If the Court were to uphold McCleskey’s challenge, Justice Powell cautioned, it would open the proverbial floodgates to a host of other claims and claimants.²³⁶ Justice Powell seemed to think that the criminal justice

226. *Id.* at 295 n.15.

227. *Id.*

228. *Id.* at 295 n.14.

229. *Id.* at 296.

230. *Id.* (quoting *McDonald v. Pless*, 238 U.S. 264, 267 (1915)).

231. *Id.* at 311.

232. *Id.* at 311–12.

233. *Furman v. Georgia*, 408 U.S. 238 (1972).

234. *McCleskey*, 481 U.S. at 302–03.

235. *See id.* at 339 (Brennan, J., dissenting).

236. *Id.* at 314–18.

system simply could not withstand such an onslaught.²³⁷ In essence, he was resurrecting Justice Stewart's rationale in *Washington v. Davis* that a wholesale statistical examination of the racial consequences of applying seemingly neutral statutory criteria to entire cohorts might threaten a wide variety of executive and legislative practices. Finally, Justice Powell reasoned, the problem of remedying the racial disparities evidenced by the Baldus study was one better left to the legislature.²³⁸ "It is the legislatures, the elected representatives of the people, that are 'constituted to respond to the will and consequently the moral values of the people.'"²³⁹

It is indisputable that *McCleskey* raises a serious hurdle to anyone challenging systemic discrimination in the criminal justice system on statistical grounds. Since 1987, federal and states courts have relied on the stringent standard of proof reaffirmed in *McCleskey* to protect a variety of institutional practices in the criminal justice context that have had an undeniable and foreseeable impact on people of color.²⁴⁰ The result has been that, except in the extremely rare case in which a government actor admits that he or she was motivated by race, successful equal protection challenges to discretionary decisions in the criminal justice arena are practically non-existent.

B. *Why Juvenile Claimants Can Overcome the McCleskey Hurdle*

At Jason's January 23, 2003, probation violation hearing, his probation officer summarized his recommendation in a single sentence: "Jason's just not probation material."

Jason's lawyer then addressed the court. How could the probation department effectively write Jason off after just six weeks of supervision? He was living with his mother for the first time in fourteen years—there was bound to be a transition period. And Jason was doing relatively well with his other conditions. "Maybe it's not that Jason isn't probation material," his lawyer concluded,

237. *See id.*

238. *Id.* at 319.

239. *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)).

240. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 470 (1996) (finding that statistical evidence showing defendants prosecuted on crack cocaine charges in federal court during a three-year period were overwhelmingly African American was insufficient to demonstrate a basis for discovery since defendants failed to identify any similarly situated white defendants who had been prosecuted under the more lenient state court standard); *Hernandez v. New York*, 500 U.S. 352, 362 (1991) (holding that defendant failed to prove purposeful discrimination despite evidence that prosecutorial categories for juror removal (i.e., the likelihood that jurors would defer to an official translation of Spanish-language testimony), necessarily led to the disproportionate removal of Latino jurors); *United States v. Richardson*, 130 F.3d 765, 781 (7th Cir. 1997) (finding that statistical disparities in sentencing are not sufficient to prove that Congress or the United States Sentencing Commission adopted disparate crack/cocaine sentencing guidelines for the purpose of harming African Americans); *United States v. Andrade*, 94 F.3d 9, 15 (1st Cir. 1996) (same); *Stevens v. State*, 456 S.E.2d 560, 562 (Ga. 1995) (holding that statistical disparities in Georgia prosecutors' invocation of "Two Strikes and You're Out" law were not sufficient to establish threshold case of discrimination).

“maybe it’s that we are placing expectations on Jason that are simply not realistic.”

“I wouldn’t call requiring a young man to be respectful of his mother ‘unrealistic,’” the judge responded, leaning back in his chair, “but I understand where you’re going, counsel. Let’s do this. If he agrees to participate in family counseling, and mom wants to take him home, we’ll let him go. But I’m going to extend his probation another six months. It’s clear to me that he needs more, not less, supervision.”

McCleskey has been roundly criticized as legally flawed and, in at least one instance, “morally reprehensible.”²⁴¹ For an equal protection challenge to the discriminatory pretrial detention of youth of color in the juvenile justice system to succeed,²⁴² however, *McCleskey* need not be frontally attacked. In fact, a careful parsing of Justice Powell’s reasoning in *McCleskey* suggests that the case may actually be helpful to potential juvenile claimants. For several reasons, which are discussed in detail below, the nature of juvenile detention decisions in many jurisdictions places them squarely within the contours of the type of administrative decisions for which, according to Justice Powell, evidence of disparate impact alone may be sufficient to create an inference of discriminatory intent.

As Justice Powell acknowledged in *McCleskey*, the Supreme Court has historically accepted statistical proof of discriminatory intent in certain contexts. The most apposite of these for the purpose of assessing the viability of a discriminatory pretrial detention claim is the jury venire selection process at issue in *Castaneda v. Partida*,²⁴³ a case decided by the Court just months after

241. See, e.g., *The Supreme Court, 1986 Term-Leading Cases*, 101 HARV. L. REV. 119, 158 (1987).

242. To date, there have been few reported challenges to the discriminatory processing of youth in the juvenile justice arena. One of the few reported decisions involving such a challenge is *State v. Green*, 502 S.E.2d 819, 827 (N.C. 1998). In that case, the claimant alleged that North Carolina’s adult court transfer statute violated the federal and state Equal Protection Clauses because it “operated to transfer disproportionate numbers of black juvenile offenders to the superior court.” *Id.* at 602. However, while the claimant “present[ed] statistics showing that a significant portion of the juveniles transferred to superior court [were] black,” he failed to argue that the statute, as applied, operated to discriminate against him on a racial basis. *Id.* “Without such comparison,” the court held, “defendant’s statistics are meaningless” and failed to establish a prima facie showing of discrimination under the Equal Protection Clause. *Id.*

243. *Castaneda v. Partida*, 430 U.S. 482 (1977). As discussed in Part IV.A, *supra*, Justice Powell also acknowledged that the Court has accepted multiple-regression analysis statistics to prove statutory violations under Title VII of the Civil Rights Act. *McCleskey*, 481 U.S. at 293–97, (citing *Bazemore v. Friday*, 478 U.S. 385, 400–01 (1986) (Brennan, J., concurring in part)). While Title VII jurisprudence is plainly relevant to the application of the impact-inference standard, the Supreme Court has deemed it inapposite to the application of the “constitutional” equal protection standard, which requires a showing of discriminatory purpose. See, e.g., *Washington v. Davis*, 426 U.S. at 238–39 (“We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII”). See also *Chavez v. Ill. State Police*, 251 F.3d 612, 638 n.8 (7th Cir. 2001) (noting that the Title VII pattern

Arlington Heights. In *Castaneda*, the Court held that statistics showing that Mexican Americans were underrepresented on grand juries in Hidalgo County, Texas, were sufficient to establish a prima facie case of intentional discrimination in grand jury selection.²⁴⁴ Under Texas's "key man" system for selecting grand juries, three to five jury commissioners or "key men" were appointed by a state district judge to select between fifteen and twenty prospective jurors from different portions of the county.²⁴⁵ Prospective jurors were then summonsed to court and the state district judge "test[ed] their qualifications" under oath.²⁴⁶ According to Texas law, qualified candidates had to be citizens of Texas and the county, qualified voters in the county, "of sound mind and good moral character," literate, have no prior felony conviction, and be under no pending indictment or legal accusation for theft or any felony.²⁴⁷ In support of his claim that the "key man" system was administered in Hidalgo County in a discriminatory manner, the defendant presented census and grand jury records which showed that Mexican Americans were grossly underrepresented among those selected for grand jury service.²⁴⁸

Distinguishing the jury selection context from *Davis* and *Arlington Heights*, the Court said that, in order to prevail on a claim of discriminatory grand jury selection, a claimant would have to show that "the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs."²⁴⁹ The Court then went on to articulate a three-pronged inquiry. A prima facie case of discriminatory purpose in grand jury selection is demonstrated, the Court held, where the defendant establishes that: (1) the group to which he belongs is a "recognizable, distinct class, singled out for different treatment under the laws, as written or as *applied*"; (2) the group has been underrepresented in the grand jury process, demonstrated by "comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time"; and (3) "a selection procedure that is susceptible of abuse . . . supports the presumption of discrimination raised by the statistical showing."²⁵⁰ Once evidence of disparate impact is shown and is coupled with evidence of excessive discretion in the administration of a jury selection procedure, the Court explained, the decision-maker must put forth race-neutral reasons for the decision.²⁵¹ If the decision-maker fails to provide an ade-

and practice analysis is only relevant to statutory schemes). For this reason, this analysis will focus solely on cases arising in the jury venire context.

244. *Castaneda*, 430 U.S. at 494-95.

245. *Id.* at 484.

246. *Id.* at 484-85.

247. *Id.* (citing TEX. CODE CRIM. PROC. art. 19.08).

248. *Id.* at 486-87.

249. *Id.* at 494.

250. *Id.* (emphasis added).

251. *Id.*

quate explanation, the Court can allow the inference of discriminatory purpose to stand.²⁵²

Applying this scheme to the facts in *Castaneda*, the Court found that Mexican Americans were “a clearly identifiable class” subject to various social “disadvantages.”²⁵³ The Court also found that the statistical evidence presented—over an eleven-year period, only 39% of those summoned for grand jury service were Mexican Americans in a county that was 79% Mexican American—was enough to give rise to an inference of discriminatory purpose.²⁵⁴ However, the inference was further bolstered, Justice Blackmun explained, by the fact that the Texas system of selecting grand jurors “is susceptible of abuse as applied.”²⁵⁵ Specifically, he noted, even though the Texas key man system was facially constitutional, it was nevertheless susceptible of abuse “as applied” because it was, among other things, “highly subjective.”²⁵⁶ Based upon this evidence, the burden of proof shifted to the state to explain its selection of the jurors in the challenger’s case on race-neutral grounds. Because the state offered no evidence either attacking the reliability of the statistics or rebutting the inference of discrimination, the Court concluded that the selection process was racially discriminatory and affirmed the decision of the Fifth Circuit.²⁵⁷ Justice Stewart, the author of *Washington v. Davis*, and Justice Powell, the author of *Arlington Heights*, dissented. Ironically, Justice Powell would rely heavily on *Castaneda* a decade later to ward off Warren McCleskey’s challenge.

In every critical respect, juvenile court pretrial detention decisions in many jurisdictions are analogous to the jury venire decision at issue in *Castaneda*, as characterized by both Justice Blackmun and later Justice Powell himself, and are distinguishable from the capital sentencing decision at issue in *McCleskey*. First, like the jury commissioners and district judges under the Texas key man system, juvenile justice decision-makers are not an *ad hoc* collection of private citizens called together to form a petit jury but are repeat actors—professionally trained judges and administrators whose decisions in hundreds of cases over time can be examined for their statistical effects.²⁵⁸ Second, notwithstanding the *Schall*

252. *Id.*

253. *Id.* at 495.

254. *Id.* at 495–96.

255. *Id.* at 497.

256. *Id.* (citing *Hernandez v. Texas*, 347 U.S. 475, 478–79 (1954) (noting that, while “the Texas system of selecting grand and petit jurors by the use of jury commissions is fair on its face and capable of being utilized without discrimination . . . it is susceptible to abuse and can be employed in a discriminatory manner”)).

257. *Id.* at 501.

258. This characteristic of detention decision-making was evident in a recent Florida case, for example, where the appellate court noted that it was, for the sixth time in a two-month span, granting an emergency habeas corpus petition “filed against this same [juvenile court] judge” for failure to comply with the state detention statute and it hoped that “the message to this trial court judge should be clear that he, too, must follow the law.” *R.G. v. State*, 817 So.2d 1019 (Fla. Dist. Ct. App. 2002) (holding that juvenile is entitled to release from detention where court did not conduct risk assessment procedure required by state statute).

Court's affirmation in 1984 that a decision-maker need demonstrate only that a prospective detainee poses a "serious risk" of reoffending, most modern juvenile detention statutes require decision-makers to assess multiple offense- and offender-related criteria. While these criteria are often highly subjective, the fact that they are prescribed and uniform for all potential detainees likens them to the criteria considered by jury commissioners and district judges under the key man system and renders the entire decision-making process more susceptible to scrutiny than the loosely constrained capital sentencing decisions.²⁵⁹ Thus, unlike the capital sentencing decisions of petit juries, which, Justice Powell emphasized, were case-specific and unverifiable, individual pretrial detention decisions can be measured against one another. Finally, like the jury commissioners and state district judges under the Texas key man system, and unlike the petit jurors in *McCleskey*, repeat actors in the juvenile justice system may be called upon to explain any statistical disparities produced by their detention decisions or recommendations. By the *McCleskey* Court's own reasoning, then, an equal protection challenge to the discriminatory pretrial detention of youth of color in the juvenile justice system should be analyzed under the *Castaneda* three-pronged inquiry: a claimant would create an inference of discriminatory intent if she could demonstrate that she was a member of a historically disadvantaged class that has been overrepresented in the population of juveniles detained by the judge or probation officer in question over a significant period of time.²⁶⁰

Significantly, at least one court has invoked such a reading of *McCleskey*. In *Commonwealth v. Lora*, a Massachusetts defendant presented various forms of statistical evidence, including an analysis of the racial demographics of all motor stops conducted by his arresting officers over a period of months, to support his claim that the officers' decision to stop and search his vehicle constituted a discriminatory application of facially neutral laws in violation of the Equal Protection Clause.²⁶¹ Citing *McCleskey*, the trial court held that the de-

259. For example, the Texas Family Code provides that a juvenile must be released after a detention hearing is held, "unless the judge finds that the child: is likely to abscond; lacks adequate supervision; lacks a parent or other person to return him or her to court when required; is a danger to himself or may threaten the public safety; or was previously adjudicated for delinquent conduct and is likely to commit an offense if released . . ." TEX. FAM. CODE § 54.01(e) (West 2002).

260. See *Castaneda*, 430 U.S. at 497 (citing *Hernandez*, 347 U.S. at 479).

261. *Commonwealth v. Lora*, No. 20020314, 2003 WL 22350945 (Mass. Super. Ct. Sept. 12, 2003). The defendant also produced an analysis of the racial demographics of twenty motor stops conducted by troopers from the officers' barracks during the relevant period, the racial demographics of the county in question, and a newspaper article on racial profiling in traffic stops that ranked Massachusetts towns by disparity in minority searches. Among other things, the statistics revealed that, while the town of Auburn is 97.5% white, 1% African American, and 0.6% Latino, of the 252 total stops the first officer made between August 2001 and February 2002 in Auburn, 54.9% involved Caucasian operators, 31.3% involved Latino operators, and 11.76% involved African American operators. While non-inventory searches occurred in 5.1% of the officer's stops of Caucasian operators, they occurred in 20.1% of the stops of Latino operators and 12.5% of the stops of African American operators. Statistics involving the second trooper were even starker: while non-inventory searches occurred in 1.9% of his stops of Caucasian operators, they occurred in 28% of the stops of Latino operators and 41.67% of the stops of African American operators.

fendant could rely on statistical evidence of discrimination to demonstrate intent if the arresting officers' decisions could be analogized to the decisions at issue in the two contexts where the Supreme Court "has accepted less-extreme statistical patterns" of discrimination—jury venire and Title VII.²⁶² Specifically, the court explained, the defendant would need to show that the variables relied upon by the arresting officers were:

objective; . . . few in number; the statistics relate[d] to a small number of entities; the sample focuse[d] on decisions made by individuals rather than on decisions made by departments or branches of government; the decision maker ha[d] an opportunity to explain the statistical disparity; and the court [was] in a position to assess both the credibility of the data and the decision maker.²⁶³

Because the scrutinized decisions met those criteria, the *Castaneda* burden-shifting framework could be properly applied.²⁶⁴ While it does not involve an institutional processing decision, what *Lora* suggests is that courts may be willing to read *McCleskey* as sanctioning the use of statistical evidence of intent when the decisions in question can be distinguished from the capital sentencing decision and readily analogized to the jury venire decisions at issue in *Castaneda*. Plainly, the pretrial detention decisions made by officials in many jurisdictions fit this mold.

What may prove more challenging, however, is demonstrating that a particular detention decision-making process is susceptible of abuse in the wake of *Schall v. Martin*. As discussed in Part I.A, *supra*, *Schall* held that even the most general preventive detention statutes may comport with due process so long as the detention order serves a legitimate state objective and is rendered pursuant to a process that affords other procedural protections.²⁶⁵ While *Schall* presents a hurdle for discriminatory pretrial detention claimants, it is certainly not insurmountable. As the Court has acknowledged, a procedure need not violate the Due Process Clause for it to be "susceptible of abuse."²⁶⁶ Indeed, Justice Marshall observed in dissent in *Schall*, it was the idiosyncratic practices of the judicial decision-makers, rather than the content of the statute they were applying, that were most responsible for inequitable and arbitrary detention outcomes.²⁶⁷ The same reasoning applies in the pretrial detention context. The detention statute in question need not be found facially unconstitutional for the procedure

262. *Id.* at *11 (citing *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987)).

263. *Id.* at *13.

264. *Id.*

265. *Schall v. Martin*, 467 U.S. 253, 256–57, 263 (1984).

266. *Castaneda v. Partida*, 430 U.S. 482, 497 (1977).

267. *Schall*, 467 U.S. at 303 (Marshall, J., dissenting) ("Not surprisingly, in view of the lack of directions provided by the statute, different judges have adopted different ways of estimating the chances whether a juvenile will misbehave in the near future."). Indeed, the *Schall* majority itself admitted that, irrespective of its statutory constitutionality, "It may be, of course, that in some circumstances detention of a juvenile would not pass constitutional muster." *Id.* at 273.

pursuant to which it is administered to be deemed susceptible of abuse. Rather it is often the corresponding lack of regularity and oversight in the application and administration of detention statutes, rather than the content of the statutes themselves, that renders the process susceptible of abuse²⁶⁸ and, in some cases, discriminatory—a finding that is not foreclosed by *Schall*.

Apart from the factual distinctions between the nature of the decision at issue in *McCleskey* and that at issue at the pretrial detention stage, the inherent differences between the aims of the juvenile justice system and the adult criminal system also argue for greater latitude in applying statistical analysis as a reformative tool. That juveniles are “different” from adults is a concept that is embedded in our laws. “[C]hildren have a very special place in life which law should reflect,” Justice Frankfurter observed a half century ago. “Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state’s duty towards children.”²⁶⁹ As a result, courts at every level have consistently considered the developmental differences of adolescence in defining the scope of juveniles’ constitutional rights.²⁷⁰ Three years ago, Justice Kennedy observed that the inherent neurological and sociological differences between children and adults “render suspect any conclusion that a juvenile falls among the worst offenders,” in the majority opinion declaring the death penalty unconstitutional when applied to juveniles under the age of eighteen.²⁷¹ “From a moral standpoint,” he concluded, “it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”²⁷² Evoking the century-old Progressive philosophy that spurred the creation of a separate justice system for children, Justice Kennedy’s observations underscore the persistent reality that the juvenile justice system continues to be guided by a welfare-oriented ideology not found in the criminal justice system. It is this fundamental distinction between the two systems that makes a challenge to the selective pretrial detention of youth of color less likely to run afoul of the four pragmatic concerns cited by Justice Powell in *McCleskey*: the potential infringement on discretionary decision-making, the pre-existence of anti-bias prophylactic measures, the “slippery slope” rationale, and the risk of usurping the role of the legislature.

In *McCleskey*, Justice Powell warned that a finding for the petitioner would

268. See Feld, *Abolish the Juvenile Court*, *supra* note 7, at 91 (arguing that “[d]espite statutes and rules, juvenile court judges make discretionary decisions effectively unconstrained by the rule of law”).

269. *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

270. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982) (Powell, J.) (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.”) (footnotes omitted).

271. *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

272. *Id.*

“be antithetical to the fundamental role of discretion in our criminal justice system.”²⁷³ As an initial matter, whether applied in the context of criminal or juvenile justice, this logic is simply flawed. As Justice Brennan observes in dissent, “discretion is a means” of achieving individualized justice, “not an end.”²⁷⁴ Evidence that “race more likely than not plays . . . a role” in decision-making necessarily means that “the very end that discretion is designed to serve is being undermined” and that individualized justice is not in fact being dispensed.²⁷⁵ This reality is all the more problematic in the juvenile justice context, where the dissemination of individualized justice is not an adjunct value in the system—it is the stated *purpose* of the system.

Nor is the presence of “safeguards designed to minimize race bias” in the juvenile justice system a basis for rejecting a potential selective-processing claim. As the system is presently configured, three of the most important constitutional safeguards against race bias in the administration of justice are absent. Indeed, a strong argument can be made that a discriminatory detention claim should prevail in order to force the adoption of additional prophylactic measures.

Third, the law’s recognition that juveniles are different minimizes what Justice Brennan called in dissent the “fear of too much justice.”²⁷⁶ The features of the juvenile justice system that render it susceptible to an equal protection attack—the lack of procedural safeguards, the emphasis on social factors, and the corresponding lack of visibility, accountability, and oversight—are, for the most part, unique to that institution. From a pragmatic perspective, this would enable opponents of wide-spread change to argue that a successful disproportionate pre-trial detention challenge should be restricted to its context: juvenile justice decision-making. And from a political perspective, the prospect of unlocking the jailhouse doors would be far more palatable if those emerging were children. This conclusion is supported by the fact that, while the phenomenon of minority overrepresentation plainly exists in the criminal justice system,²⁷⁷ Congress has never seen fit to address it.

Finally, the notion that solving the problem of race bias in the juvenile justice system is better left for the legislature is far less persuasive in the juvenile justice context, where targeted legislation that has been in effect for more than fifteen years has yielded only marginal results. In fact, an argument can be made that the intermittent congressional support, the lax oversight, and the bureaucratic intransigence encountered by the DMC Mandate are themselves the

273. *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987).

274. *Id.* at 336. (Brennan, J., dissenting).

275. *Id.*

276. *See id.* at 339 (Brennan, J., dissenting).

277. *See, e.g.,* MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME AND PUNISHMENT IN AMERICA* 29 (1995) (stating that African Americans make up approximately 13% of the population in the United States but more than half of those incarcerated “in recent years”).

products of majoritarian “process defects” worthy of correction through judicial intervention.²⁷⁸

C. *The Disproportionate Pretrial Detention Claim in Practice*

Though Jason went home with his mother on January 23, he was back in court three months later, this time for a new arrest. An argument with a classmate at Madison Park High School had erupted into a fight, and both boys were charged with assault and battery and disturbing a public assembly.

This time Jason knew what to expect, and he began talking before his lawyer could even ask for his name and address. “I’d rather take a commitment and be done with it,” Jason told his lawyer through the holding cell door. “At least that way I’d know where I’d be. No more back and forth between here, detention, my mom’s house.”

“Hold on, hold on,” his lawyer interrupted. He started to explain that commitment was by no means a foregone conclusion. That Jason’s charges weren’t that serious. That there was a lot more the court could do before getting to commitment. But Jason stopped him. “Look, it’s what’s going to happen. Maybe not today, but it will happen. It’s what they want to do. So, okay. Let’s start it right now and get it over with.”

An equal protection challenge to the disproportionate pretrial detention of juveniles of color could be raised either “defensively” or “offensively.”²⁷⁹ In the context of the delinquency proceeding itself, a juvenile defendant could seek to reverse the juvenile court’s detention order through an emergency petition for writ of habeas corpus²⁸⁰ or through a statutorily mandated process for appealing the detention order.²⁸¹ The claim could also be raised on behalf of an individual claimant or a class of claimants through an action seeking declaratory relief and an injunction against the juvenile court’s continued application of the detention

278. See generally ELY, *supra* note 31. In *Democracy and Distrust*, Ely argues that the Free Speech, Due Process, and Equal Protection Clauses should be read most aggressively when legislative majorities lock out minorities from political power or adopt policies reflecting social prejudice. *Id.* See also William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2005) (discussing the application of Ely’s representation reinforcement theory).

279. See generally Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247 (1988) (discussing the relative value as deterrents of “offensive” versus “defensive” constitutional remedies).

280. See, e.g., *A.S. v. Byrd*, 777 So.2d 1171 (Fla. Dist. Ct. App. 2001) (granting habeas corpus petition releasing juvenile from home detention when no risk assessment was prepared by the Department of Juvenile Justice as required by statute). *But see* *M.B. v. State*, 905 S.W.2d 344 (Tex. Ct. App. 1995) (denying that habeas corpus is available for relief when there is a statutory direct appeal procedure in which to raise claim); *Luchene v. Wagner*, 465 N.E.2d 395 (Ohio 1984) (noting that habeas corpus relief is not a substitute when appeal is available).

281. See, e.g., MASS. GEN. LAWS ch. 276, § 58 (laying out the procedure for appealing detention decisions and bail orders to state superior court).

procedure in question.²⁸² The obvious advantage of an “offensive” action is its potential to provide an institutional remedy—one which benefits not only the individual claimant but also other similarly situated juveniles, by deterring system actors from committing repeated constitutional violations.²⁸³ The difficulty, however, is in convincing a court to grant relief that is likely to be both legally and politically controversial.²⁸⁴

282. See, e.g., *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042, 1045 (6th Cir. 1977) (affirming district court’s authority to enjoin school board from enforcing resolutions that would rescind a voluntary cluster-school desegregation plan and ordering that the cluster plan remain in effect until final remedy approved); *Pamela B. v. Ment*, 709 A.2d 1089 (Conn. 1998) (affirming trial court’s authority to grant declaratory and injunctive relief on behalf of mother and potential class of parents, compelling chief court administrator to establish new court procedures for temporary custody order hearings).

283. See Meltzer, *supra* note 279, at 250 (arguing that when plaintiff seeks a deterrent remedy, she acts as a “private attorney general, seeking relief to benefit the community at large rather than to prevent harm that he personally is likely to suffer”). See also Note, *Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2069–74 (2000) (noting that the relatively few attempts to improve the quality of indigent defense counsel through institutional lawsuits have led to “significant and far-reaching reforms” and citing *State v. Smith*, 681 P.2d 1374 (Ariz. 1984); *State v. Peart*, 621 So. 2d 780 (La. 1993); and *State v. Lynch*, 796 P.2d 1150 (Okla. 1990)). See generally OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* 18, 86–90 (1978) (advocating the use of injunctive relief in civil rights cases).

284. The propriety of “institutional reform litigation,” as it is sometimes called, has long been debated. Among the pragmatic concerns raised by both courts and commentators are the vesting of “unreviewable discretion” in the hands of judges who are often required to fashion remedies that account for non-legal interests, see Meltzer, *supra* note 279, at 320; William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 653–54 (1982) (noting that courts are hesitant to impose court-originated remedies in both prison and school suits because they would be choosing among permissible solutions to non-legal polycentric problems), and the ability of courts to undertake the long-term supervisory role often necessitated by structural relief, see generally Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977); Fletcher, *supra*, at 648–49; but see Note, *supra* note 283, at 2072 (observing that judges are well-equipped to exercise supervisory authority over their own institutions). From a legal perspective, suits seeking institutional reform through equitable relief encounter problems of standing, see *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975) (plaintiffs alleging a “‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens” lack Article III standing); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (finding that a victim of police choke hold who failed to demonstrate likelihood that he would be subject to choke hold in the future lacked standing), the availability of an adequate remedy at law, see *O’Shea v. Littleton*, 414 U.S. 488, 499–502 (1974) (denying injunctive relief for alleged racial discrimination by judicial officers when plaintiffs had available various federal and state remedies, including the right to a substitution of judge or a change of venue, review on direct appeal or on post-conviction collateral review, and the opportunity to demonstrate that the conduct of these judicial officers is so prejudicial to the administration of justice that available disciplinary proceedings were inadequate), the doctrine of “unclean hands,” see, e.g., *Pon v. Wittman*, 81 P. 984 (Cal. 1905) (refusing to grant injunction that was sought against picketers to protect a prostitution business), and the purported lack of an irreparable injury that is “both great and immediate,” *Younger v. Harris*, 401 U.S. 37, 46 (1971) (holding that a defendant was not entitled to federal court equitable relief against state court prosecution absent a showing that irreparable harm to him would be both “great and immediate”). See also 13 AM. JUR. PROOF OF FACTS 2d 609, § 4 (2006) (citing to “a divergence of opinion with respect to the propriety of granting injunctive relief against discriminatory prosecution” and noting that courts denying injunctive relief “have sometimes expressed the fear that if one person is granted an injunction against discriminatory enforcement of a

To prevail in any context, a claimant would have to make a prima facie showing that the detention classification procedure utilized by the juvenile court in ordering her detention subjects youth of her race to substantially disparate treatment and is "susceptible of abuse."²⁸⁵ She would do this through a statistical analysis demonstrating that youth of her race are overrepresented in the relevant subsection of the detention population in the jurisdiction in question (or, depending on the availability of statistics, by courts in the county in question) and that the level of overrepresentation is statistically significant, meaning that the probability that it arose through chance is very slight.²⁸⁶ This analysis would necessarily take the form of a sophisticated, multiple-regression study of the pre-trial detention decisions made by the juvenile court in question (or, more broadly, by juvenile courts in the relevant jurisdiction) over a period of time.²⁸⁷ The claimant would attempt to bolster this statistical evidence of discriminatory impact with circumstantial evidence of the type that the Supreme Court has deemed probative of discriminatory intent in *Arlington Heights* and subsequent cases.²⁸⁸ For example, a juvenile raising a disproportionate pretrial detention claim in Massachusetts could present evidence relating to the state's historical failure to undertake efforts to reduce DMC in its juvenile justice system;²⁸⁹ the

criminal law or ordinance, others will seek the same relief, and the authorities will effectively be prevented from ever enforcing an otherwise valid law").

285. *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) (citing *Hernandez v. Texas*, 347 U.S. 475, 478–79 (1954)). Specifically, she would need to demonstrate that: (1) the group to which the claimant belongs is a "recognizable, distinct" group; (2) such group has been subject to "different treatment" under the detention process in question, as written or as applied; and (3) the detention process in question is susceptible of abuse. *Id.* See also *Wayte v. United States*, 470 U.S. 598, 608 n.10 (1985) (applying *Castaneda* framework in challenge to prosecutor's allegedly selective enforcement of criminal sanction). This, of course, assumes that the court has already been persuaded, via the analysis laid out in Part IV.B, *supra*, to apply the *Castaneda* burden-shifting framework to the claimant's petition.

286. As Justice Blackmun explained in *Castaneda*, "[t]he idea behind the rule of exclusion is not at all complex. If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process." *Castaneda*, 430 U.S. at 494 n.13 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n.13 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1976); *Eubanks v. Louisiana*, 356 U.S. 584, 587 (1958); *Smith v. Texas*, 311 U.S. 128, 131 (1940)).

287. Obviously, the most compelling analyses would demonstrate not just that juveniles of color are substantially overrepresented in the relevant subsection of detainees, but also that the race of the detainee has a statistically significant effect on detention outcomes.

288. This circumstantial evidence includes: (1) "the historical background of the decision," (2) "the specific sequence of events leading up to the challenged decision," (3) "[d]epartures from the normal procedural sequence," as well as substantive departures, (4) "the legislative or administrative history" of the procedure, *Arlington Heights*, 429 U.S. at 265–68 (laying out the foregoing four factors), (5) the foreseeability of the discriminatory impact of the detention procedure, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464–65 (1979), (6) knowledge of the discriminatory impact of the detention procedure, see *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042, 1051 (6th Cir. 1977), and (7) the availability of less-discriminatory alternatives, see *United States v. Bd. of Sch. Comm'rs of Indianapolis*, 573 F.2d 400, 413 (7th Cir. 1978).

289. See *Arlington Heights*, 429 U.S. at 267 (citing *Griffin v. Sch. Bd.*, 377 U.S. 218 (1964))

foreseeability of the discriminatory impact of the detention classification procedure in question, as evidenced by prior studies demonstrating that youth of color were overrepresented in the detention population created through use of the procedure;²⁹⁰ and the availability of less-discriminatory alternatives to such procedure, such as the Risk Assessment Instruments now utilized in other states to classify detainees.²⁹¹ Finally, the claimant would present evidence that the detention classification process in question is “susceptible of abuse.”²⁹² In most jurisdictions, a claimant would likely present circumstantial evidence regarding, among other things, the lack of administrative guidelines and oversight governing the detention decision-making process in question.²⁹³

If a claimant were able to establish such a *prima facie* case of disproportionate pretrial detention, the burden would then shift to the prosecution (or, in an offensive suit, the state attorney general or other designee) to demonstrate that “legitimate racially neutral criteria and procedures” produced the racially disparate result.²⁹⁴ While courts have historically shown deference to the state’s proffered explanations in the jury selection context,²⁹⁵ they have been less willing to

(holding that evidence detailing county’s decade-long resistance to desegregating its public schools was probative of discriminatory intent)). Specifically, a Massachusetts claimant could cite to the ACLU Report, which provides a detailed summary of the state’s failure for more than a decade to comply with the DMC Mandate despite its awareness that children of color were vastly overrepresented at various processing points in its justice system. *See supra* text accompanying notes 185–89.

290. *See, e.g., Lansing Bd. of Educ.*, 559 F.2d at 1051 (holding that where foreseeable and actual result of public officials’ action or inaction was to increase racial identifiability of schools with large minority enrollments, continuation of policy gives rise to the presumption of segregative intent); *Penick*, 443 U.S. at 464–65 (holding that evidence that the perpetuation of segregation was a foreseeable consequence of board’s practices and policies was relevant to prove the ultimate fact of forbidden purpose).

291. *Bd. of Sch. Comm’rs of Indianapolis*, 573 F.2d at 413 (holding that fact that government ignored less segregative options which would have furthered its policies as effectively as challenged option is sufficient for a *prima facie* showing of discriminatory intent). For example, a claimant could present research documenting the effectiveness of Risk Assessment Instruments (RAIs) in reducing DMC, *see HOYTT, SCHIRALDI, SMITH & ZIEDENBERG, supra* note 21, at 54–62 (describing one county’s use of an RAI to reduce DMC), and evidence regarding the availability of federal technical assistance for implementing RAIs, *see DISPROPORTIONATE MINORITY CONFINEMENT TECHNICAL ASSISTANCE MANUAL, supra* note 176.

292. In order to make this showing, a claimant would have to demonstrate that the procedure was capable of being applied in such a manner as “practically to proscribe any group thought by the law’s administrators to be undesirable,” *Smith v. Texas*, 311 U.S. 128, 130–31 (1940), or that it “provided a clear and easy opportunity for racial discrimination,” *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972).

293. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 170–71 (1972) (“Where . . . there are no standards governing the exercise of the discretion . . . the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.”).

294. *See Castaneda v. Partida*, 430 U.S. 482, 499 n.19 (1977) (noting that mere protestations of lack of discriminatory intent and affirmations of good faith will not suffice to rebut the *prima facie* case). *Accord Batson v. Kentucky*, 476 U.S. 79, 94 (1986) (“The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties.”).

295. *See, e.g., United States v. Lorenzo*, 995 F.2d 1448, 1454–55 (9th Cir. 1993) (permitting

do so when presented with compelling statistical evidence of disparate impact in procedures administered by state actors, such as judges or prosecutors, along with evidence that the procedures in question provided such actors with an “opportunity” to discriminate.²⁹⁶ In other words, the stronger the prima facie case—both statistically and circumstantially—the less likely it is that the state will mount a successful rebuttal. Even if the state were to succeed in rebutting the prima facie case, however, the very act of doing so would likely require the testimony of system professionals and the production of data and documents regarding the guidelines and practices that govern their processing decisions. This exercise itself would raise consciousness of the problem of DMC both within the juvenile court system and in the public eye, which in turn could lead to self-correcting measures even if the challenge itself failed to result in mandatory relief to the claimant.²⁹⁷

If the state were to fail to rebut the claimant’s case, the court would have wide discretion to impose remedies.²⁹⁸ The narrowest remedy would be a re-

peremptory challenges to jurors with Hawaiian surnames for reasons such as lack of attentiveness, financial hardship, and having long hair and a beard). See also Pamela S. Karlan, *Race, Rights and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2021 & nn.96–101 (1998) (discussing courts’ acceptance of proffered explanations such as weight, handwriting, clothing, and attitude).

296. See, e.g., *Avery v. Georgia*, 345 U.S. 559, 560, 562 (1953) (rejecting state’s rebuttal to prima facie showing of discrimination in jury venire when the race of the members of the jury pool was identifiable through the use of different colored tickets placed in the jury box because such a “practice makes it easier for those to discriminate who are of a mind to discriminate”); *Whitus v. Georgia*, 385 U.S. 545, 552 (1967) (rejecting state’s rebuttal to prima facie showing of discrimination in jury venire when the designation “(c)” placed opposite the names of jurors of color on the tax digest from which the pool was selected presented “the opportunity for discrimination”). See also Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1144–45 (1989) (comparing *McCleskey* and *Castaneda* and observing that “because of the highly subjective nature of the key person’s decision [in the jury venire context], the state cannot realistically expect to use their testimony to rebut a statistical prima facie case”); Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1151 (1998) (arguing that the *McCleskey* Court “misconceive[d] the role of statistical inferences from past decisions and their relationship to the challenged decision” when it contended that petit jurors would not have an opportunity to rebut the Baldus study, since “[s]tatistical inferences of factors influencing a decisionmaking process, taken from a pattern of past decisions, need no rebuttal”).

297. See, e.g., William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 638 n.10 (1982) (noting that “in the New Orleans jail litigation, the sheriff in charge of the jail encouraged extensive news coverage of what he considered deplorable conditions in order to ‘pressure the city into making improvements’”).

298. David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1038 (2004) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (affirming a complex remedial order in the school district context), and *Hutto v. Finney*, 437 U.S. 678, 700 (1978) (affirming a complex remedial order in the prison context); quoting Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1158 (1969) (“[F]ederal and state courts insofar as their ordinary jurisdiction and remedial authority are adequate to the occasion, are obliged to afford such remedies as are determined, ultimately by the Supreme Court, to be appropriate in implementation of the Constitution.”); and noting that the Supreme Court has emphasized that “breadth and flexibility are inherent in equitable remedies,” such as those contained in structural reform injunctions). See also *State v. Peart*, 621 So. 2d 780, 791 (La. 1993) (affirming the court’s own “inherent authority . . . ‘to fashion a remedy which will promote the orderly and expeditious administration of justice.’” (quoting *State v. Mims*, 329 So. 2d

mand for rehearing in the individual case or possibly the release of the individual claimant from detention.²⁹⁹ The broadest, which would likely be realized through an “offensive” process such as a motion for injunctive relief, would be an order barring the juvenile court from utilizing the detention classification process altogether until it demonstrated that it had taken steps to reduce its discriminatory impact, and perhaps compelling the court to employ proven alternatives to detention in the interim.³⁰⁰ While the latter would provide the surest path toward broad systemic reform,³⁰¹ it might, for the reasons articulated above, give appellate courts pause. Other, less sweeping remedies, which could be imposed in the context of the delinquency case itself or a separate civil proceeding, include more narrowly tailored orders compelling the juvenile court to, for example, produce additional discovery regarding its detention policies and/or data regarding the presence of DMC at other decision points,³⁰² apply a rebuttable presumption to all future claims that the juvenile court’s detention procedures are constitutionally infirm until the court can present evidence that it has implemented reformatory measures,³⁰³ or implement one of the myriad DMC reduction strategies that have already proven effective in other jurisdictions.³⁰⁴

686, 688 (La. 1976)).

299. See, e.g., *R.G. v. State*, 817 So. 2d 1019 (Fla. Dist. Ct. App. 2002) (ordering release of juvenile from detention where no risk assessment was prepared by the Department of Juvenile Justice as required by statute). See also Fletcher, *supra* note 297, at 650 (“At the conceptual level habeas corpus is the easiest remedy, for it relieves the judge of the need to resolve any non-legal polycentric remedial problems beyond the bare resolution inherent in the release of the prisoners.”).

300. See, e.g., *Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 202 (8th Cir. 1974) (enjoining state prison officials from utilizing procedure to transfer juveniles from reformatory to state prison until constitutional infirmities within the state prison were removed).

301. Note, *Constitutional Risks to Equal Protection in the Criminal Justice System*, 114 HARV. L. REV. 2098, 2115 (2001) (“If the goal is systemic change, then structural injunctions seemingly provide a ready answer.”); Meltzer, *supra* note 279, at 325 (arguing that offensive suits for remedies “would be likely to contain a much fuller record of the scope and nature of government violations, and the remedial order would be framed under a familiar process that helps to structure and resolve the question of appropriate relief”).

302. Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution*, 34 AM. CRIM. L. REV. 1071, 1090–98 (1997) (arguing for compelled discovery as a form of “soft enforcement” in selective prosecution cases).

303. See *Peart*, 621 So. 2d at 791 (remanding case for retrial of defendant’s motion for ineffective assistance of counsel and instructing lower court to, among other things, “hold individual hearings for each such moving defendant and, in the absence of significant improvement in the provision of indigent defense services to defendants . . . to apply a rebuttable presumption that such indigents are not receiving assistance of counsel effective enough to meet constitutionally required standards”).

304. For descriptions of strategies, programs, and methods which have proven effective in reducing DMC, see, for example, NO TURNING BACK, *supra* note 189 (documenting success stories in reducing DMC and providing strategies, ideas, and models for advocates, community organizations, public officials, and others addressing DMC); ASHLEY M. NELLIS, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, SEVEN STEPS TO DEVELOP AND EVALUATE STRATEGIES TO REDUCE DISPROPORTIONATE MINORITY CONTACT (DMC) (2005) (helping program administrators and juvenile justice personnel select the most effective ways to reduce DMC through performance measurement and evaluation); U.S. DEP’T OF JUSTICE, OFFICE OF

Ultimately, whether through a structural injunction, a narrowly tailored decree, or individualized relief in a single case, a successful claim would likely create incentives for local actors or state legislatures to take responsibility for fashioning and implementing their own reformatory measures.

CONCLUSION

On April 27, 2003, Jason was committed to the Massachusetts Department of Youth Services. He spent the next four months in a secure placement facility forty-five minutes outside of Boston. While he was eventually able to return to a foster home in Boston, he remained under DYS supervision until his eighteenth birthday. As a consequence of his commitment, Jason had difficulty re-enrolling in school and getting a job. Even more significant to Jason, however, was the stigma associated with being labeled a "juvenile delinquent." In the span of just six months, he had gone from "victim" to "offender" in the eyes of the law—a migration that impacted not only the community's opinion of him, but, in more subtle respects, his view of himself.

Admittedly, without evidence of overt race bias, it is impossible to determine "to a moral certainty"³⁰⁵ that Jason's race directly influenced the outcome of his individual case. What is clear, however, is that there was ample opportunity for race to infect the decision-making process. From the police officer who arrested and charged Jason largely on the basis of geographical association; to the probation officer who readily attributed Jason's behavior to internal deficiencies rather than external neglect; to the judge who, on the basis of a five-minute appearance, concluded that Jason was an adolescent in need of state "supervision"; to the lawyers who failed to learn enough about Jason to effectively neutralize the predilections of the others, it is plain that the individuals whose cumulative actions and inactions ultimately led to Jason's commitment were constrained by neither their colleagues, the public, nor their own procedures. Compounding the potential for race to impact their decisions, either consciously or unconsciously, was the fact that these decision-makers were also required by Massachusetts law to consider factors beyond just the offense for which Jason was charged—factors which, in most cases, were rooted in fleeting and impressionistic assessments of Jason's socio-familial stability.

What is also clear is that race likely did infect the decision-making process in the Suffolk County juvenile justice system in 2002. In the year that Jason

JUVENILE JUSTICE & DELINQUENCY PREVENTION, MATHEMATICS OF RISK CLASSIFICATION: CHANGING DATA INTO VALID INSTRUMENTS FOR JUVENILE COURTS (2005) (assisting juvenile courts in developing and using risk classification instruments and offering recommendations for selecting classification procedures).

305. In *McCleskey*, Professor Baldus offered the following testimony: "In [a multi-regression] analysis of this type, obviously one cannot say that we can say to a moral certainty what it was that influenced the decision." *McCleskey v. Kemp*, 481 U.S. 279, 309 n.29 (1987).

entered the system, youth of color made up 70% of the juvenile population in Suffolk County, Massachusetts, but they represented 91% of the youth held in secure detention facilities, 84% of the youth placed on supervised probation, 93% of the youth committed to the Department of Youth Services, and 95% of the youth committed to “hardware secure” DYS facilities in the county.³⁰⁶ Whether this evidence—that the decision-making process utilized by the Boston Juvenile Court in Jason’s case was susceptible of abuse and that youth of color were disproportionately detained by the court during the period in question—is proof of discrimination is debatable. What this article suggests, however, is that this evidence should be enough to create an inference of discrimination, and that the ensuing debate is one which should, and, in many respects, must, be held by the courts.

If successful, an equal protection challenge to the disproportionate pretrial detention of juveniles of color has the potential to yield benefits far beyond the mandate in any individual case.³⁰⁷ Attempts to reform the system through the carrot of federal funds contingent on good-faith efforts by state and local actors to analyze and repair their own systems have been disappointing at best, and in some cases outright failures. The threat of losing federal funding, which is the only potential sanction for maintaining systems that produce unacceptable outcomes, has simply not been potent enough in many jurisdictions to motivate the actors who matter to police themselves. The virtue of attacking the problem through an equal protection challenge is that it would, at the very least, require those actors to step forward and unpack their decisions. At best, it would force them to do much more than that. Finally, from an institutional perspective, a successful challenge would place the responsibility for reforming the system where it belongs, on those who administer it, and would give courts the opportunity to step forward and repair the damage done to their legitimacy by decades of Disproportionate Minority Contact.

306. Juvenile Defense Network: DMC Stats, <http://www.youthadvocacyproject.org/DMC/suffolk.htm>. These statistics were obtained from the Commonwealth of Massachusetts Executive Office of Public Safety by the Juvenile Defense Network, a project of the Committee for Public Counsel Services in Massachusetts.

307. Obviously, the efficacy of such a challenge in an individual case depends on the facts of that case, the levels of disproportionality reflected in the applicable studies, the legal status of the juvenile claimant, and, most importantly, the willingness of the claimant to engage in what could well become a protracted and public fight.

