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Race in Juvenile Justice and Sentencing Policy:

An Overview of Research and Policy Recommendations

Michael J. Leiber
&
Jennifer H. Peck

Introduction

An estimated 2,500 individuals nationwide have been identified as serving life without parole (LWOP) for homicides they committed while under the age of eighteen.¹ Of those, as many as 2,100 might have been sentenced according to a mandatory sentencing rule² and may now be in need of review to determine individualized sentencing in the wake of the ruling in *Miller v. Alabama*.³ Also, an estimated 1,755 youth are currently serving LWOP for crimes committed while legally classified as juveniles; seventy-three were age fourteen or younger at the time of the offense.⁴ Nationwide, seventy-seven percent of LWOP prisoners are members of minorities.⁵ “In [seventeen] states, more than 60% of the [juvenile] LWOP population is [Black].”⁶ The overrepresentation of minority youth, and in particular Black youth, as LWOPs parallels their disproportionate presence in the

1. THE SENTENCING PROJECT, IMPLICATIONS OF THE SUPREME COURT’S RULING ON JUVENILE LIFE WITHOUT PAROLE (July 2012), http://www.sentencingproject.org/doc/publications/jj_SC_JLWOP_Ruling_%20Implications_2012.pdf (last visited Feb. 5, 2013).

2. *Id.*

3. 132 S. Ct. 2455, 2457–58 (2012) (holding that for juvenile homicide offenders, the Eighth Amendment forbids a sentencing scheme mandating life in prison without parole).

4. THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE (2010), http://www.sentencingproject.org/doc/publications/publications/jj_jlwopfactsheetJuly2010.pdf (last visited Feb. 5, 2013).

5. ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 3, 19–23 (2009).

6. *Id.* at 22.

juvenile justice system as a whole.⁷ While the presence of minority youth in general as LWOPs is problematic, the majority of the literature has focused on Black youth compared to other racial and ethnic groups (e.g., Whites, Hispanics, Native Americans), and will continue to be the focus of the current review.⁸

In the wake of *Roper v. Simmons*⁹ and *Graham v. Florida*,¹⁰ it is important to understand how race and ethnicity contribute to minority overrepresentation among juvenile offenders throughout all stages of the court system. Our objective is to provide a brief overview of the role of race and ethnicity on court outcomes and how the court system can address the presence of minority youth. First, we will describe the differential offending perspective to understand minority overrepresentation in the juvenile justice system, including LWOP sentences. The differential offending perspective argues that minority youth are overrepresented as offenders because they commit more crime and more serious crime than Whites.¹¹ Second, we will describe decision-making involving race and arrest, intake, detention, judicial disposition, and waiver to adult court. Race effects have been found at many stages of the court system and it is important to describe at each of these stages where and why race matters. Third, we will describe the racial/ethnic selection bias perspective to explain racial disparities in the juvenile justice system and LWOP sentences. The racial/ethnic selection bias perspective argues that minorities are treated differently than Whites due to inherent biases in the court system. Fourth, we will describe the implications of “cumulative disadvantage,” whereby minority youth are more likely than White youth to face arrest and remain in the criminal justice

7. *Id.* at 13 (acknowledging that LWOP figures “are consistent with a larger pattern in the criminal justice system in which [Blacks] are represented at an increasingly disproportionate rate across the continuum from arrest through incarceration”).

8. See, e.g., Donna Bishop & Michael Leiber, *Racial and Ethnic Differences in Delinquency and Justice System Responses*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 445–84 (Barry C. Feld & Donna M. Bishop eds., 2012) (assessing the “differential offending” and “differential treatment” arguments in light of racial disparities in the juvenile justice system).

9. 543 U.S. 551, 570 (2005) (holding that the death penalty for offenders under the age of eighteen at the time of offense violates the Eighth and Fourteenth Amendments).

10. 130 S. Ct. 2011, 2030 (2010) (holding that the Eighth Amendment prohibits sentences of life without parole for juvenile non-homicide offenders and that states must give juvenile non-homicide offenders “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation”).

11. See Bishop & Leiber, *supra* note 8.

system for the same offenses.¹² In other words, overrepresentation at earlier stages of the court system can lead to a continued disadvantage for minority youth at later stages. Finally, we will present recommendations for addressing the overrepresentation of minorities in the juvenile justice system.

I. Minority Overrepresentation in the Juvenile Justice System

Table 1 presents national juvenile court data on the racial composition of the delinquent population across numerous stages of juvenile justice proceedings. Percentages, rates, and relative rates (i.e., comparing each minority group to Whites) illustrate racial disparities and give a general descriptive overview of the relationship between race and juvenile court outcomes.

Table 1. The Processing of Juveniles by Race/Ethnicity, 2009

	White	African American	Native American	Other ^a	Total
Population age 10-17	25,275,500	5,346,400	448,500	1,568,400	32,638,900
Percent	(78) ^b	(16)	(1)	(5)	(100)
Arrested	1,125,900	529,700	20,800	24,000	1,700,300
	(66)	(31)	(1)	(2)	(100)
Arrest Rate per 1,000 persons	45	99	46	15	5
Relative Rate to White =		2.2	1.0	0.3	
Referred to Court	955,400	505,600	21,900	21,200	1,504,100
Percent	(64)	(34)	(1)	(1)	(100)
Percentage of arrests referred	85	95	105	88	88
Relative Rate to White =		1.1	1.2	1.0	
Detained	175,500	132,800	5,100	4,500	318,000
Percent	(55)	(42)	(1.6)	(1.4)	(100)

^a Other includes Asian, Hawaiian, and Pacific Islander.

^b Numbers in parentheses are percentages.

12. More specifically, the “cumulative disadvantage” argument “implies a life-course perspective” of racial or ethnic minority disadvantage. Robert Sampson & Janet Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, in *ETHNICITY, CRIME & IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES* 364 (Michael Tonry ed., 1997).

Table 1. Continued

	White	African American	Native American	Other	Total
Percentage of referrals detained	18	26	23	21	21
Relative Rate to White =		1.4	1.3	1.2	
Formally Charged Percent	493,100 (60)	304,500 (37)	13,300 (1.6)	12,400 (1.4)	823,200 (100)
Percentage of referrals charged	52	60	61	58	55
Relative Rate to White =		1.2	1.1	1.1	
Adjudicated Delinquent Percent	301,800 (62)	170,300 (35)	9,100 (1.8)	7,500 (1.2)	488,800 (100)
Percentage of charged Adjudicated	61	56	68	60	59
Relative Rate to White =		9	1.1	1.0	
Placed Out of Home Percent	76,300 (57)	53,100 (40)	2,700 (2)	1,700 (1)	133,800 (100)
Percentage of adjudicated Placed	25	31	30	23	27
Relative Rate to White =		1.2	1.2	9	

Source: CHARLES PUZZANCHERA & BENJAMIN ADAMS, NATIONAL DISPROPORTIONATE MINORITY CONTACT DATABOOK (2012), available at <http://www.ojjdp.gov/ojstatbb/dmcd/b/>.

In 2009, the Uniform Crime Reporting (UCR) Program¹³ recorded 1.7 million juvenile arrests.¹⁴ White youth, who made up seventy-eight percent of the population age ten to seventeen, accounted for sixty-six percent of all arrests.¹⁵ Blacks, however,

13. The UCR Program, run by the Federal Bureau of Investigation, collects and publishes annual national crime statistics. *Uniform Crime Reports*, The Federal Bureau of Investigation, <http://www.fbi.gov/about-us/cjis/ucr/ucr> (last visited Feb. 10, 2013).

14. CHARLES PUZZANCHERA & BENJAMIN ADAMS, JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT SERIES BULLETIN: JUVENILE ARRESTS 2009, at 4 (2011), available at <http://www.ojjdp.gov/pubs/236477.pdf> (last visited Feb. 10, 2013).

15. The data in Table 1 comes from the National Disproportionate Minority Contact (DMC) Databook, which assesses the level of minority overrepresentation at numerous stages of the juvenile justice system. The DMC Databook is developed

were greatly overrepresented in the arrest stage as they made up only sixteen percent of the juvenile population, yet accounted for thirty-one percent of all arrests. Native American youth were equally represented by population data and arrest data (one percent), while youth in the “Other” category¹⁶ were underrepresented among arrestees, accounting for five percent of the population and two percent of arrests. Tracking racial disparities across locations and populations, arrest rates per 1,000 persons indicate additional differences in minority overrepresentation. Blacks were arrested at a rate of ninety-nine per 1,000 youth, compared to a rate of forty-five per 1,000 for Whites. Moreover, Black youth were over twice (relative rate = 2.2) as likely to be arrested as Whites.

Over 1.5 million youth were referred to the juvenile court in 2009. Almost all Black youth who were arrested were referred to court (ninety-five percent), compared to eighty-five percent of White youth arrested. In 2009, approximately 318,000 cases resulted in pre-adjudicatory detention. Once again, racial disparities are evident: twenty-six percent of cases involving Blacks resulted in detention between the stages of arrest and judicial disposition, compared to twenty-three percent of cases involving Native Americans, twenty-one percent involving other races, and eighteen percent involving Whites. Overall, Black youth were 1.4 times as likely to be detained as their White counterparts.

Racial differences in rates of formal charging are also found at the adjudication stage of the proceedings. Sixty percent of cases involving Black youth resulted in formal charging, compared to sixty-one percent for Native Americans, fifty-eight percent for other races, and fifty-two percent for Whites. While the relative rates are not as disparate as those at earlier stages, overrepresentation compared to Whites is still evident. Out of all youth formally charged, fifty-nine percent were subsequently adjudicated guilty. The fact that racial disparities at the adjudication stage are not as pronounced as at prior stages may be explained by a correction effect. A correction effect occurs when

and maintained by the National Center for Juvenile Justice with funding from the Office of Juvenile Justice and Delinquency Prevention (OJJDP), which is part of the U.S. Department of Justice. OFF. OF JUV. JUST. AND DELINQ. PREVENTION, NATIONAL DISPROPORTIONATE MINORITY CONTACT DATABOOK (May 7, 2012), available at <http://www.ojjdp.gov/ojstatbb/dmcd/index.html> (last visited Feb. 1, 2013).

16. The racial and ethnic groups included in the “Other” category included Asian, Hawaiian, and Pacific Islander.

one racial or ethnic group has a lower rate of a particular outcome at one stage compared to earlier stages. In this case, at adjudication, Black youth were adjudicated delinquent at a lower rate than all other racial groups, when there was a higher rate of occurrence for this group at earlier stages. For example, the relative rate of Blacks to Whites for delinquent adjudication was 0.9, while for both Native Americans and the "Other" group, the relative rates were slightly higher or equal to Whites (1.1 and 1.0, respectively). Even though the probability of delinquent adjudication once formally charged was lower for Blacks, it is important to note that Blacks as a whole were still overrepresented at this stage (fifty-six percent) compared to their representation in the overall juvenile population.

At the final stage of judicial disposition, racial disparities are still evident, although somewhat narrower (especially among Black youth) than at the early stages of justice proceedings. The relative rate of Blacks to Whites in terms of out-of-home placement was 1.2, the same rate obtained for Native Americans, and the relative rate for the "Other" racial category was 0.9. This racial disparity in judicial disposition means that Black youth receive the more severe sentence of being placed outside of the home, as opposed to the sentence of community treatment, at a higher rate than Whites. Adjudicated Blacks continue to be placed out of the home at a higher rate than all other racial categories.

Table 2. One-Day Count of Juveniles in Correctional Placement by Race and Ethnicity, 2010

	Total	White	African American	Native Hispanic	American	Asian	Other
N	70,792	22,947	28,976	15,590	1,236	728	1,135
Percent	100	32	41	22	2	1	2
Rate ^a	225	127	605	229	367	47	^b

Source: M. SICKMUND ET AL., CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT DATABOOK (2010), available at <http://www.ojjdp.ncjrs.org/ojstatb/cjrp/>.

^a Rates are calculated per 100,000 youths in the population age 10 to the upper age of juvenile court jurisdiction.

^b No rate is shown because there are no data for the comparable reference population.

Table 2 presents the race- and ethnicity-specific custody populations, percentages, and rates (per 100,000 youth ages ten and older) for juvenile correctional facilities from the 2010 Census

of Juveniles in Residential Placement (a one-day count).¹⁷ Once again, the results parallel Table 1 in that minorities are greatly overrepresented in juvenile correctional facilities. More specifically, minorities comprise approximately sixty-eight percent of all institutionalized youth, and the racial disparities become more apparent once the rates per 100,000 youth are considered. While the rates compared to Whites are lower for Asian youth (forty-seven per 100,000), rates for all other racial and ethnic groups are considerably higher than that of their White counterparts. For example, the rate for incarcerated White youth is 127 per 100,000, compared to 229 for Hispanics, 367 for Native Americans, and 605 for Blacks. In other words, Black youth are almost five times more likely to be incarcerated as Whites.

Overall, there is substantial evidence that, while racial disparities exist throughout all stages of juvenile justice proceedings and in correctional settings, they are most apparent at the front end of the system.¹⁸ This is especially true for Black youth.¹⁹ One reason why minority overrepresentation is apparent at the back end of the system (e.g., judicial disposition) may be due to disadvantages that occur at earlier stages of the system (e.g., arrest) and continue on to later stages. Even though there is some evidence of a correction effect at the stage of adjudication concerning Black youth, it is still apparent that minority youth in general experience harsher outcomes than their White counterparts.²⁰

II. Race Differences in Offending

This Section will discuss the differential offending perspective. As related earlier, Black youth are more likely to be arrested than Whites.²¹ This appears true across almost all offense

17. Nat'l Ctr. for Juv. Just., *Easy Access to the Census of Juveniles in Residential Placement: 1997-2010*, available at <http://www.ojjdp.gov/ojstatbb/ezacjrp/> (last visited Mar. 2, 2013). A one-day count provides a "one-day snapshot" of the characteristics of youth who reside in residential facilities on a given day. This count provides a description of the standing population in juvenile correctional facilities. It is not a measure of population flow. *Id.*

18. Bishop & Leiber, *supra* note 8, at 461-63.

19. *Id.*

20. *Id.*

21. See Table 1. For background information about crime data collection, see Janet L. Lauritsen, *Social Scientific Influences on the Measurement of Criminal Victimization*, 21 J. QUANT. CRIMINOLOGY 245, 245-66 (2005) (contextualizing the history of crime data collection by examining the methodological, financial, and political influences that shaped the development of the National Crime Victimization Survey).

categories.²² According to the Uniform Crime Reporting (UCR) data, the Black arrest rate for property crime remained nearly double the White arrest rate between 1985 and 2007.²³ Concerning violent crimes, the Black arrest rate averaged five times the White rate throughout the same time period.²⁴ While decisions to stop, release, refer, or arrest youth are contingent upon a variety of factors beyond the offense and its severity (e.g., patrolling patterns, style and structure of the police department, goals of the police department, socioeconomic makeup of a community, racial profiling), questions emerge concerning whether official arrest data reflect bias in police decision-making and procedures.²⁵

In light of the above findings, some research suggests a differential offending argument. For example, to assess the differential involvement and selection bias arguments, research by Hindelang²⁶ compared results from the UCR to those from the National Crime Victimization Survey (NCVS).²⁷ Examining rape, robbery, and assault data from the UCR (arrest statistics) and NCVS (victimization statistics), Hindelang discovered that both measurements showed Blacks to be overrepresented compared to

22. Howard Snyder, *Juvenile Delinquents and Juvenile Justice Clientele: Trends and Patterns in Crime and Justice System Responses*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 20 (Barry C. Feld & Donna M. Bishop eds., 2012).

23. *Id.* at 19.

24. *Id.*

25. See, e.g., DAVID HUIZINGA ET AL., DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM: A STUDY OF DIFFERENTIAL MINORITY ARREST/REFERRAL TO COURT IN THREE CITIES 41–42 (2007) (finding the differential offending theory unsupported and the effects of race on disproportionate minority contact significant, but arguing that racial bias in the juvenile justice system cannot be conclusively established without studying other factors); Robert Sampson, *Effects of Socioeconomic Context on Official Reaction to Juvenile Delinquency*, 51 AM. SOC. REV. 876, 884 (1986) (examining socioeconomic status, race, and neighborhood context and arguing that “the influence of [socioeconomic status] on police contacts is contextual in nature, and stems from an ecological bias with regard to police control”); William Terrill & Michael Resig, *Neighborhood Context and Police Use of Force*, 40 J. RES. CRIME & DELINQ. 291, 301 (2003) (“In sum, it appears that race is confounded by neighborhood context: Minority suspects are more likely to be recipients of higher levels of police force because they are disproportionately encountered in disadvantaged and high-crime neighborhoods.”).

26. Michael J. Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOC. REV. 93, 96–98 (1978).

27. Victimization surveys (e.g., the NCVS) ask household residents to report personal victimizations, regardless of whether the crimes were reported to the police. Therefore, if data from the NCVS reveal racial differences in criminal offending that parallel arrest data, it can be concluded with greater confidence that those differences reflect real differences in criminal offending. If the data do not parallel each other, then the selection bias argument becomes more plausible. *Id.* at 99.

their representation in the general population for all three offense types.²⁸ However, Hindelang also found evidence of an unexplained disparity concerning the crimes of rape and assault in that the Black arrest rate for these two crimes was higher than the Black NCVS rate.²⁹ In other words, Blacks were arrested at a higher rate for rape and assault compared to what victimization data concluded about both offenses. Although there was evidence of differential selection bias,³⁰ where criminal justice policies work to the disadvantage of minorities—in this case, the decision to arrest a potential offender—most racial overrepresentation in the arrest data paralleled the victimization data.³¹ Therefore, Hindelang concluded that Blacks commit more crimes and, in particular, more violent crimes.³²

Pope and Snyder³³ examined the FBI's 1997 and 1998 National Incident-Based Reporting System (NIBRS) to study whether racial bias accounts for the decision to arrest. Using data from seventeen states that consider victim accounts of the most serious offenses,³⁴ the authors failed to find direct evidence that racial bias exists in the decision to arrest.³⁵ In fact, White juvenile offenders were more likely to be arrested than their non-White counterparts, especially for violent crimes.³⁶ However, the data did indicate an indirect bias effect in the arrest of non-White juveniles: they are more likely to be arrested when the victim is White than

28. *Id.* at 100.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 101; *see also* Sampson & Lauritsen, *supra* note 12, at 355–56 (arguing that racial discrimination in the criminal justice system is indirect and contextual, and thus not systematic).

33. Carl E. Pope & Howard N. Snyder, *Race as a Factor in Juvenile Arrests*, JUV. JUST. BULL., Apr. 2003, at 1–3.

34. Through NIBRS, the FBI asks law enforcement agencies to record a substantial amount of information on each reported crime and each arrest. For example, agencies are asked for victim information pertaining to age, sex, race, and level of injury; offense information including the date and time of the incident, type of place where the incident occurred; weapon information; the victim's perception of the offender's or offenders' age, sex, and race; victim-offender relationship(s); and the demographics of arrestee(s). From this wealth of information, researchers can explore NIBRS data regarding the types of incidents likely to involve victim-offender interaction, determine the victim's perception of the offender in each incident, and examine which incidents resulted in arrests. Researchers can also compare the arrest probabilities of White and non-White juvenile offenders for similar crimes.

35. Pope & Snyder, *supra* note 33, at 4.

36. *Id.* at 3. It is important to note that the study was based on data from only seventeen states and that different juvenile arrest patterns might emerge were other states included in the analyses.

when the victim is non-White.³⁷

The National Youth Survey is an additional form of crime measurement that has examined potential race biases in delinquent offending based on a nationally representative adolescent/teenage sample of self-reported delinquent behavior.³⁸ For example, Elliott found that Black youth admitted greater involvement in violent behavior than Hispanic youth, while both racial/ethnic groups reported greater involvement than Whites.³⁹ These findings are consistent with the Denver, Pittsburgh, and Rochester Youth Studies, where White youth reported involvement in violent crimes at lower rates than Hispanic youth, and Black youth reported the highest levels of involvement.⁴⁰ Although the self-reported race differences in violent offending across all these studies are substantial, they are not nearly as great as those found in police arrest data.⁴¹ In other words, official data tends to reveal greater race disparities than self-reported data.⁴²

In summary, victimization data (e.g., NCVS data) and results from self-report surveys suggest that Black youth commit more crime and more violent crimes than Whites. The racial differences, however, are not as large as those reported in official arrest data. For example, for property and drug offenses (for

37. *Id.* at 6.

38. NATIONAL YOUTH SURVEY (NYS) SERIES, www.icpsr.umich.edu/icpsrweb/ICPSR/series/88 (last visited Mar. 2, 2013).

39. Delbert S. Elliott, *Serious Violent Offenders: Onset, Developmental Course, and Termination - The American Society of Criminology 1993 Presidential Address*, 32 *CRIMINOLOGY* 1, 1-21 (1994).

40. DAVID HUIZINGA ET AL., *URBAN DELINQUENCY AND SUBSTANCE ABUSE: INITIAL FINDINGS RESEARCH SUMMARY* 7-8 (1994).

41. Bishop & Leiber, *supra* note 8.

42. The self-report survey is an alternative method of measuring crime independent of official data in the form of police and victim reports. See Marvin Krohn et al., *The Development and Impact of Self-Report Measures of Crime and Delinquency*, 26 *J. QUANT. CRIMINOLOGY* 509, 509-25 (2010). In general, self-reports ask high school and other samples of youth (e.g., incarcerated youth) anonymously to report any offenses that they have committed, whether or not they were apprehended for their offending behavior. Self-reports may not be equally valid for all racial groups. Some researchers have suggested that Black youth tend to underreport serious deviant or delinquent behavior. See MICHAEL HINDELANG ET AL., *MEASURING DELINQUENCY* (1981); David Huizinga & Delbert Elliott, *Reassessing the Reliability and Validity of Self-Report Delinquency Measures*, 2 *J. QUANT. CRIMINOLOGY* 293, 293-327 (1986); Terence Thornberry & Marvin Krohn, *The Self-Report Method for Measuring Delinquency and Crime*, in 4 *CRIMINAL JUSTICE 2000: MEASUREMENT AND ANALYSIS OF CRIME AND JUSTICE* 33 (2000). Other research has found no racial differences in the accuracy of reporting. See, e.g., David P. Farrington et al., *Self-Reported Delinquency as a Combined Delinquency Seriousness Scale Based on Boys, Mothers, and Teachers: Concurrent and Predictive Validity for African-Americans and Caucasians*, 34 *CRIMINOLOGY* 493, 493-514 (1996).

which victimization data are not available), self-report results indicate minimal racial differences in offending.⁴³ With respect to drug offenses, self-report data from the Monitoring the Future survey have consistently shown that the highest proportion of all types of drug use is found among White youth, followed by Hispanics.⁴⁴ In fact, Black youth reported the lowest levels of illicit drug use.⁴⁵ Self-reported racial differences are not, however, consistent with official police arrest data. Official data indicate substantial overrepresentation of minorities (especially Black youth) in vandalism, theft, weapons, and drug arrests.⁴⁶ Comparisons of arrest data with victimization and self-report data reveal race as an important correlate of crime. In most instances, minority youth and in particular, Black youth, are involved in more offending and more serious offending. This conclusion lends some support to the differential offending explanation of minority overrepresentation in the juvenile justice system. The next section will focus on racial and ethnic selection bias as a second explanation of minority overrepresentation in arrests and presence in the juvenile justice system. Both differential offending and differential selection help to understand the relationship between race and juvenile justice system proceedings as well as the overrepresentation of minority youth.⁴⁷

43. LLOYD D. JOHNSON ET AL., MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG USE: OVERVIEW OF KEY FINDINGS 45 (2011), available at <http://www.monitoringthefuture.org/pubs/monographs/mtf-overview2010.pdf>. The Monitoring the Future survey is an annual national survey of high school students that began in 1975.

44. *Id.*

45. LLOYD D. JOHNSON ET AL., MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG USE: OVERVIEW OF KEY FINDINGS 49 (2012), available at <http://www.monitoringthefuture.org/pubs/monographs/mtf-overview2011.pdf>.

46. Bishop & Leiber, *supra* note 8; Snyder, *supra* note 22.

47. Although it has been argued that most mainstream theories are not designed to explain why minorities commit more frequent and serious crimes than Whites, there are numerous traditional and race-specific theoretical perspectives that attempt to explain racial differences in offending. See Sampson & Lauritsen, *supra* note 12. These perspectives view racial differences in offending behavior as indirectly related to individual differences in offenders, family processes, or structural and community explanations. RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994) (contemporary biological perspective); Joanne M. Kaufman et al., *Theory of Racial Differences in Criminal Offending*, 41 AUSTL. & N.Z. J. CRIMINOLOGY 421–37 (2008) (general strain theory); Terrie E. Moffitt, *Adolescence-Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674–701 (1993) (Moffitt's dual taxonomy); MICHAEL GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME (1990) (self-control theory); MARVIN WOLFANG & FRANCO FERRACUTTI, THE SUBCULTURE OF VIOLENCE: TOWARDS AN INTEGRATED THEORY IN CRIMINOLOGY (1967) (subculture of violence theory); ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE

III. Racial/Ethnic Selection Bias

In criminal justice proceedings involving adults, decision-makers should rely primarily on legal factors to arrive at a case outcome. Due to the *parens patriae* foundation of the juvenile court, however, decision-makers often take into account extralegal factors (e.g., age, assessments about the family).⁴⁸ As discussed earlier, differential involvement in delinquency and crime often account for differences between Whites and minorities in arrests and juvenile court outcomes.⁴⁹ In light of these legal and extralegal factors, race and ethnicity still should not be significant predictors of police and court decisions. A significant number of studies examine the extent to which legal criteria, race, and other extralegal factors influence juvenile justice decision-making.⁵⁰ Research has shown that legal factors, such as crime severity, rather than race, predict decision-making and support the idea of differential offending among minorities, explaining their overrepresentation in arrests and the juvenile justice system.⁵¹

MORAL LIFE OF THE INNER CITY (1999) (code of the street thesis).

48. Nancy Rodriguez et al., "Youth Is Enmeshed in a Highly Dysfunctional Family System": *Exploring the Relationship Among Dysfunctional Families, Parental Incarceration, and Juvenile Court Decision Making*, 47 CRIMINOLOGY 177, 197-98 (2009); BARRY FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 52-53 (1999).

49. See *supra* text accompanying note 36.

50. See Donna Bishop et al., *Contexts of Decision Making in the Juvenile Justice System: An Organizational Approach to Understanding Minority Overrepresentation*, 8 J. YOUTH VIOLENCE & JUV. JUST. 213 (2010); Michael Leiber & Joseph Johnson, *Being Young and Black: What Are Their Effects on Juvenile Justice Decision Making?*, 54 CRIME & DELINQ. 560 (2008); Nancy Rodriguez, *The Cumulative Effect of Race and Ethnicity in Juvenile Court Outcomes and Why Preadjudication Detention Matters*, 47 J. RES. CRIME & DELINQ. 391 (2010).

51. Paul Tracy, *Race, Ethnicity, and Juvenile Justice: Is There Bias in Postarrest Decision Making*, in *OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE* 300, 302 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005); Pope & Snyder, *supra* note 33, at 6. The focus of this paper is on differential offending and bias as contributing factors to the cumulative disadvantage and overrepresentation of minorities in the juvenile justice system, including youth sentenced in adult court. Where the youth lives is another factor that might contribute to youth involvement in the juvenile and criminal justice systems. That is, youth in urban settings may be more susceptible to court intervention than those in other localities. Urban courts are often offense-driven and rely less on social characteristics than those in rural areas. As a result, cases move deeper into a system that ultimately works to the disadvantage of Blacks, who reside more often in urban areas. Simply by virtue of urban residence, then, Blacks are more likely than Whites to be involved in the court system. Barry Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 157 (1991); Barry Feld, *The Social Context of Juvenile Justice Administration: Racial Disparities in an Urban Juvenile Court*, in *MINORITIES IN JUVENILE JUSTICE* 66, 66 (Kimberly Kempf-Leonard et al. eds., 1995).

According to the race/ethnic selection bias perspective, however, laws, procedures, and legal and extralegal criteria may be racially or ethnically tainted in that they often work indirectly to the disadvantage of minorities compared to Whites.⁵² While overt or intentional discrimination may still exist, effects of race and ethnicity on police decisions to arrest and case outcomes appears to be implicit, subtle, or subconscious, though no less harmful than overt bias.⁵³ For example, assessments of the youth's family, his or her progress in school, and even maturity level may more negatively impact minority youth than Whites.⁵⁴ Prior research indicates that White adolescents are viewed as more immature, impressionable, and amenable to treatment than Black youth who commit the same offenses.⁵⁵ Legitimate criteria, such as family assessments or age, also negatively impact case outcomes for boys and Blacks compared to girls and Whites.⁵⁶

Overall, at least seven comprehensive reviews of existing literature report that legal and extralegal factors alone cannot account for racial differences in involvement in the juvenile justice system.⁵⁷ This conclusion lends support to the base premises of the

52. See MICHAEL LEIBER, THE CONTEXTS OF JUVENILE JUSTICE DECISION-MAKING: WHEN RACE MATTERS 90 (2003); Sarah Steen et al., *Explaining Assessments of Future Risk: Race and Attributions of Juvenile Offenders in Presentence Projects*, in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 245, 264–65 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

53. Bishop & Leiber, *supra* note 8, at 472.

54. *Id.* at 473.

55. George Bridges & Sarah Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 567–68 (1998). In experimental research involving primes, police officers and probation officers, and attitudes toward hypothetical offenders, Graham and Lowery found that police officers and probation officers exposed to race-specific primes rated an offender as more hostile, immature, likely to recidivate, and in need of punishment than did police officers and probation officers given a race-neutral subliminal prime. Sandra Graham & Brian Lowery, *Priming Unconscious Racial Stereotypes about Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 499–500 (2004). Primes are words, subliminally presented to police officers and probation officers, which were related to the category Black or to words neutral with respect to race. *Id.* at 486.

56. See Michael Leiber & Sarah Jane Brubaker, *Does the Gender of the Intake Probation Officer Contextualize the Treatment of Black Youth?*, 12 JUST. RES. & POL'Y 51, 66–67 (2010); Michael Leiber et al., *A Closer Look at the Individual and Joint Effects of Gender and Race on Juvenile Court Decision-Making*, 4 FEMINIST CRIMINOLOGY 333, 351 (2009); Leiber & Johnson, *supra* note 50, at 564; Michael Leiber & Kristin Mack, *The Individual and Joint Effects of Race, Gender, and Family Status on Juvenile Justice Decision-Making*, 40 J. RES. CRIME & DELINQ. 34, 48 (2003); Rodriguez et al., *supra* note 48, at 180.

57. CARL POPE & WILLIAM FEYERHERM, U.S. DEP'T OF JUST., MINORITIES AND THE JUVENILE JUSTICE SYSTEM 39 (1992); CARL POPE ET AL., U.S. DEP'T OF JUST., DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH

race/ethnic selection bias perspective. Stated differently, race and ethnicity still matter. For example, Pope and Feyerherm discovered that roughly two-thirds of studies conducted from 1970-1988 found that minority youth, primarily Blacks, experienced more severe outcomes relative to similarly situated White youth.⁵⁸ A more recent literature review of over 150 studies on race and juvenile justice decision-making led Bishop and Leiber to a similar conclusion.⁵⁹

In the ensuing sections, this Article discusses the relationship between race and decision-making at five stages of the juvenile court: arrest, intake, detention, judicial disposition, and transfer to adult court. These are the stages where race differences in court outcomes have been most prominent.⁶⁰

LITERATURE FROM 1989 TO 2002 (2002); Donna Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing*, in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 23 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005); Bishop & Leiber, *supra* note 8; Rodney Engen et al., *Racial Disparities in the Punishment of Youth: A Theoretical and Empirical Assessment of the Literature*, 49 SOC. PROBS. 194 (2002); Michael Leiber, *Disproportionate Minority Confinement (DMC) of Youth: An Analysis of State and Federal Efforts to Address the Issue*, 48 CRIME & DELINQ. 3 (2002); Carl Pope & Michael Leiber, *Disproportionate Minority Confinement/Contact (DMC): The Federal Initiative*, in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 351 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

58. POPE & FEYERHERM, *supra* note 57, at 39.

59. Bishop & Leiber, *supra* note 8, at 446.

60. There are a number of theoretical explanations of racial/ethnic bias. Macro-level perspectives generally focus either on the economic and political threat Blacks pose to Whites or the interplay of racial stereotyping and inequality with greater social control. See Robert Sampson & John Laub, *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control*, 27 LAW & SOC'Y REV. 285, 305-06 (1993) (finding "that structural contexts of 'underclass' poverty and racial inequality are significantly related to increased juvenile processing"); HERBERT M. BLALOCK, JR., TOWARD A THEORY OF MINORITY-GROUP RELATIONS 73-109 (1967) (discussing macro-level theories of race relations). The "focal concerns" perspective is also used to understand the relationship between racial bias and increased social control. This perspective originally developed to explain discretion and increased social control within adult court processing decisions, but has also been applied within the juvenile justice system. Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998). According to the "focal concerns" perspective, judges have a limited amount of time and information about defendants, and may rely on focal concerns or attributions involving race, gender, and class stereotypes when making decisions. *Id.* at 767-68. The three focal concerns are: (1) the defendants' blameworthiness and culpability based on the seriousness of the offense; (2) society's concern for protecting the community; and (3) organizational considerations involving available correctional resources. *Id.* at 766-67. Judges exercise their discretion and rely on attributions such as age, race, and social class while making decisions, and develop a "perceptual shorthand" relying on legal factors (crime severity, prior record) and racial stereotypes to

Underlying the importance of these stages in the juvenile justice process is the cumulative disadvantage that minority youth encounter compared to Whites.⁶¹ This disadvantage contributes to minority youth compiling a lengthy record of prior referrals to the juvenile court, going further into the system, being placed outside the home, waived to adult court, and when in the criminal justice system, sentenced to prison.⁶² If released, the chances of minority youth living a conforming life are greatly diminished, with a concomitant increase in risk of recidivism and entry back into the system.⁶³

A. Police, Arrest, and Juvenile Processing

While there is need for further study, the impact of race and ethnicity on juvenile arrests is substantial.⁶⁴ Although cases involving serious and violent crimes restrict officers' discretion,

determine case outcomes. *Id.* The juvenile justice system has a dual focus of social control and social welfare of all youth, focusing on treatment and rehabilitation of juvenile offenders based on school, family, and peer factors. *See* Rodriguez et al., *supra* note 48. Therefore, juvenile court officers may rely on stereotypes concerning juveniles' family, peers, and school situations when determining court outcomes. Steffensmeier et al., *supra* note 60, at 787. Bishop and colleagues integrated the "focal concerns" perspective with the "loose coupling" perspective to argue that race effects may vary by stage in juvenile justice proceedings due to involvement of numerous decision-makers and associated responsibilities and concerns. Bishop et al., *supra* note 50, at 214. They argued that racial bias more likely exists at the loosely coupled stages of intake and judicial disposition. *Id.* at 216–17. These stages comprise multiple actors, multiple goals of decision-making, which are often tied to racial stereotypes, and broad discretion. *Id.* At the tightly coupled stages of petition and adjudication, there are fewer decision-makers involved. *Id.* at 219. At these stages, legal factors and, in particular, crime severity, drive decision-making. *Id.* In other words, discretion is constrained, and race effects are predicted to have a diminished role in decision-making compared to the loosely coupled stages. *Id.* Consistent with the "focal concerns" and "loose coupling" perspectives, results from Bishop and colleagues confirmed these expectations. *See id.* at 227–28. For a more complete overview of these perspectives and others, *see* Michael Leiber, *Theories of Racial and Ethnic Bias in Juvenile and Criminal Justice*, in RACIAL DIVIDE: RACIAL AND ETHNIC BIAS IN THE CRIMINAL JUSTICE SYSTEM 15 (Michael Lynch et al. eds., 2008).

61. Bishop & Leiber, *supra* note 8, at 471–72.

62. *Id.* (discussing how systemic bias leads minority youth to differential outcomes compared to Whites); Barry C. Feld & Donna M. Bishop, *Transfer of Juveniles to Criminal Court*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 801, 832 (Barry C. Feld & Donna M. Bishop eds., 2012) (identifying that criteria for waiver to criminal court can produce discriminatory outcomes).

63. Jeffrey Fagan, *The Contradictions of Juvenile Crime & Punishment*, DAEDALUS, Summer 2010, at 43, 53; Mark Soler, *Missed Opportunity: Waiver, Race, Data, and Policy Reform*, 71 LA. L. REV. 17, 19 (2010); Donna Bishop et al., *The Transfer of Juveniles to Adult Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171, 183 (1996).

64. *See* Bishop & Leiber, *supra* note 8, at 446–47.

most police-suspect encounters involve minor offenses where significant discretion and potential for bias enter into the decision to arrest.⁶⁵ Further, in a society where inequality is pervasive and crime is often linked to racial and class imageries, stereotypes may become the basis for informing police.⁶⁶ This stereotyping may also result in minority youth and the poor being more likely to be arrested than warned, released, or handled informally.⁶⁷

Although studies of police-juvenile encounters are few, most suggest that on arrests for minor offenses, race has an indirect effect that is mediated by a youth's demeanor. In an early study, Piliavin and Briar found that ten percent of police-juvenile contacts involved serious offenses, which uniformly resulted in arrest and referral to court irrespective of other factors.⁶⁸ Outcomes in the remaining ninety percent of cases were determined largely by the nature of the officer-juvenile interaction.⁶⁹ Youth who appeared tough and disrespectful were more often arrested, while those who were polite and respectful were more often released.⁷⁰ Black youth more often displayed demeanor that prompted officers to view them as "potential troublemakers."⁷¹ In a clear example of racial stereotyping, officers recognized the potential prejudice involved in these attributions but justified their decisions by pointing to departmental crime statistics showing that Blacks committed more crimes than Whites.⁷² In addition, Bittner reported that officers frequently interpret hostile demeanor as an indicator of criminal propensity as well as a signal that the situation may get out of control.⁷³ A hostile attitude may also be a response to real or

65. Robin Engel et al., *Further Exploration of the Demeanor Hypothesis: The Interaction Effects of Suspects' Characteristics and Demeanor on Police Behavior*, 17 JUST. Q. 235, 240 (2000); William Terrill & Eugene Paoline, *Nonarrest Decision Making in Police-Citizen Encounters*, 10 POLICE Q. 308, 312 (2007).

66. Fagan, *supra* note 63, at 53.

67. Dale 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, 139-40 (1994); Sampson, *supra* note 25, at 884-85.

68. Irving Piliavin & Scott Briar, *Police Encounters with Juveniles*, 70 AM. J. SOC. 206, 209 (1964). See Richard Lundman et al., *Police Control of Juveniles: A Replication*, 15 J. RES. CRIME & DELINQ. 74, 78 (1978); Robert Worden & Stephanie Myers, *Police Encounters with Juvenile Subjects 4* (Oct. 22, 1999) (unpublished manuscript) (commissioned by the Panel of Juvenile Crime: Prevention, Treatment and Control).

69. Piliavin & Briar, *supra* note 68, at 213.

70. *Id.*

71. *Id.* at 212-13.

72. *Id.*

73. EGON BITTNER, ASPECTS OF POLICE WORK 336 (1990).

perceived police prejudice, especially if police concentrate surveillance on underclass communities and differentially stop minority youth compared to Whites.⁷⁴ Such practices generate antagonism and perpetuate a vicious cycle.⁷⁵

Numerous researchers have found that neighborhood characteristics influence the exercise of officers' discretion in ways that make minority youth more vulnerable to stops and arrests.⁷⁶ In an observational study of twenty-four police departments in sixty neighborhoods, Smith found that, irrespective of neighborhood crime rates, police were more likely to initiate contact with suspects and to use or threaten to use force in racially mixed and primarily Black neighborhoods.⁷⁷ Neighborhood socioeconomic status (SES) also had a direct effect on the probability of arrest, independent of characteristics of offenders or offenses.⁷⁸ Citizens of lower-class and disproportionately minority neighborhoods were three times more likely to be arrested.⁷⁹ In addition, Sampson combined survey data and Seattle police records and found that neighborhood SES affected the likelihood of police-juvenile contacts independent of individual race, individual SES, and self-reported delinquent involvement.⁸⁰ Delinquent involvement was the strongest predictor of police contact, followed by race (minorities were more likely to be arrested) and individual-level SES.⁸¹ But even when these variables were controlled for, neighborhood SES had a significant effect, suggesting, consistent with Smith's research, that officers intensify efforts at social control in economically depressed neighborhoods where minorities more often reside.⁸²

74. *Id.* at 338.

75. ELIJAH ANDERSON, *STREET WISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* 204 (1990); L. Thomas Winfree, Jr. & Curt Griffiths, *Adolescents' Attitudes Toward the Police: A Survey of High School Students*, in *JUVENILE DELINQUENCY: LITTLE BROTHER GROWS UP* 79, 83 (Theodore N. Ferdinand ed., 1977); Michael Leiber et al., *Explaining Juveniles' Attitudes Toward the Police*, 15 *JUST. Q.* 151, 169-70 (1998).

76. Douglas Smith et al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 *J. CRIM. L. & CRIMINOLOGY* 234, 246-47 (1984).

77. Douglas Smith, *The Neighborhood Context of Police Behavior*, in 8 *CRIME & JUSTICE: COMMUNITIES AND CRIME* 313, 337-40 (Albert J. Reiss, Jr. & Michael Tonry eds., 1986); see also Terrill & Reisig, *supra* note 25, at 309 (discussing the interplay of neighborhood socioeconomic status and race to explain force used by police).

78. Smith, *supra* note 77, at 337-40.

79. *Id.*

80. Sampson, *supra* note 25, at 884.

81. *Id.* at 880.

82. *Id.*; see also Conley, *supra* note 67, at 141 (noting that both community members and police acknowledge SES areas are "under heavier surveillance by

Racial bias, either overt or covert (also known as selection bias), that is introduced by the police is very likely to affect outcomes at later stages, even if no bias occurs at later stages.⁸³ Moreover, bias introduced at the police/arrest stage is likely to continue onto later stages by different decision-makers (e.g., intake officers, judges, etc.) and, more insidiously, to be subsumed under the cover of offense-related considerations where legitimacy is unlikely to be challenged.⁸⁴ If minority youth are systematically overcharged by police, the probability that they will penetrate deeper into the juvenile system is increased.⁸⁵ Similarly, if police are more likely to arrest minorities in situations where White youth are released or handled informally, this will translate into racial differences in prior record.⁸⁶ Seriousness of the offense and prior record are key predictors of outcomes at nearly every stage in court processing, while their validity as proxies for actual behavior is seldom questioned.⁸⁷ The dual problems of "bias amplification"⁸⁸ and what might best be termed "offense contamination" are potentially critical consequences of the impact of race on police decision-making.⁸⁹ Similar to studies of juvenile court outcomes, research on police decision-making shows racial and ethnic disparities are largely indirect.⁹⁰ Stated differently, racial and ethnic disparities reflect decisions based on considerations that from the standpoint of the decision-maker, appear to be race-neutral and legitimate.⁹¹

B. Intake

"This stage is the first point of contact that youth have with the juvenile court, where initial decisions are made," most often

police"); HUIZINGA ET AL., *supra* note 25, at 25 (showing that minorities are more likely than Whites to come into contact with police).

83. Ronald Farrell & Victoria Swigert, *Prior Offense Record as a Self-Fulfilling Prophecy*, 12 LAW & SOC'Y REV. 437, 450-51 (1977).

84. Bishop & Leiber, *supra* note 8, at 471-74.

85. *Id.*

86. *Id.*

87. *Id.*

88. Dale Dannefer & Russell Schutt, *Race and Juvenile Justice Processing in Court and Police Agencies*, 87 AM. J. SOC. 1113, 1129 (1982).

89. *Id.*; Farrell & Swigert, *supra* note 83, at 451.

90. Bishop & Leiber, *supra* note 8, at 471.

91. Police deployment decisions and features of police administration and organization have also been found to impact the likelihood of increased social control, especially for minorities and the poor. James Q. Wilson, *The Police and the Delinquent in Two Cities*, in CONTROLLING DELINQUENTS 9, 28 (Stanton Wheeler ed., 1968); SAMUEL WALKER, THE POLICE IN AMERICA 180 (1999) (discussing community policing).

regarding release, diversion, court referral, and detention.⁹² Due to “differences in orientation and function between police organizations and juvenile court intake divisions,” the decision to refer youth to the juvenile court at the stage of intake may be determined to a lesser degree on the youth’s “offense and demeanor (the criteria most often used by police) and more on appraisals of youths’ backgrounds and life circumstances.”⁹³

“The consensus of prior research is that legal variables are the strongest predictors” of intake decision-making in that “lesser offenses and first offenders are more often dropped” or diverted from the system.⁹⁴ “However, most studies also reveal racial and ethnic disparities in outcomes that cannot be explained solely by legal factors.”⁹⁵ Compared to Whites, Blacks are more likely to be referred on for further court proceedings even after considerations of legal and extralegal factors.⁹⁶ Further, when research differentiates between release and diversion, Blacks are less likely to receive the latter outcome.⁹⁷

92. Bishop & Leiber, *supra* note 8, at 463. Diversion is an alternative to formal court processing and may include the charged youth paying restitution to the victim, performing community service, paying fines, or undergoing counseling or educational programs.

93. *Id.* at 463; see Bishop et al., *supra* note 50, at 217:

Intake officers most often have backgrounds in social work and typically have no legal training. They bring to the table a focus on needs assessment and treatment, a traditional *parens patriae* orientation that attends to youths’ backgrounds and needs as these relate to the goals of rehabilitation and treatment planning. Intake officers tend to weigh heavily ‘risk factors’ such as whether a youth is adequately supervised at home, whether she is doing well or poorly in school, whether her friends are delinquent, and other indicators of underlying problems in the family, school, and neighborhood contexts that may have contributed to the child’s delinquency. . . . In most jurisdictions, police officers and, increasingly, prosecutors also feature prominently in intake decision-making.

See also George Bridges et al., *Racial Disparities in the Confinement of Juveniles: Effects of Crime and Community Social Structure on Punishment*, in MINORITIES IN JUVENILE JUSTICE 128 (Kimberly Kempf-Leonard et al. eds., 1995).

94. Bishop & Leiber, *supra* note 8, at 463; see Donna Bishop & Charles Frazier, *The Influence of Race in Juvenile Justice Processing*, 25 J. RES. CRIME & DELINQ. 242, 255 (1988); Christina DeJong & Kenneth Jackson, *Putting Race into Context: Race, Juvenile Justice Processing, and Urbanization*, 15 JUST. Q. 487, 495 (1998).

95. Bishop & Leiber, *supra* note 8, at 463; see Bishop & Frazier, *supra* note 94, at 258; Leiber & Johnson, *supra* note 50, at 571–73; Michael Leiber & Kristan Fox, *Race and the Impact of Detention on Juvenile Justice Decision Making*, 51 CRIME & DELINQ. 470, 489 (2005).

96. Jeffrey Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259 (1987).

97. See Michael Leiber, *A Comparison of Juvenile Court Outcomes for Native Americans, African Americans, and Whites*, 11 JUST. Q. 257 (1994); David Bell & Kevin Lang, *The Intake Dispositions of Juvenile Offenders*, 22 J. RES. CRIME & DELINQ. 309 (1985); Michael Leiber & Jayne Stairs, *Race, Contexts, and the Use of Intake Diversion*, 36 J. RES. CRIME & DELINQ. 56 (1999).

Research has identified several factors that help explain why minority youth are less likely to be diverted from the system. "One [factor] involves the simple failure [of minority youth] to meet the criteria for diversion. As a matter of policy in many jurisdictions, juveniles are ineligible for diversion and must be automatically detained if their parents cannot be contacted or do not appear for a face-to-face interview."⁹⁸ Often, "diversion to informal probation or other community-based sanctions or services also requires an admission of guilt."⁹⁹ Officials tend to perceive such admissions as a sign of openness to treatment. "Leiber and Kempf, Bing, and Decker reported that [White youth] more often admit guilt than [Blacks]."¹⁰⁰ But minority youths' reluctance to admit guilt "may say far more about their distrust of justice officials than about their amenability to treatment."¹⁰¹ Nevertheless, officials tend to draw the inference that those who do not admit guilt lack remorse."¹⁰²

98. Bishop & Leiber, *supra* note 8, at 463. "In a Florida study, Bishop and Frazier reported that minority families were less likely to have phones, access to transportation, access to childcare, and the ability to take leave time from work without loss of pay, all of which made it more difficult for them to comply with official policy." *Id.* See Donna Bishop & Charles Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 407 (1996). Leiber and colleagues found "gender and race [affected] these outcomes, but not always as anticipated. In general, White [girls] did not receive differential treatment, while [Black girls], for the most part, were" treated differently than Black boys. "Rather than [receiving] relatively severe outcomes, as anticipated, [Black girls] were [found] to receive lenient [ones,] especially at intake. . . . [Black boys] also received leniency at intake in the form of release compared to participation in diversion. [Black boys,] however, also were more likely to receive more severe outcomes at the intake and petition stages." Leiber et al., *supra* note 56, at 351.

99. Bishop & Leiber, *supra* note 8, at 463.

100. Leiber, *supra* note 97, at 273.

101. *Id.*; see also Bishop & Frazier, *supra* note 94; Leiber, *supra* note 97, at 273.

102. Bishop & Leiber, *supra* note 8, at 463. Because of the involvement of the intake worker, police, and possibly the prosecutor, multiple orientations and goals enter into the decision-making process. See Bishop et al., *supra* note 50, at 216. The goals reflect a law enforcement perspective and are typically oriented toward holding youth accountable for their action based on the severity of the offense.

They are also attuned to protecting the community from those likely to re-offend. From a law enforcement perspective, the interests of the child are secondary to the interests of justice and public safety. Decisions that are premised on perceptions of treatment needs, on one hand, and predictions of dangerousness, on the other, are difficult to reconcile; they are also ripe for the interjection of racial and other biases. Treatment concerns tend to be ambiguous and broad in scope and easily lend themselves to stereotyping. Prior research indicates, for example, that delinquent girls are frequently typecast as more 'needy' than boys.

Bishop & Leiber, *supra* note 8, at 217; see also E. Gaarder et al., *Criers, Liars, Manipulators: Probation Officers' Views of Girls*, 21 JUST. Q. 547, 556 (2004). Similarly, White adolescents are viewed as more immature, impressionable, and

Research has also shown subtle racial bias in the effects of race on age and family situations. For example, age and family assessments may seem race-neutral but can increase racial disparities at intake and later decision-making stages.¹⁰³ More specifically, within the juvenile justice system, age is considered a mitigating factor due to the belief that younger youth lack *mens rea* as a result of immaturity, inexperience, and inability to resist peer pressure.¹⁰⁴ Older youth are seen as more responsible and handled more formally than younger youth, who receive a “youth discount.”¹⁰⁵ However, Leiber and Johnson found that while White adolescents received a “youth discount” at intake, similarly situated Black youth were referred to further court proceedings.¹⁰⁶ Therefore, the “youth discount” did not extend to Black youth, regardless of the age criterion supported by the juvenile court.¹⁰⁷

Family assessments also contribute to disparate outcomes. In a study of juvenile courts, both family structure and judgments about the adequacy of parental supervision were strong predictors of intake referral decisions.¹⁰⁸ Minority youth were less likely than White youth to reside in two-parent homes.¹⁰⁹ In addition, the case records of minority youth more often reported that parents were unwilling to supervise their children and incapable of exercising proper control (even when they expressed a willingness to do so).¹¹⁰ Although the basis for these judgments is unclear, the danger of racial stereotyping is unmistakable. These findings have been replicated in other studies.¹¹¹

amenable to treatment than Black youth who commit the same crimes. Graham & Lowrey, *supra* note 55, at 500; Bridges & Steen, *supra* note 55, at 567.

103. KEMPF ET AL., *supra* note 100; Charles Corley et al., *The Impact of Race on Juvenile Court Processes: Quantitative Analyses with Qualitative Insights*, 1 CARIBBEAN J. CRIMINOLOGY & SOC. PSYCH. 1, 12–13 (1996); Charles Frazier & Donna Bishop, *Reflections on Race Effects in Juvenile Justice*, in MINORITIES IN JUVENILE JUSTICE 23 (Kimberly Kempf-Leonard et al. eds., 1995); Leiber & Johnson, *supra* note 50, at 363.

104. See Leiber & Johnson, *supra* note 50, at 560–61.

105. *Id.*

106. *Id.*

107. *Id.*

108. See KEMPF ET AL., *supra* note 100.

109. *Id.*

110. *Id.*

111. See Corley et al., *supra* note 103, at 12–13; Frazier & Bishop, *supra* note 103, at 23–27; Leiber, *supra* note 57. Leiber and Mack examined juvenile court referrals over a twelve-year period from 1980–1991 in four Iowa counties. They found that being Black, irrespective of gender, affected justice outcomes; that is, both Black boys and girls received harsher outcomes for certain behaviors and more lenient outcomes at particular stages than their White counterparts. In addition, family status and gender conditioned outcomes for White youth; for example, being

C. Detention

“Juvenciles may be detained if there is reason to believe [that] they will fail to appear at upcoming hearings. They are also eligible for ‘preventive detention’ if they are predicted to commit [future] crimes. However, the standards that apply to the preventive detention of juveniles are vague and invite subjective decision-making with enormous potential for misapplication.”¹¹² Since at least the early 1980s, minority youth, and Blacks in particular, have been overrepresented in secure detention.¹¹³ “Nationwide, for example, between 1983 and 1997, four out of five new detainees . . . were minority youths.”¹¹⁴ In 2007, of the cases detained per 100 cases referred, the rate for Whites was 19.3, 26.4 for minorities, and for Blacks, the rate was 26.7.¹¹⁵

Most prior studies also report that Blacks are more likely than Whites to be held in detention even after consideration of relevant legal and extralegal factors.¹¹⁶ Guevara, Herz, and Spohn, for example, discovered that at pre-adjudication detention, girls and Whites were less likely to be detained than boys and non-Whites; White boys were less likely to be detained than were minority boys but there was no reported race difference between girls.¹¹⁷ Although most prior studies find that Blacks are more likely than similarly situated Whites to be held in pre-adjudication detention,¹¹⁸ Rodriguez found the opposite.¹¹⁹ Rodriguez argued

a White girl from a two-parent household decreased the likelihood of receiving a more severe outcome at intake. Leiber & Mack, *supra* note 56, at 34–35.

112. Bishop & Leiber, *supra* note 8, at 465; see BARRY HOLMAN & JASON ZIEDENBERG, *THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES* 12–14 (2006).

113. Bishop & Leiber, *supra* note 8, at 465; RICHARD MENDEL, *TWO DECADES OF JDAI: FROM DEMONSTRATION PROJECT TO NATIONAL STANDARD* 21 (2009).

114. Michael Leiber, *Race, Pre- and Post Adjudication Detention, and Juvenile Justice Decision Making*, *CRIME & DELINQ.* (forthcoming); see JUST. POL’Y INST., *REDUCING DISPROPORTIONATE MINORITY CONFINEMENT: THE MULTNOMAH COUNTY, OREGON SUCCESS STORY AND IMPLICATIONS* 2 (2002).

115. PUZZANCHERA & ADAMS, *supra* note 14.

116. Frazier & Bishop, *supra* note 103; Leiber & Fox, *supra* note 95; Michael Leiber & Jennifer Peck, *Probation Violations and Juvenile Justice Decision-Making: Implications for Blacks and Hispanics*, 11 *J. YOUTH VIOLENCE & JUV. JUST.* 61, 62 (2012).

117. Lorie Guevara et al., *Gender and Juvenile Justice Decision Making: What Role Does Race Play?*, 1 *FEMINIST CRIMINOLOGY* 258 (2006); see also Leiber et al., *supra* note 56.

118. See, e.g., Gaylene Armstrong & Nancy Rodriguez, *Effects of Individual and Contextual Characteristics on Preadjudication Detention of Juvenile Delinquents*, 22 *JUST. Q.* 521 (2005); JUST. POL’Y INST., *supra* note 114; Leiber & Fox, *supra* note 95.

119. Nancy Rodriguez, *Juvenile Court Context and Detention Decisions: Reconsidering the Role of Race, Ethnicity, and Community Characteristics in*

that the lenient treatment of Black youth at detention reflects a “self-correction” process, where “juvenile court officials may be compensating for proactive arrest policies.”¹²⁰

Prior research has also shown race to have an indirect effect on case outcomes through detention that further results in disadvantaged outcomes at later stages and ultimately contributes to the disproportionate representation of Black youth in secure corrections.¹²¹ Stated differently, detention strongly predicts more severe treatment at judicial disposition. Even though detained Black youth and White youth “may be treated similarly, because [Black youth are] more likely to be detained,” they are more likely to “receive more severe dispositions than do their White counterparts.”¹²² Race may not directly influence decision-making at later stages in the proceedings, “but its effects may be masked, operating through a racially tainted but legitimate criterion of secure detention.”¹²³ Therefore, race differentials at the stage of detention appear to be a contributing cumulative mechanism for minority overrepresentation further into the juvenile justice system.¹²⁴ The unnecessary use of secure detention may have implications that further disadvantage youth and “may become an endogenous form of inequality that is difficult to escape.”¹²⁵ Incarceration at a young age, even for a relatively short period of

Juvenile Court Processes, 24 JUST. Q. 629 (2007).

120. *Id.* at 649. A similar interpretation has been offered elsewhere of decision-making involving a correction factor on the part of juvenile court personnel for disparities at earlier stages in the proceedings. See Bishop et al., *supra* note 50, at 217–19. This highlights the complexity of decision-making in the juvenile justice system and the contextual nature of race.

121. Leiber & Fox, *supra* note 95; see Charles Frazier & John Cochran, *Detention of Juveniles: Its Effects On Subsequent Juvenile Court Processing Decisions*, 17 YOUTH & SOC. 286 (1986); Rodriguez, *supra* note 50.

122. Leiber & Fox, *supra* note 95, at 474.

123. *Id.*

124. Leiber examined pre-adjudication secure detention decision-making, detention as a sentencing option at judicial disposition, and the impact of detention on case outcomes for youth in general and Blacks in particular. Leiber, *supra* note 114. The focus of the study was one juvenile court jurisdiction in a Midwestern state. The study found that Black youth were more likely than similarly situated Whites to be detained pre-adjudication by almost two-to-one once all relevant legal and extralegal factors were considered. In addition, race had an indirect effect on intake decision-making through preadjudication detention. Race was not a determinant of detention as a dispositional sanction. Leiber also reported that pre-adjudication was not a statistically significant predictor of decision-making at petition or adjudication. Subjection of youth to pre-adjudication detention was found to predict the use of detention as a dispositional outcome, though the effect decreased rather than increased the likelihood of the outcome. The inverse relationship was true for Whites and for youth previously detained at pre-adjudication. See also Leiber & Peck, *supra* note 116.

125. Fagan, *supra* note 63, at 57.

time, may increase the risk of recidivism, future incarceration, and diminish future chances of education, employment, and marriage.¹²⁶

D. Judicial Disposition

Judges in most jurisdictions tend to rely heavily on predisposition reports prepared by probation officers. These reports commonly address issues of harm and culpability (e.g., the youth's statement regarding the offense, probation officer assessments of moral character, victim's statement), issues of danger and risk (e.g., details of the prior record, the youth's behavior on probation or other previous dispositions), and matters relevant to treatment (e.g., alcohol and substance abuse; family, school, and peer influences that may have contributed to the offense; offender expressions of guilt or remorse).¹²⁷

Similar to decision-making at other stages in the proceedings, legal factors are often "the strongest predictors of dispositional

126. *Id.* at 53; JOHN LAUB & ROBERT SAMPSON, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70, at 291 (2003); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 83–105 (2006). To better understand these occurrences, recent inquiries have focused on the criteria used to justify secure detention, especially for Black youth. *See, e.g.*, HOLMAN & ZIEDENBERG, *supra* note 112; MENDEL, *supra* note 113. Some studies have specifically focused on the referral of youth to detention on the basis of probation violations and in particular, technical violations. *See, e.g.*, Leiber & Peck, *supra* note 116; Leiber, *supra* note 114; DAVID STEINHART, SPECIAL DETENTION CASES: STRATEGIES FOR HANDLING DIFFICULT POPULATIONS: PATHWAYS TO JUVENILE DETENTION REFORM (2001). Others have focused on the structuring of detention decision-making. *See, e.g.*, William Feyerherm, *Detention Reform and Over-Representation: A Successful Synergy*, 4 CORR. MGMT. Q. 44 (2000); Michael Leiber & Lyndsay Boggess, *Race, Probation Violations and Structured Secure Detention Decision-Making in Three Jurisdictions*, 10 J. YOUTH VIOLENCE & JUV. JUST. 333 (2012); Jeffrey Hook & Sara Goodkind, *Racial Disproportionality in Juvenile Justice: The Interaction of Race and Geography in Pretrial Detention for Violent and Serious Offenses*, 1 J. RACE & SOC. PROB. 257 (2009). Probation violations typically involve committing a new delinquent act while on probation and/or an inability to abide by the conditions stipulated as part of probation (e.g., failing a drug test, failure to appear for scheduled appointments). The use of detention screening instruments to structure detention decision-making is meant to yield consistency in the application of detention criteria and reduce reliance on extralegal factors such as race or ethnicity in detention decisions. *See also* WILLIAM FEYERHERM, AN ANALYSIS OF DETENTION DECISION-MAKING IN THREE IOWA COUNTIES (2007); Christopher Mallet & Patricia Stoddard-Dare, *Predicting Secure Detention Placement for African-American Juvenile Offenders: Addressing the Disproportionate Minority Confinement Problem*, 8 J. ETHNICITY CRIM. JUST. 91 (2010); Ashley Nellis & Brad Richardson, *Getting Beyond Failure: Promising Approaches for Reducing DMC*, 8 J. YOUTH VIOLENCE & JUV. JUST. 266 (2010).

127. Bishop & Leiber, *supra* note 8, at 466.

outcomes.¹²⁸ Prior record and previous dispositions, for example, are highly influential determinants, even more so than current offense.¹²⁹ Where this is true, it is consistent with the conclusion that judges are most concerned about community protection (predictions of risk) and treatment (e.g., what interventions have already been utilized).¹³⁰ Emerson suggests that judges at disposition are especially interested in assessing moral character.¹³¹ If a youth appears in court multiple times, he or she is generally perceived as a hard-core delinquent with criminal values.¹³² Multiple previous (and, by definition, unsuccessful) dispositions ultimately lead to the conclusion that the youth is not amenable to treatment.¹³³ Unfortunately, prior record and previous dispositions, although apparently race-neutral, are contaminated to unknown degrees.¹³⁴ As discussed previously, minority youth are more vulnerable to arrest and formal processing than otherwise, similarly situated Whites.¹³⁵ Compared to White youth engaged in the same behaviors, minorities more readily accumulate offense histories and dispositions from which inferences are drawn about their character and capacity for reform.¹³⁶

The vast majority of studies indicate that race has a significant direct effect on dispositional outcomes after legal variables are taken into consideration.¹³⁷ Moreover, almost without exception, researchers who have examined the effects of decisions made at earlier points in processing report indirect effects of race operating through detention status that often result

128. *Id.*

129. John Henretta et al., *The Effect of Prior Case Outcomes on Juvenile Justice Decision-Making*, 65 SOC. FORCES 554 (1986); Douglas Smith & Raymond Paternoster, *Formal Processing and Future Delinquency: Deviance Amplification as Selection Artifact*, 24 LAW & SOC. REV. 1109 (1990).

130. Bishop & Leiber, *supra* note 8, at 473; Bishop et al., *supra* note 50.

131. ROBERT EMERSON, *JUDGING DELINQUENTS: CONTEXT AND PROCESS IN THE JUVENILE COURT* 96–100 (1969).

132. *Id.*

133. *Id.*

134. Farrell & Swigert, *supra* note 83, at 438; Bishop & Leiber, *supra* note 8, at 471; Bishop & Frazier, *supra* note 94, at 243.

135. Bishop & Frazier, *supra* note 94, at 242.

136. *Id.* at 257.

137. Bishop & Frazier, *supra* note 94; Bishop & Frazier, *supra* note 98; Rodriguez, *supra* note 50. Bishop and her colleagues discovered that Blacks were treated more leniently than Whites at judicial disposition. Bishop et al., *supra* note 50. They interpreted this as judges correcting for bias at previous stages by giving more lenient outcomes to Blacks than Whites. "Prior research has reported such practices." Leiber, *supra* note 114; Rodriguez, *supra* note 119. However, "rarely has this been reported at judicial disposition." Cf. Leiber & Fox, *supra* note 95.

in disadvantage.¹³⁸ These findings highlight the importance of analyzing juvenile justice as a series of decision points. When research is restricted to a single, late-stage outcome, correlations between race and earlier processing decisions that predict these later outcomes can obscure race effects.¹³⁹

Family considerations once again play a role at judicial disposition in ways that work to the disadvantage of minority offenders. Youth from single-parent families and youth experiencing (or perceived to be experiencing) family problems receive more severe dispositions.¹⁴⁰ Joseph Sanborn interviewed 100 court officials in three eastern communities regarding factors that influence judicial disposition and found other evidence of the importance of the family (and of the intersection of race, class, and family).¹⁴¹ When asked which characteristics should be considered at judicial disposition, court officials most often cited the family.¹⁴² In addition, when asked whether the juvenile court in fact discriminated against any particular youth, eighty-seven percent of respondents answered positively, most often identifying Black males from dysfunctional families in lower class neighborhoods.¹⁴³

Leonard and Sontheimer have also reported interactions between race and family disadvantage.¹⁴⁴ They found that Black youth from very poor families were especially likely to be removed from their homes.¹⁴⁵ Wu and Fuentes interpret this result to mean that judges view minority youth as especially needy when they live in socially disorganized, underclass areas that weaken families and promote crime.¹⁴⁶ In other words, because minority youth are more likely to live in impoverished areas (with attendant racial prejudice, racial segregation, and lack of employment), they are

138. Bishop & Frazier, *supra* note 94; Bishop & Frazier, *supra* note 98; Leiber & Fox, *supra* note 95; Rodriguez, *supra* note 50; Leiber, *supra* note 114.

139. Bishop & Frazier, *supra* note 94, at 243.

140. Allen Horwitz & Michael Wasserman, *Some Misleading Conceptions about Sentencing Research in the Juvenile Court*, 18 CRIMINOLOGY 411, 416 (1980).

141. Joseph Sanborn, *Factors Perceived to Affect Delinquent Dispositions in Juvenile Court: Putting the Sentencing Decision Into Context*, 42 CRIME & DELINQ. 99, 100-01 (1996).

142. *Id.* at 101.

143. *Id.*

144. Kimberly Kempf-Leonard & Henry Sontheimer, *The Role of Race in Juvenile Justice in Pennsylvania*, in MINORITIES IN JUVENILE JUSTICE 98 (Kimberly Kempf-Leonard et al. eds., 1995).

145. *Id.* at 116.

146. Bohsiu Wu & Angel Iarraza Fuentes, *Juvenile Justice Processing: The Entangled Effects of Race and Urban Poverty*, 49 JUV. & FAM. CT. J. 41, 49-50 (1998).

more likely to be removed from their homes.¹⁴⁷ The irony is that, however well-intended the court might be in taking this action, it is powerless to alter the neighborhood environments from which youth come and to which they will almost certainly return.¹⁴⁸

The analysis of juvenile probation officers' predisposition reports by Bridges and Steen . . . provides . . . evidence of racial stereotypes and their influence on recommendations for final disposition. In these accounts, probation officers made attributions about the causes of crime and the risk of re-offending that were linked closely to race. They more often attributed offending among Whites to external and alterable causes (e.g., delinquent peers, problems at school), while attributing offending among [Blacks] to internal and enduring character traits (e.g., aggressiveness, lack of remorse). These causal attributions corroborated [their own] beliefs that minority offenders are more dangerous than Whites, which in turn provided the basis for more punitive recommendations.¹⁴⁹

E. Waiver of Juvenile Court Jurisdiction

Minority youth are disproportionately subject to waiver policies.¹⁵⁰ Furthermore, Black youth are forty percent more likely to be waived to adult criminal court for a drug offense than White youth.¹⁵¹ In short, national data demonstrate that minority youth, especially Black youth, are transferred to adult courts far in excess of their proportional representation in the youth population and in the overall cases processed by the juvenile justice system.¹⁵²

Although a number of studies have focused on the waiver decision within juvenile court proceedings, research generally centers on the frequency and type of waiver, the severity of the outcome following transfer to adult court,¹⁵³ and recently,

147. *Id.*

148. *Id.*

149. Bishop et al., *supra* note 50, at 215 (citing Bridges & Steen, *supra* note 55).

150. Soler, *supra* note 63, at 18. The Juvenile Transfer Advocacy Unit of the Cook County Public Defender's Office reviewed the records of all youth who were automatically waived to adult court under the statute for one year (1999-2000) and found that ninety-nine percent of the transferred youth were members of a minority. JASON ZIEDENBERG, BUILDING BLOCKS FOR YOUTH, DRUGS, AND DISPARITY: THE RACIAL IMPACT OF ILLINOIS' PRACTICE OF TRANSFERRING YOUNG DRUG OFFENDERS TO ADULT COURT 9 (2001). Such a finding led Ziedenberg to state that automatic transfer statutes are "among the most racially inequitable laws in the country." *Id.* at 3.

151. JOLANTA JUSZKIEWICZ, TO PUNISH A FEW: TOO MANY YOUTH CAUGHT IN THE NET OF ADULT PROSECUTION 55-59 (2007).

152. Soler, *supra* note 63, at 31.

153. Megan Kurlychek & Bruce Johnson, *The Juvenile Penalty: A Comparison of Juvenile and Young Adult Sentencing Outcomes in Criminal Court*, 42 CRIMINOLOGY 485 (2004); Daniel Mears, *A Critique of Waiver Research: Critical*

recidivism.¹⁵⁴ Other research focuses on race, but it is generally descriptive in nature.¹⁵⁵ Studies are lacking on the determinants of the waiver decision and in particular the relationship between race, the likelihood of waiver to adult court, and youth being sentenced in adult court.¹⁵⁶

Fagan and colleagues conducted two studies that focused specifically on the racial predictors of the judicial transfer to adult court using multivariate analyses.¹⁵⁷ In the first study by Fagan and colleagues, race was not significant in the multivariate analyses, but minority youth charged with homicide were more likely than Whites to be transferred.¹⁵⁸ No evidence of a race effect was present in the second study.¹⁵⁹ Leiber, Roudebush, and Woodrick studied the waiver decision in four jurisdictions in the state of Iowa.¹⁶⁰ Race did not have a direct relationship with the decision to waive youth, once legal and extralegal variables were considered.¹⁶¹ However, being Black and older or charged with a felony increased the likelihood of transfer to adult court when compared to all other youth.¹⁶²

Kurlychek and Johnson compared the sentencing of juveniles in adult court to the sentences of young adults sentenced in adult court.¹⁶³ They discovered that juvenile offenders were treated more severely than young adult offenders (age eighteen to twenty) in

Next Steps in Assessing the Impacts of Laws for Transferring Juveniles to the Criminal Justice System, 1 YOUTH VIOLENCE & JUV. JUST. 156 (2003); DAVID MYERS, *BOYS AMONG MEN: TRYING AND SENTENCING JUVENILES AS ADULTS* (2005).

154. Bishop et al., *supra* note 50; Jeffrey Fagan et al., *Be Careful What You Wish For: The Comparative Impacts of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders* (Columbia Law Sch., Research Paper No. 03061, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=491202. Studies have shown that youth waived to adult court and released back into the community report an increase in recidivism. *Id.* at 3–5.

155. See Soler, *supra* note 63 (one example of such descriptive research).

156. Kareem Jordan & Tina Freiburger, *Examining the Impact of Race and Ethnicity on the Sentencing of Juveniles in the Adult Court*, 2 CRIM. JUST. POLY REV. 185, 188 (2010).

157. Fagan et al., *supra* note 96; Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinants of Juvenile Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314 (1990).

158. Fagan et al., *supra* note 96, at 273.

159. Fagan & Deschenes, *supra* note 157, at 342.

160. Michael Leiber et al., *Race, Contextual Factors, and the Waiver Decision within Juvenile Court Proceedings: Preliminary Findings from a Test of the Symbolic Threat Thesis*, in JUSTICE WITH PREJUDICE: RACE AND CRIMINAL JUSTICE IN AMERICA 121 (Michael J. Lynch & E. Britt Patterson eds., 1996).

161. *Id.* at 133.

162. *Id.* at 136.

163. Kurlychek & Johnson, *supra* note 153.

adult court.¹⁶⁴ Kurlychek and Johnson concluded that youth transferred to adult court were perceived as more dangerous and blameworthy, but this conclusion was not conditioned by race.¹⁶⁵ Kupchik compared the sentences of juveniles in adult court to those of youth in juvenile court.¹⁶⁶ He reported that Whites were less likely to be incarcerated than Blacks.¹⁶⁷ This relationship was stronger in adult court than in juvenile court.¹⁶⁸

McNulty examined the likelihood of receiving incarceration or probation in adult court.¹⁶⁹ She discovered that Blacks were three times more likely to be incarcerated than Whites, while Latinos were almost twice as likely to be incarcerated.¹⁷⁰ Jordan and Freiburger focused specifically on race and the sentencing of youth in adult court in nineteen of the nation's largest counties.¹⁷¹ They found that Black youth were more likely than similarly situated White youth to be sentenced to both prison and jail than probation.¹⁷² Hispanic youth were also more likely to receive prison sentences over jail compared to Whites.¹⁷³ In addition, Blacks with a prior record increased their chances of receiving a prison sentence over jail compared to Whites.¹⁷⁴ The authors argue that judges may view prior record differently for Blacks than for Whites.¹⁷⁵ Blacks with a prior record may be viewed as more dangerous than similarly situated Whites.¹⁷⁶

IV. Implications for Youth, Minorities, and LWOPS

While factors associated with differential offending (e.g., school problems, family dysfunction, impoverishment) account for minority youth overrepresentation in the juvenile justice system, bias (e.g., race/class stereotypes of the lack of moral character, dangerousness, and need of control) also appears to impact case

164. *Id.* at 498–502.

165. *Id.* at 500.

166. Aaron Kupchik, *The Decision to Incarcerate in Juvenile and Criminal Courts*, 31 CRIM. JUST. REV. 309, 309 (2006).

167. *Id.* at 321–22.

168. *Id.*

169. Elizabeth McNulty, *The Transfer of Juvenile Offenders to Adult Court: Panacea or Problem?*, 18 LAW & POLY 61 (1996).

170. *Id.* at 70.

171. Jordan & Freiburger, *supra* note 156, at 188.

172. *Id.* at 190.

173. *Id.*

174. *Id.* at 193.

175. *Id.* at 195.

176. *Id.*

outcomes.¹⁷⁷ In addition, decisions at early stages (e.g., secure detention) contribute to movement further into the juvenile justice system and transfer to adult court.¹⁷⁸ Many youth transferred to adult court await placement in adult jails.¹⁷⁹ The placement of youth in adult jail and other forms of incarceration that include the possibility of LWOP not only involve the loss of freedom, but also enhance exposure to criminal influences and emotional, physical, and sexual harm.¹⁸⁰ Youth transferred to adult court and those released from prison have an increased likelihood of engaging in crime again.¹⁸¹ Thus, “incarceration compounds social and racial disadvantage to sustain inequalities over the life course, with crime itself only a partial explanation of the sources of that disadvantage.”¹⁸² Further, continued involvement in the system leads to a mortgaging of these youths’ life chances in terms of educational attainment, access to quality employment, marriage, effective parenting, and overall, the ability to escape a life of impoverishment.¹⁸³ Additional support for this rather bleak portrait comes from the results of a national survey of juveniles serving life sentences.¹⁸⁴

Key findings from the surveys include:

- 75.1% of the respondents were members of minorities, with 60% of respondents being Black.¹⁸⁵
- “Juvenile lifers experienced high levels of exposure to violence in their homes and communities; 79% of individuals reported witnessing violence in their homes; . . . 54.1% witnessed weekly violence in their neighborhoods.”¹⁸⁶
- “Juvenile lifers, particularly girls, suffered high rates of abuse; [46.9% overall] experienced physical abuse, including 79.5% of girls; 77.3% of girls reported histories of sexual abuse; overall, 20.5% of juvenile lifers report being victims

177. See Bishop, *supra* note 57.

178. See Leiber & Peck, *supra* note 116.

179. Soler, *supra* note 63, at 21–22; JUSZKIEWICZ, *supra* note 151, at 5; ASHLEY NELLIS, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 19–20 (2012).

180. Fagan, *supra* note 63, at 47.

181. *Id.*

182. *Id.*, *supra* note 63, at 53.

183. LAUB & SAMPSON, *supra* note 126, at 275–93; ANDERSON, *supra* note 47.

184. NELLIS, *supra* note 179. The Sentencing Project conducted a study from October 2010 through August 2011 that involved surveying individuals serving LWOP in all states that house juvenile lifers. Roughly sixty-eight percent, or 1,579 inmates, responded. *Id.* at 1–2.

185. *Id.* at 8.

186. *Id.* at 2.

of sexual abuse.”¹⁸⁷

- “Juvenile lifers generally experienced significant social and economic disadvantage in their homes and communities; . . . [31.5%] of juvenile lifers were raised in public housing; . . . [17.9%] of the respondents were not living with a close adult relative just before their incarceration; some reported being homeless, living with friends, or being housed in a detention facility, treatment center, or group home.”¹⁸⁸
- “Juvenile lifers faced significant educational challenges; two in five respondents had been enrolled in special education classes; [f]ewer than half (46.6%) of these individuals had been attending school at the time of their offense; [t]he vast majority (84.4%) of juvenile lifers had been suspended or expelled from school at some point in their academic careers.”¹⁸⁹

Overall, the respondents reported youth experiences that involved exposure to home and neighborhood violence, educational deficits, engagement with delinquent peers, and family members in prison.¹⁹⁰

Additional troubling information that emerged from the survey of those serving LWOP is that 61.9% of the youth were not participating in rehabilitative programming.¹⁹¹ This was not the result of non-interest but of state and prison policies.¹⁹² Nellis reported that “32.7% had been [barred] because they will never be released from prison; an additional 28.9% were in prisons without sufficient programming or had completed all available programming.”¹⁹³

If released at some point, due to their incarceration experiences and their life experiences prior to prison, these inmates may be severely inadequately prepared to successfully transition back into society.¹⁹⁴ The cumulative disadvantage may increase the chances of a life of continued poverty, crime, and ultimately, a return to the criminal justice system.¹⁹⁵ This situation is even worse for minorities and particularly Blacks.¹⁹⁶ Further, the possibility appears of bias in the sentencing to LWOP

187. *Id.*

188. *Id.*

189. NELLIS, *supra* note 179, at 3.

190. *Id.* at 2–3.

191. *Id.* at 4.

192. *Id.*

193. *Id.* at 23.

194. *Id.* at 31–33.

195. See NELLIS, *supra* note 179, at 31.

196. See *id.* at 36.

for Blacks. Nellis examined juvenile homicide arrest information in LWOP-eligible states from 1976 through 2007, which were the years when most of the respondents received convictions.¹⁹⁷ She found that Black youth who victimized a White individual are “far more likely to be sentenced to [LWOP] than their proportion of such crimes would suggest.”¹⁹⁸

V. Recommendations

Both the differential offending and selection bias arguments account for minority overrepresentation in the juvenile justice system, including waiver to adult court,¹⁹⁹ and from one preliminary study, in the sentencing of youth to LWOP as lifers without the possibility of parole in the adult system.²⁰⁰ Therefore, to reduce minority overrepresentation and ensure greater equity in the treatment of youth overall and minority youth in particular, multi-systemic approaches are needed to address factors associated with the causes of delinquency and the overt and more frequent subtle forms of bias.

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) recommends several agency guidelines for developing intervention strategies, including:

- (1) prioritizing strategies based on critical decision points within a jurisdiction, such as arrest and detention;
- (2) identifying whether minority overrepresentation exists and studying what leads to the overrepresentation;
- (3) implementing strategies that have community and agency support;
- (4) relying on evidence-based strategies and drawing on successful initiatives; and
- (5) evaluating whether the implementation of such strategies is successful.²⁰¹

Individuals, organizations, and governmental entities have created or can create and implement several initiatives that center

197. *Id.* at 15.

198. *Id.* These findings parallel those reported concerning the imposition of a sentence of death. See David Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 708–10 (1983).

199. Bishop & Leiber, *supra* note 8.

200. NELLIS, *supra* note 179, at 14–15.

201. Michael Leiber & Nancy Rodriguez, *The Implementation of the Disproportionate Minority Confinement/Contact (DMC) Mandate: A Failure or Success?*, 1 RACE & JUST. 103, 109 (2011). For other general recommendations, see ASHLEY NELLIS, SEVEN STEPS TO DEVELOP AND EVALUATE STRATEGIES TO REDUCE DISPROPORTIONATE MINORITY CONTACT (DMC) (2005); MARK SOLER & LISA M. GARRY, REDUCING DISPROPORTIONATE MINORITY CONTACT: PREPARATION AT THE LOCAL LEVEL (2009); Nellis & Richardson, *supra* note 126, at 7–8; Soler, *supra* note 63, at 23–33.

on either direct services to youth, training and technical assistance of key personnel, or system change. The following discussion presents a brief overview of these three types of intervention strategies to address minority youth overrepresentation.

A. *Direct Services*

Direct services for the reduction of minority youth overrepresentation focus on the factors associated with why youth commit crime. These efforts center on prevention and intervention programs that address the various needs of at-risk youth (e.g., skill development, educational attainment, positive relationships with family and peers). Prevention programs may include strategies that focus on familial relationships (e.g., family therapy and parent training) or educational deficiencies (e.g., afterschool programs and vocational training). Intervention programs address the needs of youth already in the juvenile justice system and seek to reduce continued antisocial behavior among them. Beyond the focus on prevention and intervention programs, direct services include diversion programs/services, advocacy, and alternatives to secure detention.

Alternatives to secure detention have received the most attention among the different direct service options.²⁰² These efforts seek to promote the implementation of strategies and programs that reduce reliance on secure confinement, improve public safety, reduce minority youth overrepresentation, reduce costs, and lead to juvenile justice reforms.²⁰³ Alternatives to secure confinement can take various forms including home confinement, day (or evening) treatment, holdover programs, and intensive supervision programs.²⁰⁴

B. *Education, Training, and Technical Assistance*

Cultural diversity training is one strategy used to expose and educate individuals about racial and ethnic biases in the juvenile and adult justice systems. The training of law enforcement and juvenile court personnel focuses on the reduction of racial and ethnic stereotypes while educating how these biases influence the processing of youth within both the juvenile and adult justice systems.²⁰⁵ Agencies such as the OJJDP, the Annie E. Casey

202. Leiber & Rodriguez, *supra* note 201, at 110.

203. MENDEL, *supra* note 113, at 2–3.

204. U.S. DEP'T OF JUST., DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL, at 4-10 to 4-11 (4th ed. 2009).

205. Leiber & Rodriguez, *supra* note 201, at 111.

Foundation, the American Correctional Association, the Police Executive Forum, and the Sentencing Project have created various cultural diversity training curricula and informational reports and materials.²⁰⁶ National and regional conferences and the dissemination of materials are other vehicles through which governmental entities and organizations present issues to the general public and agents of the juvenile and criminal justice system.²⁰⁷

While one strategy is to educate decision-makers about race and the issue and forms of bias, another is the education of communities of color as a means to reduce their presence in the juvenile justice system. Recently, Burt and colleagues initially examined 897 Black families to assess how they dealt with racial discrimination.²⁰⁸ The authors conceptualized discrimination as a cumulative strain that impacts individuals' world views, including relationships and ideas of fairness of the law.²⁰⁹ They report that people who experienced high levels of discrimination were at a high risk of criminal offending.²¹⁰ Nearly seventy percent of the effect of discrimination occurred through depression, hostile views of relationships, and adherence to non-conventional norms.²¹¹ Youth whose parents promoted racial pride and preparation against bias, however, were less likely to engage in crime.²¹² These findings emphasize the importance of parenting practices that involve the socialization of children as to how to confront and psychologically handle discrimination in a positive, noncriminal manner.²¹³

C. System Change

Significant system change has been slow to occur.²¹⁴ When

206. *Id.*

207. This Article was written as part of such an effort in response to a Symposium entitled "Children Are Different": Culpability and Mandatory Sentencing of Juveniles Under *Miller v. Alabama* & *Jackson v. Hobbs*" sponsored by the University of Minnesota Law School. Attorneys who attended the panel that featured this paper could receive elimination of bias CLE credits.

208. The sample reduced to 779 families in Wave Two, 767 families in Wave Three, and 714 families in Wave Four. Callie Harbin Burt et al., *Racial Discrimination, Ethnic-Racial Socialization, and Crime: A Micro-sociological Model of Risk and Resilience*, 77 AM. SOC. REV. 648, 657 (2012).

209. *Id.* at 653.

210. *Id.* at 662.

211. *Id.* at 668.

212. *Id.* at 668-69.

213. *Id.*

214. JAMES BELL & LAURA JOHN RIDOLFI, ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL AND ETHNIC DISPARITIES IN THE

system change has occurred, it has come in the form of legislative reform and structural and procedural changes that affect decision-making.²¹⁵

An example of an effort to legislate for system change is the federal disproportionate minority confinement/contact (DMC) mandate. In 1989, the DMC was passed as part of the reauthorization of the Juvenile Justice and Delinquency Prevention Act (JJJPA) of 1974.²¹⁶ The DMC mandate involves five interrelated and ongoing phases: identification of DMC, assessment of possible causes, interventions, evaluation, and monitoring.²¹⁷ DMC was included as a core requirement of the JJJPA, in 1992 and 1994, and states participating in the Federal Formula Grants Program were required to adhere to the mandate.²¹⁸ States failing to make progress or at least show a good-faith effort toward progress risked losing twenty-five percent (now twenty percent) of their formula grant funds for that year and having to direct the remaining three-fourths toward achieving compliance.²¹⁹ An underlying goal of the DMC mandate was, and continues to be, the equitable treatment of all youth within the

JUVENILE JUSTICE SYSTEM 15 (2008).

215. See U.S. DEPT OF JUST., *supra* note 204; Pope & Leiber, *supra* note 57, at 351–55.

216. Juvenile Justice and Delinquency Prevention Act (JJJPA) of 1974, Pub. L. No. 93-415, § 223(a)(22).

217. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 12209(1)(S)(23) (2002).

218. Nellis & Richardson, *supra* note 126, at 1–2.

219. Leiber and Rodriguez looked at the implementation of the DMC mandate:

The JJJPA was modified in 2002, changing the emphasis from “disproportionate minority confinement” to “disproportionate minority contact,” requiring an examination of possible disproportionate representation of minority youth at all decision points in the juvenile justice system. . . . For all intents and purposes, the change from “confinement” to “contact” was a change in name only as the intent of the requirement from the start was a focus on decision making at all stages in the system leading to confinement. . . . The Formula Grants Program functions somewhat as a federal financial incentive for states that want to comply with the Office of Juvenile Justice and Delinquency Prevention (OJJDP) mandates although states may opt not to participate. The amount of money is based on the number of persons of age 17 and younger in a given state and the amount awarded to an individual state can be significant. In 1998, for example, California received \$7,839,000, whereas Oklahoma received \$779,000. If a state is found to be in compliance with a particular mandate, the money can be then used for the continuation of compliance with that mandate, used to comply with the other mandates and/or to further other juvenile justice efforts.

Leiber & Rodriguez, *supra* note 201, at 104, 118 n.2. For more information about programs to address DMC, see U.S. DEPT OF JUST., *supra* note 204, at Intro–1, 6-1 to 6-5; NELLIS, *supra* note 201, at 7; Nellis & Richardson, *supra* note 126, at 1–2.

juvenile justice system.²²⁰

Another example of system change occurred in the state of Iowa, where state legislation requires an assessment of the disproportionate impact of future proposed crime laws on racial and ethnic minorities, similar to a fiscal impact statement.²²¹ The Iowa legislature passed the Minority Impact Law in 2008, mandating assessments of

[A]ny disproportionate or unique impact of proposed policies or programs on minority persons in this state, . . . [a] rationale for the existence of programs or policies having an impact on minority persons in this state, [and] . . . [e]vidence of consultation of representatives of minority persons in cases where a policy or program has an identifiable impact on minority persons²²²

This legislation has the potential of adding a protection against unwarranted disparities in the justice system.²²³

The use of standardized screening instruments at detention has been a prominent strategy advocated by the Annie E. Casey Foundation, the MacArthur Foundation, the Haywood W. Burns Institute, and the OJJDP to reduce the overreliance on secure detention and ensure greater consistency in criteria used to justify detention.²²⁴ Supporters assume that the use of standardized detention instruments will reduce potential bias resulting in minority youth overrepresentation.²²⁵ Unfortunately, most jurisdictions do not use such instruments and instead rely on professional judgment to arrive at detention decisions.²²⁶

220. U.S. DEPT OF JUST., *supra* note 204, at 3-3. The DMC mandate has its critics. See, e.g., BELL & RIDOLFI, *supra* note 214; Leiber, *supra* note 57; Leiber & Rodriguez, *supra* note 201.

221. Marc Mauer, *Racial Impacts Statements: Changing Policies to Address Disparities*, 23 CRIM. JUST. 16, 17-18 (2009).

222. 2008 Iowa Acts 312.

223. Nellis & Richardson, *supra* note 126, at 7.

224. Leiber & Rodriguez, *supra* note 201.

225. U.S. DEPT OF JUST., *supra* note 204, at 4-24; Leiber & Boggess, *supra* note 126, at 334.

226. Christopher A. Mallett & Patricia Stoddard-Dare, *Predicting Secure Detention Placement for African-American Juvenile Offenders: Addressing the Disproportionate Minority Confinement Problem*, 8 J. ETHNICITY IN CRIM. JUST. 91, 93-94 (2010). According to the Annie E. Casey Foundation, reform sites that include the use of detention instruments have been able not only to reduce the overall number of youth detained in facilities but also to produce more equitable treatment of minority youth in juvenile court processing. In Santa Cruz, California, for example, Latino youth were two-thirds more likely to enter detention than White youth in 2005. By 2008, this disparity was reduced by half. MENDEL, *supra* note 113, at 2-3, 23. In Multnomah County, Oregon, in 1994, the proportion of referrals that resulted in detention for Blacks and Hispanics was roughly twenty-five percent, whereas Whites made up thirteen percent. In 2000,

Other efforts should focus on policy reform of the waiver process (i.e., making it more difficult to transfer youth to adult court), given not only that minority youth are waived into adult court disproportionately, but also findings showing that many of the youth transferred are involved in non-serious crime, that youth are housed in jail with adults, and that youth transferred to adult court are likely to recidivate.²²⁷ In addition, organizations and government entities should focus efforts on using alternative placement rather than adult jail for youth transferred to adult court. Lastly, prisons need to have rehabilitative programming for inmates, but especially for youth, whether serving LWOP or shorter sentences.²²⁸

Conclusion

Since its formal inception in 1899, the juvenile court has helped many children and families.²²⁹ Its ability to take into account an array of legal and social factors, including the age of the youth, has permitted the court to act in youths' best interests.²³⁰ Although differences in offending and social circumstances may account to some degree for the overrepresentation of minorities in the juvenile justice system, racist and classist characterizations, along with behavioral expectations in the larger culture, are often reproduced in juvenile courts.²³¹ This also appears to be true of sentencing youth in adult court.²³² Strategies and interventions are needed that recognize the factors associated with both differential offending and bias that result in the greater social control of minorities compared to White youth. The role cumulative disadvantage has in contributing to further movement into the juvenile and criminal justice systems, as well as the return of youth to these systems of control, also needs to be part of the discussion to reduce the presence of minorities in both judicial systems.

the proportion for all three racial and ethnic groups was about ten percent. ELEANOR HINTON HOYTT ET AL., 8 *REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION: PATHWAYS TO DETENTION REFORM* 59 (2002); see Feyerherm, *supra* note 126, at 46, 48. In addition, reductions were evident in the referrals of probation violators to detention. HOLMAN & ZIEDENBERG, *supra* note 112, at 15.

227. NELLIS, *supra* note 179, at 31; Bishop et al., *supra* note 63, at 182–83; Soler, *supra* note 63, at 21–22.

228. NELLIS, *supra* note 179, at 35–36.

229. ANTHONY PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 9–13 (2009).

230. See FELD, *supra* note 48, at 109.

231. Bishop & Leiber, *supra* note 8.

232. Fagan, *supra* note 63.

