

# Criminal Justice and Black Families: The Collateral Damage of Over- Enforcement

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## INTRODUCTION

The glaring racial disparity in the nation's prison population is well-documented.<sup>1</sup> Researchers are now analyzing the devastating consequences of high incarceration rates on the nation as a whole and on Black communities in particular.<sup>2</sup> The disruptive impact that over-enforcement has on Black families is one of these adverse consequences. Because most prison inmates are parents, incarceration breaks up families by depriving children of their parents' emotional and financial support. Juvenile detention and imprisonment also splinter families because they remove children from their homes, transferring custody from the parents to the state. In debating the legality and justice of the prison system's racial imbalance, it is important to consider the way the racial disparity in prisons jeopardizes the integrity of Black families.

Statistics showing racial imbalance in the prison population alone demonstrate a racial injustice. But many people believe that the high Black incarceration and juvenile detention rates are defensible.<sup>3</sup> Others sense their injustice but are at a loss to explain it. The traditional way to challenge racial disparities in government programs is to prove racial discrimination against individual defendants. This approach centers on demonstrating harm to individuals and racial motivation on the part of government officials.<sup>4</sup> Claimants must prove that they were hassled,

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<sup>1</sup> See MARC MAUER & THE SENTENCING PROJECT, RACE TO INCARCERATE 118-41 (1999); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 28-31 (1995).

<sup>2</sup> See, e.g., MAUER, *supra* note 1, at 178-88; JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 89-136 (1996); Velma LaPoint, *Prison's Effect on the African-American Community*, 34 HOWARD L.J. 537, 539 (1991). John Hagan and Ronit Dinovitzer summarize the collateral damage of high incarceration rates as follows:

[I]mprisonment may engender negative consequences for offenders whose employment prospects after release are diminished; for families who suffer losses both emotional and financial; for children who suffer emotional and behavioral problems due to the loss of a parent, financial strain, and possible displacement into the care of others; for communities whose stability is threatened due to the loss of working males; and for other social institutions that are affected by the budgetary constraints imposed by the increases in spending on incarceration.

John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUSTICE: PRISONS 121, 122 (Michael Tonry & Joan Petersilia eds., 1999).

<sup>3</sup> See TONRY, *supra* note 1, at 39-47 (discussing common justifications for racial disparity in prison population).

<sup>4</sup> See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 937-38 (1989).

arrested, convicted, or imprisoned because of their race.

Discrimination challenges are vulnerable for several reasons. First, it is hard to prove racial motivation. The disproportionate incarceration of Blacks results from a complex combination of biased decision making in individual cases and systemic factors, such as law enforcement priorities and sentencing legislation.<sup>5</sup> Judges, prosecutors, and police officers rarely articulate racist reasons for their actions. Second, it seems fair to punish defendants because they have usually committed a crime. For example, in *McClesky v. Kemp*,<sup>6</sup> the U.S. Supreme Court upheld the death penalty despite evidence of its racially biased administration.<sup>7</sup> The Court reasoned that statistical evidence of discrimination did not prove that the defendant's own sentence was influenced by his race or that he did not deserve to be executed. Moreover, a growing branch of scholarship on race and the criminal justice system emphasizes the benefit tougher law enforcement provides Black communities. As Randall Kennedy points out in *Race, Crime and the Law*, the victims of these offenders are most likely to be Black, as well.<sup>8</sup> Some theorists argue that victimization by criminals poses a greater threat to the well-being of Black communities than does the risk of state abuse.<sup>9</sup> Kennedy contends that "the principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws."<sup>10</sup>

An alternative perspective considers the harm of over-enforcement to Black people as a group rather than to individual defendants. This approach investigates the injury mass incarceration of a large portion of their population causes to Black communities. It is important to uncover, analyze, and address the group consequences of over-enforcement as well as the way it supports a racial hierarchy in America. When human rights organizations present prison statistics from less democratic countries (South Africa under Apartheid, for example), the public does not condition its condemnation on proving the innocence of the prisoners. Rather, it recognizes that the government can use incarceration as a tool of state repression. We understand that massive incarceration inflicts a political injury beyond the physical restraint imposed on so many individuals. It is increasingly clear that the

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<sup>5</sup> MAUER, *supra* note 1, at 128; MILLER, *supra* note 2, at 48-88.

<sup>6</sup> 481 U.S. 279 (1987).

<sup>7</sup> *Id.* at 279-82.

<sup>8</sup> RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 19 (1997).

<sup>9</sup> See, e.g., *id.*; Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1166 (1998).

<sup>10</sup> KENNEDY, *supra* note 8, at 19.

criminalization of Black Americans serves a repressive function. For example, a study conducted by the Sentencing Project and Human Rights Watch in 1998 documented the impact of high incarceration rates on the Black community's participation in civic life.<sup>11</sup> In most states, a felony conviction results in the loss of the right to vote either temporarily during incarceration or permanently. Forty-six states deny inmates voting rights during the time they are incarcerated. Thirty-one states disenfranchise felons while they are in prison as well as when they are on probation or parole. Thirteen of these states disenfranchise inmates for life. The study estimated that 3.9 million Americans, or one in fifty adults, were either currently or permanently disenfranchised from voting as a result of a felony conviction.<sup>12</sup> More than a third of these disenfranchised citizens — 1.4 million — are Black men.<sup>13</sup>

The impact of incarceration on Black political power is more dramatic when the disenfranchisement figures are considered from the group's perspective. Nearly one in seven of Black males of voting age have been disenfranchised as a result of incarceration.<sup>14</sup> The impact is especially enormous in states where ex-felons are denied the right to vote: one in four Black men are permanently disenfranchised in seven of these states.<sup>15</sup> Excluding such large numbers of citizens from the electoral process dilutes the political power of Blacks as a group. "Thus, not only are criminal justice policies resulting in the disproportionate incarceration of African Americans" concludes the Sentencing Project's Mark Mauer, "imprisonment itself reduces Black political ability to influence these policies."<sup>16</sup>

The denial of political power, however, is not the only problem. Incarceration also has a tremendous impact on Blacks' participation in the labor market. Berkeley legal studies scholar Elliot Currie notes that the more than one million poor men confined to prisons at the end of 1996 were not counted in the nation's unemployment statistics.<sup>17</sup> If these inmates were added to the official unemployment figure, the male unemployment rate would increase by more than a fourth, from 5.4% to 6.9%.<sup>18</sup> But the impact of incarceration on the jobless rate is far more

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<sup>11</sup> See MAUER, *supra* note 1, at 186.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See *id.* (noting that 13% of Black men were disenfranchised).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> ELLIOT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* 33 (1998).

<sup>18</sup> *Id.*

astounding in relation to Black men. Combining the 762,000 Black men counted in the official 1995 figures with 511,000 in state or federal prison raises the unemployment rate for Black men from under 11% to almost 18% — an increase of two-thirds.<sup>19</sup> This means that unemployment is worse in Black communities than the official numbers indicate.

Moreover, these figures also highlight how incarceration depletes Black communities of their workforce and income and therefore hurts their economic stability.<sup>20</sup> When inmates return from prison they typically lack the education and skills needed to compete in the labor market.<sup>21</sup> Imprisonment not only reduces the opportunities inmates have for legal work, it also strengthens their connections to criminal networks.<sup>22</sup> In addition, children who are incarcerated have virtually no chance of stable employment when they grow up.<sup>23</sup> "To the extent that incarceration aggravates the already severe labor-market problems of their mostly low-income, poorly educated inmates," warns Currie, "it will increase the costs to the public sector of dealing with them on the outside."<sup>24</sup>

Finally, the over-enforcement of criminal law has a similarly devastating impact on Black family life. High incarceration rates among Black adults (and an increasing number of juvenile offenders) and detention rates among Black children contribute to the disproportionate removal of Black children from their parents' custody to state control. As Mark Mauer asks, "[w]hat does it do to the fabric of the family and community to have such a substantial proportion of its young men enmeshed in the criminal justice system?"<sup>25</sup>

This essay argues that the racial disparity in criminal justice results in a growing devaluation and disruption of Black families. Part I discusses the relationship between the prison system and the child welfare system. These two institutions share a similar demography and social function. Part II examines the impact racially imbalanced incarceration of parents has on Black families. Finally, Part III considers the impact racially imbalanced detention of children has on Black families. This essay

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<sup>19</sup> *Id.*

<sup>20</sup> Hagan & Dinovitzer, *supra* note 2, at 134-35.

<sup>21</sup> *See id.* at 136-37 (discussing impact of imprisonment on future employment).

<sup>22</sup> *See* ROBERT SAMPSON & JOHN LAUB, *CRIME IN THE MAKING* 143 (1993).

<sup>23</sup> *See id.* at 20; John H. Laub & Robert J. Sampson, *Long-Term Effect of Punitive Discipline*, in *COERCION AND PUNISHMENT IN LONG-TERM PERSPECTIVE* 256 (J. McCord ed., 1995).

<sup>24</sup> CURRIE, *supra* note 17, at 73-74.

<sup>25</sup> MAUER, *supra* note 1, at 12.

concludes that the collateral damage to Black families provides more reason for opposing the trend toward greater mass incarceration of Black citizens.

## I. THE RELATIONSHIP BETWEEN THE CRIMINAL JUSTICE AND CHILD WELFARE SYSTEMS

The impact of incarceration on Black families suggests a relationship between the child welfare system and the criminal justice system. The most direct connection is that incarceration of parents places many children into foster care.<sup>26</sup> But there are less obvious and more profound links between criminal justice and child welfare.

### A. *The Systems' Demographic Similarity*

Demographically, the prison system and the child welfare system are remarkably similar. They are both populated almost exclusively by poor people and by a grossly disproportionate number of Blacks. The United States has the largest prison population in the world, and over half of it is Black.<sup>27</sup> Only Russia has a higher rate of incarceration.<sup>28</sup> The number of incarcerated Americans increased 500% in the last thirty years, from fewer than 200,000 inmates in 1972 to 1.2 million in 1997.<sup>29</sup> By 2001, there were two million Americans incarcerated in prisons and jails.<sup>30</sup> The bulk of this explosion stemmed from locking up young Black men. Black Americans are more than seven times as likely as whites to be incarcerated.<sup>31</sup> Twelve states and the District of Columbia imprison Blacks at a rate more than ten times that of whites.<sup>32</sup> The racial disparity in incarceration rates has gotten worse in recent decades: the racial imbalance increased in thirty-eight states and the District of Columbia between 1988 and 1994.<sup>33</sup> Thus, Black men are far more likely than whites to be imprisoned.

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<sup>26</sup> See *infra* notes 97-98 and accompanying text.

<sup>27</sup> MAUER, *supra* note 1, at 21-22, 118-19 tbl.2-1.

<sup>28</sup> *Id.* at 19.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS 1 (Apr. 2001), available at <http://www.sentencingproject.org/brief/facts-pp.pdf>.

<sup>31</sup> MAUER, *supra* note 1, at 126.

<sup>32</sup> MARK MAUER & THE SENTENCING PROJECT, INTENDED AND UNINTENDED CONSEQUENCES: STATE RACIAL DISPARITIES IN IMPRISONMENT 1 (1997).

<sup>33</sup> *Id.*

As alarming as the difference in white and Black incarceration rates, is the huge proportion of Black men behind bars. As of 1995, 7% of all Black men were in prison on any given day<sup>34</sup> and almost one-third of Black males could expect to be incarcerated during their lifetime.<sup>35</sup> In stark contrast, a white boy only stood a 4% chance of ever being imprisoned.<sup>36</sup> A 1991 study found that nearly one-third of all young Black men living in Los Angeles County had been jailed at least once that year.<sup>37</sup> Calls by conservative pundits to stop crime by doubling the current prison population would mean locking up nearly a quarter of all young African American men.<sup>38</sup>

This pattern of over-representation is replicated in the juvenile justice system. Although in 1997 the juvenile population was 79% white and 15% Black, Black youth accounted for 31% and white youth for 66% of delinquency cases handled by juvenile courts.<sup>39</sup> More than one in four (28%) of adjudicated delinquency cases ended in placing children outside their homes — in residential treatment centers, juvenile correction facilities, foster homes, or group homes.<sup>40</sup> Black youth, however, are sent to out-of-home placements at higher rates than white youth. That same year, 32% of cases involving Black youth resulted in out-of-home placements, compared to 26% of cases involving white youth.<sup>41</sup> The racial disparity is even starker in confinement to juvenile detention facilities. Between 1988 and 1997, the increase in Black youth detention (52%) was more than double the increase for whites (25%).<sup>42</sup> In 1997, judges sent 27% of Black delinquents to juvenile detention centers, but only 15% of white delinquents.<sup>43</sup>

The racial imbalance in the child welfare system is equally alarming. In 1986, Black children, who were only 15% of the population under age eighteen, made up about one quarter of children entering foster care and

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<sup>34</sup> MAUER, *supra* note 1, at 183.

<sup>35</sup> *Id.* at 125.

<sup>36</sup> *Id.*

<sup>37</sup> MILLER, *supra* note 2, at 5.

<sup>38</sup> See CURRIE, *supra* note 17, at 4.

<sup>39</sup> ANNE L. STAHL, U.S. DEP'T OF JUSTICE, DELINQUENCY CASES IN JUVENILE COURTS, 1997, at 1-2 (2000), available at <http://www.ncjrs.org/pdffiles1/ojdp/fs200004.pdf>.

<sup>40</sup> CHARLES M. PUZZANCHERA, U.S. DEP'T OF JUSTICE, JUVENILE COURT PLACEMENT OF ADJUDICATED YOUTH, 1988-1997, at 1 (2000), available at <http://www.ncjrs.org/pdffiles1/ojdp/fs200015.pdf>.

<sup>41</sup> *Id.*

<sup>42</sup> GILLIAN PORTER, U.S. DEP'T OF JUSTICE, DETENTION IN DELINQUENCY CASES, 1988-1997, at 1 (2000), available at <http://www.ncjrs.org/pdffiles1/ojdp/fs200017.pdf>.

<sup>43</sup> *Id.*

35% of children in foster care at the end of that year.<sup>44</sup> Today, nearly half of all children in foster care nationwide are Black, even though Black children are only 17% of the nation's youth.<sup>45</sup> Thus, the population of children under state supervision either through the juvenile justice system or the child welfare system looks identical; the children are predominantly poor and Black.

There is also a great deal of overlap between the children involved in both the juvenile justice and child welfare systems. Placement in foster care puts children at risk of being committed to juvenile detention.<sup>46</sup> A high percentage of children leaving foster care end up in prison.<sup>47</sup> The prison system supplies children to the child welfare system when it incarcerates their parents. The child welfare system supplies young adults to the prison system when it abandons them after languishing in foster care. Even more alarming is the combined impact of these two systems that regulate essentially the same population. They both result in massive state supervision of Black children. Taken together, the numbers of Black children in state custody because they are in foster care, juvenile detention, or prison has reached crisis proportions.

#### *B. The Systems' Similar Social Function*

In addition, the criminal justice system and the child welfare system serve a similar social function. Both use punishment to address the social problems of the populations under their control. The unprecedented explosion in the prison population during the 1980s occurred at a time of rising income inequality.<sup>48</sup> Expanding the penal system was a substitute for implementing social policies that tried to address poverty and racial inequality. "We were, in effect, using the prisons to contain a growing social crisis concentrated in the bottom quarter of our population," writes Elliot Currie.<sup>49</sup> "The prison *became* our

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<sup>44</sup> SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, U.S. HOUSE OF REPRESENTATIVES, 101ST CONG., U.S. CHILDREN AND THEIR FAMILIES: CURRENT CONDITIONS AND RECENT TRENDS 69 (Comm. Print 1989).

<sup>45</sup> ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SVCS., THE AFCARS REPORT: CURRENT ESTIMATES AS OF OCTOBER 2000(4), at 2 (2000) (reporting that 42% of children in foster care are Black).

<sup>46</sup> M.L. ARMSTRONG, VERA INSTITUTE OF JUSTICE, ADOLESCENT PATHWAYS: EXPLORING THE INTERSECTION BETWEEN CHILD WELFARE AND JUVENILE JUSTICE, PINS, AND MENTAL HEALTH 18 (1998).

<sup>47</sup> Richard P. Barth, *On Their Own: The Experiences of Youth After Foster Care*, 7 CHILD & ADOLESCENT SOC. WORK 419, 419 (1990).

<sup>48</sup> CURRIE, *supra* note 17, at 30.

<sup>49</sup> *Id.* at 32.

employment policy, our drug policy, our mental health policy, in the vacuum left by the absence of more constructive efforts."<sup>50</sup> The monumental investment in prisons comes at the cost of disinvestment in other social institutions that serve the communities that produce the inmate population.<sup>51</sup> The tens of billions of dollars spent each year on building the prison industrial complex were taken from other social systems that educate, house, and heal poor children.<sup>52</sup> Tough-on-crime policies are now politically expedient and prisons are an accepted source of economic growth. Prison expansion is so ingrained in American politics and market economy that we have seen, in Mauer's words, "the virtual institutionalization of a societal commitment to the use of a massive prison system."<sup>53</sup>

Another similarity is that, much like the juvenile justice system which buries the systemic reasons for crime, the child welfare system hides the systemic reasons for child maltreatment. Child protective services directs attention away from the social nature of families' hardships by laying the blame on individual parents' failings. "The underlying philosophy of the present child welfare system is that *all families should* be able to function adequately without the assistance of society, and that failure to perform the parental role without such assistance is indicative of individual pathology," explain sociologists Andrew Billingsley and Jeanne Giovannoni.<sup>54</sup> Child protection is activated only when families are already in crisis. The role of government is limited to rescuing children who have been mistreated by deficient parents, rather than ensuring the health and welfare of all families. Duncan Lindsey calls this the "residual approach" to child welfare because state intervention is treated as a last resort to be invoked only after the family has exhausted all resources at its disposal.<sup>55</sup>

Because the child welfare system perceives the resulting harm to children as parental rather than societal failures, state intervention to protect children is punitive in nature. The state's solutions to children's

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<sup>50</sup> *Id.* at 32-33.

<sup>51</sup> Hagan & Dinovitzer, *supra* note 2, at 130-31.

<sup>52</sup> CURRIE, *supra* note 17, at 35; *see also* MAUER, *supra* note 1, at 56-80 (describing development of tough-on-crime policies during last several administrations). The United States spends an estimated \$35 billion per year on corrections. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1996, at 4 tbl.1.3 (Kathleen Maguire & Ann L. Pastore eds., 1997).

<sup>53</sup> MAUER, *supra* note 1, at 9.

<sup>54</sup> ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM, at viii (1972).

<sup>55</sup> DUNCAN LINDSEY, THE WELFARE OF CHILDREN 4-5 (1994); *see also* BILLINGSLEY & GIOVANNONI, *supra* note 54, at 5.

deprivation involve intrusive meddling by social workers, behavioral requirements, and temporary or permanent removal of children from their homes.<sup>56</sup> Child protection proceedings are more akin to criminal trials than most civil adjudications because they pit individuals against the state and issue moral condemnation of parents.<sup>57</sup> Parents must often relinquish custody of their children to the state in exchange for the services and benefits their families need.<sup>58</sup>

As a result of the political choice to fund punitive instead of supportive programs, criminal justice and child welfare supervision is pervasive in poor Black communities. On any given day, nearly one in three Black males in their twenties is under the control of the criminal justice system — either in jail, on probation, or on parole.<sup>59</sup> The extent of criminal justice supervision in some inner cities is even greater. For example, in Baltimore half of young African American men are in the criminal justice system.<sup>60</sup> This oversight by prison wardens and probation officers is probably the most familiar exposure to government institutions for most inner-city Black men.<sup>61</sup>

For Black women, child protective services play a similar supervisory role.<sup>62</sup> Child welfare authorities have investigated a relatively large percentage of families in inner-city communities. For example, in Bushwick, Brooklyn, twenty out of every one thousand children have been removed from their homes and placed in protective custody.<sup>63</sup> That rate is ten times as high as in the affluent Upper East Side of Manhattan and seven times the rate in middle-class Bayside, Queens.<sup>64</sup> There were

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<sup>56</sup> See generally LINDSEY, *supra* note 55 (discussing structure and practices of North American child welfare system and examining approaches that would increase child welfare programs' effectiveness).

<sup>57</sup> The Supreme Court recognized similarities between proceedings to terminate parental rights and criminal trials. See *Santosky v. Kramer*, 455 U.S. 745, 764 (1982) (holding that termination of parental rights must be justified by clear and convincing evidence); *Lassiter v. Dep't of Soc. Svcs.*, 452 U.S. 18, 29 (1981) (holding that parents may have due process right to counsel in complex proceedings to terminate parental rights).

<sup>58</sup> See Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHL-KENT L. REV. (forthcoming 2001).

<sup>59</sup> TONRY, *supra* note 1, at 30 tbl.1-3.

<sup>60</sup> *Id.*

<sup>61</sup> See JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990*, at 252, 253 (1993).

<sup>62</sup> See Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 577-80 (1997).

<sup>63</sup> Somini Sengupta, *Parents in Poor Neighborhoods Wary of Child Welfare Agency*, N.Y. TIMES, May 31, 2000, at A1.

<sup>64</sup> *Id.*

1,413 investigations of child abuse and neglect in Bushwick in 1998, compared to only 109 on the Upper East Side.<sup>65</sup> The intensity of child welfare supervision in poor communities results in widespread fear among residents that the state will remove their children for minor forms of neglect.<sup>66</sup>

The simultaneous explosion of foster care and prison populations reflects an alarming abandonment of Black families. Instead of devoting adequate resources to support these families, the state increasingly shuffles them into the punitive machinery of law enforcement and child protection. Stereotypes about Black criminality and irresponsibility legitimate the massive disruption that both systems inflict on Black families and communities. Thus, both the prison and foster care systems can be viewed as institutions that work together to supervise and disrupt an inordinate number of Black families, furthering the subordination of Black people.

## II. INCARCERATION OF BLACK PARENTS

One of the most serious collateral harms imposed by massive incarceration is the negative impact on children with parents in prison. A recent special report by the Bureau of Justice Statistics on "Incarcerated Parents and Their Children" reveals the startling dimensions of this crisis.<sup>67</sup> In 1999, a majority of state and federal prisoners reported having a child under age eighteen.<sup>68</sup> About 2% of the nation's children — close to 1.5 million children — had a parent in prison that year.<sup>69</sup> This represents an increase of a half-million children in less than a decade.<sup>70</sup> About half of incarcerated parents (46%) lived with their children prior to incarceration.<sup>71</sup> Given the huge racial disparity in the prison population, Black children are the most likely to have an incarcerated parent. Seven percent of Black children had a parent in prison in 1999, making them nearly nine times more likely to have an incarcerated parent than white children.<sup>72</sup> Having a parent in prison is predominantly

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>.

<sup>68</sup> *Id.* at 1 (citing that 55% of state prisoners and 63% of federal prisoners reported having child under eighteen years old).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (stating increase of over 500,000 since 1991).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 2.

a problem for Black children.

Even if incarcerated parents are able to maintain contact with their children, imprisonment has a disrupting effect. Inmates can no longer take care of their children either physically or financially, placing extra economic and emotional burdens on the remaining family members.<sup>73</sup> Children are deprived of the emotional support and guidance parents provide. Losing a parent has serious psychological consequences for children, including depression, anxiety, and problems in school.<sup>74</sup> One study of children with incarcerated mothers found that the children experienced a trauma from the separation so profound that they displayed symptoms of posttraumatic stress disorder.<sup>75</sup> The stigma of having a mother or father in jail can also cause children to feel angry and defiant.<sup>76</sup>

Incarcerated parents face barriers to staying in touch with their children. Most prisons are located in remote areas far away from the cities where many inmates' families live.<sup>77</sup> This distance may force families to lose contact with the parent or to move closer to the prison to visit the parent regularly.<sup>78</sup> Although most inmates keep in regular contact with their children through letters and telephone calls, the distance of prisons usually thwarts personal visits.<sup>79</sup> Additionally, prison administrators may frustrate families' attempts to stay in contact if they move the parent to another facility.<sup>80</sup> A majority of both mothers and fathers report that their children have never visited them since

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<sup>73</sup> Hagan & Dinovitzer, *supra* note 2, at 124; Justin Brooks & Kimberly Bahna, "It's a Family Affair"—*The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 272 (1994).

<sup>74</sup> Denise Johnston, *Effects of Parental Incarceration*, in CHILDREN OF INCARCERATED PARENTS 59 (Katherine Gabel & Denise Johnston eds., 1995); see William H. Sack, *Children of Imprisoned Fathers*, 40 PSYCHIATRY 163, 165-69 (1977) (discussing case studies of children of incarcerated fathers and finding children exhibit antisocial and aggressive behavior after losing their fathers).

<sup>75</sup> Christina Jose Kampfner, *Post-Traumatic Stress Reactions of Children of Incarcerated Mothers*, in CHILDREN OF INCARCERATED PARENTS, *supra* note 74, at 89.

<sup>76</sup> Hagan & Dinovitzer, *supra* note 2, at 127.

<sup>77</sup> John C. Coughenour, *Separate and Unequal: Women in the Federal Criminal Justice System*, 8 FED. SENTENCING REP. 142, 143 (1995) (reporting that average female inmate in federal prison is 160 miles farther from her family than average male inmate).

<sup>78</sup> William H. Sack et al., *The Children of Imprisoned Parents: A Psychosocial Exploration*, 46 AM. J. ORTHOPSYCHIATRY 618, 622 (1976).

<sup>79</sup> See MUMOLA, *supra* note 67, at 5.

<sup>80</sup> See *Olim v. Wakinekona*, 461 U.S. 238, 244-45 (1983) (holding that transferring prisoner 2500 miles across Pacific Ocean from Hawaii State Prison to California's Folsom State Prison did not violate due process clause).

entering prison.<sup>81</sup>

Incarceration of mothers and fathers inflict different kinds of harms on children. More than half of men in prison are fathers.<sup>82</sup> About half of these fathers lived with their children before they were incarcerated.<sup>83</sup> Studies show that many incarcerated fathers contributed to their children's financial well being before entering prison.<sup>84</sup> Thus, massive incarceration deprives thousands of children of important economic and social support from their fathers.

Incarcerating mothers tends to disrupt family life even more because inmate mothers were usually the primary caretakers of their children before entering prison. Although only a small fraction of incarcerated parents are mothers, their numbers are rising rapidly.<sup>85</sup> The skyrocketing rate of female incarceration signals increasing disruption of families. While judges used to show mothers leniency, they are now often compelled by mandatory sentencing laws to give mothers long prison terms.<sup>86</sup> As a result, the number of children with a mother in prison nearly doubled in the last decade.<sup>87</sup> The incarceration rate of Black women is growing faster than that of Black men or the overall prison population.<sup>88</sup> From 1985 to 1995, the number of Black women in state and federal prisons increased by more than 200%.<sup>89</sup> Nearly two-thirds of women in prison are minorities.<sup>90</sup> Most are locked up for non-violent property and drug crimes.<sup>91</sup>

When fathers are imprisoned, the mother usually continues as the child's primary caretaker.<sup>92</sup> If she is able to manage without the father's income she can keep custody of the child and may even maintain a

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<sup>81</sup> MUMOLA, *supra* note 67, at 5 (reporting 56.6% of parents in state prison and 44.1% of parents in federal prison were never visited by their children).

<sup>82</sup> *Id.* at 2.

<sup>83</sup> About 44% of fathers in state prison and 55% in federal prison reported living with their children prior to admission. *Id.* at 4.

<sup>84</sup> Hagan & Dinovitzer, *supra* note 2, at 139.

<sup>85</sup> See MUMOLA, *supra* note 67, at 3 tbl.3 (citing that 7.4% of state prisoners and 6.8% of federal prisoners are mothers).

<sup>86</sup> See KATHLEEN DALY, GENDER, CRIME, AND PUNISHMENT 9-10 (1994).

<sup>87</sup> MUMOLA, *supra* note 67, at 2.

<sup>88</sup> MAUER, *supra* note 1, at 125.

<sup>89</sup> *Id.*

<sup>90</sup> Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133, 137 (1999); Kimberly Davis, *The Shocking Plight of Black Women Prisoners*, EBONY, June 2000, at 162, 163.

<sup>91</sup> Acoca & Raeder, *supra* note 90, at 135; Davis, *supra* note 90, at 164.

<sup>92</sup> About 90% of the children of incarcerated fathers live with their mothers. See MUMOLA, *supra* note 67, at 3 tbl.4.

relationship with the father while he is in jail. When mothers are imprisoned, children must usually leave home. Incarcerated mothers are much more likely than incarcerated fathers to be living with their children when they are sent to prison.<sup>93</sup> Moreover, about one-third of mothers in prison were living alone with their children when they were arrested, compared to only 4% of incarcerated fathers.<sup>94</sup> Black women in prison are even more likely to be unwed mothers. A single mother must find a relative — usually her mother — who will keep her child while she is in jail.<sup>95</sup> Relative caregivers who fill in for incarcerated mothers receive inadequate government support and most cannot meet the increased child care expenses.<sup>96</sup> Children sometimes end up in foster care and risk permanent severing of their ties with their mothers.<sup>97</sup> One in ten mothers in state prison, for example, reported that their children were in foster care or state institutions.<sup>98</sup>

Of course, some crimes make the perpetrators unfit parents. A conviction for extreme acts of domestic violence against the child or the other parent, for example, might be grounds for terminating parental rights. Some scholars have theorized that removing criminal parents may benefit children by relieving the family of problems caused by the parents' anti-social behavior.<sup>99</sup> But in most cases, incarcerated parents and children both have an interest in preserving the bond between them. In *Santosky v. Kramer*,<sup>100</sup> the U. S. Supreme Court found that parents' liberty interest in maintaining a relationship with their children applies equally to incarcerated mothers and fathers. The Court reasoned:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships

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<sup>93</sup> About 64% of mothers in state prison and 84% in federal prison reported living with their children prior to admission. *Id.* at 4.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 3 tbl.4.

<sup>96</sup> Hagan & Dinovitzer, *supra* note 2, at 143; Diane S. Young & Carrie Jefferson Smith, *When Moms Are Incarcerated: The Needs of Children, Mothers, and Caregivers*, 81 FAMILIES IN SOCIETY 130, 134 (2000).

<sup>97</sup> Philip Genty, *Termination of Parental Rights Among Prisoners*, in CHILDREN OF INCARCERATED PARENTS, *supra* note 74, at 167; Zachary R. Dowdy, *Moms Behind Bars as Female Prison Population Grows, Kids Get Left in the Wake*, CHI. TRIB., Oct. 6, 1999, at 9.

<sup>98</sup> MUMOLA, *supra* note 67, at 4.

<sup>99</sup> See Hagan & Dinovitzer, *supra* note 2, at 125 (asserting that children may benefit when court removes parents who are negligent, violent, or abusive).

<sup>100</sup> 455 U.S. 745 (1982).

are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family life.<sup>101</sup>

Prior to the *Santosky* decision, states routinely allowed the adoption of inmates' children without the inmates' consent. After *Santosky*, states have taken divergent positions on the strength of the inmates' rights and the degree of assistance the state will provide to keep families together.<sup>102</sup>

In 1983, for example, the New York state legislature abolished incarceration as a sufficient basis for termination of parental rights. Under New York law, the state must make "diligent efforts" to help parent and child to develop a meaningful relationship.<sup>103</sup> New York provides, for example, transportation for children to correctional facilities as well as social services to parents. The parent is required to cooperate with an authorized child care agency and to have a realistic plan for the future care of their children, or they risk losing their parental rights. Inmates who have no relatives to rely on and whose children are sent to foster care may not be able to prevent their children's adoption.<sup>104</sup> Other states are far less sympathetic to inmates' parental rights. Some courts have held that an inmate's poverty or length of incarceration is enough to end her bond with her child forever.<sup>105</sup> Incarceration itself also constitutes statutory grounds for termination of parental rights in some states.<sup>106</sup>

Deprivation of family contact might be seen as part of the deserved punishment for crime. But its damaging consequences for children must be added to the social costs of pursuing a policy of massive incarceration.

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<sup>101</sup> *Id.* at 753.

<sup>102</sup> See generally Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757 (1991-1992) (surveying state statutes and cases that define procedural rights of inmates and arguing that equating incarceration with parental unfitness violates procedural due process requirements).

<sup>103</sup> Joseph R. Carrieri, *The Rights of Incarcerated Parents*, N.Y. L.J., Jan. 12, 1990, at 1, 4; see N.Y. DOM. REL. LAW § 111(2) (McKinney 1990); N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 1990).

<sup>104</sup> See, e.g., *In re Gregory B*, 542 N.E.2d 1052 (N.Y. 1989).

<sup>105</sup> See, e.g., *In re Welch*, MICH. L. WKLY., Apr. 20, 1992, at 1 (D. Mich. Apr. 14, 1992); *In re R.H.N.*, 710 P.2d 482 (Colo. 1985); *In re Terry E.*, 225 Cal. Rptr. 803 (Ct. App. 1986); *In re L.A.S.*, 610 A.2d 925 (N.J. Super. Ct. App. Div. 1992).

<sup>106</sup> Jean M. Johnson & Christa N. Flowers, *You Can Never Go Home Again: The Florida Legislature Adds Incarceration to the List of Statutory Grounds for Termination of Parental Rights*, 25 FLA. ST. U. L. REV. 335, 336 (1998).

In addition to the financial and emotional strain it causes individual families, imprisoning parents increases the reach of state supervision of Black children.

### III. DETENTION OF JUVENILES

Juvenile justice also inflicts a disproportionate amount of collateral damage on Black families. Although the juvenile justice system treats youthful offenders more leniently than adults, it has the power to take children into custody and place them in secure confinement. These children are removed from their homes and from their parents' supervision. Like the incarceration of parents, detention of juveniles is racially imbalanced.

Black children are detained by the state at higher rates than any other children in the nation.<sup>107</sup> Since the 1970s, the percentage of white children held in public detention centers and reform schools has declined precipitously while the percentage of Black children in state facilities has mushroomed. In 1977, 57% of youth in public detention facilities were white, 30% Black, and 11% Latino.<sup>108</sup> By 1987, about half of the detained population was Black. Sociologists Katherine Hunt Federle and Meda Chesney-Lind reject violent crime rates as an explanation for this disparity: only 15% of juveniles locked in these facilities had been arrested for serious violence.<sup>109</sup> "The growth of the institutionalized minority population in the juvenile justice system," they conclude, "can be explained only in terms of a pervasive, systemic racism."<sup>110</sup>

Juvenile justice statistics from three states in 1996 show the gross overrepresentation of minority youth in state custody. In California, the state with the highest number of juveniles in custody, minorities made up 53.4% of the youth population, but they made up 59% of juveniles arrested, almost 64% of juveniles held in detention, and 70% of juveniles placed in secure corrections.<sup>111</sup> Although minorities comprised only

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<sup>107</sup> See Edmund F. McGarrell, *Trends in Racial Disproportionality in Juvenile Court Processing: 1985-1989*, 39 *CRIME & DELINQ.* 29, 32 (1993); Madeline Wordes et al., *Locking Up Youth: The Impact of Race on Detention Decisions*, 31 *J. RES. CRIME & DELINQ.* 149, 160 (1994); *supra* notes 42-43.

<sup>108</sup> Katherine Hunt Federle & Meda Chesney-Lind, *Special Issues in Juvenile Justice: Gender, Race, and Ethnicity*, in *JUVENILE JUSTICE AND PUBLIC POLICY: TOWARD A NATIONAL AGENDA* 165, 178 (Ira M. Schwartz ed., 1992).

<sup>109</sup> *Id.* at 180.

<sup>110</sup> *Id.* at 189.

<sup>111</sup> MIKE MALES & DAN MACALLAIR, *THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT TRANSFERS IN CALIFORNIA* 4 (2000) (citing DONNA HAMPARIAN & MICHAEL LEIBER,

14.3% of the youth population in Ohio, they represented 30% of the juvenile arrests and 43% of children in prison.<sup>112</sup> In Texas, while minorities made up half the state's youth, they accounted for 65% of juveniles in detention and 80% of juveniles in secure corrections.<sup>113</sup> All of the children held in Texas adult jails were Black or Hispanic.

Researchers have reached divergent conclusions about the impact of race on juvenile detention decisions. Some suggest that so many Black children are confined to detention facilities not because of their race but because of the seriousness of their crimes, because of their poverty, or because of their uncooperative behavior.<sup>114</sup> On the other hand, numerous studies demonstrate that, even after taking severity of present offense and prior record into account, juvenile court judges hand down more severe sanctions on Black juveniles in delinquency dispositions.<sup>115</sup> A recent, well-designed study, for example, found that race had an independent and significant influence on detention.<sup>116</sup> Using data on felony offenses in five counties of one state, the researchers controlled for factors other than race, such as the crime location, socioeconomic status, and offense characteristics that might explain juvenile confinement. Race was directly responsible for higher rates of detention at three stages in the juvenile justice process: police contact, juvenile court intake, and the preliminary hearing.

After reviewing research on racial bias, University of Missouri criminologist Kimberly L. Kempf similarly concluded that race predicts the fate of children in the juvenile justice system, even when researchers

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DISPROPORTIONATE CONFINEMENT OF MINORITY JUVENILES IN SECURE FACILITIES: 1996 NATIONAL REPORT 9 (1997)).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See, e.g., Duran Bell, Jr. & Kevin Lang, *The Intake Dispositions of Juvenile Offenders*, 22 J. RES. CRIME & DELINQ. 309, 320 (1985); Donna M. Bishop & Charles E. Frazier, *The Influence of Race in Juvenile Justice Processing*, 25 J. RES. CRIME & DELINQ. 242, 251 (1988); Jeffrey Fagan et al., *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME & DELINQ. 224, 252-53 (1987); Belinda R. McCarthy & Brent L. Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 CRIMINOLOGY 41, 58 (1986).

<sup>115</sup> BARRY KRISBEG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE 122-34 (1993); Fagan et al., *supra* note 114, at 224; Barry C. Feld, *The Social Context of Juvenile Justice Administration: Racial Disparities in an Urban Juvenile Court*, in MINORITIES IN JUVENILE JUSTICE 66, 73, 80-83, 92 (Kimberly Kempf Leonard et al. eds., 1995); Charles E. Frazier & Donna M. Bishop, *Reflections on Race Effects in Juvenile Justice*, in MINORITIES IN JUVENILE JUSTICE, *supra*, at 27; Kimberly Kempf Leonard & Henry Sontheimer, *The Role of Race in Juvenile Justice in Pennsylvania*, in MINORITIES IN JUVENILE JUSTICE, *supra*, at 119-120; McCarthy & Smith, *supra* note 114, at 41; McGarrell, *supra* note 107, at 29.

<sup>116</sup> Wordes et al., *supra* note 107, at 163.

controlled for factors such as prior record and severity of offense.<sup>117</sup> Kempf highlights the need for a process-oriented approach that examines the interdependence of decisions at multiple stages of juvenile justice. She recognizes that decisions made early in the process — for example, by police officers and prosecutors — affect how judges ultimately dispose of cases.<sup>118</sup> In her own study of juvenile justice cases in Pennsylvania, Kempf found that racial disparities in the early stages built on each other to produce worse outcomes for Black children.

Jerome Miller writes that his experience as head of the Massachusetts juvenile correction system confirmed these findings of cumulative racial bias.<sup>119</sup> His account gives a vivid picture of the way discrimination creeps into every stage of juvenile justice processing to lock up more Black children who are not guilty of serious offenses and the way white children are sheltered from such harsh treatment.

I learned very early on that when we got a black youth, virtually everything — from arrest summaries, to family history, to rap sheets, to psychiatric exams, to "waiver" hearings as to whether or not he would be tried as an adult, to final sentencing — was skewed. If a middle-class white youth was sent to us as "dangerous," he was more likely actually to be so than the Black teenager given the same label. The white teenager was more likely to have been afforded competent legal counsel and appropriate psychiatric and psychological testing, tried in a variety of privately funded options, and dealt with more sensitively and individually at every stage of the juvenile justice processing. . . . By contrast, the Black teenager was more likely to be dealt with as a stereotype from the moment the handcuffs were first put on — easily and quickly relegated to the "more dangerous" end of the "violent-nonviolent" spectrum, albeit accompanied by an official record meant to validate each of a biased series of decisions.<sup>120</sup>

Police officers or judges may detain children before they even go to trial. Like every step in the juvenile justice process, this decision is subject to virtually unmitigated discretion. As a result, detention rates vary widely among different parts of the same county or state. For

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<sup>117</sup> MILLER, *supra* note 2, at 71 (citing KIMBERLY L. KEMPF, PA. COMM'N ON CRIME & DELINQUENCY, THE ROLE OF RACE IN JUVENILE JUSTICE PROCESSING IN PENNSYLVANIA 7-8 (1992)).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 78.

<sup>120</sup> *Id.*

example, in the three police departments in the largest county of one state, detention rates ranged from 5% to 43%.<sup>121</sup> When the police pick up a youth, they must decide whether to put the youth in secure custody or return them to their parents. Both police and judges are more likely to hold Black children than white children in pretrial detention.<sup>122</sup> Once detained at the intake level, youth are more likely to be detained at a preliminary hearing.<sup>123</sup> Detained juveniles, in turn, receive harsher sentences than those who are home with their parents when their case is adjudicated.<sup>124</sup> It is not surprising that racial disparities increase at each successive stage of processing.<sup>125</sup> A larger and larger percentage of juveniles in the system are nonwhite as they proceed from arrest to intake and eventually to detention or incarceration.

Black children also end up in state custody because they are more likely to be tried as adults. A report on the California system recently concluded that "transfer from juvenile to adult court appears to exacerbate already large racial disparities in sentencing."<sup>126</sup> From the time of its creation at the end of the nineteenth century, the juvenile court has relinquished its jurisdiction in the case of very serious offenses. In the 1960s and 70s the U.S. Supreme Court formalized the procedures for transferring juveniles to adult criminal court.<sup>127</sup> Every state has enacted legislation that allows for the transfer of some juvenile offenders to criminal courts for prosecution as adults.<sup>128</sup> Political pressure to treat

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<sup>121</sup> Wordes et al., *supra* note 107, at 154.

<sup>122</sup> Bishop & Frazier, *supra* note 114, at 258.

<sup>123</sup> Wordes et al., *supra* note 107, at 163.

<sup>124</sup> M.A. Bortner & Wornie L. Reed, *The Preeminence of Process: An Example of Refocused Juvenile Justice Research*, 66 SOC. SCI. Q. 413, 420-21 (1985); Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Assessment of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1271, 1311-17 (1989); Charles E. Frazier & John C. Cochran, *Detention of Juveniles: Its Effects on Subsequent Juvenile Court Processing Decisions*, 17 YOUTH & SOC'Y 286, 297 (1986).

<sup>125</sup> See Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 400 (1996) (stating that "the racial composition of the cohort becomes increasingly non-white as it moves through the [criminal justice] system").

<sup>126</sup> MALES & MACALLAIR, *supra* note 111, at 10.

<sup>127</sup> See *Breed v. Jones*, 421 U.S. 519, 535-36 (1975) (holding that states must choose between juvenile or adult court before commencing trial on merits); *Kent v. United States*, 383 U.S. 541, 557 (1966) (requiring states to provide juveniles with procedural safeguards, such as notice and right to counsel).

<sup>128</sup> Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 LAW & INEQ. 73, 75 (1995); CHARLES M. PUZZANCHERA, U.S. DEP'T OF JUSTICE, *DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 1988-1997*, at 1 (2000), available at <http://www.ncjrs.org/pdffiles1/ojdp/fs200002.pdf>.

juvenile offenders more harshly has led to the escalation of these transfers in the last decade. The number of children serving time in adult prisons more than doubled between 1985 and 1997.<sup>129</sup>

A juvenile may be tried as an adult through judicial waiver, prosecutorial choice, or statutory exclusion of certain offenses.<sup>130</sup> The most common means of transferring a child to criminal court is a juvenile court judge's waiver jurisdiction.<sup>131</sup> When judges make waiver decisions they are choosing between punishing the juvenile in adult criminal court or rehabilitating him in juvenile court. There is little statutory guidance for judges who must decide between these two options. Statutes simply give judges broad discretion to determine a child's "amenability to treatment" or threat to public safety. This may be based on the youth's age and prior record, the seriousness of the offense, and clinical evaluations. The nearly unlimited discretion afforded juvenile court judges and the subjective nature of the waiver criteria leads to rampant discrimination in transfer decisions. Professor Frank Zimring calls waiver the "capital punishment of juvenile justice" and compares judges' wide discretion to the standardless death penalty laws that the Supreme Court overturned in *Furman v. Georgia*.<sup>132</sup>

Numerous studies have uncovered gross variations in the reasons for and rates of waivers among states and within counties of the same state.<sup>133</sup> Indeed, the location of the waiver hearing appears to have as much effect on the outcome as the juvenile's dangerousness. Judges also decide to transfer juveniles to adult court according to their race.<sup>134</sup>

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<sup>129</sup> *Teenage Population in Prisons Soaring*, CHI. TRIB., Feb. 28, 2000, at 5.

<sup>130</sup> PUZZANCHERA, *supra* note 128, at 1. Some states (28 in 1997) automatically exclude cases with specific age and offense criteria from juvenile court. *Id.* Other states (15 in 1997) give prosecutors and juvenile court judges discretion in transferring cases to criminal court. *Id.*

<sup>131</sup> In all but four states (Massachusetts, Nebraska, New Mexico, and New York), if a case meets certain criteria, a juvenile court judge has the authority to waive the juvenile court's original jurisdiction and refer the case to criminal court for prosecution. *Id.*

<sup>132</sup> Franklin E. Zimring, *Notes Toward a Jurisprudence of Waiver*, in MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY 193, 193 (John C. Hall et al. eds., 1981).

<sup>133</sup> See, e.g., Donna M. Hamparian et al., MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: YOUTH IN ADULT COURTS 150-98 (1982); Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314, 340 (1990); Barry C. Feld, *Bad Law Makes Hard Cases: Reflections on Teen-Aged Axe-Murderers, Judicial Activism, and Legislative Default*, 8 LAW & INEQ. 1, 41-46 (1990).

<sup>134</sup> See Jeffrey Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 270 (1987); Robert J. Sampson & John H. Laub, *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and*

Dissenting from a decision to keep a white youth in juvenile court, Minnesota Justice Alan Page noted that the case was virtually identical to that of a Black youth who had been transferred to criminal court to be tried as an adult.<sup>135</sup> A report by the General Accounting Office found that Black juveniles were two to three times more likely to have their cases waived for violent offenses than whites.<sup>136</sup> The campaign to prosecute juvenile offenders as adults has affected Black children the most. Between 1988 and 1997, the number of waived cases involving Black youth rose by 35%, compared with a 14% increase for whites.<sup>137</sup>

A recent analysis of juvenile transfers to criminal court in Los Angeles County discovered huge racial disparities. *The Color of Justice* reports that "Hispanic youth are six times more likely, African American youth are twelve times more likely, and Asian/other youth three times more likely than white youths to be found unfit for juvenile court and transferred to adult court in Los Angeles County."<sup>138</sup> The study's authors found that higher rates of arrest for violent offenses did not account for these racial differences.<sup>139</sup> The transfer rate to adult court for minority violent arrestees was still double that for white violent arrestees.<sup>140</sup> *The Color of Justice* reiterates the cumulative impact of racial disparities at each stage of juvenile justice processing. "Compared to white youths," the study calculated, "minority youths are 2.8 times as likely to be arrested for a violent crime, 6.2 times as likely to wind up in adult court, and seven times as likely to be sent to prison by adult courts."<sup>141</sup> At each step, minority youth's odds of ultimate imprisonment increase. Looking at state-wide data, the authors discovered even greater disparities. While African American youth were 6.7 times as likely to be arrested for a violent offense than whites, they were an astounding 18.4 times more likely than white offenders to be sentenced by an adult court to prison.<sup>142</sup>

Researchers have found another connection between juvenile detention and family disruption. While juvenile detention disrupts Black families, family disruption increases the likelihood that a child will

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*Social Control*, 27 LAW & SOC'Y REV. 285, 291 (1993) (asserting that courts are more likely to confine Black juveniles charged with drug offenses where county has large underclass).

<sup>135</sup> *In re M.E.P.*, 528 N.W.2d 240, 242-43 (Minn. 1995) (Page, J., dissenting).

<sup>136</sup> U.S. GEN. ACCT. OFF., JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS 59 (1995).

<sup>137</sup> PUZZANCHERA, *supra* note 128, at 2.

<sup>138</sup> MALES & MACALLAIR, *supra* note 111, at 5.

<sup>139</sup> *Id.* at 5-6.

<sup>140</sup> *Id.* at 6.

<sup>141</sup> *Id.* at 7.

<sup>142</sup> *Id.* at 9.

be detained. Caseworkers in Florida, for example, attribute the racial disparity in detention in that state to policies that focus on family support and cooperation in determining the disposition of delinquency cases.<sup>143</sup> Florida's Department of Health and Rehabilitative Services ("DHRS"), which initially reviews all juvenile arrests and complaints, refuses to recommend delinquent youth for diversion programs if their parents or guardians cannot be contacted, are unable to be present for an intake interview, or are perceived to be uncooperative. Department intake supervisors conceded that Black parents are often single mothers working at low-paying jobs who cannot take off from work to be interviewed. Others are single mothers on welfare with small children at home who cannot afford child care, do not have telephones, or must rely on inconvenient public transportation to get to the DHRS office. Caseworkers often interpret Black parents' distrust of the juvenile justice system as an uncooperative attitude. As one delinquency intake supervisor explained:

Our manual told us to interview the child and the parent prior to making a recommendation to the states attorney. We are less able to reach poor and minority clients. They are less responsive to attempts to reach them. They don't show. They don't have transportation. Then they are more likely to be recommended for formal processing. Without access to a client's family, the less severe options are closed. Once it gets to court, the case is likely to be adjudicated because it got there. It's a self-fulfilling prophecy.<sup>144</sup>

White parents, on the other hand, are more likely to hold professional and managerial positions that give them the flexibility and resources to cooperate with caseworkers. They also have greater access to private treatment options, such as psychological counseling and drug treatment, which enables them to keep their children out of formal processing. Most Black children in trouble "can only obtain comparable services by being adjudicated delinquent and then committed to residential facilities."<sup>145</sup> The Florida caseworkers and supervisors realized that these policies ultimately worked against Black children. But, they felt that their hands were tied by agency rules.

Juvenile justice officials also refer Black children to court rather than informal alternatives because of stereotypes about Black families. Many

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<sup>143</sup> Bishop & Frazier, *supra* note 125, at 407.

<sup>144</sup> *Id.* at 407-08.

<sup>145</sup> *Id.* at 408.

think that Black children come from female-headed households that are ill equipped to handle a troubled child. Because they perceive single mothers as incapable as providing adequate supervision for their children they believe they are justified in placing these children under state control. Judges rely heavily on pre-disposition reports that disparage Black juveniles' family situations, often resulting in detention decisions. In the following interview excerpts, Florida officials told professors Donna Bishop and Charles Frazier that this bias against Black children was justified:

Judge: "Inadequate family correlates with race and ethnicity. It makes sense to put delinquent kids from these circumstances in residential facilities."

State's Attorney: "Detention decisions are decided on the basis of whether the home can control and supervise a child. So minorities don't go home because, unfortunately, their families are less able to control the kids. . . . I think the way the system sets up programs shows some institutional bias. If family stability was not a prerequisite to admission to less severe program options, race differences would be less."

State's Attorney: "In Black families who the dad is, is unknown, while in white families — even when divorced — dad is married or something else. The choices are limited because the Black family is a multigenerational non-fathered family. You can't send the kid off to live with dad."<sup>146</sup>

These early decisions by intake officers to recommend formal prosecution and secure detention, based on a child's family situation, throw Black children into a process that too often ends in their incarceration. Black juveniles are punished more severely than whites, in essence, for being members of poor, struggling families. Incarcerating them, in turn, further disrupts their families.

The ease with which Black youth are formally processed because of racial bias or their family situation has a domino effect. Having a prior record is one of the principal grounds for severe sanctions. When Black children are initially sent to formal processing, instead of the alternatives whites are more likely to get, they also have a greater chance of incarceration if they get into trouble again.

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<sup>146</sup> *Id.* at 409-10.

## CONCLUSION

The massive incarceration of Black citizens not only discriminates against individuals, but also inflicts devastating collateral damage on Black communities. It is important to weigh the political injury of incarceration — the way racially disparate incarceration bolsters the subordination of Black people as a group — in judging its efficacy and justice. Chief among the harms of prison policy is its disproportionate disruption of Black families. Both the incarceration of parents and the detention of juveniles break up families and place children under state supervision. The criminal justice system thus works with the child welfare system to take custody of an inordinate number of Black children. This repressive impact on Black family life is further reason to curtail the trend toward greater criminalization of Black children and adults.