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## Conceptualizing an Anti-Mother Juvenile Delinquency Court

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# CONCEPTUALIZING AN ANTI-MOTHER JUVENILE DELINQUENCY COURT\*

BARBARA FEDDERS\*\*

*This Article makes three contributions to the literature on the harms to children and their families that flow from involvement in the juvenile delinquency court. It argues, first, that poor mothers of color—especially those raising children without cohabitating partners—are uniquely vulnerable among parents to both seeing their children involved, and then ensnared, in the delinquency system and suffering harm from that experience. Second, it offers the contours of a theoretical framework for understanding the persistence of counterproductive and illogical treatment. Policymakers often view the vulnerability of poor mothers of color in other systems ostensibly designed for care—most notably the provision of income supports and the so-called child welfare system—as resulting from personal failings rather than systemic racism and sexism. Consequently, women in these contexts may be stigmatized and even criminalized. This Article posits that sex and race stereotyping and bias similarly help explain the commonplace and unnecessary diminution of parental dignity in the delinquency system. This conceptualization points toward prescriptions for reform, the Article’s third contribution. The Article argues that policymakers should move away from a system of prosecution and surveillance of young people and their families as the primary social response to alleged misconduct and invest in nonjudicial, noncarceral systems, such as those that exist for wealthy white children. In the meantime, they should work to change laws, practices, and discourse that diminish the rights and dignity of parents.*

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## INTRODUCTION

This is the second in a two-part analysis of the negative impact of juvenile delinquency court on the parents of children involved<sup>1</sup> in that court. A previous piece<sup>2</sup> explored how laws, policies, and practices create economic and dignitary harms for parents.<sup>3</sup> Economic harms include fines and fees assessed against parents as well as lost wages and job opportunities incurred through compliance with the demands of juvenile court.<sup>4</sup> Dignitary harms consist of prosecutors' overriding of parents' wishes about whether to prosecute cases in which they are complaining witnesses,<sup>5</sup> judges' conscription of parents to act as the court's eyes and ears in monitoring a child's compliance with court orders, and courts' imposition of punitive consequences on parents for their children's misconduct.<sup>6</sup>

1. Throughout the Article, I use the word "involved" because many of the harms I identify occur irrespective of whether a child is adjudicated delinquent or even formally prosecuted. References to children and families being "involved" in the court are meant to include all contacts with the court from the time a referral is made. For a discussion of the stages of juvenile delinquency court, see *infra* Section I.A.

2. See generally Barbara Fedders, *The Anti-Parent Juvenile Court*, 69 UCLA L. REV. 746 (2022) [hereinafter Fedders, *The Anti-Parent Juvenile Court*] (conducting the first part of the analysis of the negative impact of juvenile delinquency courts on the parents with children in these courts, upon which this piece builds).

3. Unless noted otherwise, I use "parents" to encompass those adults with legal (though not always physical) custody of and caretaking responsibilities for children; this includes biological and adoptive parents as well as other legal guardians. However, as I will show in Part II, stereotypes about Black mothers, especially single Black mothers, make the court particularly inhospitable for those parents and undergird negative treatment of all parents. See discussion *infra* Part II.

4. See Fedders, *The Anti-Parent Juvenile Court*, *supra* note 2, at 782–85.

5. See *id.* at 794–95.

6. *Id.* at 791–93.

These economic and dignitary harms undermine juvenile courts' stated commitment to rehabilitation of the children who encounter them.<sup>7</sup> After all, it is parents on whom children most heavily depend.<sup>8</sup> Their financial and emotional stability are paramount to a child's well-being and healthy development. Therefore, the previous piece argued that any unnecessary burdens placed on parents in the delinquency process are counterproductive and illogical.<sup>9</sup>

This Article makes three additional contributions. It first argues that poor mothers of color—especially those raising children without cohabitating partners—are uniquely vulnerable among parents to both seeing their children involved, and then ensnared, in the delinquency system and suffering harm from that experience.<sup>10</sup> Second, it offers the contours of a theoretical framework for understanding why the counterproductive and illogical treatment documented in the earlier piece persists.<sup>11</sup> Policymakers often view the vulnerability of poor mothers of color in other systems ostensibly designed for care—most notably the provision of income supports<sup>12</sup> and the so-called child welfare system<sup>13</sup>—as resulting from personal failings rather than systemic racism and sexism. Consequently, women in these contexts may be stigmatized and even criminalized.<sup>14</sup> Drawing from feminist and critical race scholarship, I posit that sex and race stereotyping and bias help explain the commonplace and unnecessary diminution of parental dignity in the delinquency system.<sup>15</sup> This

7. While it is not the only or even the central purpose of most states' juvenile court statutory framework, rehabilitation of a child is typically a stated goal of a minor's juvenile justice involvement. See Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1113–15 (2009) [hereinafter Henning, *What's Wrong with Victims' Rights in Juvenile Court?*].

8. Fedders, *The Anti-Parent Juvenile Court*, *supra* note 2, at 755 n.40.

9. *Id.* at 752–53.

10. See *infra* Part I.

11. See *infra* Part II.

12. See, e.g., Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 642, 680 (2009) [hereinafter Gustafson, *The Criminalization of Poverty*]; Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 321 (2013) [hereinafter Gustafson, *Degradation Ceremonies*].

13. See, e.g., DOROTHY E. ROBERTS, *TORN APART* 65–66 (2022) [hereinafter ROBERTS, *TORN APART*] (rejecting terminology of child welfare and instead referring to the system as family policing).

14. See generally WENDY BACH, *PROSECUTING POVERTY, CRIMINALIZING CARE* (2022) (discussing the criminalization of care that affects low-income individuals); MICHELE GOODWIN, *POLICING THE WOMB* 80–81 (2020) (discussing prenatal care for poor Black women); Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163 (2017) [hereinafter Ocen, *Birthing Injustice*] (exploring prosecutions of pregnant women); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1422 (1991) [hereinafter Roberts, *Punishing Drug Addicts*] (arguing that governmental intervention into pregnant women's lives is particularly harmful to women of color).

15. A nonexhaustive list of this scholarship includes, e.g., KHIARA BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 44, 51–53 (2017); Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 871–72 (1994) [hereinafter Roberts, *The Value of Black Mothers' Work*].

conceptualization of juvenile court, arising from and contributing to bias against poor mothers of color, points toward prescriptions for reform, the Article's third contribution.<sup>16</sup> I argue that policymakers should move away from a system of prosecution and surveillance of young people and their families as the primary social response to alleged misconduct and invest in nonjudicial, noncarceral systems, such as those that exist for wealthy white children. In the meantime, they should work to change laws, practices, and discourse that diminish the rights and dignity of parents.

This Article proceeds in three parts. Part I discusses how poverty, race, and gender interact to make poor mothers of color especially vulnerable to seeing their children involved and then ensnared in the delinquency system and experiencing harm as a result.<sup>17</sup> Part II offers a theoretical framework for understanding the counterproductive and illogical harms experienced by parents, especially poor mothers of color raising children without a cohabitating partner. Part III puts forward ideas for reform that flow from this critique.

#### I. POVERTY, GENDER, AND RACE: HOW THE DELINQUENCY SYSTEM UNIQUELY BURDENS POOR MOTHERS OF COLOR

When minors become involved in the juvenile delinquency system, their parents necessarily do as well. The socioeconomic status, gender, and race of the primary custodian shape not only which children become involved in the system but how long they stay.<sup>18</sup> These factors also influence the extent to which parents experience harm from system involvement.<sup>19</sup> This part outlines the

16. See *infra* Part III.

17. Cf. Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1565 (2012) (arguing that poor Black women in public housing are vulnerable to surveillance because of the presumption of criminality “that flows from the intersection of race, gender, and poverty”).

18. While this Article differentiates between race and class, in many contexts they are intertwined; Black and Latinx youth are nearly three times as likely to live in poverty as compared with non-Latinx white youth. See AREEBA HAIDER, *THE BASIC FACTS ABOUT CHILDREN IN POVERTY* (2021), <https://www.americanprogress.org/article/basic-facts-children-poverty/#:~:text=Children%20of%20color%20across%20most,the%20highest%20rates%20of%20poverty> [https://perma.cc/C86L-TLJQ].

19. JOSHUA ROVNER, *RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS* 6 (2016) (“Researchers have found few group differences between youth of color and white youth regarding the most common categories of youth arrests. While behavioral differences exist, [B]lack and white youth are roughly as likely to get into fights, carry weapons, steal property, use and sell illicit substances, and commit status offenses, like skipping school. Those similarities are not reflected in arrest rates . . . .”); see also COAL. FOR JUV. JUST., *DISPROPORTIONATE MINORITY CONTACT FACTS AND RESOURCES* 1 (2010) (“Studies show that youth of color are sanctioned more punitively than white youth who have committed the same offense, even given similar offense histories.”); DANA SHOENBERG, *REDUCING RACIAL AND ETHNIC DISPARITIES IN PENNSYLVANIA* 1 (2012) (“Racial disparities in juvenile justice are stark: from 2002 to 2004, African-Americans constituted 16 percent

progression of a delinquency case, focusing on how socioeconomic status, gender, and race interact at each stage to disadvantage poor mothers of color and their children.<sup>20</sup> Here and elsewhere, I use North Carolina as a sample state through which to examine the undermining of parental dignity in the delinquency process. I chose North Carolina for two principal reasons: first, it was the last state to raise the upper age of juvenile court jurisdiction, and during the run-up to the legislation, advocates relied on the role of parents in delinquency court as the basis for expanding the age range of juvenile court; and second, I am personally familiar with the North Carolina juvenile courts through fifteen years of practice.

#### A. *Entry into the System*

A young person enters the delinquency system based on allegations of unlawful conduct in the community, in school<sup>21</sup> or at home, through complaints typically initiated by law enforcement.<sup>22</sup> Officers more heavily patrol and aggressively police low-income neighborhoods of color and schools with large concentrations of students of color than white, middle-class neighborhoods and schools.<sup>23</sup> In addition, socioeconomic status, gender, and race shape a parent's

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of the nation's youth, 28 percent of juvenile arrests, 37 percent of detained youth, 38 percent of youth in residential placement, and 58 percent of youth admitted to state adult prisons. Latino youth are 50 percent more likely than white youth to receive an out-of-home placement in the juvenile justice system or to be charged and tried in the adult system.”).

20. While the terminology and mechanisms of the juvenile delinquency court vary from state to state, each court shares certain key features in the process. See *What Is Juvenile Justice?*, ANNIE E. CASEY FOUND. (Dec. 12, 2020), <https://www.aecf.org/blog/what-is-juvenile-justice> [<https://perma.cc/T9Z8-24Z9>] (“The juvenile justice system is a multistage process: (1) delinquent behavior, (2) referral, (3) intake/ diversion, (4) transfer/ waiver, (5) detention, (6) adjudication, (7) disposition, (8) juvenile corrections and (9) aftercare.”).

21. Nearly half of all delinquency complaints originate in schools. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., *JUVENILE COURT STATISTICS 2018*, at 33 (2020), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/juvenile-court-statistics-2018.pdf> [<https://perma.cc/5MPE-PCPL>].

22. NAT'L RSCH. COUNCIL, *REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH* 54 (Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers & Julie A. Schuck eds., 2013) (noting that police are referring agents in approximately eighty percent of arrests of minors).

23. See HOCKENBERRY & PUZZANCHERA, *supra* note 21, at 33. For a discussion of the relationship between race and neighborhood policing, see Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 460 (2013) (noting that “aggressive institutional approaches toward adolescent offending [may often be] motivated by explicit or implicit bias,” which leads “to disproportionate arrest, prosecution, and disposition of Black and Hispanic youth”). For a discussion of the differences between how school resource officers act in middle-class and white schools as compared with low-income schools with high concentrations of students of color, see Aaron Sussman, Comment, *Learning in Lockdown: School Police, Race, and the Limits of Law*, 59 UCLA L. REV. 788, 811–16 (2012). While the impact of school resource officers (“SROs”) on school safety is unclear, it is clear that a positive correlation exists between the presence of SROs and the use of the juvenile court for misbehavior in school that violates

interactions with and reliance on law enforcement in managing stressful circumstances precipitated by disruptive, violent, or struggling children in the home.<sup>24</sup> Consider a child who breaks a window, assaults a family member, or regularly uses illegal substances. Middle- and upper-income parents might access private therapy, high-quality after-school programming, or in-patient drug treatment.<sup>25</sup> Such resources are typically out of reach, by contrast, for low-income parents.<sup>26</sup> These parents may have nowhere to turn for assistance other than police<sup>27</sup> and juvenile courts.<sup>28</sup> Indeed, research indicates that parents who rely on the police in such circumstances are disproportionately low-income mothers of color.<sup>29</sup>

However, caregivers in this situation risk losing key aspects of the parental autonomy, which should be protected under principles set by decades of case law.<sup>30</sup> If the police determine that criteria for an arrest<sup>31</sup> are met, they may take the child into custody. In the absence of these criteria, officers still can swear out a complaint against a child in delinquency court. A parent's wishes may, but are typically not statutorily required to, be considered by police in making either decision.<sup>32</sup> In fact, unbeknownst to most parents, police need not even be

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the law. *See generally* Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280 (2009) (discussing arrest rates in schools with school resource officers as compared to those without them and controlling for factors such as poverty).

24. *See* Joseph B. Richardson, Jr., Waldo E. Johnson, Jr. & Christopher St. Vil, *I Want Him Locked Up: Social Capital, African American Parenting Strategies, and the Juvenile Court*, 43 J. CONTEMP. ETHNOGRAPHY 488, 496 (2014).

25. Monica Bell, *What Happens when Low-Income Mothers Call the Police*, TALK POVERTY (Mar. 10, 2016), <https://talkpoverty.org/2016/03/10/when-low-income-mothers-call-the-police/> [<https://perma.cc/CG9E-K9W8>] [hereinafter Bell, *What Happens*].

26. *Id.*

27. *Id.*

28. *See, e.g.*, HEATHER HUNT & GENE NICHOL, *THE PRICE OF POVERTY IN NORTH CAROLINA'S JUVENILE JUSTICE SYSTEM* 13 (2021) (noting juvenile defenders in North Carolina describing poor clients whose families and schools turn to the juvenile court for services).

29. Richardson et al., *supra* note 24, at 496; *see also* Monica Bell, *Situational Trust: How Disadvantaged Mothers Reconcile Legal Cynicism*, 50 LAW & SOC'Y REV. 314, 315 (2016).

30. *See, e.g.*, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (declaring that "[t]he child is not the mere creature of the State" and recognizing that parents "have the right, coupled with the high duty," to protect their children's upbringing); *see also* *Troxel v. Granville*, 530 U.S. 57, 65, 75 (2000) (striking down visitation statute and noting that "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court").

31. *See, e.g.*, N.C. GEN. STAT. § 7B-1900 (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.) (granting police authority to take juveniles into temporary custody without a court order under multiple circumstances, including whether grounds would exist for arrest of an adult in identical circumstances under § 15A-401(b)).

32. Bell, *What Happens*, *supra* note 25 (noting "chagrin" of mother who called police for help with a son with an addiction problem only to have son incarcerated); *see, e.g.*, N.C. GEN. STAT. § 7B-1901(a) (LEXIS) (directing any person who takes a juvenile into custody without a court order to notify the parent of custody and advise the parent of right to be present with the child, but establishing that failure to notify the parent shall not be grounds for release of the juvenile, and noting that law

truthful in their questioning of children or statements to their caregivers about the potential outcomes of an arrest.<sup>33</sup>

B. *Pre-prosecution Screening*

When an officer or civilian alleges violations of the criminal law against a child in a juvenile court, the State screens the complaint to determine whether to prosecute it or handle it in a manner designed to be less likely to result in a delinquency record for the child.<sup>34</sup> Nonprosecution options typically include outright dismissal, deferrals for a set period of time that eventually result in dismissal, and formal diversion plans requiring the youth's participation in and completion of particular programs.<sup>35</sup> Here, too, the class, gender, and race of the parent affect the child's outcomes.

Consider that in some states, the screening process requires a parent to first report to court with their child. If the parent misses that required meeting, their child may be ineligible for dismissal, deferral, or diversion.<sup>36</sup> However, these meetings may be initiated only through a letter rather than official court process, such as a subpoena that requires proof of service.<sup>37</sup> Parents without stable housing may be less likely to receive such a letter.<sup>38</sup> Single mothers have

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enforcement shall release the juvenile to the parent if the person having the juvenile in temporary custody decides continued custody is unnecessary, but not granting parent a voice in making that determination).

33. Todd C. Warner & Hayley M.D. Cleary, *Parents' Interrogation Knowledge, and Situational Decision-Making in Hypothetical Juvenile Interrogations*, 28 PSYCH. PUB. POL'Y & L. 78, 79 (2022) (noting that most parents are unaware that police need not be truthful).

34. These screeners may be housed in the prosecutor's office, within law enforcement, or in juvenile probation. See *What Is Juvenile Justice?*, *supra* note 20.

35. See, e.g., § 7B-1706, amended by 2021 N.C. Sess. Laws 2021-123 (S.B. 207) (defining types of requirements that might be ordered as part of diversion plans, including restitution, community service, and "regimented physical training").

36. See, e.g., *id.* (stating juvenile and parent must sign diversion contract); see also NEB. REV. STAT. ANN. § 43-260.04 (2022) (requiring parental and child attendance); WASH. REV. CODE § 13.40.080 (2022) (same).

37. Cheri Panzer, *Reducing Juvenile Recidivism Through Pre-trial Diversion Programs: A Community's Involvement*, 18 J. JUV. L. 186, 189 (1997) (explaining the process of setting up the required meetings).

38. Because those in poverty must move often, see, e.g., Stefanie DeLuca, Holly Wood & Peter Rosenblatt, *Why Families Move (and Where They Go): Reactive Mobility and Residential Decisions*, 18 CITY & CNTY. 556, 559 (2019) ("Decades of scholarship . . . have documented that low-income and [B]lack families have been more susceptible to involuntary and frequent moves than [white families]."), they likely struggle to consistently receive mail, as illustrated in the last census when government officials struggled to contact people in poorer, urban areas, see, e.g., Kavahn Mansouri, *People in East St. Louis Don't Trust the Census. That Could Cost Illinois Millions*, BELLEVILLE NEWS-DEMOCRAT (Sept. 17, 2019, 2:19 PM), <https://www.bnd.com/news/politics-government/article234964792.html> [<https://perma.cc/8N5A-5SHE> (dark archive)] (finding that those "living in nonpermanent housing, who move often or are homeless have a significantly lower chance of being counted than those with a permanent address").



a disproportionately high risk of housing insecurity.<sup>39</sup> Moreover, parents for whom official documents often portend bad news—notice of an eviction or impending shut-off of power—may understandably avoid opening such correspondence.

Further, parents who do receive notice of screening meetings may be unable to miss work to attend, because it could mean lost wages or even the loss of a job. When a household is dependent on a single wage earner—who is disproportionately likely to be poor compared with other heads of household<sup>40</sup>—such a result is untenable for the family. Single mothers of color are in particularly financially insecure circumstances.<sup>41</sup>

In addition, one important factor militating against diversion is a screener's determination that a youth is in need of treatment or confinement.<sup>42</sup> Children of poor single mothers of color are particularly likely to be seen as in need of state intervention and supervision.<sup>43</sup> An additional factor that works against children of poor women of color, especially single mothers, is that compliance with diversion plans can require both financial resources to pay court costs and sufficient free time to transport children to court-ordered programs.<sup>44</sup> Moreover, parents are required to ensure their child's compliance and sometimes even to participate themselves.<sup>45</sup>

39. ISABELLE ATKINSON, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, HOUSING JUSTICE IS GENDER JUSTICE 5 (2022), <https://www.nationalpartnership.org/our-work/resources/economic-justice/housing-justice.pdf> [<https://perma.cc/3KFD-V4T7>].

40. Janet C. Gornick & Emily Nell, CHILDREN, POVERTY, AND PUBLIC POLICY: A CROSS-NATIONAL PERSPECTIVE 10–11, tbl.2 (Lux. Income Study, Working Paper No. 701, 2017), <https://www.econstor.eu/bitstream/10419/169261/1/701.pdf> [<https://perma.cc/EM3Z-NLHJ>].

41. AMANDA FINS, NAT'L WOMEN'S L. CTR., NATIONAL SNAPSHOT: POVERTY AMONG WOMEN & FAMILIES 1–2 (2020), <https://nwlc.org/wp-content/uploads/2020/12/PovertySnapshot2020.pdf> [<https://perma.cc/L8YP-XB26>].

42. See, e.g., *What Is Juvenile Justice?*, *supra* note 20.

43. Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing*, in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 23, 63–64 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

44. See, e.g., N.C. GEN. STAT. § 7B-1706 (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.), amended by 2021 N.C. Sess. Laws 2021-123 (S.B. 207).

45. See, e.g., HUNT & NICHOL, *supra* note 28, at 15 (noting obstacles that a parent's poverty creates for successful completion of diversion).

### C. *Charging Decision*

When the State opts to prosecute the child, their parent also becomes a party to the case<sup>46</sup> and thus subject to the court's jurisdiction.<sup>47</sup> The court obtains jurisdiction over the parent even when the parent herself initiated the complaint and has decided that court involvement will be detrimental to the child. As in the case of decisions to arrest, a parent's wishes need not be honored by the State.<sup>48</sup> While some prosecutors may elect to drop a case when the parent does not wish to proceed, in most states the prosecutor can compel a parent to testify against their child—because there is no federal statutory or common-law testimonial privilege to protect the communications between parents and their children,<sup>49</sup> and only a handful of states have such a privilege.<sup>50</sup> That low-income mothers of color raising children without cohabitating partners are disproportionately likely to rely on law enforcement and courts in the first instance for assistance with challenging children<sup>51</sup> creates knock-on race, class, and gender effects at this stage as well.

### D. *Pre-adjudication Custody Determinations*

At the time of a minor's first court appearance, a delinquency court judge will make the enormously consequential decision of whether to detain or release the child pending adjudication. Unlike their criminal defendant counterparts, alleged juvenile delinquents are not constitutionally entitled to be considered for release on cash bail.<sup>52</sup> The doctrinal basis for this comparative diminution of rights in the pre-adjudication stage arises from a 1984 case.<sup>53</sup> In *Schall v.*

46. See, e.g., N.C. COMM'N ON THE ADMIN. OF L. & JUST., *Juvenile Reinvestment*, in FINAL REPORT: RECOMMENDATIONS FOR STRENGTHENING THE UNIFIED COURT SYSTEM OF NORTH CAROLINA 95, 110 (2017), [https://www.nccourts.gov/assets/inline-files/JuvenileReinvestmentFactSheet\\_05012017.pdf](https://www.nccourts.gov/assets/inline-files/JuvenileReinvestmentFactSheet_05012017.pdf) [<https://perma.cc/9UEM-YENT>] (citing juvenile court's sweeping authority over parents in arguing that raising the maximum age of juvenile court jurisdiction will reduce recidivism by minors).

47. See, e.g., § 7B-1601(g) (LEXIS) (granting juvenile delinquency court jurisdiction over parents).

48. See JASON LANGBERG & PATRICIA ROBINSON, *A GUIDE TO JUVENILE COURT FOR YOUTH & PARENTS IN NORTH CAROLINA* 7 (2015).

49. Hillary Farber, *Do You Swear To Tell the Truth, the Whole Truth, and Nothing but the Truth Against Your Child?*, 43 LOY. L.A. L. REV. 551, 553–54 (2010).

50. *Id.* at 601 (listing Connecticut, Idaho, Massachusetts, and Minnesota). In one of those states, the parent-child privilege is abrogated in cases involving allegations of violence by the child against the parent. CONN. GEN. STAT. ANN. § 46b-138a (2022) (“[I]n any juvenile proceeding . . . the parent or guardian of such child shall be a competent witness but may elect or refuse to testify for or against the accused child except that a parent or guardian who has received personal violence from the child may . . . be compelled to testify in the same manner as any other witness”).

51. See *supra* notes 29 and accompanying text.

52. *Schall v. Martin*, 467 U.S. 253, 265 (1984).

53. *Id.* at 255–56.

*Martin*,<sup>54</sup> the Court considered the constitutionality of New York's preventive detention scheme, which allowed juveniles to be held without bail pretrial.<sup>55</sup> In denying the juvenile's appeal, the Court speciously reasoned that a child's liberty interests "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody."<sup>56</sup>

Suggesting that whether a child is at home or in a detention center is of no constitutional significance gives insufficient attention to the state's interest in preserving family bonds.<sup>57</sup> As articulated in *Duchesne v. Sugarman*,<sup>58</sup> an oft-cited 1977 Second Circuit case, due process encompasses not only parents' rights but also the interests "of children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association' with the parent."<sup>59</sup> Typically, removal of a child from their parent's physical custody occurs only after a substantiated allegation of abuse or neglect of the child.<sup>60</sup> In holding in *Schall* that minors have no constitutional rights to liberty, however, the Court diminished the rights of parents to keep their children at home.<sup>61</sup>

In asserting that the determination of whether custody is provided by the state or a parent is of no legal consequence, the Court resuscitated a strong version of the *parens patriae* doctrine about which it had only two decades prior

54. 467 U.S. 253 (1984).

55. *Id.*

56. *Id.* at 265.

57. See *infra* Section II.A; see also JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 90–91 (1996).

58. 566 F.2d 817 (2d Cir. 1977).

59. *Id.* at 825 (quoting *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 844 (1977)); see also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003) (noting "the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing").

60. See Hillela Simpson, *Parents Not Parens: Parental Rights Versus the State in the Pre-trial Detention of Youth*, 41 N.Y.U. REV. L. & SOC. CHANGE 477, 493 (2017). Compare N.C. GEN. STAT. § 7B-1903(b) (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.) (omitting, from the delinquency portions of the North Carolina Juvenile Code, reference to presumption in favor of the child remaining in the custody of the child at initial determination on a need for secure custody), and *id.* § 7B-1906(d) (LEXIS) (allowing parent to be heard in review of ongoing secure custody but not requiring state to show or judge to find that parent is unfit before ordering continued custody), with *id.* § 7B-503(a) (LEXIS) (noting, in the portions regarding removal of a child in child-welfare proceedings, there must also be a reasonable factual basis to believe that there are no other means available to protect the child and requiring the court to first consider whether the child can be released to a parent, relative, guardian, custodian, or other responsible adult). In contrasting the presumptions in favor of parental custody with child-welfare proceedings, I do not mean to suggest that courts in those proceedings are implementing those statutory presumptions with fidelity or that they are effective at preventing unjust and racially discriminatory removals. Decades of reports and scholarship suggest otherwise. See ROBERTS, *TORN APART*, *supra* note 13, at 65 (describing Child Protective Services workers as being prevented from assisting families with material resources and therefore unable to improve children's welfare, because "the only tools they're given to fix [perceived parental pathologies] rely on threatening to take the children away").

61. Simpson, *supra* note 60, at 493.

in *In re Gault*<sup>62</sup> expressed skepticism.<sup>63</sup> The Court in that case took a dim view of the notion that the state's assumed power as *parens patriae* justified the contraction of procedural protections common in the pre-*Gault* juvenile court.<sup>64</sup> Yet the *Schall* Court suggested that the interests of a child and the state are aligned, set against a "falter[ing] . . . of parental control."<sup>65</sup>

Judges often are not required by statute to first consider release to a parent before assessing other alternatives, including secure custody.<sup>66</sup> Moreover, courts in many states may hold a child for their "own protection,"<sup>67</sup> and they can and do order detention in these cases over the objection of parents.<sup>68</sup> Indeed, judges may not, and in some states need not, even hear from parents regarding the detention decision.<sup>69</sup> Nonetheless, judges can and do detain children based on hearsay reports of substandard parenting by prosecutors or probation officers.<sup>70</sup> Despite the fact that the harms of juvenile detention are well documented<sup>71</sup>—they include violence, stress, disruption of education, and damage to the parent-child bond<sup>72</sup>—courts are able, given the above-discussed permissive statutory

62. 387 U.S. 1 (1967).

63. Jean Koh Peters, *Schall v. Martin and the Transformation of Judicial Precedent*, 31 B.C. L. REV. 641, 663–64 (1990).

64. *In re Gault*, 387 U.S. at 17.

65. Simpson, *supra* note 60, at 493 (quoting *Schall v. Martin*, 467 U.S. 253, 265 (1984)).

66. *See, e.g.*, N.C. GEN. STAT. § 7B-1903(b) (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.). *See generally* INT'L HUM. RTS. L. CLINIC, UNIV. OF MINN. HUM. RTS. CTR. & JUV. JUST. ADVOCS. INT'L, CHILDREN IN PRETRIAL DETENTION: PROMOTING STRONG INTERNATIONAL TIME LIMITS (2020), <https://www.jjadvocates.org/wp-content/uploads/2020/02/JJAI-Children-in-Pretrial-Detention.pdf> [<https://perma.cc/7AHF-9K5N>] (showing the prevalence of pretrial detention rather than release to parents from minors in the United States and abroad). As Margareth Etienne argues, the opinion in *In re Gault* is in part to blame for the diminution of parental rights that occurs in juvenile court in that "it relied largely on the due process rights to which juveniles are entitled and said very little about the concomitant notice and process rights of their parents [treating] the parental rights as a collateral and secondary function of the accused juvenile's rights." Margareth Etienne, *Managing Parents: Navigating Parental Rights in Juvenile Cases*, 50 CONN. L. REV. 61, 68–69 (2018).

67. *See, e.g.*, § 7B-1903(b)(6) (LEXIS).

68. I have observed judges in multiple counties in North Carolina, as well as in Massachusetts and New York, holding children in detention despite parental assertion that they can maintain the child safely in the home.

69. *See also* Simpson, *supra* note 60, at 500 (asserting that children, in consultation with their attorneys, should be able to assert that a parents' liberty interest means that parents must be heard in certain detention hearings, and suggesting that courts are not otherwise required to hear from parents in these settings).

70. *Id.* at 493–94.

71. *Id.* at 495 (noting the exposure to violence and neglect in detention and the disruption to healthy development that occurs with removal from permanent residences).

72. *Id.*

schemes, to remove children pre-adjudication simply out of a sense that the parents are somehow not good enough.<sup>73</sup>

Perhaps unsurprisingly, children of color with parents who are poor are disproportionately likely to be held pre-adjudication.<sup>74</sup>

#### E. *Adjudication and Sentencing*

Parents are statutorily required to bring their children to court once a case is commenced,<sup>75</sup> and they frequently need to attend multiple times.<sup>76</sup> Delinquency cases typically are collectively, rather than individually, docketed.<sup>77</sup> Parents therefore must plan to miss an entire day of work to accommodate court, and even then the case is often not resolved, requiring one or more additional court appearances.<sup>78</sup> This reality places special stress on low-wage workers, particularly those without a supportive adult partner who can assist with child care or make up for lost income.<sup>79</sup> As a result, poor, single parents may be especially likely to pressure their child to plead guilty to avoid the multiple court appearances necessary for trial.<sup>80</sup>

In addition to placing a thumb on the scale in favor of a plea over a trial, socioeconomic status and race influence the sentences given after a child is

73. To be sure, courts have decreased their reliance over the years on pretrial detention in delinquency proceedings. Sarah Hockenberry & Anthony Sladky, *Juvenile Residential Facility, Census 2016: Selected Findings*, U.S. DEP'T JUST. (Dec. 2018), <http://www.ncjj.org/pdf/Juvenile%20Justice%20Bulletin/JFRC2016.pdf> [<https://perma.cc/VK4A-DMNJ>] (“In 2006, 3% of facilities held more than 200 residents, compared with 1% in 2016.”); see also CHARLES PUZZANCHERA, BENJAMIN ADAMS & SARAH HOCKENBERRY, NAT'L CTR. FOR JUV. JUST., *JUVENILE COURT STATISTICS 2009*, at 32 (2012) (“Between 1985 and 2009, the use of detention decreased for public order offense cases (from 29% to 24%) and for drug law violation cases (from 22% to 17%), changed little for property offense cases (from 18% to 17%), and increased for person offense cases (from 25% to 27%).”).

74. Simpson, *supra* note 60, at 496; see also Madeline Wordes & Sharon M. Jones, *Trends in Juvenile Detention and Steps Toward Reform*, 44 *CRIME & DELINQ.* 544, 554–55 (1998).

75. See, e.g., N.C. GEN. STAT. § 7B-2700 (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.) (“The parent . . . of a juvenile under the jurisdiction of the juvenile court shall attend the hearings of which the parent . . . receives notice.”).

76. HUNT & NICHOL, *supra* note 28, at 9.

77. See, e.g., *Juvenile Delinquency: General Information*, N.C. JUD. BRANCH, <https://www.nccourts.gov/help-topics/family-and-children/juvenile-delinquency> [<https://perma.cc/H6WB-J88Y>] (“Many cases will be scheduled at the same time, and the court will handle cases one by one.”).

78. *Id.* (instructing those attending juvenile court to be “prepared to sit and wait patiently in the courtroom or in a place designated by your attorney” and that it “is possible that your case may not be resolved when you appear in court and may be continued to a later date”); see also HUNT & NICHOL, *supra* note 28, at 9 (“Once at the courthouse, parents and children may have to wait for hours before their case is called.”).

79. See HUNT & NICHOL, *supra* note 28, at 9.

80. For an in-depth exploration of how poverty stunts the development of law in adjudication of housing claims, see Kathryn A. Sabbeth, (*Under*)*Enforcement of Poor Tenants' Rights*, 27 *GEO. J. ON POVERTY L. & POL'Y* 97, 120–21 (2019).

adjudicated delinquent.<sup>81</sup> For example, judges are often statutorily empowered to order dispositions in which the monitoring of the child is entirely outsourced to the parent.<sup>82</sup> In such a scenario, a parent with comparatively high income, as well as support from other adults, is in a better position than a low-income, single parent to ensure their child complies with court orders.<sup>83</sup>

The most frequently imposed sentence—probation<sup>84</sup>—presents acute challenges to poor youth of color. For example, they may be less able to adhere to probationary terms requiring the payment of fines or fees or a parent’s transportation to specified programs.<sup>85</sup> As a result, youth of color remain on probation and thus subject to the court’s jurisdiction longer than their white peers.<sup>86</sup>

Along with disadvantaging poor youth of color, juvenile probation often can work to the detriment of parents’ liberty interests and custodial rights.<sup>87</sup> For example, judges might order parents to attend parenting classes,<sup>88</sup> even without first finding that the parenting was substandard or contributed to the delinquent conduct.<sup>89</sup> As described above, judges can also order that parents report a child’s compliance with the rules of the home, curfew, stay-away orders, and attendance at school, conscripting parents into functioning as the court’s eyes

81. See *infra* notes 109–10 and accompanying text.

82. See, e.g., N.C. GEN. STAT. § 7B-2501(d) (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.) (“The court may . . . continue the case . . . in order to allow the family an opportunity to meet the needs of the juvenile through more adequate home supervision, through placement in a private or specialized school or agency, through placement with a relative, or through some other plan approved by the court.”).

83. HUNT & NICHOL, *supra* note 28, at 12.

84. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT’L CTR. FOR JUV. JUST., JUVENILE COURT STATISTICS 2017, at 50 (2019), <http://www.ncjj.org/pdf/jcsreports/jcs2017report.pdf> [https://perma.cc/D6DL-XQJ9].

85. HUNT & NICHOL, *supra* note 28, at 9–10 (noting the importance of access to reliable transportation to comply with court orders and the lack of such access as characteristic of living in poverty).

86. Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 686 (2002).

87. See *infra* notes 116–24 and accompanying text.

88. See, e.g., N.C. GEN. STAT. § 7B-2716 (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.); see also *In re* Cunningham, 2002-Ohio-5875, 2002 WL 31412256, at \*6 (Ohio Ct. App. Oct. 18, 2002) (holding that a trial court had authority to initiate contempt proceedings against juvenile’s mother based on a violation of an order that required mother to attend parenting classes).

89. Fedders, *The Anti-Parent Juvenile Court*, *supra* note 2, at 797–98 (describing how judges impose requirements of attendance at parenting classes based on little to no evidence that parenting is substandard or in any way contributory to the child’s offending); see also § 7B-2701 (LEXIS) (“The court may order the parent, guardian, or custodian of a juvenile who has been adjudicated undisciplined or delinquent to attend parental responsibility classes if those classes are available in the judicial district in which the parent . . . resides.”).

and ears.<sup>90</sup> Such “devolution of legal control”<sup>91</sup> from courts to parents works to diminish the in-home authority of parents. Moreover, courts need not warn parents of the potential results from receiving parent-provided incriminating information.<sup>92</sup> Judges may ignore the parents’ wishes regarding the appropriate consequence for noncompliance that parents report.<sup>93</sup> In addition, judges can and do act in disregard of poor parents’ physical custodial interests when they place juvenile probationers in the custody of a child protective services agency, as they are statutorily empowered to do in many jurisdictions.<sup>94</sup> As in the pretrial detention context, sentencing judges need not make the same findings of unfitness required in the child welfare context.<sup>95</sup> Finally, when parents fail to adhere to any of the requirements imposed by a court, they can be held in civil or criminal contempt and incarcerated.<sup>96</sup>

#### F. *Familiarity and Disrespect*

Along with these laws, policies, and practices that collectively function to diminish parental rights and dignity, a discourse of presumptuous familiarity that intrudes on the intimacy and uniqueness of parent-child relationships pervades juvenile court. Judges and lawyers regularly refer to parents in open court without their permission as “mom” or “mama,” or, on occasion, “dad,” without asking permission to do so.<sup>97</sup> In so doing, they deploy a uniquely personal term. The informality and intimacy presumed by this discourse papers over the power imbalance that exists between the parent and other court actors.<sup>98</sup> This vocabulary deployed in the context of proceedings where the alleged offenders and their families are disproportionately Black and Indigenous hearkens back to the usurpation of parents’ rights that were features of slavery

90. Fedders, *The Anti-Parent Juvenile Court*, *supra* note 2, at 752, 791–92.

91. Forrest Stuart, Amada Armenta & Melissa Osborne, *Legal Control of Marginal Groups*, 11 ANN. REV. L. & SOC. SCI. 235, 238 (2015).

92. Fedders, *The Anti-Parent Juvenile Court*, *supra* note 2, at 792.

93. *Id.* at 804.

94. *See, e.g.*, N.C. GEN. STAT. § 7B-2506(1)(c) (LEXIS).

95. *See, e.g., id.* (LEXIS) (allowing placement of a child adjudicated delinquent in the custody of a county’s department of social services without a court first finding a parent unfit and only after a determination that staying at home would be “contrary to the juvenile’s best interest”).

96. *See, e.g., id.* § 7B-2706 (LEXIS) (laying out process for civil or criminal contempt for willful failures of parents to comply with a court order).

97. Over the course of my twenty-five-year career representing children in delinquency courts, I have heard prosecutors, probation officers, and judges routinely refer to the parents of my clients this way in open court, and not once have I ever heard any of these court actors seek the permission of the parents to do so. For a discussion of a similar phenomenon in child welfare proceedings, see Amy Sinden, “*Why Won’t Mom Cooperate?*”: *A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 354 (1999).

98. M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 543 (2021).

and the coerced assimilation of Native Americans.<sup>99</sup> Moreover, in so doing, the court is modeling the very disrespect that it might excoriate a child for showing to their parent, teacher, or probation officer.<sup>100</sup>

\* \* \*

The economic and dignitary harms occasioned by juvenile court can financially and emotionally weaken parents and hurt the parent-child bond. These harms also threaten to alienate both parent and child from the juvenile court process and promote disengagement from its attendant terms and conditions.<sup>101</sup> A parent shut out of the process may lack an understanding of whether and how she can help her child succeed with completing the requirements of whatever disposition was ordered by the court. Unsurprisingly, research suggests that probation supervision diminishes rather than strengthens parents' attentiveness to their children.<sup>102</sup> Along with creating counterproductive outcomes, juvenile court involvement diminishes parental rights and dignity, particularly for poor women of color raising children without a cohabitating partner.

The next part offers a theoretical framework in which to contextualize this harmful treatment of parents, which is inconsistent with the juvenile court's stated rehabilitative goals.

## II. A THEORETICAL FRAMEWORK FOR UNDERSTANDING THE ANTI-MOTHER JUVENILE COURT

As explored in the first part, parents suffer economic and dignitary harms when their children become involved in the delinquency system.<sup>103</sup> Such harms seem illogical given the delinquency system's purported commitment to a child's rehabilitation. After all, children most heavily depend on their parents for their growth and development. Part I of this Article analyzed how class,

99. Peggy Cooper Davis, "So Tall Within"—*The Legacy of Sojourner Truth*, 18 CARDOZO L. REV. 451, 452 (1996) ("Abrogation of the parental bond was a hallmark of the civil death that United States slavery imposed."); Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 52–55 (2008) (describing how the government forcefully placed Indigenous children into boarding schools and adoption into non-Indigenous families as part of governmental efforts to wipe out Native American tribal autonomy and culture).

100. The shame-inducing experience occasioned by this discourse can be understood as part of the struggle over "narrative social power" that occurs in criminal prosecutions when "the experiences of those targeted by criminal laws are ignored and devalued." Hanan, *supra* note 98, at 501 (citing Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1453 (2005)).

101. *See supra* Section I.D.

102. Adam D. Fine, Zachary R. Rowan & Elizabeth Cauffman, *Partners or Adversaries? The Relation Between Juvenile Diversion Supervision and Parenting Practices*, 44 LAW & HUM. BEHAV. 461, 470 (2020).

103. Fedders, *The Anti-Parent Juvenile Court*, *supra* note 2, at 781–99; *see supra* note 7 and accompanying text.



gender, and race interact to render poor mothers of color uniquely vulnerable to experiencing the harm that accompanies juvenile court involvement. This part puts forth the contours of a theoretical framework that helps us make sense of why the counterproductive treatment documented in the earlier piece persists.<sup>104</sup>

To do so, it draws from insights of feminist and critical race scholars who study other systems ostensibly designed for care—in particular, the provision of income supports<sup>105</sup> and the so-called child welfare system.<sup>106</sup> This scholarship explores how racism and sexism<sup>107</sup> contribute to policymaking that stigmatizes and even criminalizes people within those systems.<sup>108</sup> Here, I posit that race and sex stereotyping and bias may similarly help explain the counterproductive, harmful treatment of parents in the delinquency system.

Of course, any theoretical framework purporting to account for the actions of multiple actors across states and over time is necessarily limited. I do not suggest here that the participants in juvenile court are intentionally discriminating against poor mothers of color, or that there are never instances when serious court intervention into the families of an alleged delinquent is warranted. My more modest aim in contextualizing the racialized and gendered harms against poor mothers in delinquency court within critical scholarship on other social systems is to point out that here, as in those systems, moralizing discourse and condescending treatment masks race-, class-, and gender-based power imbalances. This framework, therefore, helps point the way to needed change.

Recall that while children of all races and classes break the law,<sup>109</sup> poor children of color are disproportionately more likely to be policed and referred to the juvenile court, and more likely to face protracted involvement in the

104. See generally Fedders, *The Anti-Parent Juvenile Court*, *supra* note 2 (conducting the first part of the analysis of the negative impact of juvenile delinquency courts on the parents with children in these courts, upon which this piece builds).

105. See, e.g., Gustafson, *The Criminalization of Poverty*, *supra* note 12, at 680; Gustafson, *Degradation Ceremonies*, *supra* note 12, at 321.

106. See generally ROBERTS, *TORN APART*, *supra* note 13 (rejecting terminology of child welfare and referring to system instead as family policing).

107. A nonexhaustive list of scholarship on this phenomenon also includes, e.g., KHIARA BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 44, 51–53 (2017); Roberts, *The Value of Black Mothers' Work*, *supra* note 15, at 871–72.

108. See generally BACH, *supra* note 14 (discussing the criminalization of care that effects low-income individuals); MICHELE GOODWIN, *POLICING THE WOMB* 80–81 (2020) (discussing prenatal care for poor Black women); Ocen, *Birthing Injustice*, *supra* note 14 (exploring prosecutions of pregnant women); Roberts, *Punishing Drug Addicts*, *supra* note 14, at 1422 (arguing that governmental intervention into pregnant women's lives is particularly harmful to women of color).

109. Kelly Orts, *Racial and Ethnic Disparities Across the Juvenile Justice System*, EBP SOC'Y (Nov. 13, 2020), <https://www.ebpsociety.org/blog/education/451-racial-and-ethnic-disparities-across-the-juvenile-justice-system> [<https://perma.cc/QM4J-M6W>].

system than their white and middle-class peers.<sup>110</sup> This inequity should prompt prosecutors and judges to proceed with caution in their decision-making and to avoid acting in ways that presume parental deficiency and even unfitness based on their children's alleged delinquent conduct. However, key laws, policies, and practices allow for the opposite and, in so doing, work to normalize a deeply unequal system.

#### A. *Presumption of Parental Deficiency*

The presumption that parents do, and must be able to, act in the best interests of their children has deep roots in case law.<sup>111</sup> In upholding a statute that allowed for voluntary admission of minors to psychiatric hospitals by parents or guardians, for example, the Supreme Court opined that its reasoning was based on “[t]he law’s concept of the family, [which] rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”<sup>112</sup> It went on to note that “[m]ore important[ly], historically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.”<sup>113</sup> Moreover, the law has traditionally afforded a great deal of deference to parents in making child-rearing decisions, curtailing this prerogative only insofar as it conflicts with the state’s *parens patriae* power to regulate child labor<sup>114</sup> and ensure school attendance,<sup>115</sup> among other functions.<sup>116</sup>

However, in the context of juvenile delinquency court, often a child’s alleged delinquent conduct can result in the weakening of this presumption, even in the absence of evidence that a parent is in any way personally responsible for the conduct or otherwise deficient. Consider in this regard pretrial detention statutes that allow judges to detain a child without making a finding of parental unfitness or hearing from parents about whether and why such a placement is detrimental to the child.<sup>117</sup> Such statutory schemes suggest that parents, unlike judges and the detention facilities in which they place

110. See *supra* notes 88–95 and accompanying text.

111. See *supra* note 46 and accompanying text; *Parham v. J. R.*, 442 U.S. 584, 602 (1979); Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 *YALE L.J.* 645, 649 (1977) (“[T]he right to family privacy and parental autonomy, as well as the reciprocal liberty interest of parent and child in the familial bond between them, need no greater justification than that they comport with each state’s fundamental constitutional commitment to individual freedom and human dignity.”).

112. *Parham*, 442 U.S. at 602.

113. *Id.*

114. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

115. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923); *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

116. See generally Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 *HOFSTRA L. REV.* 13, 20–22 (2009) (noting that legal challenges to the state’s *parens patriae* power to regulate the societal treatment of children have been largely unsuccessful).

117. *Id.*

alleged offenders, cannot ensure the best interests of their children during the pendency of their case.<sup>118</sup> The message is one of deficiency: the problem is the parent, not systemic forces, and therefore shutting the parent out and refusing to first consider placement with the parent is not only legally permissible but also the best way to “assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community.”<sup>119</sup>

The fact that children in poor families of color are uniquely and inequitably vulnerable to arrest, detention, prosecution, and incarceration<sup>120</sup> makes these permissive detention schemes especially troubling. Recall that financially well-off parents can largely insulate themselves from government scrutiny and intervention, secure in the knowledge that no matter how less-than-ideal their parenting is, their children alleged to have broken the law are unlikely to end up in the juvenile court and they are thus unlikely to face judicial scrutiny.<sup>121</sup> These parents have access to private resources—drug treatment, private boarding school, and long-term therapy—unavailable to poor families, even those with health insurance.<sup>122</sup> Such resources are more likely to be effective at redirecting children’s misbehavior than delinquency dispositions.<sup>123</sup> Access to such resources allows parents to demonstrate to courts that they have their child’s problematic behavior under control.

When, by contrast, the families are poor, the presumption afforded to wealthy parents—that they can manage a difficult child without heavy-handed state intervention—is considerably weaker.<sup>124</sup>

In a similar way, the scheduling of cases in ways that require families to sit in court all day, multiple days in a row, seems to be facilitated by a presumption either that the poor families of color disproportionately represented in juvenile courts have nowhere else to go or an indifference to the

118. *See, e.g.*, N.C. GEN. STAT. § 7B-2506(15) (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.).

119. *Id.* § 7B-2500(3) (LEXIS).

120. *See supra* Sections I.A–E.

121. Charisa Smith, *Nothing About Us Without Us! The Failure of the Modern Juvenile Justice System and a Call for Community-Based Justice*, 4 J. APPLIED RSCH. ON CHILD. 1, 28 (2013) (“When youth in middle-class and wealthy [w]hite neighborhoods exhibit behavioral problems in school, at home, or in the neighborhood, their family and community members tend to naturally surround them with nurturing adult influences, extra-curricular activities, and even rewards for improved behavior.”).

122. *See* Bell, *What Happens*, *supra* note 25; *see also* Stacy Hodgkinson, Leandra Godoy, Lee Savio Beers & Amy Lewin, *Improving Mental Health Access for Low-Income Children and Families in the Primary Care Setting*, 139 PEDIATRICS 1, 1 (2017) (“Despite their high need for mental health services, children and families living in poverty are least likely to be connected with high-quality mental health care.”).

123. Research demonstrates that juvenile court intervention, rather than decreasing offending, instead may lead to the opposite result, and that the more intensively the court intervenes (for example through intensive supervision and detention), the more negative the impact. Tamar R. Birkhead, *Delinquent by Reason of Poverty*, 38 J.L. POL’Y 53, 97–98 (2012) (citing multiple studies).

124. *See supra* Sections I.B, I.E.

deleterious impact on low-income families of missing work.<sup>125</sup> Particularly since most children in juvenile court are there for nonserious misdemeanors,<sup>126</sup> this disregard for a parent's time seems ill-advised if not callous.

A similar indifference to class and race inequity characterizes the child welfare system, increasingly known as the family regulation or family policing system. That system, theoretically designed to handle complaints of abuse or neglect of children and respond to protect the best interests of children, is beset by extreme racial and class disproportionality and destruction of Black and Indigenous families.<sup>127</sup> As in delinquency cases, child-welfare proceedings are informal.<sup>128</sup> There, too, court actors refer to parents using overly familiar, even intimate language.<sup>129</sup> The proceedings are suffused with social-work terminology, with court participants insisting that intrusive actions are justifiable based on children's best interests<sup>130</sup> and that these interests should be defined by self-appointed experts (whether lawyers, probation officers, social workers, or judges).<sup>131</sup> Adversarialism is often injected into the parent-child relationship through their participation in child welfare or delinquency proceedings;<sup>132</sup> however, parents are implicitly or explicitly discouraged from exercising their due process rights and placing themselves in an adversarial relationship with any court actors by challenging the consensus around a child's best interests.<sup>133</sup> Predictable and entirely understandable parental expressions

125. See *supra* notes 75–80 and accompanying text.

126. See, e.g., *Did You Know?*, N.C. DEP'T PUB. SAFETY, <https://www.ncdps.gov/our-organization/juvenile-justice/did-you-know> [<https://perma.cc/DR8N-8SAY>] (noting that fifty-two percent of juvenile offenses in 2021 were for nonserious misdemeanors).

127. CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 2–3, 7, 30 (2021), [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf) [<https://perma.cc/374U-ESJA>].

128. See Sinden, *supra* note 97, at 350–58.

129. See *supra* note 97 and accompanying text.

130. Sinden, *supra* note 97, at 353 (noting prevalence of social work norms and discourse in child welfare proceedings and arguing that they create pressure on parents to resolve cases).

131. Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 318–19 n.79 (1998) (discussing randomness injected into court proceedings when lawyers representing children are allowed to inject their own personal notions of right and wrong); Sarah Valentine, *Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest Advocacy for the Queer Child*, 2008 MICH. ST. L. REV. 1053, 1057 (citing scholarship arguing that best-interest lawyering for children “can be paternalistic, ethically problematic, and potentially harmful” and arguing against it in cases involving queer children because of pervasive heterosexism and homophobia that will otherwise deflect representation and drown out the child's voice).

132. Jodi S. Cohen, *A Teenager Didn't Do Her Online Schoolwork. So a Judge Sent Her to Juvenile Detention*, PROPUBLICA (July 14, 2020, 5:00 AM), <https://www.propublica.org/article/a-teenager-didnt-do-her-online-schoolwork-so-a-judge-sent-her-to-juvenile-detention> [<https://perma.cc/Y4BS-B6LL>].

133. Sinden, *supra* note 97, at 355. See generally *Brown v. State*, 2017 WY 45, 393 P.3d 1265 (Wyo. 2017) (holding juvenile court had jurisdiction over criminal contempt action brought against juvenile's mother for violating juvenile court order).

of anger at court actions resulting in removal of a child might result in anger-management services ordered for the parent,<sup>134</sup> or prolonged involvement in family regulation or delinquency court.<sup>135</sup> This expression of strong emotions can be used as evidence of a parent's lack of fitness.<sup>136</sup> Judges who, on the one hand, speak to parents using a discourse of familiarity and informality and, on the other, deprive parents of custody—and threaten parents with contempt or worse when they react—engage in a form of judicial gaslighting.<sup>137</sup>

### B. *Individualization and Blame*

Along with the child welfare system, critical race and feminist scholarship on the provision of income support to poor people offers useful theoretical analogies to the study of the treatment of parents in delinquency court. Consider, for example, contemporary state statutes that mandate drug testing for welfare applicants or recipients. Federal law authorizing funding to states for welfare benefits specifically permits states to impose limitations on welfare

134. S. Lisa Washington, *Survived and Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1126 (2022) (“Parents who express anger, despair, or extreme sadness in reaction to family separation or invasive surveillance are regularly referred to anger management programs and therapy to address their ‘anger issue’ or ‘depression.’”); see also Imani Worthy, *Targeted by Two Systems: ‘I Couldn’t’ Focus Only on How Devastating It Was for My Child To Be Hurt and To Lose My Mother. I Also Had To Worry About ACS*, RISE (Apr. 15, 2021), <https://www.risemagazine.org/2021/04/targeted-by-two-systems/> [<https://perma.cc/Q66V-D3LL>] (“My lawyer advised me not to show anger, but how can any mother sit back while someone tries to take their child? . . . The ACS lawyer even mentioned that I need anger management. Was I not supposed to be angry?”).

135. See Sinden, *supra* note 97, at 354. In criminal courts, scholars have documented a similar phenomenon. See, e.g., Hanan, *supra* note 98, at 522 (“[G]iven the lower criminal court’s focus on orderliness, any form of talking back in court—meaning speaking to authorities as equals—risks seeming disorderly. To be perceived as disorderly is to risk becoming the target of further punishment, sanctions, and monitoring.”).

136. S. Lisa Washington, *Pathology Logics*, 117 NW. L. REV. 1523, 1564 (2023) (documenting a woman’s struggle to regain custody of her children over the course of eight years and describing the experience as follows: “You must be as calm and deferential as possible. However disrespectful and invasive [the caseworker] is, whatever awful things she accuses you of, you must remember that child protection has the power to remove your kids at any time if it believes them to be in danger [ . . . ] If you get angry, your anger may be taken as a sign of mental instability, especially if the caseworker herself feels threatened” (alterations in original) (quoting Larissa MacFarquhar, *When Should a Child Be Taken from His Parents*, NEW YORKER (July 31, 2017), <https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents> [<https://perma.cc/ZJ79-DRG7> (dark archive)])).

137. See *In re Cunningham*, 2002-Ohio-5875, 2002 WL 31412256, at \*6 (Ohio Ct. App. Oct. 18, 2002) (upholding contempt order for failing to attend parenting classes).

applicants who apparently test positive for certain drugs,<sup>138</sup> and thirteen states have such laws.<sup>139</sup>

The drug-screening process for welfare recipients and applicants does little to accurately assess and thus deter harmful drug use.<sup>140</sup> For one, these tests typically exclude alcohol, undermining any argument that the test is being done out of concern for possible substance use disorder of the applicant or recipient.<sup>141</sup> In addition, these tests yield little in the way of meaningful evidence of drug use, particularly given the cost. In 2017, for example, states spent more than \$490,000 to drug test 2,541 people who had applied for Temporary Assistance for Needy Families (“TANF”) benefits,<sup>142</sup> and these tests resulted in only 301 positive cases.<sup>143</sup> Along with not being cost-effective, the use of drug testing to screen people who are seeking minimal amounts of help is cruel,<sup>144</sup> in that it is premised on the notion that an acceptable response to a person using certain substances is to deny that person minimal amounts of cash support to meet basic needs.<sup>145</sup>

Maintaining such a regime seems illogical if one assumes that the only purpose is in fact to actually deter drug use and support children. However, such a policy may equally be understood as a mechanism for states to make the application for and receipt of aid as stigmatizing as possible.<sup>146</sup> Indeed, drug testing as a condition of receipt of income support, like much of contemporary social welfare, demonstrates how systems ostensibly designed for care are

138. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 902, 110 Stat. 2105, 2347 (codified at 21 U.S.C. § 862b (1996)) (“Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances.”).

139. Amanda Michelle Gomez & Josh Israel, *States Waste Hundreds of Thousands on Drug Testing for Welfare, but Have Little To Show for It*, THINK PROGRESS, <https://archive.thinkprogress.org/states-waste-hundreds-of-thousands-on-drug-testing-for-welfare-3d17c154cbe8/> [https://perma.cc/J7BJ-TSS5] (last updated Mar. 29, 2019, 9:20 AM).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*; see also Victoria M. Massie, *North Carolina Is the Latest State To Find Welfare Recipients Rarely Use Illegal Drugs*, VOX (Feb. 16, 2016, 4:50 PM), <https://www.vox.com/2016/2/16/11021826/north-carolina-drugs-welfare> [https://perma.cc/AP88-KX65].

144. CTR. ON BUDGET & POL’Y PRIORITIES, CHART BOOK: TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) AT 26, at 7 (2022), <https://www.cbpp.org/research/family-income-support/temporary-assistance-for-needy-families-tanf-at-26> [https://perma.cc/7RYJ-ZK4X] (“Despite recent increases, in 2021 the maximum TANF benefit for a family of three in every state was at or below 60 percent of the poverty line, and benefits fell below 20 percent in 16 states.” (emphasis in original)).

145. *Id.* at 9.

146. See Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 275, 293–300 (2010) (discussing the fact that policymakers likely know, but do not care, about racial disparity in the criminal system because disregard for this inequity does not damage one’s political reputation).

increasingly characterized by the stigmatizing practices and discourse of the criminal legal system.<sup>147</sup> In suggesting that poverty flows from pathology rather than unfettered capitalism and neoliberal disinvestment from social welfare programs,<sup>148</sup> such programs individualize an experience shared by over thirty million Americans,<sup>149</sup> stigmatizing the result of political and economic inequality. These programs, moreover, rest on empirically unsupportable narratives about the “deserving” versus the “undeserving” poor.<sup>150</sup>

Policymakers may also invoke racialized tropes to buttress political support for punitive and harsh social welfare policy. Over thirty years ago, Dorothy Roberts critiqued so-called “workfare” proposals percolating through Washington for resting on notions of Black mothers as “less fit, less caring, and less hurt by separation from their children.”<sup>151</sup> Specifically, she was criticizing welfare reforms that forced mothers of young children out of the home and into the paid workforce.<sup>152</sup> Such proposals constituted a shift away from a maternalistic philosophy that had motivated Progressive-Era welfare reformers a century earlier.<sup>153</sup> These early-twentieth-century reformers had argued that public financial support was essential for white widows<sup>154</sup> to perform their uniquely maternal duties in the home.<sup>155</sup> By contrast, late-twentieth-century proponents of welfare reform mobilized stereotypes about Black single mothers as lazy and irresponsible “welfare queens” to gain popular support for cutting government aid to all caregivers of young children, which resulted in mothers,

147. Black mothers are targeted and experience a disproportionate impact from the prosecution of women after their newborns test positive for drugs, Roberts, *Punishing Drug Addicts*, *supra* note 14, at 1435–36 (arguing that “[m]aking criminals of Black mothers apparently helps to relieve the nation of the burden of creating a health care system that ensures healthy babies for all its citizens”), along with the widespread practices by so-called child-protection workers of unnecessarily intervening to remove these babies from their mothers, *id.* at 1430–31; *see also* BACH, *supra* note 14, at 53–54.

148. *See* Ocen, *Birthing Injustice*, *supra* note 14, at 1221 (criticizing agencies for “choos[ing] to criminalize a symptom—drug use during pregnancy—rather than the structural vulnerabilities to poverty or lack of health care that produce such outcomes”).

149. EMILY A. SHRIDER, MELISSA KOLLAR, FRANCES CHEN & JESSICA SEMEGA, U.S. CENSUS BUREAU, *INCOME AND POVERTY IN THE UNITED STATES: 2020*, at 1 (2021), <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf> [<https://perma.cc/3XPL-KXCK>] (noting that in 2020, there were 37.2 million people in poverty, approximately 3.3 million more than in 2019).

150. MICHAEL B. KATZ, *THE UNDESERVING POOR: AMERICA’S ENDURING CONFRONTATION WITH POVERTY* 205–06 (2d ed. 2013).

151. Roberts, *The Value of Black Mothers’ Work*, *supra* note 15, at 874.

152. *Id.* at 875.

153. *Id.* at 872–75.

154. LAURA MEYER, IFE FLOYD & LADONNA PAVETTI, CTR. ON BUDGET & POL’Y PRIORITIES, *ENDING BEHAVIORAL REQUIREMENTS AND REPRODUCTIVE CONTROL MEASURES WOULD MOVE TANF IN AN ANTIRACIST DIRECTION* 1 (2022), <https://www.cbpp.org/sites/default/files/2-23-22fis2.pdf> [<https://perma.cc/94N9-HMZS>] (condemning as racist early welfare policy that excluded children of Black and unmarried women); Roberts, *The Value of Black Mothers’ Work*, *supra* note 15, at 873 n.11.

155. Roberts, *The Value of Black Mothers’ Work*, *supra* note 15, at 873 n.11.

including those of young children, having to leave the home during critical stages of their children's lives.<sup>156</sup>

However, depriving mothers of income support in the absence of paid childcare, stable and affordable housing, and high-quality health care creates harmful conditions for their children.<sup>157</sup> Rather than deprive mothers of needed income, governments ought to instead consider paying mothers of especially young children to stay home and provide the kind of love and nurturance that a parent can uniquely provide.<sup>158</sup> The politics of cutting income support, however, seems a safer bet for policymakers.

A similar dynamic is afoot in juvenile delinquency court. Decades of research show that the race and class disproportionality in juvenile court is attributable not to poor children of color committing more crime but to racially biased policing and prosecution.<sup>159</sup> Yet policymakers seem sure that no political backlash will result from continuing to countenance systems that individualize and punish problems resulting from poverty rather than committing to noncourt, noncarceral approaches to youthful misconduct.

The next part offers preliminary thoughts toward reimagining state responses toward alleged law breaking by young people.

### III. POLICY AND LAW REFORMS

The economic and dignitary harms occurring to families—particularly poor mothers of color raising children without a cohabitating partner—in the juvenile legal system suggest that change must occur. Much of this change can occur outside the courtroom, through moving away from policing and prosecution and toward the implementation of creative responses to alleged offending by youth. Simultaneously, juvenile courts can change policies and practices that diminish parental dignity and undermine parental rights.

#### A. *Moving Away from the Juvenile Court*

The harms outlined in this Article demand closer scrutiny of whether the juvenile court can ever actualize its rehabilitative aspirations.<sup>160</sup> Courts are

156. For a contemporary discussion of the harms of parents leaving young children at home and the dearth of high-quality daycare spots, see Maxine Eichner, *Free-Market Family Policy and the New Parental Rights Laws*, 101 N.C. L. REV. 1305, 1311–17 (2023).

157. See generally Danielle A. Crosby, Lisa A. Gennetian & Aletha C. Huston, *Does Child Care Assistance Matter? The Effects of Welfare and Employment Programs on Child Care for Preschool and Young School-Aged Children* 5–8 (Next Generation, Working Paper No. 3, 2001) (discussing centrality of childcare for low-income parents leaving welfare).

158. See Roberts, *The Value of Black Mothers' Work*, *supra* note 15, at 871 (citing Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 822 (1994)).

159. See *supra* note 126 and accompanying text.

160. Henning, *What's Wrong with Victims' Rights in Juvenile Court?*, *supra* note 7, at 1113–15; see *supra* note 7 and accompanying text.



constrained by both the limits of their jurisdiction and the resources available to them. Poverty, particularly racialized poverty,<sup>161</sup> is perhaps the most common risk factor for young people involved in the criminal legal system.<sup>162</sup> Yet delinquency judges have limited authority to meaningfully intervene in the institutions in which children are involved to help alleviate some of the factors potentially contributing to delinquent behavior.<sup>163</sup> A delinquency judge does not have the authority to order a school, for example, to conduct an evaluation to determine if a child is eligible for special education services.<sup>164</sup> Nor is she able to order a stop to an eviction, or assist a family with a food-stamp application or unemployment benefits.<sup>165</sup> Indeed, “other than waiving court costs where possible,”<sup>166</sup> even a well-intentioned juvenile court judge is powerless to address the impoverished circumstances in which the majority of young people in the juvenile court live.

Moreover, insufficient therapeutic services exist to meet the mental health needs of children and families in the system.<sup>167</sup> And those supports that exist are often reserved for children who are adjudicated for serious crimes. While it might seem logical to conserve resources in this way, in fact this allocation incentivizes overcharging, prosecutorial refusals to dismiss, and probation recommendations for long probationary periods with stiff terms and conditions.<sup>168</sup> Especially perverse, stressed parents may feel they need to initiate

161. Poverty itself of course does not have race or gender. I use the phrase “racialized, gendered poverty” to connote the intersections between race, gender, and socioeconomic status and to suggest the unique ways that children of poor women of color experience harm in the juvenile court.

162. See generally MICHAEL SHADER, U.S. DEP’T OF JUST., RISK FACTORS FOR DELINQUENCY: AN OVERVIEW (2003), <https://www.ojp.gov/pdffiles1/ojdp/frd030127.pdf> [<https://perma.cc/MT27-3XJZ> (staff-uploaded archive)] (presenting an overview of risk factors related to juvenile delinquency).

163. While examples abound of juvenile court judges taking leadership roles in convening juvenile justice stakeholders, see, e.g., Leonard Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 1, 29 (1992), in any one particular case a judge’s role is confined to the facts and legal issues presented by the child before the court, *id.*

164. 20 U.S.C. § 1414(a)(1)(B) (“[E]ither a parent of a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.”); 34 C.F.R. § 300.301 (2007) (“[E]ither a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.”); see also *Evaluating School-Aged Children for Disability*, CTR. FOR PARENT INFO. & RES. (Sept. 9, 2019), <https://www.parentcenterhub.org/evaluation> [<https://perma.cc/JN54-8YK4>].

165. See, e.g., N.C. GEN. STAT. § 7B-200 (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.) (outlining subject matter jurisdiction of the juvenile court).

166. Fedders, *The Anti-Parent Juvenile Court*, *supra* note 2, at 798.

167. *Id.* at 776.

168. See generally Traci Schlesinger, *Decriminalizing Racialized Youth Through Juvenile Diversion*, 28 FUTURE CHILD., 59–74 (2018) (“[J]urisdictions should use informal diversion to decriminalize low-risk youth and formal diversion to keep high-risk youth away from court processing and in their communities.”).

proceedings against their children expressly to attain services that are otherwise unavailable because of this allocation of (artificially) scarce resources.<sup>169</sup>

Rather than prosecute children or stigmatize their parents for actions that often reflect only a lack of opportunity, policymakers should instead consider devoting funds and human resources currently invested in the delinquency apparatus to social safety net restoration and robust youth programming.<sup>170</sup> We might look for guidance to the resources families of means can access to avoid delinquency prosecution for their children—after-school opportunities, intensive and effective therapy, and high-quality substance use treatment, for example.<sup>171</sup> Such resources are more likely to be effective at redirecting children’s misbehavior than delinquency dispositions.<sup>172</sup>

Given that the overwhelming majority of offenses committed by youths is misdemeanors,<sup>173</sup> and most of those cases arise in schools, policymakers should consider school-based resolutions. One option is prosecutorial nullification.<sup>174</sup> In Durham, North Carolina, for example, the District Attorney has declined to prosecute school-based offenses since 2020.<sup>175</sup> Restorative and transformative justice circles occur and are growing in schools across the country.<sup>176</sup> School-based responses to school-based offending are more logical than delinquency

169. An interview in Neelum Arya’s qualitative study of families in juvenile courts is illustrated. A parent whose child was involved in the system asserted, “I went [to the justice system] ‘cause I felt like I had no other choice. I thought I had exhausted all my choices, all of my options. I felt like I had nowhere else to go.” Neelum Arya, *Family-Driven Justice*, 56 ARIZ. L. REV. 623, 664 (2014) (quoting Focus Group Transcript, Wash. D.C. (Apr. 27, 2011) (unable to independently verify quote)). It is not only the juvenile court to which desperate people turn for care and who find coercion and punishment. So-called problem-solving courts, most prominently drug courts, allow participants to serve a probation rather than jail or prison sentence if they agree to stringent terms and conditions ostensibly intended to support recovery. *See, e.g.*, PHYSICIANS FOR HUM. RTS., NEITHER JUSTICE NOR TREATMENT: DRUG COURTS IN THE UNITED STATES 15–18 (2017). Yet these courts have generated substantial criticism that they punish rather than provide care and provide either inappropriate treatment or treatment to people who do not need it. *Id.*

170. *See* Sonya Goshe, *How Contemporary Rehabilitation Fails Youth and Sabotages the American Juvenile Justice System: A Critique and Call for Change*, 27 CRITICAL CRIMINOLOGY 559–68 (2019) (arguing that the rehabilitation offered to youth is largely shortsighted and inadequate in ignoring the social roots of youth problems and focusing too much “on improving internal thoughts and behaviors through short-term ‘pills and programs’”).

171. *Id.* at 567–69.

172. *See* Birckhead, *supra* note 123, at 97–98.

173. CHARLES PUZZANCHERA, TRENDS IN YOUTH ARREST FOR VIOLENT CRIME 2 (2022), <https://ojjdp.ojp.gov/publications/trends-in-youth-arrests.pdf> [<https://perma.cc/J4NX-FZ4H>].

174. For a discussion of prosecutors declining to prosecute certain crimes, see generally W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173 (2021) (exploring the framework and implications of prosecutorial nullification).

175. Joel Brown, *Durham’s New Reform-Minded District Attorney Faces Tough Questions at Town Hall*, ABC 11 (Jan. 31, 2020), <https://abc11.com/satana-deberry-durham-district-attorney-debbie-long/5893195/> [<https://perma.cc/MR2R-BMSD>].

176. *See* Scott Russell & Diane Crocker, *The Institutionalization of Restorative Justice in Schools: A Critical Sensemaking Account*, 4 RESTORATIVE JUST. 195, 198 (2016).

prosecutions; they are faster,<sup>177</sup> can be more tailored to the harm caused,<sup>178</sup> can involve the alleged victim and others affected in more meaningful ways,<sup>179</sup> and allow the youth to avoid the stigma and collateral consequences of prosecution.<sup>180</sup>

In a similar vein, school districts have begun to rethink their reliance on law enforcement to manage school-based misbehaviors.<sup>181</sup> Decades of research fail to show conclusively that police presence positively impacts student safety.<sup>182</sup> What is clear is that an in-school police force results in increased referrals of students to juvenile and criminal courts.<sup>183</sup> In some jurisdictions, school boards have decided to remove police entirely.<sup>184</sup> Others have created agreements with law enforcement agencies overseeing the officers that impose limitations on the officers' use of arrest and court referral.<sup>185</sup> These agreements are imperfect solutions to the growing criminalization of student misbehavior; they are not enforceable by students and their families, they are typically executed without community input, and, most importantly, they contain loopholes that allow police to override terms to which they have agreed in the exercise of their broad discretion.<sup>186</sup> Nonetheless, they are an important signaling tool that officers are to serve schools and their needs rather than to impose law enforcement imperatives.<sup>187</sup>

This Article does not suggest that the juvenile court should be eliminated, as some commentators have.<sup>188</sup> Instead, courts should be reserved for those accused of serious felonies. Doing so will allow for investment into needed therapeutic services for youthful offenders. A truly treatment-oriented court for

177. Lydia Nussbaum, *Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform*, 69 HASTINGS L.J. 583, 605–11 (2018).

178. *Id.* at 609.

179. *Id.* at 610.

180. *Id.* at 611.

181. See Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 180–81 (2015); see also Vesla M. Weaver & Amanda Geller, *Depolicing America's Youth: Disrupting Criminal Justice Policy Feedbacks That Distort Power and Derail Prospects*, 685 ANNALS 190, 214 (2019).

182. See Barbara Fedders, *The End of School Policing*, 109 CALIF. L. REV. 1443, 1457–59 (2021) [hereinafter Fedders, *The End of School Policing*].

183. *Id.* at 1497.

184. *Id.* at 1453.

185. *Id.* at 1496–98.

186. See generally Barbara Fedders, *The Anti-Pipeline Collaborative*, 51 WAKE FOREST L. REV. 565 (2016) (discussing the harms created by the importation of criminal justice features into the administration of student discipline and analyzing the strengths and weaknesses of anti-pipeline collaborative as an approach to ameliorating these harms).

187. Fedders, *The End of School Policing*, *supra* note 182, at 1497.

188. Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1118–22 (1991) (recommending abolition because of the availability of greater procedural safeguards and greater opportunity for effective assistance of counsel).

children accused of serious crimes, which does not burden youthful offenders with life-long collateral consequences, is consistent with decarceralism.<sup>189</sup>

The move to shrink the reach of the juvenile court is the next logical step in advocacy for public policy that recognizes the pernicious impacts on youth created by systemic racism, sexism, and poverty. Advocates for youth have successfully lobbied policymakers to raise the maximum age of juvenile court jurisdiction<sup>190</sup> and limit the circumstances in which children can be transferred to adult court.<sup>191</sup> These important wins suggest meaningful progress in the task of prioritizing rehabilitation over retribution for minors and recognizing that their age makes them categorically less culpable than adults.<sup>192</sup>

### B. *Court-Based Reforms*

In tandem with decreasing reliance on the juvenile system, reforms in law, practice, and discourse can occur that recognize the equal worth and dignity of all parents in the juvenile court. Some of these changes include restoring the least restrictive environment requirement for pretrial and post-adjudication decisions and implementing court policies to center on the needs of the families they regulate. Overall, these reforms will not fully eliminate the inherent stigmatizing and often criminalizing nature of the juvenile court system for parents, but they can serve as meaningful steps to better achieving the rehabilitative goals of the juvenile system.<sup>193</sup>

Over the last thirty years, in the wake of the tough-on-crime 1980s and 1990s, various legislatures amended juvenile court statutes to emphasize accountability and public safety.<sup>194</sup> This shift was roughly temporally accompanied by elimination of the requirement for judges to make placement decisions under a mandate to find the least restrictive available environment.<sup>195</sup>

189. See, e.g., Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1614 (2012) (arguing for a diversion of cases from specialty courts to therapeutic programs outside of court).

190. See NAT'L GOVERNORS ASSOC., AGE BOUNDARIES IN JUVENILE JUSTICE SYSTEMS 1-3 (2021), [https://www.nga.org/wp-content/uploads/2021/08/Raise-the-Age-Brief\\_5Aug2021.pdf](https://www.nga.org/wp-content/uploads/2021/08/Raise-the-Age-Brief_5Aug2021.pdf) [<https://perma.cc/2E3M-K9ZD>] (noting that "[a] total of 47 states have amended laws that define 'minors' for the purposes of juvenile court jurisdiction, as persons up to age 18").

191. MARCY MISTRETT & MARIANA ESPINOZA, THE SENTENCING PROJECT, YOUTH IN ADULT COURTS, JAILS, AND PRISONS 2-5 (2021), <https://www.sentencingproject.org/app/uploads/2022/09/Youth-in-Adult-Courts-Jails-and-Prisons.pdf> [<https://perma.cc/X29N-V4C9>] (reviewing trends in charging and prosecuting minors in adult courts and housing them in adult facilities and noting decreases in numbers of minors serving adult terms).

192. Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 542 (2017).

193. Henning, *What's Wrong with Victims' Rights in Juvenile Court?*, *supra* note 7, at 1113-15.

194. See NAT'L GOVERNORS ASSOC., *supra* note 190, at 6-9.

195. Henning, *What's Wrong with Victims' Rights in Juvenile Court?*, *supra* note 7, at 1120-21; see also *In re Bullabough*, 89 N.C. App. 171, 185, 365 S.E.2d 642, 650 (N.C. Ct. App. 1988) (referencing now-deleted portion of juvenile disposition statute commanding judge to find least restrictive alternative).

The elimination of this requirement frees judges to make pre-adjudication custody and dispositional decisions without having to first consider home as an option.<sup>196</sup> Restoring this requirement to consider the least restrictive environment should not only result in a continued decrease in courts' reliance on detention, but also restore a presumption that children belong with their families and in their own homes. Ultimately, by reinstating this requirement, courts will also reincorporate parents into the decision-making process of the juvenile system.

There are several meaningful policy changes delinquency court administrators could consider to better serve the families whose children are within the court's jurisdiction. First, courts can work to ease the inconvenience of court for the families involved. To reduce the time parents and children currently spend waiting for their cases to be called, courts should set hearings for specific times during the day rather than simply setting all cases on for the same day. The federal court system has done this with success, and more should follow its example.<sup>197</sup> This may not be a perfect solution, as cases often run behind or ahead, but being more intentional in scheduling would demonstrate the courts' respect for parents' time and effort associated with attending court. Moreover, courts could consider setting hearings for hours outside of the typical business day, similar to night court.<sup>198</sup> This shift would not only allow the youth involved in the hearings not to miss school but would also allow their parents to potentially avoid work conflicts. Additionally, courts should engage the parents, not merely the attorneys, when making scheduling and calendaring decisions. Under typical court practices, the parents are often completely removed from scheduling decisions, yet made responsible for attendance.

Second, system actors in juvenile court can practice formality to create a culture of respect for the parents involved in the system. Judges, prosecutors, defense attorneys, and probation officers in the juvenile court should address parents by their chosen honorific and surname unless parents specifically indicate otherwise. The informality that pervades juvenile court reflects and reinforces power imbalances. Parents, after all, cannot credibly refer to prosecutors, judges, probation officers, and defense attorneys by their first names or by reference to their family status. Yet all of these juvenile court stakeholders routinely co-opt terms that typically are reserved only for chosen family members. A shift to formality would help demonstrate the court's

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196. See *supra* note 72 and accompanying text.

197. See, e.g., *Court Schedule*, U.S. DIST. CT. FOR E. DIST. N.C., <http://www.nced.uscourts.gov/calendar/default.aspx> [https://perma.cc/Z59B-JAC6].

198. See, e.g., *Night Court – Magistrate Office*, GEN. SESSIONS CT., METRO. NASHVILLE & DAVIDSON CNTY., <https://gscourt.nashville.gov/departments-services/night-court/> [https://perma.cc/J7PP-XNGB].

recognition that the parent is a person of dignity and equal worth, a person with rights who deserves respect.<sup>199</sup>

#### CONCLUSION

Because juvenile courts have a statutory commitment to the rehabilitation of children, legislatures, judges, and all participants in those courts must recognize the central role that parents play in nurturance, love, and support of their children. Any actions taken in the court should strengthen, rather than diminish, parent-child bonds.

In multiple areas involving social welfare policy that primarily affects poor people of color, unfortunately, policymakers have engaged in stigmatizing practices undergirded by beliefs that poverty is an individual pathology rather than the result of structural determinants. The treatment of parents in juvenile courts reflects those practices. Reformers can apply insights from critical scholarship on those practices to create a juvenile court truer to its mission and, equally important, find noncourt ways to address youthful offending.

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199. Hanan, *supra* note 98, at 543 (citing PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 148–51 (1991)).

