Justice for Girls: Are We Making Progress?

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ARE WE MAKING PROGRESS?

Social expectations that girls behave obediently, modestly, and cautiously have been remarkably durable over more than 100 years of juvenile justice in the United States, and throughout that time these expectations have excused structural gender discrimination. At the turn of the twentieth century, these expectations were behind granting girls who were perceived to be immoral and in need of guidance that would enable them to marry and become responsible mothers.

In the mid- and late twentieth century, these expectations supported detention and incarceration of girls for status offenses, technical probation violations, and particularly running away. Now, these same expectations result in the detention and incarceration of girls who fight back at home or in intimate relationships and who are victims of sexual exploitation.

The structural discrimination that supports detaining and incarcerating girls for violating these norms is both hard to see and hard to challenge. It is often hidden behind outward good will toward girls and legitimate expressions of concern for their vulnerability and possible victimization; and it is facilitated by the many opportunities

Key Safeguard Principles
Several key principles should control the admissibility of scent lineup evidence:

Double-blind lineups. Ample evidence supports the existence of a "Clever Hans" effect. Clever Hans was a horse who could do seemingly amazing arithmetic tricks, such as counting out with his hooves the answers to complex mathematical problems. The historical research suggests that Hans's handler was not knowingly defrauding the public. Instead, he was unconsciously "caring" Hans, that is, Hans's handler, was nervous and could not control his actions. But how do we deal with girls who fight back at home or in intimate relationships and who are victims of sexual exploitation?

The structural discrimination that supports detaining and incarcerating girls for violating these norms is both hard to see and hard to challenge. It is often hidden behind outward good will toward girls and legitimate expressions of concern for their vulnerability and possible victimization; and it is facilitated by the many opportunities

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entering an era of more developmentally centered and data-driven juvenile justice policies that rely less on incarceration and more on building community and family support for youth to thrive. In February 2013, the Annie E. Casey Foundation reported that, although still the highest among industrial nations, youth confinement in the United States had reached a 35-year low. (See NEW KIDS COUNT Data Snapshot on "Juvenile Justice: 2013"
http://kcbuy.com/kb7y/7rd (last visited Apr. 19, 2013.).) Other positive juvenile justice developments include identification of vio-
cerating youth and more on building community and development of teenagers and the developmental differ-
ences between youth and adults; research on competence and culpability that explains how laws that allow lenient judgment and decision making; an increased focus on issues raised by girls in the justice system; evolving standards for humane conditions in juvenile facilities and an awareness of poor conditions; and reduced racial and ethnic disparities through the use of focused data analysis.
While the current promise of a smarter, more equitable and more effective juvenile justice system is exciting, given girls' status as a long-overlooked minority population in juvenile justice systems and the historical gender bias embedded in these systems, it is fair to wonder whether girls will be full beneficiaries of these promising developments. At the same time, given the increased awareness that girls present specific juvenile justice concerns and considering the 20-year-old federal directive to jurisdictions to develop programs for girls, past gender referencing in detention policies and practices in juvenile justice systems is inconsistent. Meanwhile, gender inequities in juvenile justice systems persist—girls are rarely a high priority for state and local juvenile justice systems, which more commonly wait to address girls' issues after issue-facing other populations or until public pressure requires them to focus on girls. And while jurisdictions must ana-
lyze race disparities, few make the intersections of race, ethnicity, and gender a part of that analysis. Because of a lack of full and practical understanding of the mecha-
nisms that perpetuate gender inequity in juvenile justice and because of the durability of gender bias in our social structure, many of the current inequities in juvenile justice systems are unconscious and unnecessary repetition of past mistakes.
However, recently there have been signs that the direc-
tion of juvenile justice systems may be changing for the better. Overall the number of youth, including girls, entering the juvenile justice system is declining, and many observers agree that we may be significant local interest and concern that girls were not being well served by existing juvenile justice programming. Federal efforts have continued to emphasize encouraging states to provide effective gender-responsive programming for girls. However, the Office of Juvenile Justice and Delin-
quency Prevention's (OJJDP's) Girls Study Group (2004) and National Girls Initiative (2010) also returned the focus to ways in which the juvenile justice process is biased against girls. The Girls Study Group noted the impor-
tant descriptive data about girls in the system and addressed the troubled mistaken impression that girls were less delinquent and more violent than boys by highlighting that gender bias harms girls and boys alike. Moreover, it clarified ways to implement gender-
specific interventions to assist chaotic families and youth development and behavior.
The desire to control girls' misbehavior that animated the early history of girls in the juvenile justice system remains associated with the legal arguments of girl offenders and parole violations, liberal use of warrants, and increased charging of misdemeanor and home-based offenses, girls' poorer outcomes, and the failure of delinquency court proceedings to public safety continue to populate secure detention and postjudicialfacilities. Meanwhile, states continue to work toward single-sex or gender-specific units that are more likely to provide safe and humane environments for girls than coeducational facilities. Girls in the justice system itself, their trauma backgrounds, and the ways in which social expectations for girls and the resulting roles girls play in their families and communities affect their development and behavior.
THE DESIRE TO CONTROL...
not fully formed, the Court found that juveniles could never be as culpable as adults.

In 2005, the Supreme Court reiterated Roper's developmental findings in Graham v. Florida, 560 U.S. 90 (2010), saying that in the intervening years the developmental research had only been strengthened, and that in addition to these developmental differences, there was evidence that juveniles' brains develop throughout adolescence and influences girls' behaviors and drives girls into the systems through structural mechanisms that are contrary to sound development practices. Girls are more likely than boys to have experienced sexual assault, rape, or sexual harassment, and early sexual abuse is common among girls victimized for commercial sexual exploitation. Studies show that a history of abuse is a more powerful predictor of delinquent behavior for girls than it is for boys. Girls who have experienced childhood trauma may suffer from posttraumatic stress disorder and other mental health disorders such as anxiety or depression, and recent research showed that almost one-third of girls in detention had one or more psychiatric disorders. (Linda A. Teplin et al., The Northwestern Juvenile Project: Overview, OJJDP Juv. JUST. BULL., Feb. 2013, at 11, available at http://tinyurl.com/c83eef3.) Most of these girls had violated probation, and many had run away. Many were victims of sexual abuse. Despite developmental research that juvenile justice programming is best delivered in community-based settings that support girls' family and community relationships and keep their educations intact, states and localities continue to rely on secure confinement for the most vulnerable girls.

Moreover, the mechanics of the juvenile justice process—use of warrants, charging of technical violations and even violation of probation, and the resulting trauma histories of runaway girls who are brought into custody for absconding, violations of probation, or for warrants, yet these girls are often also running away. Tough sanctions for runaway girls may serve as disincentives to girls who may otherwise want to return home. Nonetheless, as recently as February 2013, the Contra Costa Times lauded a program ironically named "Girls in Motion," which relies on locking girls up in juvenile jail in order to provide them treatment. (Eve Mitchell, Girls in Motion: Closed Doors Open New Options for Juvenile Offenders, CONTRA COSTA TIMES, Feb. 26, 2013, http://tinyurl.com/d888rpm.) Most of these girls had violated probation, and many had run away. Many were victims of sexual abuse. Despite developmental research that juvenile justice programming is best delivered in community-based settings that support girls' family and community relationships and keep their educations intact, states and localities continue to rely on secure confinement for the most vulnerable girls.

A trauma history is not only a background factor for girls in the juvenile justice system, but it can actually drive girls into the system. As a result of their trauma histories, girls in juvenile justice systems are typically known to the child protection, family services, or mental health system long before they even come into contact with the juvenile justice system. Given all of this, many girls in the delinquency system are on the cusp of an eye to child development.

As a result of their trauma histories, girls in juvenile justice systems are typically known to the child protection, family services, or mental health system long before they even come into contact with the juvenile justice system. As a result of our findings in the last 20 years, juvenile justice systems have also incorporated child development into their policies and practices. Juvenile justice researchers are using principles of restorative justice and positive youth development to frame probation services, dispositions, and the structure of juvenile commitment after adjudication. The use of juvenile justice systems, which are part of larger systems like education and health-care access designed to support a youth's growth, and federally funded programs are increasingly collaborative across the ecology of children's development.

The majority of girls in the system are there for status and misdemeanor offenses and violations of probation. Both the behaviors that result in girls' arrests and the structural mechanisms of the justice system for those behaviors relate to child development. Girls' behaviors should be understood ecologically, as reactions to and in tension with the larger systems of unemployment, race, poverty, and gender and in girls' lives, and it is that ecological framing that provides more nuanced and developmentally informed responses. Running away is a relatively common behavior among system-involved girls. Both boys and girls run away from home, but studies show that 75 percent of runaways are female, and for girls, running away is disproportionately a trigger for system involvement. In 2009, girls made up 55 percent of youth arrested for running away; prostitution was the leading reason girls made up the majority of arrests. Moreover, arrest statistics undercount the incidence of running away because statistics on runaways may not include juveniles who are brought into custody for absconding, violations of probation, or for warrants, yet these girls are often also running away. Tough sanctions for runaway girls may serve as disincentives to girls who may otherwise want to return home. Nonetheless, as recently as February 2013, the Contra Costa Times lauded a program ironically named "Girls in Motion," which relies on locking girls up in juvenile jail in order to provide them treatment. (Eve Mitchell, Girls in Motion: Closed Doors Open New Options for Juvenile Offenders, CONTRA COSTA TIMES, Feb. 26, 2013, http://tinyurl.com/d888rpm.) Most of these girls had violated probation, and many had run away. Many were victims of sexual abuse. Despite developmental research that juvenile justice programming is best delivered in community-based settings that support girls' family and community relationships and keep their educations intact, states and localities continue to rely on secure confinement for the most vulnerable girls.

Like running away, trauma is related to girls' development and triggers their juvenile justice involvement. Trauma, particularly for girls in the justice system, explains why girls make up the majority of arrests. In addition, arrest influences girls' behaviors and drives girls into the systems through structural mechanisms that are contrary to sound development practices. Girls are more likely than boys to have experienced sexual assault, rape, or sexual harassment, and early sexual abuse is common among girls victimized for commercial sexual exploitation. Studies show that a history of abuse is a more powerful predictor of delinquent behavior for girls than it is for boys. Girls who have experienced childhood trauma may suffer from posttraumatic stress disorder and other mental health disorders such as anxiety or depression, and recent research showed that almost one-third of girls in detention had one or more psychiatric disorders. (Linda A. Teplin et al., The Northwestern Juvenile Project: Overview, OJJDP Juv. JUST. BULL., Feb. 2013, at 11, available at http://tinyurl.com/c83eef3.) Most of these girls had violated probation, and many had run away. Many were victims of sexual abuse. Despite developmental research that juvenile justice programming is best delivered in community-based settings that support girls' family and community relationships and keep their educations intact, states and localities continue to rely on secure confinement for the most vulnerable girls.

A trauma history is not only a background factor for girls in the juvenile justice system, but it can actually drive girls into the system. As a result of their trauma histories, girls in juvenile justice systems are typically known to the child protection, family services, or mental health system long before they even come into contact with the juvenile justice system. Girls in foster care are more likely to enter the detention system than nonfoster girls as a result of histories of multiple foster placements, child protective system policies that penalize girls for running away, and inadequate communication across the juvenile justice and child protection systems. Arrests for contempt violate a juvenile offender's right to a fair and impartial hearing, and may lead to a fragmented personal history and the trauma that stems from consistent disruption. Moreover, the practice of charging girls with minor delinquency when they viewed as too difficult to handle in the child protection system is longstanding. Given all of this, many girls in the delinquency system are essentially made by the child protection system.

As a result of the 1994 Violence Against Women Act's (VAWA) initial support of mandatory arrest policies and the 2005 reauthorization's support of pro-arrest policies, many states have mandatory or pro-arrest arrest laws or policies for domestic violence cases. These laws, which are designed to diffuse typical domestic violence situations by removing the batterer from the home, are having the unanticipated consequence of increasing arrests and detentions of family for family violence. This was the case in Nevada, for example, where counties examining detention data found that while girls constituted around 20 percent of the overall detention population, they were approximately 40 percent of youth detained for domestic battery. The recognition that mandatory detention laws disproportionately affected girls resulted in changes in the Nevada law in 2007 removing mandatory detention for juveniles and encouraged counties to provide family services to keep girls at home.

For girls, fighting within their homes can be a way of gaining some control in their households and may be a reaction to family chaos or physical and sexual abuse.
Prior victimization in the home is common among girls who behave violently. The arrest, detention, and juvenile justice processing of a disproportionate number of girls for home-based violence is a systemic problem that requires a systemic solution. A developmentally informed approach calls for statutes redefining domestic battery and assault to exclude cases of intrafamily violence involving minors, eliminating mandatory arrest and detention provisions for domestic battery in favor of requiring treatment or voluntary surrender, and presuming that these situations be handled first through the family services system before a youth is charged. On the program side, processing of a disproportionate number of girls between juvenile justice systems and domestic violence services and networks, including trauma-informed approaches and empowerment models of client counseling, as well as better triage of juvenile justice cases to identify and divert those that are centrally cases of family chaos out of the delinquency system and into family services. Both approaches would restrict criminal justice responses and encourage developmentally appropriate responses to home-based trauma, rather than to revictimizing girls.

Commercial Sexual Exploitation There are no definitive data on the number of girls who are commercially sexually exploited each year in the United States. The study of the issue cited most often draws on data of homemade and runaway youth and estimated that approximately 300,000 young people each year are “at risk” for sexual exploitation. In 2009, girls made up 78 percent of arrests for prostitution and commercialized vice nationally, a total of 1,092 arrests. In the past five years there has been significant movement among states to pass comprehensive safe harbor laws. Although the details of these laws vary, they typically: (1) prevent child victims from being prosecuted for prostitution; (2) ensure that coerced minors are not prosecuted as pimps; (3) create a separate status offense petition as a “sexually exploited” child; and (4) require law authorities to make a good faith effort to determine the age of the youth involved. The TVPA notes, for example, that there is no evidence that it works, and a great deal of evidence that it results in increased trafficking of individuals who are not commercially sexually exploited. There are no definitive data on the number of girls who are commercially sexually exploited each year in the United States. There are no definitive data on the number of girls who are commercially sexually exploited each year in the United States. States to pass comprehensive safe harbor laws. Although the details of these laws vary, they typically: (1) prevent child victims from being prosecuted for prostitution; (2) ensure that coerced minors are not prosecuted as pimps; (3) create a separate status offense petition as a “sexually exploited” child; and (4) require law authorities to make a good faith effort to determine the age of the youth involved. Moreover, the Massachusetts law does not reflect the reality that children who are commercially sexually exploited are particularly vulnerable to residual of commercial sexual exploitation. There are no definitive data on the number of girls who are commercially sexually exploited each year in the United States. States to pass comprehensive safe harbor laws. Although the details of these laws vary, they typically: (1) prevent child victims from being prosecuted for prostitution; (2) ensure that coerced minors are not prosecuted as pimps; (3) create a separate status offense petition as a “sexually exploited” child; and (4) require law authorities to make a good faith effort to determine the age of the youth involved. Moreover, the Massachusetts law does not reflect the reality that children who are commercially sexually exploited are particularly vulnerable to residual of commercial sexual exploitation. However, the number of youth arrested with related charges, even if those charges were initially stayed. The stay continues in effect as long as the girl or young woman “substantially comply” with services in the child and family services system. The law creates a presumption that a status or child protection petition will be filed when a youth is charged with a prostitution-related crime, and creates a multidisciplinary team to develop a plan of services. If the survivor points out, it sends a decidedly mixed message to hold criminals accountable and treat a victim’s head while telling her you view her as exploited.

Commercial sexual exploitation is that, with few exceptions, state criminal laws allow minors to be charged with prostitution-related offenses even though they are too young to consent to sex under statutory rape laws. In New York, In re Nico­ rine (N.Y. 1965), the court decided that the 18-year-old age of consent should drive policy. But discretion makes room for bias, both in the form of mistaken developmental understanding at the state and local level, and sometimes challenging to tease apart underlying prejudice. How to address the problem of prostituted girls in the US, which has been a prominent international issue since the First World War and the Commercial Sexual Exploitation of Children, is now a focus of federal and state legislative, law enforcement, and programmatic attention. Perhaps more than any other group of girls in the justice system, the commercial sexual exploitation of children (CSEC) risks causing overcriminalization and has the potential to sweep girls into the justice system and out of the community. It requires a law and policy that address the nuances of this complex social problem and that are firmly grounded in a full, contextual, and developmentally understanding of the girls involved.

Responses to CSEC straddle the child protection and criminal justice systems, and describe defenses for girls arrested for prostitution or related charges, even if those charges were initially stayed. The stay continues in effect as long as the girl or young woman “substantially comply” with services in the child and family services system. The law creates a presumption that a status or child protection petition will be filed when a youth is charged with a prostitution-related crime, and creates a multidisciplinary team to develop a plan of services. If the survivor points out, it sends a decidedly mixed message to hold criminals accountable and treat a victim’s head while telling her you view her as exploited.

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Passed a safe harbor law in 2007, and similar comprehen­ sive laws are on the books in Connecticut, Florida, Illinois, Massachusetts, Minnesota, New Jersey, Ohio, Vermont, Washington, and, home-based violence is a systemic problem that requires a systemic solution. A developmentally informed approach calls for statutes redefining domestic battery and assault to exclude cases of intrafamily violence involving minors, eliminating mandatory arrest and detention provisions for domestic battery in favor of requiring treatment or voluntary surrender, and presuming that these situations be handled first through the family services system before a youth is charged. On the program side, processing of a disproportionate number of girls between juvenile justice systems and domestic violence services and networks, including trauma-informed approaches and empower­ ment models of client counseling, as well as better triage of juvenile justice cases to identify and divert those that are centrally cases of family chaos out of the delinquency system and into family services. Both approaches would restrict criminal justice responses and encourage developmentally appropriate responses to home-based trauma, rather than to revictimizing girls.

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from policies that appear neutral but are biased in practice. Moreover, gender bias that drives girls into the juvenile justice system is usually not obvious in facially discriminatory policies or practices and may not be the result of intentional discrimination by juvenile justice systems. It is the result of the application of facially neutral laws and policies that, in practice, result in disparate rates for juvenile detention of girls who suffer cumulative disadvantage. Because gender discrimination in juvenile justice is found largely in the impact of policies and practices, legal challenges are particularly difficult, making the movement toward data-driven decisions and policies particularly important. However, unlike the use of data to measure and devise remedies for disproportionate minority contact, which has been the subject of considerable methodological attention, the use of data to measure gender disparities is not widespread or consistent.

The use of data to understand and address disparities in juvenile justice is more commonly examined all, but it still remained 41 percent higher than the 1992 level. The proportion of black girls in the juvenile justice system is part of a larger black and white disparity in which despite the rapid growth in the number of black girls in the juvenile justice system, the interaction of race and gender in juvenile justice is almost never considered. Few systems routinely disaggregate their data by race and cross-reference them by gender. More commonly, systems examine all girls and all boys and then all youth by race and ethnicity, and as a result, they miss the intersection of race and gender entirely. Even jurisdictions collecting data to address the gender bias initiative on behalf of girls in the system, we know little about what drives them into the system and how those drivers affect girls of different races and ethnicities. In this case, the data are available to many systems, but the intersection of race and gender is not understood and the research questions are not asked.

Using data to identify decision points in the juvenile justice system that contribute to the overrepresentation of black girls in detention as a factor in decisions, and making decisions more objective has been an attractive strategy for reform. A byproduct of this work is decision makers’ improved awareness of the many ways in which their decisions have a race impact.

In the future, data-driven systems should be used in ways that focus on reducing disparate treatment of black girls and other girls of color in the juvenile justice system.

Gender bias for girls in juvenile justice systems occurs in small and hidden ways every day. Well-meaning decision makers act to protect girls from misbehavior, and in doing so push girls further into the system through mechanisms such as aggressive enforcement of warrants and violations of probation. System policies allow, and in some cases reinforce, these decisions so that girls with minor offenses and technical violations are driven deeper into the system. This occurs routinely, making data analysis of cases over time essential for jurisdictions to see the patterns in their actions.

For girls, the trend toward systemic discretion has been particularly pronounced. Almost all girls stopped girls who are not readily cooperative and compliant.

Systemic discretion, with its opportunity for bias, has been a bit of color particularly hard, and black girls have been the swiftest growing group of girls referred to the juvenile courts and entering detention. In 1992, black girls were 29 percent of girls referred to the juvenile courts, and by 2010, referrals of black girls had increased 42 percent from their 1992 level, making up 34 percent of all girls’ referrals. The pattern was even more pronounced in detention. In 1992, black girls made up 36 percent of girls detained—a total of 15,567. By 2002, the number of black girls detained had almost doubled to 29,516. By 2010, the number of black girls detained in the juvenile justice system had nearly quadrupled from 1992, but it still remained 41 percent higher than the 1992 level. The proportion of black girls in the juvenile justice system is an accurate measure of the disproportionate minority confinement. The expansion of the definition of racial disparities from confinement to contact reflected the developing understanding, through data, that race bias occurs at each stage of the juvenile justice process—arrest, detention, adjudication, probation, disposition, and waiver to the adult system. Moreover, studies show that these discriminatory decisions reflect underlying prejudice among many decision makers. For example, qualitative studies of probation files found that, controlling for offense and offense histories, probation officers were more likely to attribute failures of white youth to some fault in their circumstances, while they were more likely to attribute failures of black youth to some fault of their own.

For girls, differential treatment has resulted in their arrest, charging, detention, probation, and even discrete decisions for status offenses, misdemeanors, and technical violations of probation and parole. Every day, girls are secured detained for offenses that would not result in detention for boys. This overuse of secure confinement has been attributed to (1) paternalism among decision makers who try to protect girls from harm; (2) an effort to use the justice system to obtain services for high-need girls; (3) an effort to protect girls from sexual victimization; (4) fear of teen pregnancy and its social costs; (5) fear of girls running away from home; (6) intoleration of girls who are not readily cooperative and compliant.

Conclusion

In 2012, after 20 years of the JDDP Act instructed states to improve their systems for gender responsiveness, girls continue to be detained and committed for offenses that would not result in similarly harsh treatment for boys. The social expectations that girls be obedient, modest, and behave cautiously motivate a continuation of structural gender bias as well as combined gender and race bias that has had remarkable longevity. Arrests for domestic battery and prostitution-related offenses now supplement the continued net of status offenses and technical probation and parole violations that draw girls into the juvenile justice system.

However, we are at the beginning of a more developmentally centered and data-driven age in juvenile justice in which systems have the tools to be more reflective and intentional in policy and practice. Over time, the juvenile justice pendulum swings from a rehabilitation focus to placing more emphasis on punishment, and then back again—progress has not been linear. Each pendulum swing looks a little different, reflecting advances in our knowledge and approach to youth. This has been true of policies for girls in the juvenile system as well. Although we appear to be repeating past mistakes by sweeping girls into the system when they are victims of domestic violence, the system itself is more aware of girls’ needs, the outcry is quicker and more informed, and practices are measured against a progressive movement away from secure confinement for youth. In this way, we are making progress, despite the understandable frustration of those who have watched the pendulum swing ever since we were asked for a more hopeful era in juvenile justice, consistent federal leadership to reduce structural gender bias is essential for girls to be a full part of this positive pendulum swing.