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Justice for Girls: Are We Making Progress?

Francine T. Sherman



ABSTRACT

Over the course of more than a century, structural gender bias has been a remarkably durable feature of U.S. juvenile justice systems. Consequently, as these systems have developed over the years, reducing gender bias and addressing girls in helpful, rather than harmful, ways has required specific and concerted efforts on the part of federal and state governments. Currently, there are a number of positive trends in juvenile justice, including policy and practice that is increasingly developmentally centered and data driven. The question for those focused on girls in the juvenile justice system is how to ensure that girls are the beneficiaries of these positive trends.

This Article discusses the history of federal leadership on girls' issues and then considers the impact on girls of current trends toward developmentally centered and data-driven juvenile justice. It considers the application of developmentally centered policy in relation to girls who experience family violence and those who are commercially sexually exploited. The Article then examines the movement toward data-driven decisionmaking for its potential to reduce embedded gender bias and particularly bias at the intersection of race and gender. It examines the impact on girls of the increasing use of assessment instruments and the consequences of greater reliance on evidence-based practice as further illustrations of the new data-driven approaches. Throughout, the Article discusses the implications of these trends for girls and suggests ways that systems can ensure that girls' issues are considered and addressed.

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INTRODUCTION

Social expectations that girls behave obediently, modestly, and cautiously have been remarkably durable over more than one hundred years of juvenile justice in the United States, and throughout that time these expectations have masked structural gender discrimination. At the turn of the twentieth century, these expectations were behind the proliferation of training schools for immigrant girls who were perceived to be immoral and in need of guidance that would enable them to marry and to become responsible mothers.¹ In the mid- and late twentieth century, these expectations supported detention and incarceration of girls for status offenses, for technical probation violations, and particularly for running away.² 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.³

The structural discrimination that supports detaining and incarcerating girls for violating these norms is both hard to see and hard to challenge.⁴ It is often hidden behind outward goodwill toward girls and legitimate expressions of concern for their vulnerability and possible victimization. This concern is consistent with the social welfare mission of the juvenile court and the many opportunities for multifaceted, “best interests”-based discretionary decisions built into the juvenile justice and child welfare systems.⁵ However, a closer look suggests that what professes to be social welfare is often social control of teenage girls who frustrate child welfare and juvenile justice systems with their chronic disobedience of home, court, and agency rules.⁶ Studies show that girls are more likely than boys to be held in contempt for violating court-imposed rules⁷ and that probation officers

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1. See *infra* notes 24–28 and accompanying text.
 2. See *infra* notes 29–40 and accompanying text.
 3. See *infra* notes 119–171 and accompanying text.
 4. See *infra* notes 174–188 and accompanying text.
 5. See Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 848–49 (1988); Perry L. Moricarty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 307–08 (2008); see also 43 C.J.S. *Infants* § 82 (2012).
 6. See Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception That Swallowed the Rule*, 7 SEATTLE J. FOR SOC. JUST. 555, 558 (2009); Meda Chesney-Lind, Reaction Essay, *Criminalizing Victimization: The Unintended Consequences of Pro-arrest Policies for Girls and Women*, 2 CRIMINOLOGY & PUB. POL'Y 81, 84 (2002).
 7. See Donna M. Bishop & Charles E. Frazier, *Gender Bias in Juvenile Justice Processing: Implications of the JJDP Act*, 82 J. CRIM. L. & CRIMINOLOGY 1162, 1180 &n.40 (1992).

view girls as needy and difficult.⁸ Illustrating this attitude, probation officers in the first all-female probation unit had to be enticed to work girls' cases by offers to trade ten boys' cases for one girl's case.⁹ And when girls in the justice system are not seen as needy, they are seen as increasingly aggressive—acting more like bad boys.¹⁰

In the 1992 amendments¹¹ to the Juvenile Justice and Delinquency Prevention (JJDP) Act,¹² the U.S. Congress instructed states to analyze their systems' provision of "gender-specific services" to female offenders and plan the delivery of gender-specific treatment and prevention services.¹³ At that time, just over 300,000 girls were referred to juvenile courts on delinquency charges, making girls 20 percent of the total delinquency court population. By 2008, the number of girls referred to juvenile court had increased by 48 percent to 450,000—almost 30 percent of total delinquency court referrals.¹⁴

Unlike the restriction on disproportionate minority contact (DMC), which addresses racial disparities at all stages of the juvenile justice process, the provision of gender-responsive services has never been a core requirement of the JJDP Act upon which federal funding is contingent¹⁵ and has never been fully described. Partially for these reasons, analysis of gender's role in juvenile justice systems and

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8. See Emily Gaarder, Nancy Rodriguez & Marjorie S. Zatz, *Criers, Liars, and Manipulators: Probation Officers' Views of Girls*, 21 JUST. Q. 547, 556–58 (2004).
 9. Marian D. Daniel, *The Female Intervention Team*, JUV. JUST., Oct. 1999, at 14, 14, available at <https://www.ncjrs.gov/html/ojjdp/jjjournal1099/fem1.html>.
 10. See, e.g., DEBORAH PROTHROW-STITH & HOWARD R. SPIVAK, SUGAR AND SPICE AND NO LONGER NICE: HOW WE CAN STOP GIRLS' VIOLENCE 4 (2005) ("Girls are fighting like boys—not as much (yet) but with similar willingness to use physical violence.").
 11. Act of Nov. 4, 1992, Pub. L. No. 102-586, 106 Stat. 4982.
 12. Juvenile Justice and Delinquency Prevention (JJDP) Act of 1974, 42 U.S.C. §§ 5601–5784 (2006).
 13. See *id.* § 5633(a)(7)(B). See generally Joseph R. Biden, Jr., *What About the Girls? The Role of the Federal Government in Addressing the Rise in Female Juvenile Offenders*, 14 STAN. L. & POL'Y REV. 29 (2003).
 14. See FRANCINE T. SHERMAN, RICHARD A. MENDEL & ANGELA IRVINE, MAKING DETENTION REFORM WORK FOR GIRLS: JDAI PRACTICE GUIDE #5 (forthcoming 2012) (manuscript at 3–4) (citing M. Sickmund et al., *Easy Access to Juvenile Court Statistics: 1985–2009*, OFF. JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.gov/ojstatbb/ezajcs/asp/selection.asp> (last visited July 9, 2012)). From 1992 to 2002, while girls' referrals were steadily rising, the number of boys referred to juvenile courts remained fairly constant. Sickmund et al., *supra*. Between 2002 and 2008, the number of boys referred to juvenile courts declined 8 percent while the number of girls referred increased slightly. *Id.* Girls' arrests show a similar pattern. In 1992, girls made up 23 percent of all juvenile arrests, see Howard N. Snyder, *Fact Sheet: 1992 Juvenile Arrests—FBI Uniform Crime Reports Data*, NAT'L CRIM. JUST. REFERENCE CENTER (May 1994), <https://www.ncjrs.gov/txtfiles/fs-9413.txt>, and by 2002, this number had risen to 29 percent. See HOWARD N. SNYDER, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE ARRESTS 2002, at 8 (2004), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/204608.pdf>. It continued to rise, and girls made up close to 30 percent of juvenile arrests in 2008. Sickmund et al., *supra*.
 15. See 42 U.S.C. § 5633(a)(7)(B) (stating that there only need be a "plan" for the provision of gender-specific services).

federal leadership on the issue of gender have been inconsistent.¹⁶ 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 until they have addressed issues facing other populations or until public pressure requires them to focus on girls. And while jurisdictions must analyze race disparities, few make the intersection of race and gender a part of that analysis.¹⁷ Because of a lack of full and practical understanding of the mechanisms 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 result from the unconscious and unnecessary repetition of past mistakes.

Notwithstanding this critical view of the juvenile justice system's treatment of girls, recently there have been signs that the direction of juvenile justice in the United States may be changing for the better. Overall the number of youth, including girls, entering the juvenile justice system is declining,¹⁸ and many observers agree that we may be entering an era of more developmentally centered and data-driven juvenile justice policies¹⁹ that rely less on incarcerating youth and more on building community and family support for youth to thrive.²⁰ Positive juvenile justice developments cited by commentators are wide ranging and include identification of violence prevention programs that work; research on the brain development of teenagers and the developmental differences between youth and adults; research on competence and culpability that has changed thinking about adolescent judgment and decisionmaking; 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;²¹ reduced secure incarceration of youth; and reduced racial and ethnic disparities through the use of focused data analysis.²²

16. See *infra* notes 32–53 and accompanying text.

17. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing the intersection of race and gender discrimination in criminal justice policies); Jody Miller, *An Examination of Disposition Decision-Making for Delinquent Girls*, in RACE, GENDER, AND CLASS IN CRIMINOLOGY: THE INTERSECTIONS 219 (Martin D. Schwartz & Dragan Milovanovic eds., 1999); Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012); Kim Taylor-Thompson, *Girl Talk—Examining Racial and Gender Lines in Juvenile Justice*, 6 NEV. L.J. 1137 (2006).

18. See Sickmund et al., *supra* note 14.

19. See, e.g., Mark Soler, Dana Shoenberg & Marc Schindler, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL'Y 483, 537 (2009) (arguing that “policy makers now have abundant evidence of effective approaches” for developmentally appropriate programs and services).

20. See, e.g., *id.* at 488–92.

21. For details on the legal theories and requirements regarding conditions of confinement for institutionalized youth, see MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT ch. 2 (2012).

22. See Soler, Shoenberg & Schindler, *supra* note 19, at 488–92.

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 twenty-year-old federal directive to jurisdictions to assess gender responsiveness, one could reasonably insist that they will be.

This Article aims to help juvenile justice systems and advocates for girls ensure that, as the juvenile justice landscape changes, we do not default to well-known patterns of unconscious discrimination. This requires that policymakers and system administrators and staff intentionally and critically examine their practices for gender impact and understand the ways in which their decisions reinforce structural gender bias. It also requires a fuller understanding of how gender and race discrimination intersect in youth policy to drive teenage girls of color into the justice system.²³ Part I examines the history of girls in the juvenile justice system and assesses federal attempts to move toward more equitable practices and effective programs for girls. Part II looks at the increased role of child development in juvenile justice, and specifically at the impact of trauma on girls' behaviors and the effect of standard juvenile justice practices on girls. Finally, Part III examines several aspects of the movement toward data-driven decisionmaking in juvenile justice, including data's potential to reduce embedded gender bias, particularly at the intersection of race and gender, the impact of the increasing use of assessment instruments on girls, and the consequences of greater reliance on evidence-based practice. Throughout the Article, I discuss implications of these trends for girls and suggest ways in which systems can ensure that girls' issues are considered and addressed.

I. A HISTORY OF GIRLS AND JUVENILE JUSTICE

The use of the juvenile justice system to protect wayward girls began with the first articulation of the principle of *parens patriae* by a U.S. court in *Ex parte Crouse*.²⁴ Mary Ann Crouse was committed by a justice of the peace to the House of Refuge for being an "incorrigible or vicious" "female[] under the age of eighteen years."²⁵ Her father sued for her release, arguing that without a jury her detention was punitive and unconstitutional. The court held that her detention was not punitive

23. See *supra* note 17.

24. 4 Whart. 9, 11 (Pa. 1839).

25. *Id.* at 10.

but was justified under the state's *parens patriae* power: "May not the natural parents when unequal to the task of education, or unworthy of it be superceded by *parens patriae*, or common guardian of the community?"²⁶ The state used its *parens patriae* authority, presented as the state's power to stand in for an unfit parent, to control the behavior of a difficult girl by placing her in secure detention.

This was typical of girls' treatment in the early years of juvenile justice in the United States, and much of juvenile justice decisionmaking today is consistent with this history. Accounts of girls' treatment in the late 1800s and early 1900s show that the juvenile justice system frequently intervened to save wayward girls from perceived futures in prostitution or criminality²⁷ and redirect them toward marriage, motherhood, and home life. Girls in need of intervention were seen as both sexually vulnerable and sexually precocious; the system's role was to instill in them appropriate morality.²⁸

Juvenile court jurisdiction was quickly broadened beyond the violation of criminal laws to include status offenses, such as incorrigibility, running away, truancy, and, in some states, waywardness (or immorality).²⁹ Reflecting the notion that girls were more vulnerable and in need of protection than boys (or perhaps that girls were more innocent in character and less blameworthy), some of the early status offender laws granted longer jurisdiction over girls than over boys. For example, New York's Persons in Need of Services (PINS) law provided jurisdiction over girls until age eighteen and over boys until age sixteen.³⁰ Although state courts struck down much of this gender inequality in the language of status offense laws in

26. *Id.*

27. See BARBARA M. BRENZEL, DAUGHTERS OF THE STATE: A SOCIAL PORTRAIT OF THE FIRST REFORM SCHOOL FOR GIRLS IN NORTH AMERICA, 1856–1905, at 38–41 (1983); ANNE MEIS KNUPFER, REFORM AND RESISTANCE: GENDER, DELINQUENCY, AND AMERICA'S FIRST JUVENILE COURT 79–98 (2001); Lisa Pasko, *Damaged Daughters: The History of Girls' Sexuality and the Juvenile Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1099, 1101–05 (2010).

28. See Pasko, *supra* note 27, at 1101. The focus and double standard with respect to girls' sexuality is still present in juvenile justice. One example is the inconsistent treatment of girls who have been commercially sexually exploited. See *infra* Part II.C.

29. See BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 132–34 (3d ed. 2009). Modern status offenses include underage drinking, curfew laws, and others that define crimes only for minors. These laws stand alone and are typically not components of comprehensive status offender schemes such as the New York Persons in Need of Services (PINS) law, 1962 N.Y. Laws 3106–07 (codified as amended at N.Y. FAM. CT. ACT § 711–718 (McKinney 2010)), and the Massachusetts Child in Need of Services (CHINS) law, MASS. GEN. LAWS ANN. ch. 119, § 39E–J (LexisNexis 2009 & Supp. 2012).

30. 1962 N.Y. Laws 3106–07.

the 1970s,³¹ today we continue to see gender bias in the enforcement of status offense laws.

The federal Deinstitutionalization of Status Offender (DSO) mandate included in the JJDP Act of 1974³² targets the problem of the incarceration of girls in the name of protection. The DSO mandate prohibits states from confining status offenders in locked facilities such as those used for delinquent youth.³³ The hearings that led up to the Act's passage reflected the concern that states had criminalized "social and adjustment problems" by confining these youth, many of them girls, alongside juveniles who had committed serious crimes.³⁴ But states struggled to comply with the DSO mandate. A 1977 General Accounting Office (GAO) report documented states' general failure to remove status offenders from secure facilities, noting that "[t]he situation is worse for girls than for boys."³⁵ At that time, 70 percent of all girls in juvenile detention and correctional facilities were status offenders as compared to 20 percent of boys.³⁶ The GAO reported that states' failures to comply were the result of (1) state laws and practices that conflicted with the DSO mandate; (2) inadequate alternative services to deal with status offenders outside of detention; and (3) inadequate monitoring systems to determine compliance, including inadequate data collection by states.³⁷

In 1980, Congress responded to state pressure and passed an exception to the DSO mandate, which allowed secure confinement of status offenders for violating a valid court order (VCO).³⁸ This exception is still in effect but has been the subject of ongoing discussion. States continued to detain status-offending girls by bootstrapping delinquency onto status offenses. This occurs either by finding girls in violation of probation conditions imposed for their status offenses or by charging a status offender with a minor crime in order to relabel her conduct as delinquent. Senate Bill 678, which passed the Senate Judiciary Committee in 2009 but has

31. See, e.g., *Patricia A. v. City of New York*, 286 N.E.2d 432, 435 (N.Y. 1972). Though it was found unconstitutional in 1972, the law was not officially amended until 2000. 2000 N.Y. Laws 3418.

32. 42 U.S.C. § 5633(a)(12)(A) (2006).

33. *Id.*

34. 120 CONG. REC. 25,156 (1974).

35. *Deinstitutionalization of Status Offenders: Hearing Before the Subcomm. on Juvenile Delinquency of the S. Comm. on the Judiciary*, 95th Cong. 2 (1977) (statement of William J. Anderson, Deputy Dir., Gen. Gov't Div.).

36. *Id.*

37. COMPTROLLER GEN. OF THE U.S., GGD-78-37, REMOVING STATUS OFFENDERS FROM SECURE FACILITIES: FEDERAL LEADERSHIP AND GUIDANCE ARE NEEDED (1978).

38. JJDP Act, 42 U.S.C. § 5633(a)(11)(A)(ii); Robert (Bobby) Scott, *Afterword of JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE* 527, 528 (Francine T. Sherman & Francine H. Jacobs eds., 2011).

not become law, would have repealed the VCO exception.³⁹ Supporters of repeal argued that the ability to detain status offenders allows states to avoid developing interventions to assist chaotic families and youth who are struggling in their homes and schools.⁴⁰

In the early 1990s, federal emphasis shifted from attempting to address bias against girls in the juvenile justice and status offender systems, to encouraging programming designed and delivered to meet girls' needs.⁴¹ The 1992 reauthorization of the JJDP Act required states to analyze their juvenile justice systems' provision of "gender-specific services" to female offenders and plan the delivery of gender-specific treatment and prevention services.⁴² This focus on gender-specific programming (later renamed "gender-responsive" programming) was supported by the availability of Challenge E funds, to aid jurisdictions in providing these programs to girls in their delinquency systems.⁴³ The widespread use of Challenge E funds by states demonstrated significant local interest in as well as concern over girls not being well served by existing juvenile justice programming.⁴⁴

Federal efforts have continued to encourage states to provide effective gender-responsive programming for girls. However, the Girls Study Group, established by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in 2004 and the National Girls Initiative, established in 2010, have also returned the focus to ways in which the juvenile justice process is biased against or harmful to girls. In 2009, the Girls Study Group disseminated important descriptive data about girls in the system and addressed the troubling mistaken impression that girls were becoming more violent.⁴⁵ That analysis found that rather than signifying an overall increase in girls' aggression, the increase in arrests of girls for assaults was in large

39. Juvenile Justice and Delinquency Prevention Reauthorization Act of 2009, S. 678, 111th Cong. (2009).

40. *Meeting the Challenges Faced by Girls in the Juvenile Justice System: Hearing Before the Subcomm. on Healthy Families and Communities of the H. Comm. on Educ. and Labor*, 111th Cong. 24–25 (2010) (statement of Judge Brian Huff). See generally Arthur & Waugh, *supra* note 6, at 558.

41. See Act of Nov. 4, 1992, Pub. L. No. 102-586, 106 Stat. 4982 (amending the JJDP Act, 42 U.S.C. §§ 5601–5784 (2006)). The JJDP Act reauthorization of 1992 requires the GAO to study gender bias in state justice systems' handling of status offenders. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-95-56, JUVENILE JUSTICE: MINIMAL GENDER BIAS OCCURRED IN PROCESSING NONCRIMINAL JUVENILES 1 (1995).

42. 42 U.S.C. § 5633(a)(7)(B).

43. See Biden, *supra* note 13, at 41–42; Meda Chesney-Lind & Katherine Irwin, *Still the "Best Place to Conquer Girls": Girls and the Juvenile Justice System*, in *WOMEN, LAW, AND SOCIAL CONTROL* 271, 286–88 (Alida V. Merlo & Joycelyn M. Pollock eds., 2d ed. 2006).

44. Chesney-Lind & Irwin, *supra* note 43, at 286–88.

45. See THE DELINQUENT GIRL (Margaret A. Zahn ed., 2009) (compiling research performed by members of the Girls Study Group); MARGARET A. ZAHN ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, VIOLENCE BY TEENAGE GIRLS: TRENDS AND CONTEXT (2008).

part the result of changed laws and law enforcement practices around domestic violence. These changes had a particular impact on girls because much of their assaultive behavior occurs in the home and among family members, such as fighting between girls and their mothers or among siblings.⁴⁶ A decade ago, these cases would have resulted in referrals to family services, but today these girls are arrested, charged with assault, and often detained.⁴⁷ Charging girls for behavior arising from family chaos sweeps girls with trauma histories and chaotic families into secure juvenile justice confinement.⁴⁸ However, unlike with a traditional status offense, these girls potentially face the collateral consequences that accompany delinquency findings.⁴⁹

The Girls Study Group also continued federal efforts to promote gender-responsive programming. One of the ongoing problems in the field, however, has been confusion about what gender-responsive programming means in practice. “Painting it Pink is Not Enough” is a catch phrase for those promoting gender-responsive approaches but provides little in terms of content for juvenile justice and community programs to follow. Gender-responsive approaches consider the particular situations, developmental characteristics, and life circumstances of girls in the justice system, including their experiences as females in the justice system itself. Gender-responsive approaches also consider the trauma backgrounds common among girls in the justice system 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.⁵⁰ Although there are a number of formulations of gender-responsive

46. See *infra* Part II.B.

47. ZAHN ET AL., *supra* note 45, at 6–7.

48. See SHERMAN, MENDEL & IRVINE, *supra* note 14 (reviewing detention system data and describing an approach to data analysis to help systems understand why girls are detained and how to reduce their detention); see also Jamie Edwards, *A Lesson in Unintended Consequences: How Juvenile Justice and Domestic Violence Reforms Harm Girls in Violent Family Situations (And How to Help Them)*, 13 U. PA. J.L. & SOC. CHANGE 219 (2009).

49. See, e.g., TEX. PENAL CODE ANN. § 12.42(f) (West 2011) (stating that a juvenile adjudication for a felony offense that results in commitment to the Texas Youth Commission is deemed a “final felony conviction” for purposes of future enhanced sentencing); *In re Justin V.*, 797 N.W.2d 755, 765–66 (Neb. Ct. App. 2011) (finding that the collateral consequences exception to the mootness doctrine was applicable because the juvenile would be subject to various collateral consequences as result of his juvenile record); 32 C.F.R. § 96.6 (2011) (authorizing the military to consider an applicant’s juvenile record); Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 570, 577–79 (2004) (finding that some housing authorities investigate the criminal histories of juveniles to determine housing eligibility of their families); Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1114–15 (2006).

50. See Francine T. Sherman & Jessica H. Greenstone, *The Role of Gender In Youth Systems: Grace’s Story*, in JUVENILE JUSTICE, *supra* note 38, at 131, 137–39; see also *What Does Gender-Specific Programming Look Like in Practice?*, in OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, GUIDING PRINCIPLES FOR PROMISING FEMALE PROGRAMMING: AN INVENTORY OF BEST

elements, there is consensus across the literature that to be gender responsive, a program or system should (1) provide a safe space, both physically and psychologically; (2) promote relationships; and (3) share power with girls and across the multiple systems that work with girls.⁵¹

The study group also worked to improve the science around risk and needs assessment and program evaluation for girls. Critics argued that efforts by the Girls Study Group to promote evidence-based practices in girls programs raised the bar too high for those programs that were unable to mount the evaluations necessary to classify as an evidence-based practice, and that the study group missed local innovation and success among smaller, community-based organizations.⁵² The implicit critique was that, as a result, OJJDP, through the Girls Study Group, was not providing essential, practical evaluation support to the field. Beginning in 2010, the National Girls Initiative, as the successor to the Girls Study Group, is making an effort to respond to the needs of the field by blending science with knowledge developed in practice as they implement their agenda.⁵³

The desire to control girls' misbehavior that animated the early history of girls in the juvenile justice system remains today. Through strict enforcement of technical probation and parole violations (violations of the conditions of probation and parole, rather than new crimes), liberal use of warrants, and increased charging of misdemeanor and home-based offenses,⁵⁴ girls with significant experiences of trauma who pose little threat to public safety continue to populate secure detention and postadjudication facilities. Meanwhile, states continue to struggle as female status offenders escalate through a system that is not designed to encourage their development into productive adulthood. Girls charged with assaults and domestic battery arising from family violence are, in effect, the new status offender, whose chaotic

PRACTICES (1998), *available at* http://www.ojjdp.gov/pubs/principles/ch2_6.html; Barbara E. Bloom & Stephanie S. Covington, Gender-Specific Programming for Female Offenders: What Is It and Why Is It Important? (Nov. 1998) (unpublished manuscript), *available at* <http://www.stephaniecovington.com/pdfs/13.pdf>; Barbara E. Bloom & Stephanie S. Covington, Effective Gender-Responsive Interventions in Juvenile Justice: Addressing the Lives of Delinquent Girls (Nov. 2001) (unpublished manuscript), *available at* <http://centerforgenderandjustice.org/pdf/7.pdf>.

51. Sherman & Greenstone, *supra* note 50, at 137–39.

52. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-721R, JUVENILE JUSTICE: TECHNICAL ASSISTANCE AND BETTER DEFINED EVALUATION PLANS WILL HELP TO IMPROVE GIRLS' DELINQUENCY PROGRAMS (2009), *available at* <http://www.gao.gov/assets/100/96317.pdf>; *see also infra* notes 241–245 and accompanying text.

53. Telephone Interview With Lawanda Revoira, Director, NCCD Ctr. on Women and Girls (Feb. 7, 2012).

54. *See infra* notes 108–114 and accompanying text.

family situations and human services needs form the backdrop for entry into the juvenile justice system.

There has been significantly heightened awareness since 1992 that girls are a subpopulation within juvenile justice requiring specific research, policies, and programs. However, federal leadership has been inconsistent and issue-specific; it has focused, for example, on status offenders or commercial sexual exploitation, allowing the larger systemic and societal issues to remain despite a significant increase in research and understanding of girls' needs and the sorts of interventions that are likely to be successful.

II. CHILD DEVELOPMENT AND JUVENILE JUSTICE POLICY

Throughout much of its history, juvenile justice has been remarkably disconnected from the theory and research on child development. But in 2005, the U.S. Supreme Court shifted the direction of juvenile justice by making a critical link between jurisprudence and developmental research. In *Roper v. Simmons*,⁵⁵ which concerned the application of the death penalty to defendants under the age of eighteen, the Court found that juveniles are developmentally different from adults in significant ways and that these developmental differences, "as any parent knows and as the scientific and sociological studies . . . confirm," prevent juveniles from being classified as the most culpable criminals.⁵⁶ Reasoning that juveniles (1) lack maturity and have an underdeveloped sense of responsibility; (2) are more vulnerable to outside pressure; and (3) have characters and personalities that are not fully formed,⁵⁷ the Court found that juveniles could never be as culpable as adults. Based in part on these developmental findings, the Supreme Court held the death penalty unconstitutional for any individual under the age of eighteen.⁵⁸

In 2010, the Supreme Court reiterated *Roper's* developmental findings in *Graham v. Florida*,⁵⁹ saying that in the intervening years the developmental research had only been strengthened.⁶⁰ The Court went on to say that in addition to these developmental differences, there was evidence that juveniles' brains develop

55. 543 U.S. 551 (2005).

56. *Id.* at 569.

57. *Id.* at 569–70.

58. *Id.* at 570–71, 578–79.

59. 130 S. Ct. 2011 (2010).

60. *Id.* at 2026.

throughout adolescence, which influences their decisionmaking.⁶¹ The Court then extended what (until then) had been analysis applied only to death penalty jurisprudence⁶² to find sentences of life without the possibility of parole unconstitutional when imposed on juveniles for nonhomicide offenses.⁶³ Rather than taking a narrow approach, the Court held that the combination of a nonhomicide offense, a sentence of life without the possibility of parole, and minority status categorically violated the Eighth Amendment's prohibition against cruel and unusual punishment.⁶⁴

In the years following *Graham*, lower courts explored the reach of its holding, considering whether juvenile life without parole is constitutional under federal and state constitutions for felony murder,⁶⁵ accomplice cases,⁶⁶ and homicide cases for young juveniles.⁶⁷ Most recently, in *Miller v. Alabama* and *Jackson v. Hobbs*,⁶⁸ the Supreme Court further extended *Roper* and *Graham*. In *Miller* and *Jackson* the Court held unconstitutional mandatory sentences of life without parole in juvenile homicide cases.⁶⁹ While the Court did not find sentences of life without parole categorically unconstitutional for juveniles, it held that a life without parole sentence can only be imposed after the sentencer takes into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."⁷⁰

Developmental notions are making their way into areas other than juvenile sentencing as well. In state and federal courts, there is an increasing focus on

61. *Id.*

62. *Id.* at 2022–23, 2030.

63. *Id.* at 2034.

64. *Id.* at 2030–34; see also Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 8–10 (2011).

65. See, e.g., *United States v. Williams*, 636 F.3d 1229 (9th Cir. 2011); *Jones v. McQuiggin*, No. 2:11-cv-188, 2011 WL 2745827 (W.D. Mich. July 12, 2011); *People v. Perez*, No. G042811, 2011 WL 521319 (Cal. Ct. App. Feb. 15, 2011); *People v. Chappell*, No. B214616, 2011 WL 105652 (Cal. Ct. App. Jan. 13, 2011); *People v. Hernandez*, No. B218507, 2010 WL 2598265 (Cal. Ct. App. June 30, 2010); *State v. Uzzelle*, No. COA10-600, 2011 WL 705152 (N.C. Ct. App. Mar. 1, 2011).

66. See, e.g., *Delatorre v. Haws*, No. 2:09-cv-1974-TJB, 2011 WL 2471027 (E.D. Cal. June 20, 2011); *Cox v. State*, No. CR 00-345, 2011 WL 737307 (Ark. Mar. 3, 2011); *Hernandez*, 2010 WL 2598265; *People v. Donald*, No. A121820, 2010 WL 2594940 (Cal. Ct. App. June 29, 2010).

67. See, e.g., *Miller v. State*, 63 So. 3d 676 (Ala. Crim. App. 2010) (holding that a sentence of life without the possibility of parole was unconstitutional when imposed on a fourteen-year-old boy convicted of murder).

68. *Miller v. Alabama*, No. 10-9646 (U.S. June 25, 2012). The *Miller v. Alabama* opinion decides both that case and *Jackson v. Hobbs*. *Id.*, slip op. at 1 n.*.

69. *Id.*, slip op. at 27.

70. *Id.*, slip op. at 17.

juvenile competency to stand trial,⁷¹ waive counsel,⁷² and confess when interrogated.⁷³ In 2011, in *J.D.B. v. North Carolina*,⁷⁴ the Supreme Court took the developmental findings articulated in *Roper* and *Graham* as a given and held that age, as long as it is known or should be known to police, must be considered as an objective factor in determining whether a juvenile is in custody and therefore whether the police are required to provide *Miranda* warnings.⁷⁵ In reiterating *Roper's* and *Graham's* developmental findings the Court noted that history is “replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults.”⁷⁶

In the last twenty years, juvenile justice systems have also incorporated consideration of child development more frankly into their policies and practices.⁷⁷ Juvenile justice systems are using principles of restorative justice⁷⁸ and more recently, positive youth development⁷⁹ to frame probation services, dispositions, and the structure of juvenile commitment after adjudication. Innovations like TeamChild, a Seattle-based nonprofit organization,⁸⁰ recognize that youth in the justice system, like all youth, are more likely to succeed when they are well educated and so provide representation to delinquency-involved youth on matters related to education, healthcare, and housing in partnership with their delinquency defense.⁸¹ Similarly,

71. See, e.g., *Tyrone B. v. Superior Court*, 78 Cal. Rptr. 3d 569, 570–71 (Ct. App. 2008); *State v. M.C.*, 60 So. 3d 1264, 1265 (La. Ct. App. 2011) (holding that a juvenile was not competent to stand trial after ordering a competency hearing); *In re T.S.*, 798 N.W.2d 649, 654–55 (N.D. 2011).

72. See, e.g., *A.S. v. State*, 62 So. 3d 695, 697 (Fla. Dist. Ct. App. 2011) (holding that the trial court committed “fundamental error” when it failed to inquire thoroughly as to whether the juvenile understood and had the capacity to intelligently choose to waive counsel and to obtain the required verified written waiver); *L.D.S.J. v. State*, 14 So. 3d 289, 291 (Fla. Dist. Ct. App. 2009) (holding that “the trial court had an obligation to ensure [that a juvenile defendant] intelligently and voluntarily waived his right to counsel”); *In re C.S.*, 874 N.E.2d 1177, 1194 (Ohio 2007).

73. See, e.g., *In re A.S.*, 999 A.2d 1136, 1138 (N.J. 2010).

74. 131 S. Ct. 2394 (2011).

75. *Id.* at 2408. *J.D.B.* was thirteen years old. *Id.* at 2399.

76. *Id.* at 2404 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)).

77. Cf. JEFFREY BUTTS, SUSAN MAYER & GRETCHEN RUTH, CHAPIN HALL CTR. FOR CHILDREN, ISSUE BRIEF #105: FOCUSING JUVENILE JUSTICE ON POSITIVE YOUTH DEVELOPMENT 4 (2005); Richard M. Lerner et al., *A Vision for the American Juvenile Justice System: The Positive Youth Development Perspective*, in *JUVENILE JUSTICE*, *supra* note 38, at 92.

78. See Marlyce Nuzum, *Summaries of State Restorative Justice Legislation*, STOPVIOLENCE, <http://www.stopviolence.com/restorative/rjleg-detail.htm> (last visited July 9, 2012).

79. See *supra* note 77.

80. See TEAMCHILD, <http://teamchild.org> (last visited July 9, 2012).

81. TeamChild focuses on changing the way the juvenile system operates by addressing the often-unaddressed underlying causes of juvenile delinquency. The organization provides civil legal aid, such as education advocacy, to youth involved in the juvenile justice system. It serves youth ages twelve to eighteen who are experiencing school failure and exclusion, conflict in the home, mental illness, substance abuse, delinquency, and homelessness by advocating for children’s rights to basic services

in Massachusetts, the statewide Youth Advocacy Department has developed a nationally recognized model of juvenile defense based on principles of positive youth development.⁸²

Recently, this developmental approach has found support in federally funded programs that are increasingly collaborative and have youth development at their core.⁸³ The federal Defending Childhood initiative is one example. In 2010, the federal government provided grants to eight demonstration projects to develop community-based programming through broad local collaborations to address the impact on children of exposure to violence. Using a public health model with a focus on prevention, Defending Childhood collaborations cross a number of sectors including health, education, justice, and law enforcement.⁸⁴ Collaborative programs such as this, that are funded across federal agencies, acknowledge in their organization and service delivery that youth are growing and flexible, that they both influence and are influenced by their environments, and that family, community, and society shape their growth and provide opportunities to promote their positive development.

A. What Does This Developmental Focus Mean for Girls?

As of 2008, only 2.6 percent of those sentenced to life without parole as juveniles were female,⁸⁵ so few are direct beneficiaries of the rulings in *Graham*, *Miller*, and *Jackson*. Indeed, the majority of girls in the juvenile system are there for status and misdemeanor offenses and violations of probation.⁸⁶ However, the Supreme

so that they can create a foundation for long-term stability. *See About Us*, TEAMCHILD, <http://teamchild.org/index.php/about> (last visited July 9, 2012); *TeamChild Description*, SEATTLE FOUND. (Dec. 10, 2010), <http://www.seattlefoundation.org/npos/Pages/TeamChild.aspx>.

82. *See* PATRICIA PURITZ & WENDY WAN LONG SHANG, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, NCJ 171151, INNOVATIVE APPROACHES TO JUVENILE INDIGENT DEFENSE 4 (1998), *available at* <https://www.ncjrs.gov/pdffiles/171151.pdf>. The Massachusetts Youth Advocacy Department was formerly called Youth Advocacy Project (YAP).

83. *See, e.g.*, DEFENDING CHILDHOOD, <http://www.justice.gov/defendingchildhood> (last visited July 9, 2012); NAT'L CHILD TRAUMATIC STRESS NETWORK, <http://www.nctsn.org> (last visited July 9, 2012).

84. *About the Initiative*, DEFENDING CHILDHOOD, <http://www.justice.gov/defendingchildhood/about-initiative.html> (last visited July 9, 2012).

85. HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR YOUTH OFFENDERS IN THE UNITED STATES IN 2008, at 2 (2008).

86. In 2008, 64 percent of girls' arrests were for six nonviolent offense categories: running away, loitering or violating curfew, liquor law violations, disorderly conduct, and a catch-all category consisting of all non-indexed non-traffic offenses, which were primarily low-level misdemeanors. Girls accounted for 31 percent of arrests for curfew violations and loitering, 33 percent of disorderly conduct arrests, 44 percent of arrests for larceny and theft; 56 percent of arrests for running away and 76 percent of

Court's developmental findings and the movement to incorporate child development into juvenile justice policies and practices have particular application to girls in the justice system. Both the behaviors that result in girls' arrests and the structural mechanisms that pull them into the justice system for those behaviors relate to child development. Girls' behaviors must be understood ecologically, as reactions to and in tension with the concentric circles of family, community, and society in girls' lives, and it is that ecological framing that provides more nuanced and developmentally informed responses.

Running away is one example of a relatively common behavior among system-involved girls. Girls often exhibit this behavior in response to their environments, but it drives many girls into juvenile systems nonetheless.⁸⁷ 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.⁸⁸ In 2009, girls made up 55 percent of youth arrested for running away;⁸⁹ prostitution was the only other crime for which girls made up the majority of arrests.⁹⁰ Moreover, arrest statistics undercount the incidence of running away because statistics on runaways may not include girls arrested or brought into custody for absconding, violations of probation, or for warrants, yet these girls are often also running away. Nationally, juvenile justice systems struggle to craft gender-responsive strategies to deal with runaway girls. Tough sanctions for runaway girls reflect fear that they will become victims, awareness of the connection between running away and commercial sexual exploitation,⁹¹ and frustration when girls disobey court-mandated rules. While fears about the safety of runaway girls are legitimate, locked

arrests for prostitution and commercialized vice. CHARLES PUZZANCHERA, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, NCJ 228479, JUVENILE ARRESTS 2008, at 3 (2009), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf>.

87. See Taylor-Thompson, *supra* note 17, at 1139.

88. See *Homeless and Runaway Youth*, NAT'L CONF. STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/homeless-and-runaway-youth.aspx> (last updated Apr. 2010).

89. CHARLES PUZZANCHERA & BENJAMIN ADAMS, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, NCJ 236477, JUVENILE ARRESTS 2009, at 4 (2011), available at <http://www.ojjdp.gov/pubs/236477.pdf>.

90. *Id.* In 2009, girls accounted for 78 percent of arrests for prostitution or commercialized vice. *Id.*

91. That connection has led the Dallas Police Department to form a "High Risk Victims Unit," which identifies high-risk girls and targets them for intervention as likely victims of commercial sexual exploitation. See Sgt. Byron Fassett, SECOND ANNUAL COLLABORATIVE TO COMBAT HUMAN TRAFFICKING, <http://uniteandcollaborate.com/sgt.-byron-fassett.html> (last visited July 9, 2012); see also *infra* notes 130–171 and accompanying text.

detention and incarceration are not a remedy, and the possibility of detention can serve as a disincentive to girls who may otherwise want to return home.⁹²

The mechanics of the juvenile justice process—use of warrants, charging of technical violations of probation, VCO provisions,⁹³ and policies preventing runaway girls from returning to their foster homes⁹⁴ make it easy to sanction runaway girls with detention and even commitment. In their 1990 study of contempt sanctions among status offenders in Florida, Donna Bishop and Charles Frazier confirmed this gender bias in sanctions. Their study sought to determine whether unequal treatment of male and female status offenders and delinquents persisted after JJDP Act reforms. They studied the records of three years of status and nonstatus offense referrals in Florida at several stages of the juvenile justice process from intake through disposition.⁹⁵ They found that male status offenders had a 37.6 percent chance of formal court referral that increased to 45.7 percent if found in contempt, while female status offenders had an initial 31.2 percent chance of formal referral, which increased to 69.7 percent for contempt.⁹⁶ For repeat status offenders facing possible incarceration, the bias was even more glaring—male repeat status offenders had a 3.9 percent chance of incarceration that increased to 4.4 percent with contempt, while female repeat status offenders had a 1.8 percent chance of incarceration, which increased to 63.2 percent if found in contempt.⁹⁷

Girls recognize that running away is a behavior that pushes them deeper into the justice system and makes it difficult for many girls to move beyond formal probation supervision prior to reaching the age of majority. Sadly, these escalating sanctions for running away miss the reasons girls run, and consequently, miss opportunities to work with girls and their families to resolve these underlying issues. A more developmentally informed juvenile justice system would focus on identifying those reasons and ways to address them, rather than focusing on accountability for each run.

Like running away, trauma is related to girls' development and triggers their juvenile justice involvement. Trauma, prevalent among girls in the justice system, explains and influences girls' behaviors and drives girls into the system through

92. I, like other attorneys, have represented girls caught in this catch-22: They run away from state custody and find life on the run boring and scary. Although they want to return to their communities to attend school and be near their families, they do not because they know they will initially be locked in detention and they fear that once in detention they will have difficulty getting released.

93. See *supra* notes 38–40 and accompanying text.

94. See *infra* notes 104–106 and accompanying text.

95. Bishop & Frazier, *supra* note 7, at 1168.

96. *Id.* at 1181.

97. *Id.* at 1183.

structural mechanisms that are contrary to sound developmental principles. The Survey of Youth in Residential Placement found that 42 percent of girls and 22 percent of boys in custody reported past physical abuse while 35 percent of girls and 8 percent of boys reported past sexual abuse.⁹⁸ For many working in the justice system, this seems to be a significant undercount of girls who have experienced past abuse. Girls in the justice system are more likely than boys to have experienced sexual assault, rape, or sexual harassment, and early sexual abuse is common among girls victimized by commercial sexual exploitation.⁹⁹ Studies show that a history of abuse is a more powerful predictor of delinquent behavior for girls than it is for boys.¹⁰⁰ Girls who have experienced childhood trauma may suffer from post-traumatic stress disorder and other mental health disorders such as anxiety or depression, and studies show that up to 81 percent of girls in the juvenile justice system suffer from one or more mental health disorders compared with up to 68.5 percent of boys.¹⁰¹

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.¹⁰² 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 are involved

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98. ANDREA J. SEDLAK & KARLA S. MCPHERSON, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, NCJ 236477, YOUTH'S NEEDS AND SERVICES: FINDINGS FROM THE SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT 6, *available at* <https://www.ncjrs.gov/pdffiles1/ojjdp/227728.pdf>.
 99. *See* ZAHN ET AL., *supra* note 45, at 12; MARGARET A. ZAHN ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, NCJ 223434, THE GIRLS STUDY GROUP—CHARTING THE WAY TO DELINQUENCY PREVENTION FOR GIRLS 4 (2008), *available at* <http://www.ncjrs.gov/pdffiles1/ojjdp/223434.pdf>.
 100. Elizabeth Cauffman, *Understanding the Female Offender*, JUV. JUST., Fall 2008, at 119, 129–30 (2008).
 101. Paula Braverman & Robert Morris, *The Health of Youth in the Juvenile Justice System*, in JUVENILE JUSTICE, *supra* note 38, at 44; *see* JENNIE L. SHUFELT & JOSEPH J. COCOZZA, NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, RESEARCH AND PROGRAM BRIEF: YOUTH WITH MENTAL HEALTH DISORDERS IN THE JUVENILE JUSTICE SYSTEM: RESULTS FROM THE MULTI-STATE PREVALENCE STUDY (2006), *available at* <http://www.ncmhjj.com/pdfs/publications/PrevalenceRPB.pdf>; Meda Chesney-Lind & Scott K. Okamoto, *Gender Matters: Patterns in Girls' Delinquency and Gender Responsive Programming*, 1 J. FORENSIC PSYCHOL. PRAC., no. 3, 2001, at 1; Cindy S. Lederman et al., *Characteristics of Adolescent Females in Juvenile Detention*, 27 INT'L J.L. & PSYCHIATRY 321, 327 (2004) (finding 78 percent experience mental health issues); Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1136 tbl.2 (2002) (finding 73.8 percent of females suffered from a diagnosed mental disorder); Gail A. Wasserman et al., *Gender Differences in Psychiatric Disorders at Juvenile Probation Intake*, 95 AM. J. PUB. HEALTH 131, 133 tbl.2 (2005) (finding that 49.5 percent of surveyed females in the juvenile justice system suffer from a disorder).
 102. *See, e.g.*, FRANCINE T. SHERMAN, ANNIE E. CASEY FOUND., PATHWAYS TO JUVENILE DETENTION REFORM: DETENTION REFORM AND GIRLS 21–22 (2005); Chesney-Lind & Okamoto, *supra* note 101.

in delinquency.¹⁰³ Girls in foster placement are more likely to enter the detention system than nonfoster girls as a result of histories of multiple foster home placements,¹⁰⁴ child protection system policies that penalize girls for running away,¹⁰⁵ and inadequate communication across the juvenile justice and child protection systems. All these things contribute to a fragmented personal history and the trauma that stems from consistent disruption.¹⁰⁶ Moreover, the practice of charging girls with minor delinquency when they are viewed as too difficult to handle in the child protection system is longstanding.¹⁰⁷ Given all of this, many girls in the delinquency system are essentially formed by the child protection system.

Two of the biggest factors currently driving girls into detention and incarceration—domestic violence and commercial sexual exploitation—are closely linked to trauma and need to be understood and legally framed with an eye to child development. The failure to approach these issues with a developmental frame has resulted in many girls being driven into the justice system to their detriment. Placing girls who are victims of domestic violence and commercial sexual exploitation in secure detention and incarceration is a modern example of the gender bias that has animated the juvenile justice system since its beginning.

B. Domestic Violence

From 1996 to 2005, girls' arrests for assault increased more or decreased less than boys' arrests. Girls' arrests for simple assault increased 24 percent as compared with a 4.1 percent decrease in simple assault arrests for boys, and girls' arrests for aggravated assault declined 5.4 percent as compared with a 23.4 percent decline for boys.¹⁰⁸ This data, and the perception of girls' increased violence that surrounded it, fuelled a media cry that girls were becoming more violent and prompted researchers to examine the sources of girls' assault arrests.¹⁰⁹

103. See, e.g., Sherman & Greenstone, *supra* note 51.

104. SHERMAN, *supra* note 102, at 19 (citing DYLAN CONGER & TIMOTHY ROSS, VERA INST. OF JUSTICE, REDUCING THE FOSTER CARE BIAS IN JUVENILE DETENTION DECISIONS: THE IMPACT OF PROJECT CONFIRM (2001)).

105. See Dylan Conger & Tim Ross, *Project Confirm: An Outcome Evaluation of a Program for Children in the Child Welfare and Juvenile Justice Systems*, 4 YOUTH VIOLENCE & JUV. JUST. 97, 109 (2006); Timothy Ross & Dylan Conger, *Bridging Child Welfare and Juvenile Justice: Preventing Unnecessary Detention of Foster Children*, 81 CHILD WELFARE 471, 493 (2002).

106. See *supra* note 105.

107. MEDA CHESNEY-LIND & LISA PASKO, THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME 12 (2d ed. 2004).

108. ZAHN ET AL., *supra* note 45, at 4.

109. *Id.* at 2; Darrell Steffensmeier et al., *An Assessment of Recent Trends in Girls' Violence Using Diverse Longitudinal Sources: Is the Gender Gap Closing?*, 43 CRIMINOLOGY 355, 356 (2005).

Researchers explained the rise in girls' assault arrests in part as a result of changed laws and law enforcement practices concerning domestic violence. Researchers concluded that the rise in girls' arrests for assaults did not signify a rise in girls' violent behavior, but was in part the result of mandatory arrest policies for domestic violence that result in police charging girls for home-based violence that might have previously been handled in the child protection system.¹¹⁰ Girls who fight are more likely than boys to do so at home,¹¹¹ and are therefore often swept up by these mandatory arrest policies. Girls and young women make up 35 percent of juveniles who commit domestic assault;¹¹² and 60 percent of juvenile female domestic assault offenders committed their violence against a parent, as compared with 46 percent of juvenile male domestic assault offenders.¹¹³ Arrests of girls for domestic assaults are particularly likely when there are other children in the home, making police reluctant to charge and remove an adult caretaker.¹¹⁴

As a result of the 1994 Violence Against Women Act's (VAWA)¹¹⁵ initial support of mandatory arrest policies,¹¹⁶ many states have mandatory arrest laws or policies for domestic violence cases,¹¹⁷ and their impact—increasing arrests of

110. ZAHN ET AL., *supra* note 45, at 6–7.

111. After same-sex peers, family members are the second most common victim of girls' violence. *Id.* at 11.

112. HOWARD N. SNYDER & CARL MCCURLEY, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, NCJ 219180, DOMESTIC ASSAULTS BY JUVENILE OFFENDERS 1 (2008), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/219180.pdf>.

113. *Id.* at 5.

114. Francine T. Sherman, *Reframing the Response: Girls in the Juvenile Justice System and Domestic Violence*, JUV. & FAMILY JUST. TODAY, Winter 2009, at 16, 19; Barry C. Feld, *Violent Girls or Relabeled Status Offenders? An Alternative Interpretation of the Data*, 55 CRIME & DELINQ. 241 (2009).

115. Pub. L. No. 103-322, 108 Stat. 1902 (1994).

116. The Act provided:

The Attorney General may make grants to eligible States, Indian tribal governments, or units of local government for the following purposes:

(1) To implement *mandatory arrest* or proarrest programs and policies in police departments, including *mandatory arrest programs* and policies for protection order violations.

Violence Against Women Act § 40231, 108 Stat. at 1932 (emphasis added). Although under the 1994 VAWA the federal government granted money to states for both mandatory and proarrest policies, in the 2004 reauthorization, the term “mandatory” was completely taken out. See 42 U.S.C. § 3796hh(b) (2006) (“(1) To implement proarrest programs and policies in police departments, including policies for protection order violations.”).

117. States with mandatory arrests laws or policies include Alaska, Arizona, Colorado, Connecticut, Iowa, Kansas, Louisiana, Maine, Mississippi, Nevada, New Jersey, New York, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, and the District of Columbia. STOP ABUSIVE & VIOLENT ENV'TS, SPECIAL REPORT: ARREST POLICIES FOR DOMESTIC VIOLENCE 2 (2010); see David Hirschel et al., Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Cases (Apr. 2007) (unpublished report), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf>.

girls for family-based violence—is an unintended consequence.¹¹⁸ The 2005 reauthorization of VAWA¹¹⁹ replaced support of mandatory arrest policies with support of proarrest policies,¹²⁰ and a number of states have also adopted proarrest policies, in which arrest is the preferred, but not required, response.¹²¹

Domestic violence drives girls into the juvenile justice system beyond just the role it plays in arrest. In addition to mandatory arrest and charging policies, some state laws and state or county detention policies require secure detention for individuals charged with domestic assault or battery.¹²² Like arrest and charging policies, these laws were designed to diffuse typical domestic violence situations by removing the batterer from the home. Because girls are disproportionately arrested in cases of family violence,¹²³ these statutes result in their disproportionate detention. 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.¹²⁴ The recognition that mandatory detention laws—which distracted counties from providing family services to keep girls at home—disproportionately affected girls resulted in changes in the Nevada law in 2007 removing mandatory detention for juveniles.¹²⁵

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. Not surprisingly, prior victimization in the home is common among girls who

118. See Edwards, *supra* note 48, at 227, 238 (discussing the impact of the criminalization of domestic violence on girls whose offenses are often home based).

119. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 109 Stat. 2960.

120. For the 2005 VAWA reauthorization, the “Grants to Encourage Arrests” provision was amended as such:

- (B) in paragraph (1), by—
 - (i) striking “mandatory arrest . . .”; and
 - (ii) striking “mandatory arrest programs . . .”

Id. The current provision reads:

- (b) . . . The Attorney General may make grants to eligible States, Indian tribal governments State, tribal, territorial, and local courts (including juvenile courts), [sic] or units of local government for the following purposes:

- (1) To implement proarrest programs and policies in police departments, including policies for protection order violations.

42 U.S.C. § 3796hh.

121. States with proarrest policies include: Arkansas, California, Florida, Massachusetts, Montana, North Dakota, and Tennessee. Hirschel et al., *supra* note 117, at 2.

122. STOP ABUSIVE & VIOLENT ENV^{TS}, *supra* note 117, at 2.

123. *Supra* notes 109–110 and accompanying text.

124. Sherman, *supra* note 114, at 19.

125. *Id.* at 19–20.

behave violently.¹²⁶ Consistent with *Roper's* developmental findings, these histories of in-home victimization help explain girls' in-home violence and, because they are victims, reduce their culpability. This reduced culpability in turn argues against arrest, detention, and other involvement in the juvenile justice system that carries damaging short- and long-term consequences.¹²⁷

The arrest, detention, and juvenile justice processing of a disproportionate number of girls for home-based violence is a systemic problem present in many states that requires a systemic solution. A developmentally informed approach calls for redefining domestic battery and assault statutorily to exclude cases of intrafamily violence by minors, eliminating mandatory arrest and detention provisions for domestic violence by minors, or creating a presumption that home-based violence by minors be handled first through the family services system before a youth is charged. On the program side, it calls for better partnerships between juvenile justice systems and domestic violence services and networks, including trauma-informed approaches and empowerment models of client counseling,¹²⁸ 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.¹²⁹ These types of statutory and programmatic approaches would eliminate, or severely restrict, the criminal justice response and encourage a developmentally appropriate response to home-based trauma, rather than one that revictimizes girls.

126. See ZAHN ET AL., *supra* note 45, at 11.

127. See *supra* note 49 and accompanying text.

128. See, e.g., Heather C. Moore, *How Strong Collaboration Between Legal and Social Service Professionals Will Improve Outcomes for Trafficking Survivors and the Anti-trafficking Movement*, 1 INTERCULTURAL HUM. RTS. L. REV. 157 (2006).

129. Pima County, Arizona's Domestic Violence Alternative Center (DVAC) is an example of this sort of triage and diversion effort. Consistent with national data on the trend to charge girls with domestic battery, girls made up 39 percent of youth referred to DVAC from 2007 to 2010. DOMESTIC VIOLENCE ALT. CTR., PROGRAM EVALUATION ANNUAL REPORT 2009, at 8 (2010), available at [http://www.jdaihelpdesk.org/altdeettoolsevalu/Pima County AZ Domestic Violence Alternative Center 2009 Evaluation.pdf](http://www.jdaihelpdesk.org/altdeettoolsevalu/Pima%20County%20AZ%20Domestic%20Violence%20Alternative%20Center%202009%20Evaluation.pdf) (last visited July 9, 2012), cited in SHERMAN, MENDEL & IRVINE, *supra* note 14. Many referred youth (both girls and boys) had mental health complications, and their families had been involved with the child protection system. *Id.* at 14. Youth charged with domestic violence and referred to DVAC were less likely to be detained than youth not referred—of youth referred for domestic violence, only 10 percent were detained. *Id.* at 27. Rather, DVAC screened youth, and, with their families if possible, provided services addressing family violence and sometimes provided brief respite care for the youth. *Id.* at 22–23.

C. 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 most cited study of the issue drew on data of homeless and runaway youth and estimated that approximately 300,000 youth each year are “at risk” for commercial sexual exploitation.¹³⁰ However, the number of youth arrested or identified by state systems is much lower. In 2009, girls made up 78 percent of arrests for prostitution and commercialized vice nationally, a total of 1092 arrests.¹³¹ Much of the incidence data are local and it is unclear whether they reflect the true extent of the problem. Advocates who work with prostituted girls say that because so many evade authorities and so much of the sex trade occurs indoors, the scope of the problem is hard to pinpoint. Moreover, because state and federal databases categorize this behavior differently—some states arrest girls engaged in prostitution and some consider them to be victims—there is no one source to look to for clear data.¹³²

How to address the problem of prostituted girls, which has been a prominent international issue since the First World Congress Against Commercial Sexual Exploitation of Children in 1996,¹³³ is now a focus of U.S. federal and state legislative, law enforcement, and programmatic attention.¹³⁴ Perhaps more than

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130. See RICHARD J. ESTES & NEIL ALAN WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA, AND MEXICO* (2001). Experts agree that it is very difficult to obtain accurate data defining this problem in part because cases of commercial sexual exploitation of children (CSEC) might be recorded in criminal justice or in child protection systems, or not at all.
131. PUZZANCHERA & ADAMS, *supra* note 89, at 4.
132. See Francine T. Sherman & Lisa Goldblatt Grace, *The System Response to the Commercial Sexual Exploitation of Girls*, in *JUVENILE JUSTICE*, *supra* note 38, at 331, 335. A coalition in Suffolk County, Massachusetts (Boston) identified four hundred cases of sexually exploited and high-risk youth between 2005 and March 2011; Connecticut, which has made an effort to track these youth, identified eighty-four victims from 2009 to 2012. There is also a great deal of discussion about how widely boys and LGBT youth are affected. See, e.g., Kristen Hinman, *Lost Boys*, *VILLAGE VOICE* (Nov. 2, 2011), <http://www.villagevoice.com/2011-11-02/news/lost-boys>.
133. See, e.g., ECPAT INT’L, *GLOBAL MONITORING REPORT ON THE STATUS OF ACTION AGAINST COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: UNITED STATES OF AMERICA 6* (2006), available at http://www.ecpat.net/A4A_2005/PDF/Americas/Global_Monitoring_Report-USA.pdf; *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, G.A. Res. 54/263, Annex II, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/263 (May 25, 2000), available at <http://www2.ohchr.org/english/law/pdf/crc-sale.pdf>. See generally NICHOLAS D. KRISTOF & SHERYL WUDUNN, *HALF THE SKY* (2009) (describing the scope and complexity of sex trafficking internationally and the challenges for those assisting victims and eradicating the problem).
134. See Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 98–111 (2008); Megan Annitto, *Consent, Coercion, and Compassion: Crafting a Commonsense Approach to Commercial Sexual Exploitation of Minors*, 30 *YALE L. & POLY REV.* 1, 23–54 (2011); Tamar R.

any other current issue affecting girls in the justice system, the commercial sexual exploitation of children (CSEC) risks causing overreaction and has the potential to sweep girls into the justice system in unhelpful ways. It requires law and policy that address the nuances of this complex social problem and that are firmly grounded in a full and developmental understanding of the girls involved.

Responses to CSEC straddle the child protection and criminal justice systems, creating some uncomfortable results. The Trafficking Victims Protection Act (TVPA),¹³⁵ passed in 2000 and amended in 2003, 2005, and 2008,¹³⁶ clearly identifies minors trafficked for sex as victims and describes protections for them consistent with victim status.¹³⁷ The TVPA notes, for example, that there is no need to prove “force, fraud or coercion”¹³⁸ in establishing trafficking of a minor, and it prohibits detention of trafficked youth and adults in “facilities inappropriate to their status as crime victims.”¹³⁹

While many state laws addressing this issue have been amended over the last ten years, the focus of those changes had long been on easing the prosecution of, and increasing penalties for, pimps and johns.¹⁴⁰ However, in the last five years there has been significant movement among states to pass comprehensive safe-harbor laws. Although the details of these laws vary, they are designed to acknowledge that commercially sexually exploited children are victims and to provide them with an escape from exploitation through an alternative to criminal prosecution and appropriate services that will not stigmatize or punish them.¹⁴¹ These services may

Birckhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1067–1081, 1105–1114 (2011); Sherman & Grace, *supra* note 132, at 340–48.

135. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 7101–7112 (2006)).

136. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.

137. See 22 U.S.C. 7101(a) (“The purposes of this chapter are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children . . .”); Shelby Schwartz, Comment, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235 (2008).

138. Trafficking Victims Protection Act, 22 U.S.C. § 7102(8)(A); 42 U.S.C. § 14044e.

139. 22 U.S.C. § 7105(c)(1)(A).

140. Sherman & Grace, *supra* note 132, at 343–45.

141. *Id.*

include specifically trained advocates,¹⁴² multidisciplinary treatment planning,¹⁴³ and safe residences with specially trained staff.¹⁴⁴

The victim label, central to the TVPA and state safe-harbor legislation, can also be seen as an oversimplification that is neither sufficiently nuanced nor developmentally accurate, and is disempowering to young women in need of empowerment. Teenage girls with experience in the sex trade argue for a harm-reduction approach that would allow them to care for each other safely and empower them to make safe choices. These girls describe their involvement as a means of survival, and so, on some level, a choice they are making.¹⁴⁵ They argue that they make a choice to engage in prostitution (albeit a choice born of poverty and severely limited options) and the victim label robs them of autonomy.¹⁴⁶ In support of the position that they should have greater responsibility over their own solutions, they express distrust of official systems and note institutional violence that they experience from police and hospitals, which is particularly directed toward girls of color and those seen as gender nonconforming.¹⁴⁷

Although, a harm-reduction approach for juveniles remains outside the current mainstream of thought and policy, recent state laws that explicitly adopt the conclusion that prostituted girls are victims can actually be punitive in practice. Rooted in a victim-based approach to CSEC, New York passed a safe-harbor law in 2007¹⁴⁸ and similar comprehensive laws are on the books in Illinois,¹⁴⁹

142. See, e.g., MASS. GEN. LAWS ANN. ch. 119, §§ 21, 39K(a) (LexisNexis 2009 & Supp. 2012).

143. *Id.* § 51D.

144. See, e.g., Safe Harbour for Exploited Children Act, N.Y. SOC. SERV. LAW §§ 447-a to 447-b (McKinney 2010).

145. The idea that women and girls are reduced to criminal and personally dangerous conduct to survive is not new. See, e.g., BETH E. RICHIE, UNDERSTANDING THE LINKS BETWEEN VIOLENCE AGAINST WOMEN AND WOMEN'S PARTICIPATION IN ILLEGAL ACTIVITY (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/199370.pdf>; Nekima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand A Chance Against U.S. Drug-Sentencing Policy*, 3 U. ST. THOMAS L.J. 462, 464 (2006).

146. See Levy-Pounds, *supra* note 145; see also Hinman, *supra* note 132.

147. See JAZEERA IMAN ET AL., YOUNG WOMEN'S EMPOWERMENT PROJECT, GIRLS DO WHAT THEY HAVE TO DO TO SURVIVE: ILLUMINATING METHODS USED BY GIRLS IN THE SEX TRADE AND STREET ECONOMY TO FIGHT BACK AND HEAL 30 (2009).

148. Safe Harbour for Exploited Children Act, N.Y. SOC. SERV. LAW §§ 447-a to 447-b; see also Schwartz, *supra* note 137, at 237.

149. 720 ILL. COMP. STAT. ANN. 5/11-14 (West Supp. 2012) (“[A] person under the age of 18 . . . shall be immune from prosecution for a prostitution offense under this Section, and shall be subject to the temporary protective custody provisions of Sections 2-5 and 2-6 of the Juvenile Court Act of 1987.”).

Connecticut,¹⁵⁰ Washington,¹⁵¹ and, most recently, Massachusetts.¹⁵² The Massachusetts law, which became effective in February 2012, draws on a number of these existing laws and illustrates the way in which the tension between a law enforcement and child welfare approach can yield developmentally questionable results and may lead to more girls entering the juvenile justice system.

The Massachusetts safe-harbor law provides that a sexually exploited child (defined as someone under eighteen who falls under the TVPA definition, or is a victim of sexual servitude, or engages in specific acts covered in the criminal laws concerning prostitution) can be the subject of a status offense petition, which in Massachusetts is called Child in Need of Services (CHINS).¹⁵³ The law creates a new CHINS category, “sexually exploited child.”¹⁵⁴ If the youth admits or is found to be a sexually exploited child under the CHINS law, or found to be in need of care and protection under the existing law for the protection of abused or neglected children,¹⁵⁵ the court can stay her arraignment under the delinquency or criminal law relating to prostitution or, if she has already been arraigned, impose pretrial probation.¹⁵⁶ The stay continues in effect as long as the girl “substantially complies” with services in the child and family services system.¹⁵⁷ The law creates a presumption that a CHINS or child protection petition will be filed when a youth is charged with a prostitution-related crime.¹⁵⁸ In addition to these provisions, the Massachusetts law creates a civil cause of action for sexually exploited children,¹⁵⁹

150. CONN. GEN. STAT. ANN. § 53a-82 (West Supp. 2012). Only a person sixteen years of age or older can be found guilty of prostitution under § 53a-82, and in any prosecution of a person sixteen or seventeen years of age for an offense under this section, there shall be a presumption that the actor was coerced into committing such offense. *Id.* § 53a-82(a), (c).

151. WASH. REV. CODE ANN. § 13.40.070(6) (West Supp. 2012) (providing that a minor’s first offense shall be diverted); *id.* § 13.40.213 (2011) (providing that a prosecutor may divert the offense for juveniles alleged to have committed offenses of prostitution or prostitution loitering even if it would not be the juvenile’s first offense, as long as the county has a qualifying program for the juvenile); *see also* Sex Crimes Involving Minors Act, ch. 289, 2010 Wash. Sess. Laws 2301.

152. An Act Relative to the Commercial Exploitation of People, 2011 Mass. Acts ch. 178.

153. MASS. GEN. LAWS ANN. ch. 119, §§ 21, 39K, 39L (LexisNexis 2009 & Supp. 2012).

154. *Id.* § 21.

155. *Id.* §§ 24–26.

156. *Id.* § 39L. In Massachusetts, seventeen is the age of adult criminal jurisdiction, but the CHINS law has jurisdiction over youth until age eighteen. *Id.* ch. 218, § 60; *id.* ch. 119, § 52. So a seventeen-year-old might be charged with prostitution as an adult and then have the criminal case stayed if the youth admits under the CHINS law in the Juvenile Court to being sexually exploited. If the youth is under seventeen, the juvenile court will have jurisdiction of both the delinquency and the CHINS petition.

157. *Id.* § 39L(c).

158. *Id.* § 39L(a).

159. *Id.* ch. 260, § 4D. These provisions of the law toll the statute of limitations while the child is a minor or until she is “freed from human trafficking.” *Id.*

assigns the children advocates with expertise in the issue,¹⁶⁰ and creates a multidisciplinary team to develop a plan of services.¹⁶¹

When told about this law, a young woman survivor of commercial sexual exploitation aptly noted that while it says that sexually exploited children are victims, it then requires them to comply with the agency to be treated as victims. To her, the law seemed coercive and not compassionate.¹⁶² Indeed, the Massachusetts law does not reflect the reality that children who are commercially sexually exploited are not likely to “substantially comply” with state services, since they are trained to evade authorities, almost uniformly have histories of running away from authorities and home, and have been described as psychological captives of their pimps.¹⁶³ Moreover, as the survivor points out, it sends a decidedly mixed message to hold criminal prosecution over a victim’s head while telling her you view her as exploited.

Expanding the status offender system to include an additional class of girls is also a concern given that system’s history as a way to control girls’ behavior and pull them into the delinquency system.¹⁶⁴ Very few minors are currently charged with prostitution-related crimes in Massachusetts, and it would be counterproductive if the promise of CHINS services prompted an increase in prostitution-related charges, even if those charges were initially stayed. Moreover, requiring a girl to stipulate that she is sexually exploited under the CHINS law in order to stay her delinquency case is stigmatizing and contrary to the psychology of exploitation, and many girls may understandably choose not to proceed under the new law.¹⁶⁵

160. *Id.* ch. 119, §§ 21, 39K(a).

161. *Id.* § 51D.

162. Interview With C. (Dec. 29, 2011).

163. *See generally* JODY RAPHAEL, LISTENING TO OLIVIA: VIOLENCE, POVERTY, AND PROSTITUTION (2004); Lisa Goldblatt Grace, *Understanding the Commercial Sexual Exploitation of Children*, LINK: CONNECTING JUV. JUST. & CHILD WELFARE, Fall 2008/Winter 2009, at 1; Kendra Nixon et al., *The Everyday Occurrence: Violence in the Lives of Girls Exploited Through Prostitution*, 8 VIOLENCE AGAINST WOMEN 1016 (2002); Sherman & Grace, *supra* note 132, at 334–40, *citing* R. BARRI FLOWERS, RUNAWAY KIDS AND TEENAGE PROSTITUTION: AMERICA’S LOST, ABANDONED, AND SEXUALLY EXPLOITED CHILDREN (2001).

164. *See supra* notes 29–40 and accompanying text.

165. In Massachusetts and most other states, competent youth direct their legal representation just as adults do. Thus each girl has the right, with the assistance of counsel, to choose to proceed under the new law or to allow the delinquency case (or in the case of a seventeen-year old, the criminal case) to proceed on its usual course. *See* MASS. RULES OF PROF’L CONDUCT R. 1.14 (2011), *available at* <http://www.mass.gov/obcbbo/RPC.pdf> (Client With Diminished Capacity); COMM. FOR PUB. COUNSEL SERVS., PERFORMANCE STANDARDS GOVERNING REPRESENTATION OF INDIGENT JUVENILES IN DELINQUENCY, YOUTHFUL OFFENDER, AND CRIMINAL CASES (n.d.), *available at* <http://www.youthadvocacydepartment.org/jdn/resourcedocs/performance-standards.pdf> (last visited July 9, 2012).

A striking illustration of developmentally inappropriate and inconsistent law related to commercial sexual exploitation of minors 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.¹⁶⁶ For example, in New York, the state Superior Court upheld the prosecution for prostitution of a twelve-year-old minor who was below the age of consent under the state statutory rape law.¹⁶⁷ The court reasoned simply that the age of consent for rape was irrelevant to prosecution under the New York prostitution law, which contained no age requirement.¹⁶⁸ However, when presented with the same issue, the Texas Supreme Court reached the opposite result, finding it “difficult to reconcile the legislature’s recognition of the special vulnerability of children, and its passage of laws for their protection, with an intent to find that children under fourteen understand the nature and consequences of their conduct when they agree to commit a sex act for money.”¹⁶⁹

How can the law concerning commercial sexual exploitation of children recognize the reality of child development that increasingly guides the juvenile justice system? States should decriminalize prostitution for minors. Courts and scholars should craft a developmentally appropriate and consistent understanding of minors’ ability to consent to sex in the range of real-life contexts in which this issue arises.¹⁷⁰ Understanding the brutal nature of commercial sexual exploitation and the need to protect victimized youth, policymakers must still be mindful of the way the impulse to protect teenage girls has historically driven them into the justice system. Finally, the lawyers representing girls who are commercially sexually

166. Michigan, Illinois, Connecticut, and Tennessee revised their laws to decriminalize prostitution for some minors. In Michigan, it was minors under 16 years old. MICH. COMP. LAWS ANN. §§ 750.448, 750.449 (West 2004). In Illinois, it was minors under 18 years old. 720 ILL. COMP. STAT. ANN. 5/11-14 (West Supp. 2012). In Connecticut, it was minors under 16 years old. CONN. GEN. STAT. ANN. § 53a-82 (West Supp. 2012). In Tennessee it was minors under 18 years old. TENN. CODE ANN. § 39-13-513 (2010 & Supp. 2012). In Texas, the state’s highest court ruled that the statute criminalizing prostitution, which required that the crime be committed knowingly in order to be punishable, *see* TEX. PENAL CODE ANN. § 43.02(a)(1) (West 2011), could not apply to minors under fourteen because they cannot consent to sex. *In re B.W.*, 313 S.W.2d 818, 821–22 (Tex. 2010).

167. *In re Nicolette R.*, 779 N.Y.S.2d 487 (2004).

168. *Id.* at 488.

169. *In re B.W.*, 313 S.W.2d at 821–22.

170. *See* Birkhead, *supra* note 134, at 1094–1101. Consideration of sex offenses and the range of ways in which teenage sexuality is criminalized is beyond the scope of this Article, but such consideration should be a part of developmentally centered thinking about the application of these laws to youth and the collateral consequence of them (such as sex offender registries). *See generally* FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING 117–42 (2004).

exploited and the programs assisting these young women should draw on developmentally informed approaches, such as empowerment models of client counseling and trauma-informed approaches to treatment and systems.¹⁷¹ Just as with running away, trauma driven behaviors, and home-based violence, a developmental understanding of CSEC should drive policy.

III. USING DATA IN JUVENILE JUSTICE

The U.S. juvenile justice system was intended as an individualized and caring alternative to the adult criminal justice system. Juvenile justice, as originally conceived, was not offense-based but offender-based, with dispositions (and at times process) tailored to the needs of the individual youth before the court.¹⁷²

This vision of individualized justice, designed to meet the needs and aid in the reformation of each youth before the court, relies on discretion at every stage. By definition, this is not a one-size-fits-all system, and so discretion is built into every decision—arrest, charging, detention, probation, and disposition. But the exercise of discretion makes room for bias, both in the form of the overt exercise of prejudice and, more commonly, in the well-intentioned differentiation among youth by factors that appear neutral but have a discriminatory impact.¹⁷³ In juvenile justice, it is sometimes challenging to tease apart underlying prejudice from policies that appear neutral but are biased in practice.

For the most part, gender bias that drives girls into the juvenile justice system is not obvious in facially discriminatory statutes or policies 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 in a way that has a negative and biased impact on girls who suffer cumulative disadvantage—what has been called “unconscious” or “implicit” discrimination.¹⁷⁴ Because gender discrimination in juvenile justice is found largely in the impact or effect of policies and practices, legal challenges are particularly difficult making the movement toward data-driven decisions and policies particularly compelling.¹⁷⁵

171. See Moore, *supra* note 128, at 168 n.42, 170 n.51.

172. See Feld, *supra* note 5, at 824–25.

173. See Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of A Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 409 (1996); see also Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 377 (1999).

174. For a very thoughtful critique of the difficulty of establishing structural race bias in juvenile justice and the resulting importance of the disproportionate minority contact (DMC) core requirement to address race bias in juvenile justice, see Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374 (2007).

175. See *id.*

In 1976, the U.S. Supreme Court held in *Washington v. Davis*¹⁷⁶ that to establish state discrimination in the race context, plaintiffs must show intent to discriminate.¹⁷⁷ In later cases the Court clarified *Washington*, holding that showing discriminatory effect was not sufficient to prove that intent must have been present. Rather, the plaintiff must show that the state decided on its course of conduct “because of” its effects on the particular protected group.¹⁷⁸ The line of cases stemming from *Washington v. Davis* has made successful equal protection challenges to the sort of race and gender discrimination that results from systemwide juvenile justice policies and practices very difficult.¹⁷⁹ Equal protection challenges based on gender discrimination are even more difficult than those based on race because unlike race, which is a suspect classification requiring strict scrutiny, classifications based on gender generally require only intermediate scrutiny for states to establish legitimate justifications for their discriminatory practice or policy.¹⁸⁰

Title IX, which prohibits educational institutions that receive federal funds from practicing gender discrimination,¹⁸¹ may also have limited utility as a basis for addressing gender-based discrimination as it appears in juvenile justice systems. First, Title IX challenges would be limited to discrimination in educational or vocational programs in the juvenile justice system.¹⁸² Next, while Title IX applies in the women’s prison context, it has had limited success because courts have generally deferred to prison officials.¹⁸³ Finally, the standard for Title IX liability in the juvenile justice context is not clear, and courts have differed on the extent

176. 426 U.S. 229 (1976).

177. *Id.*; see Johnson, *supra* note 174, at 386–87.

178. *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); see also Johnson, *supra* note 174, at 386–87.

179. Johnson, *supra* note 174, at 387–88.

180. *United States v. Virginia*, 518 U.S. 515 (1996); see Marsha L. Levick & Francine T. Sherman, *When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System*, 18 WIS. WOMEN’S L.J. 9, 25–26 (2003); Elizabeth M. Schneider, *A Postscript on VMI*, 6 AM. U.J. GENDER & L. 59 (1997); Ann K. Wooster, *Equal Protection and Due Process Clause Challenges Based on Sex Discrimination—Supreme Court Cases*, 178 A.L.R. FED. 25 (2002).

181. 20 U.S.C. § 1681 (2006). See generally David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217 (2005) (discussing the scope of Title IX, including its application in the prison context and to what extent its analysis parallels equal protection analysis).

182. See Cohen, *supra* note 181, at 228–233.

183. See, e.g., *Klinger v. Dep’t of Corr.*, 107 F.3d 609, 614 (8th Cir. 1997); *Women Prisoners of the D.C. Dep’t of Corr. v. District of Columbia*, 93 F.3d 910, 932 (D.C. Cir. 1996). In the juvenile context, see *Lothes v. Butler Cnty. Juvenile Rehab. Ctr.*, 243 F. App’x 950 (6th Cir. 2007). But see, e.g., *Jeldness v. Pearce*, 30 F.3d 1220, 1231 (9th Cir. 1994) (holding that an award of merit pay to men, but not to women, for participating in the same vocational training course in the same location amounted to disparate treatment violating Title IX); Cohen, *supra* note 181, at 228–31; Levick & Sherman, *supra* note 180, at 28–29.

to which Title IX analysis mirrors equal protection analysis for gender.¹⁸⁴ As with equal protection analysis, proof of discriminatory intent, or even proof of discriminatory impact, without a legitimate state justification is difficult given the unconscious gender discrimination found in juvenile justice systems, the limitations on local data collection, and the discretion built into so much of juvenile justice decisionmaking. A particular problem establishing the impact of any one juvenile justice decision is that so many juvenile justice decisions are multifactored, making it difficult to connect an outcome to one discriminatory factor.¹⁸⁵

Equal protection and state Equal Rights Amendment (ERA) challenges to gender discrimination in juvenile justice have not been very successful.¹⁸⁶ Challenges to transfer or disposition decisions alleging that a lack of parity between girls' and boys' programming resulted in discrimination have been rejected on the theory that girls and boys in the juvenile justice system are not similarly situated. That both parties be similarly situated is an essential element of equal protection analysis.¹⁸⁷

Finally, even in the unlikely event that unconstitutional gender discrimination could be established against practices of a juvenile justice system, courts' increasing use of qualified immunity in system reform cases presents an additional barrier. Qualified immunity, which prevents recovery against a state actor for a constitutional violation unless the violation was clearly established as unconstitutional at the time of the violation and the state actor knew or should have known that it was unconstitutional, increasingly prevents remedies in cases involving youth.¹⁸⁸

Given the history of hidden or unconscious gender discrimination, programs and policies designed for boys but used with girls, and the absence of effective

184. See Cohen, *supra* note 181, at 228–31.

185. *Id.* Detention and disposition standards are examples of multifactored juvenile justice decisions. Once a youth is found delinquent, the disposition assigned often results from the court's judgment concerning what will provide needed treatment or rehabilitation, or address "present and long term public safety." MASS. GEN. LAWS ANN. ch. 119, § 58 (LexisNexis 2009 & Supp. 2012). Statutes guiding these decisions provide courts with little guidance about how to exercise their discretion, but typically a totality of factors will be considered, such as the nature of the offense, the child's social history, and the availability of family support. See Feld, *supra* note 5, at 847–50; Moriearty, *supra* note 5, at 307–08.

186. See Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201 (2005); Stefanie Fleischer Seldin, *A Strategy for Advocacy on Behalf of Women Offenders*, 5 COLUM. J. GENDER & L. 1, 7–14 (1995); Levick & Sherman, *supra* note 180, at 35–42.

187. See, e.g., *State v. Spina*, 982 P.2d 421 (Mont. 1999); *Benson v. State*, 763 So. 2d 1235 (Fla. Dist. Ct. App. 2000).

188. See, e.g., *Safford v. Redding*, 557 U.S. 364 (2009); Barry C. Feld, *T.L.O. And Reddings Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 953 (2011).

ways to remedy this discrimination in the courts, the move toward data-driven decisionmaking in juvenile justice is important for girls. In the last fifteen to twenty years, juvenile justice systems have increased their capacities to measure what they do, and with that there is increasing pressure to be reflective and set policy based on those data.¹⁸⁹ Although there is a broad range across the country in systems' data capacities and utilization, the trend is clear.

Data is increasingly being used both to examine juvenile justice practices and to evaluate programs.¹⁹⁰ Some systems now have the capacity, for example, to make detention decisions based on an objective assessment of a youth's risk and then to analyze those decisions over time to determine whether they are being made objectively based on criteria thought to be gender neutral. They can then determine whether those criteria are gender neutral in practice or whether they are having a discriminatory impact. If decisions are having a discriminatory impact in practice, some jurisdictions now have the capacity to pinpoint where bias is occurring in the system. Having those data gives systems, if they are open to using it, the power to be fairer and more targeted in their practices. Pushed forward by a federal agenda to support evidence-based practices, some effort at program evaluation, which was almost unheard of in juvenile justice twenty years ago, is now increasingly common and almost essential to obtain funding.

However, unlike the use of data to measure and devise remedies for disproportionate minority contact, which has been the subject of considerable methodological attention,¹⁹¹ the use of data to measure gender disparities is not widespread or consistent. The use of data to assess and remedy gender disparities suffers because (1) few systems are examining their practices to determine whether they have a gender-based discriminatory impact; (2) the field has not advanced to the point of determining exactly how to measure discriminatory impact on girls; and

189. See LaWanda Johnson, *Creating Juvenile Justice: Models for Change*, 93 JUDICATURE 22, 23 (2009); Stan Schneider & Lola Simpson, *Getting on Board With Juvenile Justice Information Technologies*, JUVENILE JUSTICE, *supra* note 38, at 456, 459–64.

190. Schneider & Simpson, *supra* note 189, at 464–75.

191. Here again, the elevation of DMC to a core requirement resulted in federal guidance on the methodology to best assess DMC. Prior to 2002, when the focus was on confinement, DMC was usually measured using the Disproportionate Representation Index (DRI), which compared the percentage of youth of color at a specific decision point with the percentage of youth of color in the general population. Following 2002, the Relative Rate Index (RRI) became more common, and is considered to be the more accurate measure. The RRI compares the rate of youth of color in the system at a particular decision point with the rate of white youth at that decision point and does not consider this in relation to the number of youth of color in the general population. The RRI focuses attention on bias at each decision point. See James Bell & Raquel Mariscal, *Race, Ethnicity, and Ancestry in Juvenile Justice*, in JUVENILE JUSTICE, *supra* note 38, at 111.

(3) data-driven approaches rarely consider the structural gender inequality that is embedded in society and reinforced by many juvenile justice practices.

The following Subparts will consider three ways in which those in the juvenile justice system use data and how that use of data affects girls.

A. Intersectionality in Juvenile Justice

The use of data to understand and address discrimination in juvenile justice is furthest along in the area of racial disparities.¹⁹² In 1992, the JJDP Act required states to examine DMC as a core requirement of federal funding.¹⁹³ Prior to 1992, DMC was not a core requirement and was conceptualized more narrowly as disproportionate minority confinement. The expansion of the definition of race disparities from confinement to contact reflected the developing understanding, through data, that race bias occurs at each stage of the juvenile justice process—case processing, detention, adjudication, probation, disposition, and waiver to the adult system.¹⁹⁴ Moreover, studies show that these discretionary decisions reflect underlying prejudice among many decisionmakers. 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 character.¹⁹⁵

Like youth of color, girls in the justice system have also experienced bias resulting from the unaccountable exercise of discretion by decisionmakers throughout the juvenile justice process.¹⁹⁶ For girls, differential treatment has resulted in their arrest, charging, detention, probation, and even secure dispositions

192. See *infra* note 193–195 and accompanying text; *supra* note 191.

193. See Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5633 (2006).

194. See Bell & Mariscal, *supra* note 191, at 114–15; Bishop & Frazier, *supra* note 7, at 1180–82, 1184.

195. See George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 567 (1998); Sara Steen et al., *Explaining Assessments of Future Risk: Race and Attributions of Juvenile Offenders in Presentencing Reports*, in OUR CHILDREN, THEIR CHILDREN 254 (Darnel F. Hawkins & Kimberly Kempf-Leonard eds., 2005). There is a debate in the literature about how intentional the practices that result in disproportionate minority contact are. Some say that they reflect an intentional effort to subjugate minorities and as such are the most recent iteration of institutional racism. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); JAMES BELL & LAURA JOHN RIDOLFI, *ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM* 3–7 (2008).

196. Gender bias in the juvenile justice system is well documented. See, e.g., CHESNEY-LIND & PASKO, *supra* note 107, at 55–93.

for status offenses, misdemeanors, and technical violations of probation and parole.¹⁹⁷ Every day, girls are securely detained for offenses that would not result in detention for a boy.¹⁹⁸ This overuse of secure confinement has been attributed to (1) paternalism among decisionmakers 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' expressions of sexuality; and (6) intolerance of girls who are not readily cooperative and compliant.¹⁹⁹

Systemic discretion, with its opportunity for bias, has hit girls of color particularly hard, and black girls have been the swiftest growing group of girls referred to the juvenile courts and entering detention.²⁰⁰ In 1992, black girls made up 30 percent of girls referred to the juvenile courts, and by 2008, referrals of black girls had increased 72 percent from their 1992 level, making up 35 percent of all girls' referrals. The pattern was even more pronounced in detention. In 1992, black girls made up 35 percent of girls detained—a total of 15,237. By 2002, the number of black girls detained had nearly doubled to 30,009. By 2008, the number of black girls had declined, as it had for girls overall, but it still remained 75 percent higher than the 1992 level.²⁰¹ The proportion of black girls in the juvenile justice system is particularly dramatic because they make up only 8 percent of the U.S. population of youth aged ten to seventeen.²⁰²

Despite advances in the use of data to measure and address race disparities in juvenile justice systems, and despite the rapid growth in the number of black girls in the juvenile justice system, the intersection of race and gender in juvenile justice is almost never considered.²⁰³ Few systems routinely disaggregate their data by race and ethnicity 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 DMC rarely disaggregate by gender, and so, although we know that black girls are the swiftest growing population of girls in the system,

197. See SHERMAN, *supra* note 102, at 29–38; SHERMAN, MENDEL & IRVINE, *supra* note 14 (manuscript at 4–10).

198. See SHERMAN, MENDEL & IRVINE, *supra* note 14 (manuscript at 4–10).

199. SHERMAN, *supra* note 102, at 17–18.

200. See Taylor-Thompson, *supra* note 17, at 1159–61.

201. Sickmund et al., *supra* note 14; see also SHERMAN, MENDEL & IRVINE, *supra* note 14 (manuscript at 7).

202. *Easy Access to Juvenile Populations: 1990–2010*, OFF. JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.gov/ojstatbb/ezapop> (last updated Dec. 16, 2011).

203. See Nanda, *supra* note 17. For a discussion of gender and race intersectionality in adult women, see Crenshaw, *supra* note 17, at 1246.

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.

A recent study of girls in the justice system confirms disparities at the intersection of race and gender in six California counties.²⁰⁴ Black girls living in these six counties (in the Bay Area, Sacramento Valley, and Southern California) made up approximately 3 percent of the population in California, but they made up 15–60 percent of girls arrested in their respective counties, 24–74 percent of girls detained, and up to 67 percent of girls with institutional commitments.²⁰⁵ In one Bay Area county, black girls made up 12 percent of the population but 60 percent of girls' arrests, 74 percent of juvenile hall detentions, and 72 percent of in-custody holds.²⁰⁶ Disparities among black girls were greater and more consistent than for any other subpopulation of girls.²⁰⁷

Using data to identify decision points in the juvenile justice system that contribute to disparities, working with local decisionmakers to eliminate race as a factor in decisions, and making decisions more objective has been an effective strategy to reduce race disparities.²⁰⁸ A byproduct of this work is decisionmakers' improved awareness of the many ways in which their decisions have a race impact. In this new data-driven climate, similar strategies should be used by systems focused on reducing disparate treatment of black girls and other girls of color in the juvenile justice system.

B. Using Data to Promote Fairness

Gender bias for girls in juvenile justice systems occurs in small and hidden ways every day. Well-meaning decisionmakers act to protect girls, or act out of frustration at girls' misbehavior, and in doing so push girls deeper 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

204. See MONIQUE W. MORRIS, STEPHANIE BUSH-BASKETTE & KIMBERLÉ CRENSHAW, *CONFINED IN CALIFORNIA: WOMEN AND GIRLS OF COLOR IN CUSTODY* (forthcoming 2012).

205. *Id.* (manuscript at 25–28).

206. *Id.* (manuscript at 25).

207. *Id.* (manuscript at 24).

208. See ELEANOR HINTON HOYTT ET AL., ANNIE E. CASEY FOUND., *PATHWAYS TO JUVENILE DETENTION REFORM: REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION* (2001). Organizations such as the W. Haywood Burns Institute use this strategy successfully to assist local juvenile justice jurisdictions to reduce race disparities. See *Our Work*, W. HAYWOOD BURNS INST., <http://www.burnsinstitute.org/article.php?id=56> (last visited July 9, 2012).

so that girls with minor offenses and technical violations are driven deeper into the justice system.²⁰⁹ This occurs routinely, making data analysis of cases over time essential for jurisdictions to see the patterns in their actions.²¹⁰

For girls, then, the trend toward data-driven decisions is promising when data uncover gender bias, prompting systems to change policies and practices to be fairer. While greater availability of data holds promise, its usefulness to girls depends on the research questions asked and the ways systems respond. To benefit girls, systems must have data capacity and knowhow, an understanding of how girls are cumulatively disadvantaged, and a willingness to change longstanding practices if they are shown to have a discriminatory impact.

Washoe County, Nevada's experience illustrates how data can increase understanding and change practices for girls. As a Juvenile Detention Alternatives Initiative (JDAI) jurisdiction, Washoe County closely tracks detention data and strives to base policy and practice decisions on that data.²¹¹ Since 2006, county officials have been closely monitoring data about girls in their system in an effort to eliminate the unhelpful secure detention of girls, prevent girls from unnecessarily penetrating their juvenile justice system, and improve services to girls in the community.²¹²

This 2006 data revealed that 90 percent of detained girls were confined for technical violations of probation and not for new crimes.²¹³ Upon closer analysis, it was determined that in 2006, 50 percent of girls were on probation for misdemeanor offenses and 10 percent were on probation for status offenses.²¹⁴ These girls were placed on probation for offenses that were unlikely to have triggered a probation sentence for boys, such as shoplifting, possession of alcohol, possession of marijuana, and domestic battery.²¹⁵ Probation conditions were then imposed,

209. See *supra* notes 83–119 and accompanying text.

210. For examples of such data analysis, see SHERMAN, MENDEL & IRVINE, *supra* note 14 (manuscript at 19–46).

211. The Juvenile Detention Alternatives Initiative (JDAI) is a fifteen-year-old initiative of the Annie E. Casey Foundation designed to help jurisdictions reduce the unnecessary detention of youth. Now in 110 jurisdictions across the United States, JDAI has been very effective using a data-driven approach to increase objectivity in detention decisions. See RICHARD A. MENDEL, ANNIE E. CASEY FOUNDATION, TWO DECADES OF JDAI: FROM DEMONSTRATION PROJECT TO NATIONAL STANDARD 2 (2009).

212. Telephone Interview With Carey Stewart, Dir., Washoe Cnty. Dep't of Juvenile Justice Servs. (Mar. 23, 2012).

213. Washoe Cnty. Dep't of Juvenile Servs., Washoe County Detention Reform for Girls (2007) (unpublished report) (on file with author), cited in SHERMAN, MENDEL & IRVINE, *supra* note 14 (manuscript at 50).

214. *Id.*

215. *Id.*

and when girls failed to comply with those conditions, they were lawfully detained. Washoe County's data were consistent with national data. In 2006, approximately 40 percent of detained girls were confined for technical violations or status offenses as compared with 25 percent of boys.²¹⁶

Without data, Washoe County would not have seen its pattern of imposing probation disproportionately on misdemeanor and status-offending girls, resulting in their detentions for technical violations. Seeing that pattern allowed officials to consider the attitudes that result in those sentences and rethink their probation practice. Washoe County administrators decided on the most targeted solution: They eliminated probation sentences for status offenders across the board and reduced the use of probation as a sentence for misdemeanors. Instead, they now address these cases through voluntary services or the child and family services system. Overall, the use of secure detention for girls in Washoe County dropped a dramatic 50 percent from 2006 to 2010.²¹⁷ At the same time, system practices have become more intentional and reflective. Having changed the way they manage cases to respond to the needs of girls and families, Washoe County has prevented girls from penetrating the formal juvenile justice system.²¹⁸

While the failure of systems to examine the intersection of race and gender in their data illustrates the unmet potential of data-driven decisionmaking, Washoe County's experience illustrates that potential being met. In Washoe County, data use allowed administrators to identify and reduce the discriminatory impact often embedded in juvenile justice practices. However, as with DMC, federal leadership is critical for experiences like this to become the norm. States should be required to collect juvenile justice data by gender and cross-reference it by race and ethnicity categories so they can understand the impact of juvenile justice decisions on subgroups of girls. With an ability to identify gender-based and race- and gender-based discriminatory impact in a range of juvenile justice decisions and practices, local jurisdictions will have the data needed to understand how juvenile justice decisions and practices in their jurisdictions support gender bias that has been present since the beginning of juvenile justice in the United States.

216. *Easy Access to the Census of Juveniles in Residential Placement: 1997–2010*, OFF. JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.gov/ojstatbb/ezacjrp> (last updated Dec. 19, 2011).

217. The number of girls detained in Washoe County was reduced from 489 in 2006–2007 to 382 in 2007–2008, to 304 in 2008–2009 and 244 in 2009–2010. SHERMAN, MENDEL & IRVINE, *supra* note 14 (manuscript at 51).

218. Carey Stewart, Deputy Dir., Washoe Cnty., Nev. Dep't of Juv. Services, Presentation at Juvenile Detention Alternatives Initiatives Inter-site Conference: Girls and Detention Reform: Tools for Reform (Nov. 29, 2006); *see* SHERMAN, MENDEL & IRVINE, *supra* note 14 (manuscript at 51–52).

C. Assessing Risk: The Assessment Debate

Juvenile justice systems' increasing use of validated, objective assessment instruments to guide important decisions is another instance of the trend favoring data-driven decisionmaking. Risk and risk/needs assessment instruments are used to assist courts in detention and disposition decisions. These instruments quantify the risk of a youth failing to appear in court (in the case of detention) or of reoffending (in the case of both detention and postadjudication instruments). In addition, the "needs" components in the instruments can assist postdisposition planning.²¹⁹

In the field, there has been debate around the role of gender in developing and implementing these instruments. Should these instruments be gender neutral or gender responsive? Should they include questions related to what we know to be issues prevalent among girls in the juvenile justice system to guide systems toward gender-responsive, postadjudication services; or should they strive for gender neutrality, mindful of the risk of widening the net of girls who are under juvenile justice supervision because of their needs? If the assessment is gender neutral on its face, is it being administered in a gender neutral way? If gender is to be considered, how should it be considered? Is gender alone predictive of future delinquency, or should the instrument focus on factors associated with gender? If the analysis focuses on factors associated with gender, how can it guard against sweeping high-need, low-risk girls further into a juvenile justice system that is ill equipped to assist them?

The discussion around gender and risk-assessment instruments illustrates the complexities and limitations of the data-driven movement in juvenile justice. As with establishing evidence-based practice,²²⁰ the relatively low numbers of girls in the juvenile justice system and the design of the system around boys have slowed the development of assessment instruments for girls. In its 2010 scan of assessment instruments, the Girls Study Group identified thirty-five risk or risk/needs assessment instruments and, of those, rated eleven as favorable (having positive gender-based performance information), three as unfavorable, and twenty

219. See Gina M. Vincent, John Chapman & Nathan E. Cook, *Risk-Needs Assessment in Juvenile Justice: Predictive Validity of the SAVRY, Racial Differences, and the Contribution of Needs Factors*, 38 CRIM. JUST. & BEHAV. 42 (2011). For a discussion of the reliability of needs factors in predicting postdisposition outcomes by gender, see Craig S. Schwalbe, *A Meta-analysis of Juvenile Justice Risk Assessment Instruments: Predictive Validity by Gender*, 35 CRIM. JUST. & BEHAV. 1367 (2008).

220. See *infra* text accompanying notes 235–248.

—one as having unknown gender-based performance information.²²¹ A risk/needs assessment that includes areas of specific concern for girls, such as sexual victimization, runs the real risk of sweeping more girls into the system as a result of their needs.

New York's experience with its postadjudication risk assessment instrument illustrates the difficulty of, and potential backlash to, explicitly considering gender in juvenile justice decisionmaking. New York's Probation Assessment Tool (PAT) was designed in 2003 as a validated instrument to be used by probation officers to recommend postadjudication delinquency dispositions to the Family Court.²²² The PAT, designed by the Vera Institute of Justice and the New York Probation Department, assesses a youth's risk of reoffending and on that basis makes a recommendation as to the level of restrictiveness needed in the postadjudication disposition.²²³ The court, bound by statute to "order the least restrictive available alternative . . . which is consistent with the needs and best interests of the respondent and the need for protection of the community,"²²⁴ is not required to follow the probation recommendation, but that recommendation and the PAT score tend to be given great weight in ordering dispositions.²²⁵

New York's PAT was part of an effort to increase consistency and rationality in probation recommendations through a data-driven, objective approach. In assessing risk of reoffense, the PAT assigns an "asset score" based on the age, gender, charge, arrest history, school attendance, peer group, and substance abuse characteristics of the youth, which are all factors associated with future offending. The PAT was based on an analysis of 730 adjudicated juvenile delinquents receiving dispositions in spring 2000 whose arrest patterns were tracked for three years.²²⁶ Based on that data, New York's PAT awards fourteen asset points to

221. See SUSAN BRUMBAUGH, JENNIFER L. HARDISON WALTERS & LAURA A. WINTERFIELD, *SUITABILITY OF ASSESSMENT INSTRUMENTS FOR DELINQUENT GIRLS* 6 (2010). In addition to risk and risk/needs assessments, the authors also studied global needs assessments, substance abuse instruments, and mental health instruments. In all, they identified 143 instruments and found seventy-three favorable for gender based performance. *Id.* at 5–6.

222. *In re* Geraldine A., 920 N.Y.S.2d 241, No. D-16725/09, slip op. at 3 (N.Y. Fam. Ct. Nov. 23, 2010).

223. *Id.* at 3–4; Memorandum From Joel Miller to N.Y.C. Dep't of Probation (2010) [hereinafter Miller Memorandum] (on file with author).

224. *Geraldine A.*, No. D-16725/09, slip op. at 3 (citing N.Y. FAM. CT. ACT § 352.2(2)(a) (McKinney 2008)).

225. *Id.*, slip op. at 26–27.

226. Miller Memorandum, *supra* note 223.

girls based on their gender, indicating that they are less likely to reoffend than similarly situated boys.²²⁷

In *In re Geraldine A.*,²²⁸ a New York Family Court judge criticized the PAT for automatically awarding asset points to girls based on gender, finding that the PAT “impermissibly discriminates against juvenile males by awarding a preference to delinquent females in the form of asset points based solely on the immutable fact of their gender.”²²⁹ The judge described eight “similarly situated” youth before the court for disposition. In these cases, the fourteen asset points awarded for gender resulted in probation recommendations of less restrictive dispositions for the girls than the boys.²³⁰

The court further criticized the PAT for removing the discretionary, individualized determinations of the needs of each juvenile that are a critical component of juvenile court dispositions. The court went into detail about the outcomes in the selected cases to suggest that the less restrictive PAT recommendations were incorrect and expressed concern that the Probation Department is, in effect, rewriting the juvenile statutes through its policy of relying on the PAT.²³¹

New York’s PAT is noteworthy as a rare risk-assessment instrument using gender as a predictor of positive behavior—being a girl reduced the likelihood of reoffending. It is unusual both because it uses gender, rather than factors associated with gender, and because it uses gender to predict positive rather than negative behavior. Instruments that consider factors associated with girls generally use negative behaviors, such as running away, which increase the likelihood of a more restrictive disposition. Research underlying the PAT supported its positive approach, showing that in their first eighteen months in the community following disposition, 56 percent of boys were rearrested compared with just 22 percent of girls; a more than twofold difference.²³²

Gender matters in juvenile justice and, while assigning a significant number of asset points to all girls may be too blunt a mechanism, it contrasts with discretionary juvenile justice decisions that often restrict girls more than boys for minor

227. *Id.*

228. 920 N.Y.S.2d 241.

229. *Id.*, slip op. at 29.

230. *Id.*, slip op. at 6.

231. There is tension in juvenile justice jurisprudence between the authority of the judiciary and that of the executive. These separation of powers issues have arisen in cases restricting the court’s authority to order specific juvenile justice dispositions as interfering with the ministerial authority of the agency. See, e.g., *In re Isaac*, 646 N.E.2d 1034, 1040 (Mass. 1995); *In re Jeremy*, 646 N.E.2d 1029, 1033 (Mass. 1995).

232. Miller Memorandum, *supra* note 223.

offenses.²³³ In addition to the court's finding that the PAT discriminates against juvenile males, the judge reasoned that girls are ill served by the inflated PAT score, which may result in less services and less supervision than they need.²³⁴ Contrary to this view, the longstanding juvenile justice notion that a nonempirical determination of need should form the basis for disposition has not served girls well. Given this, objective risk/needs assessments are a positive development for girls.

D. Evidence-Based Practice and Girls

In the late 1990s, social work and other social sciences popularized evidence-based practice (EBP), which originated in the health fields,²³⁵ and in the early 2000s EBP made its way into juvenile justice. EBPs are practices or programs that have been determined effective through rigorous, scientific methods, and because they are rigorously evaluated, they are considered by many to be the best possible interventions and services to achieve specific outcomes.²³⁶

In the last ten years, the movement favoring EBP in juvenile justice has become firmly rooted, reinforced by federal funding requirements that increasingly favor programs with an evidence base.²³⁷ The movement in favor of EBP in juvenile justice has professionalized the field and improved outcomes in many systems.²³⁸ In fact, it is striking that juvenile justice systems have continued for so long without the use of EBP or other proof of positive outcomes.²³⁹

However, the EBP movement in human services has been criticized, often in ways that are directly relevant to girls and other minority populations in the

233. See Meda Chesney-Lind & Francine Sherman, *Gender Matters in Juvenile Justice*, N.Y.L.J., Dec. 7, 2010, at 6; *supra* text accompanying notes 85–119, 213–216.

234. *Geraldine A.*, No. D-16725/09, slip op. at 32.

235. EVIDENCE-BASED REHABILITATION: A GUIDE TO PRACTICE 4 (Mary Law & Joy MacDermid eds., 2008).

236. See Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 597 (2009).

237. See, e.g., Soler, Shoenberg & Schindler, *supra* note 19, at 488–93; *Blueprints for Violence Prevention: Overview*, UNIV. COLO. BOULDER INST. BEHAV. SCI., <http://www.colorado.edu/cspv/blueprints/index.html> (last visited July 9, 2012). See generally Peter W. Greenwood & Susan Turner, *Establishing Effective Community-Based Care in Juvenile Justice*, in JUVENILE JUSTICE, *supra* note 38, at 477.

238. See Jeffrey A. Butts & John K. Roman, *Better Research for Better Policies*, in JUVENILE JUSTICE, *supra* note 38, at 505. The authors argue for careful and clearly explained juvenile justice research to inform policies and programs. While they agree that the evidence-based practice (EBP) movement advanced the science behind juvenile justice, they reject the notion that there is one methodology or approach suited to all the research needs of juvenile justice systems. *Id.*

239. See Diane M. Myers & Anne F. Farrell, *Reclaiming Lost Opportunities: Applying Public Health Models in Juvenile Justice*, 30 CHILD. & YOUTH SERVICES REV. 1159 (2008) (tracking dismal outcomes).

juvenile justice system.²⁴⁰ First, despite the increasing use of data by juvenile justice systems and programs, many programs do not have the capacity to mount the level of scientific research needed to establish a program as evidence based, leaving effective innovations unable to compete for federal funding and ultimately unlikely to continue. This is particularly problematic for programs serving minority populations (including girls) and those located in minority communities, where the number of youth in a program might not support the level of evaluation needed to establish an evidence-based practice. Critics argue that promising innovations, and particularly those tailored to and effective with minority cultures, are losing financial support and disappearing as a result. This leaves minority communities with programming poorly suited to their specific needs.

Girls exemplify this concern. As part of an agenda to promote research needed to better understand and make local decisions regarding girls in the justice system, the Girls Study Group tried to identify “promising programs, program elements, and implementation principles.”²⁴¹ Out of sixty-one programs identified as specifically targeting girls’ delinquency, it found that forty-four had not been studied. Of the remaining seventeen that had been studied, the Girls Study Group found none had conclusive evidence of effectiveness.²⁴² For example, it faulted the research design in eleven of the programs as inadequate to determine whether positive outcomes were the result of the program or some other factor.²⁴³ The GAO investigated the Study Group’s approach to promoting effective girls’ programming and found that programs were being held to the high standards required for evidence-based practices. Some of the experts interviewed by the GAO believed those standards were unrealistically high and burdensome, resulting in positive programs failing to achieve EBP classification.²⁴⁴ Despite much work and funding, little guidance had been provided to the field about how to develop and measure successful programming for girls, and the standards used to assess success may have resulted in successful programs and program elements being overlooked. The GAO report prompted OJJDP to provide additional training and technical

240. See Butts & Roman, *supra* note 238; *infra* note 246.

241. EILEEN REGEN LARENCE, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-721R, JUVENILE JUSTICE: TECHNICAL ASSISTANCE AND BETTER DEFINED EVALUATION PLANS WILL HELP TO IMPROVE GIRLS’ DELINQUENCY PROGRAMS 4 (2009); see also *Girls in the Juvenile Justice System: Strategies to Help Girls Achieve Their Full Potential: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 6–8 (2009) (testimony of Eileen R. Larence, Dir., Homeland Sec. & Justice Issues, U.S. Gov’t Accountability Office).

242. LARENCE, *supra* note 241, at 6.

243. *Id.*

244. *Id.*

assistance to the field about program evaluation. Moreover, in fiscal year 2011, OJJDP awarded evaluation grants to promising girls' programs in an effort to further develop the evidence needed to determine what works for girls.²⁴⁵

A second critique is that evidence-based practice is too rigid a frame to capture all that makes juvenile justice programming effective and removes the individualized quality central to social work and juvenile justice programming. Critics argue that evidence-informed practice, which would combine evidence with craft, is a better goal.²⁴⁶ An evidence-informed practice approach would be more flexible and more reflective of instincts developed through a range of professional experiences, which, while not easily quantifiable, might be more effective among diverse populations.

Finally, a critique drawn from women's international development work seems most apt.²⁴⁷ Success for girls in the justice system (like women in developing countries) requires social change, and the methodology used to identify evidence-based practices does not measure, or even really consider, social change. Although evaluation for EBP does not preclude other types of research, the emphasis on EBP to the exclusion of other ways of thinking about interventions reduces the focus on ways to promote and measure social change.²⁴⁸

As we have seen, the entry of misbehaving and high-need girls with low levels of criminality into the juvenile justice system is perhaps the most consistent and intransigent problem reformers for girls face.²⁴⁹ This problem has existed

245. Funded programs were considered "promising" under the Girls Study Group's original criteria. One example is Girls' Circles, used in many probation departments and community based programs, which is being evaluated (under an OJJDP grant) to determine whether it rises to the level of an evidence-based program. See *Current Research*, ONE CIRCLE FOUND., <http://www.girlscircle.com/research.aspx> (last visited July 9, 2012).

246. See generally Eileen Gambrill, *Evidence-Informed Practice: Antidote to Propaganda in the Helping Professions?*, 20 RES. ON SOC. WORK PRAC. 302 (2010); Craig Winston LeCroy, *Knowledge Building and Social Work Research: A Critical Perspective*, 20 RES. ON SOC. WORK PRAC. 321 (2010); Edward J. Mullen & David L. Streiner, *The Evidence for and Against Evidence-Based Practice*, 4 BRIEF TREATMENT & CRISIS INTERVENTION 111 (2004); Aron Shlonsky & Leonard Gibbs, *Will the Real Evidence-Based Practice Please Stand Up? Teaching the Process of Evidence-Based Practice to the Helping Professions*, 4 BRIEF TREATMENT & CRISIS INTERVENTION 137 (2004).

247. See SRILATHA BATLIWALA & ALEXANDRA PITTMAN, ASS'N FOR WOMEN'S RIGHTS IN DEV., CAPTURING CHANGE IN WOMEN'S REALITIES—THE CHALLENGES OF MONITORING AND EVALUATING OUR WORK (2010); IRENE GUIJT ET AL., CTR. FOR DEV. INNOVATION, EVALUATION REVISITED: IMPROVING THE QUALITY OF EVALUATIVE PRACTICE BY EMBRACING COMPLEXITY (2011); ALLAN KAPLAN & SUE DAVIDOFF, THE PROTEUS INITIATIVE, THE SINGER, NOT THE SONG: THE VEXED QUESTIONS OF IMPACT MONITORING AND SOCIAL CHANGE (2011).

248. See Butts & Roman, *supra* note 238.

249. See *supra* text accompanying notes 24–40, 108–114, 209–216.

since the formation of the U.S. juvenile justice system and continues today. Over time, a range of laws and system practices has perpetuated this overintervention. When one practice is removed (for example, through the deinstitutionalization of status offender mandate in 1974),²⁵⁰ another surfaces (such as the current practice of arresting girls disproportionately for home-based violence).²⁵¹ Data-driven approaches, when used intentionally to provide jurisdictions with the insights needed to identify and ultimately address systemic bias, will benefit girls and create fairer systems. But ultimately, one must conclude that only real social change—changed attitudes and appreciation of girls—will resolve the issue in a meaningful and lasting way.

CONCLUSION

In 2012, twenty years after the Juvenile Justice and Delinquency Prevention Act instructed states to assess 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. Improved understanding and court recognition of child development's role in juvenile justice policy, coupled with federal recognition of girls' developmental needs, suggests that a more complete understanding of girls' behavior in their homes and on the streets will guide future policy. The increased use of data in juvenile justice systems is particularly promising given the hidden nature of so much of the gender-based inequity in justice system practices.

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

250. *See supra* text accompanying notes 32–37.

251. *See supra* text accompanying notes 108–126.

the justice 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 over time.

As we once again enter 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. Juvenile justice reformers must utilize the tools now available to them to prevent repetition of unconscious gender discrimination and create a fairer and more positive justice for girls.