

*Closing the Widening Net:
The Rights of Juveniles at Intake*

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Abstract

Should juveniles have more, fewer, the same or different procedural rights than are accorded to adults? This question, posed by Professor Arnold Loewy for a panel at the 2013 Texas Tech Law Review Symposium on Juveniles and Criminal Law, requires us to examine our goals for the juvenile court system. My primary goal, having practiced in both adult criminal and juvenile delinquency forums for over twenty years, is to ensure that the reach of juvenile court is no wider than necessary, as research indicates that when children are processed through the juvenile court system and adjudicated delinquent, the impact is not benign. Potential negative consequences of juvenile delinquency adjudications are felt in such areas as housing, employment, immigration and education as well as enhanced penalties for future offenses. Further, longitudinal studies show that children exposed to juvenile court reoffend at higher rates and are stigmatized by even the most minimal contact with the juvenile court system.

This Article, the second in a series on the disproportionate representation of low-income children in the U.S. juvenile justice system, examines the intake process, which operates as one of the primary gateways to juvenile court. The Introduction describes a typical case, highlighting the shortcomings of the current process and the risks—short- and long-term—that they pose to juveniles. Part II presents the nuts and bolts of the intake stage, including details regarding who conducts the screening, its purpose, and the assessment criteria applied. Part III discusses the procedural rights of juveniles at intake according to the U.S. Supreme Court, state courts and legislatures. Part IV analyzes what can—and often does—go wrong with the intake process, resulting in a wider net being cast around minorities and low-income children and families. Part V offers proposals for reform, including providing counsel to children prior to intake; mandatory advising of children and their parents by the juvenile probation officer conducting the intake interview; and

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introducing an objective rubric for the evaluation of delinquency complaints by juvenile probation officers.

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I. Introduction

Deanna was a 15-year-old African-American girl in the ninth grade at a local high school.¹ She lived with her mother, who was unemployed, and two younger brothers in government-subsidized housing. She had never been in juvenile court before, and had an unblemished disciplinary record at school. She was struggling academically, however, and was in danger of failing algebra.

At the beginning of December, a rumor circulated among the students that someone was going to “shoot up” the school on the 21st, the date signifying the end of the phase of the Mayan calendar thought by some to represent “doomsday” or the end of the world. Dan Marks, the police officer assigned to the high school (called a “school resource officer”), interviewed several students in an attempt to determine who had started the rumor. A ninth grade boy claimed that he had heard it from Deanna. When questioned by Officer Marks, Deanna denied having started the rumor but admitted she had seen something about it on Facebook and had mentioned it to her friends.

The rumor quickly spread among students, teachers and parents, and the school community became alarmed. The central administration sent out an email to the district, relaying the rumor and advising parents to keep their children home from school on the 21st if they chose. As a result, a greatly reduced number of students attended on that date, and extra security had to be assigned to the school campus.

¹ This scenario is loosely based on several cases handled recently by the UNC Juvenile Justice Clinic. Names and identifying details have been altered to protect the identities of the children and families involved. *See* notes of author (Jan. 23, 2013) (on file with author).

At the beginning of January, Officer Marks filed a juvenile delinquency complaint against Deanna, alleging that she had committed the Class H (serious) felony of making a false report concerning mass violence on educational property,² an element of which requires proof that the juvenile knew or had reason to know that the report was false.³ The complaint was then assigned to the juvenile probation officer (JPO) handling intake, Lydia Johnson, whose evaluation consisted of a twenty-minute interview with Deanna and her mother, during which Deanna had no right to counsel and received no information concerning any other constitutional rights.

Later that month, Ms. Johnson authorized that the complaint be filed as a juvenile delinquency petition, following her office's policy that complaints alleging felonies would be presumptively approved. Thus, the JPO conducted no independent investigation or analysis of the evidence. The cursory intake interview, which had focused on Deanna's failing grades and her mother's unemployment, merely confirmed for Ms. Johnson that juvenile court involvement was warranted for the family.

At the beginning of February, Deanna's first appearance on the felony was held, at which time the judge notified her that counsel would be appointed. By then, however, Deanna had already received a ten-day suspension from school and missed yet another day of instruction to appear in juvenile court. During the ensuing weeks, Deanna had become increasingly anxious and upset. She was teased at school for having been suspended, and she worried that her friends would find out about her court case. Meanwhile, her mother's job hunt had been interrupted by the events of the case, increasing the tension at home. By the time she met with her public defender, Deanna only wanted the case to end, imploring, "Can we just move on and say I started the rumor? This is stupid."

The way in which Deanna and her family entered the juvenile court system is representative of how many young people find themselves in U.S. delinquency courts. Deanna was accused of typical adolescent misconduct committed in a school setting, which is one of the primary feeders into juvenile court.⁴ Since the mid-1990s, "zero tolerance" policies in public schools have led to children being criminally charged for minor misbehavior that in the past would likely have only been addressed internally through school disciplinary

² N.C. GEN. STAT. § 14-277.5 (2012).

³ See JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 544-45 (7th ed. 2012) (section on N.C. GEN. STAT. § 14.277.5).

⁴ See Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 J. L. & POL'Y 53, 74-76 (2012).

procedures.⁵ As a result, Deanna not only received a two week out-of-school suspension, but she was also questioned by a police officer, interviewed by a JPO, adjudicated in a public forum, and placed on court supervision for a period of at least twelve months, with a variety of conditions imposed on both her and her parents.⁶

Although the media, members of the public, and even some JPOs, prosecutors, and judges colloquially refer to juvenile court as “kiddie court” and presume that it has few negative effects on the children who are adjudicated delinquent,⁷ research indicates that the impact of juvenile court processing—such as that which Deanna and her family experienced—is not benign.⁸ Potential negative consequences of juvenile delinquency adjudications are felt in such areas as housing, employment, immigration and education as well as enhanced penalties for future offenses.⁹ Deanna’s felony adjudication, for example, could be used against her in the contexts of pretrial release, plea negotiation, or sentencing if she were to face new charges as an adult in criminal court.¹⁰ The prosecutor could invoke it during a bail hearing to support an argument for a higher bond or during plea bargaining to push for a more punitive sentence.¹¹ It could also potentially hinder her ability to obtain employment and to gain admission to colleges as well as financial aid

⁵ See CATHERINE Y. KIM ET AL., *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* 122-27 (2010); Barbara Fedders & Jason Langberg, *School Discipline Reform: Incorporating the Supreme Court’s Age Matters Jurisprudence*, *Loyola L. Rev.* (2013) (forthcoming); Marsha L. Levick & Robert G. Schwartz, *Changing the Narrative: Convincing Courts to Distinguish between Misbehavior and Criminal Conduct in School Referral Cases*, 9 *D.C. L. REV.* 53, 75 (2007).

⁶ See, e.g., N.C. GEN. STAT. § 7B-2510 (2012) (allowing the court to impose conditions that are “related to the needs of the juvenile and...reasonably necessary to ensure that the juvenile will lead a law-abiding life, including...that the juvenile...submit to random drug testing...report to a juvenile court counselor as often as required by the juvenile court counselor...make specified financial restitution or pay a fine...cooperate with electronic monitoring...[and] satisfy any other conditions determined appropriate by the court.”).

⁷ See, e.g., Tamar R. Birkhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 *Rutgers L. Rev.* 959, 970-77 & n. 975 (2010) (examining how judges, prosecutors, and JPOs often share the normative view that juvenile court is not an adversarial forum and that no negative consequences to the child will result).

⁸ See Birkhead, *supra* note __, at 96-99.

⁹ See Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 *NEV. L.J.* 1111, 1114-18 (2006).

¹⁰ See, e.g., N.C. GEN. STAT. § 7B-3000(e)-(f) (2007) (stating that a juvenile’s delinquency adjudication for a felony offense may be subsequently used by law enforcement, the magistrate, and the prosecutor for pretrial release and plea negotiating decisions in adult criminal court, and that adjudications for violent felonies may be used in subsequent criminal proceedings for impeachment or as aggravating factors at sentencing). See also RANDY HERTZ ET AL., *TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT* 276–78 (ALI-ABA 2007) (1991) (discussing potential collateral criminal and civil consequences of juvenile delinquency adjudications, including enhanced penalties for future offenses, immigration consequences, and forfeiture).

¹¹ See, e.g., N.C. GEN. STAT. § 7B-3000(e)-(f), *supra* note __.

awards.¹² Furthermore, longitudinal studies have demonstrated that children exposed to juvenile court reoffend at higher rates and are stigmatized by even the most minimal contact with the juvenile court system.¹³

This Article, written for the 2013 Texas Tech Law Review Symposium on Juveniles and Criminal Law and the second in a series that began with *Delinquent by Reason of Poverty*,¹⁴ examines the intake process, which operates as one of the primary gateways to juvenile court. Part II presents the nuts and bolts of the intake stage, including details regarding who conducts the screening, its purpose, and the assessment criteria applied. Part III discusses the procedural rights of juveniles at intake according to appellate courts and state legislatures. Part IV analyzes what can—and often does—go wrong with the intake process, resulting in a wider net being cast around minorities and low-income children and families. Part V offers proposals for reform, including providing counsel to children prior to intake; mandatory advising of children and their parents by the juvenile probation officer conducting the intake interview; and introducing an objective rubric for the evaluation of delinquency complaints by juvenile probation officers.

II. What is Intake?

Intake is the threshold screening and gate-keeping function of the juvenile court. Some jurisdictions authorize prosecutors to decide whether to file a formal petition or divert or adjust a juvenile's case informally.¹⁵ Most jurisdictions have juvenile court probation officers (JPOs) conduct intake screening during which they decide to divert, supervise informally, or refer

¹² See, e.g., Bonnie Mangum Braudway, *Scarlet Letter Punishment for Juveniles: Rehabilitation Through Humiliation?*, 27 CAMPBELL L. REV. 63, 81 (2004) (describing the problems faced by individuals whose juvenile court record is revealed to employers and colleges).

¹³ See Birkhead, *supra* note __, at 97-100 (discussing research finding that the iatrogenic and criminogenic effects of juvenile court intervention were measured at a rate seven times higher for youths charged with relative minor crimes than for youths who were not subjected to police-initiated juvenile court intervention). See also RICHARD A. MENDEL, NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 10-12 (2011) (finding that arresting children and placing them in the juvenile justice system increases the likelihood of their continued involvement in the courts as youth and adults) http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf.

¹⁴ See generally Birkhead, *supra* note 4 (exploring the disproportionate representation of low-income children in the juvenile court system and calling for lawmakers and system players to end the practice of “needs-based delinquency,” in which the court gives as much or more weight to the perceived needs of the child and her family than the quality of the evidence against her).

¹⁵ See, e.g., ARIZ. JUV. CT. RULES OF PROCEDURE 2 (C) (2012) (“The county attorney, within its sole discretion, may designate for diversion or divert the prosecution of a juvenile accused of an incorrigible or a delinquent act to a community based alternative program or to a diversion program administered by the juvenile court.”).

juveniles to the prosecutor for filing of formal petitions.¹⁶ Typically the chief juvenile probation officer for each judicial district establishes intake services. The importance of intake was noted by the U.S. Supreme Court in 1971 as one of the reasons that juveniles have no constitutional right to trial by jury:

To the extent that the jury is a buffer to the corrupt or overzealous prosecutor in the criminal law system, the distinctive intake policies and procedures of the juvenile court system to a great extent obviate this important function of the jury.¹⁷

Although each state follows the specific language of its own juvenile code, the general purpose of the intake process is to assess a combination of the following: whether there are reasonable grounds to believe the facts alleged are true; whether the facts alleged constitute a delinquent or undisciplined offense; whether the facts alleged are sufficiently serious to warrant court action; and whether to obtain assistance from community resources when court referral is not necessary.¹⁸ This last option, also termed diversion, “typically takes the form of police probation, community service or participation in such programs as teen court.”¹⁹

Social scientists have identified a number of beneficial purposes of diversion. It has been found to mitigate the rigidity of the criminal law, which reduces a vast variety of behaviors into relatively few categories.²⁰ Intentionally pushing someone in a school hallway, for example, can be prosecuted as assault and taking a pencil from a teacher’s desk without returning it as simple larceny; diversion provides an alternative avenue to hold children and adolescents responsible for such behavior without formal court involvement. It can also be understood as “a concession to the limits of judicial and community resources,” as it is more efficient and cost-effective than court proceedings.²¹ In addition, diversion helps avoid the stigma and negative effects on youth of appearing in the public forum of delinquency court and being formally adjudicated as “juvenile delinquents.” This concern draws on “labeling theory,” in which the juvenile defines herself as “deviant”

¹⁶ See, e.g., N.C. GEN. STAT. §§ 7B-1700 to 1703 (2012).

¹⁷ *McKeiver v. Pennsylvania*, 403 U.S. 528, 552 (1971) (concurring opinion).

¹⁸ See H. Ted Rubin, *The Emerging Prosecutor Dominance of the Juvenile Court Intake Process*, 26 CRIME & DELINQ. 302, 304 (1980).

¹⁹ See Kenneth Polk, *Juvenile Diversion: A Look at the Record*, 30 CRIME & DELINQ. 648-659 (1984).

²⁰ See, e.g., LESLIE J. HARRIS, LEE E. TEITELBAUM & TAMAR R. BIRCKHEAD, *CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS* 473 (3d ed. 2012).

²¹ See, e.g., *id.* at 474; Holly A. Wilson & Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review*, 40 CRIM. J. & BEHAV. 497, 514 (2012) (“An additional potential benefit of using diversion...is the growing evidence that [it] is more cost-effective than [traditional processing].”)

or “dangerous” because others perceive her that way.²² Diversion has been shown to reduce recidivism rates, as data suggests that behavioral or skill-oriented methods delivered within the community are more successful than ‘scared-straight’ or ‘shock incarceration’ deterrence programs.²³

There are three basic critiques of diversion.²⁴ Some juvenile justice advocates assert that it “widens the net” of court intervention, as it brings youth into the system for informal treatment who would not otherwise be processed. In fact, studies have shown that diverted youth experience as much intrusion into their lives as those whose cases are not diverted.²⁵ Diverted youth may also experience labeling, as the types of services mandated during a diversion program (i.e., psychological counseling, drug treatment) can impose a harsher label on a young person (i.e., mentally ill, drug addict) than referral to juvenile court, where the case may ultimately be dismissed or the child adjudicated not delinquent. As a result, social scientists have concluded that it is “[o]f particular importance [to ensure] that youth presenting low levels of risk are provided minimal levels of intervention or none at all.”²⁶ A second critique, advanced by law enforcement and JPOs, asserts that diversion trivializes the seriousness of law breaking, as there is no formal acknowledgement of wrongdoing by the juvenile offender and the case resolution is often a mere “slap on the wrist.”²⁷ A third perspective contends that diversion does a disservice to crime victims, as often they are not involved in diversion schemes, precluding them and the juveniles themselves from the potential benefits of mediation and restorative justice programs.²⁸

²² See Anne Rankin Mahoney, *The Effects of Labeling on Youths in the Juvenile Justice System: A Review of the Evidence*, 8 L. & SOC’Y REV. 583 (1974) (finding that the person labeled delinquent “begins to employ deviant behavior or a role based upon it as a means of defense, attack, or adjustment to the overt or covert problems created by the societal reaction to his behavior.”).

²³ See, e.g., Mark R Pogrebin, et al., *Constructing and Implementing a Model Juvenile Diversion Program*, 15 YOUTH & SOC’Y 305 (1984) (introduction of juvenile diversion project reduced recidivism among those handled informally); Robert Regoli et al., *Using an Alternative Evaluation measure for Assessing Juvenile Diversion Programs*, 7 CHILD. & YOUTH SERVICES REV. 21 (1985) (recidivism rate of juveniles participating in diversion programs in Denver, Colorado, found to be 26 percent lower than that of non-diverted juveniles); Wilson & Hoge, *supra* note __, at 514 (“In nearly all cases, these [diversion] programs led to lower levels of reoffending than traditional processing through the juvenile justice system.”).

²⁴ See, e.g., Anne Larason Schneider, *Diverting Status Offenses from Juvenile Court Jurisdiction*, 30 CRIME & DELINQ. 347, 357 (1984); Bruce Bullington et al., *A Critique of Diversionary Juvenile Justice*, 24 CRIME & DELINQ. 59 (1978).

²⁵ See, e.g., Charles E. Frazier & John K. Cochran, *Official Intervention, Diversion from the Juvenile Justice System, and Dynamics of Human Service Work: Effects of a Reform Goal Based on Labeling Theory*, 32 CRIME & DELINQ. 157, 172-73 (1986).

²⁶ Wilson & Hoge, *supra* note __, at 499.

²⁷ See, e.g., HARRIS ET AL., *supra* note __, at 475.

²⁸ See, e.g., ALLINA BOUTILIER ET AL., *DIVERSION LITERATURE REVIEW* 8-9 (2009) (describing restorative justice programs as mediation and conflict-resolution programs that “[bring] together victims, offenders, families, and other key stakeholders in a variety of settings” and

Intake procedures vary considerably between and among states.²⁹ While some JPOs make screening decisions based on categorical rules (i.e., no diversion of felonies; automatic approval of the petition if the juvenile does not appear at her intake appointment), others conduct in-depth interviews and/or formal hearings. Generally, all children are assessed during intake for any immediate needs, such as mental health or substance abuse problems. Most JPOs also consider other factors, such as the young person's prior record, their school attendance and behavior, and the home environment. Upon a finding of legal sufficiency, the JPO then determines whether the complaint should be filed as a petition; the juvenile should be diverted; or the case resolved without further action.³⁰ In some jurisdictions, the JPO makes a referral to the prosecutor who assesses whether a formal petition should issue; in others, the prosecutor makes the screening decision without the JPO's input.³¹

The number of cases handled by juvenile courts throughout the U.S. has increased considerably during the past three decades.³² Data collected by the federal Office of Juvenile Justice and Delinquency Prevention reveals that for the most recent year for which we have statistics, delinquency courts processed an estimated 1.5 million cases, thirty percent greater than in 1985.³³ The female proportion of the delinquency caseload has risen from approximately twenty percent in 1985 to thirty percent in 2009.³⁴ In 2009, whites were seventy-eight percent of the juvenile population and blacks were sixteen percent; yet whites made up only sixty-four percent of delinquency cases, while blacks made up thirty-four percent.³⁵ In addition to a higher percentage of girls and a disproportionate number of children of color entering the system, many more delinquency cases are handled formally than two decades ago. In 2009, nineteen percent of cases were dismissed at intake; twenty-five percent were diverted and handled informally; and fifty-five percent were handled formally with the filing of a petition, a considerable increase from 1985 when only forty-five percent of cases were referred to court.³⁶

III. Procedural Rights of Juveniles at Intake?

indicating that "offenders who meet their victims through mediation are far more likely to be directly held accountable for their behavior").

²⁹ See, e.g., HARRIS ET AL., *supra* note __, at 481.

³⁰ BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 366 (3d ed. 2009).

³¹ *Id.* at 414-15.

³² CHARLES PUZZANCHERA ET AL., JUVENILE COURT STATISTICS 2009 5, 13, 19, 36-37 (2012), available at <http://www.ojjdp.gov/pubs/239114.pdf>.

³³ *Id.* at 6.

³⁴ *Id.* at 13.

³⁵ *Id.* at 19-20 (finding that the total delinquency case rate for black juveniles was more than double the rate for white juveniles).

³⁶ *Id.* at 36-37.

In considering the import of the intake process and the potential for reform, it is critical to discuss how courts and legislatures articulate the procedural rights of juveniles at this stage, as it is likely that intake practices will change only when mandated by law.

A. The Right to Counsel

The foundational U.S. Supreme Court decision of *In re Gault*, holding that juveniles have a constitutional right to counsel among other due process rights,³⁷ explicitly applied only to the adjudicatory hearing.³⁸ However, the language and reasoning of *Gault* can be interpreted to support the contention that juveniles should also have counsel at intake:

The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'³⁹

In fact, the importance of counsel at intake was recognized even prior to *Gault*. In a 1966 note in the *Harvard Law Review*, it was stated that when intake practices resemble preliminary hearings in the criminal courts, counsel is essential to protect the rights of the child.⁴⁰ This was found to be particularly

³⁷ *In re Gault*, 387 U.S. 1 (1967).

³⁸ *Id.* at 13 (“[W]e are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process...”); *id.* at 36 n. 48 (“The problems of pre-adjudication treatment of juveniles, and of post-adjudication disposition, are unique to the juvenile process; hence what we hold in this opinion with regard to the procedural requirements at the adjudication stage has no necessary applicability to other steps of the juvenile process.”).

³⁹ *Id.* at 36 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)) (emphasis added).

⁴⁰ Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 810 (1966). See also *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (holding that a 14-year-old boy “cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights -- from someone concerned with securing him those rights -- and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.”); *Haley v. Ohio*, 332 U.S. 596, 601 (1948) (“But we are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice, and that, on the facts of this record, he had a freedom of choice. We cannot indulge those assumptions. Moreover, we cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial

important in cases in which the accused child provides inculpatory testimony during the initial interview with the JPO, for “[w]here a confession to the intake officer is admissible in court, the lawyer’s role at the adjudication stage will be severely limited if he is barred from the intake hearing.”⁴¹

This central question—whether juvenile court intake can be analogized to an adult criminal defendant’s preliminary hearing—hinges on whether the Sixth Amendment right to counsel provision extends to juveniles.⁴² In *Gault*, the Court relied on the Due Process Clause of the Fourteenth Amendment to establish a constitutional right to counsel for juveniles during the adjudicatory stage of delinquency cases.⁴³ Because juvenile proceedings had historically been considered as civil rather than criminal, the relevant inquiry was whether Fourteenth Amendment “fundamental fairness” standards required that juveniles receive the due process protections established under *Gault*.⁴⁴ While the Court’s opinion, as mentioned above,⁴⁵ may be interpreted to support a broader constitutional right to counsel for juveniles beyond just the trial phase, the Sixth Amendment may also be invoked to support such an extension.⁴⁶ In fact, lower courts have held that the Sixth Amendment right to counsel provision does extend to juveniles.⁴⁷

Therefore, if the Sixth Amendment—as incorporated by the Fourteenth Amendment—is applicable to juveniles, the question becomes whether intake is considered to be a “critical stage” of the proceedings and, thus, requires the appointment of counsel.⁴⁸ Although the U.S. Supreme Court has not directly

practices and make an empty form of the due process of law for which free men fought and died to obtain.”).

⁴¹ *Id.* at 789, 789 n.63 (“If...the intake practice resembles a preliminary hearing in the criminal courts, counsel is essential to protect the rights of the child (in such matters as giving testimony against himself which may not be accurate, may be distorted, or may not even be true).”).

⁴² Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 184-85 (2007).

⁴³ *Gault*, 387 U.S. at 41.

⁴⁴ *Id.* at 41, 62 (Black, J., concurring); *see also id.* at 72, 74, 76-77 (Harlan, J., concurring).

⁴⁵ *See supra* notes _ and accompanying text. *See also Gault*, 387 U.S. at 36 (majority opinion).

⁴⁶ Levick & Desai, *supra* note _, at 184-85.

⁴⁷ *See, e.g.,* *Deshawn E. ex rel. Charlotte E. v. Safir*, 156 F.3d 340, 349 (2d Cir. 1998 (applying Sixth Amendment protections to the right to counsel in delinquency proceedings); *United States v. Myers*, 66 F.3d 1364, 1370 (4th Cir. 1995) (applying Sixth Amendment safeguards to hearings deciding transfer from juvenile to adult criminal court); *John L. v. Adams*, 969 F.2d 228, 237 (6th Cir. 1992) (observing that the “independent constitutional right to counsel for juvenile appeals” is grounded in the Sixth Amendment’s right to counsel).

⁴⁸ *See Coleman v. Alabama*, 399 U.S. 1 (1970); (holding that preliminary hearings of an adversarial nature are “critical stage[s]” for purposes of Sixth Amendment analysis); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 305 (2003) (arguing that the Sixth Amendment supports the right to counsel for juveniles at intake). *See also Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (defining “critical stage” for the purposes of constitutional right to counsel as “points of time at or after the initiation of adversary judicial criminal

addressed the issue, most state courts and legislatures have held that the intake process is *not* considered a critical stage, particularly when statements made by the juvenile during intake are excluded from consideration during the fact-finding stage. Fourteen states have enacted such laws, prohibiting statements of juveniles made to JPOs at intake, the preliminary interview, or preliminary inquiry from being admitted into evidence at an adjudicatory hearing or criminal trial.⁴⁹ In two of those states, the legislation also precludes information gathered during a preliminary mental health screening from being admitted in later proceedings.⁵⁰ In two other states, appellate courts have held that juvenile's statements during intake cannot be used at adjudication, but they are admissible on the issue of detention and fitness for juvenile treatment as well as to impeach the juvenile's testimony at trial or at disposition.⁵¹ It has been found that as a result of such protections, intake is not "critical stage" and there is no right to counsel.⁵²

Several states have enacted legislation allowing the admission of statements made to JPOs at intake as long as the juvenile has been advised of her rights against self-incrimination and made a valid waiver of those rights.⁵³ For instance, Connecticut law allows statements made during intake to be used in a subsequent proceeding only when they were given in the presence of a parent or guardian and after being advised of the right to counsel, right to remain silent, and privilege against self-incrimination.⁵⁴ Case law has narrowed the protections of this statute in Connecticut, however, so that even when such warnings have not been given, a juvenile's statements made during

proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”).

⁴⁹ LOURDES M. ROSADO & RIYA S. SHAH, PROTECTING YOUTH FROM SELF-INCRIMINATION WHEN UNDERGOING SCREENING, ASSESSMENT AND TREATMENT WITHIN THE JUVENILE JUSTICE SYSTEM 35, 40-41 (2007) (Ark., Ariz., D.C., Haw., Iowa, Ky., Me., Md., Miss., Mo., N.M., N.C., Tex., and Va.), available at http://www.jlc.org/sites/default/files/publication_pdfs/protectingyouth.pdf.

⁵⁰ *Id.* at 35, 41 (Tex. & Va.).

⁵¹ *See, e.g.,* *People v. Humiston*, 20 Cal. App. 4th 460 (1993) (holding that a juvenile's statements at intake are inadmissible at adjudication but admissible for impeachment when the child testifies inconsistently with statements made to JPO at intake); *In re Wayne H.*, 596 P.2d 1 (Cal. 1979) (the use of a minor's statements in subsequent juvenile or criminal proceedings would frustrate the purpose of the preliminary inquiry and therefore such statements are inadmissible as substantive evidence or for impeachment; however, statements may be admitted for consideration on the issues of detention and fitness for juvenile treatment); *In the Matter of Randy G.*, 487 N.Y.S.2d 967 (N.Y. FAM. CT. 1985) (juveniles' statements made during intake to a JPO are inadmissible at a fact-finding hearing but admissible at disposition).

⁵² *See, e.g.,* N.Y. FAM. CT. ACT § 735 (h) (McKinney 2012) (“No statement made to the designated lead agency...prior to the filing of the [juvenile] petition...may be admitted into evidence at a fact-finding hearing or, if the proceeding is transferred to a criminal court, at any time prior to a conviction.”); *In the Matter of Anthony S.*, 73 Misc.2d 187, 191 (1973) (holding that there is no right to counsel at intake, as it is not part of the adjudication process and would be disruptive of such process, “especially in view of the absolute statutory privilege of § 735”).

⁵³ ROSADO & SHAH, *supra* note __, at 41-42 (Alaska, Conn., D.C., N.M., Miss., and Tenn.).

⁵⁴ CONN. GEN. STAT. ANN. § 46b-137(a).

intake may be used at a subsequent transfer hearing⁵⁵ or criminal court prosecution.⁵⁶ In at least five other states, the statutory protections against admission of statements made at intake are fairly comprehensive.⁵⁷

In jurisdictions in which there is no statutory prohibition protecting the juvenile's statements from subsequent consideration at trial, courts disagree as to whether there should be a right to counsel at intake.⁵⁸ Most states guarantee counsel for juveniles but do not address the intake process specifically.⁵⁹ Others explicitly provide a right to counsel only after a formal petition has issued and an initial court date has been set.⁶⁰ Very few states explicitly provide a right to counsel at pre-adjudication proceedings.⁶¹ Arkansas is a particular anomaly, as it provides a right to counsel at intake while also prohibiting statements made to the intake officer from being used against the child "at any stage of any proceedings in circuit court or in any other court."⁶²

Scholars and juvenile justice advocates have premised the argument that children should not go unrepresented during the intake process on several grounds. Generally, they contend that the "distinct developmental status of youth" supports the need for the assistance of skilled counsel throughout the

⁵⁵ In re Ralph M. 559 A.2d 179 (Conn. 1989).

⁵⁶ State v. Ledbetter, 818 A.2d 1 (Conn. 2003).

⁵⁷ ROSADO & SHAH, *supra* note __, at 41-42 (Alaska, D.C., N.M., Miss., and Tenn.).

⁵⁸ See Jan C. Costello & Nancy L. Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 HARV. C.R.-C.L. L. REV. 41, 81 (1981) ("Few courts have considered juveniles' right to counsel at intake, and those which have are divided.").

⁵⁹ See, e.g., IDAHO CODE ANN. § 20-514 (1) ("As early as possible in the proceedings, and in any event before the hearing of the petition on the merits, the juvenile and his parents, or guardian, shall be notified of their right to have counsel represent them."); MINN. ST. JUV. DEL. RULE 3.01 ("The child has the right to be represented by an attorney. This right attaches no later than when the child first appears in court."). See also Tory J. Caeti et al., *Juvenile Right to Counsel: A National Comparison of State Legal Codes*, 23 Am. J. Crim. L. 611, 627 (1996) (finding seventeen states and D.C. that have enacted statutes providing juveniles with the right to counsel but that do not guarantee the right at "all stages" of delinquency proceedings).

⁶⁰ See, e.g., GA. CODE ANN. § 15-11-6 ("A party is entitled to representation by legal counsel at all stages of any proceedings *alleging delinquency*." (emphasis added)); UTAH R. JUV. RULE 26(a) ("A minor who is *the subject of a delinquency petition*...shall be advised of the...right...to be represented by counsel at all stages of the proceedings....") (emphasis added).

⁶¹ See, e.g., WASH. REV. CODE ANN. § 13.40.080 ("The right to counsel shall inure prior to the initial interview for purposes of advising the juvenile as to whether he or she desires to participate in the diversion process or to appear in the juvenile court. The juvenile may be represented at counsel at any critical stage of the diversion process, including intake interviews..."); ALA. CODE sec. 12-15-210 (a) (requiring that juveniles be informed of their right to counsel at the start of intake proceedings); ARK. CODE ANN. § 9-27-316 ("A juvenile and his or her parent...shall be advised...by the intake officer at the initial intake interview...that the juvenile has the right to be represented at all stages of the proceedings by counsel.").

⁶² ARK. CODE ANN. § 9-27-321 (2012).

entirety of the delinquency process, including the preliminary stages.⁶³ They have asserted that because children may make self-incriminating statements at the pre-adjudication stage, given the recent trend of earlier screening and assessment (often immediately after arrest but prior to any official court or attorney involvement), children should not go unrepresented in jurisdictions that allow these statements to be introduced at trial.⁶⁴ They have also suggested that because the decision to enter a juvenile pretrial intervention program is frequently made by the JPO at intake, intake is in fact a critical stage in the proceedings, justifying the appointment of counsel.⁶⁵ Further, if the purpose of intake is not mere screening but the JPO is in essence functioning as a police officer or a judge by imposing sanctions that compromise the child's liberty—such as informal probation, detention, or house arrest—counsel for the juvenile should be required.⁶⁶

Additional arguments in favor of the appointment of counsel at intake recognize the importance of the advocacy role at the intake stage. Since a child and her parent “may not be informed of the criteria and information employed at intake, counsel is necessary to compel [JPOs] to make explicit their criteria, to challenge inappropriate criteria, to assist the child and her parents in arguing for a referral or informal handling, and, if [dismissal] is precluded, to require the [JPO] to set forth explicit reasons for his decision.”⁶⁷ Similarly, defense counsel can ensure that the intake worker bases her determination of whether there is probable cause for the offense on reliable information regarding the charge and the nature of the juvenile's participation, rather than on a subjective judgment regarding the child's needs.⁶⁸ When the intake process is analogized to a type of dispositional or sentencing hearing that occurs on the front end of the adjudicatory process, reformers assert that if one values representation at the latter stage, it would be just as valuable at intake.⁶⁹ Indeed, the presence of counsel has even been found to enhance the intake process. The *Gault* Court, citing the President's Crime Commission Report, stated that:

⁶³ See, e.g., Levick & Desai, *supra* note __, at 182-83 (arguing that counsel at all stages of the juvenile court process is warranted because a youth's diminished comprehension of the legal setting makes her more susceptible to coercion; her limited ability to understand the content and consequences of the process hinders her ability to obtain the best outcome for herself; and her limited education, intellectual development and maturity suggest the need for heightened legal protections).

⁶⁴ John C. Lore III, *Pretrial Self-Incrimination in Juvenile Court: Why a Comprehensive Pretrial Privilege is Needed to Protect Children and Enhance the Goal of Rehabilitation*, 47 U. LOUISVILLE L. REV. 439, 442-43 (2009); Andrew W. Maron, *Constitutional Problems of Diversion of Juvenile Delinquents*, 51 NOTRE DAME L. REV. 22, 39 (1975-76).

⁶⁵ See, e.g., S'Lee Arthur Hinshaw II, *Juvenile Diversion: An Alternative to Juvenile Court*, 1993 J. DISP. RESOL. 305, 318 (1993).

⁶⁶ See, e.g., Ferster, Courtless & Snethen, *Separating Official and Unofficial Delinquents: Juvenile Court Intake*, 55 IOWA L. REV. 864, 891-82 (1969).

⁶⁷ PIERSAM ET AL., LAW AND TACTICS IN JUVENILE CASES 220 (1977).

⁶⁸ *Id.* at 221.

⁶⁹ Marrus, *supra* note __, at 305.

[I]t is quite possible that in many instances lawyers, for all their commitment to formality, could do more to further therapy for their clients than can the small, overworked social staffs of the courts....⁷⁰

The reality on the ground, however, is that while most jurisdictions have as a matter of state law extended the right to counsel established by *Gault* to dispositional hearings, representation at other stages is much less frequent. As a result, lawyers rarely appear at intake, despite the fact that best practice standards, as articulated by such organizations as the American Bar Association, recommend that they do so:

When a juvenile is taken into custody, placed in detention or *made subject to an intake process*, the authorities taking such action have the responsibility promptly to notify the juvenile's lawyer, if there is one, or advise the juvenile with respect to the availability of legal counsel.⁷¹

B. The Right to Pre-Intake Warnings

Is the questioning that takes place during intake sufficiently similar to custodial interrogation to require that the JPO provide the juvenile with the equivalent of *Miranda* warnings? Should the juvenile be advised that she has the right to counsel, the right to remain silent, and the privilege against self-incrimination before any questioning takes place? Whether a JPO can be characterized as a law enforcement officer may be crucial to answering this question. In the few situations in which the issue has been addressed on appeal, courts have found that although JPOs may be authorized to take into custody and detain a juvenile under certain circumstances, JPOs' duties and limitations are different enough that they should *not* be considered law enforcement officers for purposes of *Miranda*.⁷²

State juvenile codes often specify that the JPO is to conduct the intake interview in a non-accusatorial setting in which questioning is not explicitly conducted with a view toward eliciting guilt or obtaining evidence to be used against the juvenile in an adjudicatory hearing.⁷³ Instead, the primary purpose of the interview is to assist the JPO in deciding at the outset whether—if the child is in detention—she needs to be further detained pending a court hearing

⁷⁰ *Gault*, 387 U.S. at 39 n.65.

⁷¹ ILJ/ABA JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, STANDARD 2.4. STAGES OF PROCEEDINGS (1980) (emphasis added).

⁷² *See, e.g.*, *Matter of Stanley C.* 116 A.D.2d 209, 212-13 (N.Y. 1986); *State v. Karow*, 154 Wis. 2d 375 (App. 1990) (the meeting with the juvenile intake worker was not the “functional equivalent” of interrogation, as the worker did not engage in any “artifice or coercion to extract a confession or other inculpatory statement”).

⁷³ *See, e.g.*, *In re Wayne H.*, 24 Cal. 3d 595, 601 (1979) (citing Cal. Juvenile court code).

and/or if the child is not in detention, whether the delinquency complaint should be dismissed, handled informally, or filed as a formal petition.⁷⁴

However, some courts and commentators have asserted that despite the stated purpose and seemingly neutral objective of the intake interview, protections for the juvenile are warranted. As discussed above,⁷⁵ the JPO questions the child at intake in detail about the alleged offense, and the child's answers may be used against her in a variety of ways. They may form the basis of the JPO's decision to divert the case or refer it to court. In states that do not protect statements made by the juvenile during intake from introduction at the adjudicatory state, they may be used to impeach the youth's testimony at a later trial.⁷⁶ In some states, they may even be used against the child as a valid confession in subsequent court adjudication.⁷⁷

It may be argued that the atmosphere at intake is equally coercive as that at police questioning, further necessitating pre-intake warnings. As the Court observed in *Gault*:

One of the purposes [of the privilege of self-incrimination] is to prevent the state, whether by force or by psychological domination, from overcoming the mind and the will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.⁷⁸

Due to the nature of intake, the juvenile may be anxious to cooperate, to appear respectful and willing to assist in the JPO's investigation. Since informal resolution of the case—whether by diversion or dismissal—typically depends on the level of cooperation exhibited by the child, she is often under significant pressure to admit to the allegations against her. As a result, the “carrot/stick” approach utilized by the JPO at intake produces “the antithesis” of a voluntary and knowing confession.⁷⁹

In fact, the year after *Gault* was decided, two child welfare workers characterized the intake officer as someone with conflicting interests and roles vis-à-vis the child, providing additional support for mandatory advising prior to questioning:

⁷⁴ See, e.g., *id.*

⁷⁵ See *supra* notes _ and accompanying text.

⁷⁶ See, e.g., In the Matter of Johnson, CA-95-13, 1996 WL 363811 (OHIO CT. APP. June 20, 1996) (“The obligation to appear and answer questions of a probation officer does not turn an otherwise voluntary statement into a compelled statement. For purposes of Miranda, a suspect is not in custody when speaking to his probation officer, as there is no formal arrest or restraint on freedom of movement. A probation officer is not required to give Miranda warnings before questioning a client, even if the [JPO] is consciously seeking an incriminating statement.”).

⁷⁷ See Maron, *supra* note _, at 39 & n.156.

⁷⁸ *Gault*, 387 U.S. at 47 (footnote omitted).

⁷⁹ PERSMA ET AL., *supra* note _, at 92-93.

Forced to react to a problem on a crisis basis, [the JPO] must respond to the child's offense and not his adjustment problem. Reacting to the community's fear, he becomes an arresting officer and not a treatment person. A helping or a counseling relationship is precluded by the nature of the [JPO's] involvement with the child. This dilemma is well-supported in self-image studies of probation officers showing that they consistently identify themselves with law enforcement officials.

Thus, probation, theoretically designed for crime prevention—a tool whereby youngsters are able to escape the punitive aspects of the correctional system—is, in reality, the first step after arrest down the gauntlet leading to imprisonment and isolation.⁸⁰

Perhaps most persuasive is the argument that warnings are necessary prior to the intake interview when incarceration—or continued incarceration—could result.⁸¹ Given that the primary purpose of intake is to determine whether a delinquency petition should be filed, there is almost always a resultant possibility of commitment to a juvenile locked facility.⁸² Even when the juvenile's statements at intake cannot be used at adjudication, they frequently can be introduced at disposition. Thus, the information elicited by the JPO during intake can be used against the juvenile during a “critical stage”—when the judge determines whether out-of-home placements or other conditions that restrict the juvenile's freedom of action are appropriate.

One juvenile court has experimented with a system in which during the pre-trial process, children were granted all of the rights articulated by *Gault*, including notice, the privilege against self-incrimination, and counsel.⁸³ Thus, at every stage of the proceeding, beginning with the initial contact with police, the child and her parent were made aware of the child's rights both orally and in writing.⁸⁴ Even children alleged to be status offenders by virtue of running away, being truant from school, or being “incorrigible,” were advised of their rights prior to the intake interview.⁸⁵ Following its implementation of this new protocol, the court concluded:

⁸⁰ Gerald R. Wheeler et al., *Youth in the Gauntlet*, 32 FED. PROBATION 21, 23 (1968).

⁸¹ See *Mathis v. United States*, 391 U.S. 1 (1968) (holding that *Miranda* applies when there is a possibility that criminal proceedings may be brought).

⁸² PIERSMA ET AL., *supra* note __, at 92-93. Juvenile locked facilities are given different labels in different states but most share the qualities and conditions typically associated with prisons. See, e.g., N.C. GEN. STAT. § 7B-1501 (29) (2012) (defining a “youth development center” as a “secure residential facility authorized to provide long-term treatment, education, and rehabilitative services for delinquent juveniles committed by the court to the Department”).

⁸³ William H. Ralston, Jr., *Intake: Informal Disposition or Adversary Proceeding?*, 17 CRIME & DELINQ. 160 (1971).

⁸⁴ *Id.* at 164-66.

⁸⁵ *Id.*

The application of *Gault* to the pre-adjudication stage of the juvenile process has not destroyed the purpose of the juvenile court but has insured procedural uniformity and the accountability of court personnel. Filling in the forms referred to above does not require a great amount of time. Parents and the accused child usually appreciate the fact that their case has not been prejudged by intake personnel and are more receptive to the interview.⁸⁶

Such a result, in which the child and parents are more open to and candid with the JPO after being advised of their rights, is consistent with the theory of procedural justice, which holds that there is a connection between a juvenile's belief that she was fairly treated during the adjudicatory process and the likelihood of her future compliance with the law and legal actors.⁸⁷

In fact, the *Gault* Court recognized the potential impact of procedural justice theory on juveniles' recidivism rates in 1967.⁸⁸ In rejecting the assertion that the substantive benefits of the juvenile court process "more than offset" the denial of due process rights to juvenile, the Court stated that due process protections may, in fact, be "more impressive and ...therapeutic" for the juvenile than the long-assumed benefits of the juvenile system—namely, its informality and the compassion of the judge.⁸⁹ Citing a 1966 report on juvenile delinquency by two sociologists, the Court asserted that when harsh punitive measures follow on the heels of "procedural laxness," a child will feel that she has been "deceived or enticed."⁹⁰ The Court concludes that "[u]nless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."⁹¹

IV. What Can Go Wrong with Intake?

One of the principal problems with the intake process is that cases in which there is no legal sufficiency can still be approved for either formal or informal processing. As a legal screening mechanism, intake is intended to ascertain whether there is a fit between the court's jurisdiction and the child's age, place of offense, and evidentiary sufficiency for the particular offense charged. If one of these elements does not exist, the case should be rejected. Yet, determining whether there is a "need" for formal court action or intervention is almost always another factor in the investigation, and it can be a

⁸⁶ *Id.* at 166-67.

⁸⁷ See Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFFALO L. REV. 1447, 1481-82 (2009).

⁸⁸ *Gault*, 387 U.S. at 26.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* (quoting STANTON WHEELER & LEONARD S. COTTRELL, JR., *JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL* 33 (1966)).

factor that trumps the absence of an evidentiary basis for the charge.⁹² Although some jurisdictions require review by a prosecutor upon request of the complainant when the JPO declines to file a petition, there is no corollary rule allowing for the juvenile to request prosecutorial review after the JPO approves the filing of a petition.⁹³

Traditionally, juvenile court intake has emphasized social over legal factors.⁹⁴ As a result, JPOs with little legal training frequently fail to conduct a careful legal screening and instead focus exclusively on the perceived needs of the family.⁹⁵ Although JPOs often utilize objective evidence-based tools, such as “risk and need assessments”⁹⁶ of the child, to ascertain whether to resolve the matter informally or via a judicial hearing, JPOs may give such instruments greater credence than is warranted at this decision point and overlook whether there is, in fact, legal sufficiency for the charge.⁹⁷ Further, juveniles and their families who are unrepresented cannot realistically be expected to balance the considerations of accepting informal probation with its potential negative consequences, resulting in children agreeing to informal terms despite a lack of evidentiary support for the underlying criminal charge.⁹⁸ Similarly, juveniles may admit to the offense after waiving counsel without giving any thought to the legal sufficiency of the case.⁹⁹

In addition, information can be gathered during intake that has an adverse impact on the juvenile at detention and disposition hearings, even in jurisdictions in which incriminating statements made to the JPO at intake cannot be introduced at trial. For instance, parents who are unfamiliar with the process fail to appreciate that characterizations of their child as “always high” or “out of control,” which they express in the heat of the moment and impulsively share with the JPO, can be held against the child at these later

⁹² See Birckhead, *supra* note __, at 81-84.

⁹³ See, e.g., D.C. CODE ANN. § 16-2305 (c) (2012) (“If the Director of Social Services has refused to recommend the filing of a delinquency or neglect petition, the Corporation Counsel, on request of the complainant, shall review the facts presented and shall prepare and file a petition if he believes such action is necessary to protect the community or the interests of the child. Any decision of the Corporation Counsel on whether to file a petition shall be final.”).

⁹⁴ See Rubin, *supra* note __, at 304.

⁹⁵ *Id.*

⁹⁶ See GINA M. VINCENT ET AL., RISK ASSESSMENT IN JUVENILE JUSTICE: A GUIDEBOOK FOR IMPLEMENTATION 5 (2012) (“Risk assessment in this Guide refers to the practice of using a structured tool that combines information about youth to classify them as being low, moderate or high risk for reoffending or continued delinquent activity, as well as identifying factors that might reduce that risk on an individual basis.”), available at http://works.bepress.com/thomas_grisso/107/.

⁹⁷ *Id.* at 63 (explaining that there is “little research on use of empirically validated risk tools” at intake, and recommending that a brief tool should be used rather than a comprehensive one because of feasibility as well as self-incrimination concerns, but advising that brief risk assessment tools “may not be as accurate in estimating risk level and may not be useful for developing an intervention strategy”).

⁹⁸ See, e.g., *State v. Quiroz*, 733, P.2d 963 (Wash. 1987).

⁹⁹ Rubin, *supra* note __, at 304.

stages. Similarly, information gathered at intake can be provided to prosecutors, potentially impacting the plea negotiation process in a way that harms juveniles—such as when subjective judgments by the JPO that the juvenile “lacks remorse” or is gang-involved are invoked by the prosecutor to reject a juvenile’s offer to admit to a less serious offense than the one initially charged.

Further, the juvenile may believe that because she has “confessed” to the JPO, there is “no sense” in having a trial.¹⁰⁰ Because counsel has not been present during intake to explain that the juvenile’s statements to the JPO may not, in fact, be admissible confessions, the child and her parents are unable to weigh their options rationally. As a result, the juvenile is more likely to waive counsel at her initial court appearance and proceed with a quick plea or to insist upon an admission even *after* an attorney is appointed, regardless of what counsel advises her regarding defense strategy or the weaknesses of the state’s case.

When the intake process is not handled fairly and results in scenarios such as these, the system inevitably casts a wider net around minorities and low-income children and families.¹⁰¹ For instance, some jurisdictions follow the policy that if a juvenile’s parents cannot be contacted and they do not appear for intake, the child is automatically ineligible for diversion. This disproportionately harms low-income families, who may move residences frequently or may not be able to take off from work to attend the intake meeting. Likewise, some jurisdictions have a policy that calls for automatic detention of the child if the family cannot be reached and fails to appear for their intake appointment.¹⁰² Such circumstances may be said to violate the spirit, if not the letter, of *Gault*.¹⁰³

Similarly, diversion to informal probation or community-based sanctions often requires the child to admit guilt during intake, premised on the theory that acceptance of responsibility indicates amenability to treatment.¹⁰⁴ Studies on race have shown that for a variety of reasons, white children admit

¹⁰⁰ See, e.g., Ellen Marrus, *The Effective Assistance of Counsel in the Wonderland of “Kiddie Court”: Why the Queen of Hearts Trumps Strickland*, 39 No. 4 CRIM. L. BULL. ART 1 (2003).

¹⁰¹ Birkhead, *supra* note __, at 84.

¹⁰² See Allison T. Chappell et al., *Exceptions to the Rule: Exploring the Use of Overrides in Detention Risk Assessment*, Youth Violence & Juv. Justice 1, 8-9 (2012) (finding that when intake officers use their own discretion to “override” the decision indicated objectively by a detention risk assessment tool, African-American youth were detained at higher rates than whites, allowing the overrides “to introduce subjectivity and bias into what is supposed to be an empirical process”).

¹⁰³ *Gault*, 387 U.S. at 38 (“[I]n order to assure ‘procedural justice for the child,’ it is necessary that counsel be appointed as a matter of course wherever coercive action is a possibility, without requiring an affirmative choice by child or parent.”).

¹⁰⁴ Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing*, in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 23, 49 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005)

guilt more frequently at this early stage than do children of color.¹⁰⁵ Causation in this context is unclear, although it could be the result of the fact that children of color are more likely than whites to be wrongfully arrested as well as that children of color may be more likely to distrust authority. Nonetheless, JPOs perceive the failure to admit guilt as demonstrating a lack of remorse, which can be an additional reason not to recommend diversion.¹⁰⁶

What happens at intake—and the ways in which it can go wrong for the child and her family—is critically important, because the decision-making process in juvenile court is cumulative. Decisions made by the initial participants—whether they are police, school administrators, or JPOs—affect those made by subsequent participants in the system.¹⁰⁷ For example, a recent analysis of youth case file records from a large urban juvenile court in the southwest revealed that youth from areas with high levels of concentrated disadvantage—primarily black and Latino youth—were more likely to be confined than youth from more affluent areas.¹⁰⁸ It was found that because JPOs perceive areas of disadvantage as high risk and dangerous for youth, they were more likely to recommend incarceration for these juveniles rather than community-based treatment.¹⁰⁹ In this way, a single attribution premised on socio-economic status provided the basis for removal of youth from their homes and neighborhoods, and as a result, young people were “treated more severely merely because they face economic strain.”¹¹⁰ Therefore, it is vital that protections be put in place to ensure that initial screening determinations are based on relevant criteria and accurate facts.

V. Reasons Not to Have Counsel Present at Intake

In recent years, there has been a crisis in the area of indigent criminal defense—the system is underfunded and public defenders are over-worked and under-resourced.¹¹¹ Given this reality, it is essential to anticipate and carefully consider the arguments against proposals for the provision of counsel to youth at the intake stage of juvenile court adjudication.

The primary ground for opposition to the appointment of counsel at intake is that it would not be “a worthwhile return for the considerable

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L.REV. 821, 822-833 n.310 (1988).

¹⁰⁸ Nancy Rodriguez, *Concentrated Disadvantage and the Incarceration of Youth: Examining How Context Affects Juvenile Justice*, 50 J. RESEARCH IN CRIME & DELINQ. 189, 206-07 (2013).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 208.

¹¹¹ See, e.g., THOMAS GIOVANNI & ROOPAL PATEL, GIDEON AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL 3-8 (Brennan Center 2013), available at http://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf.

demands on professional time and effort that representation at these early stages would require.”¹¹² In other words, the costs to the state and to the lawyer herself in terms of time and effort would outweigh the potential benefits to the juvenile, for in most instances (the argument goes), the “offense is admitted and the jurisdiction is clearcut.”¹¹³ Further, in those few cases in which the petition is not legally supported and slips through the cracks at intake, it can be “corrected by dismissal or appropriate disposition” at the hearing.¹¹⁴ This view presumes great confidence in the knowledge, judgment and discretion of JPOs as well as in the juvenile court system at large, summarily concluding that “[u]nless the lawyer is sophisticated, well-informed in such matters, and intimately familiar with his client’s personal and environmental background, he can contribute little of value to the professional intake worker’s review.”¹¹⁵

Others have argued that legal representation is not necessary to ensure that the rights of juveniles are protected at this stage, as no harm can result from a full investigation into the child and her family. It is argued that the JPO is merely acting in the “best interests” of the child, motivated only by a desire to “help” the child and her family in the form of referrals to services and treatment.¹¹⁶ This is a position that carries the most weight, perhaps, in the minority of states that have statutes precluding the introduction of statements made at intake at subsequent proceedings.

It is also argued, either separately or in conjunction with the assertions above, that the presence of counsel would be disruptive to the intake process, preventing the JPO from gathering necessary information and imposing an adversarial tone into the process.¹¹⁷ It is asserted that the routine presence of lawyers in the offices of JPOs during intake would formalize what is now an informal proceeding. Counsel might also raise legal matters that would be better reserved for the adjudicatory hearing as well as impair the “open interview climate” that is required for the JPO to conduct case evaluation.¹¹⁸

VI. Proposals for Reform

There are several potential reforms of the intake system that could sufficiently address the concerns expressed in this Article. The first and perhaps most controversial¹¹⁹ is the mandatory provision of counsel to

¹¹² See, e.g., Margaret K. Rosenheim & Daniel L. Skoler, *The Lawyer’s Role at Intake and Detention Stages of Juvenile Court Proceedings*, 11 CRIME & DELINQ. 167, 172 (1965).

¹¹³ *Id.*

¹¹⁴ *Id.* at 172-73.

¹¹⁵ *Id.* at 173.

¹¹⁶ See PIERSMA ET AL., *supra* note __, at 222.

¹¹⁷ Rosenheim & Skoler, *supra* note __, at 173.

¹¹⁸ *Id.*

¹¹⁹ See *supra* notes __ and accompanying text (discussing the legal arguments for and against a constitutional right to counsel for juveniles at intake).

juveniles prior to the intake interview. Although it can be argued that a legal basis for the right to counsel at this stage is found in U.S. Supreme Court precedent on procedural due process and Sixth Amendment grounds,¹²⁰ Supreme Court jurisprudence on the right to counsel for adult defendants,¹²¹ American Bar Association practice standards,¹²² as well as state legislation on juvenile right to counsel generally,¹²³ budgetary and other practical considerations could arguably make this initiative quite difficult to implement.

More realistic and, thus, pragmatic options also exist. Mandatory advising of both the parent and child prior to the intake interview could provide the due process protections necessary while not overburdening an already under-resourced system.¹²⁴ Participation in the intake interview by the juvenile and her parents would be voluntary. They would have the right to refuse to participate in an interview, and the JPO would have no authority to compel their attendance or ability to penalize their absence. At the time of the request, the JPO would inform the juvenile and her parents, either in writing or orally, that attendance is voluntary, that the juvenile has the right to remain silent, and that the juvenile has the right to be represented by counsel.¹²⁵ Prior to the commencement of the interview, the JPO would inform the juvenile and her parents that (depending on state law): incriminating statements made to JPO re the offense can/cannot be introduced at trial; any statements made at intake can/cannot be introduced at disposition; and any statements made at intake can/cannot be introduced at a detention hearing.

The need for safeguards against the risk of potential self-incrimination at intake has been recognized in the context of the use of screening and assessment instruments by JPOs at intake.¹²⁶ For instance, the developer of an instrument commonly used at intake emphasizes that prior to the interview the youth must be advised and informed of who will have access to the information collected, including any court/juvenile justice staff, and the possible uses of the information.¹²⁷ The youth should be cautioned against talking about past or current charges, and the interview should be stopped if the youth does so.¹²⁸ Likewise, the users' manual for a screening instrument designed to identify potential instances of mental and emotional disturbance and drug or alcohol use instructs that "[e]thical and legal obligations" require

¹²⁰ See Levick & Desai, *supra* note __, at 184-90; *supra* notes __ and accompanying text.

¹²¹ Levick & Desai, *supra* note __, at 184-90.

¹²² IJA/ABA JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO THE JUVENILE PROBATION FUNCTION: INTAKE AND PREDISPOSITION INVESTIGATIVE SERVICES 12, Standard 2.13 (1980) ("A juvenile should have an unwaivable right to the assistance of counsel at intake.").

¹²³ Levick & Desai, *supra* note __, at 190-91.

¹²⁴ IJA/ABA JUVENILE JUSTICE STANDARDS, *supra* note __, at 12, Standard 2.14.

¹²⁵ *Id.*

¹²⁶ ROSADO & SHAH, *supra* note __, at 26.

¹²⁷ *Id.*

¹²⁸ *Id.*

JPOs who administer the instrument to do one of two things.¹²⁹ The first option is to inform youth that anything they say can be used against them at adjudication; this is problematic, however, as it could jeopardize the purpose of the screening by encouraging youth to conceal certain behaviors or feelings.¹³⁰ The second approach is to “develop system-wide protections that control pre-adjudication use of screening data.”¹³¹ Indeed, limiting the tool’s dissemination and the purposes of its use would be preferable to the first option, as would the enactment of state legislation or court rules prohibiting any information obtained from mental health or substance abuse screening from being introduced as evidence against the youth in any adjudication or disposition hearing.¹³²

A third strategy—which could be implemented along with pre-intake advising—would involve the imposition via state legislation or court rules of a clear rubric for evaluation of delinquency complaints. This would remove some of the unfettered discretion that currently lies in the hands of the JPO and it would ensure that cases lacking probable cause¹³³ [“PC”] would not make their way into the juvenile court system. First, however, the following preliminary questions must be answered before the JPO can proceed further:

- Have all of the requisite elements of the offense been alleged?
 - If not, reject the complaint;
 - If so, proceed to the next step.
- Has a determination been made that reasonable grounds exist to believe that the allegations set forth in the complaint are true?
 - If not, reject the complaint;
 - If so, proceed to the next step.
- Are the grounds for referral sufficiently serious to warrant court action?
 - If not, reject the complaint;
 - If so, proceed to the next step.
- If a child is charged with participating with others in an offense, what intake decision was made in the companion cases?
 - Is this different than your decision?
 - If so, is this decision based on the role of the child in the offense or other factors?
 - If it is the former, proceed to the next step;

¹²⁹ *Id.* at 27.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 27-28.

¹³³ *See Terry v. Ohio*, 392 U.S. 39, 42 (1968) (reasonable grounds to believe that a crime has been or is being committed).

- If it is the latter, discuss further with a supervisor.
- Is there a possibility that the referral source will admit that the referral was hasty or inappropriate?
 - If so, reject the complaint;
 - If not, proceed to the next step.
- Has the referral source (school, police department, private retailer, social services agency) exhausted resources available to it?
 - If not, consider rejecting the complaint;
 - If so, discuss further with a supervisor.¹³⁴

Once these preliminary matters are addressed and answered, only then may the JPO advance to the formal rubric for evaluating the complaint:

- If the JPO finds no PC for the underlying offense:
 - No action (formal or informal) is taken, regardless of the JPO’s estimation of the child’s “needs”
- If the JPO finds PC and the juvenile has prior offenses:
 - Formal action only may be taken
- If the JPO finds PC, the child has no priors and is determined to have high risk/needs:
 - Informal or formal action may be taken, depending on the JPO’s discretion
- If the JPO finds PC, the child has no priors and low risk/needs:
 - Informal action only may be taken

This approach would represent a middle ground between what often happens during the intake evaluation in juvenile court—namely that cases lacking a factual basis are approved for filing—and the practice in adult criminal court, where the defendant’s needs are never a factor in the analysis of whether a criminal complaint should issue.

If 15-year-old Deanna’s case had been evaluated under this rubric, the result would have been far different.¹³⁵ A JPO who had been trained to pay close and careful attention to the legal basis for the allegation may have concluded that there was no PC for the felony of making a false report concerning mass violence on educational property, as there was insufficient evidence that Deanna knew or had reason to know the rumor was false; following the rubric, this would result in no action—formal or informal—being taken by law enforcement. In the alternative, a JPO may have concluded that there was PC, but that given Deanna’s lack of prior court involvement and

¹³⁴ See PIERSMA ET AL., *supra* note __, at 223-24.

¹³⁵ See *supra* notes __ and accompanying text.

current low risk/needs assessment, only informal action—such as a diversion plan—could be pursued. Although it is possible that a JPO could have concluded that there was PC and that Deanna had high risk/needs, the rubric would still provide discretion for the JPO to recommend either informal or formal court processing. All of these possibilities would be preferable to the result that did occur: automatic filing of a juvenile felony petition with no consideration of the evidence alleged or the juvenile’s needs.

A final proposal is directed at changing the culture of the intake process. Rather than encouraging JPOs to practice triage in which they must rely on implicit biases¹³⁶ to distinguish between families of means and low-income ones to quickly determine which juveniles most “need” court intervention, court rules would mandate that they follow objective, concrete criteria for decision-making.¹³⁷ First, JPOs handling intake would be trained to critically consider their own views, motivations, and perspectives regarding their work. Through performance reviews with their supervisors and peers, they would answer the following and then examine their responses:

- What are the intake worker’s views concerning the proper role of the juvenile court?
 - Does she tend to screen and refer persons *out* to community agencies or does she tend to screen *in* persons who are perceived in need of treatment?
- What informal disposition does the intake worker tend to favor?
 - Punishment?
 - Professional assistance?
 - Restitution?
 - Evidence of remorse?
- What is the intake worker’s “treatment orientation?”
 - To which “experts,” if any, will she listen?
- If the child or her parents are perceived in need of some form of assistance, could such needed assistance be provided without court intervention?
- If the intake worker is presented with a tangible plan for diversion or dismissal, will she go along with it?

¹³⁶ See NATIONAL CENTER FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: FREQUENTLY ASKED QUESTIONS 1 (2012) (“*Implicit bias* is the bias in judgment and behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control.”), available at <http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx>.

¹³⁷ See NATIONAL CENTER FOR STATE COURTS, STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 2 (2012) (hereinafter, “STRATEGIES”), available at http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx.

- Self-imposed restrictions, such as curfew and removal of privileges?
- A referral to a community agency for assistance?
- A modification of supervision arrangements?
- The taking on of new and constructive after-school activities?
- If the intake worker insists on certain conditions being met before she dismisses the petition, are these conditions clear?
 - Are they within the ability of the child and her parents to perform?¹³⁸

Using these strategies to help articulate their reasoning process, JPOs will become more aware and cognizant of the factors upon which they are basing their intake decisions. Rather than promoting a system of “color-blindness” (i.e., avoiding or ignoring race, ethnicity and socio-economic status), acknowledging and promoting appreciation of group differences and multi-cultural viewpoints appears to be a more effective tactic for reducing implicit bias.¹³⁹ JPOs such as Lydia Johnson, who handled Deanna’s case,¹⁴⁰ would clearly benefit—as would juveniles—if they regularly were to engage in this type of critical self-analysis, which required them to reveal their decisions and discuss their reasoning frankly and candidly.¹⁴¹

VII. Conclusion

With the recent economic downturn, there has been a greater awareness of the growing income gap and how it affects the most vulnerable among us—poor children and their families. We know that social mobility has decreased and that children who grow up in poverty are likely to stay poor. We know that language deficits exist in poorer homes and that the gaps in school achievement between high- and lower-income students have become chasms.¹⁴² We know that poverty impacts the physical health of children—from “obesity and diabetes to heart disease, substance abuse and mental illness”¹⁴³ We know that toxic stress can develop in a young child, caused by too much exposure to so-called stress hormones like cortisol and norepinephrine. We know that “without sufficient protection, [this level of stress] may actually reset the neurological and hormonal systems, permanently affecting children’s brains and even, we are learning, their genes.”¹⁴⁴

¹³⁸ See PIERSMA ET AL., *supra* note __, at 224.

¹³⁹ NATIONAL CENTER FOR STATE COURTS, STRATEGIES, *supra* note __, at 7.

¹⁴⁰ See *supra* notes __ and accompanying text.

¹⁴¹ See NATIONAL CENTER FOR STATE COURTS, STRATEGIES, *supra* note __, at 18.

¹⁴² Sean F. Reardon, *No Rich Child Left Behind*, N.Y. TIMES, Apr. 27, 2013, at __.

¹⁴³ Perri Klass, *Poverty as a Childhood Disease*, N.Y. TIMES, May 13, 2013, at __.

¹⁴⁴ *Id.*

We also know that contact with the juvenile justice system is “inherently criminogenic”¹⁴⁵ and that when young people perceive court procedures to be unfair, they reoffend at higher rates.¹⁴⁶ We know that detention, even for short periods of time, can be damaging to a child’s emotional well-being and that it exposes young people to the risk of physical and sexual assault.¹⁴⁷ We know that long-term commitment exacerbates the conditions of those with pre-existing behavioral and mental health problems, which includes a significant subgroup of those who enter the juvenile court system.¹⁴⁸ We know that reducing the rate of juvenile incarceration does not increase juvenile crime or violence,¹⁴⁹ and that the number of cases that are either diverted or petitioned approximates the *same percentage of youth* who have been found to “grow out of” delinquent behavior through normal adolescent development without any intervention.¹⁵⁰

Yet, we continue to use the juvenile justice system as the primary safety net for many poor children and their families. We allow those children with the most needs—whether emotional, psychological, physical or behavioral—to be fast-tracked through an indiscriminate intake system. We watch passively as they are saddled with the stigma of juvenile delinquency adjudications and are often warehoused for months or years in juvenile detention facilities.

Deanna and her situation may sound familiar to you.¹⁵¹ She may resemble your client. She may remind you of a friend or, perhaps, your sister. She may even make you think of your (younger) self. Imagine if Deanna were from a family of means with two college-educated parents who were both gainfully employed. Imagine that she had ready access to tutors and therapists. Picture her living in a well-tended home in a suburban neighborhood. Would this have made a difference at intake? Would Ms. Johnson have recommended some alternative to formal issuance of a felony petition? If so, what is it that separates this version of Deanna from the one described in the Article’s opening paragraphs? Until the intake process is restructured, we will continue to have a juvenile court system in which the only logical answer to this

¹⁴⁵ Wilson & Hoge, *supra* note __, at 499 (quoting McAra & McVie, *The Impact of System Contact on Patterns of Desistance from Offending*, 4 EUR. SOC’Y OF CRIMINOLOGY 315, 318 (2007)).

¹⁴⁶ Birckhead, *supra* note __, at 1458-59.

¹⁴⁷ See MENDEL, *supra* note __, at 5-6.

¹⁴⁸ *Id.* at 12.

¹⁴⁹ *Id.* at 9-12.

¹⁵⁰ See BOUTILIER ET AL., *supra* note __, at 1 (“Research has shown that most youth will naturally “age out” of delinquent behavior without the intervention of the juvenile justice system. Research has also shown that juvenile justice and criminal justice systems may actually delay development and disrupt the natural engagement with families, school, and work, which will reduce the likelihood of the youth’s successful transition to adulthood.”), available at <http://www.ojjdp.gov/dso/Diversion.pdf>.

¹⁵¹ See *supra* notes __ and accompanying text.

question is socio-economic status. Closing the widening net will bring us one step closer to changing this equation.