

Missed Opportunity: Waiver, Race, Data, and Policy Reform

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The decision to prosecute a juvenile in adult criminal court—to “transfer” jurisdiction from juvenile to adult court, or to “waive” the jurisdiction of the juvenile court¹—is a key decision point in the juvenile justice system.² For decades, researchers have documented racial disparities at key decision points in the system, including at waiver.³ The research literature on waiver is

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1. In this Article, the terms “transfer” and “waiver” are used interchangeably to mean the decision to prosecute a juvenile in adult criminal court, whether the decision is made by a judge after a hearing, by a prosecutor pursuant to discretion granted by statute, or by the legislature in designating certain offenses for which youth are automatically charged in adult court.

2. HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 190 (2006), *available at* <http://www.ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf>.

In Louisiana, any child at least 15 years of age who has been indicted for first or second degree murder, aggravated rape, or aggravated kidnapping is automatically prosecuted in adult criminal court. LA. CHILD. CODE ANN. art. 305(A)(i)(a) (Supp. 2010). Any child 15 or older who is accused of such crimes, but not indicted, is prosecuted in juvenile court, though there may be a transfer hearing at which the judge may transfer the case to adult court. *Id.* art. 305(A)(i)(b). The juvenile court has jurisdiction over any child at least 14 years old who is accused of certain other crimes, such as attempted first degree murder, armed robbery, forcible rape, or distribution or possession with intent to distribute controlled or dangerous substances. *Id.* art. 857(A)(1)–(8). At the discretion of the prosecutor or the juvenile court judge, a transfer hearing may be held at which the juvenile may be transferred to adult court, based on whether there is probable cause to believe that the juvenile committed the offense and “there is no substantial opportunity for the child’s rehabilitation through facilities available to the court.” *Id.* art. 862(A)(1)–(2) (2004). The existence of opportunity for rehabilitation is based upon the child’s age, maturity, and sophistication; the nature and seriousness of the alleged offense; the child’s prior acts of delinquency; the child’s response to past efforts at rehabilitation; whether physical or mental problems contributed to the child’s alleged crime; and the appropriateness of the remedies available to the juvenile court. *Id.* art. 862(A)(2)(a)–(f).

3. BARRY KRISBERG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE 112–34 (1993); NAT’L COAL. OF STATE JUVENILE JUSTICE ADVISORY GRPS., A DELICATE BALANCE (1989); NAT’L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE

particularly rich and includes information on racial differences.⁴ However, with one notable exception,⁵ states have not used such information to guide policy decisions in order to reduce racial disparities.

This is important because, in recent years, many jurisdictions around the country have begun to use careful data collection and analysis at pre-adjudication decision points in the juvenile justice system. These developments have led to policy and practice changes that have significantly reduced racial and ethnic disparities involving youth of color.⁶ However, no jurisdiction has yet undertaken such an effort with respect to data on waiver.

This failure to gather and analyze waiver data at the local and state levels and use it to guide policy reform is a missed opportunity. Youth of color are disproportionately subject to waiver policies.⁷ For example, black youth are 40% more likely to be waived to adult criminal court for a drug offense than white youth,⁸ and waiver carries serious negative consequences, including incarceration in adult jails.⁹

This Article examines the major research on waiver and discusses what it reflects about racial differences. This Article then describes data collection and analysis at pre-adjudication decision points in the juvenile justice system in multiple jurisdictions and considers how this data substantially reduces racial and ethnic disparities. Finally, this Article suggests new collection and analysis of data that would enable jurisdictions to change waiver policies and practices and to reduce racial and ethnic disparities among youth.

JUSTICE SYSTEM (2007), available at http://www.nccd-crc.org/nccd/pubs/2007_jan_justice_for_some.pdf; Carl E. Pope & William H. Feyerherm, *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature (Part I)*, 22 CRIM. JUST. ABSTRACTS 327–35 (1990); Carl E. Pope & William H. Feyerherm, *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature (Part II)*, 22 CRIM. JUST. ABSTRACTS 527–35 (1990).

4. See *infra* Part I.

5. The exception is Illinois. See *infra* note 30 and accompanying text.

6. See *infra* Part II.

7. NEELUM ARYA & IAN AUGARTEN, CAMPAIGN FOR YOUTH JUSTICE, CRITICAL CONDITION: AFRICAN-AMERICAN YOUTH IN THE CRIMINAL JUSTICE SYSTEM 26 (2008) (citing JOLANTA JUSZKIEWICZ, CAMPAIGN FOR YOUTH JUSTICE, TO PUNISH A FEW: TOO MANY YOUTH CAUGHT IN THE NET OF ADULT PROSECUTION (2007)), available at <http://www.campaignforyouthjustice.org/documents/AfricanAmericanBrief.pdf>.

8. *Id.* at 19.

9. *Id.* at 28.

I. WAIVER RESEARCH

Waiver to adult court is one of the best-studied aspects of the juvenile justice system. A report from the Office of Juvenile Justice and Delinquency Prevention (OJJDP) summarized the research literature and focused on six major studies over the past 15 years.¹⁰ Three of the major studies were conducted in Florida, where most waiver occurs through prosecutorial discretion.¹¹ The Florida studies compared youth prosecuted in adult criminal court with closely-matched youth prosecuted in juvenile court.¹² Two other studies compared New Jersey youth charged with robbery or burglary in juvenile court with closely-matched youth charged in adult criminal court with similar offenses in New York (where 16 is the age of criminal responsibility).¹³ The sixth study focused on recidivism over 18 months among 494 youth in Pennsylvania charged with robbery or assault, using a statistical model to compare a large number of variables.¹⁴

The six studies reached similar conclusions: waiver does not reduce recidivism; in fact, it substantially increases recidivism.¹⁵ The Centers for Disease Control and Prevention also reviewed the research on waiver and reached the same conclusion.¹⁶

10. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, Wash., D.C.), June 2010, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>.

11. Donna Bishop et al., *The Transfer of Juveniles to Adult Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171 (1996); Lonni Lanza-Kaduce et al., *Juvenile Offenders and Adult Felony Recidivism: The Impact of Transfer*, 28 J. CRIME & JUST. 59 (2005); Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism over the Long Term*, 43 CRIME & DELINQ. 549 (1997). Waiver also occurs by judicial decision in juvenile court after a due process hearing, *Kent v. United States*, 383 U.S. 541 (1966), and by legislative decision that youth should automatically be prosecuted in adult court if they are charged with specific offenses, SNYDER & SICKMUND, *supra* note 2, at 110–11.

12. See *infra* note 17 and accompanying text.

13. Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POL'Y 77 (1996); Jeffrey Fagan, Aaron Kupchik & Akiva Liberman, *Be Careful What You Wish For: The Comparative Impacts of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders* (Columbia Law Sch., Pub. Law Research Paper No. 03-61, July 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=491202.

14. Redding, *supra* note 10, at 4.

15. *Id.* at 6.

16. *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, MORBIDITY & MORTALITY

The research studies were very thorough and comprehensive. For example, one of the Florida studies compared 315 best-matched pairs on 12 factors in addition to basic factors such as current offense, prior offenses, and age. The 12 additional factors were prior juvenile referrals, multiple charges at arrest, multiple incidents involved in the case, charge consolidation, legal problems during case processing, gang involvement, codefendants or accomplices, property loss or damage, victim injury, use of weapons, felony charges, and the presence of mitigating and aggravating factors.¹⁷ The New Jersey studies matched the youth for age, race, gender, age at first offense, prior offenses, offense severity, case length, sentence length, and court.

All of the studies collected data on race but reached different conclusions. The first New York–New Jersey study found that race was unrelated to the waiver decision.¹⁸ The second New York–New Jersey study reported that blacks who were waived were more likely to be rearrested than other minorities or white youth who were waived.¹⁹ However, that study noted that the authors were unable to determine, based on their data, whether the results were due to different behavior patterns by black youth or to different behavior patterns by police with respect to black youth.²⁰

The Florida research focused on recidivism and, using available data, coded race only as “White” or “non-White.”²¹ The researchers concluded that the effect of race on the probability of rearrest was not significant.²² The Pennsylvania research also coded race only as “White” or “non-White.” Over 80% of the “non-White” youth were black. The study also reported that the effect of race on the probability of recidivism was not significant.²³

Some reports on waiver focus specifically on race. For example, *To Punish A Few: Too Many Youth Caught in the Net of Adult Prosecution* reviewed the most recent available data on

WKLY. REP. (Ctr. for Disease Control & Prevention, Atlanta, Ga.), Nov. 27, 2007, available at <http://www.cdc.gov/mmwr/PDF/rr/rr5609.pdf>.

17. Lanza-Kaduce et al., *supra* note 11.

18. Fagan, *supra* note 13, at 90.

19. Fagan, Kupchik & Liberman, *supra* note 13, at 59, 65.

20. *Id.* at 67.

21. Bishop et al., *supra* note 11, at 177.

22. Winner et al., *supra* note 11, at 554.

23. David L. Myers, *The Recidivism of Violent Youths in Juvenile and Adult Court: A Consideration of Selection Bias*, 1 YOUTH VIOLENCE & JUV. JUST. 79, 84 (2003).

youth charged with felonies in criminal courts in 40 of the largest jurisdictions in the country.²⁴ The study found²⁵ that:

- *Youth of color were disproportionately subject to waiver policies.* Five out of six cases (83%) filed in adult courts involved youth of color—more than 60% were black youth, and almost 20% were Latino youth.
- *Most black youth were waived to adult court by prosecutorial discretion or statutory exclusion,²⁶ meaning that a judge did not individually evaluate whether they were amenable to rehabilitation.* For black youth, almost half (49.2%) of the cases were in criminal court due to statutory exclusion, and almost one-third (31.9%) were there as a result of prosecutorial discretion.
- *More than 40% of black youth prosecuted in adult court were not convicted, suggesting that the cases against them were not strong.* More than a quarter of the youth (27.3%) were not convicted at all, and 12.7% were returned to juvenile court.
- *Disparities in waiver varied significantly according to the type of offense.* For example, drug cases were filed against black youth at almost five times the rate of white youth. This is of particular concern because in a self-reporting survey of high school seniors conducted by the National Institute on Drug Abuse, white youth reported substantially more drug behavior than black youth (e.g., using heroin and cocaine at seven times the rate of black youth).²⁷ In another survey by the National Household Survey on Drug Abuse, white youth aged 12 to 17 reported selling drugs one-third more frequently than black youth.²⁸
- *Most youth waived to adult court were not serious violent offenders.* The top five offenses for which youth were waived to adult court, covering 75% of all cases, were for offenses that are routinely handled in juvenile courts: robbery, assault, drug manufacture, burglary, and other drug offenses.
- *Many black youth waived to adult court were held in adult jails.* About half of black youth prosecuted in adult court were

24. JUSZKIEWICZ, *supra* note 7, at 25.

25. The following summary of the findings is from ARYA & AUGARTEN, *supra* note 7, at 26–28.

26. *See supra* note 1.

27. NAT'L INST. ON DRUG ABUSE, 1 MONITORING THE FUTURE REPORT, 1975–1999 (2000), *cited in* ELEANOR HINTON HOYTT ET AL., ANNIE E. CASEY FOUND., REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION 21–22 (2002), available at <http://www.aecf.org/upload/publicationfiles/reducing%20racial%20disparities.pdf>.

28. HOYTT ET AL., *supra* note 27, at 21–22.

released pretrial. Of those who were not released, almost two-thirds (65.4%) were held in adult jails. The rest were held in juvenile facilities.

- *A majority of black youth convicted in adult criminal court did not receive an adult prison sentence.* More than half of black youth convicted in adult court (55.5%) received a lesser sentence: 24.6% were released on probation, 10.3% received a juvenile sanction or were sent to boot camp, 4% were released for time served, and 16.6% were sentenced to jail.

Another study that focused on waiver and race is *Drugs and Disparity: The Racial Impact of Illinois' Practice of Transferring Young Drug Offenders to Adult Court*.²⁹ The report looked at the impact of the Illinois “automatic transfer” statutes, passed in the 1980s, which provided that any youth aged 15 or 16 charged with drug sale within 1,000 feet of a school or public housing development would automatically be prosecuted in adult criminal court. Most prosecutions under the statute occurred in Cook County. The study reported that the overwhelming majority of youth transferred under the statute were black or Latino.

With one notable exception, this research has not been used to support data-driven efforts to reduce the unnecessary use of waiver. The exception is in Illinois, where the studies on the impact of the automatic transfer statute led the legislature to amend the statute to provide that drug cases within 1,000 feet of a school or public housing development should originate in juvenile court.³⁰

Even in Illinois, the reform effort was successful because the data on over-representation clearly demonstrated that the weight of the drug offense statutes fell almost entirely on black and Latino youth. The Chicago Reporter and Chicago's National Public Radio affiliate, WBEZ, did an analysis of all juveniles charged with selling drugs within 1,000 feet of a school or public housing project from the years 1995 to 1999. Slightly less than 95% were black, and just over 4% were Latino—more than 99% youth of

29. JASON ZIEDENBERG, BLDG. BLOCKS FOR YOUTH, DRUGS AND DISPARITY: THE RACIAL IMPACT OF ILLINOIS' PRACTICE OF TRANSFERRING YOUNG DRUG OFFENDERS TO ADULT COURT (2001), *available at* http://www.justicepolicy.org/images/upload/01-04_REP_ILDrugDisparityYouthTransfer_JJ-RD.pdf.

30. For an account of efforts to reform the statutes, see Elizabeth Kooy, *Challenging the Automatic Transfer Statute in Illinois*, in BLDG. BLOCKS FOR YOUTH, NO TURNING BACK: PROMISING APPROACHES TO REDUCING RACIAL AND ETHNIC DISPARITIES AFFECTING YOUTH OF COLOR IN THE JUSTICE SYSTEM 34 (2005), *available at* http://www.buildingblocksforyouth.org/noturningback/ntb_fullreport.pdf.

color.³¹ The Juvenile Transfer Advocacy Unit of the Cook County Public Defender's office reviewed the records of all youth who were automatically waived to adult court under the statute from October of 1999 to October of 2000 and found the same result: more than 99% of the transferred youth were youth of color.³² One researcher called the automatic transfer statutes "the most racially inequitable laws in the country."³³

There has not been an effort to systematically collect data on waiver and to use that data to drive policy decisions. On the other hand, juvenile justice policymakers have made notable progress at the front end of the juvenile justice system, particularly at the detention decision point.

II. REDUCING RACIAL AND ETHNIC DISPARITIES AT THE FRONT END OF THE JUVENILE JUSTICE SYSTEM

Racial and ethnic disparities, sometimes called "disproportionate minority contact" (DMC), occur in three ways in the juvenile justice system. The first and most common is *over-representation of youth of color* at a particular point in the system compared to their number or percentage in the general population. In 2003 black youth comprised 28% of the youth arrested although they comprised only 16% of the adolescent population of the United States.³⁴ Moreover, there is over-representation at each successive key point in the system: black youth were 30% of the youth referred to the juvenile court, 37% of the youth in secure detention, 34% of the youth formally processed by the juvenile court, 30% of the youth adjudicated by the juvenile court, 35% of the youth transferred to adult court by judicial waiver, 38% of the youth in residential placement, and 58% of the youth admitted to state adult prisons.³⁵

A second way that racial inequities occur is by *disparate and harsher treatment of youth of color* at a particular decision point compared to white youth at the same decision point. Research shows that youth of color, notably black and Latino youth, are more likely to be incarcerated in state facilities and to spend more time incarcerated than white youth, even when charged with the same type of offense.³⁶

31. ZIEDENBERG, *supra* note 29, at 8.

32. *Id.* at 9.

33. *Id.* at 3.

34. NAT'L COUNCIL ON CRIME & DELINQUENCY, *supra* note 3.

35. *Id.*

36. Mark Soler, Dana Shoenberg & Marc Schindler, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL'Y 483, 531-32 (2009)

Racial inequities occur a third way when youth of color *disproportionately and unnecessarily enter and penetrate* the juvenile justice system. Youth of color are more likely than white youth to be arrested and are more likely to go deeper into the system, even for the same offense. As they move from point to point in the system, youth of color suffer a “cumulative disadvantage” compared to white youth.³⁷

Federal and state governments have addressed the need for DMC reduction over the past two decades. In 1988, the National Coalition of State Juvenile Justice Advisory Groups brought the issue of DMC to the attention of federal and state policymakers with its report *A Delicate Balance*.³⁸ That same year, Congress amended the Juvenile Justice and Delinquency Prevention Act (JJDP) to require states to address “Disproportionate Minority Confinement” in their juvenile justice systems.³⁹ In 1992, Congress made the DMC provision a “core requirement” of the Act, meaning that states could lose 25% of their federal juvenile justice funding if they did not comply.⁴⁰ In 2002, Congress again amended the JJDP to require states to address “Disproportionate Minority Contact,” which includes arrest and other key decision points in the system.⁴¹ The OJJDP now requires states receiving federal juvenile justice funding to periodically report over-representation at each of the nine key decision points in the system.⁴²

There is a big difference between reporting DMC data and using the data to reduce inequities in the system. The Annie E. Casey Foundation led the way in collecting specific data about race and ethnicity and utilizing the data to drive policy. In 1992, the Foundation began its Juvenile Detention Alternatives Initiative (JDAI) with the goal of reducing unnecessary and inappropriate detention without jeopardizing public safety. JDAI now operates in

(citing FRANCISCO A. VILLARRUEL ET AL., *BLDG. BLOCKS FOR YOUTH ¿DÓNDE ESTÁ LA JUSTICIA? A CALL TO ACTION ON BEHALF OF LATINO AND LATINA YOUTH IN THE U.S. JUSTICE SYSTEM* 5 (2002), available at <http://cclp.org/documents/BBY/donde.pdf>).

37. NAT'L COUNCIL ON CRIME & DELINQUENCY, *supra* note 3, at 4.

38. NAT'L COAL. OF STATE JUVENILE JUSTICE ADVISORY GRPS., *supra* note 3.

39. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

40. Act of Nov. 4, 1992, Pub. L. No. 102-586, 106 Stat. 4982.

41. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

42. SNYDER & SICKMUND, *supra* note 2, at 189–90.

110 sites in 27 states and the District of Columbia.⁴³ Using data to reduce DMC is a “core strategy” in JDAI.

The Foundation focused on detention for several reasons. First, detention is a gateway to the juvenile justice system and a microcosm of the ills of that system. When JDAI began, two-thirds of the juvenile detention facilities in the country were overcrowded. Less than one-third of the youth detained were charged with violent crimes. In 1995, 56% of the youth detained were youth of color, primarily black and Latino youth, up from 43% in 1985. In 2003, 65% of youth detained were youth of color. All of these percentages were disproportionate to the percentage of youth of color in the general population and the percentage of youth of color arrested.⁴⁴

Moreover, detention has significant negative consequences for youth. It disrupts education, family connections, and ongoing services. It subjects youth to psychological stress and potential physical assault. It exacerbates difficulties for youth with pre-existing mental health problems, which includes 30 to 70% of incarcerated youth.⁴⁵ Conditions in many juvenile detention facilities are substandard or outright abusive.⁴⁶ A majority of youth held in detention could be safely sent home or placed in community-based programs with appropriate supervision.⁴⁷

In order to address the over-use of detention in an effective and data-driven way, JDAI requires each site to report admissions to detention, average length of stay (ALOS), and average daily population (ADP) on a quarterly basis.⁴⁸ ADP is a direct indicator of the use of detention and is a function of two factors: number of

43. RICHARD A. MENDEL, ANNIE E. CASEY FOUND., TWO DECADES OF JDAI: FROM DEMONSTRATION PROJECT TO NATIONAL STANDARD 2 (2009), available at http://www.aecf.org/~media/Pubs/Initiatives/Juvenile%20Detention%20Alternatives%20Initiative/TwoDecadesofJDAIFromDemonstrationProjecttoNat/JDAI_National_final_10_07_09.pdf.

44. *Id.* at 4–7.

45. Jennie L. Shufelt & Joseph J. Cocozza, *Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Study* (Nat'l Ctr. for Mental Health & Juvenile Justice, Delmar, N.Y.), June 2006, at 2, available at <http://www.ncmhjj.com/pdfs/publications/PrevalenceRPB.pdf>.

46. See BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2007), available at http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/TheDangersofDetentionTheImpactofIncarcerating/dangers_of_detention_report.pdf.

47. MENDEL, *supra* note 43, at 7.

48. *JDAI Starter Kit: Year 1 Site Development*, JDAI HELP DESK, 2 (Aug. 30, 2006), <http://www.jdaihelpdesk.org/Docs/Documents/2010%20TAB%20A%20Year%201%20Dev%20Milestones.pdf>.

admissions and average length of stay per admission. Consequently, ADP may be decreased by reducing admissions, average length of stay, or both. Therefore, JDAI utilizes core strategies aimed at reducing unnecessary or inappropriate admissions and unnecessarily long case processing times.⁴⁹ JDAI measures success by looking at whether there are reductions in admissions, ADP, and ALOS in the quarterly reports that sites submit.

JDAI also requires sites to break down the detention data by race, ethnicity, and gender. This enables juvenile justice stakeholders in the sites to see patterns of disproportionality or disparate treatment of youth of color, as well as gender differences.

In addition, JDAI requires each site to report on the results of using its Risk Assessment Instrument (RAI), an objective screening tool that accords a specific number of points to key indicators of the risks that youth will not show up for court or will commit another offense before his or her adjudication hearing. Use of objective admissions instruments like a RAI is another core strategy of JDAI. RAIs include such factors as current charge, prior adjudications, prior failures to appear in court, and aggravating and mitigating factors. Using points to determine the level of risk—high, medium, and low—reduces the influence of subjective decision-making about which youth to place in detention.⁵⁰

Sometimes local policy requires a youth to be detained automatically if charged with certain behaviors, such as violation of probation, and that policy may *override* the results of the RAI. In some jurisdictions, intake staff members retain discretion to decide which youth should be detained, notwithstanding the results of the RAI.⁵¹ JDAI requires sites to report the number of overrides each quarter; a high number may mean that the RAI is not working well or that the staff is not using it properly. Sites are also required

49. D. ALAN HENRY, ANNIE E. CASEY FOUND., REDUCING UNNECESSARY DELAY: INNOVATIONS IN CASE PROCESSING (1999), *available at* <http://www.aecf.org/upload/publicationfiles/reducing%20unnecessary%20delay.pdf>; FRANK ORLANDO, ANNIE E. CASEY FOUND., CONTROLLING THE FRONT GATES: EFFECTIVE ADMISSIONS POLICIES AND PRACTICES (1999), *available at* <http://www.aecf.org/upload/publicationfiles/controlling%20front%20gates.pdf>.

50. ORLANDO, *supra* note 49; DAVID STEINHART, ANNIE E. CASEY FOUND., JUVENILE DETENTION RISK ASSESSMENT: A PRACTICE GUIDE TO JUVENILE DETENTION REFORM (2006), *available at* <http://www.aecf.org/upload/PublicationFiles/JJ3622H5038.pdf>.

51. *See, e.g.*, STEINHART, *supra* note 50, at 92 (Cook County, Ill.); *id.* at 93 (Multnomah County, Or.); *id.* at 97 (State of Virginia).

to report the use of alternatives to detention such as group homes or evening reporting centers.⁵²

The emphasis in JDAI on regular collection and reporting of data, and reform of policies and practices based on analyses of that data, has had an enormous impact on the juvenile justice field. In many jurisdictions, reliance on data to drive policy reform is a foreign concept. Although agency directors, county councils, and other public officials routinely make decisions that allocate millions of dollars in agency resources and affect staffing at every level, many have never thought to base their decisions on careful analysis of what actually happens to young people in the system.⁵³ In contrast, in JDAI sites, stakeholders keep track of key data in order to measure progress and promote system accountability.

The JDAI approach has brought about significant reductions in detention population in many sites. In the most recent assessment of population reduction in JDAI sites, conducted in 2008 using 2007 data, 73 sites reported a total of 1,484 fewer youth in detention per day than before they began working on JDAI—a 27% reduction.⁵⁴ In a more recent one-day count in JDAI sites, 78 sites reported a total of 1,955 fewer youth in detention than before JDAI—a drop of 35%.⁵⁵ Twenty-four JDAI sites have reduced detention by 50% or more.⁵⁶

In a number of JDAI sites, there have also been substantial reductions in DMC. For example, Multnomah County, Oregon found that youth of color were significantly more likely to be detained than white youth. By carefully analyzing detention data and developing community-based alternatives to detention, the county eliminated the disparity and reduced the likelihood of detention to 22% for all youth.⁵⁷ Santa Cruz, California learned from its data analysis that average length of stay in detention was longer for Latino youth than for white youth. The reason was a shortage of culturally appropriate programs for Latino youth. By working with Latino organizations and developing the necessary programming,

52. MENDEL, *supra* note 43. See generally PAUL DEMURO, ANNIE E. CASEY FOUND., CONSIDER THE ALTERNATIVES: PLANNING AND IMPLEMENTING DETENTION ALTERNATIVES (2005), available at <http://www.aecf.org/upload/publicationfiles/consider%20the%20alternatives.pdf>.

53. DEBORAH BUSCH, ANNIE E. CASEY FOUND., BY THE NUMBERS: THE ROLE OF DATA AND INFORMATION IN DETENTION REFORM 11 (1999), available at <http://www.aecf.org/upload/publicationfiles/by%20the%20numbers.pdf>.

54. MENDEL, *supra* note 43, at 14.

55. *Id.*

56. *Id.* at 16.

57. HOYTT ET AL., *supra* note 27, at 8.

the county cut the number of Latino youth in detention, and the average daily population by 50%, from 34 to 17.⁵⁸

The W. Haywood Burns Institute (BI) in San Francisco works on DMC reduction in sites throughout the country and has further developed the JDAI data-driven approach. It created a data-collection template that digs deeper into the pre-adjudication process.⁵⁹ For example, the Burns Institute Level One data template collects all of the data required by JDAI *plus* data on arrests, time of offense, and geographic indicators such as zip code, all disaggregated by race, ethnicity, and gender.

For arrests and admissions to detention, the instrument collects “Top 10” offenses: those for which youth are most frequently arrested and detained. This is a particularly useful innovation. Most data collections group offenses into large categories: person crimes, property crimes, drug crimes, and public order crimes. However, “person crimes” includes simple assault, which may be a schoolyard argument, as well as aggravated rape and murder, which are obviously much more serious. “Drug crimes” includes simple possession as well as manufacture and distribution of large amounts. Consequently, when examining data disaggregated by race and ethnicity, and by category of offense,⁶⁰ disparities are noticeable, but only in broad terms.

For example, research shows that black youth are more likely to be incarcerated in public facilities and to spend longer periods incarcerated than white youth charged with the same type of crime (person, property, drug, or public order).⁶¹ However, are we comparing apples and apples, or apples and oranges? It is theoretically possible that white youth are primarily involved with drug possession, and black youth are primarily involved with drug manufacture and distribution. If true, that would explain why black youth are locked up more often for drug offenses and spend more

58. DOUGLAS W. NELSON, ANNIE E. CASEY FOUND., A ROAD MAP FOR JUVENILE JUSTICE REFORM 24 (2008), available at http://datacenter.kidscount.org/db_08pdf/2008_essay.pdf.

59. There are two versions of the template. One version is for jurisdictions that count “Latino” as a race. *BI Data Reporting Tool—Not Disaggregated Race and Ethnicity*, CENTER FOR CHILD. L. & POL’Y, http://www.cclp.org/documents/DMC/BI%20Data%20Reporting%20Tool_Not%20Disaggregated%20Race%20and%20Ethnicity%20%201.xlsx (last visited Oct. 4, 2010). Another version is for jurisdictions that disaggregate “Latino” as an ethnicity and count it separately from race. *BI Data Reporting Tool—Disaggregated Race and Ethnicity*, CENTER FOR CHILD. L. & POL’Y, http://www.cclp.org/documents/DMC/BI%20Data%20Reporting%20Tool_Disaggregated%20Race%20and%20Ethnicity%20%202.xlsx (last visited Oct. 4, 2010).

60. NAT’L COUNCIL ON CRIME & DELINQUENCY, *supra* note 3, at 28–29.

61. *Id.*

time incarcerated than white youth. But this is almost certainly not true because it is contrary to the findings of self-reporting surveys of adolescents, which show similar amounts of illicit drug use.⁶² More to the point, when offenses are grouped into broad categories, they cannot be analyzed in ways that allow for useful policy and practice reforms.

However, collecting data by the actual “Top 10” offenses makes it clear what the offense is: simple possession, possession with intent to distribute, manufacture, or distribution. This in turn makes it possible to determine whether black youth who possess illegal drugs (or who sell or distribute such drugs) are treated differently by the police, prosecutors, and the courts than white youth who are charged with the same offense. This makes it much more possible to draw accurate conclusions and to identify and find solutions for racial or ethnic disparities. The same benefit occurs when collecting data on “Top 10” offenses for which youth are detained.

These data allow a closer analysis of patterns of arrest and detention in a jurisdiction and enable stakeholders to better understand where DMC occurs in the process. Armed with this data, stakeholders can determine what kinds of policy or practice changes will reduce DMC. BI staff members assist site stakeholders in collecting and analyzing their data and in identifying appropriate changes to their pre-adjudication juvenile justice processes.

In many of the BI sites, these efforts have resulted in substantial reductions in detention of youth of color. In Baltimore, Maryland, BI staff collected and analyzed data on detention admissions, and found that 45% resulted from youth’s failures to appear at court hearings. Most of the youth were black. The site stakeholders then developed a policy under which the court clerk’s office calls youth and families to remind them of upcoming court dates. This resulted in a reduction in detention of black youth for failing to appear by 50% and a significant decrease in overall detention population.⁶³ In Peoria, Illinois, BI staff and local officials learned from their data analysis that many youth were admitted to detention for assaults, many of which occurred at one high school. The remedy was to address student confrontations

62. There is only about a one percent difference between illicit drug use by white youth and by black youth. NAT’L SURVEY ON DRUG USE AND HEALTH, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., ILLICIT DRUG USE, BY RACE/ETHNICITY, IN METROPOLITAN AND NON-METROPOLITAN COUNTIES: 2004 AND 2005 (2007), available at <http://www.oas.samhsa.gov/2k7/popDensity/popDensity.htm>.

63. Soler, Shoenberg & Schindler, *supra* note 36, at 535.

directly by instituting peacemaking circles and hiring a Restorative Justice Coordinator. As a result, referrals to secure detention from schools dropped by 35%, and referrals to detention of black youth decreased by 43%.⁶⁴

Most recently, the John D. and Catherine T. MacArthur Foundation provided financial support for carrying the BI approach to a large scale as part of its Models for Change juvenile justice reform initiative. Models for Change operates in four “core” states—Pennsylvania, Illinois, Louisiana, and Washington—and supports reform in a variety of areas, including mental health—juvenile justice collaboration services, juvenile indigent defense, and diversion to informal processing. Models for Change supports DMC reduction in all of the core states.⁶⁵ The Center for Children’s Law and Policy (CCLP) coordinates and provides technical assistance for DMC reduction efforts in eight sites in the four core states. The BI provides consulting assistance in several of the sites.

In addition, since 2007 the Foundation has supported a DMC Action Network, also coordinated by CCLP. The Network operates in eight sites in four “partner” states—Kansas, Maryland, North Carolina, and Wisconsin. Again, the BI provides consulting assistance in several of the sites. In all twenty sites in the core and partner states, juvenile justice stakeholders collect data with the BI Level One template. CCLP staff members assist them in analyzing the data, identifying policy and practice changes, and implementing the reforms.⁶⁶

In many of the core and partner sites, there have been significant reductions in over-representation of youth of color in the juvenile justice system, racial and ethnic disparities, and unnecessary entry and penetration of youth of color into the system. In Berks County, Pennsylvania, data analysis pointed to the need for detention alternatives with intensive supervision, so the county developed an Evening Reporting Center for youth who otherwise would go into detention. The county also created a Detention Screening Instrument, similar to the Risk Assessment Instrument described above. The county’s expanded use of Multi-

64. *Restorative Justice in Schools*, DMC ENEWS (Ctr. for Children’s Law & Policy, Wash., D.C.), Nov. 12, 2008, available at http://www.cclp.org/documents/DMC/DMC_eNews_001.pdf.

65. *Racial and Ethnic Fairness/DMC*, MODELS FOR CHANGE, <http://www.modelsforchange.net/about/Issues-for-change/Racial-fairness.html> (last visited Sept. 26, 2010).

66. *DMC Action Network*, CTR. FOR CHILD. L. & POL’Y, http://www.cclp.org/DMC_Action_Network.php (last visited Sept. 26, 2010); *Models for Change*, CTR. FOR CHILD. L. & POL’Y, <http://www.cclp.org/modelsforchange.php> (last visited Sept. 26, 2010).

Systemic Therapy and other alternatives to long-term out-of-home placement kept more youth of color in the community, closer to home. These data-driven efforts led to a decrease in detention population, most of whom are youth of color, by 65% from the highest quarter during the baseline year and a decrease in out-of-home placements by 40%.⁶⁷ In Union County, North Carolina, data analysis led to the creation of graduated sanctions for youth who violated probation. As a result, the representation of youth of color in detention dropped by 32%.⁶⁸ In Rock County, Wisconsin, county officials reduced the percentage of youth of color in detention from 71 to 30% after two years of participation in the DMC Action Network, also through the development of graduated sanctions and incentives for probation violators.⁶⁹

These examples demonstrate the effectiveness of data-driven juvenile justice reform efforts. The same strategies can be used to drive policy on waiver.

III. DEVELOPING DATA-DRIVEN POLICIES ON WAIVER, RACE, AND ETHNICITY

The research studies provide evidence of over-representation of youth of color in waiver,⁷⁰ and the second New Jersey study raises the question of whether black youth receive disparate treatment by the police. However, none of the studies explain how and why that occurs or what can be done to reduce unnecessary waiver, particularly of youth of color. It is necessary to peel the onion to get deeper into the process using focused data collection.

Data collection, analysis, and policy reform on waiver should build on the experiences of JDAI, the BI, and Models for Change. If states and local jurisdictions want to reduce unnecessary use of waiver, particularly with respect to youth of color, they should begin collecting detailed data on the decisions involved in the waiver process.

The data template that the BI and Models for Change have been using is a good model for data collection. The collection should start with arrest, the first key decision point in the system. Collecting data on the “Top 10” offenses that lead to waiver, along with data on race, ethnicity, gender, geography, and time of offense, would make it possible to answer the following questions:

67. Soler, Shoenberg & Schindler, *supra* note 36, at 536. Additional data is on file with the author.

68. *Id.*

69. *Id.*

70. *See supra* Part I.

What are the most common offenses that lead to waiver? Are there racial or ethnic differences in arrest patterns for those offenses, such as over-representation of black or Latino youth? Are there particular neighborhoods or other geographic areas where most of the offenses that lead to waiver occur? Are there time periods during the day when waiver offenses are most likely to occur?

Research indicates that black youth are 40% more likely to be waived for a drug offense than white youth.⁷¹ Why does that occur? Is it explained by different offense rates by youth of different races? Do black youth, in fact, sell drugs more often than white youth?

Collecting detailed data would also make it possible to look at arrests for a particular offense (e.g., drug distribution) and compare youth waived to adult court for that offense with youth charged with the same offense who were not waived to adult court. Are there racial or ethnic differences between the two groups? Are there geographical differences—is there any pattern of arrests of black youth for the offense occurring in a particular location, while arrests of white youth for the same offense occur in a different location? Are there time differences between the groups—e.g., are arrests for one group more likely to occur during the daytime and arrests of the other group more likely at night?

This type of analysis lays a strong foundation for digging deeper by collecting additional quantitative data as well as “qualitative” data—e.g., how decisions are made at key decision points and what policies guide those decisions. The analysis also makes it possible to consider remedies. Arrest is a decision point that is usually the province of police officers. If there are racial disparities in arrests, does that indicate the need to provide training on cultural awareness for police officers? Or are the disparities due to the existence of “hot-spot” high-crime locations in particular neighborhoods and police decisions to deploy officers at those locations? If most of the waiver offenses are committed in particular neighborhoods, is there a need for new community-based programs for youth in those neighborhoods, or police substations to increase the law enforcement presence, or probation department field offices to provide enhanced supervision and perhaps decrease recidivism for youth on probation?

This same type of analysis can be done with the waiver decision. If prosecutors have discretion in deciding whether to charge a juvenile in juvenile court or adult criminal court, do the data show racial disparities in charging decisions or consistent decision making on each offense across racial and ethnic groups?

71. See *supra* note 8 and accompanying text.

Do disparities differ by gender or location of the offense? If judges hold transfer hearings on youth who could be waived, do the data show racial disparities in those decisions? If there are disparities, what are the causes? Are they the same for all offenses and subgroups? For waivers that are the result of legislative decisions (i.e., automatic transfers for specific offenses), are there racial imbalances in implementation of those statutes, as there were in Illinois with the automatic transfer drug statute?

In the same manner, a jurisdiction can collect information on disposition of cases (return to juvenile court, dismissal, plea bargain, offense the youth pled guilty to compared to offense charged, guilty verdict, not guilty verdict) and sentencing (probation, jail time, prison time, length of sentence). These data will reveal any patterns of racial or ethnic disparities. For example, how do data in a particular jurisdiction compare with national research findings that 40% of black youth prosecuted in adult court are not convicted?⁷² Are black youth more likely than white youth to have cases returned to juvenile court or dismissed? Do some offenses have particularly high rates of dismissal or return to juvenile court? Do white youth receive shorter sentences than black youth waived for the same offense? If so, why does that occur?

Equally important, this kind of data collection will enable a jurisdiction to ask whether, among the youth waived, there are some—or many—who do not need to be prosecuted as adults. How many of the black youth who returned to juvenile court or had their cases dismissed should never have been waived to adult court in the first place? Because waiver *increases* the likelihood of recidivism,⁷³ utilizing a data-driven strategy to identify and reduce unnecessary waiver can enable jurisdictions to reduce recidivism; save money on court costs, prosecutor and defender time, and incarceration costs; and lessen the negative consequences to youth from incarceration in adult jails.

Transitioning from current data collection to more detailed collection and analysis may not be easy and may provoke resistance,⁷⁴ but for jurisdictions concerned with fairness in their waiver process and effective use of scarce resources, the benefits could be substantial.

72. See *supra* note 8 and accompanying text.

73. See *supra* notes 15–16 and accompanying text.

74. See JAMES BELL & LAURA JOHN RIDOLFI, W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM (2008), available at <http://www.modelsforchange.net/publications/199>.