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In Loco Juvenile Justice: Minors in Munis, Cash from Kids, and Adolescent *Pro Se* Advocacy—Ferguson and Beyond

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Over the last century, countless pages have been filled by advocates and academics, courts and commentators, all offering insights and suggested improvements for juvenile justice in the United States.[1] In recent years, one practice in particular has drawn increased attention and criticism—transferring youth from our nation's juvenile system into criminal courts for adult prosecution and prison sentences.[2]

Numerous voices have joined the movement to challenge the imposition of lengthy adult prison terms for kids convicted of serious crimes. Given their special vulnerabilities and the need for treatment rather than punishment, critics argue that young felony offenders should have their cases handled in our country's specialized juvenile courts, where they might receive age-appropriate interventions intended to support redirection and healthy development.[3]

1. Many advocates and experts have taken on issues like the overuse of pre-trial detention in juvenile courts and conditions of confinement in juvenile detention centers. *See, e.g.*, SARAH ALICE BROWN, TRENDS IN JUVENILE JUSTICE STATE LEGISLATION: 2011-2015 (2015), http://www.modelsforchange.net/publications/783; ANNIE BALCK, ADVANCES IN JUVENILE JUSTICE REFORM: 2009-2011 (2012), http://www.njjn.org/uploads/digital-library/NJJN_adv_fin_press_sept_update.pdf; BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2013), http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf; BILL RUST, ANNIE E. CASEY FOUND., JUVENILE JAILHOUSE ROCKED: REFORMING DETENTION IN CHICAGO, PORTLAND, AND SACRAMENTO (1999), http://www.aecf.org/resources/juvenile-jailhouse-rocked-reforming-detention-in-chicago-portland-and-sacra/; James Austin et al., *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, OJJDP JUVENILE JUSTICE BULL. (U.S. Dep't of Justice, D.C.), Sept. 2005, http://www.networkofcare.org/library/alternativestoyouthdetention.pdf. These efforts have resulted in the reform of juvenile detention practices across the country.

2. *See, e.g.*, JEFFREY A. BUTTS, RESEARCH AND EVALUATION DATABITS, TRANSFER OF JUVENILES TO CRIMINAL COURT IS NOT CORRELATED WITH FALLING YOUTH VIOLENCE (2012), http://johnjayresearch.org/wp-content/uploads/2012/03/databit2012_05.pdf; Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, OJJDP JUVENILE JUSTICE BULL. (U.S. Dep't of Justice, D.C.), Aug. 2008, http://www.cclp.org/documents/Alternatives/Juvenile%20Transfer%20Laws%20OJJDP.pdf.

3. *See, e.g.*, ESTIVALIZ CASTRO ET AL., CAL. ALL., TREAT KIDS AS KIDS: WHY YOUTH SHOULD BE KEPT IN THE JUVENILE JUSTICE SYSTEM (2014), http://jjustice.org/wordpress/

Interestingly, these conversations have almost entirely overlooked another set of important legal venues and their juvenile justice implications—those adjudicating low-level offenses such as local traffic and ordinance violations. There has been little scholarly, judicial, or advocacy address of the almost underground phenomenon of prosecuting minors in municipal courts.

This Essay calls for greater attention to the issue. It does so in the wake of recent events in Ferguson, Missouri. As covered by national and international news, residents of Ferguson—along with allies across the region, country, and globe—protested the shooting death of Michael Brown, an unarmed Black teenager, who was killed in August 2014 by white municipal police officer, Darren Wilson.[4] Not only did this event spark calls for Officer Wilson's arrest, police reforms, and racial justice more generally,[5] but somewhat remarkably, it also generated wide-spread agreement that local courts needed to change the way they process, prosecute, and punish low-level ordinance violations.[6]

Indeed, as the nation has now discovered, in part due to the Department of Justice's investigation of the Ferguson police and

wp-content/uploads/CAYCJ-treat-kids-as-kids-Oct-2014.pdf; DANIELLE MOLE & DODD WHITE, TRANSFER AND WAIVER IN THE JUVENILE JUSTICE SYSTEM 24 (2005) (noting "Juveniles who are transferred to the adult criminal justice system have poorer outcomes than comparable youth sentenced in the juvenile court system") http://66.227.70.18/programs/juvenilejustice/jjtransfer.pdf; Marsha Levick, *As Another Young Boy Commits Suicide in an Adult Prison, We Must Rethink the Prosecution of Children as Adults*, HUFFINGTON POST BLOG (Nov. 23, 2014), http://www.huffingtonpost.com/marsha-levick/as-another-young-boy-comm_b_5862590.html.

4. *See, e.g.*, Sara Sidner, *Activist Cornel West among 49 People Arrested at Ferguson Protests*, CNN (Oct. 13, 2014, 8:47 PM), http://www.cnn.com/2014/10/13/us/ferguson-protests/; *Ferguson Unrest: From Shooting to Nationwide Protests*, BBC NEWS (Aug. 10, 2015), http://www.bbc.com/news/world-us-canada-30193354.

5. *See, e.g.*, Jamelle Bouie, *Why the Fires in Ferguson Won't End Soon*, SLATE (Aug. 19, 2014, 6:42 PM), http://www.slate.com/articles/news_and_politics/politics/2014/08/ferguson_protests_over_michael_brown_won_t_end_soon_the_black_community.html ("The tensions have been building for a long time, and even justice for Michael Brown won't change that."); Daniel Wallis & Edward McAllister, *Ferguson Demonstrators Begin 120-Mile March to Missouri State Capital*, REUTERS (Nov. 29, 2014), http://www.reuters.com/article/us-usa-missouri-shooting-idUSKCN0J80PR20141129 (reporting one racial justice march participant noted: "This isn't just about St. Louis. We are speaking for other cities, other countries, too").

6. *See, e.g.*, Jennifer S. Mann, *Cries for Reform in Traffic Courts Grow Louder in Wake of Ferguson*, ST. LOUIS POST-DISPATCH (Sept. 5, 2014, 11:30 PM), http://www.stltoday.com/news/local/crime-and-courts/cries-for-reform-in-traffic-courts-grow-louder-in-wake/article_0295f598-7421-515a-8c52-337a36b7cc71.html.

court system,[7] the aggressive pursuit of fines and court fees through traffic cases and related quality-of-life actions has been one of the most troubling aspects of life for many St. Louis, Missouri residents.[8] But the experiences of juveniles—youth under the age of eighteen—have received much less attention in the course of these critiques and calls for municipal court reform.

Yet in some places, like Ferguson, young people, considered juveniles by United States Supreme Court standards, face automatic municipal court prosecution without any prior certification hearing or specialized legal protections.[9]

This Article suggests we draw lessons from Ferguson and work proactively to improve local municipal court practices across the country in the days ahead. In particular, we should redirect young people from municipal dockets largely focused on enhancing local finances, to age-appropriate, specialized juvenile courts intended to support youth. There, minor conflicts with the law should be resolved informally as an acknowledgment that kids will—and should—be kids.

This Article will proceed in four parts. Part I describes the ways in which most people conceive of youth contact with the justice system—either through juvenile or criminal courts. It begins by discussing juvenile courts, outlining their history and goals, as well as the rights they must provide to youth. It also notes that while legal

7. U.S. DEPT. JUST., C.R. DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

8. *See* Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST (Sept. 3, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/; Conor Friedersdorf, *Ferguson's Conspiracy Against Black Citizens*, ATLANTIC (Mar. 5, 2015), http://www.theatlantic.com/national/archive/2015/03/ferguson-as-a-criminal-conspiracy-against-its-black-residents-michael-brown-department-of-justice-report/386887/ ("Ferguson officials repeatedly behaved as if their priority is not improving public safety or protecting the rights of residents, but maximizing the revenue that flows into city coffers.").

9. *See, e.g.*, MO. REV. STAT. § 211.021(2) (2010) (defining child generally for purposes of juvenile delinquency prosecution as anyone under the age of 17, thereby allowing all 17 year olds to be directly filed into the municipal and criminal court systems); MO. REV. STAT. § 211.031.1(2) & (3) (2015) (carving further out an exception for 15 and 16 year olds, allowing municipal courts to prosecute them for traffic, curfew, and tobacco offenses), *compare with* Roper v. Simmons, 543 U.S. 551 (2005) (holding, in a Missouri case, that anyone under the age of eighteen is considered a juvenile against whom a death sentence may not be imposed under the Eighth Amendment).

protections within these institutions are constitutionally required—juvenile courts themselves are not. That is, at least to date, appellate courts have declined to find that children in conflict with the law have a constitutional right to juvenile courts as venues of first resort.

Part I continues with a discussion of the long-standing practice of excluding some youth from juvenile courts, prosecuting them in criminal courts, and sentencing them as adults. It also summarizes a growing body of literature and wave of advocacy that calls for an end to harsh adult prison terms for youth. This work focuses largely on lengthy sentences for homicides and other serious crimes.

It further describes one significant result of this movement—the emergence of enhanced constitutional rights and protections at criminal sentencing proceedings for youth under the age of eighteen. Such substantive changes and safeguards are largely rooted in modern adolescent development teachings. Yet these critiques and remedies have almost entirely ignored a third kind of court that impacts kids—local municipal courts.

Part II provides an overview of United States municipal courts, using St. Louis County's ninety municipalities generally, and the Ferguson Municipal Court in particular, as a lens. Part III then sheds light on contemporary local practices for kids in municipal courts, in Ferguson and around the country, that undermine state and federal juvenile justice laws and policies that see youth as different from adult offenders.

Part IV suggests that we draw insights from efforts to protect juveniles in the most serious cases and apply them to minor municipal court matters. First, common sense suggests most kids belong in courts created for kids. While public shaming and punishing poverty are unacceptable practices for adults, they are even more unconscionable when visited upon children. Thus, referring youth to child-centered confidential juvenile courts rather than municipal courts comports with contemporary and historic concerns about young people and their special needs.

Second, it explains that deploying localized punitive practices against children amounts to what I refer to as "*in loco* juvenile justice," which displaces both state and federal standards intended to protect youth. Like traditional *in loco parentis* doctrine, where the state steps into the role of parent for the child, municipalities seem to be attempting to step into the role of the state *vis a vis* juveniles and juvenile justice. The Latin term *in loco* also captures the

localized, place-specific nature of municipalities and their courts. Finally, the phrase evokes the feeling of irrationality presented by municipal courts serving as a shadow juvenile justice system, undermining the goals and intentions of state and federal youth laws and policies.

For instance, state contract doctrines preclude adults from collecting debts from kids. And federal law generally prohibits detaining juveniles based on status offenses or jailing them with adults for any alleged wrongdoing. Ordering children to satisfy court fines or face the possibility of liberty deprivation for minor youthful indiscretions is not only inconsistent with such federal policies, but potentially preempted on state law grounds.

Emerging standards around youth sentencing and justice in serious felony matters provide further powerful support for a constitutional right to juvenile court treatment. While such a right has not been recognized to date, this Article argues the Supreme Court's evolving standards for youth—cases from the last decade, *Roper v. Simmons*,[10] *Graham v. Florida*,[11] *Miller v. Alabama*,[12] and *In re JDB*[13]—may finally provide firm footing for such a claim.

Thus, the Ferguson crisis should be seen as an opportunity to embrace more humane practices when dealing with kids in conflict with the law—even for low-level local ordinance violations. Policing and prosecuting youth should involve age-appropriate interactions and interventions, with juvenile courts serving as the default legal venue. Current events demonstrate that *in loco* juvenile justice practices—localized efforts that displace state, federal, and constitutional youth laws and policies—are no longer invisible or appropriate.

10. 543 U.S. 551 (2005).
11. 560 U.S. 48 (2010).
12. 132 S. Ct. 2455 (2012).
13. 131 S. Ct. 2394 (2011).

I. KIDS IN CONFLICT WITH THE LAW: THE JUVENILE VERSUS CRIMINAL COURT STORY

The United States maintains a conflicted conception of youth when it comes to courts, crimes, and case processing.[14] On one hand, our state justice systems have developed countless child-centered venues called juvenile courts, where youth are processed when they allegedly break the law.[15] And the United States Supreme Court has provided basic due process protections to kids who face prosecution in these courts.[16]

On the other hand, in some instances we frame kids and their alleged crimes as so non-childlike that we prosecute them in our state criminal court systems and punish them as adults.[17] In fact, some jurisdictions go so far as to sentence children to die behind bars with life without the possibility of parole as their prison term.[18] However, in the case of the latter, the Supreme Court recently announced the need to constitutionally temper such actions in light of modern scientific understandings of adolescence.[19]

While seemingly disconnected, when taken together, these two frameworks—affirmative juvenile court requirements and criminal court restrictions—may offer some fundamental principles for the future of dealing with youth in conflict with the law.[20]

A. Development and Deployment of Specialized Juvenile Courts

United States juvenile courts have a complex and somewhat cyclical history.[21] With the development of the first juvenile court in

14. See MARK LIPSEY ET AL., IMPROVING THE EFFECTIVENESS OF JUVENILE JUSTICE PROGRAMS: A NEW PERSPECTIVE ON EVIDENCE-BASED PRACTICES 5 (Georgetown Ctr. for Juvenile Justice Reform, ed. 2010) ("Juvenile justice systems in the United States have long struggled with the inherent tension between their role in meting out punishment . . . [and] bringing about constructive behavior change.").

15. *See infra* Section I.A.

16. *See infra* Section I.A.

17. *See infra* Section I.B.

18. *See infra* Section I.B.

19. *See infra* Section I.C.

20. *See infra* Section I.C.

21. This is an account that is still very much being written, as formerly overlooked narratives and experiences, including those of youth of color, are finally being added to legal history's annals. *See, e.g.*, CHERYL D. HICKS, TALK WITH YOU LIKE A WOMAN: AFRICAN

1899 in Chicago, Illinois, the nation started down a path of embracing specialized venues for prosecuting kids accused of wrongdoing.[22] Without any mandate from the United States Supreme Court, and over numerous constitutional challenges to the creation of such institutions,[23] the juvenile court model spread across the country during the 1910s and the 1920s.[24] By the middle of the last century, every jurisdiction had developed its own juvenile court system and juvenile code.[25]

Our country's juvenile courts were founded on the idea of *in loco parentis*, where the state sought to stand in the shoes of the child's parent.[26] From the outset, its architects sought to create a non-punitive forum with less formal legal practices geared towards the

AMERICAN WOMEN, JUSTICE, AND REFORM IN NEW YORK, 1890-1935 (Thadious M. Davis & Mary Kelley eds., 2010); Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335 (2013); *see generally* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970) (challenging traditional historical accounts of juvenile courts and noting their implications).

22. ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 138–39 (40th anniversary ed. 2009) (describing the passage of the 1899 Illinois Juvenile Court Act and beginning of the nation's juvenile court movement); Mae C. Quinn, *Access to Justice: Evolving Standards in Juvenile Justice: From* Gault *to* Graham *and Beyond*, 38 WASH. U. J. L. & POL'Y 1, 3 (2012) (noting the first juvenile justice movement in this country began at the turn of the last century).

23. *See, e.g.*, *Ex parte* Daedler, 228 P. 467, 471 (Cal. 1924) ("[I]t may be stated that the almost universal trend of modern cases is in the direction of upholding the constitutionality of juvenile court laws as against assaults upon their validity."); Piland v. Clark County Juvenile Court Services, 457 P.2d 523, 523 (Nev. 1969) ("The constitutionality of Juvenile Court laws has been sustained in over 40 jurisdictions against a variety of attacks."); *see also* Emma O. Lundberg, *The Juvenile Court as a Constructive Social Agency*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK 155, 155 (1922) ("The past few years have witnessed in some quarters considerable opposition to the work of the juvenile court.").

24. PLATT, *supra* note 22, at 139; *see also* Emma O. Lundberg, *Juvenile Courts—Present and Future*, *in* PROCEEDINGS OF THE ANNUAL CONGRESS OF THE AMERICAN PRISON ASSOCIATION 48, 48 (1921) ("Although every State but two has legislation authorizing the establishment of special juvenile courts or juvenile sessions, the juvenile court movement is still in a relatively primitive stage.").

25. PLATT, *supra* note 22, at 139 ("By 1928, all but two states had adopted a juvenile court system."); Quinn, *supra* note 22, at 3 ("[T]reatment intervention through informality took hold in juvenile courts during the first half of the last century.").

26. *In re* Gault, 387 U.S. 1, 16 (1967) (describing *in loco parentis* as the "power of the state to act . . . for the purpose of protecting the property interests and the person of the child").

needs of young people.[27] For instance, they reportedly wished to remove kids from the public spectacle of the criminal courtroom and focus on rehabilitation over retribution.[28]

Today, while every state has its own individual juvenile code and juvenile court structure, all generally consider the special interests of children who appear before them.[29] For instance, juvenile courts assume that youth are still minors who have family and community connections.[30] Parents and guardians are actual parties to proceedings where custody and other familial implications may be considered.[31] In addition, most juvenile courts continue to provide some form of confidentiality and protection from the stigma of formal public findings.[32] The vast majority of formally adjudicated

27. Kristin Henning, *Juvenile Justice After* Graham v. Florida*: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 19–20 (2012) (describing the protective intuitions that drove the establishment of separate juvenile courts); *see also* PLATT, *supra* note 22, at 142–43 (noting how at the outset juvenile court judges were framed as "therapist[s]" working to understand and save children, rather than punish them).

28. Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 124 (2013) ("Given the traditional rehabilitative focus of the juvenile court, it stands to reason that the juvenile court system will have more to offer than the adult system in terms of treatment."); *see also* PLATT, *supra* note 22, at 145 ("The passage of the Illinois juvenile court act in 1899 prompted a flood of optimistic rhetoric from child-saving organizations.").

29. *See, e.g.*, ARK. CODE ANN. § 9-27-302 (1989) (requiring consideration of best interest of the juvenile before placement in state custody); N.C. GEN. STAT. § 7B-100(5) (1979) ("[T]he best interests of the juvenile are of paramount consideration by the court."); WIS. STAT. § 938.01(2)(f) (1995) (stating the purposes of Wisconsin Juvenile Code include responding to the best interest of the juvenile).

30. Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 839 (2006) ("Parental involvement is generally indispensable in the rehabilitative mission of the [juvenile] court and is often essential in helping children communicate with lawyers, make critical legal decisions, and achieve stated objectives in the juvenile case.").

31. *See id.*; *see also, e.g.*, *Common Questions About Juvenile Courts*, ALA. COURT, http://juv.alacourt.gov/Cases/question.aspx (last visited Nov. 14, 2015) ("Parents or guardians of a child may be made parties in all juvenile court actions, which means that a parent or guardian may be required to pay attorney fees, fines, court costs, restitution and other costs and/or carry out certain activities which the court deems is in the best interest of the child . . . .").

32. *See, e.g.*, KY. REV. STAT. ANN. § 610.340(1)(a) (1986) (stating juvenile court records generally "shall be deemed confidential and shall not be disclosed" except to interested parties or for upon court order good cause); NEB. REV. STAT. § 43-2108 (2015) (describing which juvenile court records are open to public inspection and which are to be maintained in confidence); *cf.* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should*

cases result in youth receiving treatment through social services, probation, and special youth placements, rather than fines, jail, or prison.[33] And frequently they are informally resolved by way of youth-centered diversionary programs and practices, including warnings and dismissal.[34]

Many have argued that juvenile courts are too informal and often entangle youth in a net of state control.[35] The United States Supreme Court embraced such critiques when it declared in 1967 that paternalism should not be used to justify arbitrariness or a lack of process in juvenile proceedings.[36] Handing down *In re Gault*, the Supreme Court announced a right to representation, against self-incrimination, and a baseline of notice and due process formality for youth-centered proceedings.[37] Despite recognizing its failings and the need to strike a balance relating to state *in loco parentis* practices, the Court embraced the juvenile court model and acknowledged benefits to prosecuting kids outside of the adult criminal courts.[38]

Schools and Public Housing Authorities Be Notified?, 79 N.Y.U. L. REV. 520 (2004) (noting the various expanding exceptions to juvenile court confidentiality principles).

33. *See* Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 58 (2012) (noting that of 1.7 million juvenile court cases processed in 2008, over 900,000 resulted in either informal adjustment services or formal supervision through probation). While some state juvenile courts may impose fines as part of case disposition, many states prohibit fines for children. *See, e.g.*, MO. REV. STAT. § 211.181 (2005) (providing order for disposition or treatment); JOY COOK CARMICHAEL ET AL. 25 FLA. JUR. 2D FAMILY LAW § 422 (2015) ("A trial court . . . has no power to impose a fine on a juvenile in a delinquency proceeding, or allow for imposition of only nominal fines."); TENN. CODE ANN. § 37-1-131(5) (2014) (providing maximum fine of $50 for law violation). In addition, a parent or guardian is usually a party to such cases. *See, e.g.*, E. BAY CMTY. LAW CTR., FINANCIAL COSTS FOR YOUTH AND THEIR FAMILIES IN THE ALAMEDA COUNTY JUVENILE JUSTICE SYSTEM: A GUIDE FOR ADVOCATES (2013), http://www.researchgate.net/publication/272242330.

34. *See* MODELS FOR CHANGE, JUVENILE DIVERSION GUIDEBOOK (2011), http://www.modelsforchange.net/publications/301.

35. *See, e.g.*, Barbara Fedders, *Losing the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 784 (2010); Robin Walker Sterling, *Fundamental Unfairness: In Re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 614–15 (2013); *see also* Birckhead, *supra* note 33, at 81 (describing phenomenon of adjudicating youth not based on culpability but perceived need).

36. *In re* Gault, 387 U.S. 1 (1967).

37. *Id.* at 34; *see also* Mae C. Quinn, *Giving Kids Their Due: Theorizing a Modern Fourteenth Amendment Framework for Juvenile Defense Representation*, 99 IOWA L. REV. 2185, 2190–91 (2014).

38. *See Gault*, 387 U.S. at 79; *see also* Walker, *supra* note 35, at 643.

In offering this middle ground, many believe *Gault* did not go far enough in protecting kids, particularly youth of color who are vastly overrepresented in juvenile courts and corrections centers today.[39] Many juvenile court systems currently face scrutiny for problematic practices.[40] Despite these problems, few juvenile justice experts call for the abolition of juvenile courts.[41] While such sentiments were shared by some stakeholders decades ago,[42] today almost all youth advocates agree that it is preferable to have juveniles prosecuted in the juvenile court system rather than criminal courts, given the harsh sentencing alternatives and other stigmas kids face when prosecuted as adults.[43]

Yet, as described further below, many youth in the United States are excluded from juvenile court jurisdiction each year. Serious youthful offender cases are frequently prosecuted in adult criminal courts and end with harsh prison terms.[44]

B. Continued Practice of Prosecuting Kids in Criminal Courts

Although the turn of the last century marked the beginning of the juvenile court movement, it did not end the practice of prosecuting kids in adult courts. Even after the Chicago Juvenile

39. *See, e.g.*, Fedders, *supra* note 35, at 784; Sterling, *supra* note 35, at 614–15.

40. In fact, as this paper goes to press, Saint Louis County's Family Court is contending with findings by the United States Department of Justice, alleging the court system fails to adequately protect the right to counsel, due process of law, or equal protection of the laws. *See* U.S. DEPT. JUST. C.R. DIV., INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT, ST. LOUIS, MISSOURI (2015), http://www.justice.gov/sites/default/files/crt/legacy/2015/07/31/stlouis_findings_7-31-15.pdf. Some of the findings in that report relate to state-wide issues inherent in Missouri's juvenile court structure. *See id*. at 53. However, others appear to reflect a need for the same kinds of practice and cultural changes called for in DOJ's Ferguson Police Report. *See supra* note 7.

41. *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997); *see also* Emily Buss, *The Missed Opportunity in* Gault, 70 U. CHI. L. REV. 39, 46 (2003) (referencing Professor Feld's continuing call for abolition).

42. *See* Quinn, *supra* note 37, 2194–95 (2014) (recounting how various advocates and academics during the 1990s called for the abolition of juvenile court jurisdiction).

43. *See id*. at 2194 n.43 (noting how Professor Marty Guggenheim changed course, initially calling for the end of juvenile courts and then retreated from this position); Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 472 (2013) (noting fears of juvenile courts being abolished if advocates fight too hard for individual rights for youth).

44. Guggenheim, *supra* note 43, at 473.

Court was established in 1899, its first presiding judge sent thirty-seven youth to an adult grand jury for presentment.[45] A tiered system of justice emerged where the most sympathetic youthful offenders were handled by the juvenile justice system, while those accused of the most serious crimes might still face adult prison time.[46] Moreover, no uniform rule was established for when a youth or her actions were so non-childlike that juvenile court was no longer an option,[47] or how that determination should be made.[48]

In 1954, this Janus-faced approach of dealing with kids in court, as well as the lack of uniformity around denial of juvenile court jurisdiction, led the New Jersey Supreme Court to lament "there remain . . . strongly conflicting opinions as to how juveniles should be dealt with in cases involving homicide and other heinous misconduct."[49] A decade later, the United States Supreme Court granted certiorari in *Kent v. United States,* a case involving a young person charged with sexual assault.[50] However, the Court was not squarely presented with the issue of whether it was constitutional to try youth as adults. Instead, it was asked to review the transfer

45. Fox, *supra* note 21, at 1187 n.29.

46. Richard E. Zimring, *The Punitive Necessity of Waiver*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 207 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) ("While juvenile court is the universal rule, every . . . jurisdiction has provided for exceptions to it.").

47. Robert O. Dawson, *Judicial Waiver in Theory and Practice*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 45 (Jeffrey Fagan & Franklin E. Zimring eds., 2010) (providing overview of waiver laws across jurisdictions); David Pimentel, *The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence*, 64 TEX. TECH L. REV. 71, 86 (2013) ("State systems are all over the map as to which kids get routed into the adult criminal justice system.").

48. Today, even the names of the processes differ across jurisdictions. Depending on where a child lives, she might find herself facing charges in adult court because of processes referred to as transfer, waiver, certification, statutory exclusion, or direct file procedures. *See* Jenny E. Carroll, *Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings:* Apprendi*, Adult Punishment, and Adult Process*, 61 HASTINGS L.J. 175 (2009) (cataloging the range of terms used to bar a youth from receiving juvenile court treatment; the terms transfer, waiver, and certification are used interchangeably in this article).

49. State v. Monahan, 104 A.2d 21, 27 (N.J. 1954). The court went on to describe the wide range of approaches—from courts that believed the more serious the crime, the more likely the need for the therapeutic intervention of the juvenile justice system, to those that held even pre-teens should receive the most serious sanctions available under the law for homicides.

50. Kent v. United States, 383 U.S. 541, 543 (1966).

procedures provided by the District of Columbia and determine whether they were constitutionally adequate.[51]

In reversing the criminal conviction of the teen in that matter, the Court noted the significance of a proceeding that could forever remove a child from the jurisdiction of juvenile court and warned that such a determination needed to be undertaken with great care.[52] Moreover, due process mandated meaningful assistance of counsel to defend a child against transfer to adult criminal court.[53]

Over the next two decades, numerous challenges were brought seeking to prohibit youth from being tried as adults—some in cases where prosecutors had the ability by statute to "direct file" the cases of youths in adult courts without prior hearing.[54] In these and other matters defense attorneys sought rulings that gave youth a constitutional right to, or at least a presumption of, juvenile court prosecution for alleged wrongdoings.[55] But state and federal courts presented with these claims denied them.[56] This, in turn, set the stage for the next wave in the nation's juvenile justice movement—a

51. *Id.* at 551–54.

52. *Id.* at 554 ("We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.").

53. *Id.* at 554; *see also* Carroll, *supra* note 48 (describing *Kent*'s limited features and holding).

54. *See, e.g.*, Jahnke v. State, 692 P.2d 911, 928–29 (Wyo.1984); State v. Bell, 785 P.2d 390 (Utah 1989).

55. *See* Lynda E. Frost Clausel & Richard J. Bonnie, *Juvenile Justice on Appeal*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURTS 181–206 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (describing challenges across the country during the 1980s and 1990s to statutory exclusion and other juvenile transfer practices).

56. *See e.g.*, People v. Jiles, 251 N.E.2d 529, 531 (Ill. 1969) ("While there would probably be almost universal agreement that it is desirable for a State to maintain a juvenile court . . . we are aware of nothing in the constitution of the United States or of this State that requires a State to do so."); State v. Green, 544 P.2d 356, 361 (Kan. 1975) ("[T]he Kansas Legislature could, in the exercise of its wisdom, withhold the protection of the doctrine of parens patriae from all juveniles exceeding fifteen years of age."); State v. Cain, 381 So. 2d 1361, 1363 (Fl. 1980) (finding no inherent or constitutional right to be treated as a juvenile); *see also* Woodard v. Wainright, 556 F.2d 781, 785 (5th Cir. 1977) ("[T]reatment as a juvenile is not an inherent right but one granted by the state legislature, therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved.").

sharp increase in the number of youth prosecuted and sentenced as adults.

The practice of prosecuting children as miniature adult criminals became widespread during the 1980s and 90s.[57] Communities and commentators fed panic around a reported rise in violent juvenile crimes. Thus a new teen "super-predator" narrative emerged—primarily targeting youth of color.[58] During the same period a range of new "tough on crime" laws and practices were used to drastically increase the number of juveniles tried in criminal courts and punished with long adult prison terms.[59] Kids regularly received mandatory terms of life imprisonment without the possibility of parole during this period, and some were sentenced to execution.[60]

At the end of the 1980s the United States Supreme Court took up two cases that challenged capital punishment for children. In the first, *Thompson v. Oklahoma*, the Court overturned the death sentence of fifteen-year-old William Wayne Thompson for his role in a homicide, holding that it amounted to cruel and unusual punishment under the Eighth Amendment because it was out of step with norms of a modern society.[61] The very next year, however, it denied a similar claim for a two older teens in *Stanford v. Kentucky*.[62]

57. Pimentel, *supra* note 47, at 86 ("In the 1980s and 1990s, there was an explosion of legislation across the country that expanded the laws, in almost every state, that allow juveniles to be tried as adults.").

58. Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. GENDER, RACE & JUST. 281 (2012); *see also* Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, THE SENTENCING PROJECT 5, 5–6 (2012), http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf (unpacking the racially-biased myth of the teen "super-predator" by noting that it arose while homicide rates for juvenile offenders was actually on the decline).

59. Slobogin, *supra* note 28, at 104 (2013) (reporting that the number of youth under eighteen prosecuted as adults rose from approximately 15,000 a year in the 1970s to 250,000 a year by 2007); Quinn, *supra* note 22, at 11 ("[T]he number of teens in adult correctional facilities rose from sixteen hundred in 1988, to over nine thousand in 1997.").

60. Nellis, *supra* note 58, at 6 ("[T]here was a steep rise in the number of teens who were sentenced to life without the possibility of parole during the mid-1990s."); *see also, e.g.*, Quinn, *supra* note 22, at 11–12 (describing how fifteen-year-old William Wayne Thompson received a death sentence in 1984 for his role in a homicide).

61. Thompson v. Oklahoma, 487 U.S. 815 (1988).

62. Stanford v. Kentucky, 492 U.S. 361 (1989) (Seventeen-year-old Heath Wilkins had been condemned to die in a Missouri court; Kevin Stanford, the Kentucky litigant, received a death sentence for a crime committed when sixteen).

Kids who kill at age sixteen and seventeen, the Court held, could be sentenced to die consistent with Eighth Amendment principles.[63]

C. Legal Limits on Imposing Adult Sentences on Kids

Shortly thereafter, juvenile justice organizations, sentencing reform groups, social scientists, and even government agencies began to more vigorously question the wisdom of extreme sentencing practices and policies for juveniles—a group that came to be more clearly defined as all youth under the age of eighteen.[64] The work of these advocates laid the groundwork for a new litigation push that resulted in a range of restrictions on adult sentences for young people.[65] Thus the start of this century, like the start of the last, saw a powerful movement to treat kids differently from adults and protect them from the harsh, sometimes life-and-death impact of criminal courts.

In 2005, the United States Supreme Court reconsidered the question presented by *Stanford*—that is, whether the Eighth Amendment precludes imposition of the death sentences for all juveniles.[66] Determining that standards of human decency had indeed evolved since 1989, the Court banned executions of all youth under the age of eighteen.[67] Reaching this conclusion in *Roper v. Simmons*,[68] the Court looked not only at legislative enactments and the direction of change in the law, but at emerging scientific opinions and international norms relating to adolescence.[69]

63. *Id.*

64. *See, e.g.*, Patricia Allard & Malcolm Young, *Prosecuting Juveniles in Adult Court: Perspectives for Policymakers and Practitioners*, THE SENTENCING PROJECT (2002), http://www.sentencingproject.org/doc/publications/sl_prosecutingjuveniles.pdf (declaring "imposition of adult punishments, far from deterring crime, actually seems to produce an increase in criminal activity in comparison to the results obtained for children retained in the juvenile system"); *see also* Robert G. Schwartz, *Age-Appropriate Charging and Sentencing*, 27 CRIM. JUST. 49, 49 (2012) (describing the MacArthur Foundation's support in the 1990s for the Research Network on Adolescent Development and Juvenile Justice, which produced numerous studies demonstrating reduced culpability on the part of youth).

65. Nellis, *supra* note 58, at 6.

66. Roper v. Simmons, 543 U.S. 551 (2005).

67. *Id.* at 564–67, 578–79.

68. *Id.* at 578–79.

69. *Id.* at 568–78.

For instance, the Court relied heavily on the work of developmental psychologists like Jeffrey Arnett[70] and Laurence Steinberg,[71] as well as interdisciplinary juvenile justice experts like Elizabeth Scott.[72] Their research supported the Court's determination that youth are categorically different from adults in three key areas—(1) recklessness and risk taking, (2) susceptibility to peer pressure, and (3) amenability to change given their still developing characters. Such fundamental differences, the Court held, made traditional sentencing rationales largely irrelevant to children under the age of eighteen.[73] It also excluded them from the group of people who could receive the most extreme sentences under law.[74]

Five years later, the Supreme Court applied these factors and analyses to youth who were sentenced to die behind bars—but who had not actually killed or intended to kill another person.[75] In *Graham v. Florida* the Court again cited emerging understandings of adolescence,[76] including new medical findings about the still developing brains of youth.[77] In doing so, it overturned the death-

70. Jeffrey Arnett, *Reckless Behavior of Adolescents: A Developmental Perspective*, 12 DEV. REV. 339 (1992) (documenting the widespread nature of reckless risk taking during adolescence which diminishes as youth enter adulthood).

71. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009 (2003) (psychologist and legal expert call for end of death penalty for youth given their immaturity and lack of moral development).

72. *Id.*

73. Roper v. Simmons, 543 U.S. 551, 569–70.

74. *Id.* at 553. The Court further noted the rest of the world had abandoned such practices as being outdated and barbaric. *Id.* at 576. Other than Somalia, every country had outlawed the execution of children under the United Nation's Convention on the Rights of the Child. *Id.* Such international norms also informed the Court's independent judgment in determining that evolving standards of decency under the Eighth Amendment precluded death sentences for all juveniles under the age of eighteen—even for youth who committed homicidal acts. *Id.* at 578 ("[W]e acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.").

75. Graham v. Florida, 560 U.S. 48 (2010).

76. *Id.* at 68.

77. *Id.* (relying on opinions of amici, including the American Medical Association, which noted "parts of the brain involved in behavior control continue to mature through late adolescence"). The Court also relied upon international practices concerning youthful offender treatment and sentencing, which overwhelmingly outlawed life without parole for children. *Id.* at 80 (noting that when applying life without parole sentences to "juveniles who did not

behind-bars sentence of a seventeen-year-old who had committed an armed robbery.[78]

The Court also held that—other than homicide cases where specific *mens rea* was demonstrated—life without parole sentences for juveniles were cruel, unusual, and constitutionally prohibited.[79] Such absolute terms did not sufficiently allow for the possibility of rehabilitation in individual cases.[80] And, despite the Court's long history of declaring "death is different" for purposes of Eighth Amendment analysis, it imposed a ban on a category of sentence for a category of defendants—juveniles—outside of the capital punishment context for the first time.[81]

Thus, *Graham* may be seen as the start of a unique kind of constitutional analysis for defendants under the age of eighteen, even beyond the death penalty context—the evolving standards of youth doctrine.[82] It created a class of litigants who deserve special attention in the realm of prosecution practices and policies, but it also acknowledged that our understanding of youth is transient and ever-changing. Indeed, just two years later the Court applied this special approach to youthful offenders in another non-death penalty case, *Miller v. Alabama*, addressing the practice of mandatory juvenile life-without-parole prison terms.[83]

Here the Court offered new and nuanced reasoning to substantially amend the proportionality and evolving standards of

commit homicide, the United States adheres to a sentencing practice rejected the world over").

78. *Id.* at 74.

79. *Id.*

80. *Id.* at 69 ("It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.").

81. *Id.* at 61 (applying Roper's teachings although "here a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes").

82. Quinn, *supra* note 22 at 12–16 (describing this "particularly noteworthy doctrinal shift" as reflecting a new wave in our country's juvenile justice movements). Others have offered a slightly different take on this development, referring to it as the "children are different" doctrine. *See, e.g.*, Elizabeth S. Scott, *"Children are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. OF CRIM. L. 71, 73 (2013) ("The Court has created a special status for juveniles through doctrinal moves that had little precedent in its earlier Eighth Amendment cases."); Robert Schwartz, *supra* note 64, at 49 (2012) (referring to the "tectonic shift" in juvenile justice in light of *Roper*, *Graham*, *Miller* and *J.D.B.*).

83. Miller v. Alabama, 132 S. Ct. 2455 (2012).

decency doctrines as applied to youth—this time for kids who had killed, but had been mandatorily sentenced to life without parole.[84] Uniquely merging the teachings from *Roper* and *Graham* with another line of cases that prohibited death sentences in felony murder matters without an assessment of culpability,[85] the Court prohibited automatic imposition of death behind bars penalties without an individualized sentencing hearing.[86] Again noting emerging social scientific findings about the developing natures of juveniles,[87] the Court issued a blanket prohibition against blanket sentences in juvenile homicide cases that do not take account of the differences between youth and adults.[88]

D. Evolving Standards for Trying and Treating Youth

Presented in this way, Supreme Court jurisprudence relating to accused youth appears to involve two distinct bodies of law: older cases that provide procedural rights in juvenile proceedings, and newer cases that provide substantive sentencing limits in adult court proceedings. As to the latter, just as occurred in the wake of *Kent* and *Gault* in the 1960s,[89] many commentators have begun to consider their further implications.[90] For instance, scholars like Cara Drinan and Marty Guggenheim have projected we will see more categorical bars on particular kinds of adult sentences for kids—such as life without parole or mandatory prison terms.[91] At least one state high court—Iowa's—has already jettisoned mandatory minimums

84. *Id.* at 2463–75.

85. *See* Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978).

86. *Miller*, 567 U.S. at 2460.

87. *Id.* at 2464 (relying further on Steinberg, Scott, and the American Psychological Association). For whatever reason, the Court did not discuss international norms in the *Miller* decision.

88. *Id.*at 2460.

89. *See* Quinn, *supra* note 37, at 2193 (recounting contemporary reactions to *Gault* which saw the decision as part of the due process revolution of the Warren Court).

90. *See generally* Paul Litton, *Symposium: Bombshell or Babystep? The Ramifications of* Miller v. Alabama *for Sentencing Law and Juvenile Crime Policy*, 78 MO. L. REV. 1003 (2013) (describing symposium focusing on the legal implications of Miller).

91. *See* Cara H. Drinan, *The Miller Revolution*, 101 IOWA L. REV. (forthcoming 2015), http://ssrn.com/abstract=2475126; Guggenheim, *supra* note 43.

for youth based upon *Miller*'s analysis.[92] Some lower courts are doing the same.[93]

Others believe these cases require rethinking juvenile court practices. For instance, Elizabeth Scott has suggested *Roper* and its progeny may shape not only youth sentencing but also juvenile transfer practices.[94] That is, "given that juveniles are presumptively less culpable than their adult counterparts, the decision about whether a particular youth will be tried as an adult should be made in a way that is compatible with constitutional values."[95] Scott believes that only the most serious felony matters should face the possibility of certification to criminal court and only after an individualized hearing to determine the appropriateness of such transfer in that particular case.[96] Thus direct filing of youth under the age of eighteen into adult courts should be precluded.

This Article argues that we might read the most recent Supreme Court pronouncements on juvenile sentencing together with older cases on juvenile court practices to address yet another area ripe for reform. Beyond portending new approaches for "deep end" juvenile prosecutions—serious felony cases where adult prison terms are possible—such an analysis supports reconsideration of minor municipal court matters that involve young people. This includes how cases of children are processed in local institutions like the Ferguson Municipal Court in St. Louis County, Missouri.

II. AMERICAN MUNICIPAL COURT SYSTEMS

Local municipal courts are both ubiquitous and invisible on the American legal landscape.[97] Almost all community residents at some

92. State v. Lyle, 854 N.W.2d 378 (Iowa 2014); Grant Rodgers, *Iowa Ruling Shifts from Mandatory Minimums for Juveniles*, DES MOINES REG. (July 19, 2014, 12:39 AM CDT), http://www.desmoinesregister.com/story/news/2014/07/18/iowa-ruling-shifts-from-mandatory-minimums-for-juveniles/12833927/.

93. *See, e.g.*, State v. Smiley, Case No. 1331-CR04069 (Greene Co. Cir. Ct. Mo., Jan. 6, 2015).

94. Scott, *supra* note 82.

95. *Id.* at 99.

96. *Id.* at 99–100.

97. I refer to courts of first resort that enforce local ordinance and code violations as "municipal courts." But as will be further explained, such venues have different names in different places depending on the nature of the local government structure. They may be

point in their lives are likely to visit these institutions to deal with traffic infractions or local ordinance violations.[98] Yet they have received little attention in modern legal scholarship.[99] With the world watching events unfold in Ferguson, however, many are now beginning to ask questions about the appropriate role and reach of local governments—including their courts.[100]

Some of these questions were posed in decades past.[101] Indeed, just as juvenile courts have a somewhat cyclical and contested history, the same is true for local municipal courts in the United States. Their story has also vacillated between the thematic poles of autonomy and dependence. For these institutions, the ongoing inquiry has been whether local governments should be seen as independent free agents with broad discretion, or merely state subdivisions operating under limited license and in need of close monitoring and supervision. Youth have suffered as a result of the alternating commitments of juvenile justice policies in the country. Now, many are currently enduring hardships due to the municipal government pendulum, which has been permitted to swing too far in the direction of local autonomy over the state's interests of supporting and protecting youth.

known as city courts, traffic courts, police courts, village courts, mayor's courts, justice of the peace courts, or by some other designation.

98. Howard I. Kalodner, Note, *Metropolitan Courts of First Instance*, 70 HARV. L. REV. 320, 320 (1956) ("Criminal courts of first instance constitute the only contact that most Americans ever have with the judiciary."); *Municipal Courts*, CITY OF EL PASO, https://www.elpasotexas.gov/municipal-courts (last visited 20 Nov. 2015) ("The judges and staff of El Paso Municipal Court recognize that for most people their impression of the justice system is derived from their experience in municipal courts.").

99. Two notable and very thoughtful exceptions to this scholarly silence are Wayne A. Logan, *The Shadow of Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001) and David M. Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149 (2014). As will be further discussed below, while municipal courts have received little contemporary scholarly attention, in recent years press accounts and advocacy groups have begun to shed light on their practices. *See* William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES, (Sept. 25, 2006), http://www.nytimes.com/2006/09/25/nyregion/25courts.html?page wanted=all; Hannah Rappleye & Lisa Riordan Seville, *The Town That Turned Poverty into a Prison Sentence*, THE NATION, (Mar. 14, 2014), http://www.thenation.com/article/town-turned-poverty-prison-sentence/.

100. *See* Balko, *supra* note 8; Aaron Lewis, *Don't Shoot*, DATELINE AUSTRALIA-SBS (Aug. 26, 2014), http://www.sbs.com.au/news/dateline/story/dont-shoot.

101. *See, e.g.*, Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 310 (1913); T.E. Lauer, *Prolegomenon to Municipal Court Reform in Missouri*, 31 MO. L. REV. 69 (1966).

A. Municipal Justice Generally

Life in colonial America revolved around farm, family, and church, with parishes or townships growing up around these institutions.[102] Over time, these units established their own forms of local government, including informal adjudicative systems to resolve disputes among neighbors and claims of wrongdoing in the community.[103] Most localities borrowed from the English Crown's historic practice of appointing peace keepers—or justices of the peace—for this purpose.[104] And even as colonies reformed themselves as sovereign states, adopted state constitutions, and then ratified the federal Constitution, many colonial practices continued.[105]

For instance, Georgia's state constitution provided both state-level superior courts and local-level inferior courts.[106] The latter included courts presided over by justices of the peace with limited

102. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 28 (Rita Kimber & Robert Kimber trans., 1973) (noting colonies encompassed "smaller units, called counties or districts" and these were further divided into "cities, towns, townships, and parishes"); *see also* Mae C. Quinn, *From Turkey Trot to Twitter: Policing Puberty, Purity, and Sex-Positivity*, 38 N.Y.U. REV. L. & SOC. CHANGE 51 (2014) (describing the role of church, family, and the home in early America).

103. *See* ADAMS, *supra* note 102, at 4–6 (noting that while early America rejected the idea of a monarchy, its founders drew from English constitutional teachings); Chester H. Smith, Note, *The Justice of the Peace System in the United States*, 15 CAL. L. REV. 118, 118 (1927) (noting that in colonial America, "the problem was to settle disputes among neighbors and to prevent friction where possible").

104. MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 7–10 (2003); *see also History of Justices of the Peace*, GOV'T S. AUSTRL. ATT'Y GEN. DEP'T (Mar. 21, 2013), http://www.agd.sa.gov.au/government/about-us/department/justice-peace-services/history-justices-peace (comparing justices of the peace to knights appointed by the King of England as peace keepers for unruly areas).

105. EDWARD PEASE ALLINSON & BOIES PENROSE, PHILADELPHIA 1681–1887: A HISTORY OF MUNICIPAL DEVELOPMENT xiii-xliii (1887), http://www.archive.org/stream/philadelphia168100alliuoft/philadelphia168100alliuoft_djvu.txt (describing shared governance at the birth of the country, with many seeing the local unit as the dominant concern); *see also* Paul Revelson, Nothing But Trouble*: The Ohio Legislature's Failed Attempts to Abolish Mayor's Courts*, 35 U. DAYTON L. REV. 223, 224–25 (2010) (explaining Ohio's justice of peace courts, which existed through the 1800s, operated in small towns and handled civil matters for up to seventy dollars in damages, preliminary hearings for felony cases, and adjudications for minor criminal matters like affrays).

106. Edward C. Brewer, III, *The City Court of Atlanta and the 1983 Georgia Constitution: Is the Judicial Engine Souped Up or Blown Up?*, 15 GA. ST. U. L. REV. 941, 946–47 nn.19 & 21 (1999).

adjudicative powers who passed judgment in cases "of conscience" or disputes about small sums of money.[107] New Jersey's first Constitution also established justice-of-the-peace courts that allowed for justices to be chosen through local elections and to preside over non-jury matters in community-based courts.[108]

As the United States grew, however, so did local government.[109] Communities became less homogenous both in terms of their populations and their forms. Emerging industrial cities drew large and diverse populations at the turn of the last century.[110] Suburbs also emerged.[111] All of this presented challenges for previously parish-based government thinking and structures.

Some saw growth and modernization as an opportunity for greater professionalism in local government.[112] Historically, justices of the peace received jobs as a result of political patronage or by offering special treatment to influential community members.[113] They were paid from fines and fees they were able to collect from litigants, raising questions about their objectivity.[114] And most were not lawyers, law-trained, or schooled in legal ethics.[115]

107. *Id.*

108. John Morelli, *Rising from the Chaos: A History of the Municipal Courts*, 187 N.J. LAW. 8, 8–9 (1997).

109. Smith, *supra* note 103, at 118 ("But today with paved roads, automobiles and instant communication . . . it is safe to say that the conditions which forced the creation and spread of the justice of the peace system in the United States have long since ceased to exist.").

110. Roscoe Pound, *supra* note 101, at 310 ("[O]ur common-law polity postulates an American farming community of the first half of the nineteenth century; a situation as far apart as the poles from what our legal system has had to meet in the endeavor to administer justice to great urban communities at the end of the nineteenth and in the twentieth century.").

111. Mark B. Feldman & Everett L. Jassy, Note, *The Urban County: A Study of New Approaches to Local Government in Metropolitan Areas*, 73 HARV. L. REV. 526, 526 (1960) ("[A] projection of population outward from the central city into suburban 'dormitory communities' has occurred concurrently with the familiar movement from rural areas into the central cities.").

112. *See generally* Pound, *supra* note 101 (lauding modernization of courts).

113. Smith, *supra* note 103, at 121–22 (describing how local politics and influence impacted the work of justices of the peace).

114. WILLRICH, *supra* note 104, at 9–10; *see also* Morelli, *supra* note 108, at 9 (recounting critiques of justices of the peace in New Jersey, whose "compensation . . . depended in part on the penalties they assessed against defendants they found guilty of some offense").

115. Pound, *supra* note 101, at 305 (noting that during the 1800s "[a]dministration of justice by lay judges, by executive officers, and by legislatures was crude, unequal, and often partisan, if not corrupt").

Others believed new kinds of local court systems were needed to deal with specialized issues presented by busy urban areas, shared spaces, and the "vices" allegedly created by city living.[116] In particular, Progressive Era social reformers saw local criminal courts as a means of deploying more nuanced and humane decision-making to help solve family and community problems.[117] It is perhaps no surprise, then, that Chicago—home of the first juvenile court in 1899—served as one of the first sites for judicial innovation for adult defendants during the same era.[118] This included specialized local dockets intended to address the "social issues" underlying specific criminal charges, such as family discord and mental illness.[119] Thus, at about the same time as the launch of the juvenile court movement, the United States also saw a proliferation of local-level specialized courts for adults.[120]

But while many supported such innovations, some claimed these experiments in justice created confusion, contributed to duplicative processes, and fostered disparities in case outcomes.[121] New questions

116. *See id.* at 311–12 ("Demand for socialization of law, in America, has come almost wholly if not entirely from the city" in light of needs to address housing congestion, sanitation, and protection of the vulnerable); *see also* Percy Stickney Grant, *How To Put the People Behind the Law*, N. AM. REV., Nov. 1911, at 699–709 (report outlining the ways in which law and legal institutions, including the courts, failed to account for turn-of-the-century developments such as tenement-house living, dangerous factory work, and immigration).

117. *See* THE COMM. OF FIFTEEN, THE SOCIAL EVIL (Edwin R. A. Seligman ed., 2d ed. 1912) (noting a reform group's recommendations for improving legal processes relating to prostitution cases with a view towards curing the "social evil" of sex work and its implications); Bertha Rembaugh, *Problems of the New York Night Court for Women*, 2 WOMEN L.J. 45 (1912) (urging new more therapeutic practices in the city's night court for young women accused of prostitution).

118. *See* WILLRICH *supra* note 104, at 6, 32, 96–127 (cataloging the ways in which Chicago's city court system, with its own psychiatric unit, became one of the first in the country to attempt social engineering through mental health and other intervention for litigants).

119. *See generally id.*

120. *See, e.g.*, *Women Should Be Judged by Women*, 4 WOMEN L.J. 45 (1915) (reporting on Georgia Bullock's appointment to serve as the first judge in the Los Angeles Women's Court, a special court for women defendants and juvenile cases, and calling for its replication); See Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: History and Organization*, 7 BROOK. L. REV. 133, 174 (1937) (noting that, in New York City, "[t]he first specialized court created by resolution was the Manhattan traffic court, on March 2, 1916," and that many more followed over the next few decades).

121. Brewer, *supra* note 106, at 956–57 (recounting the fight to impose greater uniformity upon Atlanta's city courts during the 1940s); Morelli, *supra* note 108, at 8 ("By

also arose about the source and extent of local government authority—including the power and expertise of local judges to get involved in complex matters of human behavior without sufficient support or training.[122] More than this, in some urban areas, close relationships among local judges, police, and bondsmen resulted in new system dysfunctions, abuses of discretion, and widespread corruption.[123]

Ultimately, from the 1910s through the 1960s, waves of local court reform took place across the country.[124] Some of these efforts sought to reduce confusion and increase uniformity, resulting in early problem-solving courts falling by the wayside.[125] But some

the early 20th century, the New Jersey judicial system was a confusing jumble of courts."); *see also* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 46 J. AM. JUD. SOC. 55, 62 (1962) (noting the resulting "[m]ultiplicity" of courts is characteristic of archaic law").

122. *See* Kross & Grossman, *supra* note 120, at 133, 159 (recounting the results of the Page Commission study of 1910, which sought to bring greater professionalism to New York's magistrates' courts, but noting the return of problems in the 1930s); *see also* Morris Ploscowe, *The Significance of Recent Investigations for the Criminal Law and Administration of Criminal Justice*, 100 U. PA. L. REV. 805, 823 (1952) (calling for greater oversight of local police activity to avoid unprofessional behaviors and more even-handed prosecution practices of crimes, like gambling, overlooked in some districts).

123. *See* Mae C. Quinn, "*Feminizing" Courts: Lay Volunteers and the Integration of Social Work in Progressive Reform*, *in* FEMINIST LEGAL HISTORY 206, 208–09 (Tracy A. Thomas & Tracey Jean Boisseau eds., 2011) (describing the work of women lawyers and others who sought to rid New York's magistrates' courts of corrupt bondsmen who took advantage of poor women defendants in the 1910s); Aaron D. Simowitz, *How Criminal Law Shapes Institutional Structures: A Case Study of American Prostitution*, 50 AM. CRIM. L. REV. 417, 434–35 (2013) (recounting how organized crime infiltrated New York City magistrates' courts in the 1930s, including using designated bondsmen for alleged prostitutes working for the organization).

124. Robert E. Allard, *Court Reorganization Reform–1962*, 46 J. AM. JUD. SOC. 110 (1962) (cataloging differences in court reform efforts in seven different states); Alden Ames, *The Origin and Jurisdiction of the Municipal Courts in California*, 212 CAL. L. REV. 117, 117–18 (1933) (outlining the goals of California's 1924 constitutional amendments and the Municipal Courts Act); Revelson, *supra* note 105, at 226 (noting that Ohio's inferior court system underwent significant changes in 1910 with the "creation and growth of the municipal court").

125. Allard, *supra* note 124, at 110–14 (noting the differing motivations for reform of courts of first resort, including overlapping jurisdiction and inefficiencies); *see generally* Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL'Y 57 (2009).

states also made way for even greater autonomy in local law making, law enforcement, and prosecution functions.[126]

Under new "home rule" provisions,[127] local entities—frequently referred to as municipalities—could establish themselves by way of incorporation or charter to run their own law making bodies and courts.[128] Such localities were given a fair amount of independence—with the law surrounding limits on their powers being developed as they were built.[129]

Today the model municipal structure contemplates a local government with authority bounded by state law preemption principles.[130] Generally, local legislatures can pass local laws relating only to the health and safety of their communities—such as local traffic provisions and basic rules of community engagement—that do

126. *See, e.g.*, George C. S. Benson, *Joseph D. McGoldrick's The Law and Practice of Municipal Home Rule 1916-1930*, 47 HARV. L. REV. 1077 (1934) (book review) ("[T]he power to establish courts is normally a state power, though California and Colorado constitutions specifically confer the power to create municipal and police courts upon cities."); *see also* Feldman & Jassy, *supra* note 111 (describing the emergence and challenges of the "home rule" movement, fostering more formal local entities for purposes of governance and services).

127. Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737, 738–39 (1959) ("Typical home-rule [constitutional] amendments provide that any community of a certain minimum size . . . may adopt a charter for its own government, which charter shall be submitted for approval to the voters of the community by referendum and then to the legislature or governor.").

128. *See* Ames, *supra* note 124, at 118 n.15 ("The word 'municipal' is most frequently defined as pertaining to a city or corporation having the right of local self-government.") (citation omitted) (internal quotation marks omitted). An examination of all differences among local political structures—including the distinction between general and special localities—is beyond the scope of this paper. For more information on these topics, *see generally Number of Municipal Governments & Population Distribution,* NAT'L LEAGUE OF CITIES, http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-structures/number-of-municipal-governments-and-population-distribution (last visited Sept. 19, 2015).

129. Note, *Judicial Inquiry into the Validity of a Municipal Ordinance*, 14 YALE L.J. 280, 281 (1905) ("[M]unicipal by-laws and ordinances are subject to investigation in the courts with a view to determining whether or not there has been an unwarranted interference with constitutional rights."); Note, *supra* note 127, at 739 ("If a municipality acts beyond the authority granted it by the legislative enabling act or constitutional home-rule provision or charter adopted thereunder, the action is ultra vires and therefore invalid whether or not it conflicts with a state statute."); *see also* Logan, *supra* note 99, at 1424 (noting the continuing contemporary tension between state preemption doctrine and local deference).

130. Jaros, *supra* note 99, at 1152–53 ("Intrastate preemption occurs when state law precludes local governments from exercising their authority in a particular field.").

not run contrary to state law.[131] Local municipal executives, such as mayors, approve such laws and local police enforce them within the confines of geographic municipal boundaries by way of citation or arrest.[132] Local judges, who are required to comply with state laws and apply constitutional due process principles, adjudicate alleged transgressions of local codes within municipal courts.[133]

But in many parts of the country, serious questions about the efficacy, fairness, and integrity of local courts continue to this day.[134] And perhaps no local government and municipal court system has received more public attention than Ferguson—one of ninety small independent municipalities in St. Louis County, Missouri.

B. St. Louis County Case Study

Just over one million people live in Missouri's St. Louis County.[135] However, as highlighted in recently released advocacy

131. *Id.* at 1169; *see also* Note, *supra* note 127, at 737, 739 ("When a municipality adopts a home-rule charter, and in some states even before the adoption of such a charter, it gains the right to enact ordinances governing a wide range of local and municipal affairs.").

132. *See* NAT'L LEAGUE OF CITIES, *supra* note 128, (describing forms of local governments and municipalities as the predominant general form of local political structure); *see also* GA. MUN. ASS'N, HANDBOOK FOR GEORGIA MAYORS AND COUNCILMEMBERS 1, 1–2 (2012), http://www.gmanet.com/GMASite/media/PDF/handbook/handbook_complete.pdf.

133. *See, e.g.*, Morelli, *supra* note 108, at 9 ("The [New Jersey] Legislature abolished police, magistrate and recorder courts, and in their place authorized the establishment by ordinance of a municipal court or a joint municipal court with one or more other municipalities."); Revelson, *supra* note 105, at 226 (noting that, in Ohio "[b]y 1951, with the passage of 'a uniform law governing the powers and subject matter jurisdiction of municipal courts,' nearly all police courts were replaced by municipal courts" but mayor's courts remained in some areas).

134. *See, e.g.*, Kristina J. Bohn-Elia, *Soundoff*, ARIZ. ATTORNEY, May 2005, at 8 (featuring a public defender weighing in on due process and right to counsel deprivations in Arizona's municipal courts); Elizabeth A. Campbell & Tanya M. Marcum, *Disbursement of Fines and Costs in Civil Infraction Cases*, 80 U. DET. MERCY L. REV. 345 (2003) (describing conflicts of interest and other issues existing in Michigan courts that process low-level civil infractions); Glaberson, *supra* note 99 ("[S]erious things happen in these little rooms all over New York State. People have been sent to jail without a guilty plea or a trial, or tossed from their homes without a proper proceeding.").

135. According to 2013 census data estimates, 1,001,444 people live in the County of St. Louis. *See U.S. State and County Quick Facts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/29/29189.html (last visited Sep. 20, 2015).

group reports,[136] this population is spread across ninety different localities of vastly different sizes.[137] Almost all localities are independently incorporated municipalities that run their own local governments, including legislative bodies, executive agencies, and courts.[138] One of these municipalities is the town of Ferguson.[139]

Ferguson has a population of about 21,000 people.[140] Two-thirds of its residents are Black and more than one-third of the children live below the poverty line.[141] Yet according to one study, last year the Ferguson Municipal Court handled approximately 12,000 municipal ordinance violation cases.[142] With a Municipal Code comprised of hundreds of different provisions, potential charges run the gamut—everything from littering and loitering to traffic violations.[143]

Most cases start by way of citation or arrest. Notably, however, the Ferguson Police Department is ninety-four percent White while the community it serves is more than two-thirds Black, creating a high level of distrust and concern about racial bias.[144] And, in fact, according to the state's attorney general statistics, the agency has

136. ArchCity Defenders is a non-profit legal services group that provides free direct representation in criminal and civil matters, while working to connect clients with housing and other social services. *See* ARCHCITY DEFENDERS, MUNICIPAL COURTS WHITE PAPER, http://www.archcitydefenders.org/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf (last visited Sept. 30, 2015). Better Together is a project of the Missouri Council for a Better Economy, a grassroots, non-profit group interested in improving the economy and quality of life in the St. Louis area. *See About Better Together*, BETTER TOGETHER, http://www.bettertogetherstl.com/about (last visited Sept. 20, 2015).

137. ARCHCITY DEFENDERS, *supra* note 136, at 4 ("St. Louis County is comprised of 90 municipalities ranging in population from 12 to over 50,000."); *see also Public Safety – Municipal Courts*, BETTER TOGETHER, (Oct. 2014), http://www.bettertogetherstl.com/wp-content/uploads/2014/10/BT-Municipal-Courts-Report-Full-Report1.pdf.

138. BETTER TOGETHER, *supra* note 137, at 5 (noting that about eighty municipalities in St. Louis County run their own local court systems).

139. *See* CITY OF FERGUSON, http://www.fergusoncity.com/ (last visited Sept. 20, 2015).

140. BETTER TOGETHER, supra note 137, at 30.

141. ARCHCITY DEFENDERS, *supra* note 136, at nn. 67–71 and accompanying text.

142. *Id.* at 31.

143. FERGUSON, MO. CODE OF ORDINANCES, https://www.municode.com/library/mo/ferguson/codes/code_of_ordinances?nodeId=PTIICOOR (last visited Sept. 30, 2015).

144. Rebecca Leber, *Ferguson's Police Force Is 94 Percent White—And That's Basically Normal in the U.S.,* NEW REPUBLIC (Aug. 13, 2014), http://www.newrepublic.com/article/119070/michael-browns-death-leads-scrutiny-ferguson-white-police.

long engaged in racially disproportionate vehicle stops and investigations.[145]

Generally, an individual cited for a municipal code violation was either arrested or instructed to come to court on a future date.[146] If arrested, a defendant would be held until the court could see her to consider release or, alternatively, police might inform the accused of the amount of bail that could be posted to secure release.[147] By way of example, during recent protests in Ferguson, citizens were arrested for failing to disperse and forced to post bail in amounts as high as $1,000 to secure pre-trial release for these civil ordinance violation matters.[148]

Yet during this process of citation or arrest, court appearance, and possible sentencing, most defendants were not represented.[149] State public defenders do not offer services in these courts.[150] And localities like Ferguson seldom provide court-appointed counsel for indigent defendants, claiming in part that municipal matters are merely low-level civil cases.[151] Many run assembly-line-like court

145. MISSOURI ATTORNEY GENERAL, MISSOURI TRAFFIC STOP REPORTS (2014), https://www.ago.mo.gov/home/vehicle-stops-report (reflecting significant overrepresentation of black drivers in Ferguson traffic stops for over a decade).

146. Frances Robles, *Mistrust Lingers as Ferguson Takes New Tack on Fines*, N.Y. TIMES (Sept. 12, 2014), http://www.nytimes.com/2014/09/13/us/mistrust-lingers-as-ferguson-takes-new-tack-on-fines.html?_r=0.

147. Julia Lurie & Katie Rose Quandt, *How Many Ways Can the City of Ferguson Hit You with Court Fees? We Counted*, MOTHER JONES (Sept. 12, 2014, 5:30 AM EDT), http://www.motherjones.com/politics/2014/09/ferguson-might-have-break-its-habit-hitting-poor-people-big-fines ("Ferguson Municipal Court is only in session three days a month, so if you can't meet bail, you might sit in jail for days until the next court session.").

148. Rebecca Rivas, *Lawyers Say High Bonds for Protestors are Unlawful and Unfair*, ST. LOUIS AM. (Oct. 1, 2014), http://www.stlamerican.com/news/local_news/article_bdd62ee0-498c-11e4-8a3d-83313fda3102.html.

149. Balko, *supra* note 8 (estimating that fewer than twenty-five percent of defendants in St. Louis County municipal courts are represented by counsel); ARCHCITY DEFENDERS, *supra* note 136, at 7 ("[I]n all but a very few, these municipalities fail to provide lawyers for those who cannot afford counsel.").

150. *Frequently Asked Questions for Clients*, MO. ST. PUB. DEF. (2004), http://www.publicdefender.mo.gov/clients/FAQ_clients.htm; *see also* Mo. Rev. Stat. § 600.042.4 (2015) ("[D]efenders shall not be required to provide legal services to persons charged with violations of county or municipal ordinances, or misdemeanor offenses except as provided in this section.").

151. *See, e.g.*, *Your Rights In Municipal Court*, LEE'S SUMMIT, MISSOURI MUNICIPAL COURT, http://cityofls.net/Municipal-Court/Court-process/Your-Rights-in-Municipal-Court.aspx (last visited Sept. 30, 2015) (informing defendants of their "right to retain an

dockets,[152] where hundreds of defendants might be summoned to court on any given night.[153] Generally they were not provided with meaningful explanations of their options, advice about pleading guilty, or information about the collateral consequences that may flow from entering a plea—including the issuance of arrest warrants or possible loss of driving privileges.[154]

In such systems, many municipal court defendants do not fully appreciate the consequences of failing to contest their charges. In fact, regardless of their civil designation for purposes of informal processes and lack of counsel, such matters frequently result in significant punitive and financial sanctions, including hefty "court fees" simply for being processed by the courts.[155] And in many St. Louis municipal courts, pleading guilty has resulted in arrest and jail time when a defendant is unable to pay fines or complete conditions of probation, or does not appear for future case docketing.[156]

But arrest, bail, and jail for civil violations, particularly when accompanied by deprivation of the right to counsel and punishment for poverty, is simply inconsistent with American constitutional values.[157] The issue has not been squarely addressed by the United States Supreme Court,[158] but most states agree civil infractions

attorney" and where jail might be imposed "the Court will advise you to seek counsel"—but no mention of the right to court appointed attorneys).

152. Baldasar v. Ilinois, 446 U.S. 222, 228 n.2 (1980) (Marshall, J. concurring) (referencing municipal court practices as providing "assembly-line" justice).

153. Balko, *supra* note 8 (reporting on court being held on a basketball court in Florissant, Missouri in order to accommodate the volume).

154. Even until recently the Ferguson City Website did not provide meaningful information about the court's processes or the rights of persons charged there. In fact, the city's court website was buried deep in part of the public safety and Ferguson Police Department webpages. *See City Courts*, CITY OF FERGUSON, http://www.fergusoncity.com/60/The-City-Of-Ferguson-Municipal-Court (last visited Sept. 30, 2015); *see also* ARCHCITY DEFENDERS, *supra* note 136, at 7 (noting that "unrepresented defendants often enter pleas of guilty without knowing that they have the right to consult with a lawyer . . . [and] without a knowing, voluntary, and intelligent waiver" of their rights).

155. *See* Lurie & Quandt, *supra* note 147.

156. Balko, *supra* note 8.

157. Rivas, *supra* note 148 (quoting this author as questioning the legality of arrests and bail conditions for civil violations and without provision of counsel).

158. It also appears that the Missouri Supreme Court has yet to squarely address this issue in this context. *Cf.* Strode v. Director of Revenue, 724 S.W.2d 245 (Mo. 1987) (*en banc*) (challenging arrest unsuccessfully under a municipal ordinance based on conflicting state and

should not serve as grounds for arrest.[159] In fact, the Ninth Circuit Court of Appeals recently reinstated a false arrest claim based on a San Francisco police officer's action in taking an individual into custody for an alleged civil violation.[160] And while the United States Supreme Court has upheld the ability to arrest for low-level, fine-only traffic matters under the Fourth Amendment—that case, *Atwater v. Lago Vista*, involved alleged violations that were criminal in nature.[161]

In fact, Missouri's Criminal Code provides that state-level civil infractions are legally different from criminal charges.[162] Missouri courts have repeatedly reiterated the same.[163] To the extent the various Missouri statutes, rules, and local municipal codes conflict on the issue of whether arrest and jail may follow from a local civil

local driving under the influence provisions; claim did not directly challenge law enforcement's ability to arrest for civil municipal code violation in the first instance).

159. *See, e.g.*, *Civil Motor Vehicle Infractions FAQ*, MASS. COURT SYS. (2015), http://www.mass.gov/courts/selfhelp/tickets/cmvi-faq.html (explaining that mere civil traffic violations, if ignored, result in civil penalties like suspension of driving privileges and that criminal traffic violations can result in the criminal sanction of arrest); *Traffic and Nontraffic Civil Infraction Matters*, MICH. COURTS., http://courts.mi.gov/self-help/center/casetype/pages/infraction.aspx (last visited Sept. 30, 2015) ("A person cannot be sent to jail for a civil infraction unless they are found to be in civil contempt."); *Types of Traffic Offenses*, HAW. STATE JUDICIARY, (2008), http://www.courts.state.hi.us/self-help/traffic/types_of_violations.html (describing the difference between criminal traffic infractions, which allow for arrest and incarceration, and civil traffic infractions which do not).

160. Edgerly v. San Francisco, 713 F.3d 976 (9th Cir. 2013) (explaining that arrest for California civil infraction could provide grounds for false arrest claim); *cf.* Virginia v. Moore, 553 U.S. 164 (2008) (upholding mistaken arrest for citation-only *misdemeanor crime*). Note further that in *Moore* the Court upheld an officer's search incident to arrest following a cite-only traffic offense. But the case presented the issue of a single officer, in a single case, making a single error—not a standing practice of arrest for civil law violations.

161. 532 U.S. 218 (2001) (noting the charges were brought under a state statute that classified the actions as misdemeanors); *see also Moore*, 553 U.S. 164; Charlie Gerstein & JJ Prescott, *Process Costs and Police Discretion*, 128 HARV. L. REV. F. 268, 284 (2015), http://ssrn.com/abstract=2543945 (calling for a move towards civil enforcement of low-level, quality of life offenses, which the authors argue could involve "only very brief detentions" of no more than twenty-four hours).

162. *See, e.g.*, MO. REV. STAT. § 556.021.1 (2014) ("An infraction does not constitute a criminal offense and conviction of an infraction shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.").

163. *See, e.g.*, City of Cameron v. Stinson, 633 S.W.2d 437, 439 (Mo. Ct. App. 1982) ("[P]rosecutions for the violation of a municipal ordinance are civil and not criminal proceedings in the constitutional sense" but "have certain quasi-criminal aspects."); *see also* State *ex rel.* Estill v. Iannone, 687 S.W.2d 172 (Mo. Ct. App. 1985).

charge,[164] they should be found either to be unconstitutionally vague[165] or read in favor of the accused.[166] The St. Louis county municipal practice of taking people into custody—and in some instances denying bail—for alleged civil municipal violations, stands in stark contrast to long understood United States legal norms.

Second, as the United States Supreme Court decided more than ten years ago in *Alabama v. Shelton*,[167] defendants facing suspended jail time are entitled to appointment of counsel. The provision of counsel is clearly compelled in probation cases, where jail may result for failure to successfully complete conditions.[168] But municipal court proceedings, where defendants face arrest or jail for failing to satisfy fees and fines, should similarly trigger *Shelton* right to counsel rules.[169] No matter how these practices might be framed locally, they are tantamount to the suspended jail time contemplated by *Shelton*. Here, too, St. Louis County municipal court practices largely disregard constitutional representation principles.

Third, incarceration based on indigence is akin to debtors' prison practices abandoned long ago. In a series of cases decided in the 1970s and 1980s, the United States Supreme Court held that courts may not imprison defendants for failing to satisfy financial sanctions without first determining whether the failure was willful.[170] Such

164. *See, e.g.*, MO. REV. STAT. § 544.216 (2014) (stating Missouri law enforcement officers may effectuate an arrest based on violations of state criminal laws, state law infractions, or municipal ordinance violations).

165. *See, e.g.*, Christina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. POL'Y & ETHICS J. 255, 257–58 (2010) (noting vagueness doctrine is traditionally triggered when laws are "standardless" or allow for "seriously discriminatory enforcement" but calling for even broader allowance of the doctrine's application).

166. *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 889 (2004) (calling the rule of lenity a "meta" rule); *see also* Damon v. City of Kansas City, 419 S.W.3d 162, 168 (Mo. Ct. App. 2013) (stating in Kansas City municipal summons documents that defendant was required to plead "guilty" or "not guilty" and further including a threat of warrant and arrest are inconsistent with civil violation practices).

167. 535 U.S. 654 (2002).

168. *Id.*

169. *Id.; see also* Erica Hashimoto, *Abandoning Misdemeanor Defendants*, 25 FED. SENT'G REP. 103, 103 (2012) (reporting that while the "suspended sentence" standard should have vastly increased the number of cases in which attorneys are provided, in fact the number has decreased post-*Shelton*).

170. *See generally* Bearden v. Georgia, 461 U.S. 660 (1983) (explaining that probation may not be revoked based on failure to pay a fine and restitution absent a determination that

willfulness cannot be found where an individual is simply too poor to pay the amount ordered.[171] Codified state law in Missouri recognizes the same.[172] In fact, Missouri law suggests that civil default judgment is the appropriate remedy when a defendant fails to pay fines, fees, or costs in conjunction with a state-level civil infraction.[173]

Yet practices of civil arrest, *pro se* defense, and jail punishments for poverty have persisted for years in Ferguson and other St. Louis County local courts.[174] In one recent year, Ferguson alone issued over 20,000 arrest warrants[175] Most warrants stemmed from cases where there was no lawyer, no meaningful legal advice provided before plea, and no assessment of the individual's ability to pay imposed fines and fees.[176]

Much of this has been driven by a desire to collect as much money as possible for local coffers. In fact, St. Louis municipalities ambitiously forecast future prosecution revenues each year.[177] And as property values in poorer areas like Ferguson have fallen, reliance on court-generated income has increased.[178] While it cost only $313,192 to operate the Ferguson municipal court system last year, it pulled in more than $1.8 million through financial sanctions and sentences.[179] Commentators have noted that municipal court fines, fees, and costs serve as a "hidden tax" that disproportionately impacts communities

the non-payment was willful and not based on indigence); Tate v. Short, 401 U.S. 395 (1971) (prohibiting jail of a poor defendant for failure to pay a fine); Williams v. Illinois, 400 U.S. 235 (1970) (finding that punishment based on indigence improper).

171. *See Bearden*, 461 U.S. at 668.

172. *See* MO. REV. STAT. §§ 560.026 (2014) (Imposition of Fines), 560.031 (Response to Non-Payment); *see also id.* at § 479.260 ("[T]he judge may assess costs against the defendant except in those cases where the defendant is found by the judge to be indigent and unable to pay the costs.").

173. *Id.* at § 556.021.1(3).

174. Jeremy Kohler et al., *Municipal Courts Are Well-Oiled Money Machine,* ST. LOUIS POST-DISPATCH, Mar. 15, 2015, http://www.stltoday.com/news/local/crime-and-courts/municipal-courts-are-well-oiled-money-machine/article_2f45bafb-6e0d-5e9e-8fe1-0ab9a794fcdc.html ("People who can't afford lawyers are stuck with answering to the original charge, and sometimes end up in jail if they miss court appearances because they cannot pay.").

175. ARCHCITY DEFENDERS, *supra* note 136, at 34, nn.73–74 and accompanying text.

176. *See id.*

177. BETTER TOGETHER, *supra* note 136, at 2 (describing how some municipalities "actually ***budget*** for increases in fines and fees").

178. *Id.* ("[R]esearch revealed that fines-and-fees revenue increased at a time when property-tax revenue declined.").

179. *Id.* at 27, tbl.6.

of color and the most economically challenged individuals in the St. Louis region.[180]

After decades of such problems,[181] government and community advocates are finally beginning to take action and call for reform of these practices. For instance, in November 2014, Missouri's Governor appointed a sixteen-member commission to conduct "a thorough, wide-ranging and unflinching study of the social and economic conditions that impede progress, equality and safety in the St. Louis region."[182] In December 2014, Missouri's attorney general filed suit against several municipalities who appeared to be collecting more fines and fees than permitted by state law.[183]

In 2015, several local advocacy groups filed their own legal actions, successfully challenging and changing various municipal court debtors' prison practices in Ferguson and neighboring towns.[184] And the Missouri Legislature passed Senate Bill 5, a multi-faceted and much celebrated piece of legislation, which seeks to

180. *Id.* at 2 ("The practice of using fines and fees to impose 'hidden taxes' on the poorest populations is evident.").

181. Indeed, many of these issues were addressed in a law review article published in the 1960s, and local attorneys have been operating in these courts for decades. *See* Lauer, *supra* note 101.

182. Jay Nixon, *Executive Order 14-15*, OFF. MO. GOVERNOR (Nov. 18, 2014), https://governor.mo.gov/news/executive-orders/executive-order-14-15. As this article goes to press, it remains to be seen what will become of the Commission's various advisory findings. For more about Governor Jay Nixon's "Ferguson Commission," see *The Process So Far*, STL POSITIVE CHANGE, http://stlpositivechange.org/commission-work (last visited Sept. 30, 2015).

183. *See* Mariah Stewart, *Missouri Attorney General Sues Municipalities Over "Predatory" Traffic Fines*, HUFFINGTON POST (Dec. 18, 2014), http://www.huffingtonpost.com/2014/12/18/missouri-traffic-fines-lawsuit_n_6350634.html. These suits were ultimately dismissed, in part because of legislative reforms adopted in Senate Bill 5. *See infra* note 187.

184. *See, e.g.*, Monica Davey, *Ferguson One of 2 Suburbs Sued over Gauntlet of Traffic Fines and Jail*, N.Y. TIMES (Feb. 8, 2015), http://www.nytimes.com/2015/02/09/us/ferguson-one-of-2-missouri-suburbs-sued-over-gantlet-of-traffic-fines-and-jail.html. These successful lawsuits and related settlements have focused on jail conditions, money bail issues, and incarceration based on poverty. *See, e.g.*, Jeremy Kohler, *Municipal Courts Make Major Changes before New Law Takes Effect*, ST. LOUIS POST-DISPATCH (Aug. 28, 2015), http://www.stltoday.com/news/local/crime-and-courts/municipal-courts-make-major-changes-before-new-law-takes-effect/article_480a7d9d-6006-5efc-8521-02ec0d0d3743.html. Interestingly, to date no suit has squarely challenged the constitutionality of: (1) arrest or detention practices relating to mere civil violations; or (2) disregard for *Shelton* when jail follows conditional discharge violations.

address some of the harsh municipal court practices outlined above.[185]

III. MINORS IN MUNICIPAL COURTS—FORGOTTEN IN FERGUSON AND BEYOND

These emerging critiques and challenges to local policing and prosecution practices in St. Louis County are historic and important.[186] And many important changes appear to be underway. Remarkably, however, most of these efforts, accounts, and reforms have largely overlooked one especially vulnerable group harmed by municipal court practices—children.[187]

Fortunately, the United States Department of Justice (DOJ) in its investigation of Ferguson shed further light on this issue.[188] The DOJ's well-publicized March 2015 report recounted numerous instances of local children enduring the same racially biased, inhumane, and abusive municipal policing practices that were visited on adults.[189] And after hearing testimony from this author, impacted

185. Robert Patrick & Stephen Deere, *"Sweeping" Court Reform Comes as Nixon Signs Bill to Cap Cities' Revenue, End Predatory Habits*, ST. LOUIS POST-DISPATCH (July 10, 2015), http://www.stltoday.com/news/local/crime-and-courts/sweeping-court-reform-comes-as-nixon-signs-bill-to-cap/article_cafffb7e-b24d-5292-b7bb-84ef81c6e81d.html.

186. William H. Freivogel, *Missouri Supreme Court Eases Penalty for Not Paying Court Fines*, ST. LOUIS PUB. RADIO (Jan. 6, 2015), http://news.stlpublicradio.org/post/missouri-supreme-court-eases-penalty-not-paying-court-fines (reporting a change in a municipal court rule which will require courts to consider indigence in conjunction with fines, which is only partially response to complaints and will not take effect until summer); *see also* Editorial Board, Editorial, *Reforms Follow Protests in Ferguson*, N.Y TIMES, Sept. 7, 2015, at A16 ("It is no small achievement that Missouri began enforcing a series of tough new court reforms last month aimed at ending one particularly flagrant abuse: the systematic fleecing of accused traffic offenders in a revenue scheme to bolster the budgets of local governments.").

187. *See, e.g.*, William Freivogel, *Two Visions of Municipal Court Reform*, ST. LOUIS PUB. RADIO (Nov. 12, 2014), http://news.stlpublicradio.org/post/two-visions-municipal-court-reform (reflecting that no groups calling for municipal court reforms have mentioned the impact of court practices on kids as litigants, or the possibility of redirecting youth from the reach of such courts); *see also* Mike Lear, *Washington University Professor Wants Missouri Juvenile Court Reforms*, MISSOURINET (Aug. 17, 2015), http://www.missourinet.com/2015/08/17/washington-university-professor-wants-missouri-juvenile-court-reforms/ (recounting this author's critiques of Senate Bill 5, including its failure to specifically account for kids in municipal courts).

188. INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 7.

189. *Id.*; *see also* Mae C. Quinn, *Robbed of Childhood and Chances—Ferguson and Beyond*, ST. LOUIS POST-DISPATCH (Mar. 25, 2015), http://www.stltoday.com/news/opinion/robbed-of-childhood-and-chances-ferguson-and-beyond/article_7d5cdd2f-1e3b-

youth, and other community members,[190] the Governor's Ferguson Commission has turned its attention to the issue of minors in municipal courts.[191]

Indeed, each year in St. Louis—and across the country—countless young people are forced to contend with the myriad municipal court problems outlined above. As described throughout the next section, these issues take on heightened legal and constitutional significance when visited on juveniles.[192]

A. Missouri's "Shadow" Juvenile Justice System[193]

In Missouri, juvenile courts were created at the turn of the last century to provide intervention and assistance for youth in conflict with the law.[194] Joining the Progressive Era's movement, Missouri lawmakers saw value in removing children from the harsh setting and consequences of criminal courts.[195] The 1905 Juvenile Courts Act clearly embraced protective *in loco parentis* thinking, specifically providing that "care, custody and discipline of the child" in Juvenile

5e40-b95a-68fcf6bba77f.html (describing in part how DOJ's Ferguson Report should be read as surfacing the region's "shadow" juvenile justice systems operating in the shadows of constitutional and state law).

190. *See, e.g.*, Jason Rosenbaum, *Ferguson Commission Eyes Overhaul of Region's Municipal Courts*, ST. LOUIS PUB. RADIO (Dec. 16, 2014), http://news.stlpublicradio.org/post/ferguson-commission-eyes-overhaul-regions-municipal-courts.

191. *See, e.g.*, Jennifer Mann, *Ferguson Commission Seeks Complete Overhaul, Shrinking of Municipal Courts*, ST. LOUIS POST-DISPATCH (June 23, 2015), http://www.stltoday.com/news/local/crime-and-courts/ferguson-commission-seeks-complete-overhaul-shrinking-of-municipal-courts/article_14b97058-ac3f-537d-9616-1378ed0e0cae.html (referencing proposal of limited right to counsel for juveniles in municipal courts). Again, as this article goes to press, this group's efforts are still very much in progress and advisory in nature. *See supra* note 136.

192. Again, throughout this Article I generally use the terms "minor" and "juvenile" interchangeably to refer to youth under the age of eighteen.

193. *See* Elizabeth A. Angelone, Comment, *The Texas Two-Step: The Criminalization of Truancy Under the Texas "Failure to Attend" Statute*, 13 SCHOLAR 433, 452 (2010) (referring to Texas's "shadow juvenile justice system" in local municipal courts).

194. MO. JUV. JUST. ASS'N, CELEBRATING 100 YEARS OF JUVENILE JUSTICE IN MISSOURI: 1903-2003 1 (2003), http://www.njjn.org/uploads/digital-library/100years.pdf (describing enabling legislation for Missouri's first juvenile courts—established in 1903 in St. Louis and Jackson County).

195. *See generally* Noah Weinstein, *The Juvenile Court Concept in Missouri: Its Historical Development—The Need for New Legislation*, 1957 WASH. U. L. Q. 17, 31 (1957) [hereinafter Weinstein, *Historical Development*].

Court "shall approximate as nearly as may be that which should be given by its parents . . . ."[196] The Act went on to explain: "[A]s far as practicable any delinquent child shall be treated, not as a criminal, but as misdirected and misguided, and needing aid, encouragement, help and assistance."[197]

Since 1905, the term "child" has been defined, for juvenile delinquency purposes as someone under the age of seventeen.[198] Missouri was and is an outlier. In 1959 when the possibility of raising the age of juvenile court jurisdiction was considered as part of the current "modern" Juvenile Code, Missouri declined to embrace the change.[199]

At that time, thirty-one other states had already raised the age to eighteen.[200] Today, forty states provide that for purposes of prosecution, juvenile court jurisdiction extends until a young person turns eighteen.[201] And, as already discussed, eighteen is the constitutional cut-off for purposes of juvenile status.[202] Nevertheless, seventeen-year-olds in Missouri continue to have their municipal ordinance cases "direct filed" into municipal courts for processing and prosecution.[203]

More than this, children as young as fifteen are now charged in Missouri's municipal courts for some local offenses.[204] However,

196. *Id.* at 31.

197. *Id.*

198. *Id.* at 22. The 1903 Juvenile Courts Act provided for original jurisdiction for all accused youth under the age of sixteen. *Id.* at 26. Two years later the Act was amended to extend juvenile court prosecution to sixteen-year-old youth—but not seventeen-year-olds. *Id.* at 30.

199. Noah Weinstein & Lee N. Robins, *The Juvenile Court in Missouri: 1957-59—A Survey of Current Developments and Future Requirements*, 1959 WASH. U. L. Q. 373, 374 (1959).

200. In 1959, Missouri's "modern" Juvenile Court's Act was passed, rejecting a proposal to raise the age of jurisdiction to eighteen and instead retaining seventeen as the cut-off. *Id.*

201. JEFFREY A. BUTTS & JOHN K. ROMAN, LINE DRAWING: RAISING THE MINIMUM AGE OF CRIMINAL COURT JURISDICTION IN NEW YORK 5 (2014); *see also* Weinstein & Robins, *supra* note 199, at 374. Last year the Missouri Legislature finally reconsidered this dated position. Senator Wayne Wallingford, a Republican, has introduced Senate Bill 213, seeking to raise the age of juvenile court jurisdiction to eighteen. S. Bill 213, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015), https://legiscan.com/MO/text/SB213/2015.

202. *See supra* Section I.C.

203. And, of course, they are also "direct filed" into our adult criminal court system for alleged violations of state criminal laws.

204. MO. REV. STAT. § 211.031.1(3) (2014).

allowing fifteen and sixteen year olds to be prosecuted in municipal courts is out of step with historical practices in Missouri. For instance, at the turn of the last century, even minor local infractions were directed to specialized juvenile courts for evaluation.[205] And, at least up through the mid-1960s, most alleged child traffic matters were directed away from local municipal courts and into specialized juvenile courts for review.[206] Juvenile court staff handled such issues as age-appropriate indiscretions on the part of children.[207] For instance, in 1965, St. Louis County's Juvenile Court dismissed the vast majority of such cases—nearly 1000 in all—after providing a warning or some low-level informal intervention intended to educate and redirect the child from future violations.[208]

Yet Missouri's current Juvenile Code now precludes juvenile court treatment for anyone fifteen years of age or older "who is alleged to have violated a state or municipal traffic ordinance."[209] All such matters are handled exclusively by municipal court judges.[210] Other local matters, including curfew prosecutions, also may be filed directly in municipal courts.[211]

205. Weinstein, *supra* note 195, at 23–30; *see also* Kalodner, *supra* note 98, at 340 (stating how in 1956, one commentator noted that the "[p]roblems of juvenile delinquency in cases of defendants under the age of sixteen almost never fall within the jurisdiction of criminal courts of first instance").

206. Weinstein, *supra* note 195, at 22.

207. *Id.*

208. *Id.* at 37.

209. *See* Mo. Rev. Stat. § 211.031.1 (2)(3). This reflects a change from just a few years ago, where the cut-off for municipal prosecution of children was fifteen and one-half years old. *See* H.B.1171, 145th Gen. Assemb., 2d Reg. Sess. (Mo. 2012) (reducing municipal court jurisdiction from age fifteen and one-half to fifteen beginning in 2013 for traffic cases). Interestingly, the bill was sent to committee with a note suggesting that without such change, minor traffic offenders were not otherwise subject to the jurisdiction of courts. *See* COMM. ON JUDICIARY, H.B. 1171 COMMITTEE BILL SUMMARY, 145th Gen. Assemb., 2d Reg. Sess. (Mo. 2012), http://www.house.mo.gov/billtracking/bills121/sumpdf/HB1171C.pdf. In fact, such cases could have simply remained under state juvenile court jurisdiction. Other legislative materials erroneously suggested that the law actually expanded juvenile court jurisdiction over such matters—rather than restricting it. *See, e.g.*, SENATE STAFF, CURRENT BILL SUMMARY H.B. 1171, 145th Gen. Assemb., 2d Reg. Sess. (Mo. 2012), http://www.senate.mo.gov/12info/BTS_Web/Bill.aspx?SessionType=R&BillID=107149; *see also* COMM. ON JUDICIARY, H.B. 1171 PERFECTED BILL SUMMARY, 145th Gen. Assemb., 2d Reg. Sess. (Mo. 2012), http://www.house.mo.gov/billtracking/bills121/sumpdf/HB1171P.pdf.

210. Mo. Rev. Stat. § 211.031.1(2)–(3) (2014).

211. *Id.* (describing Missouri's concurrent jurisdiction arrangement for curfew cases).

It is clear that seventeen-year-old children in Missouri have been arrested, asked to post bail, faced accusation in public court settings, and received sanctions and punishment, all without any specialized legal treatment or required appearance of a supportive adult. In some instances, parents have been turned away at the courthouse doors and told they are not allowed to accompany their seventeen-year-old children to see the judge.[212] Despite the United States Supreme Court's repeated pronouncements that youth are part of a special category for prosecution purposes up until age eighteen, Missouri has ignored this constitutional cut-off.

As for fifteen- and sixteen-year-olds, it is not entirely clear how they are being handled in Missouri municipal courts. As noted above, municipal courts see themselves as having concurrent jurisdiction with juvenile courts in some of these child defendant matters—and exclusive jurisdiction in others. But Missouri's Municipal Code does not require special court treatment for these children—such as confidentiality, appointment of counsel, or waiver of fines or costs based on minority. Nor does Missouri law expressly preclude the issuance of bench warrants for fifteen- and sixteen-year-old children for failure to make timely payments of fines and fees.[213]

Similarly, while the Missouri Juvenile Code states that youth under the age of seventeen should not be held in local jails,[214] it does not expressly prohibit public arrest, transport in handcuffs, or extended stays in juvenile detention centers for purposes of return on municipal court bench warrants in traffic or other civil matters.

Yet these cases often stem from nothing more than normal youthful indiscretions. Parents may be uninformed about the prosecutions.[215] And, as recently reported by national media, many

212. This author has witnessed this phenomenon—where parents have been told they are not permitted to join their teenage children in the courtroom, but must instead wait outside for the child to exit. This author has heard from other advocates about court staff precluding parents of even young teens from entering the courtroom. Conversation with St. Louis clinic colleagues, July 2015.

213. *See generally e.g.*, MO. SUP. CT. R. 37.47. (2004).

214. *See* MO. REV. STAT. § 211.033(1) (2014) ("No person under the age of seventeen years, except those transferred to the court of general jurisdiction under the provisions of section 211.071 shall be detained in a jail or other adult detention facility as that term is defined in section 211.151.").

215. In fact, during a recent Ferguson City Council Meeting one parent testified that she did not even know about the traffic tickets, fines, and fees that had been imposed on her

at-risk teens may be negotiating these punitive processes entirely on their own.[216] But Missouri is not alone in its ongoing arrangement of running municipal courts without specialized protections or concerns for youthful litigants. Several other states have their own shadow juvenile justice systems that present similarly problematic pictures of local courts failing to account for youthful vulnerabilities.

B. Invisible Juvenile Justice Systems in Other States

1. Wyoming

Wyoming has created a juvenile justice system rife with "loopholes" that allow child defendants to face charges in municipal courts without any prior certification hearing.[217] This is because for nearly every alleged law violation—whether it is a state crime or a municipal ordinance violation—the prosecution has the power to elect to charge the child outside of the juvenile court setting.[218] Thus, youth may have their cases directly filed into juvenile, circuit, or local municipal courts without any concern for their status as minors.[219]

According to critics, historically these decisions have been driven by the leanings of local police and prosecutors.[220] They have also resulted in fewer than twenty percent of accused children being

teen sons until well after the fact. *See* Mae C. Quinn, *Open Letter to Mayor of Ferguson: Amnesty Would Make Amends*, ST. LOUIS AM. (Sept. 24, 2014), http://www.stlamerican.com/news/columnists/guest_columnists/article_8b705cd2-4414-11e4-b812-5fdfef440f5c.html.

216. *See* Seth Freed Wessler & Lisa Riordan Seville, *Kids in Court: Is it Time to Raise the Age for Criminal Responsibility?*, NBC NEWS (Jan. 20, 2015, 11:40 AM), http://www.nbcnews.com/feature/in-plain-sight/kids-court-it-time-raise-age-criminal-responsibility-n289566; *see also* Quinn, *supra* note 215.

217. Donna Sheen, *Professional Responsibilities Toward Children in Trouble with the Law*, 5 WYO. L. REV. 483, 513–15 (2005).

218. John M. Burman, *Juvenile Injustice in Wyoming*, 4 WYO. L. REV. 669, 677 (2004); *see also* WYO. STAT. ANN. § 14-6-237 (2014).

219. Burman, *supra* note 218, at 689 ("[A] juvenile is potentially subject to the jurisdiction of three different courts: the juvenile court[,] . . . circuit court, . . . or municipal court.").

220. *See id*.

processed in juvenile courts.[221] Rather, kids of all ages have found themselves tangled up with Wyoming's adult courts, resulting in stories like this one offered by a local attorney: "I've seen an eight-year-old in municipal court counting out quarters from her change purse to pay a fine imposed on her for using chalk on the outside of a barn."[222]

Like municipal court judges in Missouri, those in Wyoming are tasked with assessing fines for the benefit of the locality, which are then deposited with the town's treasurer.[223] The salary of local judges is also set by local officials.[224] As in the days of common law justices of the peace, the bench has incentive to collect as many fines and court costs as possible. Unlike Missouri, Wyoming municipal court judges have special statutory powers to allow youth to complete community service through youth-focused programs.[225] But most communities do not fund such projects.[226] Wyoming's shadow juvenile justice system, unlike Missouri's system, has previously been the subject of scrutiny and criticism, as well as attempted reform.[227] Yet, reports of direct prosecution of kids in municipal courts without any specialized protections continue.[228]

221. ACLU, INEQUALITY IN THE EQUALITY STATE: THE DAMAGED JUVENILE JUSTICE AND DETENTION SYSTEM IN WYOMING v (2010) (finding youth are subject to "vastly different treatment based on where they live").

222. Star Tribune Editorial Bd., Editorial, *Wyo Legislators Can Learn from Juvenile Justice Study,* CASPER STAR TRIB., July 18, 2010, http://trib.com/news/opinion/editorial/wyo-legislators-can-learn-from-juvenile-justice-study/article_72b028ea-70df-5913-acd4-e2f3d48cc8ec.html.

223. Burman, *supra* note 218, at 691–92.

224. *Id.* at 691.

225. *Id.* at 692.

226. *Id.*

227. *See*, *e.g.*, Burman, *supra* note 21818; *see also* Maggie Lee, *Wyoming Inches Towards Reform*, JUV. JUST. INFO. EXCHANGE (Oct. 31, 2012), http://jjie.org/wyoming-inches-toward-reform/.

228. Kelsey Bray, *Wyoming's Juvenile Justice System Sees Progress*, WYO. TRIB. EAGLE (Dec. 23, 2013), http://www.wyomingnews.com/articles/2013/12/23/news/20local_12-23-13.txt#.VgV7kMtViko (reporting minor offenses—like youthful alcohol consumption—are still being directly prosecuted in adult courts); *see also* Brice Hamack, *Go Directly to Jail, Do Not Pass Juvenile Court, Do Not Collect Due Process: Why Waiving Juveniles into Adult Court Without a Fitness Hearing is a Denial of their Basic Due Process Rights*, 14 WYO. L. REV. 775 (2014).

2. Texas

Texas also runs a secondary juvenile justice system. Like minors in Missouri, minors in Texas are excluded from juvenile courts once they turn seventeen, and are directly prosecuted in municipal courts for any local ordinance violations.[229] But youth under seventeen years of age have also faced municipal court prosecution for various Class C misdemeanors, including truancy, which carry a fine of up to $500 and a possible jail sentence.[230] The problem of aggressive truancy and school-based prosecutions in Texas has received attention over the last few years.[231] One municipal court judge in particular became well-known for imposing criminal convictions on children under seventeen, fining them $500, suspending their driving privileges, and imposing community service—all just for missing school.[232] Beyond publically shaming them in the courtroom, the judges might hold students who continue to skip class in contempt as well as impose jail time.[233]

In 2013, three advocacy groups filed a complaint with the United States Department of Justice about such practices.[234] The Justice Department subsequently opened an investigation in March

229. Angelone, *supra* note 193, at 458; see also Michele Deitch et al., *Seventeen, Going on Eighteen: An Operational and Fiscal Analysis of a Proposal to Raise the Age of Juvenile Jurisdiction in Texas*, 40 AM. J. CRIM. L. 1 (2012).

230. Angelone, *supra* note 193, at 452; *see also, e.g.*, *Court Procedures*, CITY OF SAN MARCOS TEX. (2015), http://www.ci.san-marcos.tx.us/index.aspx?page=80 ("The municipal court has jurisdiction over juveniles (under age 17) charged with most Class C misdemeanor offenses.").

231. *See, e.g.*, Gary Fields & John R. Emshwiller, *For More Teens, Arrests by Police Replace School Discipline*, WALL ST. J. (Oct. 20, 2014, 10:30 PM), http://www.wsj.com/articles/for-more-teens-arrests-by-police-replace-school-discipline-1413858602 (describing misdemeanor "tickets" given in Texas schools that send kids to local adult courts); Michael Mulvey, *Dallas School District Parents with Truant Kids Taught a Lesson*, ABC-DALL. (Oct. 16, 2009, 9:50 AM), http://www.wfaa.com/story/news/local/2014/08/06/13424782/.

232. Mulvey, *supra* note 231.

233. *Id.*; *see also* Christina Sterbenz, *Texas is Treating Kids Who Skip Class Like Grown-Up Criminals*, BUS. INSIDER (June 18, 2013), http://www.businessinsider.com/complaint-filed-over-texas-truancy-court-2013-6.

234. *See* Letter from Civil Rights Groups to Civil Rights Division accusing Dallas Schools and Truancy Courts of Civil Rights Violations, TEX. APPLESEED (July 1, 2013), https://www.texasappleseed.org/sites/default/files/148-STPP-DOJletterAdding3 Complainants.pdf.

2015.[235] Since that time, Texas Governor Greg Abbott signed into law a provision that decriminalizes child truancy.[236] But the law apparently does not impact the government's ability to directly charge children under age seventeen with other Class C misdemeanors in adult courts.[237]

3. Colorado

Colorado prosecutes children in local municipal courts rather than juvenile courts for matters where jail sentences of less than ten days may be imposed.[238] Such charges might include anything from littering[239] to shoplifting.[240] The penalties provided under some local codes make clear that one set of non-financial penalties is available for defendants over eighteen years of age, while a different set applies to defendants under eighteen. For instance, in the municipality of Grand Junction, adults face up to one year of incarceration for convictions[241] while youth receive community service sentences.[242] But both adults and children are subject to fines of up to $1000.[243]

235. Press Release, U. S. Dep't of Just., Department of Justice Announces Investigation of the Dallas County Truancy Court and Juvenile District Courts (Mar. 31, 2015), http://www.justice.gov/opa/pr/department-justice-announces-investigation-dallas-county-truancy-court-and-juvenile-district.

236. *Texas Turns Away from Criminal Truancy Courts for Students*, AL-JAZEERA AM. (June 20, 2015, 4:00 PM), http://america.aljazeera.com/articles/2015/6/20/texas-turns-away-from-criminal-truancy-courts-for-students.html.

237. *Id.*

238. COLO. REV. STAT. § 19-2-104(1)(a)(II) (2014).

239. *See, e.g.*, GRAND JUNCTION, COLO. MUN. CODE, ch. 8.12 (2015).

240. For an example of a shoplifting case, see R.E.N. v. City of Colorado Springs, 823 P.2d 1359 (Colo. 1992).

241. THE CHARTER OF THE CITY OF GRAND JUNCTION COLORADO, art. XVII, § 148, http://www.codepublishing.com/co/grandjunction/html/GrandJunctionCH.html#17.148 ("Any person 18 years of age or older who shall violate any of the provisions of this Charter for the violation of which no punishment has been provided herein, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding one thousand ($1,000.00) dollars, or by imprisonment in jail not exceeding one year, or by both such fine and imprisonment.").

242. *Id.* ("Any person under 18 years of age who violates any of the provisions of this Charter for the violation of which no punishment has been provided herein, shall be punished by a fine not exceeding one thousand ($1,000.00) dollars, and/or be required to perform useful public service not to exceed 48 hours or any combination thereof.").

243. *Id.*

In 1992, in one of the only reported legal challenges to such practices, the Colorado Supreme Court upheld direct-file municipal court prosecutions against children in *R.E.N. v. City of Colorado Springs*.[244] The court decided that the existence of a state juvenile court system did not preclude non-protective municipal court processing of youth.[245]

Beyond this, relying on Colorado Home Rule standards, the court also upheld the local municipal court's decision to deny accused youth the same protections and procedures provided in the juvenile court system[246]—including the right to counsel, social study, and records expungement.[247] It found that "neither political entity is encroaching on the regulatory sphere of the other" and both "can establish the types of proceedings they deem appropriate, within constitutional bounds, to prosecute juveniles in their jurisdiction."[248]

IV. CONSTITUTIONAL AND OTHER CONCERNS—CASE AGAINST MINORS IN MUNIS

The problem with *R.E.N.* is that it treated children the same as any other local legal issue—like zoning, littering, or speeding. But as noted, in the nearly twenty-five years since *R.E.N.*, the United States Supreme Court has repeatedly held that kids are constitutionally different from adults, and present a *sui generis* category for legal analysis. Beyond this, state laws covering a variety of fields—not just juvenile crime control—demonstrate special concern for the legal treatment of youth.

Therefore, while adults surely have reason to protest municipal court practices that provide assembly-line justice, deprive them of court-appointed counsel, and imprison them for poverty,[249] children

244. *R.E.N.*, 823 P.2d at 1361.

245. *Id.* at 1362.

246. *Id.* at 1363 ("Municipalities are not required to follow the Procedures in the Children's Code simply because the Children's Code contains detailed and comprehensive procedures for juvenile delinquency proceedings brought in state juvenile courts.").

247. *Id.* at 1360–61 n.1.

248. *Id.* at 1363–64.

249. *See supra* Section II.B; *see also* ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 10 (2010) [hereinafter IN FOR A PENNY] (describing a "two-tiered system of justice" where "the poorest defendants are punished more harshly than those with means" in many local courts).

have these and additional compelling grounds to challenge their treatment in such systems. Unfortunately, children—especially while unrepresented—neither know the basic legal protections to which they are entitled, nor have the wherewithal to litigate complex state law, federal law, and constitutional issues.[250] The next Section seeks to shed light on the manifold constitutional, legal, and policy concerns presented by the prosecution of minors in municipal courts that to date have gone largely unnoticed and unchecked.

A. Stigmatizing and Traumatizing Vulnerable Youth

As noted, the growing practice in this country of prosecuting and penalizing poverty has drawn sharp criticism from all corners.[251] Countless adult defendants have come forward in recent years to share how such practices have not only wreaked havoc on their lives, but also served to degrade and demoralize them in the courtroom and the larger community.[252] And, of course, the United States Department of Justice's Ferguson Police Department investigation confirms many such accounts.[253]

The working poor recount enduring extraordinary hardship—in addition to stress and shame—as a result of financial sanctions for

250. I further explore this dilemma in my article in progress, *(Im)mobilizing Youth* (forthcoming). *See also* Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J.L. & GENDER 715, 750 (2013) (acknowledging inherent vulnerabilities and disabilities of childhood justifying special protections, while also calling for greater participatory rights for youth).

251. *See, e.g.*, Michael Pinard, *Poor, Black and "Wanted": Criminal Justice in Ferguson and Baltimore*, 58 HOW. L. REV. (forthcoming 2015); Kelley Beaucar Vlahos, *Local Courts Reviving 'Debtors' Prison' for Overdue Fines, Fees*, FOX NEWS (Dec. 28, 2013), http://www.foxnews.com/politics/2013/12/28/local-courts-reviving-debtors-prison-for-overdue-fines-fees/; Andrew Welsh-Huggins, *Debtors' Prisons: Thrive or Serve Jail Time?*, CHRISTIAN SCI. MONITOR (Apr. 4, 2013), http://www.csmonitor.com/Business/Latest-News-Wires/2013/0404/Debtors-prisons-Thrive-or-serve-jail-time.

252. Even late-night talk show comedians have highlighted the plight of such individuals, including John Oliver with his coverage of Harriett Cleveland of Montgomery, Alabama. *See SPLC Client Featured on "Last Week Tonight" Segment on Debtors' Prisons*, S. POVERTY L. CTR. (Mar. 22, 2015), http://www.splcenter.org/get-informed/news/splc-client-featured-on-last-week-tonight-segment-on-debtors-prisons; *see also* KAREN DOLAN & JODI L. CARR, THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY (2015), http://www.ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf.

253. INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 7.

low-level local ordinance violations.[254] For instance, a local judge dressed down one Ohio mother by laughing at her as she cried in the courtroom.[255] Across California, countless individuals live in fear of public arrest because of their poverty.[256] And in St. Louis, on any given evening, lines of black citizens waiting to see judges about their cases have been seen streaming out of the municipal court doors and down the street, often while seats remain empty in the courtroom.[257] In the end, sometimes giving up hope of getting out from under these pressures, many go underground hoping police and warrants will not find them.[258]

As horrifying as these stories are when told by grown adults, they are far worse when shared by children.[259] But in some parts of the country, youth, who are not old enough to hold a job, sign a lease, or even vote, endure the same dehumanizing processes, indignities, and pressures.

Without lawyers at their side or even a trusted adult to explain the process to them, many young people attempt to make sense of confusing legal documents, complicated agreement terms, and ongoing requirements delivered from the bench.[260] But in the jargon-filled, fast-moving world that is local municipal court practice, it is hard to imagine how even the most mature child can knowingly, intelligently, and voluntarily enter a guilty plea, forgo rights, and

254. *See generally* ACLU OF OHIO, THE OUTSKIRTS OF HOPE: HOW OHIO'S DEBTORS' PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES (Apr. 2013).

255. *Id.*

256. ALEX BENDER ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA (2015), http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf.

257. Quinn, *supra* note 37, at 2204–05.

258. *See* Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 23, 2014, 10:02 AM), http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor ("The result is that people face arrest and go underground to avoid police. But this means they cut themselves off from job opportunities, welfare benefits or other programs that could get them on their feet.").

259. IN FOR A PENNY, *supra* note 249, at 46–47.

260. But even with an adult present, many such children make decisions without understanding the gravity of the situation or reliable advice. For instance, one Texas mother, "a hair stylist, didn't have an attorney and Googled advice on how her daughter should plead" at court. *See Texas Turns Away from Criminal Truancy Courts for Students*, *supra* note 236.

accept the terms presented. Yet, in some jurisdictions, kids age seventeen and younger are expected to do just that.[261]

Advocates, teachers, and other youth allies see the unfortunate results of these rushed courtroom arrangements.[262] Already at-risk kids report they did not understand what was happening in court and were too scared to speak up.[263] The practical effect—unpaid fines, court fees, and then arrest warrants—is that such kids are passed over for jobs, turned away from housing, and civilly disabled in other ways as they try to become young adults.[264] And for many youth, hopelessness and desperation may set in while operating under the weight of these adult responsibilities.[265]

More fundamentally, many of these municipal cases stem from behaviors that are absolutely normal for teenagers. They do not reflect deviance, violence, or propensity for harming others.[266] Instead, ordinary adolescent actions such as making noise, congregating in groups, or mouthing back to adults are frequently deemed unlawful by expansive local ordinance code provisions.[267]

261. *See supra* Section III.A. And here, again, it is clear that as a matter of law seventeen-year-old children facing charges in municipal courts receive no specialized consideration as a matter of law. Given the morass that is Missouri law, idiosyncrasies in local practices, and a lack of publicly available data about youth processing in municipal courts, it is not entirely clear what has been happening to fifteen- and sixteen-year-old defendants who face charges, fail to appear, fall behind on fines, and the like. *See supra* Section III.A.

262. This author's clinic has been repeatedly contacted by school teachers, social services providers, counselors and others seeking assistance for youth dealing with municipal court charges, fines, and warrants stemming from incidents when they were just seventeen years old. Colleagues at the Colorado Juvenile Defender Center (CJDC) have similarly encountered young people who have pleaded guilty in such courts without having a lawyer to assist them. Zoe Schein, *The Dangers of Municipal Courts for Youth*, NAT'L JUV. JUST. NETWORK NEWS CTR. (Dec. 17, 2015), http://www.njjn.org/article/dangers-of-municipal-courts-for-youth.

263. *See* Wessler & Seville, *supra* note 216; *see also* BENDER ET AL., *supra* note 256, at 15 (recounting the story of "Joshua," a homeless youth, who lives in fear of arrest for a warrant relating to "lodging" on a public street overnight).

264. Wessler & Seville, *supra* note 216.

265. *Id*; *see also* Balko, *supra* note 8 (describing how youth in St. Louis are impacted by municipal court practices).

266. Gerstein & Prescott, *supra* note 161 at 278–79 (noting that those convicted of low-level quality of life charges usually are no danger to society—but have "merely offended other people's sensibilities").

267. *See, e.g.*, FLORISSANT, MO., MUN. CODE § 210.376 (providing that "[n]o person shall loiter . . . at a time or manner not usual for a law abiding citizen" or "take[] flight" from police); JENNINGS, MO., CITY CODE § 24.29 (defining disorderly conduct as, among other things, using "insulting language" where a "breach of the peace may be occasioned");

Many of these provisions are fatally overbroad or improperly chill First Amendment rights.[268] And even if constitutional, if presented in a properly functioning juvenile court, such matters should be handled informally or with warnings and dismissals.[269] Both substantive law and court procedures in many municipalities fail to account for adolescent development, brain science teachings, and what most any mother or father will tell you—that kids will, and should, be kids.

Therefore, as a matter of common sense, charging and prosecuting juveniles under the age of eighteen with low-level ordinance violations in this way is antithetical to the government's role in supporting youth.[270] They also run contrary to the most recent holdings of the Supreme Court, acknowledging youth under the age of eighteen as a vulnerable group in need of special treatment by our courts.[271] Rather than protecting young people, such localized practices—which might be seen as a form of *in loco* juvenile justice—traumatize and reduce the life chances of some of the country's most vulnerable and already traumatized young people.[272]

UNIVERSITY CITY, MO., CODE § 215.385 ("It is unlawful for any person to fail or refuse to obey a reasonable order or direction of a police officer."); *see also* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 395–97 (2013).

268. *See, e.g.*, Peter W. Poulos, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CAL. L. REV. 379, 382 (1995); *see also* INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 7, at 24–28.

269. *See* MODELS FOR CHANGE, *supra* note 34, at 104.

270. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) (noting that its decisions rested not only on common sense—on what "any parent knows"—but on science and social science as well).

271. *See supra* Sections I.C. & I.D.

272. *See* ERICA J. ADAMS, HEALING INVISIBLE WOUNDS: WHY INVESTING IN TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE 3 (Just. Pol'y Inst. ed., 2010), http://www.justicepolicy.org/images/upload/10-07_REP_HealingInvisibleWounds_JJ-PS.pdf (reporting that many economically challenged urban youth of color suffer trauma through exposure to violence and other destabilizing factors in their communities); *Trauma Informed Systems of Care*, NAT'L CTR. JUV. & FAM. CT. JUDGES, http://www.ncjfcj.org/our-work/trauma-informed-system-care (last visited Sept. 18, 2015) ("The juvenile justice system needs to be trauma informed at all levels.").

B. Side-Stepping Federal Mandates

In many municipal courts around the country, prosecution practices not only harm young people, but also conflict with federal laws specifically intended to protect against harsh treatment of juveniles. On the books for over forty years, the federal Juvenile Justice and Delinquency and Prevention Act (JJDPA) was enacted to help states improve their youth justice systems.[273] Known as one of most important pieces of juvenile legislation in this country's history, its provisions seek to reduce harm to court involved kids.[274]

Today, the JJDPA has several core components or goals that states must satisfy to receive federal juvenile justice funding. The first is deinstitutionalization of youthful "status offenders."[275] The second involves protective measures for youth in custody, including separating them both physically and by "sight and sound" from adult prisoners.[276] A third goal is reduction of juvenile "disproportionate minority contact (DMC) with the justice system."[277]

Status offenses are defined as behaviors that are unlawful because they are committed by youth.[278] Activities like underage drinking, underage smoking, curfew violations, and truancy are common examples of such charges where the child's minor status is essential to the charge.[279] Under the JJDPA, states should not respond to such youthful indiscretions with arrest and placement in secure facilities—juvenile detention centers or otherwise.[280] Instead, federal funding is provided to support deinstitutionalization in such cases to avoid

273. 42 U.S.C. § 5601 (2012).

274. Gary Gately, *Will This Be the Year JJDPA is Reauthorized?*, JUV. JUST. INFO. EXCHANGE, (Sept. 4, 2014), http://jjie.org/will-this-be-the-year-jjdpa-is-reauthorized/ (noting that states that fail to comply with the components of the JJDPA are "really doing harm to [juveniles] in the system").

275. *Compliance with the Core Requirements of the Juvenile Justice and Delinquency Prevention Act*, OFF. JUV. JUST. & DELINQ. PREVENTION, http://www.ojjdp.gov/compliance/index.html (last visited Oct. 1, 2015).

276. *Id.*

277. *Id.*

278. See 42 U.S.C. § 5633(a)(11) (2012) (referring to "juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult").

279. Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception that Swallowed the Rule*, 7 SEATTLE J. SOC. JUST. 555, 555 (2009).

280. *Id.*

unnecessary incarceration and harm to kids based on minor adolescent misbehaviors.[281]

Unfortunately, the practices in many jurisdictions appear to frustrate the intention of these provisions. For instance, in Wyoming the municipal ordinance violation of minor in possession of alcohol is excluded from the state's definition of status offenses.[282] In Wyoming, not only are youth subject to secure detention for such offenses—but may be prosecuted as adults in municipal courts and sentenced to adult jail time.[283]

In Missouri, the current morass of state Juvenile Code and local Municipal Code provisions also appear to frustrate JJDPA's goal of deinstitutionalization of status offenders. For instance, the Juvenile Code provides that juvenile courts have concurrent jurisdiction with municipal courts for youthful curfew cases.[284] But it does not further direct which entity has primary responsibility for these matters or how they should be processed, prosecuted, or punished.

Some Missouri municipal codes expressly state that curfew cases can be referred to juvenile court for processing.[285] Yet, interestingly, some local curfew provisions apply to youth up to age eighteen.[286] Related ambiguities and interpretation problems exist for underage smoking, which is handled differently across different municipalities in Missouri. On the face of their Ordinance Codes, places like Ferguson appear to permit fines of up to $1000 and three months in jail for any violator under the age of eighteen without any reference to juveniles or juvenile court.[287]

In fact, the very definition of "status offense" and to whom it applies in Missouri is far from clear. In 2008, the Missouri legislature sought to extend the coverage of juvenile court status offense prosecutions to cover youth up to age eighteen, rather than just

281. *Id.* at 558.

282. John M. Burman, *Juvenile Injustice in Wyoming*, 4 WYO. L. REV. 669, 686–87 (2004).

283. *Id.*

284. MO. REV. STAT. § 211.031.1(2)–(3).

285. *See, e.g.*, JENNINGS, MO., MUN. ORDINANCE § 24-17.

286. *See, e.g.*, *id.*; FERGUSON, MO., MUN. ORDINANCE § 29-91.

287. *See* FERGUSON, MO., MUN. ORDINANCE §§ 29-153(b), 29-155, 1-15. *But see* FLORRISANT, MO., MUN. ORDINANCE § 210.500 (allowing for fines only, ranging from $50 for first offenses and up to $750 for subsequent incidents of underage smoking).

seventeen.[288] However, the enabling legislation indicated such a change would not occur until the legislature also provided funding to support extending juvenile court jurisdiction.[289] To date, despite repeated requests by our court system for funding, this has not occurred.[290] Seventeen-year-olds remain in a kind of legislative limbo in the Show Me State when it comes to status allegations.

Finally, while Missouri's Juvenile Code expressly defines certain acts as status offenses—like failing to attend school and running away from home—any offense "not classified as criminal" is also considered a status offense if committed by a child under the age of eighteen.[291] As municipal proceedings are merely civil in nature, it would seem that every municipal ordinance charge involving a minor should be interpreted as a status offense, thereby precluding arrest and secure detention in a jail or juvenile detention center under the JJDPA. But this does not appear to be the case.

Jurisdictions may not be reporting such issues as violations of JJDPA. They may claim that once state law provides exclusive or concurrent jurisdiction to adult venues—like municipal courts—such matters are no longer considered "juvenile" cases under the Act.[292] But such claims seem to place form over substance and thwart the

288. *See* MO. JUV. CODE § 211.021(2) (expanding definition of "child" to cover "any person over seventeen but not yet eighteen years of age alleged to have committed a status offense").

289. *See* MO. JUV. CODE § 211.021(2) (Revisor's note clarifies withholding effective date of expanded definition of status offense until sufficient appropriations are made to support the expansion); *see also* Mo. H.B. 1550 (2008).

290. MO. OFFICE OF ADMIN., 2015 MISSOURI JUDICIARY BUDGET REQUEST 5 (Sept. 20, 2013), https://oa.mo.gov/sites/default/files/Judiciary%20FY%202015%20Budget.pdf (seeking over four-million dollars to implement HB 1550, which was signed into law seven years earlier in 2008).

291. *See* Mo. Stat. Ann. §§ 211.021(2), (7), 211.031.1(2)(e). As noted earlier, the legislature has specially carved out non-felony traffic offenses for those age fifteen to eighteen as exclusively municipal matters, and provided concurrent jurisdiction between juvenile and municipal court for certain curfew and tobacco violations. Mo. Stat. Ann. § 211.031.1(3). But the Juvenile Code also suggests Juvenile Courts do not have jurisdiction over tobacco cases. *See* Mo. Stat. Ann. § 211.031.1(2).

292. CAMPAIGN FOR YOUTH JUSTICE, JUVENILES IN JAILS: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 5 (2007), http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf (describing the use in many states of a "loophole" in the JJDPA and its enabling regulations that allows states to treat as adults any youth certified to criminal court or direct filed into such institutions).

spirit and intention of JJDPA's deinstitutionalization mandate. It is also notable that federal regulatory exclusions focus on the distinction between juvenile and criminal court proceedings—without offering much insight about municipal courts that might hold themselves out as civil venues.[293]

Similar issues can be seen in municipal management of arrested youth—both in terms of separation requirements and DMC reporting. The general rule is that juveniles may not be housed with adults in jails and detention centers, even during temporary stays. Instead, they must be protected by what has become known as "sight and sound" separation. [294] But as described above, across the country youth under eighteen may pass through local holding cells and jails each year. And, particularly in smaller municipal police departments and courthouses, physical facilities may not ensure complete separation—and protection—of youth from adults.[295]

More than this, some jurisdictions may be excluding traffic arrests and other ordinance violation arrests from their JJDPA count numbers. Here, too, they may claim that because municipal courts, rather than juvenile courts, have original jurisdiction in such cases, they are not "juvenile" matters for purposes of reporting requirements. These same jurisdictions may be undercounting youthful minority contact with the justice system, by excluding traffic, and other municipal ordinance cases from annual reports seeking to discern racial disparities in juvenile policing and prosecution.[296]

293. *See* Substantive Requirements, 28 CFR § 31.303 (2015). What is more, new regulations providing greater clarity consistent with the original goals of the JJDPA appear to be in progress. *See* Liz Ryan, *Federal Juvenile Justice Regs: What's the Hold Up?*, CHRON. SOC. CHANGE (Apr. 29, 2014), https://chronicleofsocialchange.org/opinion/federal-juvenile-justice-regs-whats-the-holdup/6422.

294. 42 U.S.C. §§ 5633(a)(12)–(13) (2012); *see also* 28 CFR § 31.303.

295. *See, e.g.*, Gary Gately, *Grassley OJJDP Probe Widens, Implicating 6 States, 2 Territories,* JUV. JUST. INFO. EXCHANGE (Mar. 4, 2015), http://jjie.org/grassley-ojjdp-probe-widens-implicating-6-states-2-territories/ (raising questions about sight and sound compliance in states like Idaho and Tennessee).

296. In fact, as this article goes to press, the Office of Juvenile Justice and Delinquency Prevention is revisiting its guidelines for statutory interpretation and compliance under the JJDPA. For instance its facilities monitoring manual is currently being updated see, e.g., OJJDP GUIDANCE MANUAL (2010), http://www.ojjdp.gov/compliance/guidancemanual2010.pdf/. In addition OJJDP Administrator Robert L. Listenbee issued a policy statement reminding states that if requirements are not satisfied they may lose federal

C. Displacing State Law through Local Adultification of Kids

Minors in municipal courts raise other significant legal concerns. States may provide local municipal courts with jurisdiction in the cases of some children in conflict with the law. But that does not mean local governments can ignore the much-occupied fields of state juvenile law and child welfare. Although some scholars have recently proposed greater local influence over family affairs[297] and contested the extent to which federal interests impact family law principles,[298] the state has long stood as a central government agent in protecting the rights and needs of children in this country.[299] Under this traditional allocation of power, state norms and goals around child treatment and welfare should trump *in loco* juvenile justice practices that directly conflict with them or undermine their achievement.

1. Lack of power in special fields of child law and regulation

States differ in their approaches to delegation of "home rule" authority.[300] In some jurisdictions, municipalities have "no inherent powers" and may legislate locally only to the extent expressly permitted by state law.[301] Thus, although a municipal court system may have jurisdictional powers in some youthful offender matters, it

juvenile justice funds. *See* U.S. DEP'T JUST., OJJDP POLICY: MONITORING OF STATE COMPLIANCE WITH THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT (2015), http://www.ojjdp.gov/compliance/monitoring-state-compliance-JJDPA-policy.pdf

297. *See, e.g.*, Sean H. Williams, *Sex (and Money) in the City*, 21 (U. of Tex. L., Pub. L. Res., Paper No. 625, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532589.

298. Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1836 (2014); Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787 (2015).

299. *See* Joanna L. Grossman, *Family Law's Loose Canon*, 93 TEX. L. REV. 681, 690 (2015) (book review) ("[I]t is still by and large true that family law and family status are controlled by the states."); *see also* Meredith Johnson Harbach, *Is the Family a Federal Question*?, 66 WASH. & LEE L. REV. 131, 134 (2009) (noting that historically family law has been seen as a "quintessentially state issue"); Rosenbury, *supra* note 298, at 1836 ("The individual states have long played a primary role in defining the legal family in the United States, with states often determining who does and does not enjoy the legal status of spouse, parent, and child.").

300. *See* Williams, *supra* note 297, at 2 (discussing the distinction between generally less empowered "legislative" and more empowered "imperio" home rule states).

301. *See, e.g.*, Damon v. City of Kansas City, 419 S.W.3d 162, 183 (Mo. App. W.D. 2013) ("A city has no inherent powers, but is confined to those expressly delegated by the state and those necessarily implied in the authority to carry out the delegated powers.").

does not necessarily follow that they have the authority to create penalty or enforcement schemes in such cases.[302] And, even where such authority may be implied from local jurisdictional powers, municipal courts do not have carte blanche to prosecute and punish as they wish.[303]

Municipal court defendants are generally entitled to due process and constitutional protections.[304] But municipalities must take particular care when dealing with child defendants as a class of litigants. Not only have children been deemed categorically less culpable as a matter of Supreme Court constitutional law,[305] they have long held a special place in state law and policy.[306]

For instance, across the country state laws affirmatively require parents to provide for their children,[307] schools to educate them,[308] and police to protect them.[309] Entire administrative structures have been constructed by most states to ensure maintenance of these supportive features, as well as to intervene when they are not

302. *See, e.g.*, Village of Depue Illinois v. Exxon Mobile Corp., 537 F.3d 775, 787 (7th Cir. 2008) (holding that although municipality had the right to adopt certain provisions, it could not apply or enforce them in a way that exceeded its authority).

303. *See, e.g.*, Zilba v. City of Port Clinton, Ohio, 924 F. Supp. 2d 867, 885 (N.D. Ohio 2013) (stating that the power to regulate parking did not allow for creation of penalty scheme inconsistent with state penalties for parking offenses); *see also* Ryals v. City of Englewood, 962 F. Supp. 2d 1236, 1251 (D. Colo. 2013).

304. *See, e.g.*, *Damon,* 419 S.W.3d at 191 (holding that municipal court must provide due process and other constitutional and statutory procedural protections to defendants).

305. *See supra* Sections I.C, I.D.

306. *See generally State Child Welfare Policy Database*, *About Us*, CASEY FAM. PROGRAMS (2010), http://www.childwelfarepolicy.org/about_us (making "publicly available an array of state child welfare policies so that policy makers, practitioners, and other stakeholders can stay abreast of the policies that protect our nation's most vulnerable children").

307. *See State Child Welfare Policy Database*, *Data by Topic*, CASEY FAM. PROGRAMS (2010), http://www.childwelfarepolicy.org/maps/single?id=137 (showing state by state provisions on parental responsibilities).

308. *See* Paul L. Tractenberg, *Education Provisions in State Constitutions* (forthcoming *in* STATE CONSTITUTIONS FOR THE 21ST CENTURY), http://camlaw.rutgers.edu/statecon/subpapers/tractenberg.pdf (last visited Nov. 21, 2015).

309. *See* Theodore P. Cross et al., *Police Involvement in Child Protection Services Investigations*, 10 CHILD MALTREATMENT 1, 2 (2005), http://www.unh.edu/ccrc/pdf/CV83.pdf ("The nature of their mutual involvement in the same cases follows from CPS's mission to ensure children's safety and well-being in caretaking relationships and law enforcement's mission to investigate crimes and protect the public safety.").

functioning as they should.[310] Further, broad swaths of protective legislation—from anti-child labor regulations,[311] to mandatory reporting provisions,[312] to laws prohibiting contract enforcement against minors[313]—affirmatively set the stage for adult engagement with young people in every state.

While state legislators may have allowed for municipalities to take jurisdiction over some ordinance cases involving children—that is, sharing the field with regard to who might accept such matters—none appears to have expressly offered to share the fields of child treatment and family protection. Nor did they likely intend to do so, particularly in the manner we see happening in many of today's localities.

Yet municipal policing and prosecution practices that engage children without consent of their guardians, take them out of their family homes, disrupt their educational services, or seek to enforce financial and contractual obligations surely encroach upon zones intended to be maintained exclusively by the state to ensure the well-being of its children. In fact, despite its holding in *R.E.N.* over two decades ago, the Colorado Supreme Court has recently struck down municipal actions on state field preemption grounds based on these very concerns.

In 2000, Juliana Ibarra was a Colorado foster mother for three children, each of whom had been both the victims and perpetrators of sexual abuse.[314] Despite their status as child victims, the youth were adjudicated delinquent for their actions and required to register under Colorado state law as sex offenders.[315] However, that same

310. *See, e.g.*, *Child Protective Services*, N.Y. ST. OFF. CHILD. & FAM. SERV., http://www.ocfs.state.ny.us/main/cps/ (last visited Nov. 21, 2015); *Child Protection Services*, CAL. DEP'T OF SOC. SERV. (2007), http://www.dss.cahwnet.gov/cdssweb/pg93.htm.

311. *See Wage Hour Division (WHD): State Child Labor Laws Applicable to Agricultural Employment*, U.S. DEP'T LAB. (Jan. 1, 2015), http://www.dol.gov/whd/state/agriemp2.htm.

312. *See State Child Welfare Policy Database*, *Persons Required to Report*, CASEY FAM. PROGRAMS (Apr. 2010), http://www.childwelfarepolicy.org/maps/single?id=160.

313. *See, e.g.*, ILL. ST. B. ASS'N, KIDS AND THE LAW: AN A TO Z GUIDE FOR PARENTS 3 (2008), http://www.isba.org/sites/default/files/teachers/publications/Kids%20and%20the%20Law.pdf (noting that children in Illinois do not have the ability to contract until they reach age 18—or the age of majority).

314. City of Northglenn v. Ibarra, 62 P.3d 151, 153–54 (Colo. 2003).

315. *Id.* As explained by Ms. Ibarra, "These kids need protecting. They are not like pedophiles. They were [sexually] violated before and they responded [by violating their

year the city of Northglenn, where Juliana and her children lived, passed Ordinance 1248.[316] According to youth advocates, the law was an attempt to redefine "the term 'family' so as to exclude any household that contains more than one individual who must register as a sex offender."[317] Thus, by allowing unrelated sex offenders to live in her home, Ms. Ibarra allegedly violated local law.[318] She was ultimately charged, prosecuted, and fined.[319]

Ms. Ibarra appealed to the Colorado Supreme Court alleging, among other things, that punishment under Ordinance 1248 amounted to an unfair infringement on "the right to personal choice in matters of family life."[320] That is, her foster family was "torn apart" by the local law's enforcement.[321] In holding that enforcement of the Ordinance was implicitly preempted by the state's preeminence in the fields of family law and child welfare, the Court noted that "Ordinance 1248 and the Children's Code superficially appear to regulate two different subject matters."[322] However, as applied, local law infringed on the state's ability to meet its obligations to youth.[323] The Court ultimately held that application of Ordinance 1248 was "preempted because it regulate[d] a matter of statewide concern: adjudicated delinquent children in state-created foster care families."[324]

Although the issue before the Colorado Supreme Court related to state-placed foster and delinquent youth, its analysis applies with equal force to other matters of child welfare, family integrity, and the legal status of juveniles. Indeed, the Court noted that "[t]he *parens patriae* interests in the welfare of children have always been a matter of state legislation."[325] Thus, local laws applied in ways that implicate

siblings]." George Lane & Stacie Oulton, *Sex Offender Rule Loses in Court*, DENVER POST (Mar. 20, 2001), http://extras.denverpost.com/news/news0320b.htm.

316. *City of Northglenn*, 62 P.3d at 153.

317. *City of Northglenn v. Ibarra*, ACLU OF COLO. (2012), http://aclu-co.org/court-cases/city-of-northglenn-v-ibarra/.

318. *City of Northglenn*, 62 P.3d at 154.

319. *Id.*

320. *Id.*

321. *See* Lane & Oulton, *supra* note 315.

322. *City of Northglenn*, 62 P.3d at 160.

323. *Id.*

324. *Id.* at 163.

325. *Id.* at 162.

child law matters which have been "traditionally and historically regulated by the state" should be treated as implicitly preempted.[326]

Even if not expressly so denoted, therefore, a state's historic commitment to the regulation of child treatment in the home and society may be read as entirely preempting municipal court child punishment practices that implicate these areas.[327] Any action beyond taking jurisdiction may involve entry into fields of law and regulation intended to remain under state control.[328]

2. Specific conflicts with contract and other doctrines

Many municipal court practices also directly conflict with, or affirmatively frustrate the goals of, state laws relating to children. As noted above, under most state statutory and regulatory schemes, youth are legally dependent upon their parents or guardians who have the power to make a range of decisions about their lives. Even the most basic determination of whether a child is permitted to take a bus across town to visit a courthouse is one that, under state law, begins with an assessment of the need for child autonomy under the circumstances, the role of parent, and the significance of the familial structure.[329]

Therefore, taking children into custody by warrant without parental notice or consent, making determinations that might impact a child's education, and even summoning a child before the bench necessarily implicates state-constructed legal frameworks.[330] What is

326. *Id.* at 162–63.

327. *Id.*

328. *See id.* at 162 ("Although the Constitution assigns home-rule powers to Northglenn . . . it does not specifically provide that Northglenn may regulate land-use in such a manner that also regulates the number of adjudicated delinquent children living in foster care homes.").

329. *See* Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 824 (2015) ("The ability to 'establish a home and bring up children' is a fundamental part of the American dream.") (internal citation omitted); Annette R. Appell, *The Child Question*, 2013 MICH. ST. L. REV. 1137, 1155 (2013) ("Children are, effectively, under coverture of their parents; this includes management of their own spiritual and physical health and their freedom to choose their own activities, labor, and education.").

330. Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 833–34 (2007) ("[A]bsent abuse or other forms of perceived family default, parents enjoy almost complete authority over their children at home."). One exception to this general concept of difference is a child's independent right to counsel, regardless of the position of the guardian or parent. *See* In re Gault, 387 U.S. 1, 34–38 (1967); *see also* Kristin Henning, *Juvenile Justice*

more, these practices simply disregard the legal deference generally provided to families as units and legal protections afforded to youth as vulnerable individuals.[331] Accordingly, they would appear to be implicitly preempted by state law.

Another area of long-standing state-law child regulation relates to privacy and confidentiality. Juvenile, family, and education law and procedures have generally protected the identity of children from the general public, particularly when the information in question may be intimate or stigmatizing.[332] This is why juvenile courts are generally closed to those who do not have a direct interest in the proceedings and education records are not available to the general public like other government records.[333]

But as described above, many municipal courts subject children to automatic public presentation and shaming by way of prosecution of low-level ordinance violations. Even if not in direct contravention of a particular statute, such practices may work to frustrate the spirit and purposes of the various privacy-protecting provisions established by the state on behalf of children.

Perhaps the most striking example of direct conflict can be seen in municipal court financial sanction practices. As a matter of state law, children are considered dependent upon the adults in their lives.[334] Thus, there are affirmative restrictions on their ability to

after Graham v. Florida*: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 18 (2012) (noting how modern juvenile law should evaluate "protective rights that are necessary to ensure accurate fact-finding and prevent undue coercion by the state" differently from "capacity-based rights that are arguably only appropriate for youth who have sufficient capacity to exercise them").

331. *Id.*; *see also* Appell, *supra* note 250 (exploring tension between child's autonomy versus role within family unit).

332. *See generally* RIYA SAHA SHAH, LAUREN FINE & JAMIE GULLEN, JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT (2014), http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/national-review.pdf; LISA LARSEN, MINN. H. RES. DEP'T, FEDERAL AND STATE LAWS GOVERNING ACCESS TO STUDENT RECORDS (2000), http://www.house.leg.state.mn.us/hrd/pubs/studrec.pdf.

333. SHAH ET AL., *supra* note 332; *see also* NAT'L ASS'N OF COUNS. FOR CHILD., POLICY STATEMENT: CONFIDENTIALITY OF JUVENILE COURT PROCEEDINGS AND RECORDS 2 (1998), http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/policy/policy_statement_-_confident.pdf (advocating a case-by-case basis analysis of confidentiality in juvenile courts, with the interest of the child serving as paramount consideration).

334. *See, e.g.*, McNamara v. McNamara, 181 N.W.2d 206, 210 (Iowa 1970) ("[B]oth parents are under the same legal duty to support their children."); Morrison v. Richerson, 497

enter into financially binding contracts. Youth under the age of eighteen generally may not take out car loans or rent apartments.[335] And adults who seek to enter into such an arrangement with a child, under most state law schemes, do so at their own peril.[336] The agreement will not be upheld; it will be voided as a matter of law.[337]

Yet, in many places, municipal court judges allow children to enter into agreements to pay fines, court fees, and other litigation costs and then seek to enforce them through warrants, contempt orders, threats of arrest, and even detention or incarceration.[338] This practice stands in stark contrast to what is generally permitted under state law contract frameworks constructed to protect children from intimidation, overreaching, and financial liability during their formative years.[339] It may well be that some features of these state-constructed frameworks are not sufficiently nuanced and thus worth revisiting in the days ahead.[340] But these are matters for state legislatures and courts—not local municipal actors. *In loco* juvenile justice is thus prohibited.

D. Denying Youth a Modern Constitutional Right to Juvenile Court

Finally, as described above, constitutional juvenile law is at an important crossroads. Recent United States Supreme Court pronouncements establishing the evolving standards of youth standard suggest a fundamental shift in thinking about sentencing children as adults. More than this, particularly when coupled with

N.W.2d 506, 506 (Mich. App. 1993) (noting that a child has right to financial support from parent); *In re* Adoption of Marlene, 822 N.E.2d 714, 719 (Mass. 2005) (describing the history of child dependence and duty of parental support in Massachusetts).

335. *See, e.g.*, Rodriguez v. Reading House. Auth., 8 F.3d 961, 966 (3d Cir. 1993) (youth unable to enter into lease with housing authority); Halbman v. Lemke, 99 Wis. 2d 241, 247–50 (1980) (finding a youth's car contract voided).

336. Victoria Slade, Note, *The Infancy Defense in the Modern Contract Age: A Useful Vestige*, 34 SEATTLE U. L. REV. 613, 617 (2011) ("The [infancy] doctrine exists to protect minors from foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the market place.") (internal quotation and citation omitted).

337. 5 WILLISTON ON CONTRACTS § 9:5 (4th ed.).

338. *See supra* Part III.

339. *See generally* Slade, *supra* note 336.

340. *Id.* (noting calls by some contemporary commentators for softening of the infancy defense in contract cases, particularly in light of youthful online behaviors and sophistication).

the Supreme Court's earlier cases providing basic protections for juveniles facing juvenile court prosecution, these developments may finally dictate a child's constitutional right to juvenile court in the first instance.

As noted, numerous challenges to the practice of "automatic" criminal court prosecution of children were raised and litigated during the 1970s and 1980s. And courts repeatedly held that there was no presumption in favor of juvenile court prosecution.[341] States were not required to establish juvenile court systems at all. Therefore, legislatures could do as they pleased to create exclusions and exceptions to juvenile court prosecution and treatment.[342] But much has changed since the 1970s and 1980s.[343]

At this point it is hard to imagine any state closing its juvenile court system. If any tried to do so, it is difficult to believe such action would go without massive resistance—followed by maintenance of the system. In fact, standards have evolved over the last few decades such that both public sentiment and constitutional standards recognize children are inherently different from adults and, in most cases, require different treatment.[344] While there may not be an inherent right to be treated as a juvenile, the United States Supreme Court appears to have now crafted one.[345]

341. People v. Jiles, 251 N.E.2d 529, 531 (Ill. 1969) ("While there would probably be almost universal agreement that it is desirable for a State to maintain a juvenile court . . . we are aware of nothing in the constitution of the United States or of this State that requires a State to do so."); State v. Green, 544 P.2d 356, 361 (Kan. 1975) ("[T]he Kansas Legislature could, in the exercise of its wisdom, withhold the protection of the doctrine of parens patriae from all juveniles exceeding fifteen years of age."); State v. Cain, 381 So. 2d 1361, 1363 (Fl. 1980) (finding no inherent or constitutional right to be treated as a juvenile).

342. *See, e.g.*, Woodard v. Wainright, 556 F.2d 781, 785 (5th Cir. 1977) ("[T]reatment as a juvenile is not an inherent right but one granted by the state legislature, therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved.").

343. Kristen Simms Cross, *When Juvenile Delinquents Are Treated as Adults: The Constitutionality of Alabama's Automatic Transfer Statute*, 50 ALA. L. REV. 155, 174 (1998) (recounting past unsuccessful challenges to direct filing practices, but forecasting different results in future litigation).

344. *See* MARK W. LIPSEY ET AL., *supra* note 14, at 8 (reporting on overwhelming popular support for early intervention, treatment, and rehabilitation of youth).

345. *See* Neelum Arya, *Using* Graham v. Florid*a to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 137 (2010) ("Although the *Graham* Court passively accepts the constitutionality of youth being tried as adults, the issue has never been properly brought

That is, *Roper*,[346] *Graham*,[347] and *Miller*[348] all stand for the proposition that youth under the age of eighteen, as a class, demand unique analysis and consideration when compared with adults—except in unusual circumstances. As argued by Elizabeth Scott, this necessarily means that only in the rarest and most serious cases can juveniles face adult prosecution, and only after an individualized transfer hearing.[349] While not the focus of Professor Scott's inquiry, this same analysis should also prohibit automatic prosecution of low-level youthful indiscretions, like traffic offenses and ordinance charges, in adult courts, including local municipal courts.

Indeed, in light of its recent decision in *J.D.B. v. North Carolina*, it is obvious the Court intended for the evolving standards of youth doctrine to apply beyond the sentencing context and to justice system processing of young people more generally.[350] In *J.D.B*, the Court held that under *Miranda v. Arizona*, courts needed to analyze the question of "custody" from the perspective of the juvenile at the time of police questioning.[351] That is, the Court in that context too required specialized analysis and approaches for children in conflict with the law.

As noted by juvenile advocate and expert Marsha Levick, "the Court's recognition of a reasonable *juvenile* for the purposes of the *Miranda* custody analysis augurs a broad shift in the analysis of a juvenile's guilt, criminal responsibility, and conduct across a wide spectrum of American criminal law."[352] *J.D.B.*, therefore, provides further support for a claim that minors under age eighteen deserve special treatment in case prosecution, with the default venue of first resort being juvenile court.

before the Court, and lawyers should not disregard potential claims using the Eighth Amendment.") (internal citations omitted).

346. *See generally* Roper v. Simmons, 543 U.S. 551 (2005).

347. *See generally* Graham v. Florida, 560 U.S. 48 (2010).

348. *See generally* Miller v. Alabama, 132 S. Ct. 2455 (2012).

349. *See* Scott, *supra* note 82, at 100–01.

350. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2399 (2011).

351. *Id.*

352. *See also* Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in* J.D.B. v. North Carolina *for Purposes of the* Miranda *Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 503 (2012).

Absent such a position, state juvenile justice systems that allow for juveniles under the age of eighteen to be prosecuted and punished in municipal courts, without any prior finding relating to their special maturity, seriousness of their offense deserving adult treatment, or lack of need for heightened protections, are simply arbitrary. That is, beyond pushing youth in the lowest level cases into adult court proceedings with no prior process, many municipalities focused on increasing local finances actually deny youth the basic *Gault* due process protections they would receive if prosecuted in juvenile court—including the right to counsel.

And even where a particular part of a state justice system is not required as a matter of substantive constitutional law, it must be administered in a rational manner.[353] When a specially protected class is denied such privileges or access, the deprivations must be even more carefully scrutinized.[354] Thus irrationally denying certain groups of minors access to treatment in our juvenile courts violates both equal protection and due process principles. Looking at this from a different angle, arbitrarily exposing certain youth to the punitive features of an adult municipal court system runs afoul of the constitution.[355] That is because state criminal justice and punishment schemes must not be administered in a capricious or haphazard fashion.[356]

Thus, such indefensible *in loco* juvenile justice practices that fail to account for youth under the age of eighteen as a special class, may

353. *See* Griffin v. Illinois, 351 U.S. 12, 13 (1956) (noting that a state may not, "consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment[,] . . . deny adequate appellate review to the poor while granting such review to all others"); *see also* Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259, 289 (2009) ("But the Supreme Court has held that once a state does confer the right to appeal it must provide a system that is fundamentally fair and that provides for 'adequate and effective' review of a defendant's claims.").

354. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). *But see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (declining to apply suspect class analysis to children in educational rights setting).

355. *Cf.* Foucha v. Louisiana, 504 U.S. 71, 84 (1992) (discussing how the Due Process clause prohibits arbitrary state action, particularly when liberty is at stake).

356. *See e.g.*, Ferman v. Georgia, 408 U.S. 238, 239–40 (1972) (striking down Georgia's death penalty scheme for being "arbitrary and capricious"); Denmore v. Kim, 538 U.S. 510, 551–52 (2003) (noting that "selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the necessity of putting them away" violates the Due Process Clause).

provide further constitutional ammunition for demanding a right to juvenile court as venue of first resort—at least in low-level municipal offense cases.[357]

V. CONCLUSION—JUVENILE COURT AS FIRST RESORT

We find ourselves in a historic moment. Constitutional juvenile law now demands that juveniles—youth under the age of eighteen—must be seen as a discreet class of people who deserve special treatment in our justice system. The Supreme Court's last four decisions relating to juveniles and juvenile justice have laid the groundwork for fundamentally rethinking of practices of the past, not just for youth sentencing, but the ways in which we deal with young people throughout the policing, processing, and prosecution spectrum.

Similarly, events that have unfolded in Ferguson, Missouri have surfaced previously overlooked problems of local municipal policing and prosecution practices. This too has resulted in bold reassessment of local justice systems. Assembly-line justice, deprivations of the right to counsel, and punishment for poverty have all been called out for the travesties that they are.

Taken together, these events cry out for a further related reform effort—that is, removing minors from municipal court prosecutions largely focused on enhancing local coffers, not child well-being. Instead, juveniles should be directed to properly functioning youth-centered juvenile courts. And there they should not only receive the protections provided under *Gault*, but should also be addressed like the still developing children they are.[358]

In this way, we can begin to put an end to *in loco* juvenile justice practices and move towards a more coherent system in this country for kids who are in conflict with the law—one where child-centered juvenile courts are the venues of first resort for everyone under the age of eighteen.

357. *See also* Appell, *supra* note 250, at 754 n.240 (calling for a constitutional amendment to provide enhanced rights and protections for children).

358. Again, as discussed *supra* note 40, many of our nation's juvenile courts are in tremendous need of improvement too. However, it would seem to make the most sense to engage in youth prosecution reforms under one roof—rather than in multiple state and local venues spread out across a region.