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Framing Justice: Media, Bias, and Legal Decisionmaking

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FRAMING JUSTICE: MEDIA, BIAS, AND LEGAL DECISIONMAKING

PERRY L. MORIEARTY*

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I. INTRODUCTION

The intersection of media and justice has emerged as a focal point in recent years.¹ More than just a debate over “cameras in the courtroom,” legal scholars, media experts, and, most recently, cognitive psychologists have begun to explore the broader links between the American news media’s preoccupation with crime—the “if it bleeds, it leads” edict—and our burgeoning prison industrial complex.² This Article will build upon this research through the examination of a dynamic that is largely unexplored—mediated crime discourse, social cognition, and racial disparities in the administration of justice. It does so within the context of the U.S. juvenile justice system, whose postmodern orientation, practices, and legal outcomes suggest a significant interplay among the three.

During the 1990s, juveniles of color³ were the focus of what some have called a classic “moral panic” in this country, during which politicians, educators, religious leaders, law enforcement, and much of the public were consumed by the looming threat posed by America’s

1. In January 2009, for example, the *Stanford Law Review* devoted its symposium to the topic of “Media, Justice, and the Law.” Symposium, *Media, Justice, and the Law*, 61 STAN. L. REV. 1333 (2009).

2. See, e.g., Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 400–05 (2006) (arguing that the news media’s treatment of violent crime has impacted public opinion and increased support for punitive criminal and juvenile justice policies); Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash,”* 87 MINN. L. REV. 1447, 1517–18, 1527–28 (2003) (arguing that the increase in black youth homicide rates in the late 1980s “provided the immediate political impetus to ‘get tough’ and to ‘crack down’ on youth crime” and that the “[n]ews media coverage . . . overemphasiz[ed] the role of minority perpetrators in the commission of violent crime,” so that “distorted news coverage . . . allows [politicians] to enact racial animus in the guise of crime policies”); Rachel Lyon, *Media, Race, Crime, and Punishment: Re-Framing Stereotypes in Crime and Human Rights Issues*, 58 DEPAUL L. REV. 741, 742 (2009) (linking crime news with increased incarceration rates); William R. Montross, Jr. & Patrick Mulvaney, *Virtue and Vice: Who Will Report on the Failings of the American Criminal Justice System?*, 61 STAN. L. REV. 1429, 1429–36 (2009) (arguing that American crime reporting is “succinct, superficial, and devoid of context” and that criminal justice reporting is practically nonexistent); see also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1551–57 (2005) (explaining the link between media coverage of violent crime news stories involving racial minorities and the high number of arrests of racial minorities). See generally RICHARD L. FOX ET AL., *TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY* 199–203 (2d ed. 2007) (outlining five broad findings that help delineate central aspects of the tabloid justice era and emphasizing the detrimental consequences of the “entertainment-ization” of increased legal coverage in the media).

3. This Article defines “juveniles of color” according to its definition under the Juvenile Justice and Delinquency Prevention Act of 1974 (“JJDP”), as African-American, Native American, Hispanic, Pacific Islander, and Asian-American. See 28 C.F.R. § 31.303(j) (6) (2009) (defining “minority populations” as African-Americans, American Indians, Asians, Pacific Islanders, and Hispanics).

youth.⁴ At its center was the American news media.⁵ Long criticized for overemphasizing the prevalence and nature of adult crime,⁶ the media's depiction of juvenile suspects during this period was nearly as imbalanced. Amid several high profile crimes in the late 1980s, the media abandoned its traditional posture of confidentiality and restraint toward child lawbreakers in favor of a meme that in many respects harkened back to the days of the eugenics movement.⁷ In 1989, the term "wilding" was introduced into journalists' lexicon to describe the pastime of this "new breed" of adolescents, who terrorized at random for the sheer pleasure of doing so.⁸ Six years later, these "Godless" and "deviant" creatures were labeled adolescent "superpredators."⁹ They suffered from a condition of "abject moral poverty," the media relayed, and had "absolutely no respect for human life and no sense of the future."¹⁰ The iconographic image of the juvenile superpredator proved to be an especially salient symbol for a discourse whose racial connotations were unambiguous: Juvenile offenders were violent, amoral, and *dark*. With the emergence of twenty-four-hour cable news during the same period, the American public was literally saturated throughout the 1990s with images of

4. See ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 109–12 (2008) [hereinafter SCOTT & STEINBERG, RETHINKING] (arguing that juvenile gang members were at the center of a moral panic during the 1990s that produced draconian laws such as California's Proposition 21); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 807 (2003) [hereinafter Scott & Steinberg, *Blaming Youth*] (arguing that the punitive trend in juvenile justice policy has elements of "moral panic, in which the media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat"); see also STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS 9–10 (1972) (examining the Mods and Rockers phenomenon in 1960s Britain "to illustrate some of the more intrinsic features in the emergence of such collective episodes of juvenile deviance and the moral panics they both generate and rely upon for their growth").

5. For purposes of this Article, the term "news media" refers to both print media, including newspapers and magazines, and broadcast media, including network television news, local television news, cable news, and radio news. It does not encompass digital, computerized, or networked media, which are commonly referred to as "new media."

6. See, e.g., Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 597 (2004) ("It is well established that the media present distorted images of crime and justice.").

7. Eugenics, a theory grounded in the idea that criminal behavior is genetically determined, was influential in the formation of Progressive policies toward juveniles in the early twentieth century. LAURA L. FINLEY, JUVENILE JUSTICE 41 (2007).

8. See Michael Welch et al., *Youth Violence and Race in the Media: The Emergence of "Wilding" as an Invention of the Press*, 11 RACE, GENDER & CLASS 36, 37–39 (2004).

9. See *infra* note 10; see also *infra* Part II.B.

10. The term "superpredator" was coined in 1995 by then Princeton Political Science Professor John DiIulio. See John J. DiIulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23.

juveniles of color taking the ubiquitous “perp walk.” This Article refers to the aggregate content and features of this narrative as the “superpredator discourse.”

In important respects, the superpredator discourse distorted reality. The most obvious distortion was the implicit and, at times, explicit suggestion by the media that adolescent crime rates were increasing at a time when in fact they were dropping by unprecedented amounts.¹¹ While violent crime rates among juveniles mushroomed in the late 1980s and early 1990s,¹² they began to fall precipitously in the mid-1990s.¹³ Nonetheless, media coverage of violent juvenile crime continued to increase. The second and perhaps most pernicious distortion was the media’s tendency to overemphasize the link between race and violent crime. Several studies conducted during the 1990s concluded that both adults and juveniles of color were overrepresented as perpetrators and underrepresented as victims in media crime stories.¹⁴ In reality, most of the crimes committed during the 1990s were neither violent nor committed by minorities—they were property crimes carried out by white offenders.¹⁵

By the early twenty-first century, the superpredator discourse had receded, but by then, the juvenile justice system had been irrevocably altered. During the mid-1990s, even as juvenile crime rates dropped by record rates, crime news coverage skyrocketed,¹⁶ and the American

11. See *infra* note 13 and accompanying text.

12. See BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 201 (1999) (noting that the juvenile arrest rate for all violent crimes increased 67.3% between 1986 and 1995).

13. See MARK SOLER, *PUBLIC OPINION ON YOUTH, CRIME AND RACE: A GUIDE FOR ADVOCATES* 5 (2001), <http://www.buildingblocksforyouth.org/advocacyguide.pdf> (explaining that “despite a 68% decline in youth homicides from 1993 to 1999, 62% of poll respondents in 1999 believed youth crime was up”).

14. LORI DORFMAN & VINCENT SCHIRALDI, *OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS* 13 (2001), <http://www.buildingblocksforyouth.org/media/media.pdf> (citing to six of seven studies conducted during the 1990s that found that the news media underrepresented minorities as victims of crime, and nine of twelve studies conducted predominantly during the 1990s that found that the media overrepresented minorities as perpetrators of crime).

15. Feld, *supra* note 2, at 1530–31 (“The nearly exclusive focus on violent crime coverage distorts the actual distribution of serious criminal behavior in the real world because most crimes are property crimes committed by white offenders.” (citing Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 *AM. J. POL. SCI.* 560, 562 (2000); Franklin D. Gilliam, Jr. et al., *Crime in Black and White: The Violent, Scary World of Local News*, 1 *HARV. INT’L J. PRESS-POL.* 15 (1996))).

16. Between 1990 and 1998, for example, violent crime rates fell by twenty percent, but network television news coverage of violent crime increased by eighty-three percent; during the same period, homicide rates fell by over thirty percent while coverage of homicides increased by a staggering 473%. DORFMAN & SCHIRALDI, *supra* note 14, at 10; see also Feld, *supra* note 2, at 1530 (citing the same data).

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public became gripped by fear that offending was out of control.¹⁷ Predictably, politicians were paying attention. Between 1992 and 1997, nearly every state in the country passed legislation that made it easier to prosecute juveniles as adults in criminal court in what legal scholar Franklin Zimring called the “most sustained legislative crack-down ever on serious offenses committed by youth within the jurisdictional ages of American Juvenile Courts.”¹⁸ Under these so-called “get tough” laws, juveniles were not only saddled with adult sentences, but were also confined in record numbers in adult facilities.¹⁹ The raw numbers were stark. In 1988, approximately 1600 juvenile offenders were confined in this country’s adult jails; by 1997, there were more than 9000.²⁰

These policies had particularly severe consequences for youth of color. While it had been the case for decades that racial and ethnic minorities were more likely to be arrested, detained, formally charged in juvenile court, transferred to adult court, and confined to secure residential facilities than their white counterparts,²¹ these disparities soared during the late 1980s and 1990s. By 1997, African-Americans constituted about fifteen percent of youth under the age of eighteen in the nation, but nearly one-half of them were transferred to adult court²²—a disparity for which crime commission rates could not begin to account. Through sophisticated multi-regression analyses, numerous studies conducted during the 1980s and 1990s identified statistically significant “race effects” on decisionmaking at multiple points in the system.²³ Social scientists concluded that it was not just that mi-

17. Jeffrey D. Alderman, *Leading the Public: The Media’s Focus on Crime Shaped Sentiment*, PUB. PERSP., Mar.–Apr. 1994, at 26, 26–27 & fig.1 (describing the increase in public concern about crime in the mid-1990s).

18. Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from an Ideological Battleground*, 11 FED. SENT’G REP. 260, 260 (1999).

19. See *infra* text accompanying note 20.

20. See JAMES AUSTIN ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS 5 tbl.2 (2000).

21. See *infra* Part III.B.

22. Building Blocks for Youth, Fact Sheet: Punitive Policies Hit Youth of Color Hardest, http://www.buildingblocksforyouth.org/issues/dmc/facts_yoc.html (last visited May 24, 2010).

23. “[R]ace effect means that minority status . . . has an impact on what happens to youth as they are processed through the juvenile justice system.” CARL E. POPE ET AL., U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001 10 n.1 (2002) [hereinafter DMC: 1989–2001 REVIEW OF LITERATURE]; see also Michael J. Leiber, *Disproportionate Minority Confinement (DMC) of Youth: An Analysis of State and Federal Efforts to Address the Issue*, 48 CRIME & DELINQ. 3, 11–14, 40 (2002) (noting that most of the studies being examined “found evidence of race differences in juvenile justice outcomes that [we]re not totally accounted for by differential involvement in crime” and defining

norities were committing a disproportionate number of offenses, but there was reason to believe that race bias might be infecting outcomes for juveniles of color.²⁴

This Article will claim that the ascendance of the superpredator discourse may have contributed to the presence of racial bias in the administration of juvenile justice during the postmodern era.²⁵ While the news media’s influence on the political, penal, and legal orientation of the criminal and juvenile justice systems has been increasingly well documented,²⁶ its role in shaping the mental processes of those who administer the law has not. I will suggest that the superpredator discourse amplified the racial biases of juvenile court “insiders”²⁷ in at least two distinct ways. First, it likely fostered a “motivational bias” to apply the law, and in particular the “get tough” laws, more rigidly to youth of color.²⁸ This theory is based on the notion that most insiders are, to a large extent, political actors whose longevity depends on public support.²⁹ Thus, as long as the general public was convinced that minority offenders were inherently more deviant and predatory than white offenders—and by some accounts, this was true well into the

“race effect” as “the presence of a statistically significant race relationship with a case outcome that remains once controls for legal factors have been considered”); Belinda R. McCarthy & Brent L. Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process: The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 CRIMINOLOGY 41, 58–60 (1986) (noting that as cases progress, race and class directly affect dispositions, with minority youth receiving harsher sentences).

24. See *infra* notes 31, 43 and accompanying text.

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25. See *infra* Part IV.

26. See, e.g., FOX ET AL., *supra* note 2, at 1–17 (introducing the idea that “tabloid justice stories” published by the media sometimes emphasize troubling aspects of the justice system, but “most important[ly],” the stories “have played a substantial role not only in exposing a new and irresponsible era of journalistic standards but also in undermining public faith in the justice system”); Beale, *supra* note 2, at 421–71 (asserting that sensationalist coverage of violent crime in the media has increased, contributing to greater levels of fear of crime and amplified support for harsher punishment); Feld, *supra* note 2, at 1527 (arguing that news media coverage of violent crime overemphasized race and violence in such a way that it encouraged tougher policies toward criminals); Scott & Steinberg, *Blaming Youth*, *supra* note 4, at 807–08 (describing the facilitative role that news media has played in fueling public fears about youth crime); see also Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 710 (2002) (“Sensationalized media accounts of inner-city violence played against this backdrop of a real and troubling increase in juvenile homicide to create an exaggerated threat to public safety.”).

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27. For purposes of this Article, the term “insiders” refers to those actors within the juvenile court whose decisions determine whether and/or how an individual juvenile will be processed. They generally include juvenile court judges, clerk magistrates, prosecutors, probation officers, and intake officers.

28. See *infra* Part IV.

29. See *infra* notes 30, 39 and accompanying text.

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twenty-first century—insiders had a political incentive to “get tough” on youth of color.³⁰

Second, the superpredator discourse may have amplified insiders’ implicit racial biases. Building on Professor Jerry Kang’s Trojan Horse theory, which likens the process through which racially and criminally explicit news programming infiltrates the human psyche with a corruptive computer virus,³¹ I will suggest that the graphic and racialized nature of the superpredator discourse likely sparked an imperceptible cognitive reaction within the minds of those insiders whose job it was to make day-to-day decisions inside the juvenile court.³² Unbeknownst to those who were exposed to the superpredator discourse, at the same time that they were obtaining what they consciously believed to be objective facts about incidents of juvenile crime, they were unwittingly taking in subliminal messages that juveniles of color were incarcerated in disproportionate numbers not because the juvenile justice system was infirm, but because juveniles of color were inherently more deviant than their white counterparts.³³ In turn, insiders developed unconscious “attributional” biases regarding minority offenders.³⁴

Admittedly, these theories are weakened by the inherent difficulty of proving causation.³⁵ After all, insiders are unlikely to admit or

30. See Kenneth Bresler, “I Never Lost a Trial”: When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537, 541 (1996) (criticizing prosecutors who “keep personal tallies . . . for self-promotion”); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004) (finding that judges became more punitive the closer they came to reelection).

31. See Kang, *supra* note 2, at 1553–54 (“A type of computer virus, a Trojan Horse installs itself on a user’s computer without her awareness. . . . Here is the translation to the news context: we turn on the television in search of local news, and with that information comes a Trojan Horse that alters our racial schemas.”).

32. See *infra* Part IV.B.2.

33. See *infra* Part IV.B.

34. See, e.g., George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 567 (1998) (concluding that probation officers’ written rationales for sentencing recommendations indicated that they were more likely to attribute the criminal behavior of minority youth to internal forces, such as personal failure, inadequate moral character, and personality, and the criminal behavior of white youth to external forces, such as environment, even when the objective risk factors associated with the youth were similar); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 499 (2004) (documenting the impact of written racial cues on police and probation officers’ judgments about the “culpability,” “likely recidivism,” and “deserved punishment” of hypothetical offenders).

35. While several laboratory studies have documented the impact of media-generated cues on subsequent perception and behavior, this research is often hampered by its inability to control for other forms of stimuli to which a subject may have been exposed and the lack of real world conditions associated with routine media consumption. See Beale, *supra*

even realize they are biased,³⁶ let alone that the media was a source. But consider the wealth of interdisciplinary evidence produced over the last two decades. Legal scholars and political scientists have repeatedly linked the media’s coverage of juvenile crime with the public and political outcry for a more punitive juvenile justice system.³⁷ Social cognition research, in turn, has demonstrated that decisionmakers who are motivated to arrive at a particular conclusion show bias toward directional outcomes that support that conclusion,³⁸ and that this bias is particularly acute when elected actors (that is, insiders) are actively motivated by political concerns.³⁹ In the social cognition context, psychologists have shown that implicit bias is intrinsic to the human brain⁴⁰ and is both exacerbated and activated through exposure to the racial language and imagery embedded in media crime coverage, like the superpredator discourse.⁴¹ While it is logical to infer that racialized messages about juvenile offenders might be less likely to interfere with the information processing of

note 2, at 466 (observing that studies of media effects on subsequent displays of racial bias “present no evidence that the news media constitute the original—or even the most important—source of the prejudices and stereotypes” observed).

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36. See *infra* notes 235, 274 and accompanying text.

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37. See *supra* note 26 and accompanying text.

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38. See generally Ziva Kunda, *The Case for Motivated Reasoning*, 180 PSYCHOL. BULL. 480, 482–88 (1990) (citing an example of reasoning driven by directional goals in which students who want to believe that they will achieve academic success may recall their prior academic successes with more frequency than their academic failures).

39. See, e.g., Alexes Harris, *Diverting and Abdicating Judicial Discretion: Cultural, Political, and Procedural Dynamics in California Juvenile Justice*, 41 L. & SOC’Y REV. 387, 418 (2007) (arguing that the desire among certain California juvenile court prosecutors to “project[] an image that they are holding youth accountable to their offenses and that ‘justice’ is being served[] determined what would happen in the courtroom”); Huber & Gordon, *supra* note 30, at 248 (arguing that “[t]rial judges will become more punitive as their terms proceed”).

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40. See Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1256–57 (2002) (citing neuroscience as supporting the proposition that “basic cognitive mechanisms . . . predispose us toward stereotypes”); Allen J. Hart et al., *Differential Response in the Human Amygdala to Racial Outgroup vs. Ingroup Face Stimuli*, 11 NEUROREPORT 2351 (2000) (describing differing responses in the human amygdala to images of one’s own racial group and other racial groups); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995) (linking social cognition theory to discrimination); see also Kevin N. Ochsner & Matthew D. Lieberman, *The Emergence of Social Cognitive Neuroscience*, 56 AM. PSYCHOLOGIST 717, 720 (2001) (explaining that “[s]tereotypes are cognitive structures” that influence expectations and beliefs, which in turn “biases person perception processes”).

41. See Gilliam & Iyengar, *supra* note 15, at 563–67 (describing experiments to assess the effect of crime news). The racial priming effect is so powerful that sixty percent of the participants in a “crime script” video experiment that did not include a perpetrator recalled seeing one, and of those, seventy percent recalled seeing an African-American perpetrator. *Id.* at 564.

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juvenile court insiders by virtue of both their professional training⁴² and the likelihood that their “direct” experiences with minority offenders would outweigh their mediated experiences, recent studies have confirmed that subliminal racial cues can amplify and trigger unconscious bias and stereotyping by juvenile court insiders.⁴³ Finally, multiple scholars have observed that the lax conditions within which decisions are made in the juvenile court allow racial biases to flourish.⁴⁴ While none of this constitutes proof of a connection between mediated crime discourse, racial bias, and disparate treatment, I will suggest that it should, at the very least, prompt us to take a closer look.

Part II of this Article will explore the American news media’s treatment of juvenile offending and justice over the last two decades. It focuses in particular on the superpredator discourse—the iconographic caricature of juvenile offenders that gained traction in the 1990s even as violent crimes rates among juveniles were dropping precipitously.⁴⁵ Part III will then examine what has happened within the juvenile justice system during the same period. After a brief description of the history and purpose of the juvenile court, I will document the increasingly sophisticated evidence of one of the juvenile justice system’s most troubling features—the presence of disproportionate minority contact.⁴⁶

Part IV will consider the intersections between the phenomena described in Parts II and III. Drawing upon recent social science stud-

42. Generalized research shows that subliminal racial cues are less likely to interfere with performance and judgment when the subject has been trained for the task at hand. See, e.g., Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1326 (2002) (suggesting that training participants to distinguish guns from cell phones may reduce “Shooter Bias”).

43. See Graham & Lowery, *supra* note 34, at 487 (documenting the impact of written racial cues on police officers’ and juvenile probation officers’ judgments about the “culpability, expected recidivism, and deserved punishment” of hypothetical offenders); cf. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590–91 (2006) (arguing that prosecutors exhibit cognitive bias); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1553 (2004) (finding that capital defense attorneys exhibit the same levels of implicit bias as the rest of the population); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) (reporting on a study of 167 federal magistrate judges, which revealed that they are susceptible to heuristics and biases when making decisions); Michael J. Leiber & Kristan C. Fox, *Race and the Impact of Detention on Juvenile Justice Decision Making*, 51 CRIME & DELINQ. 470, 489–90 (2005) (attributing observed negative race effects in outcomes to “racial stereotyping of African Americans as delinquent, prone to drug offenses, dangerous, and unsuitable for treatment”).

44. See *infra* Part III.B.

45. See *infra* Part II.

46. See *infra* Part III.

ies of causes, functions, and consequences of motivational and implicit biases, I will claim that exposure to the superpredator discourse may have had a discernable impact on the motives, attitudes, and behaviors of those whose job it was to administer justice within the juvenile court.

Part V will explain why this analysis is both timely and significant. First, it is self-evident that any link among mediated discourse, racial bias, and disparate treatment is normatively undesirable and worthy of attention. In this regard, the most obvious target may be the media. While Professor Jerry Kang and others have suggested that the government may have a role to play through the regulation of broadcast media,⁴⁷ a less controversial approach might be through what cultural criminologists call “replacement discourse,” a counter-narrative, à la the “Jena 6” storyline,⁴⁸ whose purpose is to neutralize episodic crime coverage through the promotion of thematic alternatives.⁴⁹ A number of institutional interventions are also promising. In both public and private settings, “debiasing” protocols aimed at enhancing internal and external decisionmaking accountability, reliance on objective classification instruments, and cultural competency education have proven successful in minimizing bias.⁵⁰

This analysis also has implications for the broader struggle to reduce systemic disparities and their attendant academic debates. Here, too, the juvenile justice system provides context. Remarkably, during precisely the same era that the superpredator craze was in full swing and racial disproportionality was swelling, the federal government was actively engaged in a national initiative to reduce it.⁵¹ In 1988, Congress amended the Juvenile Justice and Delinquency Prevention Act (“JJJPA”) to require every state receiving certain forms of juvenile justice funding to investigate and take steps to remedy the problem of disproportionate minority contact (“DMC”) in its secure facilities.⁵²

47. Kang, *supra* note 2, at 1571–72.

48. *See infra* note 347 and accompanying text.

49. *See infra* Part V.B.

50. *See infra* Part V.A.

51. *See infra* note 52 and accompanying text.

52. Pub. L. No. 100-690, § 7258(c), 102 Stat. 4434, 4440 (1988) (codified as amended at 42 U.S.C. § 5633(a)(22) (2006)). Under the JJJPA, the acronym “DMC” originally referred to “Disproportionate Minority Confinement,” which occurs when the percentage of minority youth confined in juvenile justice system facilities exceeds their proportion in the general population. *See* Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, § 223(a), 88 Stat. 1109, 1119–22 (1974) (codified as amended at 42 U.S.C. § 5633(a)(22) (2006)) (requiring that states provide plans that are designed to reduce the disproportionate number of minorities in the juvenile justice system). In 2002, Congress expanded the concept of DMC to include any point of “contact” with the juvenile justice

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Over the last twenty years, hundreds of millions of federal dollars have been filtered to the states, several prominent foundations have joined the cause, municipal commissions have been formed, technical assistance manuals and websites have been created, and dozens of initiatives have been launched to make up what has been called a “multi-million dollar cottage industry” dedicated to achieving racial equity in this country’s juvenile courts.⁵³ Yet, however promising on paper,⁵⁴ the “DMC Mandate” has been mostly ineffectual in practice, and disparities have generally remained stagnant.⁵⁵

While blame for the DMC Mandate’s failure defies consensus, what has become clear is that in the majority of states, juvenile court insiders have yet to embrace and implement proven remedies.⁵⁶ Currently pending before the U.S. Senate is Senate Bill 678, the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2008, a bill that aims to strengthen the provisions of the DMC Mandate by providing more explicit and stringent guidance to states.⁵⁷ What the legislation does not address, however, are the sources of this entrenched and attenuated insider intransigence. I will suggest that just as the superpredator discourse and the political firestorm that followed contributed to racial disproportionality, the discourse may also have played a role in subverting, or at the very least neutralizing, the aims of its federally mandated cure. While some of this resistance is undoubtedly the product of insiders’ natural tendencies to legitima-

system at which minority youth are overrepresented. *See* Pub. L. No. 107-273, § 12209(1)(P), 116 Stat. 1873, 1878 (2002) (codified as amended at 42 U.S.C. § 5633(a)(22) (2006)) (specifying that states should submit plans to reduce the number of minority juveniles who “come into contact with the juvenile justice system”). The acronym “DMC” now commonly refers to “Disproportionate Minority Contact.”

53. *See* JAMES BELL & LAURA JOHN RIDOLFI, ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 15 (2008), <http://www.burnsinstitute.org/downloads/BI%20Adoration%20of%20the%20Question.pdf> (indicating that the “multi-million dollar cottage industry” of initiatives has largely failed to produce any measurable results).

54. *See, e.g.*, Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 378–79 (2007) (citing the provision as a potential model for regulatory responses to racial disparities in other realms of the public arena).

55. *See* HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 163 (2006) (demonstrating that there has been little change in the racial make-up of the delinquency case load); *see also infra* Part V.

56. *See, e.g.*, ROBIN DAHLBERG, ACLU, DISPROPORTIONATE MINORITY CONFINEMENT IN MASSACHUSETTS 1–2 (2003) (discussing Massachusetts’s continued failure to comply with the DMC Mandate).

57. *See* S. 678, 111th Cong. §§ 205, 210, 271 (2009).

tize and defend the status quo,⁵⁸ this resistance can become nearly insurmountable, I will suggest, during periods when the dominant mediated discourse undermines the egalitarian messages on which the reform effort is premised.⁵⁹ While this proposition may seem self-evident, neither it nor its normative implications have been explored in any depth.

II. CONSTRUCTING A “SUPERPREDATOR”

Once reified as the “Fourth Estate” of government, the news media has long been regarded an indispensable element of Western society.⁶⁰ In its purest form, the news media is envisioned as a guardian of the public interest, responsible for exposing abuses of power while defending the democratic values of the populace.⁶¹ In a true free market system such as ours, however, it is all but inevitable that less noble pursuits would emerge. In the early 1990s, the media began to incorporate an “infotainment” approach to reporting.⁶² Nowhere was this more apparent than in the news media’s coverage of crime and

58. See, e.g., Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1123–25 (2006) (arguing that people “are motivated to accept and perpetuate features of existing social arrangements, even if those features were arrived at accidentally, arbitrarily, or unjustly”).

59. See *infra* notes 366–67 and accompanying text. Likewise, it can become far easier to remediate disparities when this discourse is consonant with reform. We have seen this most recently with globalized efforts to combat climate change.

60. See THOMAS CARLYLE, ON HEROES AND HERO WORSHIP, & THE HEROIC IN HISTORY 141 (Univ. of Cal. Press 1993) (1841). Carlyle explained:

[T]here were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a *Fourth Estate* more important than they all Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority. It matters not what rank he has, what revenues or garnitures: the requisite thing is that he have a tongue which others will listen to; this and nothing more is requisite.

Id. (attributing quote to Sir Edmund Burke).

61. See generally DOUGLASS CATER, THE FOURTH BRANCH OF GOVERNMENT 3–4 (1959) (“The good ones provide separate eyes and ears for their constituencies—a double check on the Congressmen. Unlike the Congressmen, they can carry even a picayune issue directly to the President with some hope of evoking a response.”); Walter H. Annenberg, *The Fourth Branch of the Government*, in IMPACT OF MASS MEDIA: CURRENT ISSUES 290, 290–93 (Ray Eldon Hiebert & Carol Reuss eds., 1985) (“[M]ost Americans agree that despite its excesses . . . the press has served us well through the years, [and] has been a constructive factor in our growth and prosperity by keeping our citizenry informed.”).

62. Critics charge that both print and broadcast media adopted an “infotainment” approach to reporting during the 1990s, which emphasized celebrity and scandal and deemphasized policy and data. See, e.g., PROJECT FOR EXCELLENCE IN JOURNALISM, CHANGING DEFINITIONS OF NEWS 1 (1998), <http://www.journalism.org/sites/journalism.org/files/ChangingDefinitionsofNews.pdf> (explaining that a two-part study of newspapers, nightly news, and news magazines over a twenty-year span and prime time network news magazines over a seven-week period in 1997 found that “[t]here ha[d] been a shift toward lifestyle,

criminal justice. The 1990s saw a decisive shift by both the print and broadcast news media toward a “soft news”⁶³ agenda that sensationalized and, in many ways, racialized crime stories.⁶⁴ While sensationalism and scandal were not new to the news media,⁶⁵ even against this backdrop, several trends of the 1990s stood out. The first was the rapidity with which crime took center stage in the media in the early 1990s. Between 1990 and 1993, for example, network news coverage of crime tripled to an average of nearly five stories per broadcast, as crime leapt from the fifth to the first most covered topic on the evening news.⁶⁶ The second was the media’s seemingly insatiable thirst for violent crime stories. Coverage of homicides alone increased more than five-fold by the end of the decade.⁶⁷ The third was the media’s obsession with high-profile criminal cases—the Menendez brothers, JonBenét Ramsey, and, of course, O.J. Simpson, among the

celebrity, entertainment and celebrity crime/scandal in the news and away from government and foreign affairs”).

63. “Soft news” has been described as “news that is typically more sensational, more personality-centered, less time-bound, more practical, and more incident-based than other news.” Thomas E. Patterson, *Doing Well and Doing Good: How Soft News and Critical Journalism Are Shrinking the News Audience and Weakening Democracy—And What News Outlets Can Do About It* 3–5 (Harvard Kennedy Sch., Working Paper No. RWP01-001, 2000), available at http://www.hks.harvard.edu/presspol/publications/reports/soft_news_and_critical_journalism_2000.pdf.

64. This style of crime and criminal justice reporting has been labeled “tabloid justice,” and is said to emerge through the convergence of a “legal proceeding presented largely as entertainment, an obsessive media establishment, and an attentive public.” FOX ET AL., *supra* note 2, at 6–7; see also Beale, *supra* note 2, at 422 (noting that the “coverage of crime—particularly violent crime—has increased dramatically, and the nature of the coverage has shifted toward a tabloid style”).

65. In the late nineteenth century and early twentieth century, for example, “yellow journalism” regularly featured salacious crime stories as a diversion from policy-laden news. See generally W. JOSEPH CAMPBELL, *YELLOW JOURNALISM: PUNCTURING THE MYTHS, DEFINING THE LEGACIES* 5–13 (2001) (describing the rise of “yellow journalism” beginning at the end of the nineteenth century).

66. 1990—*The Year in Review*, MEDIA MONITOR, Jan. 1991, at 2–3 (reporting that network evening news stories on crime aired 542 times; of these, stories on murder and homicide statistics aired eighty-six times, while stories on the high-profile Marion Barry drug arrest aired fifty-five times); 1993—*The Year in Review*, MEDIA MONITOR, Jan.–Feb. 1994, at 2 (reporting that network news stories on crime and drugs aired 1698 times; of these, 329 were stories on murder, which is triple the number of murder stories that aired in 1992). For the decade as a whole, crime was by far the number one news topic. *The Media at the Millennium*, MEDIA MONITOR, July–Aug. 2000, at 2–3 (reporting that during the 1990s, network news programs produced 14,289 total crime stories—nearly 4000 more than the second most covered topic, economy and business—and that “[s]ince 1993, when the networks’ infatuation with crime began, crime has been the number one news topic four out of seven years”). By all accounts, local news coverage of crime was even more extreme. See DORFMAN & SCHIRALDI, *supra* note 14, at 11 (noting that the “if it bleeds, it leads’ edict . . . seems to govern local TV news in particular”).

67. *The Media at the Millennium*, *supra* note 66, at 3–4.

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most memorable. Fourth was the emergence of the network news magazines, such as ABC's *20/20*, CBS's *48 Hours*, and NBC's *Dateline*, which frequently devoted their entire programming hour to a single criminal case.⁶⁸ And finally, as I discuss below, the 1990s stood out for the degree to which child offenders, once protected from public scorn by law and practice, began to dominate crime news stories.

A. "Wilding"

Although juvenile crime rates had begun to rise several years earlier,⁶⁹ it was not until the infamous "Central Park Jogger" case in 1989 that the media began to coalesce around a juvenile crime narrative.⁷⁰ The facts of the case are tragically familiar. On April 19, 1989, a young female jogger was brutally beaten, raped, and left to die in Manhattan's Central Park.⁷¹ Within hours, a group of seven Harlem teens ranging in age from fourteen to sixteen were arrested and charged with rape, assault, and attempted murder.⁷² All of the suspects were African-American or Latino. On April 22, 1989, three days after the attack, the *New York Times* introduced a new term into the crime lexicon:

The youths who raped and savagely beat a young investment banker as she jogged in Central Park Wednesday night were part of a loosely organized gang of 32 schoolboys whose random, motiveless assaults terrorized at least eight other people over nearly two hours, senior police investigators said yesterday.

Chief of Detectives Robert Colangelo, who said the attacks appeared unrelated to money, race, drugs or alcohol,

68. FOX ET AL., *supra* note 2, at 84–86.

69. "Between 1984 and 1994, the number of murders involving only juvenile offenders increased by 150% . . ." HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, LAW ENFORCEMENT AND JUVENILE CRIME 5 (2001), <http://www.ncjrs.gov/pdffiles1/ojdp/191031.pdf>. This increase has been attributed in part to "[t]he deindustrialization of the urban core" during the 1970s and 1980s, which led to massive job losses for urban minorities, "the introduction of crack cocaine into the inner cities, and the proliferation of guns among youths." Feld, *supra* note 2, at 1454 n.18, 1515–18. It has also been linked more broadly to a cross-national surge in crime rates during this period. See DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 90 (2001) ("Late modernity's impact upon crime rates was a multi-dimensional one that involved: (i) increased opportunities for crime, (ii) reduced situational controls, (iii) an increase in the population 'at risk', and (iv) a reduction in the efficacy of social and self controls as a consequence of shifts in social ecology and changing cultural norms.").

70. See *infra* notes 74–76 and accompanying text.

71. David Pitt, *Jogger's Attackers Terrorized at Least 9 in 2 Hours*, N.Y. TIMES, Apr. 22, 1989.

72. *Id.*

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said that some of the 20 youths brought in for questioning had told investigators that the crime spree was the product of a pastime called “wilding.”⁷³

Immediately, journalists latched onto the story.⁷⁴ In New York City newspapers alone, the term “wilding” would appear 156 times in articles over the next eight years.⁷⁵ The national news media also jumped into the fray. A month after the assault, as the victim began to recover, *People* magazine would dub the crime the “Night of the ‘Wilding.’”⁷⁶ The introduction and proliferation of the term “wilding” was significant in several respects. First, its racial connotations were unmistakable. In every one of the 156 New York newspaper articles in which the race of the perpetrator was mentioned in the text, the suspects were identified as either African-American or Latino males; conversely, with the exception of a single incident, each of the victims was described as a white female.⁷⁷ By contrast, when, four months after the Central Park Jogger attack, thirty white teenagers from Bensonhurst, Brooklyn, cornered a sixteen-year-old African-American boy in a parking lot and shot him to death, they were referred to in the press as “white young men” or a “gang of thirty white teens.”⁷⁸

Second, the “wilding” meme purported to brand a “new breed” of child offenders, who committed vicious and motiveless crimes for the sheer pleasure of doing so.⁷⁹ A survey of the 406 print and television

73. *Id.*

74. In many respects, the underlying facts of the case lent themselves to a “literary” narrative:

First and foremost, the attack occurred in New York City’s Central Park, a city and a public space that have been mythologized with a legendary reputation for predatory violence. Secondly, the victim was a white female whose physical attributes, social status, and personal biography were injected into virtually every media account. She was described as young, beautiful, and educated as well as a Manhattan investment banker Likewise, her personal and physical attributes indicated further a strong moral character: As a jogger, she exemplified the socially admired trait of taking care of one’s health while extolling the virtues of athleticism. It has been said that tragedy cannot emerge without greatness. In case [sic] of the Central Park jogger, her persona, projected by the media, serves as a significant subtext magnifying the horrific nature of the crime and her struggle to survive.

Welch et al., *supra* note 8, at 39.

75. *Id.* at 42.

76. *PEOPLE WKLY.*, May 22, 1989.

77. See Welch et al., *supra* note 8, at 45.

78. Lynell Hancock, *Wolf Pack: The Press and the Central Park Jogger*, *COLUM. JOURNALISM REV.*, Jan.–Feb. 2003, at 38, 42.

79. The media’s invention of “new forms of menace” was not a new practice:

While drawing on racial stereotypes in reporting incidents of crime, the media also resorts to sensationalism whereby so-called new forms of menace are invented and commodified for public consumption. The media, for example, has

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news stories that appeared in the fifteen days after the story broke, for example, found that “[t]he crime was most often presented as a random act, a product of subculture of ‘wild youth.’”⁸⁰ “The story was like a centrifuge,” a former New York *Newsday* columnist would later remark. “Everyone was pinned into a position—the press, the police, the prosecution—and no one could press the stop button.”⁸¹

The postscript to the Central Park Jogger case is, of course, essential. Based solely on their purported confessions, three of the juveniles were convicted of first-degree rape and first-degree assault and sentenced to five to ten years in prison; a fourth was convicted of attempted murder and rape and sentenced to five to ten years; a fifth was convicted of assault, riot, and sexual abuse and sentenced to eight-and-a-half to twenty-six years; a sixth pled guilty to an unrelated robbery; and charges against the seventh were dropped.⁸² In 2002, thirteen years after their convictions, a convicted rapist named Matias Reyes confessed to the crime.⁸³ DNA testing subsequently matched Reyes’s DNA to DNA recovered from the victim, and the six juveniles were acquitted—but not before they had spent the remaining years of their adolescence in prison.⁸⁴

B. “Stone Cold Predators” and “Crime Tsunamis”

“Wilding” set the stage for what might be the most infamous characterization of juveniles in history. In 1995, in an article entitled *The Coming of the Super-Predators*, former Princeton University Political Science Professor John DiIulio warned of an oncoming tsunami of adolescent “super-predators”—“morally impoverished” youth who had grown up “surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings.”⁸⁵ These were “kids who have absolutely no respect for human life and no sense of the future” and who are “‘stone-cold predators.’”⁸⁶ DiIulio projected that the juvenile population would only continue to in-

played a key role in the social construction of mugging, crack babies, crank (i.e., methamphetamine or “speed”), drive-by shootings, superpredators, and serial killers.

See Welch et al., *supra* note 8, at 37 (citations omitted).

80. TIMOTHY SULLIVAN, *UNEQUAL VERDICTS: THE CENTRAL PARK JOGGER TRIALS* 57 (Notable Trials Library 1994) (1992).

81. *Id.*

82. Welch et al., *supra* note 8, at 40.

83. Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 220 (2006).

84. *Id.*

85. DiIulio, *supra* note 10, at 25–26.

86. *Id.* at 23–24.

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crease.⁸⁷ The news media ran with this narrative. “*Superpredators*” *Arrive*, announced *Newsweek* in January 1996, with a question: *Should We Cage the New Breed of Vicious Kids?*⁸⁸ “They are not here yet,” warned the *Tampa Tribune* four months later, “but they are predicted to be a plague upon the United States in the next decade. They are not some creatures from outer space; they are our own children.”⁸⁹

The typical superpredator script had three predominant elements: violence, depravity, and cast. First, juvenile offenders were violent: They were “gangbangers,” “carjackers,” “hardcores,” “street thugs,” “monsters,” “hoods,” “juvies” and, of course, “superpredators.”⁹⁰ While the news media has always gravitated toward violent crime stories,⁹¹ this was taken to a new level in the 1990s. Between 1993 and 1997, three separate studies concluded that homicides made up more than a quarter of all crimes reported on the evening news—at a rate of 100 to 300 times their actual occurrences.⁹² A 2000 study of local evening newscasts in six major United States cities found that when children appeared in crime news stories, it was in the context of violent crime eighty-four percent of the time.⁹³ Consider some of the cover stories from popular news magazines during the 1990s: *Newsweek*, March 9, 1992: *Kids and Guns: A Report from America’s Classroom Killing Grounds*; *Time*, August 2, 1993: *Big Shots: An Inside Look at the Deadly Love Affair Between America’s Kids and Their Guns*; *News-*

87. See WILLIAM J. BENNETT, JOHN J. DIJULIO, JR. & JOHN P. WALTERS, *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* 26 (1996) (charting the projected increase in the United States juvenile population between 1990 and 2010).

88. Peter Annin, “*Superpredators*” *Arrive: Should We Cage the New Breed of Vicious Kids?*, *NEWSWEEK*, Jan. 22, 1996, at 57.

89. Editorial, *Heading Off the “Superpredators,”* *TAMPA TRIB.*, May 21, 1996, at 8.

90. See, e.g., *Advice to Waterpark Managers: Take Strong Stance Against Gangs*, *AMUSEMENT BUS.*, Nov. 8, 1993, at 50 (“hardcores”); Editorial, *Cracking Down on CHA Violence*, *CHI. TRIB.*, Dec. 20, 1997, at 22 (“gangbangers”); Annin, *supra* note 88, at 57 (“superpredators”); Denney Clements, *Saving Kids from Crime*, *WICHITA EAGLE*, Nov. 9, 1997, at 13A (“monsters”); Kevin Diaz, *20 of Cars Stolen in City Are Not Found*, *STAR TRIB. (MINNEAPOLIS-ST. PAUL)*, Apr. 22, 1986, at B1 (“hoods”); Christopher Heredia, *Contra Costa Dilemma—Detention v. Prevention: Report Critical of County Approach to At-Risk Kids*, *S.F. CHRON.*, Nov. 14, 1997, at A23 (“carjackers”); Mark Johnson, *Purge of Gun Dealers Working Clinton Crusade Cuts Tally 56% to 124,286 as Small-Timers Lose*, *RICHMOND TIMES-DISPATCH*, Jan. 30, 1997, at A2 (“street thugs”); Victoria Slind-Flor, *Pressure to Give Juries to Juvies Tried as Adults*, *NAT’L L.J.*, Oct. 6, 1997, at A6 (“juvies”).

91. See *supra* note 6 and accompanying text.

92. DORFMAN & SCHIRALDI, *supra* note 14, at 8–9.

93. CHILDREN NOW, *THE LOCAL TELEVISION NEWS MEDIA’S PICTURE OF CHILDREN* 7, 16 (2001), http://www.childrennow.org/uploads/documents/local_television_2001.pdf (examining local hour-long evening newscasts in Atlanta, Boston, Des Moines, Los Angeles, New York, and Seattle for CBS, NBC, and ABC affiliates between July 1 and July 31, 2000).

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week, August 2, 1993: *Teen Violence: Wild in the Streets*; *U.S. News & World Report*, November 8, 1993: *Guns in the Schools: When Killers Come to Class—Even Suburban Parents Now Fear the Rising Tide of Violence*; and *U.S. News & World Report*, March 25, 1996: *Teenage Time Bombs: Violent Juvenile Crime Is Soaring—and It Is Going to Get Worse*.⁹⁴

The second predominant element of the superpredator script was the notion that this new breed of juvenile offenders was morally depraved.⁹⁵ This message was sometimes explicit—*Kids Without a Conscience?* asked the cover of *People* magazine in June 1997⁹⁶—but more often implicit. In its coverage of juvenile offending, the news media overwhelmingly relied on a technique called “episodic” framing—instead of placing an individual incident in its broader statistical, political, or socioeconomic context, the news media frequently reported juvenile offenses as discrete events.⁹⁷ Political scientists Professors Franklin Gilliam and Shanto Iyengar cite the following sample from a Los Angeles Channel 9 (KCAL) newscast as typical of an episodic crime news script:

Anchor’s introduction: “A man was shot this afternoon in broad daylight while sitting in his jeep.”

Crime Scene Coverage: pictures of jeep and cordoned-off street; concerned neighbor comments (“Imagine something like this happening just in front of your house; I mean, it’s really scary.”)

Apprehension of suspect: “Police are looking for this man last seen driving away in a blue Honda Accord (picture of suspect on screen). Police believe the suspect may have argued with the victim before he was shot.”⁹⁸

This entire segment was presented in a little over a minute, Gilliam and Iyengar note.⁹⁹ According to social scientists, this type of

94. See Robert E. Shepherd, *How the Media Misrepresents Juvenile Policies*, CRIM. JUST., Winter 1998, at 37, 38 (listing cover stories in national magazines that have “heightened the emphasis on youth crime”).

95. See *infra* notes 100, 124, 138–41 and accompanying text.

96. PEOPLE WKLY., June 23, 1997.

97. See CHILDREN NOW, *supra* note 93, at 5, 16 (finding that eighty-one percent of stories featured on locally produced evening news programs on the three major networks in six American cities between July 1 and July 31, 2000, “made no connection between discrete events (e.g. criminal incidents) and broader trends or themes (e.g. U.S. poverty rates or after school programs)”; DORFMAN & SCHIRALDI, *supra* note 14, at 7, 12 (observing that “[s]tudies spanning almost 100 years—1910 to 2000—are consistent in their findings that news reports describe what happened with little reporting about why the crime and violence happened or what could be done about it”).

98. Gilliam & Iyengar, *supra* note 15, at 561.

99. *Id.*

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framing encourages viewers to associate the conduct in question with the moral deficiency of the individual, rather than her underlying social milieu,¹⁰⁰ and, in the context of crime, galvanizes support for more punitive crime policies.¹⁰¹ Episodic framing was a staple of children's news stories in the 1990s. For example, a 1999 study of local evening news programming in Los Angeles, Chicago, Boston, Seattle, and Columbia, South Carolina, found that ninety-four percent of stories on youth were presented in an episodic style.¹⁰² A similar study of local evening newscasts in six major metropolitan areas conducted a year later found that eighty-one percent of stories in which children were the primary subject made no connection between discrete events, such as crimes, and broader themes, such as poverty.¹⁰³

Third, like its adult counterpart, the standard superpredator script almost always had a "cast"—primarily in the form of a perpetrator and victim. More often than not, the perpetrators were portrayed as black or brown and the victims as white.¹⁰⁴ A 1999 study of youth

100. See, e.g., ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 49 (2001) (arguing that framing an incident, such as a drive-by shooting, as a "gang war story" may obscure "other possible mental associations" and may "makel] . . . more sympathetic connections less available to the audience"). See generally SHANTO IYENGAR, *IS ANYONE RESPONSIBLE?: HOW TELEVISION FRAMES POLITICAL ISSUES* 5 (1991) (asserting that because framing focuses on "specific episodes, individual perpetrators, victims, or other actors at the expense of more general, thematic information," viewers are less likely to attribute responsibility to societal factors).

101. See, e.g., Shanto Iyengar, *Framing Responsibility for Political Issues*, 546 *ANNALS AM. ACAD. POL. & SOC. SCI.* 59, 64–65 (1996) (noting that thirty-six percent of participants surveyed after viewing an experimental episodic news story assigned individualistic rather than societal responsibility to the perpetrator of the crime and sixty percent called for more punitive crime policies); cf. Paul M. Kellstedt, *Media Framing and the Dynamics of Racial Policy Preferences*, 44 *AM. J. POL. SCI.* 245, 249–50 (2000) (noting that media coverage of race frequently shifts between emphasizing one of two core American values—individualism and egalitarianism—and arguing that when media coverage disproportionately emphasizes the value of individualism, the public is more likely to express conservative policy preferences).

102. *What's the Matter with Kids Today?: Images of Teenagers on Local and National TV News*, *MEDIA MONITOR*, Sept.–Oct. 2000, at 1–2.

103. *CHILDREN NOW*, *supra* note 93, at 5, 16.

104. See Gilliam & Iyengar, *supra* note 15, at 562 & nn.3–4. The link between crime news and racial imagery is well established. *Id.* at 560–61 (citations omitted); see also DORIS A. GRABER, *VERBAL BEHAVIOR AND POLITICS* 154–56 (1976) (detailing the effect of mass media on racial stereotyping); Robert M. Entman, *Blacks in the News: Television, Modern Racism, and Cultural Change*, 69 *JOURNALISM Q.* 341 (1992); Robert M. Entman, *Modern Racism and the Images of Blacks in Local Television News*, 7 *CRITICAL STUD. MASS COMM.* 332, 335–36 (1990) (compiling data from Chicago newscasts featuring African-Americans); Gilliam et al., *supra* note 15, at 7–8 (noting the tendency of news coverage to link race and violent crime); Jon Hurwitz & Mark Peffley, *Public Perceptions of Crime and Race: The Role of Racial Stereotypes*, 41 *AM. J. POL. SCI.* 375, 376 (1997) (same); Mark Peffley et al., *The Intersection of Race and Crime in Television News Stories: An Experimental Study*, 13 *POL. COMM.* 309 (1996) (same); D. Romer et al., *The Treatment of Persons of Color in Local Television News: Ethnic Blame Discourse or*

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stories broadcast on four national and fifteen local news programs across the country, for example, found that youth of color appeared in crime news far more often than white youth—fifty-two percent and thirty-five percent, respectively.¹⁰⁵ Conversely, white youth appeared more often in health and education stories than youth of color—thirteen percent to two percent, respectively.¹⁰⁶ Again, Professor DiIulio was an avid participant in this dialogue. In a 1996 article entitled *My Black Crime Problem, and Ours*, Professor DiIulio wrote:

The second reason to keep the champagne corked is that not only is the number of young black criminals likely to surge, but also the black crime rate, both black-on-black and black-on-white, is increasing, so that as many as half of these juvenile super-predators could be young black males.¹⁰⁷

C. *Media Myths*

In several important respects, the superpredator discourse distorted reality. The first was its overemphasis of violent crime. Even as Professor DiIulio and others were publishing their dire forecasts, national crime rates had begun to plummet.¹⁰⁸ After spiking in the late 1980s and early 1990s, the 1990s as a decade saw the “largest decline in violent crime rates in more than half a century.”¹⁰⁹ News coverage of violent crime, however, continued to explode. A study by the Center for Media and Public Affairs revealed that even though the national homicide rate fell more than forty percent between 1990 and 1999, media coverage of murders increased more than seven-fold during this period.¹¹⁰ Juvenile crime coverage was no exception. While violent crime rates among juveniles rose sharply between 1986 and

Realistic Group Conflict?, 25 COMM. RES. 286 (1998) (surveying similar data from Philadelphia news stations); Scot Worthy et al., *Just Des(s)erts?: The Racial Polarization of Perceptions of Criminal Injustice*, 31 L. & SOC'Y REV. 637, 649–50, 654 (1997) (analyzing this trend generally and in the context of a single news story).

105. *What's the Matter with Kids Today?*, *supra* note 102 (reporting results of a study of youth stories shown in Boston, Chicago, Los Angeles, Seattle, and Columbia, South Carolina, by ABC, CBS, NBC, CNN, and the network affiliates from September 29–October 24 and November 28–December 5, 1999). R

106. *Id.*

107. John D. DiIulio, Jr., *My Black Crime Problem, and Ours*, CITY J., Spring 1996, at 19.

108. *See supra* note 13 and accompanying text. R

109. Gary LaFree, *Explaining the Crime Bust of the 1990s*, 91 J. CRIM. L. & CRIMINOLOGY 269, 269 (2000); *see also* ALFRED BLUMSTEIN & JOEL WALLMAN, *THE CRIME DROP IN AMERICA 2* (2000) (noting the decline in violent crime in the 1990s); FBI, *CRIME IN THE UNITED STATES 1999: UNIFORM CRIME REPORTS 15*, 30 (2000) (noting that the murder and robbery rates significantly dropped between 1995 and 1999).

110. *The Media at the Millennium: The Networks' Top Topics, Trends, and Joke Targets of the 1990s*, MEDIA MONITOR, July–Aug. 2000, at 3.

1995,¹¹¹ they too began to drop by unprecedented amounts in the mid-1990s.¹¹² Between 1993 and 1999, youth homicide rates fell sixty-eight percent.¹¹³ Nonetheless, the media was not deterred. A study of juvenile offending coverage by Hawaii's major newspapers, the *Honolulu Star Bulletin* and the *Honolulu Advertiser*, captured this dichotomy. Between 1987 and 1996, the newspapers' coverage of juvenile delinquency increased thirty-fold, and its coverage of gangs increased forty-fold.¹¹⁴ Indeed, "gang activity" constituted the most frequently covered juvenile crime topic.¹¹⁵ What is most remarkable about this coverage is that, unlike the rest of the Nation, Hawaii's juvenile crime rates either declined or remained stagnant during that period.¹¹⁶

Second, in its effort to demonize superpredators, the news media rarely provided either a cognitive or sociological perspective on the causes of juvenile crime.¹¹⁷ For decades, developmental psychologists had speculated that the inherent differences between the adolescent brain and the adult brain accounted for higher levels of youthful offending.¹¹⁸ This research came to a head in the 1990s when the John D. and Catherine T. MacArthur Foundation sponsored a decade-long project on Adolescent Development and Juvenile Justice ("ADJJ"), which focused on developing a better understanding of adolescent decisionmaking, adjudicative competence, and criminal culpability.¹¹⁹ ADJJ research confirmed what theorists had suspected: Juveniles possess what has been termed "immature judgment," which impacts their peer orientation, their risk perception, their temporal perspective, and their capacity for self-management.¹²⁰ Neuroscientific evidence also began to emerge that these characteristics are organic: The portions of the human brain that regulate long-term planning, impulse control, regulation of emotion, and risk evaluation are simply not fully

111. FELD, *supra* note 12, at 201 (noting that the juvenile arrest rate for all violent crimes increased 67.3% between 1986 and 1995). R

112. See SOLER, *supra* note 13, at 5 (providing statistics). R

113. *Id.*

114. DORFMAN & SCHIRALDI, *supra* note 14, at 18. R

115. *Id.*

116. *Id.*

117. See *supra* notes 95–23 and accompanying text. R

118. See *infra* notes 121–23 and accompanying text. R

119. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, About the Network: Our Purpose, http://www.adjj.org/content/about_us.php (last visited May 25, 2010).

120. Scott & Steinberg, *Blaming Youth*, *supra* note 4, at 811–13 (2003). Laurence Steinberg is a director of the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. *Id.* at 809. R

formed until adulthood.¹²¹ This research led a number of legal scholars to call for new approaches to evaluating adolescent decisionmaking and punishment that took these psychosocial realities into account.¹²² Even as evidence was mounting that juvenile offenders lacked the criminal capacity of their adult counterparts,¹²³ the news media continued to portray juvenile offenders as blameworthy.¹²⁴

The third distortion was the media's tendency to overemphasize the link between race and violent crime. While it is indisputable that juvenile homicide rates increased significantly between the 1980s and early 1990s,¹²⁵ and that adults of color accounted for a disproportionate share of violent crime arrests in the mid-1990s,¹²⁶ several subsequent studies concluded that both adults and juveniles of color were overrepresented as perpetrators and underrepresented as victims in media crime stories.¹²⁷ A now famous study of Los Angeles local news during the mid-1990s, for example, found that African-Americans

121. *Id.* at 816 (citing L. P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417 (2000) (examining research on animal and human brain maturation and concluding that, across species, the brain remodels during adolescence)).

122. *See, e.g.*, Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1788 (1995) (calling for a "more comprehensive approach" to evaluate adolescent decisionmaking because the current approach inadequately considers psychosocial factors that may impact an adolescent's maturity of judgment); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 51-53, 61-63 (1997) (noting potential psychosocial differences between adolescents and adults and suggesting ways in which the legal system could account for these differences when punishing adolescents); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1610, 1647-51, 1657 (1992) (citing studies demonstrating that adolescents make decisions differently than adults and proposing a framework for analyzing adolescent decisionmaking that focuses on adolescent judgment factors as well as reasoning); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 160 (1997) (contending that psychosocial developmental factors may "influence decisionmaking by adolescents in ways that are relevant to competence to stand trial and criminal responsibility").

123. *See, e.g.*, Scott & Grisso, *supra* note 122, at 172-73 (noting that evidence from developmental psychology supports the conclusion that juvenile offenders are less culpable than adults).

124. *See, e.g.*, Brian Doherty, *When Kids Kill: Blame Those Who Pull Trigger*, MILWAUKEE J. SENTINEL, May 31, 1998, at J1 (rejecting the contention that "all of us" are responsible for teenage violence and insisting that "the kids who commit these horrible acts . . . are to blame").

125. *See* MARC MAUER, RACE TO INCARCERATE 84 (1999) ("[H]omicide rates among white males in the 14-17 age group doubled [from 1984 to 1993] . . . while for black males, the rate more than quadrupled . . .").

126. *Id.* at 127 ("[B]lack offending rates are considerably higher than for other groups, accounting for 43 percent of these arrests in 1996.")

127. DORFMAN & SCHIRALDI, *supra* note 14, at 13 (citing nineteen studies conducted during the 1990s and noting that six of seven studies found that the news media under-

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were twenty-two percent more likely to be shown by the media committing violent crime than nonviolent crime, while, in reality, they were equally likely to be arrested for both violent crime and nonviolent crime.¹²⁸ White Americans, on the other hand, were thirty-one percent more likely to be depicted committing a nonviolent crime than a violent crime, when, in fact, they were just seven percent more likely to be arrested for a nonviolent crime.¹²⁹ If anything, the portrayal of minority juveniles was more exaggerated. A 2000 study of local newscasts in six major U.S. cities, for example, found that sixty-two percent of the stories involving Latino youth were about murder or attempted murder.¹³⁰ To put this in perspective, in 1998, minority youth accounted for only one quarter of all juvenile crime arrests and less than half of all violent juvenile crime arrests.¹³¹ There is also evidence that the news media overrepresented the incidence of interracial crime. For example, between 1990 and 1994, inter-ethnic homicides in Los Angeles were likely to be reported by the *Los Angeles Times* twenty-five percent more than intra-ethnic homicides.¹³²

D. Believing the Hype

By all indications, the American public was listening. Even as national crime rates continued to decline, a flurry of public opinion polls conducted in the late 1990s revealed the American public’s fear of violent juvenile offenders.¹³³ In a 1997 *Los Angeles Times* poll, for example, eighty percent of respondents stated that the media’s portrayal of violent crime had increased their personal fear of becoming a crime victim.¹³⁴ Not surprisingly, then, the public’s fear of juvenile offenders reached a fever pitch in the mid-1990s—even as juvenile

represented minorities as victims of crime, and nine of the remaining twelve found that the media overrepresented minorities as perpetrators of crime).

128. Gilliam et al., *supra* note 15, at 13 & fig.4.

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129. *Id.*

130. CHILDREN NOW, *supra* note 93, at 14, 16; see also Melissa Hickman Barlow, *Race and the Problem of Crime in Time and Newsweek Cover Stories, 1946 to 1995*, Soc. JUST., Summer 1998, at 149, 155–56, 177 (performing a qualitative analysis of all *Time* and *Newsweek* crime cover stories between 1946 and 1995 and concluding that both publications began to racialize crime and equate “young black males” to criminals in the 1960s (internal quotation marks omitted)); DORFMAN & SCHIRALDI, *supra* note 14, at 21 (referencing a study that found that youth of color were far more likely to appear in television crime news than white youth).

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131. EILEEN POE-YAMAGATA & MICHAEL A. JONES, AND JUSTICE FOR SOME 7 (2000), <http://www.buildingblocksforyouth.org/justiceforsome/jfs.pdf>.

132. Susan B. Sorenson et al., *News Media Coverage and the Epidemiology of Homicide*, 88 AM. J. PUB. HEALTH 1510, 1512 (1998).

133. See *infra* notes 134–36 and accompanying text.

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134. Greg Braxton, *Ratings vs. Crime Rates*, L.A. TIMES, June 4, 1997, at Metro 1.

crime rates continued to fall precipitously. For instance, although juvenile homicides declined by sixty-eight percent between 1993 and 1999, sixty-two percent of respondents in one 1999 poll believed that juvenile crime rates were increasing.¹³⁵ Polls also revealed that white Americans substantially overestimated the likelihood of being victimized by a person of color. For example, nearly twice as many respondents to a 1994 poll believed that they were more likely to be victimized by a minority than a white perpetrator,¹³⁶ when, in reality, they were roughly three times more likely to be victimized by other whites.¹³⁷

The public was also growing increasingly concerned that its adolescent population had lost its moral compass. A 2001 report published by the Frameworks Institute, which compiled information from dozens of surveys on perceptions of youth, was particularly illuminating. Among the findings reported were the following: In response to a 1998 survey, only sixteen percent of Americans said that “young people under the age of 30 share[d] most of their moral and ethical values”—a result that, the author noted, “puts young adults’ values only above . . . welfare recipients . . . and rich people.”¹³⁸ Asked in a separate 1998 poll what comes to mind when they think of teens, nearly three-quarters responded with negative descriptions, such as “‘rude,’” “‘wild,’” or “‘irresponsible,’”¹³⁹ and eighty-two percent of adults responding to a 1998 poll felt that youth “do not have a [] strong . . . sense of right and wrong”—up from forty-six percent in 1965 and thirty-four percent in 1952.¹⁴⁰ Not surprisingly, poll respon-

135. SOLER, *supra* note 13, at 5.

136. See, e.g., Walter L. Updegrave, *You're Safer Than You Think*, MONEY, June 1994, at 114 (reporting that “49% of Americans believe that whites are preyed on more often by non-white criminals . . . rather than by other whites (26%)”).

137. See *id.* (“[O]f the 5.1 million violent crimes with white victims in 1992, the perpetrator was white 66% of the time and black only 21%.”); see also CALLIE RENNISON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VIOLENT VICTIMIZATION AND RACE, 1993–1998 10 (2001), <http://bjs.ojp.usdoj.gov/content/pub/pdf/vvr98.pdf> (“Sixty-six percent of white victims and 76% of black victims were victimized by an offender of the same race, 1993–98 . . .”).

138. MEG BOSTROM, FRAMEWORKS INST., THE 21ST CENTURY TEEN: PUBLIC PERCEPTION AND TEEN REALITY 4, 33 (2001) http://www.frameworksinstitute.org/assets/files/PDF/youth_public_perceptions.pdf (citing WASH. POST ET AL., AMERICAN VALUES: 1998 NATIONAL SURVEY OF AMERICANS ON VALUES 3 (1998), <http://www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14655>).

139. *Id.* at 4 (summarizing two national telephone polls conducted between December 1–8, 1998, one of 1005 adults—including 384 parents of children under 18, and another of 328 teenagers (citing PUBLIC AGENDA, KIDS THESE DAYS ’99 3, 10 (1999), http://www.publicagenda.org/files/pdf/kids_these_days_99.pdf)).

140. *Id.* at 6, 33 n.11–13 (internal quotation marks omitted) (citing the Shell Poll by Hart Research, a national poll of 1277 adults conducted between March 16–20, 1999; a

dents overwhelmingly endorsed punitive responses to juvenile offending. In a 1995 poll, for example, eighty-seven percent of Americans agreed that a juvenile charged with a serious violent crime should be tried as an adult, seventy percent agreed that a juvenile who is charged with selling illegal drugs should be tried as an adult, and sixty-three percent agreed that a juvenile charged with a serious property crime should be tried as an adult—even though fifty percent of respondents said that they believed that the purpose of the juvenile justice system was to “train, educate and counsel” offenders.¹⁴¹

While discerning the public’s attitudes about race proved more difficult, it is clear that the media played a critical role.¹⁴² By the end of the twentieth century, white Americans and Americans of color were living increasingly segregated lives.¹⁴³ Approximately seventy-five percent of all whites lived in areas that were less than five percent African-American.¹⁴⁴ As a result, most whites obtained their information about members of other races, and African-Americans in particular, not through direct experience, but from the news media.¹⁴⁵ The more homogeneous the community, the more dependent they were on the media,¹⁴⁶ and, interestingly, the more punitive their attitudes were.¹⁴⁷ According to a study conducted by Professor Frank Gilliam, Jr., whites who lived in homogeneous neighborhoods were more likely to endorse punitive crime policies and express negative stereotypes of African-Americans when exposed to an African-American suspect in a violent crime story than whites living in heterogeneous neighborhoods.¹⁴⁸ What was apparent is that, in the eyes of the public, race and crime were inextricably entwined.

E. Ignoring the Juvenile Court

Ironically, the one place the media was not during the 1990s was inside the juvenile court. Until recently, most modern journalists had

national Gallup Poll of 2783 adults conducted in November 1965; and a national poll conducted by Ben Gaffin and Associates that published the results of 2987 personal interviews of adults conducted in June and July of 1952).

141. *Id.* at 31–32, 38 n.132 (citing a national poll published by the Public Policy Research Institute of 1005 adults conducted from June 6–26, 1995).

142. *See infra* Part IV.B.1.

143. Feld, *supra* note 2, at 1523–24.

144. *Id.* at 1524.

145. *Id.* at 1523–24.

146. *See id.*

147. *See infra* text accompanying note 148.

148. Franklin D. Gilliam, Jr. et al., *Where You Live and What You Watch?: The Impact of Racial Proximity and Local Television News on Attitudes About Race and Crime*, 55 *POL. RES. Q.* 755, 760, 770 (2002).

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never even crossed the threshold of a juvenile courtroom.¹⁴⁹ This was largely a function of the juvenile court's presumptive closure laws that were premised on the belief that wayward youth should be protected from public scorn as they mended their ways.¹⁵⁰ Surprisingly, for the first half of the twentieth century, the juvenile court had been largely open to the public and the press.¹⁵¹ In 1979, however, the Supreme Court reaffirmed that one of the historically important characteristics of a juvenile court proceeding was its confidentiality, which shields the juvenile from stigmatizing publicity.¹⁵²

As of the early 1990s, presumptive closure laws still banned the press and the public from juvenile court proceedings in many states. As the juvenile justice system adopted a more punitive orientation over the course of the decade, more and more state legislatures began to open their juvenile courts.¹⁵³ By the latter part of the decade, most jurisdictions allowed some form of media access to the juvenile court.¹⁵⁴ As of 1998, laws in forty-two states allowed the media access to the identity, and sometimes even the physical images, of certain court-involved youth.¹⁵⁵ Yet, there was still a dearth of media coverage.¹⁵⁶ In some states, access on the books did not translate to meaningful access on the ground, and journalists had to fight their way inside the courtroom.¹⁵⁷ Some legal scholars contend that the Supreme Court's failure to explicitly extend its holding in *Richmond*

149. See Emily Bazelon, Note, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155, 155 (1999) (explaining that most juvenile cases are closed to the public).

150. See *id.* (explaining that the founders of the juvenile court believed that juveniles could be rehabilitated only if they were shielded from stigma).

151. See Barbara White Stack, *Opening Juvenile Courts: Children Should Not Be Numbers*, COLUM. JOURNALISM REV., Mar.-Apr. 2002, at 62, 62. Despite pressure from nineteenth-century Progressives to shield juvenile offenders from the stigma of publicity, the press pushed back, arguing that secrecy would render the court susceptible to abuse. *Id.*

152. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 107 (1979).

153. See PATRICIA TORBET & LINDA SZYMANSKI, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996-97 UPDATE 8-11 (1998) (stating that in 1996 and 1997 alone, twelve states enacted legislation opening juvenile court hearings); see also HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 101 (1999) (noting that juvenile court records are more open as state statutes reduce confidentiality).

154. SNYDER & SICKMUND, *supra* note 153, at 101.

155. *Id.*

156. See, e.g., Emily Metzgar, *Neither Seen Nor Heard: Media in America's Juvenile Courts*, 12 COMM. L. & POL'Y 177, 177 (2007) (discussing the "relative dearth of coverage of juvenile justice issues in American journalism").

157. See *In re M.B.*, 819 A.2d 59, 60-61 (Pa. Super. Ct. 2003) (describing newspaper's suit to gain access to Pennsylvania's juvenile courts).

*Newspapers, Inc. v. Virginia*¹⁵⁸ to the juvenile court has left the issue of access in legal limbo.¹⁵⁹

Today, fifteen states have presumptively closed delinquency proceedings,¹⁶⁰ and every state now has legislation that allows information contained in juvenile court records to be specifically released to one or more of the following parties: the prosecutor, law enforcement, social services agencies, schools, the victim, or the public.¹⁶¹ The media, too, has far greater access. Fourteen states have laws that allow the media to attend juvenile delinquency hearings as long as they do not reveal the juvenile offender's identity, thirty states give the media access to public access hearings or records, and four states condition media access to delinquency hearings or records on court permission.¹⁶² Yet, there remains today very little reporting from inside the juvenile court.¹⁶³

III. FROM *PARENS PATRIAE* TO PENAL DISPROPORTIONALITY

A. *The Modern Juvenile Court*

The nation's first juvenile court was established in Cook County, Illinois, in 1899.¹⁶⁴ A product of the prevailing Progressive philosophy that child offenders should be treated rather than punished,¹⁶⁵

158. 448 U.S. 555, 580–81 (1980) (deciding that the public and the press have a right to attend criminal trials, at least in the case of an adult defendant).

159. See Joshua M. Dalton, *At the Crossroads of Richmond and Gault: Addressing Media Access to Juvenile Delinquency Proceedings Through a Functional Analysis*, 28 SETON HALL L. REV. 1155, 1155–56 (1998) (opining that the Supreme Court should apply the *Richmond Newspapers* holding to juvenile proceedings); Louis A. Day, *Media Access to Juvenile Courts*, 61 JOURNALISM Q. 751, 756 (1984) (same); Bazelon, *supra* note 149, at 159 (same).

160. See SNYDER & SICKMUND, *supra* note 55, at 108 (indicating that as of 2004, fourteen states had presumptively open proceedings and twenty-one additional states had open proceedings for certain cases).

161. *Id.* at 109.

162. *Id.*

163. See DALE KUNKEL ET AL., *COVERAGE IN CONTEXT: HOW THOROUGHLY THE NEWS MEDIA REPORT FIVE KEY CHILDREN'S ISSUES* (2002) (finding that journalists fail to provide systematic context and a broader policy picture for the juvenile justice stories they reported). The Jena Six case is illustrative. Even as hundreds of journalists descended on Jena, Louisiana, to report on the prosecution of six local youths for an allegedly racially motivated assault of a white student, there was very little reporting from inside the local juvenile court. See Raquel Christie, *Double Whammy*, AM. JOURNALISM REV., Feb.–Mar. 2008, available at <http://www.ajr.org/Article.asp?id=4454> (criticizing the media's coverage of the Jena Six story); see also *State v. Bailey*, 969 So. 2d 610, 610–11 (La. 2007) (explaining the facts involved in the "Jena 6" case and noting that media coverage was responsible for making those facts widely known).

164. C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 667 (2005).

165. *Id.* at 664.

the juvenile court was envisioned as a rehabilitative alternative to the criminal justice system.¹⁶⁶ Central to its mission was the prevailing Western principle of penal proportionality—that penalties imposed by the State should be proportional to the blameworthiness of the offender.¹⁶⁷ Every element of the nascent court was designed with this ideology in mind: Charges would be civil rather than criminal, social servants and clinicians would replace lawyers and juries,¹⁶⁸ “crimes” would be called “delinquent behavior,” and judges would issue “dispositions” rather than “sentences.”¹⁶⁹ Broad discretionary powers replaced formal rules of evidence and procedure,¹⁷⁰ which, it was thought, would best enable the states to carry out their role as “*Parens Patriae*”—or parent of the country.¹⁷¹

By the 1960s, however, the system could not both parent and punish effectively. In fact, the Supreme Court lamented in 1966 that juvenile offenders often receive the “worst of both worlds . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”¹⁷² Several key cases created the due process protections that juveniles are given today,¹⁷³ the most seminal of which was the Supreme Court’s 1967 decision *In re*

166. Feld, *supra* note 2, at 1458; see Clarke, *supra* note 164, at 667–68 (observing that “[s]ince its inception, the juvenile justice system has been geared toward child welfare and individual assessment and treatment”). According to Professor Clarke, the Progressives’ approach to juvenile delinquency represented a departure from the colonial belief that parents and educators “were free to use whatever means they deemed appropriate to correct misbehaving children.” *Id.* at 662.

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167. See Reid Griffith Fontaine, *On Passion’s Potential to Undermine Rationality: A Reply*, 43 U. MICH. J.L. REFORM 207, 223 (2009) (defining “penal proportionality” as the idea that “one should be punished to the exact degree—no less, no more—to which he acted wrongfully”).

168. See Feld, *supra* note 2, at 1458–60 (“Juvenile courts employed informal procedures, excluded lawyers and juries . . . [and] required a specialized judge trained in social sciences and child development . . . assisted by social service personnel, clinicians, and probation officers . . .”).

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169. Clarke, *supra* note 164, at 667 n.34 (citation and internal quotation marks omitted).

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170. See *id.* at 668 (noting that “courts were given maximum discretion to allow for flexibility in diagnosis and treatment”); Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 378–79 (“In solving the problems of the juvenile brought before the court, the juvenile court judge . . . was supposed to be free to consider all relevant information without regard for rules of evidence.”).

171. Feld, *supra* note 2, at 1458–59; see also BLACK’S LAW DICTIONARY 1114 (6th ed. 1990) (defining *parens patriae* as “a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc.”).

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172. *Kent v. United States*, 383 U.S. 541, 556 (1966).

173. See Clarke, *supra* note 164, at 669–70 (citing *Kent*, 383 U.S. 541, *In re Gault*, 387 U.S. 1 (1967), and *In re Winship*, 397 U.S. 358 (1970), as the cases of the “‘due process revolution’ in juvenile justice”).

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Gault,¹⁷⁴ which held that the constitutional rights to notice, to counsel, to confront and cross-examine witnesses, to a fair and impartial hearing, and to protections against self-incrimination all applied to juvenile court proceedings.¹⁷⁵

Although the Court was willing to engraft certain due process protections into juvenile proceedings, it expressly refused to grant juveniles all of the procedural rights afforded to adults. In 1971, the Court held that juveniles had no constitutional right to a jury trial in state delinquency proceedings on the ground that a judge's adjudication was sufficient to meet the "fundamental fairness" standard required under the Due Process Clause.¹⁷⁶ Thirteen years later, the Court found that juveniles did not have a constitutional right to bail pending the adjudication of their charges.¹⁷⁷

These decisions would become all the more significant during the "get tough" movement of the 1990s. The push for more punitive juvenile justice policies had already begun in the late 1980s, as members of both parties started to see the benefits of running on "crack down on crime" platforms. The exploitation of the Willie Horton case in the 1988 election may be the most famous example,¹⁷⁸ but the political response in the wake of the Central Park Jogger attack is also illustrative. In the months after the incident, New York City Mayor Edward Koch called for the death penalty for "wilding," deeming the seven suspects "monsters" and complaining that the juvenile justice system was too lenient.¹⁷⁹ Donald Trump paid \$85,000 for full page advertisements in the *New York Times* demanding the death penalty for

174. 387 U.S. 1.

175. *Id.* at 33–34, 41, 55, 57.

176. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543, 545 (1971) (plurality opinion). The Court specifically reasoned that "[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner." *Id.* at 547.

177. *Schall v. Martin*, 467 U.S. 253, 268 (1984).

178. See generally Gregory W. Gwiasda, *Network News Coverage of Campaign Advertisements*, 29 AM. POL. RES. 481 (2001) (analyzing the impact of the Willie Horton advertisement in the 1988 presidential election). While serving a life sentence for murder, Willie Horton was released as part of a weekend furlough program, but did not return and committed rape and armed robbery. John J. Donohue, III & Justin Wolfers, *Estimating the Impact of the Death Penalty on Murder*, 11 AM. L. & ECON. REV. 249, 283 n.27 (2009).

179. Michael Welch et al., *Moral Panic over Youth Violence: Wilding and the Manufacture of Menace in the Media*, 34 YOUTH & SOC'Y 3, 10 (2002); Hancock, *supra* note 78, at 39 (noting that "Mayor Ed Koch was often quoted calling the arrested boys 'monsters' and complaining that juvenile laws were too soft").

the suspects in the Central Park Jogger attack,¹⁸⁰ and mayoral candidate David Dinkins called for a “new ‘antiwilding law.’”¹⁸¹

As crime rates continued to climb in the early 1990s,¹⁸² the calls for stiffer penalties for juvenile offenders reached a fever pitch. Politicians across the country saw an opening. Between 1992 and 1997 alone, legislatures in forty-five states enacted or enhanced waiver laws that made it easier to transfer juvenile offenders to the adult criminal justice system; thirty-one states gave both juvenile and criminal courts expanded sentencing authority over juvenile offenders; forty-seven states enacted laws that modified or removed traditional juvenile court confidentiality provisions by making records and proceedings more open; and twenty-two states expanded the role of juvenile crime victims in the juvenile justice process.¹⁸³ In the span of just a decade, the mitigating factors of age and immaturity were effectively subordinated to the goal of incapacitating a certain subset of offenders—an ideological shift that turned the principle of penal proportionality on its head.¹⁸⁴ According to the National Council on Crime and Delinquency, between 1990 and 2004, the incarceration of youth in adult jails has increased 208%.¹⁸⁵

Remarkably, however, even as the stakes have risen exponentially for thousands of adolescent offenders, the juvenile court system has held fast to many of its arcane practices and procedures. At the same time that most jurisdictions were handing out adult sentences, juvenile courts continued to deprive juveniles of three of the criminal justice system’s most fundamental checks against institutional bias—jury trials,¹⁸⁶ bail,¹⁸⁷ and public oversight.¹⁸⁸ Compounding this overall lack of visibility was the fact that forty years after the Supreme Court

180. Welch et al., *supra* note 179, at 21; Hancock, *supra* note 78, at 39.

181. Welch et al., *supra* note 179, at 9–10.

182. See *supra* note 12 and accompanying text.

183. SNYDER & SICKMUND, *supra* note 55, at 96–97.

184. See *id.* (explaining that “[t]he 1990s saw unprecedented change as state legislatures cracked down on juvenile crime”).

185. CHRISTOPHER HARTNEY, NAT’L COUNCIL ON CRIME & DELINQUENCY, YOUTH UNDER AGE 18 IN THE ADULT CRIMINAL JUSTICE SYSTEM 3 (2006), http://act4jj.org/media/factsheets/factsheet_24.pdf.

186. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 547 (1971) (plurality opinion) (holding that juveniles are not constitutionally entitled to jury trials, among other things, because “[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court’s assumed ability to function in a unique manner”).

187. See *Kent v. United States*, 383 U.S. 541, 555–56 (1966) (finding that juveniles are not entitled to the same basic rights as adults in criminal court, including bail); see also *Schall v. Martin*, 467 U.S. 253, 256–57 (1984) (holding that juveniles can be preventively detained before trial consistent with due process).

upheld the right to counsel in juvenile court, many juveniles still appeared without attorneys.¹⁸⁹ Finally, perhaps the most arcane yet most resistant feature of the juvenile court was its almost complete reliance on discretionary decisionmaking. Despite the dramatic uptick in punitive outcomes in the 1990s, juvenile court intake officers, prosecutors, probation officers, and, to a lesser extent, judges in many jurisdictions have retained their nearly unfettered discretion to dispose of the juveniles before them.¹⁹⁰ The net result was a juvenile court system that, by the mid-1990s, was meting out all of the punishment, without the due process, accountability, and visibility of its adult counterpart.

B. The Problem of Disproportionate Minority Contact

For at least ninety years, the percentage of minority youth present in the U.S. justice system has far exceeded their proportion in the general population.¹⁹¹ While social scientists had known for decades that adolescents of color were more likely to be arrested, detained, formally charged in juvenile court, transferred to adult court, and confined to secure residential facilities than their white counterparts,¹⁹² these disparities soared during the 1980s and 1990s.¹⁹³ Between 1983 and 1997, the overall youth detention population

188. See SNYDER & SICKMUND, *supra* note 153, at 95 (noting that juvenile proceedings are “quasi-civil” and “may be confidential,” while criminal proceedings are “open” and accessible to the public (internal quotation marks omitted)).

189. See JUDITH B. JONES, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, ACCESS TO COUNSEL 2 (2004) (“In some jurisdictions, as many as 80 to 90 percent of youth waive their right to an attorney [at some point in the process] because they do not know the meaning of the word ‘waive’ or understand its consequences.”); see also PATRICIA PURITZ & CATHRYN CRAWFORD, FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 28 (2006) (reporting that “judges and parents in Florida courts engage in practices and procedures that pressure youth, directly or indirectly, to waive the right to counsel”).

190. See FELD, *supra* note 12, at 140–45 (discussing juvenile courts’ continued reliance on discretionary decisionmaking, which often requires officials with little training to make clinical predictions about a juvenile’s future behavior through an assessment of various social status factors that are beyond the youth’s control).

191. As far back as the 1920s, criminologists were attempting to identify the root causes of minority overrepresentation. See, e.g., GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 966–79 (1944) (arguing that racism in laws and the criminal justice system, as well as poverty and other social factors, help explain higher crime statistics among African-Americans); Thornsten Sellin, *The Negro Criminal: A Statistical Note*, 140 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 53–54 (1928) (explaining that the data collected only represents the apparent, not the real, criminality involving African-Americans and explaining that this may be because of the treatment by the agencies of criminal justice).

192. POE-YAMAGATA & JONES, *supra* note 131, at 1–3 (noting and detailing the attention given to the overrepresentation of minorities in the Nation’s prisons); see also POPE ET AL.,

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increased by forty-seven percent.¹⁹⁴ While the detained white population increased by just twenty-one percent, however, the detained minority population grew by seventy-six percent.¹⁹⁵ In other words, four out of five youth newly detained during this fifteen-year period were youth of color.¹⁹⁶

In 2002, the Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) altered its methodological approach to calculating disproportionality and adopted the Disproportionate Minority Contact Relative Rate Index (“RRI”).¹⁹⁷ The RRI tests for disparity by comparing the total volume of minority youth present at a particular decision point with the corresponding percentage of white youth.¹⁹⁸ Though more methodologically refined than the general population statistics analysis, the RRIs for 2005 tell largely the same story as the old methods—that, with the exception of adjudication, minorities fared worse than whites at every stage of the juvenile justice process and that the effects were cumulative.¹⁹⁹

The causes of DMC are more difficult to discern. Two primary theories have historically been advanced: The first is that children of color commit more serious offenses than other youths; the second is that race bias plays a role in juvenile justice system processing.²⁰⁰ While differential offending contributes to DMC, research shows that the statistical differences between the offending patterns of white youth and minority youth are simply not great enough to account for the racial disparities observed at any of the processing points in the juvenile justice system.²⁰¹ Social scientists have increasingly focused

supra note 23, at 5 (finding that twenty-five of thirty-four studies reviewed reported “race effects” in the processing of youth). R

193. ELEANOR HINTON HOYTT ET AL., PATHWAYS TO JUVENILE DETENTION REFORM: REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION 10 (2001), <http://www.aecf.org/upload/publicationfiles/reducing%20racial%20disparities.pdf>.

194. *Id.*

195. *Id.*

196. *Id.*

197. SNYDER & SICKMUND, *supra* note 55, at 189. R

198. *Id.* at 190. The RRI Matrix adds greater detail by comparing the RRI at each decision point with that of the previous decision point to “reveal the nature of decision disparities.” *Id.*

199. C. PUZZANCHERA & B. ADAMS, NATIONAL DISPROPORTIONATE MINORITY CONTACT DATABOOK (2005), available at <http://ojjdp.ncjrs.gov/ojstatbb/dmcdm/asp/display.asp?year=2005&offense=1&displaytype=rri>. Specifically, in 2005, minority youth were 1.7 times as likely to be arrested, 1.1 times as likely to be waived to adult court, and 1.2 times as likely to be placed in a secure facility as white youth. *Id.*

200. POE-YAMAGATA & JONES, *supra* note 131, at 7. R

201. HOYTT ET AL., *supra* note 193, at 21. While it is true that African-American youth commit “slightly more violent crime” than white youth, they commit “about the same amount of property crime, and less drug crime than white youth,” and “[i]n no category R

on multiple regression research that is able to isolate a race effect by comparing outcomes between “similarly situated” white youth and youth of color through the disaggregation of other relevant legal and non-legal variables.²⁰² Significantly, most of these studies have found that race-neutral criteria cannot by themselves account for the disparities observed in processing outcomes—in other words, *but for* the presence of race bias, overrepresentation would not exist to the same degree.²⁰³

These so-called “race effects,”²⁰⁴ research indicates, are most likely the product of the unconscious bias that flourishes amid the system’s excessive discretion, inadequate procedural safeguards, sub-

can the marginal differences in white and African-American behavior explain the huge disparity in arrest or incarceration rates.” *Id.* at 19. African-American youth are arrested at twice the rate of white youth for drug offenses and two-and-a-half times the rate of white youth for weapons offenses even though white youth report substantially higher levels of drug use and commission of weapons crimes. *Id.* at 20–21. According to OJJDP, a 1997–2001 survey commissioned by the Bureau of Labor Statistics found that African-American and Latino youth ages twelve to seventeen self-reported higher rates of gang involvement, property theft over fifty dollars, and serious assault than white youth ages twelve to seventeen, but fewer instances of vandalism, property theft less than fifty dollars, drug sales, and firearm possession. SNYDER & SICKMUND, *supra* note 55, at 70. Similarly, a National Institute of Drug Abuse Survey of high school seniors found that “white youth reported using heroin and cocaine at seven times the rate of African American youth,” and a National Household Survey on Drug Abuse found that “white youth ages 12–17 reported selling drugs a third more frequently than African American youth.” HOYTT ET AL., *supra* note 193, at 20–21.

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202. Kimberly Kempf-Leonard, *Minority Youths and Juvenile Justice: Disproportionate Minority Contact After Nearly 20 Years of Reform Efforts*, YOUTH VIOLENCE & JUV. JUST., Jan. 2007, at 71, 75.

203. To date, five comprehensive reviews of the literature demonstrate that legal and extralegal factors alone are unable to account for race differentials present in the juvenile justice system. See Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing*, in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN JUVENILE JUSTICE 23 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) (providing empirical demonstration of racial disparities in juvenile justice); Rodney L. Engen et al., *Racial Disparities in the Punishment of Youth: A Theoretical and Empirical Assessment of the Literature*, 49 SOC. PROBLEMS 194, 195 (2002) (reviewing “theoretical perspectives on racial disparity, highlighting the central predictions of each perspective”); Michael J. Leiber, *Disproportionate Minority Confinement (DMC) of Youth: An Analysis of State and Federal Efforts to Address the Issue*, CRIME & DELINQ., Jan. 2002, at 3, 3–4 (identifying “the extent of minority overrepresentation in states’ juvenile justice systems and assessment of the causes of DMC”); POPE ET AL., *supra* note 23, at 2 (reviewing studies from March 1989 to December 2001); CARL E. POPE & WILLIAM FEYERHERM, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, MINORITIES IN THE JUVENILE JUSTICE SYSTEM: RESEARCH SUMMARY (1995) (confirming the overrepresentation of minorities in the juvenile justice system); see also Carl E. Pope & Michael J. Leiber, *Disproportionate Minority Confinement/Contact (DMC): The Federal Initiative*, in OUR CHILDREN, THEIR CHILDREN, *supra*, at 351 (providing “a historical overview of the activities employed to address disproportionate minority youth confinement/contact”).

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204. See *supra* note 23.

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jective decisionmaking criteria, and “policy initiatives rooted in distorted, ethnocentric views of what is in the best interests and appropriate for children, particularly children of parents accorded lesser social status.”²⁰⁵ This theory finds support in one particular study. In an attempt to determine why African-American youth in three Washington State counties were receiving harsher sentencing recommendations than white youth charged with the same crimes, sociologists George Bridges and Sara Steen examined more than two hundred county probation reports.²⁰⁶ After controlling for factors such as age, gender, and offense history, Bridges and Steen found that the officers were more likely to attribute the criminal behavior of minority youth to “internal attributions,” such as personal failure, inadequate moral character, and personality, but saw the criminal behavior of white youth as a product of “external attributions,” such as poor home life, lack of appropriate role models, and environment.²⁰⁷ These perceptions, in turn, led the officers to recommend state intervention for minority youth at greater rates.²⁰⁸

IV. MEDIA, BIAS, AND LEGAL DECISIONMAKING

Suppose it is December 1998 in Palm Beach, Florida, and a prosecutor in the juvenile system is watching the local ten o'clock news, which he does most weeknights before going to bed. In recent years, the lead story has often involved violent crime, replete with a blanketed body lying on a sidewalk, police cars, and cadres of sobbing relatives. On this particular night, the story is about a fight at an Orlando

205. Kempf-Leonard, *supra* note 202, at 78; *see also* MICHAEL J. LEIBER, THE CONTEXTS OF JUVENILE JUSTICE DECISION MAKING: WHEN RACE MATTERS 105–16 (2003) (finding that in one juvenile court, a strong emphasis on *parens patriae* coupled with an influx of multiple minority groups into the area and perceptions that such minority groups do not abide to middle-class standards of dress, demeanor, marriage, and respect for authority led to different outcomes for minority youth and white youth); Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 412 (1996) (concluding that “institutional racism” rather than “intentional race discrimination” likely accounted for the clear indications of “racial disparities in processing” observed in their Florida study).

206. *See* George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 557–58 (1998).

207. *Id.* at 561, 564–67 (emphasis omitted).

208. *Id.* at 564–67. Similarly, in their study of processing decisions in the Florida juvenile justice system, Professors Bishop and Frazier observed that “in delinquency cases, black family systems generally tend to be *perceived* in a more negative light.” Bishop & Frazier, *supra* note 205, at 408–09; *see also* Leiber & Fox, *supra* note 43, at 489 (attributing observed negative race effects in outcomes to “racial stereotyping of African Americans as delinquent, prone to drug offenses, dangerous, and unsuitable for treatment”).

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high school, which has left a seventeen-year-old junior dead. Cameras capture the suspect as he is ushered into a waiting patrol car. Though his back is to the camera, the prosecutor can tell he is African-American. “Just another act of random violence,” a reporter remarks.

The next morning, the prosecutor returns to his office and sits down at his desk. Waiting for him is a list of a dozen or so juveniles who have been arrested in the area over the last month. One of the juveniles on the list, Anthony L., was arrested a few weeks earlier for a school-based offense. The police report alleges that the fifteen-year-old approached a classmate in a school cafeteria and demanded money. When the boy refused, Anthony reportedly reached into the boy’s pocket and removed two dollars. From the mug shot, the prosecutor sees that Anthony is African-American.

Even though Anthony has no prior record, the prosecutor knows he has wide latitude to determine what charges to bring. If he charges Anthony with a felony, he knows he can file the case directly in the criminal division of the circuit court.²⁰⁹ As the prosecutor considers his options, his assistant appears at his doorway to tell him that the judge is about to take the bench. He stands and gathers several stacks of paper from his desk. As he walks out of his office, he hands Anthony L.’s police report to the assistant. “Direct file. Strong-arm Rob.”

Did the local news story about the Orlando fight play a role in the prosecutor’s decision to charge Anthony L. as an adult? The prosecutor would undoubtedly say no, and the reality is that he would probably be sincere in his self-assessment. Social cognition theory, however, suggests that the news story could have played such a role.²¹⁰

A. *The Politics of Motivational Bias*

It is likely that the Palm Beach prosecutor is an elected actor.²¹¹ In thirty-nine states, trial court judges must also stand for election.²¹² Over the last two decades, these numbers have prompted legal scholars, psychologists, and political scientists to consider the convergence of these often competing roles—those of elected politician and ad-

209. See FLA. STAT. § 985.557(1)(b) (2006) (directing that a Florida prosecutor may seek to charge a sixteen or seventeen-year-old defendant as an adult for a felony offense when “the public interest requires that adult sanctions be considered or imposed”).

210. See *supra* notes 40–41 and accompanying text.

211. Cf. STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2005 3 (2006) (“In 2005, 85% of chief prosecutors reported they had been elected or appointed to a 4-year term.”).

212. Huber & Gordon, *supra* note 30, at 247.

ministrator of justice.²¹³ After all, just as elected prosecutors and judges must uphold the rule of law, they are also beholden to the preferences of their constituents. The result, social scientists suggest, is that social and political influences may serve to “contour” and “craft” the way in which courts apportion justice.²¹⁴ In psychological terms, the political climate may “motivate” prosecutors and, to a lesser extent, judges to employ particular strategies and reasoning to reach politically popular decisions.²¹⁵

A recent qualitative study of three southern California juvenile courts, which focuses on the ways in which prosecutors divert judicial discretion from judges, is instructive.²¹⁶ The study observed that “the sense of a more punitive political climate in the broader community (‘society,’ the Legislature, appellate courts) gives prosecutors the moral authority within the courtroom to use the legal maneuvers to divert judicial discretion, or in other instances to force bench officers to abdicate their own discretion.”²¹⁷ It concluded that one of the “externally oriented goals of the prosecutors’ office” is to “project[] an image that they are holding youth accountable to their offenses and that ‘justice’ is being served[, which] determined what would happen in the courtroom.”²¹⁸ By contrast, defense attorneys operating within this “get tough” climate are “shackled by the stigma attached to their

213. See, e.g., Harris, *supra* note 39, at 413, 418 (elected prosecutors); Huber & Gordon, *supra* note 30, at 248 (elected trial judges).

214. See Harris, *supra* note 39, at 390 (explaining the ways in which “pressures from both public constituencies and supervisors can be exerted on court officials’ decisionmaking practices within the courtroom”).

215. Professor Kunda calls this “motivated reasoning”:

“Motivated reasoning” is generally defined as] affect[ing] reasoning through reliance on a biased set of cognitive processes: strategies for accessing, constructing, and evaluating beliefs. . . .

The motivated reasoning phenomena under review fall into two major categories: those in which the motive is to arrive at an accurate conclusion, whatever it may be, and those in which the motive is to arrive at a particular, directional conclusion. . . . [B]oth kinds of goals affect reasoning by influencing the choice of beliefs and strategies applied to a given problem. But accuracy goals lead to the use of those beliefs and strategies that are considered most appropriate, whereas directional goals lead to the use of those that are considered most likely to yield the desired conclusion.

Kunda, *supra* note 38, at 480–81.

216. See Harris, *supra* note 39, at 398, 418 (explaining that throughout the course of this study, the prosecutors’ office tried to divert discretion from judges and that additionally some judges “abdicated their decisionmaking power in fear of the consequences of exercising it”).

217. *Id.* at 413.

218. *Id.* at 418; see also David Pritchard, *Homicide and Bargained Justice: The Agenda-Setting Effect of Crime News on Prosecutors*, 50 PUB. OPINION Q. 143, 145 (1986) (observing that “[m]aintaining a public image as a crime-fighter” may influence prosecutorial decision-

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clients” and “are usually the weakest competitors for influence within the courthouse, and as a result end up getting along by going along.”²¹⁹

So, how does the media fit into this dynamic? During the 1990s, the superpredator discourse helped shape the political climate within which juvenile court insiders operated—a political climate which, by all indications, demanded that insiders “get tough” on juveniles.²²⁰ While it was rarely explicit, the volume, content, and framing of crime news stories implied that the most deviant and dangerous of these offenders—the “Willie Hortons”²²¹—were those of color. In the words of Professor Feld, “[o]ver the past few decades, the media have reinforced conservative interpretations of crime and put a black face on it.”²²²

B. *The Automaticity of Implicit Bias*

While the role of implicit bias in shaping insider decisionmaking may be more complex and attenuated than that of motivational bias, it is no less important. To put this theory in context, I begin with a brief overview of social cognition theory and the concept of implicit bias. Contrary to the prevailing assumption that human beings are rational and deliberate animals for whom consciousness is the predominant mode, some cognitive scientists believe that unconscious mental processes largely control our thoughts and behaviors.²²³ We cope with what would otherwise be an overwhelming environment by unwittingly engaging in a series of complex cognitive processes that enable us to parse and react to incoming information.²²⁴ We respond to external stimuli by selectively “mapping” the information we receive into established categories.²²⁵ When we encounter another human being, for example, we might map our perceptions into categories associated with social characteristics, such as age, gender, race,

making “to the extent of stressing adversary dispositions in publicized cases, regardless of the strength of evidence against the defendant”).

219. Harris, *supra* note 39, at 415 (citation and internal quotation marks omitted). R

220. *See infra* Part IV.B.

221. *See supra* note 178. R

222. Feld, *supra* note 2, at 1526. R

223. *See* SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 35–36 (2008) (questioning whether “conscious will is an illusion created by people thinking about an action before performing it”).

224. Kang, *supra* note 2, at 1499. R

225. *Id.* at 1498–99.

or sexual orientation.²²⁶ The categorization of these perceptions activates cognitive structures called “schemas,”²²⁷ and from the information or “meanings” embedded in our schemas, we draw inferences and make predictions about the person.²²⁸

When we map a person into a racial category, we activate “racial schemas” along with the “racial meanings” embedded in those schemas.²²⁹ These racial meanings may include both cognitive beliefs about racial groups (“stereotypes”) and affective feelings about such groups (“prejudices”).²³⁰ According to psychologists, our respective categories and schemas influence every aspect of our cognition—what information we receive, how that information is classified, how we react to it, and how we remember it.²³¹

More mystifying is that all of this happens whether we want it to or not. Psychologists believe that human beings think, make decisions, and react to other people along a continuum of modes that range from purely automatic at one extreme to controlled at the other.²³² When we react automatically, our thought processes are unintentional and unconscious.²³³ At the other end of the spectrum, these processes are conscious and deliberate. Research suggests that “schematic thinking” can operate at both ends of the continuum.²³⁴

How do we gauge the content of the racial meanings embedded in our racial schemas? The reality is that self-reported attitudes have become almost meaningless—most people are not aware of the stereotypes or prejudices they possess or, if they are, are unwilling to

226. *Id.* at 1499 & n.47 (citing Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 376 (Daniel T. Gilbert et al. eds., 4th ed. 1998)).

227. A “schema” has been defined as a “cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes.” *Id.* at 1498 (internal quotation marks omitted).

228. *Id.* at 1498–99.

229. *Id.* at 1499.

230. *Id.* at 1500.

231. *Id.* at 1493 (defining “racial mechanics” as “the ways in which race alters intrapersonal, interpersonal, and intergroup interactions” (citing Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1138–46 (2000))).

232. See Susan T. Fiske et al., *The Continuum Model: Ten Years Later*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 231, 231–42, 249 (Shelley Chaiken & Yaacov Trope eds., 1999) (noting citations in the social-scientific literature to “the continuum model,” which posits a continuum between automatic and cognitive processes to account for the range of ways that people form impressions of others).

233. See John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 231–33 (1996) (discussing theoretical and empirical models in support of an “automaticity” hypothesis).

234. Kang, *supra* note 2, at 1506.

admit to them.²³⁵ To get around this, social psychologists have begun to develop indirect ways to measure racial meanings.²³⁶ The most recent phase of this research has sought to take advantage of the automaticity of schematic thinking through what are called reaction-time studies. Scientists trigger automatic cognitive processes through subliminal exposure to external stimuli, a technique known as “priming,” which activates a subject’s racial schemas, but they do not trigger conscious awareness of either the prime or its impact.²³⁷ Subjects are then asked to perform a subsequent task, which may be linguistic, interpretative, or physical.²³⁸ When the prime and the task are consistent with the subject’s schema, the subject’s response time is faster; when they are inconsistent, it is slower.²³⁹ The time differentials observed are viewed as measurements of an individual’s “implicit bias.”²⁴⁰

These studies have evolved into an entire industry devoted to measuring implicit bias and a prototype called the Implicit Association Test (“IAT”).²⁴¹ Not surprisingly, the IAT, along with a host of other tests, have repeatedly documented varying degrees of implicit race bias against African-Americans, Latinos, Jews, Asians, and non-Americans.²⁴² This implicit bias, in turn, has been shown to have demonstrable effects on performance, judgment, and treatment of others.²⁴³

1. *The “Superpredator” Virus*

An important inquiry is, of course, where do racial meanings come from? By and large, they come from “vicarious experiences”

235. See *infra* note 274 and accompanying text.

236. Kang, *supra* note 2, at 1507 & n.78 (describing attempts by social psychologists to identify and measure “symbolic,” “modern,” “ambivalent,” and “aversive” racism).

237. *Id.* at 1505 & n.72 (citations omitted).

238. *Id.* at 1508–09.

239. *Id.* at 1510 (“Tasks in the schema-consistent arrangement should be easier, and so it is for most of us. How much easier . . . provides a measure of implicit bias.”).

240. *Id.* at 1509.

241. See generally Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998) (describing three IATs and assessing the test’s usefulness for measuring evaluative associations). The IAT, which tests associations between categories (for example, “White”) and attributes (for example, “smart”), is now available electronically. See Harvard University, Project Implicit, <https://implicit.harvard.edu/implicit> (last visited May 25, 2010).

242. Kang, *supra* note 2, at 1512.

243. *Id.* at 1514–35; see also Blasi, *supra* note 40, at 1256–57 (citing neuroscience as supporting the proposition that “basic cognitive mechanisms . . . predispose us toward stereotypes”).

with racial others.²⁴⁴ While our direct experiences may be more influential, our vicarious experiences are more numerous.²⁴⁵ In a society as racially segregated as ours, Professors Robert Entman and Andrew Rojecki theorize that “[w]hites depend heavily on cultural material, especially media images” for cataloging racial others.²⁴⁶ Problems arise, however, when the material presented by the media is imbalanced or inaccurate. When the images transmitted by the media are distorted, the racial meanings in our schemas become distorted.²⁴⁷

This is borne out in one particular study conducted near the height of the superpredator frenzy. In 1998, political scientists Frank Gilliam and Shanto Iyengar designed an experiment to test the impact of a “crime news script.”²⁴⁸ They created four separate versions of a fictitious local newscast that contained a short crime segment in the middle.²⁴⁹ Before the more than two thousand participants saw the videotape, they were asked to complete a short questionnaire soliciting information about their economic and social backgrounds, their political beliefs, and customary media habits.²⁵⁰ They were then divided into four groups. Some participants watched a story in which the alleged perpetrator of a murder was an African-American male.²⁵¹ Other subjects were given the same news report, but this time featuring a white male as the murder suspect.²⁵² A third group of participants watched the news report edited to exclude information concerning the identity of the perpetrator.²⁵³ A fourth control group saw no crime news story at all.²⁵⁴ The participants were then asked to complete a second, longer questionnaire that probed their attitudes toward crime and punishment.²⁵⁵

The results were astonishing. More than sixty percent of those who had watched the crime report with no reference to a perpetrator falsely recalled seeing one, and of those, seventy percent identified

244. See Kang, *supra* note 2, at 1539 (defining “vicarious experiences” as “stories of or simulated engagements with racial others provided through various forms of the media or narrated by parents and our peers”).

245. *Id.* at 1540.

246. ENTMAN & ROJECKI, *supra* note 100, at 49.

247. Kang, *supra* note 2, at 1540.

248. Gilliam & Iyengar, *supra* note 15, at 561.

249. *Id.* at 563.

250. *Id.* at 564.

251. *Id.* at 563.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 564–65.

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the perpetrator as African-American.²⁵⁶ White participants who had seen the version with the African-American suspect exhibited an increased tendency to attribute crime to individual failings and increased negative attitudes toward African-Americans that exceeded the increases observed in those who had seen the version with the white suspect.²⁵⁷ They also exhibited a statistically significant six percent increase in levels of support for punitive crime policies and more than a ten percent increase in levels of what Gilliam and Iyengar referred to as “new,” “hidden,” or “covert” racism.²⁵⁸

Borrowing Professor Kang’s analogy, I suggest that what Gilliam and Iyengar’s mug shot study detected was the presence of something akin to a “superpredator virus.” When we watch a news program, Kang explains, racial imagery associated with crime stories enters our subconscious and, like a computer virus, “silently waits to take action . . . which the user, if conscious of it, would disavow.”²⁵⁹ “In other words,” Professor Kang suggests, “as we consume local news, we download a sort of Trojan Horse virus that increases our implicit bias,”²⁶⁰ which has critical and demonstrable real-world consequences in how we interpret and interact with others.

Unbeknownst to those who watched the newscast with the African-American suspect, at the same time they were obtaining what they consciously believed to be credible and objective facts about an incident of local crime, they were also downloading subliminal messages about the intersections of race, youth, and violence. Like a virus, these messages installed themselves into viewers’ racial schemas, where, without their knowledge, the messages increased the viewers’ implicit biases about age, race, and causes of and solutions to violent crime. When participants were then questioned about their views on crime and race, they retrieved not only the preexisting racial meanings embedded in their schemas (which were prerecorded in questionnaires), but also the virally enhanced content added just moments before. It was this amplified or enflamed content that accounted for the observable increases in punitiveness and “new racism.” In their analysis of these findings, Gilliam and Iyengar emphasized that the relatively modest increases in unconscious bias they observed after a five-second exposure to a single photo were likely to be even more pronounced in the “cluttered context of everyday news coverage in

256. *Id.* at 564.

257. *Id.* at 567–70.

258. *Id.* at 566–69.

259. Kang, *supra* note 2, at 1553–54.

260. *Id.* at 1490.

which viewers encounter multiple visual cues about criminal suspects.”²⁶¹

2. *The Insider Effect*

What effect would these biases have on juvenile court insiders, like the Palm Beach prosecutor? The logical assumption is that the “outsiders” in Gilliam and Iyengar’s study would be susceptible to media hyperbole in ways that juvenile court insiders would not. Yet, while there is evidence that subliminal racial cues are less likely to interfere with the performance of trained professionals than they are of lay subjects,²⁶² multiple studies have detected the presence of cognitive bias in decisionmaking by prosecutors,²⁶³ judges,²⁶⁴ and probation officers.²⁶⁵

One recent study is particularly illuminating. In 2004, Professors Sandra Graham and Brian Lowery set out to expand the theory that sociologists Sara Steen and George Bridges had espoused six years earlier—that unconscious racial stereotypes can affect how juvenile probation officers perceive and subsequently treat juvenile offenders.²⁶⁶ The participants included a racially diverse and gender-balanced group of ninety-one juvenile probation officers in Los Angeles.²⁶⁷ Members of the experiment first performed what the researchers called a “mind-clearing task,” which required them to track a string of letters on a rapidly flashing computer screen.²⁶⁸ Amid the flashing letters, however, certain officers were subliminally exposed to words commonly associated with African-Americans (such as black,

261. Gilliam & Iyengar, *supra* note 15, at 572 (internal quotation marks omitted).

262. Generalized research shows that subliminal racial cues are not as likely to interfere with judgment and performance when the subject has been trained for the task at hand. See *supra* note 42 and accompanying text.

263. See Burke, *supra* note 43, at 1632 (arguing that even the most conscientious and ethical prosecutors fall prey to cognitive bias).

264. See Guthrie et al., *supra* note 43, at 778–80 (describing a study of 167 federal magistrate judges, which revealed that they are susceptible to biases and heuristics when making decisions); Jeffrey J. Rachlinski et al., *Inside the Bankruptcy Judge’s Mind*, 86 B.U. L. REV. 1227, 1229–30 (2006) (exploring whether specialist judges are susceptible to heuristics and biases when making decisions); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information?: The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1258–59 (2005) (reporting experimental evidence showing that judges have difficulty deliberately disregarding relevant, but inadmissible, evidence when making merits decisions).

265. See Bridges & Steen, *supra* note 34, at 555–57 (finding significant differences in probation officers’ attributions about the causes of a crime depending on the race of the offender).

266. Graham & Lowery, *supra* note 34, at 484.

267. *Id.* at 494.

268. *Id.* at 488.

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homeboy, rap, and so on), while others were exposed to race-neutral words.²⁶⁹ Participants then read two vignettes about a hypothetical adolescent who allegedly committed either a property crime or an assault.²⁷⁰ In both, the race of the offender was left unstated, and the scenarios were ambiguous about the causes of the crime.²⁷¹ After reading the vignettes, the probation officers rated the offender on various personal traits, such as hostility and immaturity, and made judgments about the offender's culpability, expected recidivism, and deserved punishment.²⁷² In contrast to subjects who did not receive the racial "priming," the probation officers who had been exposed to the subliminal messaging "judged the alleged offender to be less immature and more violent" as well as "more culpable, more likely to reoffend, and more deserving of punishment," and "their global trait ratings were more negative."²⁷³ The results were consistent even among officers who self-reported, and likely believed, that they held no racial bias toward minorities.²⁷⁴ "What's particularly interesting," Professor Lowery would later remark, "is that many of the officers were African Americans themselves. This shows the degree to which even African Americans can be affected by the negative associations in the environment."²⁷⁵

By all accounts, the superpredator discourse dominated not just local news during the 1990s, but network and cable broadcasts, newspapers, and magazines as well.²⁷⁶ Since the viruses it carried had the effect of increasing the implicit biases of those who were exposed to it for mere seconds, as was the case in Gilliam and Iyengar's study, there is every reason to believe that its effect on regular media consumers

269. *Id.* at 488–90. The sixteen race prime words in the first list were as follows: graffiti, Harlem, homeboy, jerricurl, minority, mulatto, negro, rap, segregation, basketball, black, Cosby, gospel, hood, Jamaica, and roots. *Id.* at 489 n.5. The words in the second list were as follows: afro, Oprah, islam, Haiti, pimp, dreadlocks, plantation, slum, Tyson, welfare, athlete, ghetto, calypso, reggae, rhythm, and soul. *Id.* The sixteen words in the first race-neutral list were as follows: baby, enjoyment, heaven, kindness, summer, sunset, truth, playful, accident, coffin, devil, funeral, horror, mosquito, stress, and toothache. *Id.* The words in the second list were as follows: warmth, trust, sunrise, rainbow, pleasure, paradise, laughter, birthday, virus, paralysis, loneliness, jealousy, hell, execution, death, and agony. *Id.*

270. *Id.* at 487.

271. *Id.*

272. *Id.*

273. *Id.* at 496.

274. *Id.* ("When an ethnicity was incorrectly reported, respondents again were more likely to 'recall' that the alleged offender was African American than either Latino or White.")

275. Marguerite Rigoglioso, Racial Stereotypes Can Be Unconscious but Reversible (Jan. 2008), http://www.gsb.stanford.edu/news/research/hr_racialstereotypes.shtml.

276. *See supra* notes 5–15 and accompanying text.

would be at least as strong. If, like the rest of us, juvenile court judges, prosecutors, and probation officers were watching and reading the news on a regular basis during the 1990s—and by most accounts they were²⁷⁷—they, like the subjects in Graham and Lowery’s experiment, were unwittingly downloading superpredator viruses that affected their unconscious beliefs and feelings about the relative culpability and salvageability of juvenile offenders of color.

Is there reason to believe that the superpredator discourse would interfere less with the mental processes of those whose job it is to evaluate minority offenders on a daily basis? Consider the Palm Beach prosecutor. In all likelihood, our prosecutor spends hours each day working in a courthouse filled with young people of color, like Anthony L. But while he might be exposed to dozens of police reports, mug shots, and rap sheets bearing images of these youth, he may never have a conversation with any of them. More importantly, the data that he is taking in and ultimately “mapping” into his cognitive library through these indirect experiences are bound to be negative or, at the very least, neutral.²⁷⁸ So, even before the prosecutor turns on the ten o’clock news, he may already have had a day of vicarious encounters that altered his racial schema. News stories like the one about the Orlando fight can act as the proverbial icing on the cake. Even if he is not conscious of it, the mediated images of minority juveniles committing crimes in his own backyard reinforce what the prosecutor may already suspect: Kids of color are more violent, less repentant, and more in need of punitive segregation than their white counterparts.²⁷⁹

How might these mediated biases translate into increased racial disparity? Recall the Washington State study by Bridges and Steen that explicitly linked attributional biases—the tendency of probation

277. As former Chief Justice Rehnquist acknowledged in his 1987 book about the Court, judges “read newspapers and magazines . . . watch news on television, [and] talk to [their] friends about current events.” WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 98 (1987); see also Pritchard, *supra* note 218, at 143–44 (noting, for example, that prosecutors are “avid readers of newspaper stories about their cases”).

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278. A prosecutor who is surrounded in his daily routine only by crime victims, police officers, and other prosecutors might develop a deepened presumption of guilt that can contribute to cognitive bias. See Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 *HOW. L.J.* 475, 486–87 (2005) (noting that prosecutorial relationships affect prosecutorial loyalties); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 *AM. J. CRIM. L.* 197, 208 (1988) (noting that prosecutors are typically isolated from populations who might trigger empathy for defendants, while surrounded by populations “who can graphically establish that the defendant deserves punishment, and who have no reason to be concerned with competing values of justice”).

279. See *supra* text accompanying notes 248–58.

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officers to attribute the criminal behavior of minority youth to dispositional forces and that of white youth to ecological forces—with more punitive outcomes.²⁸⁰ In the case of the prosecutor, simply seeing Anthony L.’s mug shot may have triggered these attributional biases, which, without the prosecutor’s awareness, influenced his decision to charge Anthony L. as an adult.

C. *The Juvenile Justice System as Host*

In many respects, the lack of accountability and oversight within the juvenile court enable biased decisionmaking. The recent case of Luzerne County, Pennsylvania, is a case in point. In 2009, Luzerne County Judges Mark Ciavarella and Michael Conahan pleaded guilty to accepting financial kickbacks in exchange for placing children in private residential detention facilities in a scheme that was remarkable for both its complexity and audacity.²⁸¹ By all accounts, Judge Ciavarella was especially brazen in his pursuit of the scheme: He routinely failed to inform the children appearing before him in juvenile court of their right to a trial, their right to confront and cross-examine witnesses, and the burden of the government to prove every element of its case beyond a reasonable doubt.²⁸² In some cases, Judge Ciavarella went so far as to adjudicate youth delinquents and place them in detention without even taking a plea.²⁸³ When he held detention hearings, they lasted no more than a few minutes, with no opportunity for the youth to speak on her behalf or to present testimony or evidence.²⁸⁴ To increase the number of out-of-home placements, Judge Ciavarella exerted pressure on probation officers to recommend detention of juveniles even when detention was inappropriate and to change recommendations of release to recommendations of detention.²⁸⁵ Amazingly, the scheme began to unravel, not because the dozens of prosecutors, probation officers, correctional of-

280. Bridges & Steen, *supra* note 34, at 564–67; *see also* Bishop & Frazier, *supra* note 205, at 409–10 (noting that “many respondents indicated that juvenile justice officers make decisions influenced in part by perceptions (or misperceptions) of youths’ family backgrounds and circumstances”); Leiber & Fox, *supra* note 43, at 489 (concluding that “race affects case processing and outcomes directly, in combination with other factors, and indirectly through detention”).

281. *See* Plea Agreement, *United States v. Conahan*, No. 3:09-CR-028 (M.D. Pa. Jan. 26, 2009) (pleading guilty to wire fraud and conspiracy to defraud the United States); Plea Agreement, *United States v. Ciavarella*, No. 3:09-CR-028 (M.D. Pa. Jan. 26, 2009) (same).

282. Amended Complaint-Class Action, *H.T. v. Ciavarella*, Civil Action No. 3:09-CV-00357 (M.D. Pa. Apr. 23, 2009).

283. *Id.*

284. *Id.*

285. *Id.*

ficers, and defense attorneys who were privy to its daily fallout cried foul, but because the Juvenile Law Center (“JLC”), a public interest law firm three counties away, began to investigate statistical abnormalities in attorney waiver rates in Luzerne.²⁸⁶ In 2007, the JLC launched an investigation, and in 2008 it petitioned the Pennsylvania Supreme Court to enjoin the County from continuing to conduct delinquency hearings without counsel or lawful waivers of counsel.²⁸⁷ The Court denied the petition in December 2008, but granted a motion for reconsideration one month later after evidence of the kickback scheme surfaced.²⁸⁸

The case of Luzerne County, Pennsylvania, is extreme, but it serves as a poignant reminder that there may be no arm of our justice system more susceptible to abuse than the juvenile court. Whether it is the blatant corruption that went undetected for five years in Luzerne County, or the unconscious race bias that percolated under the surface in Washington State,²⁸⁹ the juvenile court has proven itself an especially fertile host to decisionmaking pathologies. It has also proven itself particularly resistant to formalized efforts to cure them.

V. IMPLICATIONS AND PRESCRIPTIONS

By the turn of the twenty-first century, the superpredator narrative had faded from the lexicon, and even John DiIulio was rethinking his stance. In 2001, he told the *New York Times*, “If I knew then what I know now, I would have shouted for prevention of crimes.”²⁹⁰ By then, however, the damage had already been done. In a little over a decade, the juvenile justice system had morphed from an institution

286. See Editorial, *Seeking Justice*, PHILA. INQUIRER, Jan. 3, 2010 (describing how the JLC embarked on a mission to correct “injustices against thousands of juveniles who were denied their legal rights in Luzerne County’s court system” and expressed shock at the “‘vast conspiracy of silence’ among Luzerne County officials”).

287. Application of J.V.R., H.T. & Similarly Situated Youth For Exercise of King’s Bench Power or Extraordinary Jurisdiction, *In re J.V.R.*, No. 81 MM 2008 (Pa. 2008).

288. Order, *In re J.V.R.*, No. 81 MM 2008 (Pa. Feb. 11, 2009) (granting motion for reconsideration of denial of application for the exercise of extraordinary jurisdiction and to amend application and appointing Hon. Arthur E. Grim, Senior Judge of Berks County, as Special Master to act on behalf of the court to “review all Luzerne County juvenile court adjudications and dispositions that have been affected by the recently revealed criminal allegations, specifically including: (1) cases in which Judge Ciavarella committed juveniles to PA Child Care, LLC and Western PA Child Care, LLC; and (2) cases in which it is alleged that juveniles appearing before Judge Ciavarella were denied their constitutional right to counsel”).

289. See Bridges & Steen, *supra* note 34, at 557–67 (noting a link between probation officers’ conclusions about the causes of a crime and the offender’s race).

290. Elizabeth Becker, *As Ex-Theorist on Young “Superpredators,” Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19 (internal quotation marks omitted).

that saw adolescent offenders as immature and malleable to one willing to give up on entire subsets of youth before they were even given a chance to rehabilitate.²⁹¹ More troubling, these subsets were made up largely of minority youth. By 2006, more than sixty-five percent of the young people held in long-term confinement through delinquency adjudications, and nearly seventy-two percent of those placed through criminal convictions in the United States, were racial minorities.²⁹²

Juvenile justice advocates appear to be at a crossroads. A decade of declining juvenile crime rates and the public's shift in focus over the last eight years from schoolyards at home to battlefields abroad and, more recently, to housing foreclosures and swelling unemployment rates, have left both stakeholders and the public less comfortable with the harsh policies of the 1990s.²⁹³ Lawmakers in some states have even begun to ratchet back their "get tough" laws.²⁹⁴ Even beyond the legislative focus on the DMC Mandate, analysts are now suggesting that this "period of relative calm" in the juvenile justice world may be rife with opportunity for meaningful reform.²⁹⁵

Plainly, the news media is at a critical juncture as well. The commercial pressures at play in the 1990s have only worsened, and today both print and broadcast media outlets are struggling to survive.²⁹⁶ The annual *State of the News Media* report issued by the Pew Project for Excellence in Journalism, for example, is especially bleak.²⁹⁷ Increasingly, consumers are turning to the Internet for their daily dose of

291. See SCOTT & STEINBERG, *RETHINKING*, *supra* note 4, at 4 (explaining that the justice system, which used to view juvenile lawbreakers as "youngsters whose crimes were the product of immaturity," now routinely holds those same offenders to adult criminal standards).

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292. National Center for Juvenile Justice, Easy Access to the Census of Juveniles in Residential Placement, <http://ojjdp.ncjrs.gov/ojstatbb/ezacjrp> (last visited May 26, 2010) (follow "Crosstabs" hyperlink; select "Race" under "Column Variable"; select "2006" under "Year of Census"; select "Committed" under "General Status"; select "Adjudicated, placed here" or "Convicted, criminal court"; select "Detention Center" and "Long-term Secure" under "Facility Self-Classification"; then click "Show Table").

293. SCOTT & STEINBERG, *RETHINKING*, *supra* note 4, at 11.

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294. *Id.* at 11–12.

295. See *id.* at 12 (arguing that the lack of imminent concern over juvenile justice issues presents an opportunity "to devise a model of juvenile justice that can better serve the needs of society in the twenty-first century" before juvenile crime rates rise again and provoke a harsh public response).

296. See Pew Project for Excellence in Journalism, *The State of the News Media 2009*, http://www.stateofthemediamedia.org/2009/narrative_overview_intro.php?cat=0&media=1 (last visited May 26, 2010) (examining annual trends in media consumption and the news industry generally).

297. *Id.* ("This is the sixth edition of our annual report on the State of the News Media in the United States. It is also the bleakest.").

news,²⁹⁸ and calls for the traditional news media to “reinvent” itself have become almost deafening.²⁹⁹ The problem, of course, is that the same economic downturn that has left the news media looking for ways to cut costs has also hit indigent communities especially hard—a phenomenon which, historically, has led to an increase in crime rates.³⁰⁰ Thus, even if they have not begun to already, juvenile crime rates will rise again. Whether another moral panic will ensue remains to be seen.

A. *Debiasing*

Perhaps the most encouraging news that cognitive psychologists have for us is that schematic thinking is not inevitable, and stereotypes are not immutable. Research shows that the automaticity of stereotypes can be neutralized through repeated negation of stereotypic associations, affirmation of positive associations with the cohort in question,³⁰¹ and “social tuning,” which can be accomplished through relationship-building with the target.³⁰² In other words, when perceivers are motivated to develop a relationship with a member of a stereotyped group,³⁰³ or to form a good impression of that person,³⁰⁴ automatic stereotype activation can be inhibited. In layperson’s terms, there is reason to believe that demographic diversity in hiring and cultural competency training could help reduce the reliance on schematic thinking and stereotyping by juvenile court decisionmakers.³⁰⁵

Interestingly, the Department of Justice seems to agree. In its most recent Technical Assistance Manual, OJJDP acknowledges that

298. *See id.* (noting that in one survey, the number of Americans who said they got their news online rose by nineteen percent over the last two years).

299. *Id.* According to the 2009 Pew report, “[t]he problem facing American journalism is not fundamentally an audience problem or a credibility problem [but instead] a revenue problem—the decoupling, as we have described it before, of advertising from news.” *Id.*

300. *See, e.g.,* Lauren King, *Statistics Point to Increase in Crime During Recessions*, VIRGINIAN-PILOT, Jan. 19, 2009, at B1 (noting that statistics suggest that general crime rates often rise during economic downturns due to a variety of factors).

301. *See* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 248–49 (2002) (discussing suppression of stereotypes and the promotion of opposing counter-stereotypes).

302. *See* Graham & Lowery, *supra* note 34, at 501 (promoting “social tuning” as a means to counter unconscious bias in the juvenile justice system); Brian S. Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842, 851–52 (2001) (reporting experimental data supporting the same conclusion).

303. Lowery et al., *supra* note 302, at 852.

304. Lisa Sinclair & Ziva Kunda, *Reactions to a Black Professional: Motivated Inhibition and Activation of Conflicting Stereotypes*, 77 J. PERSONALITY & SOC. PSYCHOL. 885, 901 (1999).

305. *See infra* notes 306–18 and accompanying text.

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“[m]isunderstandings about cultural differences and racial stereotyping frequently contribute to differential sentencing decisions for black and white youth who have committed similar crimes.”³⁰⁶ The most promising response to this phenomenon is what OJJDP calls “institutionalized cultural competency training” programs that teach juvenile court actors to “recognize and minimize the influence of cultural differences on their decisionmaking processes.”³⁰⁷ OJJDP defines “cultural competency” as “a set of congruent behaviors, attitudes, and policies that interface with each other in a system, an agency, or a network of professionals to work effectively in cross-cultural situations.”³⁰⁸ Drawing on a wealth of recent social psychological research, OJJDP suggests that developing a conscious awareness of those cultural cues that influence decisionmaking, such as demeanor and language use, is essential to curbing cultural biases and stereotypes and producing changes in institutional practices.³⁰⁹ Among other interventions, OJJDP endorses a training curriculum designed by the American Correctional Association and the Police Executive Forum to combat unconscious bias in individual actors and improve institutional policies overall, which incorporates a “cultural diversity action plan” focused on “self-awareness, values, prejudice, communication, goals, and task management.”³¹⁰

Especially when administered in conjunction with the adoption of empirically based, standardized, objective decisionmaking modules called Risk Assessment Instruments (“RAIs”), cultural competency training can be extremely effective in reducing DMC.³¹¹ In 1999, the Santa Cruz, California, probation department developed and implemented a cultural competency staffing plan that established guidelines to promote bilingual hiring and prepare existing staff to provide services to a culturally diverse client population.³¹² At the same time, the department undertook a major system change strategy to develop a culturally competent juvenile detention screening instrument.³¹³

306. U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL 6-23-6-24 (2009) [hereinafter TECHNICAL ASSISTANCE MANUAL].

307. *Id.* at 6-24.

308. *Id.* at 4-13 (citation omitted).

309. *Id.* at 4-13-4-14.

310. *Id.* at 4-14.

311. See Eric Lotke & Vincent Schiraldi, *The Juvenile Detention Alternatives Initiative: The Santa Cruz and Portland Models*, in BUILDING BLOCKS FOR YOUTH, NO TURNING BACK: PROMISING APPROACHES TO REDUCING RACIAL AND ETHNIC DISPARITIES AFFECTING YOUTH OF COLOR IN THE JUSTICE SYSTEM 8, 11-15 (2005) (highlighting program success).

312. TECHNICAL ASSISTANCE MANUAL, *supra* note 306, at 4-62.

313. *Id.*

The end product was an RAI based on a set of quantifiable risk elements (such as the seriousness of current charge, prior adjudications, and prior court, detention, and placement history) that was intended to be free of any criteria that could create unintentional racial biases.³¹⁴ The instrument also provided an override option, whose use was carefully monitored for racial disparities.³¹⁵ The department generated monthly outcome reports, which were classified by ethnicity, among other things.³¹⁶ The results were immediate: Prior to implementation of the cultural competency plan and the RAI, Latino youth represented thirty-three percent of the general youth population in the County, but accounted for sixty-four percent of the daily juvenile detention population.³¹⁷ This figure fell to fifty-three percent in 1999 following the launch of the DMC initiative, and the disproportionate rate index value for Latino youth also saw a drop.³¹⁸

Finally, it is axiomatic that what may be most critical to “debiasing” the juvenile court is injecting the prophylactic feature most lacking—accountability. As incongruous as it sounds, the best purveyor of accountability may be the media itself. For years, commentators have touted the benefits of making the criminal justice system more accessible to the media generally and broadcast media in particular.³¹⁹ Greater media access would not only educate the public about the realities of the justice system, they argue, but would also hold its actors to a higher standard of accountability by forcing them to be more attune to the rule of law and less to the allure of bureaucratic efficiency and political convenience.³²⁰ These arguments become even

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 4-63.

318. *Id.* Multnomah County, Oregon, has also seen DMC rates drop significantly through a combination of RAIs, staff diversification, outreach to families and community organizations, and development of new community-based alternatives to detention. Lotke & Schiraldi, *supra* note 311, at 9-15.

319. See FOX ET AL., *supra* note 2, at 198 (citing ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE CRIMINAL JUSTICE SYSTEM AND THE O.J. SIMPSON CASE (1997); Steven Brill, *The Simpson Legacy*, L.A. TIMES, Oct. 8, 1995, at F5; Paula Canning, *Battles for Cameras in Courtrooms Continue*, NEWS MEDIA & L., Spring 2003, at 34, available at <http://www.rcfp.org/news/items/index.php?i=6024>; Douglas Lee, *Florida Election Case Proved Value of Cameras in the Courtroom*, FREEDOM FORUM, Dec. 26, 2000, <http://www.freedomforum.org/templates/document.asp?documentID=4104>; Amy Ridenour, *The Supreme Court is Wrong to Ban Camera Coverage*, NAT'L POL'Y ANALYSIS, Nov. 2000; Al Tompkins, *A Case for Cameras in the Courtroom*, POYNTERONLINE, Nov. 28, 2000). Richard Fox, Robert Van Sickle, and Thomas Steiger, however, disagree. They write that “contrary to the idealized prediction that greater public exposure would bring about [a] range of public benefits . . . we believe that citizens are simply being more misinformed.” *Id.* at 201.

320. *Id.* at 198.

more compelling when applied to the juvenile court, an institution that adheres only loosely to the standards of due process, whose players are largely anonymous, whose practices are often shrouded in secrecy, and whose population is our society's most vulnerable. Significantly, the National Council of Juvenile and Family Court Judges, which includes some of the most powerful juvenile court "insiders" in the country, now agrees. It recently endorsed a presumptively open court system:

Traditional notions of secrecy and confidentiality should be re-examined and relaxed to promote public confidence in the court's work. . . . The court should be open to the media, interested professionals and students and, when appropriate, the public, in order to hold itself accountable, educate others, and encourage greater community participation.³²¹

B. *Replacement Discourse*

A more direct response to the influence of mediated discourse on both DMC and on efforts to reduce it is the promotion of a "replacement discourse," which "captures 'the fluid nature of criminal violations and the legal processing of such infractions.'"³²² According to media critics, this can be done through crime stories which are "thematic" rather than "episodic" and include a "public health" perspective.³²³ Integral to this is the willingness of journalists to expand their

321. REPORTERS COMM. FOR FREEDOM OF THE PRESS, ACCESS TO JUVENILE COURTS: A REPORTER'S GUIDE TO PROCEEDINGS & DOCUMENTS IN THE 50 STATES & D.C. (1999), available at <http://www.rcfp.org/juvcts/index.html>.

322. Gregg Barak, *Media, Crime, and Justice: A Case for Constitutive Criminology*, in CULTURAL CRIMINOLOGY 142, 143 (Jeff Ferrell & Clinton R. Sanders eds., 1995) (quoting Stuart Henry & Dragan Milovanovic, *The Constitution of Constitutive Criminology: A Postmodern Approach to Criminological Theory*, in THE FUTURES OF CRIMINOLOGY 130 (David Nelkin ed., 1994)).

323. See, e.g., ENTMAN & ROJECKI, *supra* note 100, at 217 (noting that "virtually every book ever written [about news reporting] has called for news stories to provide more context, but to little avail"); DORFMAN & SCHIRALDI, *supra* note 14, at 29-31 (recommending that journalists add "social context to the storytelling and give audiences some guideposts for interpreting the crime"); JANE ELLEN STEVENS, REPORTING ON VIOLENCE: NEW IDEAS FOR TELEVISION, PRINT AND WEB 10 (2001) (recommending that journalists report on the status of violence and the public health response to violence, which will lead to more stories about the daily incidents that "harm communities the most and cause cities to spend huge chunks of their budgets (hundreds of thousands to millions of dollars) on police, medical and rehabilitation expenses" and more stories on "predictable, effective methods to reduce and prevent violence").

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sources beyond law enforcement;³²⁴ the willingness of the news media as an institution to increase enterprise and investigative journalism;³²⁵ and the willingness of individual media outlets to audit their own story selection and content.³²⁶ While not explicitly aimed at reducing the “viral” capacity of crime news reporting, they are likely to have that effect by not only reapportioning the racial and violent content of crime news stories but also by encouraging more associations with positive racial exemplars.

Encouragingly, some print journalists have already undertaken these measures. Consider the real life case of fifteen-year-old Anthony Laster.³²⁷ On December 3, 1998, Palm Beach County School Board police arrested Laster after grabbing two dollars from a middle school classmate’s pocket.³²⁸ Laster is mentally challenged and hearing-impaired.³²⁹ Just weeks before the incident, his mother had died.³³⁰

Nonetheless, Laster was taken and held at the county’s juvenile detention center.³³¹ Just before Christmas, however, prosecutor Barry Kirscher decided to make an example of Laster: “‘This is a robbery,’” Kirscher declared. Laster “‘terrorized a child and took away his money [and Laster’s] learning disability has nothing to do with his

324. See DORFMAN & SCHIRALDI, *supra* note 14, at 27–29 (arguing that overreliance on traditional police sources, who have incentive to emphasize the prevalence of violent crime, “hampers the full story on crime”); STEVENS, *supra* note 323, at 10 (noting that “reporters continue to cover crime and violence by talking only to law enforcement and criminal justice officials and experts” and “leave out public health experts who can provide violence prevention data, research and resources that readers and viewers can use to prevent the types of violent incidents that cause them and their communities the greatest harm”).

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325. See DORFMAN & SCHIRALDI, *supra* note 14, at 31–32 (explaining that “[e]nterprise journalism means reporters don’t work from news releases or police scanners, but get out from behind their desks, into the community, where a variety of sources and perspectives can be reported”).

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326. See ENTMAN & ROJECKI, *supra* note 100, at 217 (recommending that the media “provid[e] self-critical material that offers context and clarifies the causes of the images that appear” and suggesting, for example, that when reporting that “Black crime rates are much higher than White,” the media also report that this “racial difference disappears if we control for employment status”); FOX ET AL., *supra* note 2, at 206 (concluding that the “only potentially effective long-term reforms . . . lie in the realms of civic education, a greater public awareness of the ‘problem,’ and a new sense of propriety on the part of both the citizenry and the media”).

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327. See *supra* Part IV.

328. Editorial, *He Stole Lunch Money, So Now He’s a Criminal*, PALM BEACH POST, Feb. 9, 1999, at 18A.

329. *Id.*

330. *Id.*

331. Editorial, *Send \$2 Child Robber to Court for Children*, PALM BEACH POST, Mar. 4, 1999, at 18A.

capacity to commit a crime.’”³³² Kirscher charged Laster with strong-arm robbery, extortion, and petty theft.³³³ His case was filed directly in the adult criminal division.³³⁴ The boy was transferred to jail where he stayed through Christmas.³³⁵ Though his bond was set at \$5000, it took his family three weeks to redeem his mother’s insurance policy and secure the boy’s release.³³⁶

Unlike most juvenile cases, however, Anthony Laster’s case made headlines. In the span of twelve weeks, dozens of articles appeared in newspapers across the country, many decrying Kirscher’s decision.³³⁷ Some castigated Kirscher as a racist, pointing out that his office had a track record of disproportionately arraigning African-American youth on the harshest possible charges.³³⁸ Although he had charged Laster as an adult, Kirscher had charged a fifteen-year-old white youth who threatened to bomb his school in commemoration of the Columbine massacre as a juvenile, allowing him to attend a daytime delinquency program for adolescents.³³⁹ Others took an expressly thematic approach, deeming the Laster case yet another example of prosecutorial overreaching, and took the opportunity to place the case within the broader context of the “get tough” laws.³⁴⁰ “Juvenile justice advocates are pointing to this Florida case as a cautionary tale of what can happen when prosecutors have the power to charge and try minors as adults for serious offenses without having a judge review the case,” the *Boston Globe* reported.³⁴¹ “These advocates also say putting more youths into the adult system means they could be exposed to violent adult behavior while losing out on counseling and other rehabilitation services provided through the juvenile court system.”³⁴² The case al-

332. *He Stole Lunch Money, So Now He’s a Criminal*, *supra* note 328, at 18A.

333. *Id.*

334. *Send \$2 Child Robber to Court for Children*, *supra* note 331, at 18A.

335. *He Stole Lunch Money, So Now He’s a Criminal*, *supra* note 328, at 18A.

336. *Id.*

337. *See, e.g.*, Karen Testa, *Retarded Boy Faced Prison for \$2 Theft*, PHILA. INQUIRER, Mar. 10, 1999, at A17.

338. Linda Breed, *Brazill Case Draws National Attention*, WORKERS WORLD, June 7, 2001, available at <http://www.mail-archive.com/kominform@lists.eunet.fi/msg07611.html> (quoting a Palm Beach County newspaper that reported “[h]ard-hearted Barry Kirscher wants to send Nathaniel Brazill, 13, to the electric chair, but the record shows he’s not so hard on renegade cops or young white folk”).

339. *Id.*

340. *See* Louise D. Palmer, *Age of Innocence? Move to Try Juveniles as Adults Comes Under Scrutiny*, BOSTON GLOBE, Mar. 13, 1999, at A1 (describing increasing approval in Congress and the White House for giving prosecutors the power to try minors who are fourteen and older as adults).

341. *Id.*

342. *Id.*

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most made it onto prime time network news as well, but just a few days after a *60 Minutes* crew arrived in town to investigate, Kirscher dropped the charges.³⁴³

Other pieces of “watchdog” journalism have emerged with similar results. In the late 1990s, for example, a veteran journalist in Arkansas named Mary Hargrove launched a six-part series on the deplorable conditions and rampant physical and sexual abuse in state-run juvenile facilities, which prompted high-level resignations and the eventual closure of the infamous Observation and Assessment Center in Little Rock, Arkansas.³⁴⁴ In 2005, the *Denver Post* and *Rocky Mountain News* ran a feature on juveniles serving life without parole (“LWOP”) sentences, which zeroed in on the fact that many of the children profiled had been sentenced as adults to life for their involvement in felony murders—an offense that would have resulted in a five-year sentence had it been prosecuted in juvenile court.³⁴⁵ The following year, the Colorado legislature enacted a law prohibiting juveniles from receiving LWOP sentences altogether.³⁴⁶ And, of course, in 2007, hundreds of print and broadcast journalists flocked to Jena, Louisiana, to report on the case of six African-American high school students charged with attempted murder in the beating of a white classmate.³⁴⁷

Some national news magazines have also gotten into the act over the last decade by rounding out their typical crime reporting with

343. Karen Testa, *Case Dropped Against Disabled Boy Who Took \$2*, STUART NEWS, Mar. 5, 1999, at A8.

344. Mary Hargrove, *When Juveniles Are Locked Up: A Reporter Uncovers Abuse in a System Few People Know Exists*, NEIMAN REPORTS, Winter 1998, at 30–32. The series tapped myriad sources, including Arkansas’s Department of Human Services, and took Hargrove months to compile. *Id.*

345. See, e.g., Gwen Florio et al., *Life for Death: Should Teen Murderers Get a Second Chance at Freedom?*, ROCKY MTN. NEWS, Sept. 17, 2005, at 1A (profiling Colorado inmates who were convicted of murder between the ages of fourteen and seventeen and were charged as adults).

346. SCOTT & STEINBERG, RETHINKING, *supra* note 4, at 267.

347. Christie, *supra* note 163 (noting that “[f]rom September 7, 2006, to October 12, 2007, the Associated Press distributed 74 stories about the Jena nooses, 52 on state wires, 38 on national wires, 22 on North American wires and five on southern regional wires,” and on September 20, 2007, an estimated 20,000 people from around the Nation held rallies in Jena). One of the chief retrospective complaints about the Jena coverage, however, is that with the exception of some local Louisiana papers, most journalists took as gospel facts about the case disseminated by interested bloggers and failed to do any independent investigation of their own. *Id.* (quoting a column by *Jena Times* Assistant Editor Franklin, which stated that “the media simply formed their stories based on one side’s statements about the Jena 6 . . . were downright lazy in their efforts to find the truth . . . [or] simply reported what they’d read on blogs, which expressed only one side of the issue”).

contextual information on the causes of juvenile offending. *Time* and *Newsweek*, for example, both ran issue features on the links between adolescent brain development and behavior.³⁴⁸ For the most part, however, broadcast media has been a hold-out. While enterprise reporting remains the core of television news magazines like *60 Minutes* and *Frontline*, it has all but disappeared from many of the networks.³⁴⁹ Analysts blame a host of industry developments, from deregulation, which has facilitated ownership of broadcast media outlets by commercially driven corporations, to the flurry of high-profile lawsuits launched during the 1990s, which have made investigative reporting a “magnet[] for legal action.”³⁵⁰

C. *The DMC Mandate*

One of the most remarkable aspects of these trends was that they occurred during a period when the federal government was taking almost unprecedented steps to remedy the problem of racial disproportionality in the juvenile justice system. In 1987, the Coalition for Juvenile Justice issued a report entitled *An Act of Empowerment*, which discussed the “special problem of the treatment of minorities and

348. See Sharon Begley, *Getting Inside a Teen Brain*, NEWSWEEK, Feb. 28, 2000, available at <http://www.newsweek.com/id/82963> (discussing how brain development could explain behavioral characteristics of teenagers, including poor decisionmaking and lack of self control); Claudia Wallis, *What Makes Teens Tick*, TIME, Sept. 26, 2008, available at <http://www.time.com/time/magazine/article/0,9171,994126,00.html> (surveying scientific research on how teenage brain development influences behavior, including the ability of teens to read emotional signals from others and assess the risks associated with their decisions).

349. Melissa Guthrie, *Investigative Journalism Under Fire: Shrinking Budgets and Concerns over Legal Risk Have Hurt a Vital Genre*, BROADCASTING & CABLE, June 22, 2008, available at http://www.broadcastingcable.com/article/114234-Investigative_Journalism_Under_Fire.php.

350. *Id.* According to some media critics, however, government may have a role to play in reducing the negative externalities of broadcast media. Professor Leonard Baynes, for example, has argued that the FCC should take action to revoke the licenses of broadcasters “who have no people of color in their prime-time programs or disproportionately portray people of color in a stereotypical manner.” Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 299 (2003). More generally, Professor Jerry Kang suggests that the FCC has the power to restrict “bad” and promote “good” broadcast content. Kang, *supra* note 2, at 1543. While print media is generally insulated, the FCC has the ability to regulate broadcast media to promote the “public interest.” *Id.* at 1542–43. Kang advocates pushing the FCC, through public comment to any future Notice of Proposed Rulemaking, a court challenge via the Administrative Procedure Act, and/or a Notice of Inquiry to recode the “public interest” standards in ways that would, at the very least, “shine a new light on racial meanings generated and delivered throughout all media.” *Id.* at 1568–72. In the context of juvenile justice, protecting the public interest may be even more compelling when the cohort being harmed is per se politically powerless by virtue of its age.

American Natives caught up in the juvenile justice system” and made detailed recommendations for addressing the problem.³⁵¹ Armed with this and a series of recent empirical studies documenting widespread racial disproportionality at multiple decision points in jurisdictions throughout the country,³⁵² juvenile justice advocates lobbied Congress to amend the JJDPA.

One of the 1988 amendments to the JJDPA required states receiving funding from the Title II, Part B Formula Grants Program³⁵³ to investigate the problem of disproportionate minority confinement in secure facilities and to develop action plans to address its causes.³⁵⁴ This has become known as the “DMC Mandate” or “DMC Initiative.” Specifically, if the proportion of a given group of minority youth detained or confined in its secure detention facilities, secure correctional facilities, jails, and lockups exceeded the proportion that group represented in the general population, the DMC Mandate required the state in question to develop and implement plans to reduce the disproportionality.³⁵⁵ The DMC Mandate was elevated to a core requirement of the JJDPA in 1992,³⁵⁶ and a decade later was expanded to encompass disproportionality not only in confinement, but at every processing point within the juvenile justice system.³⁵⁷

The passage of the DMC Mandate was historic, as it purported to redress not only those disparities caused by overt race bias, but also those caused by the structural conditions endemic to the institutions that produced them. The problem, however, is that with the excep-

351. THE NAT'L COALITION OF STATE JUVENILE JUSTICE ADVISORY GROUPS, AN ACT OF EMPOWERMENT 3 (1987).

352. See, e.g., Barry Krisberg et al., *The Incarceration of Minority Youth*, 33 CRIME & DELINQ. 173, 178–90 (1987) (discussing trends in juvenile incarceration between 1977 and 1982 based on statistics from the U.S. Bureau of the Census).

353. The Formula Grants Program makes federal funds available to states “to support State and local programs that prevent juvenile involvement in delinquent behavior.” 42 U.S.C. § 5602(1) (2006). Under the program, OJJDP determines the amount for which each state is eligible using a formula based on the state’s juvenile population. See 28 C.F.R. § 31.301(a) (2009) (“Funds shall be allocated annually among the States on the basis of relative population of persons under age eighteen.”). To be eligible for the program, a State must submit a comprehensive three-year plan setting forth the State’s proposal for meeting the mandates and goals outlined in the JJDPA. 42 U.S.C. § 5633(a). The State’s plan is amended annually to reflect new programming and initiatives to be undertaken by the State and local units of government. *Id.*

354. Pub. L. No. 100-690, § 7258(c), 102 Stat. 4439, 4440 (1988) (codified as amended at 42 U.S.C. § 5633(a)(23) (2006)).

355. *Id.*

356. Pub. L. No. 102-586, § 2(f)(3)(A)(ii), 106 Stat. 4982, 4993–94 (1992) (codified as amended at 42 U.S.C. § 5633(a)(22) (2006)).

357. Pub. L. No. 107-273, § 12209(1)(P), 116 Stat. 1873, 1878 (2002) (codified as amended at 42 U.S.C. § 5633(a)(22) (2006)).

tion of a few jurisdictions, it simply has not done so. Perhaps the most obvious indicator of this fact is that since 1990, national DMC rates for arrest, placement, and detention have barely budged, while the adult court waiver rate has had only a moderate decrease.³⁵⁸ At the state level, some jurisdictions have used Formula Grant funds to make a genuine dent in DMC rates, but most have not. In fact, despite study after study revealing statistically significant race effects on juvenile court processing, some insiders continue to insist that DMC is the product of differential offending alone.³⁵⁹

The sources of the DMC Mandate’s ineffectiveness have defied consensus. Some blame the Mandate’s vague and ineffectual regulatory language,³⁶⁰ others cite inadequate funding,³⁶¹ others OJJDP’s seemingly lax and arbitrary enforcement,³⁶² while still others focus on the failure of state-level bureaucrats and institutional actors to embrace and implement proven remedies.³⁶³ National DMC expert James Bell of San Francisco’s W. Haywood Burns Institute boils it down to a simple metaphor. State actors will embrace efforts to reduce DMC if one of two things happens, he explains: They “feel the heat” or they “see the light.”³⁶⁴ Currently, the Burns Institute and other advocacy groups across the country are lobbying Congress to turn up the “heat.” As of mid-2010, pending before the Senate is Senate Bill 678, the Juvenile Justice and Delinquency Prevention

358. PUZZANCHERA & ADAMS, *supra* note 199.

359. Leiber, *supra* note 23, at 15–16.

360. *See, e.g., Reauthorization of the Juvenile Justice and Delinquency Prevention Act: Protecting Our Children and Our Communities: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 230–31 (2007) [hereinafter JJDPA Reauthorization Hearing]* (statement of Richard Miranda, Chief, Tucson Police Department) (“This vague requirement that states ‘address’ efforts to reduce DMC has left state and local officials without a clear mandate or guidance for reducing racial and ethnic disparities.”); BELL & RIDOLFI, *supra* note 53, at 15–16 (arguing that “[c]urrent federal mandates do not provide guidance or engagement”).

361. *See, e.g., JJDPA Reauthorization Hearing, supra* note 360, at 3 (statement of Sen. Russell D. Feingold) (“As the Federal commitment has dropped off, there is some evidence suggesting that the rate of violent juvenile crime, which had been declining steadily for many years, has begun in the past couple of years to climb again.”); *id.* at 214 (testimony of Deidre Wilson Garton, Chair, Wisconsin Governor’s Juvenile Justice Commission) (“Yet, as Federal funds have been severely cut and earmarked over the last seven years, gains are reversing and correctional placements are rising . . .”).

362. *See, e.g., Leiber, supra* note 23, at 16–17, 28 app. D (discussing disparities between different states’ assessment programs); *see also* BELL & RIDOLFI, *supra* note 53, at 15–16 (discussing how the lack of strategy, guidance, and consistent standards have contributed to the ineffectiveness of state DMC plans).

363. *See, e.g., DAHLBERG, supra* note 56, at 1–2 (discussing Massachusetts’s continued failure to comply with the DMC Mandate).

364. Telephone Interview with Laura John Ridolfi, Law & Policy Analyst, W. Haywood Burns Inst. (Aug. 20, 2009).

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Reauthorization Act of 2009, a bill that is supposed to strengthen the provisions of the DMC Mandate by providing more explicit and stringent guidance to states and localities.³⁶⁵ What has garnered far less attention is the “light,” or, more specifically, why it is that many insiders still do not seem to see it.

I claim that the superpredator discourse may be a source of this obscurity. Admittedly, some obscurity is inevitable, because stakeholders, like most of us, are inherently motivated to defend and justify their beliefs and those of the systems of which they are a part. Often referred to as “system justification,” this theory posits that members of organizations plagued by injustice will often rely on stereotypes or “system justifying biases” to explain and legitimate their existing practices even in the face of evidence that those practices contribute to the injustice.³⁶⁶ Yet, I claim that racially “tinged” social discourses, like the superpredator discourse, can bolster this predisposition to rationalize the status quo by perpetuating negative stereotypes of the victimized cohort. In the DMC context, the superpredator meme reinforced the biased perception that juveniles of color were incarcerated in disproportionate numbers not because the juvenile justice system was infirm, but because they were inherently more deviant than their white counterparts.³⁶⁷ This, in turn, led insiders to cling to existing institutional structures and practices, even when presented with viable alternatives. At times, these system justifying motives manifested themselves as overt opposition to the Mandate. As long as the public continued to believe that minority offenders were inherently deviant and predatory, stakeholders had a political incentive to denounce or at the very least ignore claims that these juveniles were “victims” of the system. More often, however, the system justifying motives manifested themselves implicitly in the form of the individual apathy and collective intransigence that seem to have hampered meaningful progress in most jurisdictions.

365. S. 678, 111th Cong. (2009) (reauthorizing and improving the Juvenile Justice and Prevention Act of 1974).

366. *See, e.g.*, Blasi & Jost, *supra* note 58, at 1123–25 (discussing how System Justification Theory suggests that people are motivated to accept and perpetuate existing social arrangements). **R**

367. This is illustrated in one recent study that found that even subliminal associations with race could prompt juvenile justice officials to overattribute the criminal behavior of minority youth to negative internal traits (such as moral depravity) and the criminal behavior of white youth to external forces (such as deviant peers or a dysfunctional family). *See* Graham & Lowery, *supra* note 34, at 484 (discussing the study on subliminal associations with race). **R**

Finally, this analysis has broader implications for the increasingly heated debate over the ascendance of the so-called “unconscious bias discourse.” In an article published just last year entitled *(How) Does Unconscious Bias Matter?* Stanford Law Professors Ralph Richard Banks and Richard Thompson Ford argue that despite its undeniable political appeal in advancing conversations about race by “sever[ing] the link between the moral blameworthiness of the individual, and the wrongness of the resulting discrimination,”³⁶⁸ the discourse is “as likely to subvert as to further the goal of substantive racial justice.”³⁶⁹ Beyond the empirical unreliability of the IAT and the failure of the unconscious bias approach to describe adequately the nature and origins of racial inequity, they lament that the rhetoric of unconscious bias risks diverting attention away “from problems of substantive inequality.”³⁷⁰ Rather than focus on “mental state” and antidiscrimination law, reformers should concentrate on policy.³⁷¹

One such policy is, of course, the DMC Mandate. In a 2007 article entitled *Disparity Rules*, Columbia Professor Olatunde C.A. Johnson cites the DMC Mandate as a promising statutory alternative to the traditional disparate impact regime as a means of redressing systemic disparities.³⁷² “The potential practical power of the [DMC Mandate] is that it provides a mechanism for encouraging a public institution not only to uncover bias in its practices (both explicit and implicit), but also to examine more broadly how its practices work to reproduce or exacerbate racial disadvantage.”³⁷³ Like Banks and Ford, Johnson suggests that advocates and academics must look beyond unconscious bias to “combat structural patterns of racial inequality.”³⁷⁴

In some respects, Banks, Ford, and Johnson are right. Addressing the cognitive pathologies that contribute to biased decisionmaking cannot be the sole objective of antidiscrimination efforts. The problem is that unless these pathologies are accounted for and surmounted, the broader structural reforms they seek (whether achieved through enhanced intra-institutional accountability measures, objective risk assessments, or something else altogether) may never even

368. Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1104 (2009).

369. *Id.* at 1110.

370. *Id.* at 1054, 1110–21.

371. *Id.* at 1054, 1120–21.

372. Johnson, *supra* note 54, at 374 (“[DMC] is potentially more far-reaching than traditional disparate impact standards The DMC approach innovatively responds to the complex mechanisms that sustain contemporary racial inequality.”).

373. *Id.* at 380.

374. *Id.* at 374.

get off the ground. In this sense, this Article suggests that mental state and policy reform may be inextricably entwined. While unconscious bias need not be the express target of antidiscrimination policies themselves, it should be the target of efforts to *implement* those policies, particularly amid a climate of pronounced racial antipathy toward the cohort those policies are designed to protect. The DMC Mandate is case in point.

VI. CONCLUSION

Nearly a year into what has been called America's "post-racial" era, significant racial and ethnic disparities continue to plague nearly every public system and institution in this country. Increasingly, regulatory provisions like the DMC Mandate have emerged to do what our courts will not—redress not only those disparities caused by overt race bias, but also those caused by the structural conditions endemic to the institutions that produced them. Plainly promising on paper, however, emerging laws like the Kentucky Racial Justice Act,³⁷⁵ which targets disparities in capital punishment,³⁷⁶ share a common feature with the DMC Mandate: They have been largely ineffective in practice.³⁷⁷

As advocates and legislators work to pinpoint the sources of their stagnation, I suggest that they may want to look to not only the legislation in question, but also the mediated discourses that may have both contributed to the disparities and undercut the legislation's normative aims. The juvenile justice system is informative. While it is impossible to quantify the impact that the "superpredator discourse" may have had on either disproportionate minority contact or legislative efforts to reduce it, the evidence (albeit imperfect) is compelling. We know that the 1990s witnessed a period of unprecedented mediated antipathy toward juvenile offenders of color, which culminated in the iconographic demonization of the adolescent superpredator. We also know that this type of racialized discourse drives public opinion and readily activates the implicit racial biases of its consumers—biases that have been linked to more punitive outcomes for offenders of color. Fi-

375. KY. REV. STAT. ANN. §§ 532.300–.309 (West 2009). For example, one provision of the statute provides that "[n]o person shall be subject to or given a sentence of death that was sought on the basis of race." *Id.* § 532.300(1).

376. See Olatunde C.A. Johnson, *Legislating Racial Fairness in Criminal Justice*, 39 COLUM. HUM. RTS. L. REV. 233, 238 (2007) (explaining that Kentucky enacted such legislation to "address racial disparities in the death penalty").

377. See *id.* ("While Kentucky's Racial Justice Act should give advocates hope for the possibility of reform at the state level, it is less clear whether the legislation has been implemented successfully.").

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nally, we know that these biases enhance stakeholders' natural tendency to rationalize and legitimate their existing practices, even when presented with evidence that those practices are unjust. Cumulatively, this evidence suggests that the media had an indirect but meaningful impact on both racial disparities in the juvenile justice system and on the DMC Mandate's failure to reduce them. While this syllogistic connection among mediated discourse, racial bias, racial disparity, and remedial stagnation does not constitute proof of causation, I suggest it should, at the very least, encourage those legislators, advocates, and academics currently consumed with the fight against entrenched racial disparities to consider this connection carefully.